

## ASX ANNOUNCEMENT

14 February 2023

**INVESTEE ADVENT –  
UPDATE ON PEP-11 FEDERAL COURT PROCEEDINGS:  
ASSET ENERGY PTY LTD V THE COMMONWEALTH MINISTER FOR RESOURCES, AS  
THE RESPONSIBLE COMMONWEALTH MINISTER OF THE COMMONWEALTH-NEW  
SOUTH WALES OFFSHORE PETROLEUM JOINT AUTHORITY & ANOR**

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### HIGHLIGHTS

- **Federal Court of Australia quashes former Prime Minister Scott Morrison’s decision to refuse PEP 11 extension & secondary work program**
  - **The PEP 11 application is remitted to the Joint Authority to be determined in accordance with law**
  - **The Australian Government ordered to pay Asset’s costs as agreed or assessed**
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MEC Resources Limited (“**MEC**” or the “**Company**”) (ASX:MMR) highlights the following information provided by its investee company, Advent Energy Limited (“**Advent**”).

Advent is pleased to announce on behalf of the PEP 11 Joint Venture comprising Advent holding an 85% interest and Bounty Oil & Gas NL holding a 15% interest (“**PEP 11 JV**”) the resolution of the Federal Court Proceedings (WAD106/2022) between Asset Energy Pty Ltd (a wholly owned subsidiary of MEC’s investee, Advent Energy Limited) and the Respondents (being the Commonwealth Minister for Resources et al).

The proceedings involved the decision made on 26 March 2022 by the Commonwealth - New South Wales Offshore Petroleum Joint Authority (Joint Authority) to refuse Asset Energy’s Application (as JV operator) for a variation and suspension of the conditions to which PEP 11 is subject and a related refusal to grant an extension of term (the Decision).

The presiding judge; Justice Jackson has agreed with the consent position reached by the parties quashed the Decision and concluded that the Decision of the Joint Authority was affected by apprehended bias. This was because a fair-minded observer would have reasonably apprehended that the former Prime Minister of Australia the Hon Scott Morrison MP, as a member of the Joint Authority, did not bring a fair mind to determine Asset Energy’s application.

Attached are the following issued by the Federal Court of Australia today:

- the Orders made 14 February 2023.; and
- the Reasons for Judgment of Justice Jackson.

In the meantime, PEP 11 continues in force and the Joint Venture is fully in compliance with the contractual terms of PEP 11 with respect to such matters as reporting, payment of rents and the various provisions of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

**Advent Energy Limited**

The Company presently has a direct shareholding of 38.27% in Advent.

David Breeze (Managing Director) authorised the release of this announcement to the market.

For further information please contact:

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# FEDERAL COURT OF AUSTRALIA

## Asset Energy Pty Ltd v The Commonwealth Minister for Resources

[2023] FCA 86

File number: WAD 106 of 2022

Judgment of: **JACKSON J**

Date of judgment: 14 February 2023

Catchwords: **ADMINISTRATIVE LAW** - decision of the Commonwealth-New South Wales Offshore Petroleum Joint Authority - determination of an application for a variation and suspension of a permit - application for review under *Administrative Decisions (Judicial Review) Act 1977* (Cth) - rules of natural justice - apprehended bias - public indication by Commonwealth Minister of intent to refuse application - decision of the Joint Authority quashed - application remitted to the Joint Authority for determination according to law

Legislation: *Constitution* ss 64, 65  
*Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5, 16  
*Judiciary Act 1903* (Cth) s 39B  
*Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) ss 6, 7, 8, 56, 59, 60, 264, 265

Cases cited: *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469  
*Babington v Commonwealth of Australia* [2016] FCAFC 45; (2016) 240 FCR 495  
*Burns v Australian National University* (1982) 40 ALR 707  
*Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337  
*Fleet v District Court of New South Wales* [1999] NSWCA 363  
*Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438  
*Irwin v Military Rehabilitation & Compensation Commission* [2009] FCAFC 33; (2009) 174 FCR 574  
*Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488  
*Kovalev v Minister for Immigration and Multicultural Affairs* [1999] FCA 557; (1999) 100 FCR 323

*Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70

*Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48; (2011) 244 CLR 427

*Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507

*Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 207 CLR 391

*Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509

*VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 921

*Webb v The Queen* (1994) 181 CLR 41

Division:	General Division
Registry:	Western Australia
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	33
Date of last submissions:	2 February 2023
Date of hearing:	Determined on the papers
Counsel for the Applicant:	Mr SJ Free SC with Ms M Parker
Solicitor for the Applicant:	Ensign Legal
Counsel for the First Respondent:	Mr NM Wood SC with Ms FI Gordon SC and Ms AI Wharldall
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	The second respondent filed a submitting notice save as to costs

# ORDERS

WAD 106 of 2022

**BETWEEN:** ASSET ENERGY PTY LTD (ACN 120 013 390)  
Applicant

**AND:** THE COMMONWEALTH MINISTER FOR RESOURCES, AS  
THE RESPONSIBLE COMMONWEALTH MINISTER OF  
THE COMMONWEALTH-NEW SOUTH WALES  
OFFSHORE PETROLEUM JOINT AUTHORITY  
First Respondent

MINISTER FOR REGIONAL NEW SOUTH WALES, AS  
RESPONSIBLE STATE MINISTER OF THE  
COMMONWEALTH-NEW SOUTH WALES OFFSHORE  
PETROLEUM JOINT AUTHORITY  
Second Respondent

**ORDER MADE BY:** JACKSON J

**DATE OF ORDER:** 14 FEBRUARY 2023

## THE COURT ORDERS THAT:

1. The decision of the Commonwealth-New South Wales Offshore Petroleum Joint Authority (constituted by the first and second respondents) (**Joint Authority**) dated 26 March 2022, to refuse the applicant's application for a variation and suspension of the conditions to which Petroleum Exploration Permit for Petroleum No. NSW/PEP-11 is subject (**Application**), is quashed.
2. The Application is remitted to the Joint Authority to be determined in accordance with law.
3. The first respondent must pay the applicant's costs, as agreed or assessed.
4. The proceeding is otherwise dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

### JACKSON J:

- 1 The applicant, **Asset Energy** Pty Ltd, owns an 85% interest in Petroleum Exploration **Permit** NSW/PEP-11 and is the operator of a joint venture in relation to the Permit.
- 2 On 23 January 2020 Asset Energy applied for a variation and suspension of conditions attaching to the Permit and an extension of the term of the Permit (**Application**). On 30 March 2022 the National Offshore Petroleum Titles Administrator (**NOPTA**) gave notice that the Commonwealth-New South Wales Offshore Petroleum **Joint Authority** had decided to refuse the Application (**Decision**). The person who made the Decision as the Commonwealth member of the Joint Authority was the then Prime Minister, the Hon Scott Morrison MP, acting on the basis that he was also a Minister for Industry, Science, Energy and Resources.
- 3 Asset Energy seeks an order of this Court quashing the Decision. Relevantly, it alleges that the Decision was affected by bias in the form of predetermination. The first respondent, the Commonwealth Minister for Resources is acting as contradictor in the proceeding; the second respondent, the Minister for Regional New South Wales (**State Minister**) filed a submitting appearance. The matter was programmed for a hearing in March of this year. But the two active parties have filed a minute of consent orders to quash the Decision. The minute was supported by a memorandum signed jointly by counsel on behalf of each of those parties, explaining the basis of their consent to the quashing of the Decision (**Joint Memorandum**).
- 4 Although the parties have presented the Court with a consent position, the Court must still determine whether it is within its power and appropriate to make the orders sought. It is important that the Court is satisfied of the basis on which the orders are to be made. The Court will be performing the public function of quashing a decision which, in this case, was made by members of the executive of both the Commonwealth and New South Wales in a case of public interest. It is therefore appropriate to give reasons for the decision: see *Kovalev v Minister for Immigration and Multicultural Affairs* [1999] FCA 557; (1999) 100 FCR 323 at [11]-[13] (French J); *Fleet v District Court of New South Wales* [1999] NSWCA 363 at [59]; *Irwin v Military Rehabilitation & Compensation Commission* [2009] FCAFC 33; (2009) 174 FCR 574 at [1], [13]-[16]; *VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 921 at [2]-[6].

