FEDERAL COURT OF AUSTRALIA

The Environment Centre NT Inc v Minister for Resources and Water (No 2) [2021] FCA 1635

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| File number: |  |
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| Judgment of: | **GRIFFITHS J** |
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| Date of judgment: | 23 December 2021 |
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| Catchwords: | **ADMINISTRATIVE LAW** – judicial review challenge to legislative instrument and decisions arising from the Beetaloo Strategic Basin Plan – decision to prescribe the Beetaloo Cooperative Drilling **Program** by statutory instrument for the purposes of s 33(1) of the *Industry, Research and Development Act 1986* (Cth) (***IRD Act***) (the **Instrument**) – where Program provides for up to $50 million in funding for gas exploration activities in Beetaloo sub-basin – decision by Minister to approve approximately $21 million in funding under the Program to third respondent (**Approval Decision**) – whether the phrase “after making reasonable inquiries” in s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (***PGPA Act***) is an objective jurisdictional pre-condition before making the Instrument or Approval Decision – whether Minister required to make reasonable inquiries into climate change and related risks arising from gas exploration and production – where Minister did not make inquiries into climate change or related risks – whether Minister contravened the *Commonwealth Grants Rules and Guidelines 2017* in making Instrument or Approval Decision**ADMINISTRATIVE LAW** – whether Instrument or Approval Decision legally unreasonable – where Minister did not make inquiries into climate change and related risks – consideration of higher threshold of legal unreasonableness for delegated legislation – Instrument not legally unreasonable in appropriate legal sense – whether Approval Decision exercise of statutory or non-statutory power – Approval Decision amenable to judicial review for legal unreasonableness whether statutory or non-statutory power exercised – held: no legal unreasonableness**ADMINISTRATIVE LAW** – two alleged factual errors in Department’s Brief to Minister before Approval Decision – held: no jurisdictional error**ADMINISTRATIVE LAW** – challenge to Commonwealth’s decision to enter into three contracts with third respondent on 9 September 2021 **(Contracts Decision**) on grounds of legal unreasonableness, irrationality or illogicality – consideration of outcome-focussed unreasonableness where no reasons for decision available – where no evident and intelligible justification for timing of Contracts Decision in context of the current proceedings and correspondence between the parties – where Commonwealth did not adduce any evidence at final hearing as to the timing of the Contracts Decision – whether Court can take into account affidavit filed at interlocutory stage but not read – consideration of common law model litigant obligations – where the Commonwealth accepted that entering into the contracts with no prior notice to the applicant in the context of the proceedings and correspondence was in breach of common law model obligations – where Commonwealth accepted that its conduct denied the applicant an opportunity to seek interlocutory injunctive relief – breach of common law model litigant obligations relevant to legal unreasonableness –whether Court should refuse relief in exercise of its discretion – held: timing of Contracts Decision legally unreasonable – declaratory relief granted and Contracts Decision set aside |
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| Legislation: | *Constitution* s 61*Administrative Decisions (Judicial Review) Act 1977* (Cth)*Financial Framework Legislation Amendment Act 2008* (Cth)*Financial Management and Accountability Act 1997* (Cth) s 44*Industry Research and Development Amendment (Innovation and Science Australia) Act 2016* (Cth)*Industry, Research and Development Act 1986* (Cth) ss 33, 34*Judiciary Act 1903* (Cth) ss 39B, 55ZG*Public Governance, Performance and Accountability Act 2013* (Cth) ss 8, 15, 50, 71, 105C*Financial Management and Accountability Amendment Regulations 2010 (No 3)* (Cth)*Financial Management and Accountability Regulations 1997* (Cth) reg 9*Commonwealth Grants Rules and Guidelines 2017* cll 2.3, 2.4, 3.3, 3.11, 4.6, 4.10*Environment Protection Act 2019* (NT)*Petroleum Act 1984* (NT) s 20*Petroleum (Environment) Regulations 2016* (NT) |
