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**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : CONSERVATION COUNCIL OF WA INC -v-  
CHAIRMAN, ENVIRONMENTAL PROTECTION  
AUTHORITY [2022] WASC 59

**CORAM** : ALLANSON J

**HEARD** : 22 DECEMBER 2021

**DELIVERED** : 1 MARCH 2022

**FILE NO/S** : CIV 2246 of 2020

**BETWEEN** : CONSERVATION COUNCIL OF WA INC  
Applicant

AND

CHAIRMAN, ENVIRONMENTAL PROTECTION  
AUTHORITY  
Respondent

WOODSIDE ENERGY LTD  
Other Party

THE STATE OF WESTERN AUSTRALIA  
Intervenor

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*Catchwords:*

Judicial review - *Environmental Protection Act 1986* (WA) - Where proponent of proposal applied to respondent to approve changes during implementation pursuant to s 45C of the Act - Where application assessed by offices of Department who provided memorandum recommending approval and a letter

notifying the proponent of the decision - Where respondent signed the memorandum accepting the recommendation and signed the letter - Whether the respondent had personally carried out the duty to consider whether the proposed changes might have a significant detrimental effect on the environment in addition to or different from the effect of the original proposal - Turns on facts

Judicial review - Where respondent required to consider whether changes to proposal might have a significant detrimental effect on the environment in addition to or different from the effect of the original proposal - Whether respondent correctly understood and applied s 45C or considered whether a detrimental effect was 'unlikely'

Judicial review - Where applicant commenced proceedings 16 months after it became aware of reviewable decision - Where applicant requires leave to proceed outside the limitation period under O 56 of the *Rules of the Supreme Court 1971* (WA) - Whether sufficient justification for delay

Judicial review - Where applicant requires leave to proceed outside the limitation period - Whether other party would suffer prejudice if applicant given leave to proceed

*Legislation:*

*Environmental Protection Act 1986* (WA)

*Rules of the Supreme Court 1971* (WA)

*Result:*

Application for leave to proceed dismissed

Application for review dismissed

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr H H Jackson SC and Mr C M Beetham

Respondent : No appearance

Other Party : Mr S Penglis SC and Ms M Georgiou

Intervenor : Mr A J Sefton SC and Ms J E Shaw

*Solicitors:*

Applicant : Environmental Defender's Office Of Western Australia  
Respondent : State Solicitor's Office  
Other Party : Allens  
Intervenor : State Solicitor's Office

**Case(s) referred to in decision(s):**

Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298

Minister for Immigration and Citizenship v SZGUR (2011) HCA 1; (2011)  
241 CLR 594

Plaintiff M47/2018 v Minister for Home Affairs [2019] HCA 17; (2019)  
265 CLR 285

Re Minister for the Environment; Ex parte Elwood [2007] WASCA 137

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**ALLANSON J:**

**Introduction**

1           On 18 July 2019, the Chairman of the Environmental Protection Authority approved an application by Woodside Energy Ltd for changes to the North West Shelf Gas Project Additional Liquefied Natural Gas (LNG) Facilities proposal (Ministerial Statement 536), pursuant to s 45C(1) of the *Environmental Protection Act 1986* (WA).

2           The applicant, the Conservation Council of Western Australia Inc, became aware of the decision on 20 August 2019.<sup>1</sup>

3           On 18 December 2020, the applicant commenced these proceedings to review the decision.

4           The Chairman, Environmental Protection Authority, was named as the respondent. At the time of the decision, Dr Tom Hatton held the office of Chairman. Dr Hatton's term has now expired.

5           The respondent gave notice that he would abide the decision of the court. The State of Western Australia intervened.

6           Woodside Energy Ltd appeared as 'other party' to the application.

7           The application for review was made outside the time limited by O 56 of the *Rules of the Supreme Court 1971* (WA). The applicant applied for leave to proceed with the application. The application for leave was opposed, but all parties agreed that the question of leave should be dealt with at the hearing of the main application. Woodside filed substantial affidavit evidence directed to the prejudice it said it and third parties would suffer were the application upheld after such a protracted delay.

8           In these reasons, unless stated otherwise, references to legislation are to the *Environmental Protection Act 1986* as it was in July 2019.<sup>2</sup>

9           I will generally use the defined terms adopted by the parties in their statement of agreed facts. I expand some acronyms where I think that makes the reasons easier to read; others, such as EPA (Environmental Protection Authority), are sufficiently familiar to be left.

