CITATION:	*Central Australian Frack Free Alliance Inc v Minister for Environment & Anor* [2024] NTSC 75
PARTIES:	CENTRAL AUSTRALIAN FRACK FREE ALLIANCE INC v MINISTER FOR ENVIRONMENT and TAMBORAN B2 PTY LTD (ACN 105 431 525)
TITLE OF COURT:	SUPREME COURT OF NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory Jurisdiction
FILE NO:	2023-00209-SC
DELIVERED:	18 September 2024
HEARING DATE:	7 & 8 November 2023
JUDGMENT OF:	Grant CJ

CATCHWORDS:

ADMINISTRATIVE LAW – Jurisdictional error – Ground of review other than procedural fairness – Decision not authorised – Decision otherwise contrary to law – Statutory construction – Unreasonableness

Minister approved environment management plan for activities conducted under exploration permit – Whether Minister misconstrued phrase 'environmental impacts and environmental risks' when assessing environment management plan – Whether environment management plan required to describe environmental

impacts or environmental risks associated with unsustainable greenhouse gas emissions – Whether environment management plan required to contain assessment of environmental impacts arising directly or directly from an emergency situation – Whether application required to be referred to Environment Protection Agency because activity had potential to have significant impact on environment.

Environment Protection Act 2019 (NT) ss 10, 11, 48, 50, 53, 58, 59
Petroleum Act 1984 (NT) ss 16, 18, 19, 20, 29, 31, 32, 42, 44, 45, 47, 56, 74, 105, 118
Petroleum (Environment) Regulations 2016 (NT) regs 3, 5, 6, 7, 8, 9, 11, 14, 17, 22, 27, 30, 31, Sch 1

Attorney-General (NSW) v Quin (1990) 170 CLR 1, *Attorney-General (Qld) v Riordan* (1997) 192 CLR 1, *Australian Conservation Foundation Inc v Minister for the Environment & Another* (2016) 251 FCR 308, *Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456, *Coast and Country Association of Queensland Inc v Smith & Ors* [2016] QCA 242, *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719, *Craig v South Australia* (1995) 184 CLR 163, *CSL Australia Pty Ltd v Minister for Infrastructure and Transport (No 3)* [2012] FCA 1261, *Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189, *Disorganized Developments Pty Ltd v South Australia* (2023) 97 ALJR 575, *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21, *Ex parte Blackwell; Re Hateley* (1965) 83 WN (Pt 1) (NSW) 109, *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510, *Mees v Kemp* [2004] FCA 366, *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24, *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, *Minister for Immigration v SZVFW* (2018) 264 CLR 541, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd* [2019] NSWCA 216, *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, *Oakey Coal v New Acland Coal* (2021) 272 CLR 33, *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 262 FCR 527, *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463, *R v A2* (2019) 269 CLR 507, *S v Australian Crime Commission* (2005) 144 FCR 431, *Stran v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 233, *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, *Wei v Minister for*

Immigration and Border Protection (2015) 257 CLR 22, *Western Australia v Ward* (2002) 213 CLR 1, *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, referred to.

REPRESENTATION:

Counsel

Plaintiff:	EM Nekvapil SC with JE Hartley
First Defendant:	L Spargo-Peattie
Second Defendant:	G Rich SC with H Baddeley and C Ernst

Solicitors

Plaintiff:	Environmental Defenders Office
First Defendant:	Solicitor for the Northern Territory
Second Defendant:	Squire Patton Boggs

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Central Australian Frack Free Alliance Inc v Minister for Environment & Anor [2024] NTSC 75
2023-00209-SC

BETWEEN:

CENTRAL AUSTRALIAN FRACK FREE ALLIANCE INC
Plaintiff

AND:

MINISTER FOR ENVIRONMENT
First Defendant

AND:

TAMBORAN B2 PTY LTD (ACN 105 431 525)
Second Defendant

CORAM: GRANT CJ

REASONS FOR DECISION
(Delivered 18 September 2024)

[1] On 30 January 2023, the plaintiff commenced proceedings by originating motion seeking an order quashing the decision of the first defendant (**the Minister**) dated 14 October 2022 (**the decision**) to approve the *Amungee NW Delineation Program EP98 (OR 111-3)* Environment Management Plan (**the EMP**); and an order restraining the second defendant (**Tamboran**) from conducting any activity in reliance on the decision or the EMP.

The grounds of review

[2] The grounds of review set out in the originating motion may be summarised as follows:

(a) when assessing the EMP, the Minister misconstrued the phrase ‘environmental impacts and environmental risks’ in reg 9(1)(c) and Sch 1, cl 3(1)(a) of the *Petroleum (Environment) Regulations 2016* (NT) (**the Regulations**) by acting on the basis that the phrase did not include, or excluded, the events and circumstances attendant upon any future production phase of the exploitation of the natural gas resources (**Ground 1**);

(b) the Minister could not lawfully have been satisfied that the EMP included details of all environmental impacts and environmental risks as required by regs 9(1)(a) and 11(3)(a) and Sch 1, cl 3(1)(a) of the Regulations because the EMP did not describe the environmental impacts or environmental risks associated with unsustainable greenhouse gas emissions (**Ground 2**);

(c) the Minister erred in law in finding that the EMP contained the matter set out at Sch 1, cl 3(2)(a)(ii) of the Regulations in that it contained an assessment of procedures to be followed in relation to any possible emergency situation rather than an assessment of the environmental impacts arising directly or indirectly from an emergency situation (**Ground 3**); and

(d) the Minister was precluded from approving the EMP because the activity the subject of the EMP had the potential to have a significant impact on the environment and was therefore required to be referred to the Northern Territory Environment Protection Agency (**the NT EPA**) under s 48(a) of the *Environment Protection Act 2019* (NT) (**Ground 4**).

[3] By summons filed on 13 June 2023, the plaintiff sought particular discovery of all documents in Tamboran's possession, custody or control containing: (a) estimates of the total volume of petroleum that might be recovered by future production actions within the area of Exploration Permit 98 (**EP98**); (b) estimates of the volume of petroleum that might be recovered in each year of future production activities within the area of EP98; (c) estimates of the rate at which petroleum may be recovered within the area of EP98 on an annual basis; (d) estimates of the volume of greenhouse gas emissions that would result from the recovery, transmission, processing, export and end-use of the consumption of that petroleum; and (e) estimates of the timeframe in which future production activities within the area of EP98 would be likely to commence and the estimated duration of those production activities.

[4] The parties were in agreement that the determination of that application for particular discovery was contingent in large part on the validity of the plaintiff's assertions concerning the proper construction of the

Regulations and the *Environment Protection Act* set out in the grounds of review. That is, the categories of documents sought by way of particular discovery could only be relevant in the event that the plaintiff's interpretation of the governing legislation was correct. In order to determine that anterior matter, the parties agreed that the following issues would be tried and determined as preliminary questions pursuant to r 47.05 of the *Supreme Court Rules 1987* (NT):

1. Is Ground 1 articulated in the plaintiff's originating motion dated 30 January 2023 made out?
2. Is Ground 2 articulated in the plaintiff's originating motion dated 30 January 2023 made out?
3. Is Ground 3 articulated in the plaintiff's originating motion dated 30 January 2023 made out?
4. As to Ground 4 articulated in the plaintiff's originating motion dated 30 January 2023:
   (1) Did the *Environment Protection Act* 'permit' the making of the impugned decision, within the meaning of reg 9(3)(c) of the *Petroleum (Environment) Regulations*?
   (2) Does reg 9(3) of the *Petroleum (Environment) Regulations* give rise to an 'objective jurisdictional fact' which requires the Court to consider whether it is satisfied, on the balance of probabilities, that the proposed action 'has the potential to have a significant impact on the environment'?
5. If the answer to questions 1, 2, 3 and 4(1) is 'no', and the answer to question 4(2) is 'yes':
   (1) Can an event or circumstance associated with a future production phase of the exploitation of the natural resource the subject of the relevant EMP be relevantly an 'impact' of the proposed exploration phase activities?
   (2) Should the second defendant give particular discovery in accordance with the categories articulated in [1] of the plaintiff's submissions in relation to Application for Particular Discovery dated 18 August 2023?

Factual and statutory context

[5] Section 105 of the *Petroleum Act 1984* (NT) makes it an offence to explore for or recover petroleum other than in accordance with an exploration permit, retention licence or production licence. The *Petroleum Act* also provides for the grant of those forms of petroleum interest by the responsible Minister. So far as exploration permits are concerned, s 16 of the *Petroleum Act* provides that the Minister may invite applications for the grant of an exploration permit over a graticular section falling within the jurisdiction of the Territory; s 18 provides for notice of such applications; s 19 provides for an objection process; and s 20 provides for the Minister to grant an exploration permit subject to conditions notified to and accepted by the applicant.