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| Cases cited: | *Athavle v State of New South Wales* [2021] FCA 1075*Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; 249 CLR 1*Auckland Harbour Board v R* [1924] AC 318*Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65; 202 FCR 200*Australian Broadcasting Corporation v Redmore Pty Ltd* [1989] HCA 15; 166 CLR 454*Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456*Australian Heritage Commission v Mount Isa Mines Ltd* [1997] HCA 10; 187 CLR 297*Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; 247 CLR 345*Barristers’ Board (WA) v Tranter Corporation Pty Ltd* [1976] WAR 65*Bechara v Bates* [2021] FCAFC 34; 338 ALR 414*Caporale v Deputy Commissioner of Taxation* [2013] FCA 427; 212 FCR 220*Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010]78 NSWCA 190; 78 NSWLR 393*Chattaway v Minister for Health and Ageing* [2020] SASCFC 63; 136 SASR 347*City of Brunswick v Stewart* [1941] HCA 7; 65 CLR 88*Clements v Bull* [1953] HCA 61; 88 CLR 572*Commonwealth v Fernando* [2012] FCAFC 18; 200 FCR 1*Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213*Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd (No 2)* [2010] FCA 1224; 190 FCR 11*Director of Public Prosecutions (ACT) v Martin* [2014] ACTSC 104; 9 ACTLR 1*Elston v Commonwealth* [2014] FCA 704*EWV20 as litigation representative for AFF20 v Minister for Home Affairs (No 3)* [2021] FCA 866*Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; 236 CLR 120*Ilic v City of Adelaide* [2010] SASC 139; 107 SASR 139*Jabbour v Secretary, Department of Home Affairs* [2019] FCA 452; 269 FCR 438*Kingston v Australian Capital Territory* [2011] ACTSC 165*Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437*Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1*Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541*Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332*Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611*National Home Doctor Service Pty Ltd v Director of Professional Services Review* [2020] FCA 386; 276 FCR 388*P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366*Plaintiff M96A v Commonwealth* [2017] HCA 16; 261 CLR 582*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355*Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; 204 CLR 82*Scott v Handley* [1999] FCA 404; 58 ALD 373*Sealed Air Australia Pty Ltd v Aus-lid Enterprises Pty Ltd* [2020] FCA 29; 375 ALR 324*Secretary, Department of Social Services v Cassaniti (No 2)* [2015] NSWSC 1795*SHJB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 303; 134 FCR 43*Stewart v Minister for Immigration, Citizenship, Migrant Service and Multicultural Affairs* [2020] FCAFC 196; 281 FCR 578*The Environment Centre NT Inc v Minister for Resources and Water* [2021] FCA 1121*Tran v Minister for Home Affairs* [2019] FCA 1126*Wilkie v Commonwealth* [2017] HCA 40; 263 CLR 487*Wodrow v Commonwealth* [2003] FCA 403; 129 FCR 182*Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; 61 NSWLR 707*Yoong v Director, Professional Services Review* [2021] FCA 1445Gabrielle Appleby, “The Government as Litigant” (2014) 37(1) *UNSW Law Journal* 94Michelle Taylor-Sands and Camille Cameron, “‘Playing fair’: government as litigants” (2007) 26 *Civil Justice Quarterly* 497 |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Counsel for the Applicant: | Mr P Herzfeld SC with Mr O Jones |
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| Solicitor for the Applicant: | Environmental Defender’s Office |
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| Counsel for the First and Second Respondents: | Mr T Howe QC with Mr C Tran and Ms M Caristo |
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| Solicitor for the First and Second Respondents: | Australian Government Solicitor |
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| Counsel for the Third Respondent: | Mr R Lancaster SC |
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| Solicitor for the Third Respondent: | Baker McKenzie |