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<sup>1</sup> Agreed facts [20].

<sup>2</sup> The Act was substantially amended by the *Environmental Protection Amendment Act 2020*. Relevantly, ss 45, 45A, 45B and 45C were deleted and replaced.

10 This application was heard immediately following the hearing of an application in CIV 2247 of 2020 between the same parties in which the applicant sought review of a decision by the respondent pursuant to s 45C to approve changes to the Pluto Liquefied Natural Gas (LNG) Project. The two actions are independent of each other. There was, however, a degree of overlap in evidence, in particular in relation to the reasons for delay. And there are issues of law common to both. This action also turns on findings of fact about the process by which the respondent made his decision. It was a common issue in both actions that the application for judicial review was brought outside the limitation period and more than 12 months after the decision challenged.

11 In my reasons in *Conservation Council of WA Inc v Chairman, Environmental Protection Authority* [2022] WASC 58, which were published at the same time as these reasons, I have discussed fact finding in judicial review proceedings, and the legislative context in which both decisions were made. I will not repeat those general matters in these reasons. Some matters are set out in full in both reasons, even though the reasoning is substantially the same. I have, however, tried to avoid unnecessary repetition.

### **Evidence**

12 The applicant read the affidavit of Timothy James Macknay, Managing Lawyer of the Environmental Defenders Office Ltd, affirmed 8 March 2021; and the affidavit of Ruby Luciana Hamilton, solicitor, affirmed 19 October 2021.

13 The respondent did not adduce evidence.

14 The State read the affidavit of Anthony Xavier Sutton, Executive Director of the EPA Services Directorate of the Department of Water and Environmental Regulation, affirmed 31 May 2021. The only direct evidence regarding the decision-making process was in the affidavit of Mr Sutton.

15 The parties filed a statement of agreed facts that included most of Mr Sutton's evidence regarding the events leading to the decision of the respondent. Mr Sutton also included, as attachments, relevant documents including the application for s 45C approval, the memorandum to the respondent prepared by EPA Services following the assessment of the application, and the respondent's letter advising Woodside of the decision.

16 Woodside read affidavits directed to the issue of delay, and prejudice. The affidavits were received as confidential evidence due to the commercially sensitive nature of the information in them. Submissions on prejudice, in response to the application for an extension of time were heard in closed court for the same reason. In these reasons I refer to six of those affidavits:

- (1) Affidavit of Sarah Louise Carter, sworn 8 September 2021;
- (2) Affidavit of Charles Philip Blaxill, sworn 29 September 2021;
- (3) Two affidavits of Michael Kenneth Gibson sworn 8 September 2021 and 8 November 2021; and
- (4) Two affidavits of Gary William McLeod, sworn 8 September 2021 and 8 November 2021.

17 Woodside also read three affidavits of Mr Blaxill, filed on 1 October 2021, 19 November 2021 and 3 December 2021, and two further affidavits of Mr McLeod filed on 5 October 2021 and 8 November 2021.

18 The court also received, as an exhibit, a letter dated 24 January 2020 from Niall Myles of Woodside Energy to the applicant.

### **The facts**

19 The parties filed a statement of agreed facts, largely taken from the affidavit of Mr Sutton. In setting out the agreed facts, I have referred to Woodside, rather than 'the other party', and expanded some abbreviations. Some defined terms, including NWS Proposal and NWS Application, are convenient and have been retained. The substance of the agreed facts is not changed.

#### **Woodside's Proposal and its s 45C Application**

1. On or about 24 December 1997, Woodside referred the North West Shelf Gas Project Additional Liquefied Natural Gas Facilities Proposal (**NWS Proposal**) to the Environmental Protection Authority (**EPA**) pursuant to s 38(1) of the Environmental Protection Act.
2. Woodside is the proponent of the NWS Proposal.
3. The EPA required Woodside to assess the NWS Proposal by way of a Public Environmental Review, which was submitted by Woodside to the EPA in November 1998.