5 For the following reasons, the orders sought will be made. It is appropriate to say at the outset that this is based on *apprehended* bias on the part of Mr Morrison, not actual bias. The law's concern about apprehended bias arises out of the general principle that judicial and administrative processes should not just be impartial, they must be seen to be impartial: see *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 518-519 (Barwick CJ, McTiernan J agreeing). In this case, Mr Morrison is not a party to the proceeding and there has been no occasion for him to put forward his perspective on the relevant events. That has not been necessary, because the test for apprehended bias is an objective one which is about what a hypothetical observer might think. These reasons contain no adverse finding about Mr Morrison's subjective state of mind when he made the Decision: see *Webb v The Queen* (1994) 181 CLR 41 at 71-72 (Deane J); *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at [7].

### **Statutory and administrative framework**

6 The Decision was made under s 264(2) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). The Joint Authority is the entity with the power to make decisions under that provision. The area covered by the Permit is off the shore of New South Wales, so in relation to the Permit the Joint Authority is constituted by the responsible State Minister for New South Wales, and the responsible Commonwealth Minister: s 56(2) read with the definition of 'offshore area' in s 7 and s 8 and see also the map in s 6. Section 59 and s 60 of the Act effectively give the Commonwealth Minister's view on any decision precedence over that of the State Minister. That is, if the two Ministers disagree, it is the Commonwealth Minister's decision that will have effect as the Joint Authority's decision: s 59(2).

7 In the case of the Commonwealth, the responsible Minister is defined as 'the Minister who is responsible for the administration of this Act' (or another Minister acting for and on behalf of that Minister): see s 7 of the Act. At all times from 1 February 2020 (just after the Application was made) until 26 March 2022 (when it was refused) Administrative Arrangements Orders made by the Governor-General specified the Minister administering the **Department** of Industry, Science, Energy and Resources as the Minister responsible for the administration of the Act.

8 At all material times the Hon Keith Pitt MP was a Minister responsible for the administration of the Act. But on 15 April 2021 the Governor-General signed and sealed an instrument of Appointment of Minister of State which said that Mr Morrison was appointed to administer the

Department. The appointment was stated to be pursuant to s 64 and s 65 of the *Constitution*. If valid and effective, it would have empowered Mr Morrison to administer the Act and to make a decision on Asset Energy's application as part of the Joint Authority. The Joint Memorandum says that this appointment was not disclosed to the Parliament or otherwise publicly. It refers to certain findings about the appointment that appear in the *Report of the Inquiry into the Appointment of the Former Prime Minister to Administer Multiple Departments* by the Hon Virginia Bell AC, although the parties have not put that report before the Court.

9 It is not appropriate to enter into these matters for the purposes of this proceeding. They may have been relevant to a ground of challenge of the Decision which is not pursued in the Joint Memorandum, namely that the Decision was void and of no effect because Mr Morrison was not validly appointed as the responsible Commonwealth Minister. But the parties now submit that it is unnecessary to resolve that issue. I agree that it is unnecessary. Moreover, the Court should not address the validity of Mr Morrison's appointment, as it raises questions of the construction and application of the *Constitution* which need not be answered in order to do justice between the parties: see *Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 207 CLR 391 at [248]-[252] (Gummow and Hayne JJ); *Babington v Commonwealth of Australia* [2016] FCAFC 45; (2016) 240 FCR 495 at [47] applying *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 590 (Higgins J). I will proceed on the assumption that the appointment of Mr Morrison as a Minister administering the Department was valid. Also, while the Joint Memorandum refers to the purported appointment in connection with the allegations of apprehended bias, as will be seen Mr Morrison's public comments provide sufficient basis for the orders sought without having to rely on the appointment.

10 Returning to the statutory framework, s 264(1) of the Act allowed Asset Energy to make an application of the kind that it made. Section 264(2) gave the Joint Authority the power, by written notice given to the holders of the Permit, to vary or suspend any of the conditions to which the Permit was subject, or to exempt the holders of the Permit from compliance with the conditions, on such further conditions as were specified in the notice. Section 264(3A) effectively required the Joint Authority to give written notice to the permit holders as soon as practicable if it refused the application. Section 265 gave the Joint Authority the power to extend the term of the licence if it decided to suspend any of the conditions to which the Permit was subject.