ORDERS

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|  | NSD 758 of 2021 |
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| BETWEEN: | THE ENVIRONMENT CENTRE NT INCApplicant |
| AND: | MINISTER FOR RESOURCES AND WATERFirst RespondentTHE COMMONWEALTH OF AUSTRALIASecond RespondentIMPERIAL OIL & GAS PTY LTD (ACN 002 699 578)Third Respondent |

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| order made by: | GRIFFITHS J |
| DATE OF ORDER: | 23 december 2021 |

THE COURT ORDERS THAT:

1. The Court declares that the Commonwealth’s decision dated 9 September 2021 to enter into three contracts with the third respondent is invalid.
2. The said three contracts dated 9 September 2021 are declared void.
3. The Commonwealth’s decision referred to in order 1 is set aside.
4. The further amended originating application filed on 24 September 2021 otherwise be dismissed.
5. In the light of these reasons for judgment and orders the parties should seek to agree orders for costs. If they are unable to do so:
	1. within 28 days hereof, each party is to file and serve a written outline of submissions, not exceeding three pages in length, in support of their respective positions on costs;
	2. within a further 7 days thereof, each party is to file and serve a written outline of submissions in response, not exceeding two pages in length; and
	3. the Court will then determine the issue of costs on the papers and without a further oral hearing.