4. The EPA assessed the NWS Proposal and published a report containing its findings and recommendations in December 1999 (**1999 Report**). On 11 February 2000, the then Minister for the Environment issued Ministerial Statement 536 (**MS 536**) authorising the implementation of the NWS Proposal.
5. Prior to the amendment the subject of these proceedings, the NWS Proposal had been amended three times, on 25 February 2005, 7 June 2005, and 29 August 2006.
6. By attachment to an email to EPA Services (a division of the Department of Water and Environment) dated 19 March 2019, Woodside applied, pursuant to s 45C of the Environmental Protection Act, to further amend the NWS Proposal to permit Woodside to construct and operate two new onshore receipt points and tie-ins to provide flexibility to fill emerging capacity at the Karratha Gas Plant and allow for transfer of gas via the proposed onshore Pluto North West Shelf Interconnector Pipeline and/or the existing gas pipeline system for processing at the Karratha Gas Plant (the **NWS Application**).
7. At all material times, the Respondent, as then holder of the office of Chairman of the EPA, was duly delegated by the Minister for Environment by instrument dated 24 November 2004, all the powers and duties conferred or imposed under s 45C of the Environmental Protection Act.
8. Between about 19 March 2019 and 17 July 2019, an Environmental Officer within EPA Services:
  - (a) assessed the NWS Application; and
  - (b) prepared the **Decision Documents**, being:
    - (i) a memorandum to the Respondent summarising the officer's assessment of the NWS Application, and making recommendations (**the Memorandum**);
    - (ii) a draft letter to Woodside from the Respondent advising Woodside that the NWS Application had been approved; and
    - (iii) a draft new attachment to MS 536, reflecting the changes sought in the NWS Application.
9. The Decision Documents appear to have been prepared on the basis of templates, copies of which were made available to the

Environmental Officer by way of hyperlinks in the Office of EPA's EIA Practitioners Guide.<sup>3</sup>

10. It was common for EPA Services branch managers and/or the Executive Director of EPA Services, Mr Anthony Sutton, to discuss s 45C applications with the Respondent while they were being assessed by EPA Services, including at a standing fortnightly meeting between the Respondent and each of the branch managers.
11. During the period in which EPA Services was assessing the NWS Application, Mr Sutton recalls discussing proposals of Woodside relating to the 'Burrup Hub' with the Respondent. However, Mr Sutton does not recall any specific discussions that he had with the Respondent about the NWS Application.
12. The Memorandum, amongst other things, summarised various matters, including the conclusion reached by EPA Services in relation to its assessment of the NWS Application that 'there is a high degree of confidence that the proposed changes will not have a significant detrimental effect on the environment that is additional to, or different from the effect of the original proposal'. The Memorandum recommended that the Respondent:
  - (a) note that Woodside has proposed changes to the NWS Proposal (MS 536) as detailed in the Memorandum;
  - (b) note that EPA Services considers it unlikely that the proposed changes will have a significant detrimental effect on the environment that is additional to, or different from, the effect of the original proposal;
  - (c) approve the changes to the proposal under s 45C of the *Environmental Protection Act* by signing attachment 4 to MS 536; and
  - (d) sign an attached letter to Woodside.
13. On 18 July 2019, the Memorandum to the Respondent (and its enclosures) were endorsed by the Manager of the 'EIA North' branch of EPA Services and Mr Sutton.
14. On 18 July 2019, and after an EPA Board Meeting that occurred on that date, Mr Sutton met with the Respondent to discuss the NWS Application.

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<sup>3</sup> An internal departmental document designed to assist assessment officers within the Department involved in assessment: Affidavit of Anthony Xavier Sutton affirmed 31 May 2021 [21].

15. At that meeting, Mr Sutton gave the Respondent the Decision Documents and the hard copy file maintained by EPA Services for the NWS Application, which included:

- (a) the NWS Application;
- (b) correspondence between EPA Services and the Compliance and Enforcement Directorate of the Department;
- (c) a diagram of the Burrup Hub;
- (d) a checklist submitted with the NWS Application; and
- (e) MS 536 as it was at the time.

16. The documents on the hard copy file for a section 45C application would not necessarily include all documents that an assessment officer had considered as part of their assessment of a section 45C application. In particular, copies of key documents concerning the proposal already held by Department, such as the NWS Public Environmental Review, which were often voluminous, would not be placed on the hard copy file for the NWS Application. These documents were otherwise available to the Respondent via the EPA's website, DWER's records or as requested.

17. Mr Sutton does not recall much about the meeting for the NWS Application, other than that it occurred immediately after the EPA board meeting that was held on the same date. In accordance with his general practice, it is likely that he talked the Respondent through the memorandum of advice from EPA Services and answered any questions that he had, although he cannot specifically recall doing so.