## Relevant events

11 The parties have agreed that the following events are relevant. There is evidence of these matters before the Court in the form of an affidavit of David Breeze, Asset Energy's Managing Director, dated 1 June 2022 and two affidavits of Nicholas Tiverios, a solicitor acting for Asset Energy, dated 25 October 2022 and 17 November 2022. Subject to what follows, I am satisfied that the evidence provides a sufficient basis to accept the description of the events given in the Joint Memorandum.

12 The Application sought a variation of the work program conditions attached to the Permit, so as to suspend a requirement to drill an exploration well for two years, and to replace a requirement to conduct a seismic program with a requirement to perform post well studies. It sought a corresponding extension of the term of the Permit for two years.

13 The Joint Memorandum sets out a number of public statements that Mr Morrison made about the Application over the course of 2021. These include (footnotes omitted):

14.1. On 4 March 2021, during a press conference in Tomago, New South Wales, Mr Morrison had the following exchange with a journalist:

Journalist: ... [regarding PEP-11] are you saying that you don't support the extension of that licence?

Mr Morrison: I am. Pretty clearly.

Journalist: That will make some of our tourist operators very happy.

Mr Morrison: It's going to make me very happy. I think that's the right decision.

14.2. On 21 April 2021, during a press conference at Berkeley Vale, New South Wales, Mr Morrison said, in response to a question about when a decision on the 'PEP- 11 licence' would be made and how he 'fe[lt] about it':

I think I made it pretty clear what my Government's view was about that. I mean that will go through processes, but I've made it absolutely crystal clear that's not something I support, and you can expect my view on that to be rock solid.

14.3. On 7 May 2021, during a doorstep interview in Williamstown, New South Wales, Mr Morrison had the following exchange with a journalist:

Journalist: ... Last time you were here you indicated that you didn't support the extension of gas exploration licence PEP-11.

Mr Morrison: Correct.

Journalist: Have you seen or heard anything since that time to change your mind on that?

Mr Morrison: No, not at all, that is firmly and absolutely [inaudible].

14.4. On 8 November 2021, during a radio interview with 2HD, Mr Morrison had the following exchange with an interviewer:

Interviewer: A number of government MPs and including yourself, have spoken out against the renewal of the PEP11 exploration licence off the coast of, well, your electorate and end up here in the Hunter as well. Keith Pitt's the sole person responsible for making a call on that, but he seems reluctant to do it. Can we expect an announcement re PEP11?

Mr Morrison: Well, I think people know my view about this. It's very clear. I can assure you that that's the position I will continue to progress. And I think that should give people a lot of comfort that the Prime Minister is not supportive of that.

14 All but the first of these exchanges occurred after the Governor-General had executed the document titled 'Appointment of Minister of State' on 15 April 2021.

15 On 14 December 2021, Mr Morrison annotated and signed a memorandum of recommendations from the Department about the Permit. Three options were put before him, and he indicated his preferred option was to 'refuse the title' and to sign an attached letter to the NSW Joint Authority Minister notifying his 'intent to refuse'. Mr Morrison signed that letter, which recommended that Asset Energy be granted 30 days to respond to a notice of intent to refuse.

16 NOPTA gave that notice to Asset Energy in a letter dated 16 December 2021. It said that the Joint Authority had considered the Application, including additional material provided on 18 February 2020, 12 March 2020 and 6 August 2020, and intended to refuse the Application. The letter described three matters which, it said, the Joint Authority had taken into account in forming that intention. It closed by requesting that if Asset Energy wished to make a submission in respect of those matters or another matter relevant to the Application, it do so within 30 days from receipt of the letter. It said that if a submission was provided within that time, the Joint Authority would take it into account in deciding whether to accept or refuse the Application.

17 However, on the same day, 16 December 2021, Mr Morrison held a press conference at Terrigal, New South Wales at which he announced that, 'after careful consideration, the Government has taken, through my own decision, the first step to formally reject an application for the Petroleum Export [sic] Permit, known as PEP-11'. He stressed that the 'refusal of the application' was based on certain reasons which he then described. He said 'I have taken that decision directly as Prime Minister' and referred to it as a 'very sensible, a very balanced and well-considered decision' and a 'sensible, practical, balanced decision, taking into account all

the factors that are necessary' and that it was 'important that I methodically worked through the proper process to make the ultimate decision'.