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

REASONS FOR JUDGMENT

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GRIFFITHS J:

## Introduction

1. This judicial review challenge relates to a legislative instrument and several decisions arising from the Government’s strategic plan titled “Unlocking Beetaloo: The Beetaloo Strategic Basin Plan” (**Strategic Plan**), published by the first respondent (the **Minister**) in January 2021. That Strategic Plan has the objective of producing additional gas from the Beetaloo sub-basin in the Northern Territory and aims to accelerate development in that area.
2. In brief, the various matters arising from the Strategic Plan which are the focus of the judicial review challenge are as follows:
3. the Minister’s decision to prescribe the Beetaloo Cooperative Drilling **Program** by a statutory instrument made on 11 May 2021 for the purposes of s 33(1) of the *Industry, Research and Development Act 1986* (Cth) (***IRD Act***) (the **Instrument**);
4. the Minister’s decision dated 17 June 2021 to approve approximately $21 million in funding under that Program to be paid to the third respondent (**Imperial**) (the **Approval Decision**); and
5. the Commonwealth’s decision made pursuant to s 34 of the *IRD Act* to enter into contracts with Imperial on 9 September 2021 (the **Contracts Decision**) which gave contractual effect to the Approval Decision.
6. The applicant raises the following four grounds of judicial review (noting that ground 3 was not pressed).

### (a) Ground 1

1. The applicant claims that in making both the Instrument and the Approval Decision, the Minister failed to comply with s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (***PGPA Act***). Section 71 of the *PGPA Act* prohibits a Minister from approving a proposed expenditure of relevant money unless the Minister “is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money”. In brief, the applicant contends that “reasonable inquiries” is an objective jurisdictional pre-condition, and that the Minister failed to make “reasonable inquiries” in relation to various matters associated with climate change. In addition, because the obligation in s 71(1) of the *PGPA Act* to make reasonable inquiries is affirmed by the *Commonwealth Grants Rules and Guidelines 2017* (**2017 Guidelines**), it follows that a breach of the statutory provision also constitutes a breach of the Guidelines. The applicant also contends that, independently of s 71 of the *PGPA Act*, the Minister contravened the 2017 Guidelines in making the Instrument and/or the Approval Decision.

### (b) Ground 2

1. The applicant claims that, in making the Instrument and/or the Approval Decision, the Minister acted in a way that was legally unreasonable, illogical and/or irrational in that the Minister did not have regard, or adequate regard, to climate change and related risks.

### (c) Ground 4

1. The applicant claims that, in making the Approval Decision:
2. the Minister acted upon the advice of an assessment committee which included a statement that Imperial’s three drilling projects will likely generate over $70 million in additional investment, which was incorrect; and
3. although the Minister was advised that both the assessment committee and the **Department** of Industry, Science, Energy and Resources were satisfied that the spending proposal represented value for money, a proper use of Commonwealth resources, and is an efficient, effect, economical and ethical use of resources which was consistent with Commonwealth policies, the assessment committee had never conducted any such assessment.

### (d) Ground 5

1. The applicant claims that the timing of the making of the Contracts Decision was legally unreasonable, illogical and/or irrational.
2. Before addressing each of those four grounds in turn, it is desirable to summarise some relevant background facts and set out some relevant statutory and other provisions.