18. On 18 July 2019, but at a time unknown to Mr Sutton, the Respondent approved the NWS Application and signed the Decision Documents.

20 In his affidavit, Mr Sutton gave the following further evidence relevant to the making of the decision:

- (1) EPA Services receives on average 34 applications for s 45C approval each year. Dr Hatton, who held the position of Chairman of the EPA at the time of the decision, was appointed in November 2015 and had made more than 100 decisions under s 45C at the time of this decision.<sup>4</sup>

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<sup>4</sup> Affidavit of Anthony Xavier Sutton affirmed 31 May 2021 [6] - [9].

- (2) In May 2016, the Department prepared a simplified hierarchical policy framework for the EPA. As part of that new policy framework, the Procedures Manual was first published and a Practitioner's Guide was prepared to assist assessment officers within the Department.<sup>5</sup>
- (3) Woodside's application to amend the NWS proposal, attached to the email dated 19 March 2019, included a report which described the content of the proposed change, reasons why Woodside sought the change, and a discussion of the detrimental environmental effects of the change.<sup>6</sup>
- (4) Officers of EPA services were expecting the application to be submitted, as it had been generally foreshadowed in meetings with Woodside to discuss a number of the company's projects that were being assessed. Mr Sutton's recollection is that the respondent attended most of those meetings with Woodside.<sup>7</sup>

21 The documents provided to the respondent were attached to the affidavit of Mr Sutton. The NWS Application was only 21 pages, including an executive summary.

22 The Memorandum<sup>8</sup> included a table considering the NWS Application by reference to six aspects, derived from the reasons of Buss JA in *Re Minister for the Environment; Ex parte Elwood*,<sup>9</sup> including:

- (1) Aspect 4, (determination as to whether the change to the original proposal might (in the Minister's opinion) have any detrimental effect on the environment and, if so, what) summarised the proposed change to the NWS Proposal by reference to construction of the onshore receipt points and tie-ins, and operation of onshore receipt points and tie-ins. Specifically, the table summarised factors relating to emission of greenhouse gases, nitrogen, and other emissions.
- (2) In relation to whether the detrimental effect which the changes might have, was additional to or different from that of the original proposal (aspect 5), the Memorandum advised that no

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<sup>5</sup> Affidavit of Anthony Xavier Sutton affirmed 31 May 2021 [19] - [22], and Annexure AXS-3 to 9 of the Affidavit of Anthony Xavier Sutton affirmed 31 May 2021.

<sup>6</sup> AXS-2.

<sup>7</sup> Affidavit of Anthony Xavier Sutton affirmed 31 May 2021 [18].

<sup>8</sup> AXS-13.

<sup>9</sup> *Re Minister for the Environment; Ex parte Elwood* [2007] WASCA 137 (*Elwood*).

additional or different detrimental environmental effects were likely to occur, 'as the gas received from pipeline sources will be able to be processed by existing KGP infrastructure and to meet current MS 536 and other regulatory conditions'.<sup>10</sup>

- (3) The Memorandum further advised that no additional or different environmental effects had been identified and the changes were not of a scale or intensity to be significant, essentially for the same reason.

23 The respondent signed the Memorandum accepting the recommendations on 18 July 2019.<sup>11</sup>

24 On the same day he signed a letter advising Woodside that approval of the changes was granted.<sup>12</sup>

25 The changes to the relevant ministerial statement, MS 536, were:

- Add to the reserve source listed in Table 1 of Schedule 1 *and gas received through onshore receipt points and tie-ins.*
- Add to the project facilities column listed in Table 1 of Schedule 1; *Onshore receipt points and tie-ins.*

**The grounds of the application**

26 The applicant contended that the respondent's purported exercise of discretion under s 45C was beyond power on two grounds. The applicant filed particulars of ground 1(a):

- (a) on its proper construction, s 45C requires the decision maker to personally perform the duty imposed on him or her by s 45C(2) (being the forming of an opinion as to whether the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal) as a prerequisite to the exercise of the discretion in s 45C(1), and the respondent did not personally perform the duty in s 45C(2); or, in the alternative

Particulars

1. By a briefing note titled Recommendation – Change to Proposal dated 17 July 2019 addressed to the First Respondent (Briefing Note), the Environmental

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<sup>10</sup> AXS-13, 111.

<sup>11</sup> AXS-13, 106.

<sup>12</sup> AXS-13, 112.

