

BETWEEN:

FRIENDS OF THE NORTH WEST INC

Applicant

and

MINISTER FOR THE ENVIRONMENT, HERITAGE AND WATER

Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS
(Junior Counsel)

Statement of facts

1. Petro Energy Pty Ltd proposes to build and operate a floating LNG plant to process gas in the Selinka Gas Field, approximately 150 km off the coast of WA (**Proposal**). The Proposal is likely to emit noise and chemical pollution into the surrounding environment, which intersects a humpback whale migratory route.
2. Humpback whales are a 'listed threatened species' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). Section 18 of the *EPBC Act* prohibits action that 'has or will have a significant impact' on a listed threatened species without the Minister's approval.
3. Section 67 of the *EPBC Act* provides that actions which are prohibited without the Minister's approval are 'controlled actions.' On 10 June 2013, the Minister determined that the Proposal was a controlled action.
4. Section 87 of the *EPBC Act* requires the Minister to choose one of several methods of assessing the environmental impact of a controlled action. On 10 June 2013, the Minister decided to assess the Proposal on referral information.
5. Section 93 of the *EPBC Act* provides that within 30 days of the Minister deciding to assess a controlled action on referral information, the Department of Sustainability, Environment, Water, Population and Communities (**Department**) must:
 - 5.1. publish a draft report containing a recommendation as to whether the controlled action should be approved (**Report**); and
 - 5.2. invite the public to provide comments in relation to the Report within 10 business days.

The Department published a draft Report in respect of the Proposal on 10 July 2013.

6. On 17 July 2013, the Applicant:

- 6.3. submitted several scientific studies concerning the environmental impact of floating LNG plants to the Department; and
 - 6.4. asked the Minister in writing to delay his decision on the Proposal until after the release of a new scientific study by the International Whaling Commission, due to be released in early August 2013 (**Delay Request**).
7. On 25 July 2013, the Department finalised the Report and gave it to the Minister.
 8. Section 130 of the *EPBC Act* required the Minister to approve the Proposal within 20 business days after receiving the finalised Report, or “such longer period as the Minister specifies in writing.”
 9. On 30 July 2013, the Minister approved the Proposal (**Approval**) subject to conditions. The Minister’s reasons for the Approval (**Reasons**) stated that the Minister:
 - 9.5. had given “strong consideration” to the Commonwealth government’s policy of “streamlining” environmental approval of offshore gas projects and “cutting environmental green tape” in order to ensure that the Australia offshore gas industry remained competitive and attractive to international investment (**Policy**); and
 - 9.6. refused the Delay Request as he considered that adequate time had been given for public comment.
 10. The Applicant seeks judicial review of the Approval and the Minister’s refusal of the Delay Request under the *Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)*.

Submission 1: The Approval was not an improper exercise of power within the meaning of s 5(2)(f) of the *ADJR Act* (inflexible application of policy).

11. Section 5(2)(f) of the *ADJR Act* provides that “an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case” is improper.
12. A decision-maker is normally entitled to treat government policy as a relevant consideration in the absence of statutory provision to the contrary. The propriety of paying regard to policy considerations is particularly evident where the power is entrusted to a Minister of the Crown responsible to Parliament.
Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409, 420 (Bowen CJ, Deane J).
13. Although the Minister’s power to approve the Proposal is discretionary, it is confined by the statement of relevant considerations in s 136 of the *EPBC Act*. Section 136 is an exhaustive statement: s 136(5). However, it includes the broad category of “economic and social matters” as a mandatory consideration: s 136(1)(b).
14. The Policy is not specifically directed at any administrative power. Rather, it provides that the environmental approval decisions should be “streamlined” for economic reasons. The Minister was entitled to take the Policy into account when considering “economic and social matters.”

15. In the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard, it is generally for him or her to determine the appropriate weight to be given to them.

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24, 41 (Mason J).

16. There is nothing inherently wrong in the Minister pursuing a policy which:
 - 10.1. is consistent with the statute under which the relevant power is conferred;
 - 10.2. does not preclude the Minister from taking into account relevant considerations; and
 - 10.3. does not require the Minister to take into account irrelevant considerations.

NEAT Domestic Trading v AWB Ltd (2003) 216 CLR 277, 289 [24] (Gleeson CJ).

17. Although the Minister gave “strong consideration” to the Policy, he gave genuine consideration to the merits of the Proposal before approving it, as evidenced by the Minister’s imposition of detailed conditions on the Proposal.

Submission 2: The Minister’s refusal of the Delay Request was not an improper exercise of power within the meaning of s 5(2)(g) of the *ADJR Act* (unreasonableness).

18. Section 5(2)(g) of the *ADJR Act* provides that “an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power” is improper. Section 5(2)(g) reflects the common law notion of ‘*Wednesbury* unreasonableness.’

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, 230 (Lord Greene MR).

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24, 41 (Mason J).

19. By requiring the Minister to make decisions within prescribed time periods, s 130 of the *EPBC Act* reflects the legislature’s intention, expressed in s 3(2)(d), that the environmental assessment and approval process should be “efficient and timely.”
20. Section 130(1A) of the *EPBC Act* grants the Minister a discretion to delay his decision for “such longer period as the Minister specifies in writing.” The discretion is unconfined by statutory criteria.
21. In *Li*, the High Court affirmed the decision of the Full Court of the Federal Court granting judicial review of the Migration Review Tribunal’s refusal to delay a decision. Gageler J discussed *Wednesbury* unreasonableness, holding that:

Judicial determination of *Wednesbury* unreasonableness in Australia has in practice been rare. Nothing in these reasons should be taken as encouragement to greater frequency. This is a rare case.

Minister for Immigration and Citizenship v Li [2013] HCA 18, [113] (Gageler J).

22. Although Gageler J was satisfied that the Tribunal had acted unreasonably, its refusal to delay directly affected the Tribunal's ultimate decision. The delay was sought pending the review of a 'skills assessment' which was unfavourable to the applicant. Ultimately, the review resulted in an assessment favouring the applicant. The Tribunal relied on the erroneous skills assessment in deciding to refuse the applicant a visa. In contrast, the Delay Request in this case was for the purpose of providing further information which the Minister might have regard to, not for the purpose of correcting information which the Minister was required to rely on. *Minister for Immigration and Citizenship v Li* [2013] HCA 18, [122] (Gageler J).
23. In *Tarkine National Coalition*, this Court considered an application for judicial review of a Ministerial decision under the *EPBC Act*. Although the application was successful, the Court rejected the ground of review alleging *Wednesbury* unreasonableness, noting Gageler J's observation. *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694, [84] (Marshall J).
24. It is not the function of the Court to substitute its own decision for that of the Minister. For the Court to intervene on the ground of unreasonableness would require "something overwhelming." *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 40-41 (Mason J). *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694, [85] (Marshall J). *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 (Lord Greene MR).

Dated this 21st day of August 2013

Scott Young
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