## Summary of background facts

1. The applicant is the peak community-sector environment organisation in the Northern Territory. It has a particular interest in the topic of climate change and the effect of gas exploration and extraction activities in the Northern Territory generally (and in the Beetaloo sub-basin) on biodiversity and climate change.
2. There was no dispute that the applicant had standing to bring the present proceedings.
3. As mentioned above, in January 2021 the Government published the Strategic Plan, which has given rise to the Program. An express aim of the Strategic Plan is to grow the onshore gas industry in the Northern Territory by “unlocking” and “enabling” the exploration of the Beetaloo sub-basin and extracting and using gas from that area.
4. The Program was prescribed by the Instrument which was made by the Minister on 11 May 2021 under s 33(1) of the *IRD Act*.
5. On 17 June 2021, the Minister made the Approval Decision, which involved granting approximately $21 million to Imperial in respect of three new exploration wells located in Imperial’s “EP187 exploration zone”. Imperial held an exploration permit under s 20 of the ***Petroleum Act*** *1984* (NT) which authorised it to conduct exploration in that zone. Exploration Permit 187 (**EP187**) covers approximately 3-4% of the Beetaloo sub-basin. The original term of EP187 was extended to 19 March 2022 (and then subsequently to September 2022), following a moratorium on hydraulic fracturing of onshore unconventional shale reservoirs in the Northern Territory pending a report by an independent scientific panel on that topic (the **Pepper Inquiry**). The moratorium was lifted in April 2018 after the Pepper Inquiry released its final report, which found that if 135 recommendations to mitigate the risks of hydraulic fracturing were implemented, the risks could be minimised “to an acceptable level”, and in some instances “avoided all together”.
6. The applicant commenced its judicial review challenge on 28 July 2021, at which time it challenged the lawfulness of the Instrument and the Approval Decision. It will be necessary to describe in some detail the subsequent course of that litigation and, in particular, the events leading up to the Commonwealth’s decision to execute three contracts with Imperial on 9 September 2021 (the **Imperial Contracts**). As noted above, the lawfulness of the Contracts Decision is challenged under ground 5, on grounds of legal unreasonableness, irrationality and/or illogicality. The burden of that challenge turns on the timing of the Contracts Decision and the context in which it was made, with particular reference to an exchange of correspondence between the applicant’s solicitors and the Commonwealth. That correspondence concerns the timing of the Contracts Decision and the Commonwealth’s failure to provide a substantive response to the applicant’s request that the Commonwealth undertake not to enter into any contracts with Imperial pending finalisation of the judicial review challenge.

### (a) The Program

1. The Program provides a monetary incentive for exploration and appraisal activities to be undertaken in the Beetaloo sub-basin. This is done by way of a 25% refund on eligible project expenditure up to $7.5 million per exploration well, with a maximum of three wells per applicant.
2. Grant applications under the Program are assessed, with reference to the Beetaloo Cooperative Drilling **Grant Opportunity Guidelines**, by an assessment committee. The chair of that committee is the general manager of the Department’s Resources Strategy Branch, Resources Division.
3. By a media release dated 17 December 2020, the Minister announced the Government’s plan to accelerate gas exploration and development in the Beetaloo sub-basin “to create thousands of jobs, provide significant economic benefits to the region and ensure Australia remains a world leader in the production of natural gas”. The Minister referred, perhaps a little ironically, to the area having been described as the “hottest play on the planet”. He referred to the Northern Territory’s Geological Survey which estimated that the Beetaloo sub-basin could hold more than 200,000 petajoules of gas. The Minister referred to the Strategic Plan as “a key early step in the Gas-fired Recovery agenda, and is the first of five plans to be delivered under the $28.3 million Strategic Basins Plan program announced in the October Budget”.
4. In another media release dated 18 March 2021, the Minister announced that $50 million would be provided in grants through the Program, which was expected to deliver approximately 10 additional exploration wells in the Beetaloo sub-basin by 2022, and bring forward at least $150 million of private investment. The Minister described the Program as supporting gas operators to speed up exploration and development of the area.
5. On 18 March 2021, the Grant Opportunity Guidelines were published in relation to the Program. The Grant Opportunity Guidelines described matters such as the eligibility and assessment criteria and how to apply for a grant.
6. On 7 April 2021, Imperial submitted three grant applications under the Program for a total of approximately $21 million in funding with respect to three new exploration wells in the EP187 zone. As noted above, the Minister approved these applications on 17 June 2021, subject to a final assessment as to the amount for which Imperial was eligible under the Program. When the Minister made the Approval Decision he had before him a brief prepared by his Department (**Department’s Brief**), which relevantly provided as follows:
7. This brief seeks your decision to approve three applications under the Beetaloo Cooperative Drilling Program (BCDP) (see Attachment A). Under the guidelines (see Attachment B), you are the final decision maker for which grants to approve, taking into account the advice of an expert assessment committee and the availability of grant funds. Up to $50 million is available in funding for BCDP grants from 1 July 2021 to 30 June 2023 to accelerate exploration and appraisal activities for prospective gas resources in the Beetaloo sub-basin.
8. In making these decisions you are subject to the requirements of the Public Governance Performance and Accountability Act 2013 (PGPA Act) and the Commonwealth Grants Rules and Guidelines (CGRGs) (see Attachment C).
9. The assessment committee met on 27 May 2021 and 1 June 2021 and assessed the three eligible applications against the BCDP assessment criteria (which includes environmental approvals and other NT Government regulatory requirements), value for money and the program objectives and outcomes.
10. Imperial Oil & Gas Pty Ltd were the applicant of the three eligible applications and sought total funding of $21,806.453 for three wells (Carpentaria 2, 3 and 4). The assessment committee assessed all three applications as being satisfactory and in accordance with the program guidelines. Imperial Oil and Gas Pty Ltd’s three drilling projects will likely generate over $70 million of additional investment.
11. Detail regarding the committee’s assessment of the applications is at Attachment A. Of note, the assessment committee recommended that certain activities and expenditure were not eligible and the grant offers should be reduced by removing ineligible activities during the contract negotiation process. The committee agrees that these are not obstacles to the overall eligibility of the projects. The Department will inform you of the final value of grants committed and value of funds remaining in the program available for further projects.
12. To date, six applications have been received for the BCDP with three of these found to be ineligible due to applications being incorrectly lodged by a parent company of the permit holder rather than the permit holder themselves.
13. You approved the legislative instrument to expend Commonwealth monies for the BCDP and it was registered with the Federal Register of Legislation on 14 May 2021. This allows you to make spending decisions for the program (**MS21-000595** refers).