Protection Authority Services Directorate of the Department of Water and Environmental Regulation (Directorate):

- a. summarised an application under s 45C by the Other Party (s 45C Application) which proposed changes to the North West Shelf Gas Project Additional Liquefied Natural Gas (LNG) Facilities proposal (Ministerial Statement 536) (NWS Proposal);
  - b. proffered an assessment of the proposed changes to the NWS Proposal as set out in the s 45C Application;
  - c. recommended to the First Respondent that he:
    - i. note that the Other Party had proposed changes to the NWS Proposal as detailed in the Briefing Note;
    - ii. note that the Directorate had formed the view that the proposed changes to the NWS Proposal were unlikely to have a significant detrimental effect on the environment that is additional to, or different from, the effect of the original NWS Proposal;
    - iii. approve the proposed changes to the NWS Proposal by signing a draft Attachment 4 to Ministerial Statement 536 which was attached to the Briefing Note; and
    - iv. sign a draft letter to the Other Party which was attached to the Briefing Note.
2. The Briefing Note did not attach the s 45C Application.
  3. The Briefing Note did not recommend or invite the First Respondent to form, for himself, a view about the environmental effect of the proposed changes to the NWS Proposal whether by adopting the Directorate's opinion or otherwise.
  4. The First Respondent did not form, for himself, a view about the environmental effect of the proposed changes to the NWS Proposal.

- (b) on its proper construction, s 45C(2) requires, as a jurisdictional fact enlivening the discretion in s 45C(1), the respondent to form an opinion as to whether the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal, and the respondent - if he did personally perform the duty in s 45(2) - did not form that opinion.

**Ground 1 (a)**

*The applicant's case*

27 Section 45C provides:

- (1) After a statement has been issued under section 45(5) in relation to a proposal, the Minister may approve of the proponent changing the proposal without a revised proposal being referred to the Authority under this Part.
- (2) The Minister must not give approval under subsection (1) if the Minister considers the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal.

28 The applicant's primary argument was that the respondent could only exercise the power in s 45C(1) if he formed the opinion that there was no reasonable possibility that the change or changes would have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal.

29 To form that opinion the respondent had to consider for himself, that is, to reach a conclusion following an active intellectual process, whether the changes might have that effect.

30 The court should infer that the respondent did not personally engage in the intellectual process to form the opinion required by s 45C. The applicant relied on:

- (1) the evidence of Mr Sutton regarding his meeting with the respondent on 18 July 2019;
- (2) the terms of the Memorandum which did not invite active intellectual engagement by the respondent, but merely recommended that he note the views of EPA Services and approve the changes;

- (3) there is no evidence that the respondent considered any document other than the Memorandum or obtained or requested further material;
- (4) the respondent did not request any amendments and signed the letter to Woodside on the same day; and
- (5) the letter to Woodside was neither prepared nor modified by the respondent, but merely stated the approval in pro forma terms based on a departmental template.

31 In particular, the applicant submitted that the memorandum did not itself contain an evaluation of the matters required by s 45C(2), nor did it provide the respondent with material upon which he might have done so.

32 Finally, the applicant submitted that the absence of any affidavit from the respondent reinforces the inferences on which the applicant relied.

### *Consideration*

33 If all that the respondent did was sign the decision documents and letter to Woodside, without forming the opinion referred to in s 45C(2), then he did not make a decision in accordance with s 45C. It was not in dispute that the respondent must personally engage in an intellectual process directed at determining whether the proposed change or changes 'might' have and additional or different detrimental effect. I am not satisfied, however, that the applicant has established that the respondent did not himself consider whether the changes had that effect.

34 The applicant bears the onus of proof in establishing the facts necessary to make out the errors it alleged.<sup>13</sup> Where the applicant relies on inferences from the agreed or proved facts, those facts 'must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied'.<sup>14</sup>

35 First, the applicant relied on the fact that the Memorandum did not note the need for the respondent to consider the matter for himself and to reach his own conclusion or invite, or recommend, the respondent to

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<sup>13</sup> *Plaintiff M47/2018 v Minister for Home Affairs* [2019] HCA 17; (2019) 265 CLR 285 [39]; *Minister for Immigration and Citizenship v SZGUR* (2011) HCA 1; (2011) 241 CLR 594 [67].