18 Also on 16 December 2021, Mr Morrison issued a media release which commenced with the statement:

The Petroleum Exploration Permit PEP-11 will not go ahead under steps taken by the Morrison Government to reject the project.

The following statements were attributed to Mr Morrison:

Prime Minister Scott Morrison said the Government was taking steps to protect local communities and the environment by putting a stop to PEP-11.

'This project will not proceed on our watch', the Prime Minister said.

'Gas is an important part of Australia's current and future energy mix but this is not the right project for these communities and pristine beaches and waters.

'From Newcastle through to Wollongong my Government has listened to the concerns of local Liberal Members and candidates and their communities and we're putting our foot down.'

19 The media release also referred to the Government's 'refusal of the application' as being based on three reasons and said that NOPTA would grant Asset Energy 30 days to respond to the notice of intention to refuse the Application.

20 On 22 January 2022 Asset Energy wrote to NOPTA responding to NOPTA's letter of 16 December 2021 and the Government media release of the same day and making submissions as to why the Application should be granted.

21 On 15 February 2022 Mr Morrison annotated and signed a further memorandum of recommendations from the Department which, again, put three options before him. The one he chose as his preferred option was to 'Propose to refuse the application' and to sign an attached letter to the New South Wales Joint Authority Minister notifying him of the decision Mr Morrison thought should be made on the Application. The New South Wales Minister wrote to Mr Morrison saying he supported his 'proposal to refuse the application'.

22 On 26 March 2022 Mr Morrison annotated and signed a third memorandum of options in which he agreed to sign a letter to NOPTA confirming the decision to refuse the Application and also signing a statement of reasons to be sent to the State Minister seeking his agreement to it. The signed letter to NOPTA was also dated 26 March 2022 and conveyed 'the agreed decision of

the Joint Authority to refuse the application'. It gave several reasons for the decision and asked NOPTA to convey the decision to Asset Energy.

23 NOPTA gave written notice of the Decision to Asset Energy on 30 March 2022.

### **The Commonwealth Minister for Resources' concession**

24 Asset Energy's application to the Court is made under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) and s 39B of the *Judiciary Act 1903* (Cth). However the Joint Memorandum is based on the ADJR Act alone. It relies on the ground that appears in s 5(1)(a) of that Act, namely that a breach of the rules of natural justice occurred in connection with the making of the Decision. The ADJR Act applies to the Decision because it is a decision of an administrative character made under a Commonwealth Act: ADJR Act s 3 definitions of 'decision to which this Act applies' and 'enactment'; and see *Burns v Australian National University* (1982) 40 ALR 707 at 714 (Ellicott J).

25 The Joint Memorandum says that the Commonwealth Minister now accepts that the Decision was 'infected by apprehended bias'. The well-established test of apprehended bias is whether a fair-minded person, properly informed as to the nature of the process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to the decision: see *Ebner* at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing); *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438 at [68] (McHugh J). The test is the same for administrative decision makers as it is for judicial officers. Its content may be different, however, as what may be expected of a judicial or quasi-judicial officer may be different to a person making a purely administrative decision: *Ebner* at [4]; *Hot Holdings* at [70]. The rule against apprehended bias is a rule of procedural fairness or natural justice: *Ebner* at [4]; *Hot Holdings* at [68] and see e.g. *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70. If the rules of natural justice have been breached the Court may, in its discretion, make an order quashing or setting aside the Decision: ADJR Act s 5(1)(a) and s 16(1)(a).

26 In light of these principles, the Joint Memorandum records that the Minister's concession is based on the following matters (footnote omitted):

- 26.1 a fair-minded lay observer might reasonably apprehend that Mr Morrison might not have brought an open mind to determining the Application; and
- 26.2 in light of s 59 of the Act, a fair-minded lay observer might therefore reasonably apprehend that the Joint Authority constituted by Mr Morrison as the responsible Commonwealth Minister, together with the responsible State Minister, might not have brought an open mind to determining the Application.