…

1. The Department’s Brief included four attachments, namely:
2. a document titled “Beetaloo Cooperative Drilling Program – Committee Recommendations and Minister Decision”, which summarised the assessment committee’s recommendations to approve Imperial’s three applications;
3. the Grant Opportunity Guidelines, which, as noted above, outlined the eligibility and selection criteria for grants under the Program;
4. a document titled “Program Governance – CRGGs, Appropriation and Spending proposal and Background”, which set out some requirements of the *IRD Act*, *PGPA Act* and the 2017 Guidelines as applicable to the Approval Decision; and
5. legal advice (which was not adduced into evidence).
6. Finally, as noted above, on 9 September 2021 the Minister’s delegate made the Contracts Decision, thereby entering into the Imperial Contracts.
7. Climate change and related risks are at the heart of grounds 1 and 2 of the applicant’s challenge. In brief, the applicant contends that the Minister failed to comply with what the applicant claims are statutory and related duties that required the Minister to make inquiries about and/or take into account the results of inquiries about climate change and related risks before making either the Instrument or the Approval Decision. The Commonwealth does not contend that inquiries as to these risks were in fact made by the Minister before making either the Instrument or the Approval Decision. Rather, the Commonwealth’s position is that there was no legal obligation for those inquiries to be made.

### (b) Imperial’s evidence summarised

1. Imperial relied upon three substantive affidavits by its managing director, Mr Alexander Underwood, affirmed on 10, 26 and 28 October 2021 respectively. Mr Underwood described exploration and appraisal activities carried out by Imperial in the EP187 zone, including conducting seismic surveys, drilling wells to evaluate hydrocarbon potential and carrying out fracture stimulation in order to inform future technical appraisal decisions. Mr Underwood said that the next steps in appraising the EP187 zone involved:
2. drilling a horizontal well section;
3. undertaking fracture stimulation of that section; and
4. subsequent flow testing, namely by flowing gas to the surface through the well bore to assess the commercial production potential within EP187.
5. Mr Underwood also described nine chronological milestones under the first of the Imperial Contracts (which relates to the Carpentaria-2H well) (**First Imperial Contract**) dating from 1 November 2021 to 30 June 2022. He described how, post 9 September 2021, Imperial had placed orders with third parties relating to the construction, acquisition of equipment for drilling and other works in anticipation of some of those milestones. Mr Underwood said, and I accept, that if the first four milestones are not achieved within their relevant period, this would have “very significant consequences” for Imperial, including:
6. putting Imperial in breach of the First Imperial Contract and putting at risk various payments under that contract; and
7. having to delay drilling until after the wet season (late December to March).
8. Mr Underwood deposed, and I also accept, that in the light of the Imperial Contracts and the tight milestones described above, on 16 September 2021 Imperial’s parent company (Empire Energy Group Ltd) approved capital investments to proceed with drilling the proposed well covered by the first Imperial Contract, and seismic acquisition and associated civil construction works, as well as authorising entry into other related contracts.
9. Mr Underwood candidly acknowledged that these decisions were made by Imperial’s parent company in full awareness of the current judicial review challenge. Accordingly, the parent Board appreciated that there was some risk that Imperial would not receive the Government grants. Mr Underwood stated, however, that the parent Board considered the risks to be acceptable on the basis that it considered *inter alia* that the Commonwealth had acted in accordance with its obligations and no injunction had been sought restraining any party from entering into the Imperial Contracts. Mr Underwood said that Imperial was pursuing a strategy focussed on bringing EP187 into commercial production promptly, which requires drilling multiple wells. Finally, Mr Underwood said that he was unable to say whether the parent Board would have acted as it did in progressing the works if it did not have the benefit of the Imperial Contracts. He said that this “would have been a finely balanced judgment for the [parent] Board”. Mr Underwood was not required for cross-examination and I accept his evidence.

### (c) Applicant’s evidence regarding climate change

1. The applicant relied on the following three expert reports which described the risks presented by climate change and related matters, including in relation to the extraction and use of gas from the Beetaloo sub-basin:
2. a report by Dr Hugh Saddler, who is a consultant in the general fields of energy policy, economics and technology assessment. Dr Saddler’s report provided estimates of the potential total greenhouse gas emissions arising from the exploration and exploitation of gas fields in the Beetaloo sub-basin;
3. a report by Professor Nerilie Abram. Professor Abram is a professor of Climate Science at the Australia National University and a current member of the International Climate Crisis Advisory Group chaired by Sir David King from the University of Cambridge. In her report, Professor Abram described the threats posed by climate change to the environment and the economy, as well as the relationship between estimated GHG emissions from the extraction and consumption of gas from the Beetaloo sub-basin with Australian and international global targets for limiting global temperature rise; and
4. a report by Ms Nicki Hutley, economist (the **Hutley Report**). In her report, Ms Hutley described the current and likely future economic costs of anthropogenic climate change and the economic costs and benefits of the anticipated development of the Beetaloo sub-basin as described in the Program.
5. None of the experts was required for cross-examination.
6. It is necessary to summarise the key matters which emerge from this expert evidence. Significantly, however, it should be noted at the outset that the expert evidence was substantially directed to climate change and related risks posed by the Program as a whole and was not specifically directed to the climate change implications of the exploration and appraisal activities which are the subject of the Imperial Contracts.
7. First, the overwhelming effect of the expert evidence is that climate change presents a serious threat to Australia and the world, including threats to the environment, human health and the economy.
8. Secondly, the largest single contributor to human-caused increases in atmospheric greenhouse emissions is the burning of fossil fuels. In the period from 2011 to 2019, this accounted for 86% of CO2 emissions, with gas constituting almost a quarter of those emissions. In May 2021, the International Energy Agency produced a report which said that in order to reach net zero global emissions by 2050, there should be no new oil or gas fields approved for development.
9. Thirdly, the expert evidence indicates that, as global warming worsens, the risks of passing irreversible tipping points grows and every fraction of a degree of additional climate warming increases the harm.
10. Fourthly, there is little doubt that the extraction and use of gas from the Beetaloo sub-basin will contribute in a material way to climate change, noting that if the sub-basin holds over 200,000 petajoules of gas, the burning of even 10% of which would double Australia’s current annual emissions. The Hutley Report indicates that on the current trajectory, losses from climate change in Australia will reach approximately $580 billion by 2030 and result in thousands of job losses. Ms Hutley estimated the economic, social and environmental costs of emissions from the Beetaloo sub-basin alone as approximately $11 billion.
11. Fifthly, in the light of this expert evidence, the applicant submitted that the extraction and use of gas from the Beetaloo sub-basin will detrimentally affect the ability of both Australia and the world to meet commitments under the 2016 Paris Agreement.
12. Sixthly, the Hutley Report identified the risk that pursuing the development of a major new gas field will have further economic effects as a result of the movement of the global economy away from emissions intensive assets and associated trade risks. With those risks in mind, the Hutley Report also outlined concerns over the economic viability of gas production in the Beetaloo sub-basin.