<sup>14</sup> *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298, 305.

consider the matter for himself and to reach his own conclusion. The uncontested evidence was that the EPA deals with, on average, 34 applications under s 45C a year. Dr Hatton had been in the position of Chairman for about four years at the time of the decision, and had himself dealt with over a hundred such applications. He was also in that position when the Administrative Procedures were published. I would not assume that he needed to be told about the nature of his statutory duty on each occasion when the power in s 45C(1) was to be exercised.

36 Second, the Memorandum and attached documents provided sufficient material for the respondent to engage in his own active intellectual process directed at whether the proposed changes 'might' have the requisite effect. When regard is had to the nature of the proposed changes, the NWS Application, and the summary of it in the table to the memorandum, were sufficient to enable the respondent to consider whether the power might be exercised.

37 Third, I am not satisfied that I should infer that the respondent had no other relevant material available on which to make the decision, and did not have regard to anything other than the Memorandum, or the Memorandum and attached file. It is probable that the respondent not only had regard to the Memorandum but accepted the conclusions and recommendations in it. But before the application was received, it had been generally foreshadowed in meetings with Woodside. It is likely the respondent attended most of those meetings. The decision to approve the NWS Application was the end of a process of assessment between March 2019 and July 2019. It was common for EPA Services branch managers and Mr Sutton, to discuss s 45C applications with the respondent while they were being assessed by EPA Services, including at a standing fortnightly meeting. Mr Sutton could also recall discussing Woodside's proposals for the Burrup Hub with the respondent, although he could not recall any specific discussion. The respondent and Mr Sutton discussed the NWS Application on 19 July 2019, when it is likely that Mr Sutton talked the respondent through the Memorandum, and answered any questions he had.

38 Copies of other documents - including the Public Environmental Review of the original proposal - were available to the respondent via the EPA website and Department records.

39 Fourth, I am not satisfied that anything turns on the use of template documents, including the letter; or from the fact that the

respondent did not amend the letter. The letter was in very general terms, expressed in accordance with a long standing precedent, and was to advise Woodside of a favourable decision. It was, in its terms, not intended to provide reasons other than in the most general way.

40 Finally, the applicant submitted that the failure of the respondent to file an affidavit as to his decision making is properly to be taken into account in favour of drawing the inferences which the applicant says should be drawn.<sup>15</sup> Even taking into account the failure of the respondent to adduce evidence, I am not satisfied that the evidence positively points to the inference for which the applicant contends.

## Ground 1(b)

### *The applicant's case*

41 The applicant submitted that the respondent was required by s 45C to form an opinion as to whether the changes proposed in the Pluto Application *might* have a significant detrimental effect on the environment in addition to or different from the effect of the original proposal. The court should infer that the opinion that the respondent formed was not that required by the provision, but that the respondent considered that the changes, 'are unlikely to result in a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal'.

42 The applicant submitted that, on the ordinary meaning of 'unlikely', the respondent had formed the opinion that it was less than likely that the relevant change or changes would have the significant detrimental effect to which s 45C(2) refers. In contrast, the term 'might' in s 45C(2) connotes that there is a reasonable possibility that the relevant change or changes will have that effect.

43 Whether a change is unlikely to have an effect is materially different from whether there is no reasonable possibility that it will.

44 The applicant submitted that the court should infer that the respondent misunderstood the nature of the opinion he was required to form, and formed his opinion in terms of whether the changes were unlikely to have a detrimental effect, in addition to or different from the original proposal. The applicant submitted that inference arises from both:

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<sup>15</sup> *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298, 320 - 321.

- (1) the terms of the letter advising Woodside of the decision; and
- (2) the different expressions used within the Memorandum and the use of the language of likelihood in the recommendation to, and accepted by, the respondent.

45 The applicant submitted that there is no evidence that the respondent had regard to internal departmental documents. Further, the Administrative Procedures and Procedures Manual did little more than repeat the language of the section, introduce the erroneous language of 'likely', and restate the six steps from *Elwood*.

### *Consideration*

46 It was not disputed that the respondent was required by s 45C to form an opinion as to whether the changes proposed in the NWS Application *might* have a significant detrimental effect on the environment in addition to or different from the effect of the original proposal.

47 The word 'unlikely' can have the meaning for which the applicant contended. But, as submitted by the State, 'likely' and 'unlikely' are not always used as the equivalent of probable or improbable. Their meaning depends on the particular context in which those terms are used.