[6] The legislative scheme draws a clear distinction between activities authorised by petroleum interests which are directed to identifying a petroleum reservoir with potential commercial value, and activities authorised by petroleum interests which are directed to the commercial recovery of petroleum. Exploration permits granted pursuant to Part II, Div 2 of the *Petroleum Act* and retention licences granted pursuant to Part II, Div 3 of the *Petroleum Act* fall into the former category. Activities conducted pursuant to those petroleum interests are directed to determining whether there is petroleum present in the relevant area

which is potentially of a commercial quality and quantity.[1] Production licences granted pursuant to Part II, Div 4 of the *Petroleum Act* fall into the latter category. That form of petroleum interest may only be granted to the holder of an exploration permit or a retention licence where the Minister is satisfied that there is a commercially exploitable accumulation of petroleum in the area subject to the exploration permit or retention licence.[2] It is only on the grant of a production licence that the interest holder may recover petroleum from the licence area for production purposes.[3]

[7] For each of these forms of petroleum interest, an applicant must provide a programme of technical works proposed to be undertaken in accordance with the authorisation.[4] The assessment of an application is conducted with reference to the particular works identified in the programme. The Minister’s approval of an application includes the technical works programme, including any required amendment to the proposed programme. It then forms a condition of the petroleum

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1 An exploration permit gives the permittee the right to explore for petroleum, and authorises the extraction, removal or recovery of petroleum only for the purpose of establishing the presence and appraising the quality of petroleum in the permit area: *Petroleum Act*, s 29. A retention licence is granted where the holder of an exploration permit has established the presence of petroleum and 'satisfied the Minister that the petroleum present in the exploration permit area is potentially of a commercial quality and quantity', but is not presently commercially viable: *Petroleum Act*, ss 31, 32. A retention licence only allows the recovery of petroleum on an appraisal basis in order to evaluate the development potential of the petroleum believed to be present in the licence area: *Petroleum Act*, s 42.

2 *Petroleum Act*, ss 44, 47.

3 *Petroleum Act*, s 56.

4 *Petroleum Act*, ss 16(3)(d), 32(1)(e), 45(1)(d).

interest that the permittee or licensee conducts all operations in accordance with the approved technical works programme.[5]

[8] Section 118 of the *Petroleum Act* confers an orthodox regulation-making power upon the Administrator. Without limiting the generality of that power, it is expressed to extend to prescription for or in relation to, amongst other things: (a) the exploration for petroleum and the carrying on of operations for that purpose; (b) the production of petroleum and the carrying on of operations and execution of works for that purpose; and (c) the protection of the environment and people who have lawful access to the exploration permit or licence area. The regulations prescribing matters for the protection of the environment may provide for functions to be performed and powers to be exercised by the Minister, and the way in which the Minister may perform a function or exercise a power or discretion. That power is expressed to include making provision for 'a scheme under which persons proposing to undertake certain activities under this Act must obtain prior Ministerial approval of an environment management plan'. That scheme may also include provision for judicial review or merits review of decisions made under the regulations.

[9] In pursuance of that power, the Regulations create criminal offences of strict liability for carrying out a regulated activity where there is no

5 *Petroleum Act*, s 58(b)(ii).

current environment management plan[6] for the activity,[7] and for carrying out a regulated activity in contravention of an environment management plan which is in force.[8] Regulation 5 defines 'regulated activity' to mean 'an activity or a stage of an activity: (a) carried out, or proposed to be carried out, in connection with a technical works programme for a petroleum interest; and (b) that has, or will have, an environmental impact or environmental risk.' It may be noticed that the requirement for an environment management plan is directed specifically to activities which form part of the technical works programme attending the grant of the relevant type of petroleum interest, and that the 'environmental impact or environmental risk' is to be assessed by reference to those works and that activity.

[10] The term 'environment management plan' is defined in s 5 of the *Petroleum Act* to mean, 'a plan prepared under and in accordance with the regulations that addresses potential environmental risks and impacts that might arise from carrying on the activities contemplated by the plan'. Necessarily consistent with that definition in the principal legislation, the term is defined in the Regulations to mean: '(a) an environment management plan, or proposed revision of a current plan, submitted under regulation 6 for approval; or (b) a current

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6 The term 'plan' appearing in the offence provisions is defined to mean 'environment management plan': *Petroleum (Environment) Regulations*, reg 3.

7 *Petroleum (Environment) Regulations*, reg 30.

8 *Petroleum (Environment) Regulations*, reg 31.

plan.'[9] The term 'current plan' is defined to mean: '(a) an environment management plan approved under regulation 11 and in force; and (b) any conditions to which the approval is subject, as specified in the approval notice for the plan.'[10]

[11] Regulation 6(1) of the Regulations provides that 'an interest holder who proposes to carry out a regulated activity must first submit to the Minister, for approval, an environment management plan relating to the activity'. By that formulation, read together with the statutory definition of 'regulated activity', the requirement to submit an environment management plan for approval is related and limited to the activities and technical works to be carried out in connection with the interest holder's petroleum interest. Regulation 6 does not require an applicant to submit an environment management plan that relates to an activity which the applicant does not propose to carry out and which does not form part of its approved technical works programme, much less an activity which the applicant cannot lawfully carry out under its petroleum interest. That limitation is reflected in the provisions of regs 7 and 8, which deal respectively with stakeholder engagement and the form and content of an environment management plan by reference to 'regulated activity'.

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9 *Petroleum (Environment) Regulations*, reg 3.

10 *Petroleum (Environment) Regulations*, reg 3.

[12] Leaving aside the process for resubmission, reg 11(2) of the Regulations provides that the Minister must approve the plan, with or without conditions, if reasonably satisfied that the plan meets the 'approval criteria'. It is that reference to 'approval criteria' which calls up reg 9 of the Regulations. It provides:

> **Approval criteria for plan**
>
> (1) The approval criteria for an environment management plan are that the plan must:
>
> (a) include all the information required by Schedule 1; and
>
> (b) be appropriate for the nature and scale of the regulated activity to which the plan relates; and
>
> (c) demonstrate that the activity will be carried out in a manner by which the environmental impacts and environmental risks of the activity will be reduced to a level that is:
>
> (i) as low as reasonably practicable; and
>
> (ii) acceptable; and
>
> (d) include an Authority Certificate in relation to the land on which the activity will be carried out.
>
> (3) If an activity is required to be referred to the NT EPA under Part 4, Division 3 of the *Environment Protection Act 2019*, the Minister must not make a decision to approve an environment management plan for the activity under regulation 11 unless:
>
> (a) the NT EPA has determined that an environmental impact assessment is not required under that Act for that activity; or
>
> (b) if the NT EPA has determined that an environmental impact assessment is required – an environmental approval is granted under that Act for the activity and the decision is consistent with that approval; or
>
> (c) the *Environment Protection Act 2019* otherwise permits the making of the decision.

[13] Again, it is plain from reg 9(1)(b) that the approval criteria are concerned with the regulated activity to which the plan relates. Similarly, the references in reg 9(1)(c) to 'the activity' and 'the environmental impacts and environmental risks of the activity' are references to the activities and technical works to be carried out in connection with the interest holder's petroleum interest. The requirement in reg 9(1)(a) that the environment management plan 'include all the information required by Schedule 1' must also be read subject to a relationship with the activities and technical works authorised by the petroleum interest in question.

[14] Schedule 1, cl 3 provides:

> **3 Assessment of environmental impacts and environmental risks**
>
> (1) A plan must include:
>
> (a) details of all environmental impacts and environmental risks of the regulated activity described in the plan and an assessment of those impacts and risks; and
>
> (b) a description of the process used to assess the environmental impacts and environmental risks.
>
> (2) The assessment mentioned in subclause (1)(a) must be of:
>
> (a) all the environmental impacts and environmental risks arising directly or indirectly from:
>
> (i) all aspects of the regulated activity; and
>
> (ii) potential emergency conditions, whether resulting from an incident or any other reason; and
>
> (b) the cumulative effects of those impacts and risks when considered with each other and in conjunction with any other activities or events that occurred or may occur in or near the permit area for the regulated activity.
>
> *Example for clause 3(2)(b) of other activities or events*
> *Activities or events associated with:*

> *(a) other exploration for, or production of, petroleum; or*
> *(b) the exploration for, or extraction of, minerals or extractive minerals.*

[15] Having regard to the statutory context, the reference to 'all environmental impacts and environmental risks of the regulated activity described in the plan' can only be to the impacts and risks of the activities identified in the technical works programme for the petroleum interest. The requirement that the relevant impact and risks take into account indirect, cumulative and conjunctive causes would seem to be directed to matters which occur or may occur contemporaneously with the performance of activities under the petroleum interest, rather than to activities which might be authorised at a later date under a different type of petroleum interest in relation to the same permit or licence area. So much is apparent from the reference by example to <u>other</u> exploration or production activities and events, and extractive mineral activity.[11]

[16] In conformance with that scheme and those statutory processes, Tamboran holds exploration permit EP98 under the *Petroleum Act* authorising it to conduct exploration activities in the permit area. The EMP seeking approval to conduct the regulated activity in accordance with the technical works programme for that exploration permit was submitted by Tamboran's predecessor-in-title. The decision by the Minister to approve the EMP was made under, and in purported

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11 The operation of this provision is discussed further below in the context of the first preliminary question.

compliance with, the statutory scheme for the submission and approval of environment management plans which is described above.

Environmental impacts and environmental risks

[17] The legal premise of the plaintiff's first ground of review is that when considering the EMP for approval, the Minister was obliged to have regard to the environmental impacts and risks of not just exploration activities, but also production-phase activities. The plaintiff relies on the decision of the Full Court of the Federal Court in *Minister for the Environment and Heritage v Queensland Conservation Council Inc (*the *Nathan Dam Case)*[12] in pressing the contention that the assessment of environmental impacts and risks extends beyond the activity subject to the statutory authorisation, and includes potential impacts arising from the conduct of other activities. That case involved a proposal to construct and operate a dam in Central Queensland to provide sustainable irrigation for agricultural and industrial purposes.