## Some relevant statutory and other provisions

1. Section 71 of the *PGPA Act* provides:

**71 Approval of proposed expenditure by a Minister**

(1) A Minister must not approve a proposed expenditure of relevant money unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money.

(2) If a Minister approves a proposed expenditure of relevant money, the Minister must:

(a) record the terms of the approval in writing as soon as practicable after giving the approval; and

(b) comply with any other requirements prescribed by the rules in relation to approvals of proposed expenditure.

(3) For a Parliamentary Department, the references in subsection (1) or (2) to a Minister are references to:

(a) a Presiding Officer, for expenditure for which he or she alone is responsible; and

(b) the Presiding Officers jointly, for expenditure for which they are jointly responsible.

1. Section 8 of the *PGPA Act* defines “proper” as meaning “efficient, effective, economical and ethical” and “relevant money” is defined as including money that is held by the Commonwealth.
2. The other primary relevant statute for the purposes of the proceedings is the *IRD Act*. In 2016, Pt IV was inserted into that Act by the *Industry Research and Development Amendment (Innovation and Science Australia) Act 2016* (Cth). Section 33(1), which is contained in Pt IV, provides:

The Minister may, by legislative instrument, prescribe one or more programs in relation to industry, innovation, science or research, including in relation to the expenditure of Commonwealth money under such programs.

1. Section 34(1) of the *IRD Act* provides for the Commonwealth to make, vary or administer an arrangement (which includes entering into a contract) under a program prescribed by a legislative instrument made under s 33(1).
2. Under s 105C of the *PGPA Act*, the Finance Minister may, by written instrument, make provision about grants by the Commonwealth. Relying on that power, the Finance Minister made the 2017 Guidelines. A Minister’s mandatory obligation to comply with s 71 of the *PGPA Act* is expressly affirmed in cll 3.3, 3.11, 4.6 and 4.10 of the 2017 Guidelines.
3. It is well to set out the terms of cll 2.3 and 2.4 (which define what is a “grant”), as well as cll 4.6 and 4.10 of the 2017 Guidelines (footnotes omitted).

2.3. For the purposes of the CGRGs, a ‘grant’ is an arrangement for the provision of financial assistance by the Commonwealth or on behalf of the Commonwealth:

a. under which relevant money or other CRF money is to be paid to a grantee other than the Commonwealth; and

b. which is intended to help address one or more of the Australian Government’s policy outcomes while assisting the grantee achieve its objectives.

2.4. The CGRGs apply to all forms and types of grants. Grants may take a variety of forms, including payments made:

a. as a result of competitive or non-competitive selection processes;

b. where particular criteria are satisfied; or

c. on a one-off or ad hoc basis.

Types of grants may include, but are not limited to: research grants; grants that provide for the delivery of services; grants that help fund infrastructure; or grants that help build capacity.

…

4.6. Officials *must* provide written advice to Ministers, where Ministers exercise the role of an approver. This advice must, at a minimum:

a. explicitly state that the spending proposal being considered for approval is a ‘grant’;

b. provide information on the applicable requirements of the PGPA Act and Rule and the CGRGs (particularly any ministerial reporting obligations), including the legal authority for the grant;

c. outline the application and selection process followed, including the selection criteria, that were used to select potential grantees; and

d. include the merits of the proposed grant or grants relative to the grant opportunity guidelines and the key principle of achieving value with relevant money.

…

4.10. In addition to the requirements under the PGPA Act, where the proposed expenditure relates to a grant or group of grants, the Minister:

a. *must* not approve the grant without first receiving written advice from officials on the merits of the proposed grant or group of grants. That advice must meet the requirements of the CGRGs (see paragraph 4.6); and

b. *must* record, in writing, the basis for the approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money.

1. It is also relevant to note footnote 35 to cl 4.6, which provides that “[f]or demand-driven grant opportunities, this advice should include: how the allocation method was developed; how implementation issues were considered; and an outline of risk mitigation strategies”.