48 In the present case, the court is not construing an instrument, or even attempting to ascertain the intended meaning of reasons for decision. The respondent was not required to give reasons for his decision on the application, and did not purport to do so. The court must ascertain whether the respondent did not form the belief required by s 45C by inference from documents, including the letter to Woodside, that were not intended to be a statement of reasons.

49 The Administrative Procedures, in my opinion, provide important context. The evidence of Mr Sutton was that the procedures were introduced following publication of the *Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments under the Environmental Protection Act 1986 (WA)* in May 2016. Dr Hatton was appointed Chairman of the EPA in November 2015 and accordingly was in that position when the review and Administrative Procedures were published.

50 The Administrative Procedures correctly stated, in accordance with s 45C(2) that the Minister must not give approval under s 45C(1) if the Minister considers that the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal. While the procedures referred to a change being approved if the Minister considered the change was unlikely to have a significant detrimental effect, that was immediately followed by a second correct statement of the effect of s 45C(2).

51 The templates which formed the basis of the Decision Documents, provided for a recommendation that the respondent approved the change where, following assessment, 'the EPA Services considers that there was a high degree of confidence that the proposed changes will not have a significant detrimental effect ...'. While the recommendations then are expressed in terms that 'it is unlikely' that the proposed changes will have a significant detrimental effect, that conclusion must be read in the context of the whole document and the Administrative Procedures by reference to which it was prepared.

52 The Memorandum and attached table<sup>16</sup> addressed 'Six Aspects (relevant to the proposed changes)' and a statement of the EPA Services advice. Relevantly, the changes were assessed by reference to:

- whether the changes 'might (in the Minister's opinion) have any detrimental effect on the environment and, if so what';
- 'whether the detrimental effect (if any) which the change(s) might have on the environment is additional to, or different from, the detrimental effect (if any) which the original proposal has had or will have'; and
- 'whether any detrimental effect which the change(s) to the original proposal might have on the environment ... is, in the circumstances, significant'.<sup>17</sup>

53 The findings set out in the table were that:

- (1) there were not expected to be any additional air emissions and all emissions were capable of being processed by existing infrastructure and to meet relevant regulatory conditions;

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<sup>16</sup> AXS-19.

<sup>17</sup> AXS-13, 110 - 111.

- (2) there would be no addition to the key environmental factors;
- (3) no additional or different detrimental environmental effects were likely to occur as a result of the proposed change 'as the gas received from pipeline sources will be able to be processed by existing [Karratha Gas Plant] infrastructure and to meet current MS 536 and other regulatory conditions'; and
- (4) no additional or different environmental effects had been identified and the changes were not of a scale or intensity to be significant.

54 The documents are not consistent in stating the test in the words of the section, although the correct statement of s 45C(2) is part of the Administrative Procedures and is reflected in 'aspects' 4, 5 and 6 of the memorandum. The documents do not use the term 'reasonable possibility', but neither does s 45C.

55 When regard is had to all of the documents, I am not satisfied that the correct inference is that 'unlikely' was used - in the Memorandum or the letter to Woodside - in the sense of 'less probable than not', or that the respondent misunderstood the test that he was to apply, or that he applied the wrong test.

56 The applicant has not proved the error alleged.

### **Delay**

57 The application for judicial review was brought pursuant to O 56 of the *Rules of the Supreme Court 1971* (WA). Where an application is made outside the period of six months after the later of the date on which a reviewable decision was made or reviewable conduct occurred, or the date on which an applicant became aware of it, the applicant requires leave to proceed. The court may give or refuse leave.<sup>18</sup>

58 The NWS Decision was made on 19 July 2019. The applicant became aware of the decision on 20 August 2019. It acted immediately and lodged applications under the *Freedom of Information Act 1992* for documents relating to the NWS Decision.

59 On 11 November 2019, the applicant's solicitors received an email containing a web link to the documents found to be within the scope of

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<sup>18</sup> O 56 r 5(2)(a)

the Freedom of Information application. Over 12 months passed before this action was commenced.