[18] The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) relevantly prohibited an action that has, will have or is likely to have a significant impact on the world heritage values of a declared World Heritage property. The proponent of an action of that type was required to refer the proposal to the Minister for determination of whether it required approval. In that particular case, the Minister

12 *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.

found that the construction and operation of the dam was likely to have a significant impact on certain species and ecological communities, but no significant impact was considered likely to heritage values in the Great Barrier Reef World Heritage Area.

[19] The applicants sought judicial review of the Minister's decision on the basis that the Minister was obliged to have regard not just to the immediate impacts of the dam, but all of the consequences which could be predicted to follow from the dam's operation. One such consequence which was recognised by the information before the Minister was cotton farming conducted with irrigation, which would lead to the run-off of fertilisers with a likely impact on the Great Barrier Reef. The Court at first instance ultimately found that the task involved 'a wide consideration of the consequences which will follow if a proposed activity proceeds', and that the Minister's inquiry did not afford that consideration.[13]

[20] On appeal, the Full Court held that the impact of fertiliser run-off was a relevant consideration in the Minister's decision because 'all adverse impacts' included indirect impacts resulting from third-party conduct beyond the proponent's control. Unlike the statutory regime under consideration in the present case, there was no definition of 'impact' in the *Environment Protection and Biodiversity Conservation Act*

13 *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463.

requiring a causal nexus with the activity in question (discussed further below). However, the Full Court's decision recognised that even under that more liberal statutory regime, a causal nexus between the activity and the impact was necessary. The Court stated:

> It is unhelpful, we consider, to attempt to paraphrase the expression "all adverse impacts" in s 75(2)(a) of the EPBC by recourse to phrases like "inextricably involved" or "natural consequence". "Impact" in the relevant sense means the influence or effect of an action: Oxford English Dictionary, 2nd ed, vol VII, 694-695. As the respondents submitted, the word "impact" is often used with regard to ideas, concepts and ideologies: "impact" in its ordinary meaning can readily include the "indirect" consequences of an action and may include the results of acts done by persons other than the principal actor. Expressions such as "the impact of science on society" or "the impact of drought on the economy" serve to illustrate the point. Accordingly, we take s 75(2) to require the Minister to consider each way in which a proposed action will, or is likely to, adversely influence or effect the world heritage values of a declared World Heritage property or listed migratory species. As a matter of ordinary usage that influence or effect may be direct or indirect. "Impact" in this sense is not confined to direct physical effects of the action on the matter protected by the relevant provision of Pt 3 of Ch 2 of the EPBC Act. <u>It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter.</u> Provided that the concept is understood and applied correctly in this way, it is a question of fact for the Environment Minister whether a particular adverse effect is an "impact" of a proposed action. However, we do not consider that the Minister did apply the correct test in answering the question of fact which had arisen in the present case.[14]
>
> *[Emphasis added]*

[21] That case presents an example of the requirement that the relevant impact and risks should properly take into account indirect, cumulative

14 *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24 at [53].

and conjunctive causes which are sufficiently close to the action to be characterised as the consequences of the action. That included matters which would or may occur as a natural consequence of the building of the dam. The Full Court found that there was an inescapable inference that the purpose of the dam was to release water for irrigation for agricultural purposes. That was a natural consequence of the performance of the proposed activity of building a dam, rather than a natural consequence of activities which might be authorised at a later date under a different approval process.

[22] That distinction is reflected in the contemporaneous decision of Weinberg J in *Mees v Kemp*,[15] which involved a challenge to the Minister's decision under the *Environment Protection and Biodiversity Conservation Act* that a proposal to construct and operate a section of freeway was not a 'controlled action' requiring approval. The applicant's contention was that the Minister had failed to take into account that once the subject section of the freeway was constructed, it was a 'strong chance' or 'almost inevitable' that a further freeway link would be constructed to complete a ring road around Melbourne with adverse consequences for protected species. After considering a raft of Australian, United States and New Zealand authorities in relation to the secondary and indirect environmental consequences of proposed activity, Weinberg J observed that the court at first instance in

15 *Mees v Kemp* [2004] FCA 366.

Queensland Conservation Council Inc v Minister for the Environment and Heritage[16] had specifically excluded hypothetical possibilities from the range of matters that the Minister was required to take into account, and stated:

> Any case involving environmental assessment and approval will always involve some element of conjecture. However, there seems to me to be an important difference between the conjecture as to whether a proposed action (itself certain to occur if approval is granted) is "likely" to endanger a particular threatened species, and the far greater conjecture involved in considering whether a proposed action might, in turn, lead to some other action, which might, in turn, ultimately have that effect.[17]

[23] In the wake of the *Nathan Dam Case*, the Parliament inserted a statutory definition of 'impact' into the *Environment Protection and Biodiversity Conservation Act* to clarify the extent to which impacts which are indirect consequences of actions must be considered or dealt with under that legislative regime, including the impacts of actions by third parties which are an indirect consequence of the taking of an action by the first person. Even under that definition, the action was required to be 'substantially causative' of indirect consequences.[18] There remains a distinction between indirect consequences arising from a secondary action which is facilitated by a proposed action and certain to occur,[19] and indirect consequences which cannot arise either

16 *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463.

17 *Mees v Kemp* [2004] FCA 366 at [107].

18 *Australian Conservation Foundation Inc v Minister for the Environment & Another* (2016) 251 FCR 308 at [155]-[160].

19 For example, using water from an authorised irrigation dam for irrigation purposes or using coal from an authorised coal mine for its intended purpose.

lawfully or practically on the basis of the statutory authorisation of a proposed action. That distinction is not fully comprehended by the proposition that an action may be the indirect cause of an environmental impact, or that an indirect environmental consequence may arise as the result of a different act and/or actor.

[24] In each case, the assessment of the environmental impacts and risks which might be said to result from a proposed activity subject to a statutory authorisation will depend upon the operation of the governing statute or statutes. The matters which the Minister was required to take into account in the EMP approval process this case is a question of statutory construction. For that purpose, both the *Petroleum Act* and the Regulations are to be construed by attributing legal meaning to the legislative text, in a manner that best achieves their purpose or object consistently with the language used in the relevant provisions.[20] As the Minister has submitted, that process does not seek to divine unexpressed legislative intention or to remedy perceived legislative inattention.

[25] The stated objective of the *Petroleum Act* includes to provide a legal framework that 'encourages persons to undertake effective exploration for petroleum and to develop petroleum production so that the optimal value of the resource is returned to the Territory', and that 'provides

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20 *Disorganized Developments Pty Ltd v South Australia* (2023) 97 ALJR 575 at [14]-[15].

protection to the environment of the Territory'.[21] The legal framework is stated by the legislature to provide for, amongst other things, 'the promotion of active exploration for petroleum, and of the development of petroleum production if commercially viable', and 'the reduction of risk or potential risk of environmental harm by ensuring that activities associated with the exploration for, or production of, petroleum are carried out in a manner in which the environmental impacts and risks of the activities are reduced to a level that is: (i) as low as reasonably practicable; and (ii) acceptable'.[22]

[26] There is, of course, a limitation on the extent to which an objects clause may govern the interpretation of a provision of the Act in which it appears. An objects clause cannot cut down the meaning of a provision if that meaning in its textual and contextual surroundings is plain and unambiguous.[23] While an objects clause may be used to resolve uncertainty or ambiguity, it cannot control clear statutory language or command a particular outcome in the exercise of discretionary power.[24] Allowing for that limitation, it is plain from the stated legislative objective that the *Petroleum Act* is designed to encourage active exploration for and development of petroleum

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21 *Petroleum Act*, s 3(1).

22 *Petroleum Act*, s 3(2).

23 *S v Australian Crime Commission* (2005) 144 FCR 431 at [22]; *Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189 at [14].

24 *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 78*; CSL Australia Pty Ltd v Minister for Infrastructure and Transport (No 3)* [2012] FCA 1261 at [99].

product. Environmental considerations do not take any particular primacy in the achievement of that objective, and nor do they have operation beyond what the legislation requires at each step of the exploration, development and production processes.

[27] That stated objective also lays the groundwork for and reflects a statutory structure which deals quite separately with exploration for petroleum, on the one hand, and petroleum production, on the other hand. That context is important, because it may point to factors which affect the legal meaning to be ascribed to the statutory text.[25] As has been described above, the approval processes for each of those types of petroleum interest have quite a different focus. The activities which fall for consideration in the assessment of an application for an exploration permit are those which are set out in the proposed technical works programme identified in the application, and those which the legislation authorises to be conducted under that particular form of interest. The approval process is not in its terms concerned with works or consequences falling outside or beyond those activities.

[28] As already described, reg 11 required the Minister to be satisfied that the EMP met the 'approval criteria'. So far as is relevant for present purposes, that required the EMP to 'be appropriate for the nature and scale of the regulated activity to which the plan relates'; and to

25 *R v A2* (2019) 269 CLR 507 at [32]-[33].

‘demonstrate that the [regulated] activity will be carried out in a manner by which the environmental impacts and environmental risks of the [regulated] activity will be reduced to a level that is as low as reasonably practicable and acceptable’.[26] The legislative text plainly and unambiguously requires that an environment management plan address the environmental impacts and risks of the regulated activities it authorises. So much is apparent from the fact that the legal obligation to hold a current environment management plan is imposed by reference to ‘regulated activity’. That phrase is defined in turn by reference to the technical works programme for the petroleum interest in question, and the consequence of ‘environmental impact or environmental risk’ arising from that particular activity.

