IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION

WAD 005 of 2013

BETWEEN:

FRIENDS OF THE NORTH WEST INC Applicant

and

MINISTER FOR THE ENVIRONMENT, HERITAGE AND WATER Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS
(Junior Counsel)

Statement of facts

1. Petro Energy Pty Ltd proposes to build and operate a floating LNG plant to process gas in the Selinka Gas Field, approximately 150 km off the coast of WA (**Proposal**).

2. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (***EPBC Act***)

3. On 30 July 2013, the Minister approved the proposal (**Decision**). The Minister's reasons for the Decision (**Reasons**) stated that:

    3.1. in deciding to approve the taking of the action, the Minister had given strong consideration to a recent Commonwealth government policy announcement that it would 'streamline' environmental approval of offshore gas projects and 'cut environmental green tape' in order to ensure that the Australia offshore gas industry remained competitive and attractive to international investment;

    3.2. he had not delayed the decision in response to FNW's letter, as he considered that adequate time had been given for public comment in compliance with the provisions of the EPBC Act.

Submission 1: The Minister did not make the Decision according to a rule or policy without regard to the merits of the particular case.

1. The Minister's Reasons disclose only that the Minister "gave strong consideration" to the policy. The Minister had regard to the merits of the

2. A lawful policy is normally a relevant consideration which a decision-maker is bound to take into account.

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

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

4. In Drake, the Court said:

   > The propriety of paying regard to general policy considerations is most evident in a case such as the present where there are no specified statutory criteria for the exercise of the discretionary power and where the power is entrusted to a Minister of the Crown responsible to Parliament.

Submission 2: The Minister's refusal to delay the Decision was reasonable in the circumstances.

1. Section 5(2)(g) of the *ADJR Act* provides that the improper exercise of a power includes "an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power." This provision incorporates the common law notion of '*Wednesbury* unreasonableness.'

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

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

2. The High Court considered *Wednesbury* unreasonableness in *Li*, affirming decisions at first instance and on appeal to the Full Court which upheld this ground of review.

3. This Court recently considered an application for judicial review of a Ministerial decision under the *EPBC Act* in *Tarkine National Coalition.* Although the application was successful, the Court rejected the ground of review alleging *Wednesbury* unreasonableness, noting Gageler J's observation.

   > The above response is a persuasive one, at least in the latter two points. It is difficult to see how the decision could be characterised as irrational or so unreasonable that no decision-maker would make it. As Gageler J said in Li at [113] "judicial determination of Wednesbury unreasonableness in Australia has in practice been rare. Nothing in these reasons should be taken as encouragement to greater frequency. This is a rare case".

4. In *Li*, the applicant sought judicial review of the Migration Review Tribunal's refusal to delay its decision on a visa application until the applicant could put certain evidence before the Tribunal. The decision was held to be "unreasonable in the *Wednesbury Corporation* sense" at first instance, on appeal to the Full Court of the Federal Court, and on appeal to the High Court. Gageler J said:

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

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

5. In contrast to the refusal in *Li*, the Minister's refusal to defer the Decision was not 'fatal' to the applicant's interests.

Minister for Immigration and Citizenship v Li [2013] HCA 18, [31] (French CJ).