60 The following facts are agreed in the statement of agreed facts:

25. On or about 18 November 2019, and informed by the documents received from the Department on 11 November 2019, the Applicant's solicitors completed the preparation of the documentation required for a referral pursuant to s 38 of the Environmental Protection Act.<sup>19</sup>
26. On 18 November 2019, the Applicant lodged the s 38 referral.
27. On 28 November 2019, the EPA acknowledged receipt of the s 38 referral.
28. Between 28 November 2019 and 9 November 2020, there was correspondence between various of the Applicant (and its solicitors), the EPA and Woodside.
29. By letter dated 22 January 2020 from the Applicant to the Respondent and by letter dated 24 January 2020 from the Applicant's solicitors to Woodside, the Applicant acknowledged the limitation period for any application for judicial review of the NWS Decision.
30. As of 22 January 2020 at the latest, the Applicant had engaged solicitors and senior counsel to advise it in relation to seeking leave from the Supreme Court of Western Australia to make an application for judicial review in relation to the NWS Decision.
31. On 24 January 2020, there was a meeting between the Applicant, EPA and the Department in which the status of the EPA's consideration of whether the s 38 referral was valid was discussed.
32. On 24 January 2020, the Applicant's solicitors notified Woodside, the Respondent and the Minister, inter alia, that while the Applicant understood an assessment of the s 38 referral would not be made before the limitation period expired for the making an application for judicial review, the Applicant reserved its right to make that application in the future.
33. On 9 November 2020, the EPA informed the Applicant that it did not consider the s 38 referral to be valid.

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<sup>19</sup> Referral of a significant proposal pursuant to s 38 initiates a process under which the EPA must decide whether or not to assess the proposal. A proposal cannot be referred to the EPA under s 38 more than once: s 38(5j).

34. On 27 November 2020, the Applicant's solicitors gave notice to the Minister, the Respondent and Woodside that the Applicant intended to apply for judicial review of the NWS Decision, and invited the Minister to revoke the NWS Decision.

35. By letter dated 9 December 2020, received by the Applicant's solicitors on 10 December 2020, the Minister advised the Applicant that the Chairman had not revoked the NWS Decision or treated it as invalid, and that the Minister did not propose to intervene.

61 Proceedings were commenced approximately 16 months after the applicant became aware of the decision and 10 months after the limitation period expired.

62 In all other respects, the facts and submissions on delay do not differ from those in *Conservation Council of WA Inc v Chairman, Environmental Protection Authority* [2022] WASC 58. I will not repeat that discussion in these reasons.

63 In my opinion, the delay in this case also is properly characterised as excessive and unwarrantable, and is itself a sufficient reason to exercise the discretion against the grant of leave.

64 Had the applicant brought this action within time, it would have been disposed of much more quickly and economically. Significant time was allowed for preparing the extensive affidavit evidence relating to prejudice upon which Woodside relied. All parties prepared submissions on delay and prejudice. The hearing time was extended by the oral argument on that issue. There was a further, in my opinion regrettable, consequence that the whole matter could not be heard and determined in open court.

65 Woodside adduced evidence of actions taken and costs incurred on the basis that it had regulatory approval. It referred to matters expected to occur in the first quarter of this year which could now be jeopardised. Woodside also referred to potential prejudice should it be unable to comply with obligations it has incurred under various agreements.

66 The evidence to support these submissions was received, without objection by any party, as confidential. It is difficult to fully address prejudice in these reasons without straying into matters that were received on a restricted basis.

67 Because I would dismiss this action on its merits, I will simply indicate the basis upon which I find that Woodside, and potentially third parties, would suffer significant prejudice were leave given.

68 Woodside adduced uncontested evidence that it and other parties, including joint venture participants, have made decisions, investments, and commitments on the strength of the NWS Decision. Those matters are set out in pars 71 and 72 of Woodside's submissions and the affidavits of Sarah Louise Carter filed 8 September 2021; Charles Philip Blaxill, sworn 29 September 2021, and Michael Kenneth Gibson sworn 8 September 2021 and 8 November 2021. That material is restricted, but it is available to the applicant's legal advisers.

69 I have also had regard to the affidavits of Gary William McLeod, sworn 8 September 2021 and 8 November 2021 showing internal and external costs incurred in relation to infrastructure, operating costs, and other expenditure, for some cost items, from 18 July 2019.

70 I have taken into account that costs were incurred before the limitation period expired (or even began to run). Agreements were entered, or decisions made, either with knowledge that the applicant might commence proceedings, or after this action was commenced. That does not lessen the prejudice that would be suffered were an approval given in July 2019 was now set aside.

### **Conclusion**

71 The application for leave to proceed is refused pursuant to O 56 r 5.

72 The application for review is dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

TB

Associate to the Honourable Justice Allanson

1 MARCH 2022