[29] That construction is reinforced by the content of Sch 1 to the Regulations, which required that the EMP include a description of the ‘regulated activity’ to which the plan relates; a description of the environment that may be affected by the ‘regulated activity’; an assessment of the environmental impacts and environmental risks of the ‘regulated activity’; and a specification of the environmental outcomes in relation to the ‘regulated activity’. The other information prescribed by Sch 1 is also directed to the regulated activity which is authorised by the petroleum interest in question.

26 *Petroleum (Environment) Regulations*, reg 9(1).

[30] That conclusion is not altered by the fact that the definition of ‘environmental impact’ in reg 3 of the Regulations includes ‘potential adverse change to the environment resulting wholly or partly from a regulated activity’; that Sch 1, cl 3(2)(a) of the Regulations extends to environmental impacts and risks ‘arising directly or indirectly from all aspects of the regulated activity’; or that Sch 1, cl 3(2)(b) of the Regulations requires the assessment of the environmental impacts and risks in an environment management plan to include ‘the cumulative effects of those impacts and risks when considered with each other and in conjunction with any other activities or events that occurred or may occur in or near the permit area for the regulated activity’.

[31] First, the use of the word ‘resulting’ in the definition of ‘environmental impact’ requires that any ‘potential adverse change to the environment’ must still have a causal relationship with the ‘regulated activity’ conducted under the petroleum interest in question. The significance of definition and context when construing the word ‘impact’ was addressed by Fraser JA in *Coast and Country Association of Queensland Inc v Smith & Ors* in the following terms:

> The appellant emphasised the breadth of meaning which that passage attributed to the word “impact”. The appellant’s arguments on this topic did not attribute sufficient weight to the very different text and context in which the word “impact” appears in s 269(4)(j) of the *Mineral Resources Act*. The Full Court of the Federal Court [in the *Nathan Dam Case*] was at pains to make it clear that its construction of the Commonwealth legislation was not influenced by concepts developed in relation to other environmental protection legislation, including legislation in the

> Australian States, and that it was also not helpful to have regard to different phrases. Conversely, the Full Court's construction does not guide the proper construction of the very different provisions of the *Mineral Resources Act*. A more liberal construction of "all adverse impacts" in the Commonwealth legislation is suggested by a combination of different matters. In s 75(2)(a), the adjective "all" qualifies "adverse impacts" and there is no expressed requirement for a causal relationship between the "action" and the "impact" such as is found in the words "caused by" in s 269(4)(j)). … Also, the "action" in the *Nathan Dam Case* comprehended not only the construction of the dam but also the downstream irrigation which would result from its operation.[27]

[32] The same general observations may be made in relation to the meaning to be ascribed to 'environmental impact' in the present context. The definition of 'environmental impact' is expansive only in the senses that the regulated activity need not be the sole cause of the adverse change, and the possibility of adverse change as a result of that regulated activity need not rise to the level of certainty.

[33] Second, cl 3(1)(a) makes it plain that the assessment is directed to the environmental impacts and risks of the 'regulated activity' authorised under the petroleum interest in question. The reference in cl 3(2)(a) to environmental impacts and risks 'arising directly or indirectly from … the regulated activity' does not obviate the requirement for a causal relationship with the regulated activity authorised under the subject petroleum interest, which in this case is exploration activity described in the technical works programme. Its operation is not to bring into consideration impacts mediated through production activity. Its

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27 *Coast and Country Association of Queensland Inc v Smith & Ors* [2016] QCA 242 at [30].

operation is only that the regulated activity need not be the most proximate or immediate cause of the environmental impact or risk under consideration.

[34] Third, in a statutory scheme which creates a rigidly staged scheme for the exploration for petroleum, and the subsequent development of petroleum production if commercially viable, the reference in cl 3(2)(b) to ‘other activities or events’ should not be construed as an oblique reference to potential future production activity governed by quite discrete regulatory processes and requirements. The language of cl 3(2)(b), whatever else it may do, is not apt to extend that assessment to the environmental impacts and risks of activity which may (or may not) at some point in the future be authorised under a different form of petroleum interest. The reference to impacts and risks which ‘may occur’ does not extend to anything which might conceivably occur in the future, or to matters contingent or speculative on the grant of a production licence.

[35] Under the statutory regime which has been described above, any future production phase activities may never occur and could not lawfully occur unless and until Tamboran (or any successor-in-title): (1) carries out exploration and appraisal activities in respect of the area covered by EP98; (2) discovers a commercially exploitable accumulation of petroleum within that area; (3) applies for a production licence; (4) is granted a production licence on conditions which are acceptable to it;

(5) submits an environment management plan relating to the proposed production phase activities that satisfies the approval criteria, including by assessing the environmental impacts and risks of those activities; and (6) receives approval for that environment management plan from the Minister of the day.

[36] The activities authorised by EP98, and required to be addressed in the EMP, are confined to exploration. The EMP will remain in force until the regulated activity under the technical works programme for EP98 has been completed and the environmental outcomes under the EMP have been met.[28] The regulated activity to be carried out under the technical works programme cannot be modified without prior notice to the Minister,[29] with the requirement for the submission of a revised EMP for any new or increased environmental impact or environmental risk.[30] Moreover, any requirement that the EMP extend to the environmental risks and outcomes of production activity would have the consequence that the EMP would remain in force and run in tandem with the environment management plan subsequently approved for any production activity. The statutory scheme clearly does not contemplate multiple environment management plans operating in relation to a regulated activity.

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28 *Petroleum (Environment) Regulations*, reg 14.

29 *Petroleum (Environment) Regulations*, reg 22.

30 *Petroleum (Environment) Regulations*, reg 17.

[37] At the point of the relevant assessment by the Minister, production activities were not authorised under either EP98 or any other process or approval, the conduct of production activities in the future was dependent upon the results of the exploration phase, and production activities could not lawfully occur without the grant of a production licence under the *Petroleum Act* with the attendant statutory requirement for the submission and consideration of a further environment management plan directed specifically to those production activities. It is at that point that the environmental impacts and environmental risks of proposed production activity are required to be included in an environment management plan for consideration and approval by the Minister in accordance with the approval criteria and procedures in regs 9 and 11 of the Regulations.

[38] That construction of the legislation is both dictated by the text and consistent with the practical and rational operation of the legislative scheme. The interpretation pressed by the plaintiff would require an environment management plan for an exploration permit, whatever the nature of the proposed exploration activity might be, to identify and assess environmental impacts and risks of potential production activity which may never occur, and the scope of which is unknown even if a commercially viable petroleum reservoir was to be discovered.

[39] The vast bulk of regulated activity which might conceivably be undertaken under the technical works programme for a production

licence cannot be identified with any specificity until the existence, location and characteristics of the commercially viable petroleum reservoir are known. Until such time, the environmental impacts and risks cannot be identified in any complete and meaningful way for incorporation into an environment management plan. The construction pressed by the plaintiff would require an environment management plan for exploration activity to address the notional environmental impacts and risks of hypothetical production activity. The inherent nature of exploration activity is that the production hypothesis remains in a state of flux in relation to such things as volume, location, quality, recovery methodology and transportation.

[40] That reality is graphically illustrated by the fact that the total area of surface disturbance involved in the regulated activity the subject of this particular technical works programme and EMP was 106.86 hectares, whereas the total area of EP98 subject to potential exploration and production-phase activity is 1,030,000 hectares.[31] That in turn illustrates the difficulty with the plaintiff's proposition that all exploration activity is 'likely' to lead to the grant of a production licence and production activity. The consequence of the plaintiff's premise would be that the proponent of exploration activity set out in a technical works programme, whatever its nature and form might be, is required to address all of the potential environmental risks and impacts

31 Court Book 1495.

of a hypothetical production phase, even if that exploration activity is limited to something like the construction of access tracks for preliminary seismic testing purposes. As the Minister submits, that consequence would be contrary to the stated objective of the *Petroleum Act*, because it would operate as a disincentive rather than an encouragement to exploration activity, and would not improve environmental outcomes because any assessment at that early stage would be of extremely limited utility.

[41] On the plaintiff's construction, any change in the production hypothesis which changes the scope of the notional environmental impacts and risks would also require a revised environment management plan.[32] That would be the case even where the permit holder is subjectively unaware of that change in scope. A failure to submit a revised environment management plan in those circumstances would expose the permit holder to an offence of strict liability,[33] render the environment management plan liable to revocation[34] and render the exploration licence liable to cancellation.[35] Those results would be inconsistent with the practical and rational operation of the legislative scheme, and cannot be the objective intention of the legislature.

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32 *Petroleum (Environment) Regulations*, reg 17.

33 *Petroleum (Environment) Regulations*, reg 17.

34 *Petroleum (Environment) Regulations*, reg 27.

35 *Petroleum Act*, s 74.

[42] For these reasons, the first preliminary question must be answered in the negative.

Unsustainable greenhouse gas emissions

[43] The second ground of review asserts that the Minister could not lawfully have been satisfied that the EMP included details of all environmental impacts and environmental risks as required by regs 9(1)(a) and 11(3)(a) and Sch 1, cl 3(1)(a) of the Regulations because the EMP did not describe the environmental impacts or environmental risks associated with unsustainable greenhouse gas emissions. The challenge is put on the basis that the Minister misconstrued Sch 1, cl 3(1)(a) of the Regulations in that respect; made a finding that was 'irrational' or 'perverse' in the administrative law sense; and/or made a finding which 'no reasonable decision-maker' could have made.