27 The Minister's concession is said to be based on the factual background set out above, in particular (footnote omitted):

- 27.1. Mr Morrison procured his appointment to administer DISER [i.e. the Department] for the purpose of enabling him to make a decision directly about the Application.
- 27.2. Mr Morrison had indicated his opposition to the Application, in terms that suggested that his mind was not open to persuasion, both:
  - (a) before and after he procured his appointment to DISER to make a decision on the Application; and
  - (b) before and after he was briefed by DISER on the Application.
- 27.3. Mr Morrison had on 16 December 2021 - after having been briefed by DISER on the Application, but before Asset had had an opportunity to provide written submissions to NOPTA in response to the Joint Authority's notice of intention to refuse the Application - made statements including by authorising a media release that attributed certain statements to him, in conclusive language to the effect that the Application had been or would be refused.
- 27.4. While Asset was on notice of Mr Morrison's statements on 16 December 2021 before the Joint Authority's Decision was conveyed on 30 March 2022, it was not on notice of all the essential facts relevant to its decision whether to waive its right to complain as to Mr Morrison acting as the responsible Commonwealth Minister in the decision to be made by the Joint Authority on the Application. In particular, Asset was not on notice that Mr Morrison had procured his appointment to administer DISER for the purpose of enabling him to make a decision directly about the Application.

**There is a proper basis to conclude that the Decision was affected by apprehended bias**

28 I make no finding about the first of the matters set out immediately above, and do not rely on it as a basis for making the orders proposed. It is not clear to me how Mr Morrison's subjective purpose in procuring the appointment, whatever that purpose was, is relevant to the essentially objective test of apprehended bias: see *Ebner* at [7]; *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [12]; *Michael Wilson & Partners Limited v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 at [33]. It follows that for present purposes I place no significance on the timing mentioned in para 27.2(a) of the Joint Memorandum. And in relation to the last paragraph just quoted, it is enough to say that Asset Energy's lack of notice of Mr Morrison's appointment to administer the Department disposes of any suggestion of waiver of its right to complain.

29 Nevertheless, in light of the consent position of the parties I am satisfied that the other matters referred to provide a proper basis to conclude that the Decision was affected by apprehended bias. The timing referred to in para 27.2(b) of the Joint Memorandum is significant. The first time Mr Morrison formally indicated his position on the Application was when he annotated

and signed the memorandum of recommendations on 14 December 2021. It can be inferred from attachments that accompanied that memorandum that it was not given to him until 10 December 2021 at the earliest. So there is no reason to think that his public comments before that time were the product of having reached a decision after deliberating on the Application and relevant supporting material. Those comments conveyed implacable opposition to the Application. In *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; (2001) 205 CLR 507 at [71]-[72], Gleeson CJ and Gummow J said (of actual bias):

... Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion. ...

... The state of mind described as bias in the form of prejudice is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion. ...

30 In this case, Mr Morrison's public comments might lead a fair-minded observer to reasonably apprehend that when he did come to deliberate on the matter, sometime between 10 and 14 December 2021, his mind might have been closed to persuasion.

31 The same may be said about any deliberation that took place after Asset Energy was given 30 days to make a submission after being notified of the Joint Authority's intention to refuse the Application. Although the letter giving notice said that the Joint Authority would take the submission into account in deciding whether to accept or refuse the Application, on the same day Mr Morrison held a press conference and issued a media release in which he spoke in terms that the Application had been refused, and said that the project would not proceed.

32 Under the Act, the Commonwealth Minister's decision would take precedence over that of the State Minister if they disagreed, so the reasonable apprehension of bias affected the Decision of the Joint Authority as a whole.

33 It follows that I accept the parties' joint submission that a breach of the rules of natural justice occurred in connection with the making of the Decision. On the face of the materials there is no discretionary reason not to exercise the power in s 16(1)(a) of the ADJR Act to quash the Decision. Once the Decision is quashed, the Application must go back to the Joint Authority to determine in accordance with law. The parties have agreed that the Commonwealth Minister will pay Asset Energy's costs. The orders sought will be made.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson.

Associate:

A handwritten signature in black ink, consisting of a series of fluid, connected strokes that form a cursive name.

Dated: 14 February 2023