[44] What Sch 1, cl 3(1)(a) of the Regulations required in the present case was that the EMP contain 'details of all environmental impacts and environmental risks of the regulated activity described in the [EMP]'. For the reasons already described, that 'regulated activity' was limited to the activity described in the technical works programme. The EMP included a summary of potential environmental impacts and risks, including greenhouse gas emissions, and concluded there were no

significant impacts.[36] So far as greenhouse gas emissions were concerned, the EMP provided an estimate of the quantity of those emissions which would result from the regulated activity in a 'tonnes of carbon dioxide equivalent', and described the manner in which those emissions could be mitigated.[37] In relative terms, the potential emissions of the proponent's current approved, proposed and potential petroleum exploration activities in the Northern Territory were estimated to represent less than 1 percent of total Northern Territory greenhouse gas emissions for a single year, and 0.029 percent of total Australian greenhouse gas emissions for a single year.[38] The EMP included a description of the environmental risk assessment methodology,[39] a risk matrix,[40] an assessment of risk acceptability,[41] and risk assessment outcomes including in relation to greenhouse gas emissions.[42] In particular, that environmental risk assessment outcome concluded that there would be '[n]o significant impact on air quality and no excess greenhouse gas emissions as a result of [the] exploration activities'.

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36 Court Book 138-139.

37 Court Book 226-227.

38 Court Book 233.

39 Court Book 320.

40 Court Book 322-323.

41 Court Book 324-325.

42 Court Book 326-327, 336.

[45] Items 74 to 78 of Appendix L (Risk Assessment) of the EMP identified the various events which might occur in the course of undertaking the regulated activity which might give rise to the risk of greenhouse gas emissions, such as diesel combustion, flaring of gas during well-testing, and uncontrolled releases and leaks of gas.[43] The consequences for the environment of those events were described in terms of their potential level of impact on such things as species, habitats, ecosystems and areas of cultural significance. The likelihood of those events occurring were rated as either 'Remote' or 'Highly Unlikely', and the overall risk assessment having regard to the potential consequences and likelihood of those events was categorised as 'Low'. That assessment also included that the risks associated with uncontrolled or unanticipated emissions, including well sabotage, were moderate, and any uncontrolled emission was likely to be restricted in duration.

[46] Items 74 and 75 of Appendix L (Risk Assessment) also contained a description of residual environmental risks which might be generated by the exploration activity. That description referred to the 'well-documented' risks associated with greenhouse gas generation through diesel combustion, and the fact that petroleum exploration activities in the Northern Territory generated less than 1 percent of total Northern Territory greenhouse gas emissions. So far as cumulative effects were

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43 Court Book 1169-1170.

concerned, Item 83 of Appendix L (Risk Assessment) stated that on a worst-case scenario the total greenhouse gas emissions for the full development of the Beetaloo Sub-basin if technically and commercially viable would contribute 1.3 percent of total Northern Territory greenhouse gas emissions and 0.05 percent of total Australian greenhouse gas emissions, but would likely provide a viable transition fuel with only 50 percent of the greenhouse gas emissions of coal.[44]

[47] It is important when dealing with the assertion that the Minister misconstrued the governing statute to understand that this Court on judicial review is concerned only with the scope of the Minister's power and the manner in which that power was exercised. It is not concerned with the content of that exercise of power in the sense of assessing the merits of the Minister's decision. As Brennan J said in *Attorney-General (NSW) v Quin* in dealing with administrative decisions:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

44 Court Book 1170.

> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.[45]

[48] The contention that a decision-making body has misconstrued the statute conferring the decision-making power, and thereby misconceived the extent of its powers, is most frequently made in relation to jurisdictional error on the part of inferior courts or other bodies exercising judicial or quasi-judicial powers.[46] When dealing with the exercise of administrative powers and functions, the question was ordinarily framed as whether the decision-maker had taken action outside the limits imposed on the exercise of power by the governing statute, whether by express words or necessary implication. Although the concepts of administrative *ultra vires* and jurisdictional defect had different historical origins, there has been a considerable blurring of the distinction and the modern focus on statutory interpretation has tended to sweep over the old conceptual boundaries.

[49] In *MZAPC v Minister for Immigration and Border Protection*,[47] the core propositions of jurisdictional error in relation to 'administrative decisions made by an executive officer whose decision-making authority is conferred by statute' were expressed by the majority in the following terms:

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45 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36.

46 That form of defect was characterised as jurisdictional error in *Craig v South Australia* (1995) 184 CLR 163 at 177-178.

47 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506.

> The constitutionally entrenched jurisdiction of a court to engage in judicial review of the decision, where that jurisdiction is regularly invoked, is no more and no less than to ensure that the decision-maker stays within the limits of the decision-making authority conferred by the statute through declaration and enforcement of the law that sets those limits. To say that the decision is affected by jurisdictional error is to say no more and no less than that the decision-maker exceeded the limits of the decision-making authority conferred by the statute in making the decision. The decision for that reason lacks statutory force. Because the decision lacks statutory force, the decision is invalid without need for any court to have determined that the decision is invalid.[48]

[50] As is apparent from that formulation, invalidity will arise when a limit to the decision-making power has been exceeded in a way that is material such that the decision lacks authority. For administrative decision-makers exercising authority conferred by statute, invalidity and excess of jurisdiction (or power) are the joint outcome of a single process of analysis. As the majority went on to say in *MZAPC v Minister for Immigration and Border Protection*:

> The statutory limits of the decision-making authority conferred by a statute are determined as an exercise in statutory interpretation informed by evolving common law principles of statutory interpretation. Non-compliance with an express or implied statutory condition of a conferral of statutory decision-making authority can, but need not, result in a decision that exceeds the limits of the decision-making authority conferred by statute. Whether, and if so in what circumstances, non-compliance results in a decision that exceeds the limits of the decision-making authority conferred by the statute is itself a question of statutory interpretation.[49]

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48 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [29]. See also the discussion by Colvin J, *Reviewing Judicial Power for Jurisdictional Error*, Address to the WA Chapter of the Australian Institute of Administrative Law, 24 August 2021.

49 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [30].

[51] The nature of the constructional error on the part of the Minister which is asserted by the plaintiff is that the phrase 'details of all environmental impacts and environmental risks of the regulated activity described in the plan' appearing in Sch 1, cl 3(1)(a) of the Regulations must, by reference to the definition of 'environmental impact', include the 'adverse change' or 'potential adverse change' which might be caused by 'unsustainable greenhouse gas emissions'. The assertion follows that although the EMP made reference to 'unsustainable greenhouse gas emissions' as a relevant impact and risk, it did not include every particular process or thing which might be affected by unsustainable greenhouse gas emissions, including such things as surface water and particular species of flora and fauna, and it did not address what that impact might cause. In the plaintiff's submission, that would extend to include such things as worsening climate change with the risk of more days with weather conditions conducive to extreme bushfires, more intense and heavy rainfall and more extreme heat days.

[52] This contention bears some similarity to one of the grounds of challenge considered in *Australian Conservation Foundation Inc v Minister for the Environment & Another*,[50] in which it was argued that the statutory decision-maker had failed to take into account the impact or likely impact of combustion emissions in the sense of what they

50 *Australian Conservation Foundation Inc v Minister for the Environment & Another* (2016) 251 FCR 308 at [155]-[174].

might cause, particularly in the form of increased ocean temperature, ocean acidification and more extreme weather events. No error was found in the decision-maker's determination in that respect. Even under the expanded definition of 'impact' in the *Environment Protection and Biodiversity Conservation Act*, it could not be concluded that increased combustion emissions from the burning of coal extracted from the proposed coalmine, which were themselves an indirect consequence of the proponent's action, would be a substantial cause of the temperature, acidification and weather events asserted. Accordingly, they were not 'impacts' which were required to be taken into account in determining whether the proposed action was a 'controlled action'.

[53] If that same logic and approach is applied to the present case, it could not be concluded that greenhouse gas emissions from the regulated activity the subject of the EMP would 'result' in the relevant sense in bushfires, flooding rainfall and extreme heat; or that the Minister misconstrued the Regulations in that respect; or that the Minister's decision to approve the EMP was invalidated by the fact that those asserted impacts and risks were not the subject of particular attention and analysis in the EMP. That is because the term 'details' extends only to 'environmental impacts and environmental risks', which in turn extend only to adverse changes and potential adverse changes 'resulting' from a regulated activity.

[54] For the reasons given in answer to the first preliminary question, when considering the EMP for approval, the Minister was obliged to have regard only to the environmental impacts and risks of the exploration activity and not also to potential production-phase activities. Given the limited nature of the regulated activity in this case, and the contributory emission percentages attributable to petroleum exploration activity which were described in the EMP, it was not a statutory precondition to approval that the EMP enter into an examination of the climate change consequences of 'unsustainable' greenhouse gas emissions, even by reference to the well-documented risks of that level of emissions.[51] It was also not a statutory precondition to approval that the EMP extrapolate those emission quantities and contributory percentages in order to calculate their proportional contribution to total global greenhouse gas emissions. That is because it was not possible to conclude that the regulated activity would be a substantial cause of 'unsustainable' greenhouse gas emissions or consequential events and circumstances such as bushfires, flooding rainfall and extreme heat. As a matter of materiality and degree, that inability is not obviated by the extension of the definition of 'environmental impact' to potential adverse changes resulting 'wholly or partly' from a regulated activity.

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51 The literature to which those well-documented risks were referenced included the National Greenhouse and Energy Reporting Scheme, which is a national framework for the collation of information about greenhouse gas emissions directed to the formulation of government policy and program development to address the risks of unsustainable emissions, and the Intergovernmental Panel on Climate Change, which is the United Nation's body responsible for assessing and reporting on the science related to climate change.

[55] The estimate of the quantity of emissions in a carbon dioxide equivalent which might result from the exploration activity described in the EMP was subject to a range of variables such that it is impossible to determine the quantity of actual net emissions which would result. As a consequence, it is also impossible to draw any conclusions as to the likely contribution of the regulated activity to any specific increase in global temperature or any extreme weather event, and not possible to characterise those matters as impacts and risks in the sense contemplated and required by the statute. Even if the upper-level and contingent estimate of emissions contained in the EMP was adopted for that purpose, it would still not be possible to identify the necessary relationship between the regulated activity and any specific increase in global temperature or extreme weather event. The approach pressed by the plaintiff conflates the environmental impacts and risks of the regulated activity which must under the terms of the statute be addressed in an environment management plan with the climatic consequences of unsustainable greenhouse gas emissions which are unconnected in any materially causal sense with the regulated activity, and which have either already occurred or will occur irrespective of the conduct of the regulated activity.

[56] The essence of this challenge is that the Minister had no power to approve the EMP because it did not contain all of the details required by the Regulations in relation to a particular aspect of one of many

identified environmental risks and impacts. In order to rise to the level of *ultra vires* or invalidity, the defect asserted must be such as to deprive the statutory decision-maker entirely of power to make the decision in question. That involves a number of steps. First, it may be accepted that the Minister's power to approve an environment management plan is conditional on the plan complying with the statutory requirements for such a document. Second, it is necessary to determine whether there has been a failure in compliance with those statutory requirements of such a nature as to deny the environment management plan characterisation as such. For the reasons described, there was no failure of that type. Accepting that to be so, the third step in the plaintiff's challenge must also fail because there was no failure to comply with the conditions of the grant of decision-making power which precluded the Minister's approval, or invalidated that approval once made.

[57] So far as the assertions of irrationality and unreasonableness are concerned, the essence of the question is also whether the statutory decision-maker exceeded the limits on the grant of statutory power, but with a focus on whether the decision was 'within a range of possible [and] acceptable outcomes which are defensible in respect of the facts and law'.[52] The threshold for that form of legal unreasonableness is

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52 *Minister for Immigration v SZVFW* (2018) 264 CLR 541 at [81]-[82]. See also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [105]; *Minister for Immigration and Border Protection v*

high. Ultimately, that will turn on whether the decision-maker's satisfaction of the relevant state of affairs was illogical or not based on findings or inferences of fact supported on logical grounds such that it was not possible to reach on the available material.[53] Although the 'legal standard of reasonableness' should not be considered as limited to what is in effect an irrational or bizarre decision, that standard will only be satisfied where the decision in question lacks evident and intelligible justification.[54] As Allsop CJ stated in *Minister for Immigration and Border Protection v Stretton*:

> The boundaries of power may be difficult to define. The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or

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Stretton (2016) 237 FCR 1 at [2]; *Stran v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 233 at [119].

53 See, for example, *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21 at [33]-[35]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at [38]; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [133]-[136]; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at [33].

54 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351-352.

explications of legal unreasonableness, of going beyond the source of power.[55]

[58] The relevant question in this case is whether the Minister could be reasonably and rationally satisfied that the EMP contained the matters required by Sch 1, cl 3(1)(a) of the Regulations. Having regard to the relevant content which has been described above, it cannot be said that the Minister's implicit conclusion that the EMP dealt satisfactorily with the environmental impacts and risks of 'unsustainable greenhouse gas emissions' was unavailable on the material. That conclusion did not extend, and was not required to extend, to broader questions of whether exploration for, production and utilisation of hydrocarbons generally causes unsustainable greenhouse gas emissions, and what the causes and consequences of unsustainable emissions are in a global sense.

[59] For these reasons, the second preliminary question is answered in the negative.

Possible emergency situation

[60] The third ground of review asserts that the Minister erred in law in finding that the EMP contained the matter set out at Sch 1, cl 3(2)(a)(ii) of the Regulations, because it contained an assessment of procedures to be followed in relation to any possible emergency situation rather than an assessment of the environmental impacts

55 *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [11].

arising directly or indirectly from an emergency situation. The clause provides:

> The assessment method mentioned in subclause (1)(a) must be of:
>
> (a) all the environmental impacts and environmental risks arising directly or indirectly from:
>
> (i) …
>
> (ii) potential emergency conditions, whether resulting from an incident or any other reason;

[61] The challenge is put on the same basis as the second ground of review, *viz* that the Minister misconstrued Sch 1, cl 3(2)(a)(ii) of the Regulations in that respect; made a finding that was 'irrational' or 'perverse' in the administrative law sense; and/or made a finding which 'no reasonable decision-maker' could have made.

[62] Appendix L of the EMP is in the form of a Risk Assessment document[56] which assesses each relevant risk by reference to: (1) a classification of the environmental factor concerned; (2) the risk scenario description; (3) any relevant code of practice; (4) the unmitigated risk rating by reference to consequence and likelihood in accordance with the Risk Matrix incorporated at the beginning of the document; (5) the risk mitigation measures in relation to prevention, detection and recovery; (6) the residual risk rating, again by reference to both consequence and likelihood; (7) whether the risk management criteria to render the risk as low as reasonably practicable (ALARP) have been achieved; (8) an

56 Court Book 1157 et seq.

assessment of whether the risk acceptability criteria have been achieved; and (9) a scientific uncertainty ranking.

[63] That Risk Assessment document includes an assessment of a number of environmental impacts and risks arising from potential emergency conditions. By way of representative example, Item 14 of the Risk Assessment deals with contamination of surface water as the result of the failure of a flowback storage tank. In terms of likelihood, the risk is categorised as 'Remote' which, by reference to the risk matrix, means less than a 1 percent chance of occurring within the following 12 months. In terms of possible consequences, that unmitigated risk is classified as 'Serious', which, by reference to the risk matrix, may include:

> Serious medium term reversible impacts to low risk species, habitats, ecosystems or area/s of cultural significance.

[64] The Risk Assessment document then specifies the risk mitigation measures for that particular risk by reference to prevention, detection and recovery. So far as prevention is concerned, the document makes reference to the Wastewater Management Plan, the Spill Management Plan, the specification of the flowback storage tanks and their compliance with the relevant Australian Standards, and the following matters:

- The site is earthen bunded to prevent off-site release of flowback. This is considered an additional level of

containment, as the primary and secondary containment is the principal spill risk control.

- Site earthen bunding will have a minimum bund wall height of 300 millimetres capable of managing at least 110 percent of the largest waste water tank volume.
- The earthen bund will be constructed in a manner to withstand a tank failure scenario with appropriate compaction and stabilisation applied.
- Separation between lease pad and closest major waterway is ~ 15 kilometres.
- No major wetlands, with closest ~ 150 kilometres away (Lake Woods).

[65] The residual risk ALARP and acceptability statement provides:

> The consequence and likelihood of a containment failure are negated through onerous wastewater management requirements stipulated in the COP. The lease pad is bunded, preventing the off-site release of wastewater in the event of a failure. A spill management plan is required to be implemented to prevent, detect and respond to spills to prevent off-site releases. The spill is therefore likely to be smaller, with any spillage restricted to the lease pad. The consequence of a spill is therefore considered to be ‘serious’ with moderate short term (weeks-months) contamination. The area is not in close proximity to [any] major watercourse with a 13 kilometre separation distance. Given the separation distance and bonding, the likelihood is considered remote, with the probability of occurring less than one percent.

[66] There is no doubt that the EMP could have taken a more detailed approach to the analysis of the environmental impacts and environmental risks arising from a potential emergency condition related to the failure of flowback storage tanks. There is also no doubt that the EMP might have been more specific in relation to the species, habitats and ecosystems which might potentially be affected by such a failure. However, it is not possible to conclude that as a matter of statutory interpretation an environment management plan which does

not descend into that level of detail fails to satisfy Sch 1, cl 3(2)(a)(ii) of the Regulations such that the Minister exceeded the limits of the decision-making authority conferred by the statute in approving the EMP. It is also no doubt the case that the Minister might have declined to approve the EMP on the basis that further specification was required, but the Minister's determination that the EMP satisfied the relevant statutory requirement cannot be said to be unavailable on the material or otherwise illogical. As already observed, the legal standard of reasonableness is not concerned with the content of that exercise of power in the sense of assessing the merits of the Minister's decision.

[67] The plaintiff has also provided two examples of matters which it asserts are missing from the EMP. The first example relates to Item 36 of the Risk Assessment, which concerns the risk of "Accidental ignition of fire from exploration activities (drilling, stimulation, flaring, seismic and general access)'. The plaintiff says that assessment does not include 'the risk associated with a bushfire naturally occurring and intersecting with the proposed works'. The second example relates to Item 20 of the Risk Assessment, which concerns the risk of 'Changes in surface water hydrology resulting in vegetation dieback from ponding and diversions away from natural surface systems with environmental and cultural value'. The plaintiff says that assessment does not include 'an assessment of what happens if the proposed works are flooded'.

[68] So far as the first example is concerned, the EMP describes the preventative measures to include a 'bushfire management plan implemented to prevent and respond to bushfires', 'bushfire awareness included in site inductions', 'firefighting equipment to be available to deal with fires', compliance with 'regional bushfire management plans', and a reference to the fact that the area in the vicinity of the leases has had recent bushfire activity with the consequence of reducing the fuel load. The EMP describes the recovery measures to include the implementation of fire hazard reduction strategies (such as back burning) to reduce the risk of fire ignition, and states that where a bushfire is started and cannot be controlled the operators will engage with pastoralists to coordinate response activities. Those references illustrate that any attempt to draw some material distinction between the assessment of risks occurring by reason of a naturally occurring bushfire and those occurring by reason of accidental ignition arising from exploration activities is highly artificial.

[69] So far as the second example is concerned, there is no evidence which would sustain a finding of any real risk of flooding of the proposed works. The speculative nature of that contention is borne out by the assessment in Item 20 that the lease pad is located away from watercourses and regional flow paths, lease pads are designed to divert stormwater without impeding natural surface water flows, and the closest major watercourse is located 15 kilometres away.

[70] Even leaving those matters aside, as Tamboran submits, the fact that the plaintiff may be able to conceive of additional emergency scenarios that could have been included in the EMP does not sustain a conclusion that the Minister's state of satisfaction was irrational, illogical or not based on findings or inferences of fact supported by logical grounds.

[71] For these reasons, the third preliminary question is answered in the negative.

Reference to the NT EPA

[72] The fourth ground of review asserts that reg 9(3) of the Regulations precluded the Minister from approving the EMP in circumstances where the EMP was required to be referred to the NT EPA under s 48(a) of the *Environment Protection Act* because the activities authorised under EP98 had the potential to have a significant impact on the environment and none of the exceptions in reg 9(3)(a) to (c) had application. Section 48 of the *Environment Protection Act* provides:

> **Referral of proposed action**
>
> Subject to section 49, a proponent must refer to the NT EPA for assessment (a ***standard assessment***) a proposed action that:
>
> (a) has the potential to have a significant impact on the environment; or
>
> (b) meets a referral trigger.

[73] Sections 10 and 11 of the *Environment Protection Act* define 'impact' and 'significant impact' in the following terms:

10 Meaning of impact

(1) An impact of an action is:

(a) an event or circumstance that is a direct consequence of the action; or

(b) an event or circumstance that is an indirect consequence of the action and the action is a substantial cause of that event or circumstance.

(2) An impact may be a cumulative impact and may occur over time.

11 Meaning of significant impact

A ***significant impact*** of an action is an impact of major consequence having regard to:

(a) the context and intensity of the impact; and

(b) the sensitivity, value and quality of the environment impacted on and the duration, magnitude and geographic extent of the impact.

[74] As already extracted above, reg 9(3) of the Regulations provides that if an activity is required to be referred to the NT EPA under Part 4, Div 3 of the *Environment Protection Act* (in which s 48 appears), the Minister must not make a decision to approve an environment management plan for the activity under reg 11 unless one of three exceptions has application. The exceptions in reg 9(3) are: (a) the NT EPA has determined that an environmental impact assessment is not required; (b) if an environmental impact assessment is required, an environmental approval has been granted under the *Environment Protection Act* for the activity and the Minister's decision is consistent with the approval; or (c) the *Environment Protection Act* otherwise permits the making of the decision.

[75] The first preliminary question arising in relation to this ground of review is whether the *Environment Protection Act* 'permitted' the decision to approve the EMP within the meaning of reg 9(3)(c) of the Regulations. The plaintiff asserts that it did not.

[76] In answering that question, reg 9(3) must be construed consistently with the relevant provisions of the *Environment Protection Act*. That is in large part because Part 4, Div 3 of the *Environment Protection Act* and reg 9(3) of the Regulations were introduced as part of the same suite of legislative amendments, and were clearly intended to operate as part of a unified scheme. The complementary language used in both pieces of legislation also bears that out. As was stated in *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 at 722:

> Upon the hypothesis … that there is a rational integration of the legislation of the one Parliament, it is proper for courts to endeavour to so construe interrelated statutes as to produce a sensible, efficient and just operation of them in preference to an inefficient, conflicting or unjust operation.[57]

[77] Part 4 of the *Environment Protection Act* deals with the environmental impact assessment process. Division 3 of Part 4 deals with referral and assessment. Section 48 of the *Environment Protection Act* casts an obligation on the proponent of a proposed action to refer it to the NT EPA if it has the potential to have a significant impact on the

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57 *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 at 722 per Kirby P.

environment. That provision is not directed to the Minister as the decision-maker under reg 9(3) of the Regulations.

[78] Section 50 is the only provision in Part 4, Division 3 of the *Environment Protection Act* which casts any obligation on the Minister as a statutory decision-maker. Under that provision, if the Minister considers that the application for authorisation – in this case, authorisation to undertake exploration activities – should be referred to the NT EPA, the Minister 'may' refuse to consider the application until the referral is made and determined, 'must' encourage the proponent to refer the action, and 'may' refer the action herself or himself. The effect of the discriminating use of obligatory and discretionary modal verbs is that the provision does not cast any obligation on the Minister either to refuse to consider the application until a referral is made, or to refer the proposed action herself or himself. The provision clearly contemplates that a statutory decision-maker may consider an application for authorisation of a proposed action, and grant authorisation, even if the proposed action has the potential to have a significant impact on the environment.

[79] That is so whatever the statutory obligation resting on the proponent may be. If the proponent does not refer a proposed action in circumstances where the NT EPA considers that it does have the potential to have a significant impact on the environment, the NT EPA 'may' issue a notice pursuant to s 53(1) of the *Environment Protection*

Act requiring the proponent to refer the action. In such a case the proponent is obliged to make the referral under s 48 of the *Environment Protection Act*, and a failure to do so attracts criminal sanction.

[80] Section 53(4) of the *Environment Protection Act* expressly contemplates that a call-in notice may be issued even if the statutory decision-maker has already granted a statutory authorisation for the proposed action. Moreover, just as there is no obligation on a statutory decision-maker to refuse to consider an application for authorisation or to refer a proposed action to the NT EPA, there is no obligation on the NT EPA to issue a call-in notice even if it believes on reasonable grounds that a proponent is taking or proposing to take an action that should be referred. Nothing in that provision, or in the scheme for referral generally, operates such that a statutory authorisation granted in those circumstances is void, invalid or otherwise unlawful.

[81] The *Environment Protection Act* deals specifically with the situation which obtains where a statutory authorisation has been granted prior to a referral. Section 58 of the *Environment Protection Act* provides that once a referral has been made to the NT EPA, a statutory decision-maker must not grant the statutory authorisation until such time as the NT EPA has determined whether an environmental impact assessment is required and, if so, until that assessment and approval process is complete. Section 59 of the *Environment Protection Act* provides

expressly that a statutory authorisation granted before the referral of the proposed action ceases to have effect only for the period during which the NT EPA is conducting any environmental impact assessment and approval process,[58] and for the period during which any stop work notice issued is in force.[59] At the conclusion of that period, the statutory authorisation springs back into effect.

[82] The operation of the scheme described above mirrors both the language and the operation of the exceptions provided by reg 9(3) of the Regulations. Within the terms of the chapeau to reg 9(3), the only 'requirement' for an activity to be referred to the NT EPA under Part 4, Div 3 of the *Environment Protection Act* rests on the proponent. Even if it is accepted that the proponent was subject to that requirement in the present case, the term 'permits' in reg 9(3)(c), when considered in the statutory context, means 'allows', or, to put it more passively, 'does not prevent'. Not only is that the plain and ordinary meaning of the word, that meaning conforms with the operation of a scheme in which the Minister is allowed to grant a valid authorisation even where the proponent is required to refer the proposed action to the NT EPA and has not, and in which a referral does not invalidate a statutory

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58 That provision has application despite anything to the contrary in the enactment authorising the statutory authorisation, which in this case is the Regulations: *Environment Protection Act*, s 59(3).

59 The NT EPA may issue a stop work notice to a proponent who is required to refer an action under Part 4, Division 3 of the *Environment Protection Act*. However, even where the NT EPA issues a stop work notice on the basis of a determination that the proposed action has the potential to have a significant impact on the environment, the legislative scheme recognises the continuing validity of any subsisting statutory authorisation issued by a relevant statutory decision-maker by providing that a stop work notice may be issued even in that event: *Environment Protection Act*, s 197.

authorisation granted before any referral is made. In the operation of that scheme, it is only where the referral has been made and remains undetermined that the Minister is precluded from granting the relevant statutory authorisation. Moreover, that operation is the only manner in which the *Environment Protection Act* might otherwise 'permit' the making of the decision, and reg 9(3)(c) should be interpreted in a manner which avoids superfluity.[60]

[83] For these reasons, and in the absence of a referral and a determination that an environmental impact assessment was required, the *Environment Protection Act* 'permitted' the decision to approve the EMP within the meaning of reg 9(3)(c) of the Regulations.

[84] The second preliminary question arising in relation to this ground of review is whether reg 9(3) of the Regulations gives rise to an 'objective jurisdictional fact' which requires this Court to consider whether it is satisfied, on the balance of probabilities, that the proposed action 'has the potential to have a significant impact on the environment' within the meaning of s 48 of the *Environment Protection Act*. The plaintiff asserts that the question whether the proposed action was required to be referred to the NT EPA is a 'jurisdictional fact', the existence of which can be objectively determined by the Court. The consequence of characterising that matter as a jurisdictional fact is that

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60 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71]*;* citing *Commonwealth v Baume* (1905) 2 CLR 405 at 414.

if this Court concludes that a referral was required and none was made, the Minister's decision to approve the EMP will be nullified or invalid.[61] The operative question is whether it was the legislature's intention that an approval granted in circumstances where the proposed action has the potential to have a significant impact on the environment, and in the absence of a referral to the NT EPA, is *ipso facto* invalid.[62]

[85] In *Project Blue Sky Inc v Australian Broadcasting Authority*,[63] the majority of the High Court determined that a statutory requirement that a decision-making agency perform its functions in a manner consistent with Australia's international treaty obligations was not intended to invalidate an act done in breach of the requirement. In coming to that conclusion, the majority was influenced by the fact that the requirement regulated the exercise of functions already conferred on the agency; that the requirement did not have a 'rule-like' quality which could be easily identified and applied; that the obligations arising under the requirement were 'expressed in indeterminate language'; and that there would be a degree of public inconvenience if a failure to comply with the requirement resulted in the invalidity of

61 See, for example, *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391; *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446 at [60].

62 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93]; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [28], [37]-[39].

63 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

subsequent acts and decisions.[64] It might be said that many of those same features attend the operation of the 'requirement' in reg 9(3) of the Regulations.

[86] The plaintiff seeks to distinguish the result in *Project Blue Sky* by reference to the subsequent decision of the High Court in *Forrest & Forrest Pty Ltd v Wilson*.[65] In that subsequent case, the High Court held that the statutory requirements imposed 'essential preliminaries' to the exercise of the power relevantly conferred by the statute. That was said (at [63]) to be made clear 'by both the express terms and the structure of the provisions as sequential steps in an integrated process' leading to the grant of the statutory authorisation question (in that case, a mining lease). Even accepting the rigour which governs compliance with the requirements of a statutory regime which confers power on the executive government to grant exclusive rights to exploit resources,[66] reg 9(3) of the Regulations does not prescribe that mode of exercise of statutory power and nor is it concerned with a disposition of property in the form of something like the grant of a mineral lease.[67] Those provisions of the *Environment Protection Act* concerning the referral of proposed actions contain no express terms obliging the Minister to

64 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [94]-[98].

65 *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510.

66 *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510 at [64]-[65].

67 The grant by the Crown of a mining lease is in effect a sale by the Crown of minerals to be taken by the lessee at a price payable over a period of years as royalties: *Western Australia v Ward* (2002) 213 CLR 1 at [285], citing *Newcrest Mining (WA) Limited v The Commonwealth* (1997) 190 CLR 513 at 616.

desist from approving an environment management plan in the absence of a required referral, and there is no clear and structured sequence in that respect.[68] There is, to that extent, an intention to depart from what might be described as the ordinary form and incidents of a statutory regime conferring conditional power to grant exclusive rights to exploit resources.

[87] For the reasons already given in answer to the first preliminary question arising in relation to this ground, on proper construction reg 9(3) of the Regulations does not create an essential precondition which had to be satisfied before the Minister could approve the EMP. That is because even if it is assumed that the proposed action has the potential to have a significant impact on the environment, such that the proponent of the proposed action was required to refer the matter to the NT EPA but failed to do so, the Minister was not precluded from proceeding to grant the statutory authorisation, and nor was that authorisation invalid by reason of that failure. The continuing operation of that authorisation, and any cessation in its effect, falls to be determined in accordance with the legislative scheme governing referrals. Regulation 9(3) does not give rise to a jurisdictional fact because the statutory scheme contemplates that a decision will be valid

68 The same observations may be made in relation to the expression of that principle in *Oakey Coal v New Acland Coal* (2021) 272 CLR 33 at [56]-[57], and the result in that case. It also involved the grant of mining leases, and turned on an objection which automatically triggered a referral to the Land Court and a statutory scheme under which the Minister could not make a decision to grant or reject an application for a mining lease without a valid recommendation of the Land Court.

regardless whether or not there exists an exception to the requirement for referral. In other words, even if it is accepted that a referral was required, it was not an essential precondition to the exercise of the Minister's power to approve the EMP.

[88] Even leaving aside that requirement of essentiality, reg 9(3) of the Regulations does not give rise to a jurisdictional fact the objective presence or absence of which is amenable to determination by a court on judicial review.[69] The legislative scheme described above contemplates that the statutory decision-maker, the proponent of the proposed action and the NT EPA may each have different views on the potential for impact on the environment and the question of whether a referral is required. The NT EPA's view is determinative of the issue within the confines of the statutory scheme, both in the sense that it may compel a proponent to refer a proposed action and, once a proposed action has been referred, that it must determine whether it has the potential to have a significant impact on the environment.

[89] That determination has a number of features and incidents. *First*, there may, and often will be, a conflict of evidence and opinion concerning the issue. The resolution of any conflict is a matter which lies within

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69 See, for example, *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 262 FCR 527 at [100]; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [166], citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93].

the province of the NT EPA's special expertise.[70] The members of the NT EPA are appointed on the basis that they have skills, knowledge and experience in, *inter alia*, environmental science, environmental and natural resource management and environmental law.[71] *Second*, the determination of the matter is complex and evaluative.[72] The terms in which 'significant impact' is defined necessarily render the determination evaluative and subjective, because the conclusion will depend 'on a range of potentially difficult and complicated facts, assessments and value judgements'.[73] *Third*, one consequence of a construction which allowed a court on judicial review to make what is effectively a decision on the merits concerning those matters is that the approval of an environmental management plan would always be susceptible to challenge by prerogative writ, with a consequential impact upon the efficiency and certainty of the statutory scheme.[74] *Fourth*, the statutory scheme leaves the determination to the subjective opinion of the NT EPA. Under the terms of the legislation, even if a proponent refers a proposed action to the NT EPA on an assessment

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70 See, for example, *Ex parte Blackwell; Re Hateley* (1965) 83 WN (Pt 1) (NSW) 109 at 116–117; *Attorney-General (Qld) v Riordan* (1997) 192 CLR 1 at 14–15; cf *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [90].

71 *Northern Territory Environment Protection Authority Act 2012* (NT), s 10.

72 See, for example, *Ex parte Blackwell; Re Hateley* (1965) 83 WN (Pt 1) (NSW) 109 at 116–117; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [56]; *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd* [2019] NSWCA 216 at [31], [41]-[42], [137] and [182].

73 See *Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456 at 466 per Black CJ (in dissent); subsequently upheld in *Australian Heritage Commission v Mount Isa Mines* (1997) 187 CLR 297 at 303-304.

74 See, for example, *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [63]-[65]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [97]-[98].

that it is required to do so, the NT EPA may yet determine that an environmental impact assessment is not required on the basis that the action does not have the potential to have a significant impact on the environment.[75] If the determination was genuinely one of objective jurisdictional fact, a referral would be determinative of whether an environmental impact assessment is required. These features and incidents foreclose any contention or construction to the effect that the satisfaction of an obligation to refer is a jurisdictional fact which if unsatisfied deprives the Minister of any jurisdiction to approve an environment management plan.

[90] Those conclusions in relation to preliminary question 4 make it unnecessary to answer preliminary question 5. However, the foregoing conclusions and answers also close off the plaintiff's application for particular discovery of those categories of documents articulated in paragraph [1] of the plaintiff's submissions in relation to Application for Particular Discovery dated 18 August 2023.

Answers

[91] The preliminary questions are answered as follows.

Question 1:

Is Ground 1 articulated in the plaintiff's originating motion dated 30 January 2023 made out?

Answer:

No.

75 *Environment Protection Act*, s 55.

Question 2:

Is Ground 2 articulated in the plaintiff's originating motion dated 30 January 2023 made out?

Answer:

No.

Question 3:

Is Ground 3 articulated in the plaintiff's originating motion dated 30 January 2023 made out?

Answer:

No.

Question 4:

As to Ground 4 articulated in the plaintiff's originating motion dated 30 January 2023:

(1) Did the *Environment Protection Act* 'permit' the making of the impugned decision, within the meaning of reg 9(3)(c) of the *Petroleum (Environment) Regulations*?

(2) Does reg 9(3) of the *Petroleum (Environment) Regulations* give rise to an 'objective jurisdictional fact' which requires the Court to consider whether it is satisfied, on the balance of probabilities, that the proposed action 'has the potential to have a significant impact on the environment'?

Answer:

(1) Yes.

(2) No.

Question 5:

If the answer to questions 1, 2, 3 and 4(1) is 'no', and the answer to question 4(2) is 'yes':

(1) Can an event or circumstance associated with a future production phase of the exploitation of the natural resource the subject of the relevant EMP be relevantly an 'impact' of the proposed exploration phase activities?

(2) Should the second defendant give particular discovery in accordance with the categories articulated in [1] of the plaintiff's submissions in relation to Application for Particular Discovery dated 18 August 2023?

Answer:

(1) Unnecessary to answer.

(2) Unnecessary to answer, but no.

[92] Any party has liberty to make application in relation to costs within 28 days if need be.

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