## Consideration and determination

1. To avoid adding unduly to the length of these reasons for judgment, rather than summarise the parties’ primary submissions, I will address those submissions in considering and determining the four remaining judicial review grounds.

## Ground 1 – Failure to comply with s 71 of the *PGPA Act* and/or the Guidelines when making the Instrument and the Approval Decision

1. The following issues arise:
2. Whether the phrase “after making reasonable inquiries” in s 71(1) of the *PGPA Act* involves a jurisdictional pre-condition which must be satisfied objectively before the Minister can approve the proposed expenditure of relevant money?
3. Whether s 71(1) of the *PGPA Act* applied at all to the making of the Instrument?
4. If s 71(1) applied to either the Instrument or the Approval Decision, to what extent did it, or the 2017 Guidelines, oblige the Minister to make reasonable inquiries in relation to various matters associated with climate change?
5. If the 2017 Guidelines applied to either the Instrument or the Approval Decision, did they comply with cll 4.6 and 4.10 of the Guidelines (independently of s 71 of the *PGPA Act*)?
6. If there was non-compliance with s 71(1) and/or the 2017 Guidelines, was the effect of the non-compliance to invalidate the Instrument or the Approval Decision?
7. I shall now address each of these issues in turn.

### (a) Is the making of reasonable inquiries under s 71(1) of the PGPA Act an objective jurisdictional pre-condition?

1. The applicant contended that s 71(1) has two steps. The first is that the Minister makes reasonable inquiries. The second is that the Minister is satisfied, after doing so, that the expenditure would be a proper use of relevant money. The applicant contended that the first step under s 71(1) relating to the making of reasonable inquiries is framed as an objective requirement and not as a requirement which turns merely on the Minister’s subjective judgment or opinion.
2. The applicant contended that, because the first step in s 71(1) is objective (and not subjective), it is a matter for the Court to determine whether reasonable inquiries had in fact been made in all the circumstances, rather than the scope of judicial review being confined to the review of the Minister’s subjective opinion on the matter. In short, the applicant contended that the requirement that there be “reasonable inquiries” was an objective pre-condition to an exercise of power to which s 71 applied (citing *inter alia* *Plaintiff M96A v Commonwealth* [2017] HCA 16; 261 CLR 582 at [39] per Gageler J).
3. The applicant relied upon the following five primary matters in support of that contention. First, it pointed to [347] of the Revised Explanatory Memorandum to the Public Governance, Performance and Accountability Bill 2013 (Cth) (**PGPA EM**)which states:

A Minister must make reasonable inquiries to determine whether a proposed expenditure is a proper use of relevant money.

1. Secondly, it submitted that [349] of the PGPA EM reinforced the special significance of s 71:

Most provisions in the Bill do not apply to Ministers, which is appropriate given their constitutional role and the ability for Parliament to hold them to account for their decisions. However, this provision is considered appropriate because rules for expenditure approval are fundamental to ensure good government, the public interest, transparency and accountability.

1. Thirdly, the applicant relied upon the text and structure of s 71(1) and the fact that the making of reasonable inquiries was an anterior matter for the Minister’s consideration before turning to the second step as to whether or not the Minister is satisfied that the proposed expenditure is proper (citing *Woolworths Ltd v* ***Pallas Newco*** *Pty Ltd* [2004] NSWCA 422; 61 NSWLR 707).
2. Fourthly, the applicant challenged the Commonwealth’s argument that it was unlikely that the first step was intended to be objective because of the difficulties a Court would experience in assessing and judging objectively whether reasonable inquiries had been made. The applicant emphasised that no practical difficulty is presented in this particular case because the Minister had made no inquiries at all into climate change or related risks.
3. Fifthly, the applicant challenged the weight to be given to the Commonwealth’s submission that the characterisation of the provision should take into account the prospect of applicants challenging approved expenditures and the practical ramifications and inconvenience potentially posed by such challenges.
4. For the following reasons, while acknowledging that the applicant’s position is reasonably arguable, I reject it.
5. First, as the applicant acknowledged in oral address, it may be inappropriate to use the language of “jurisdictional fact” in determining this issue, having regard to what was said in cases such as ***Gedeon*** *v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; 236 CLR 120 at [43]and ***Chase Oyster Bar*** *Pty Ltd v Hamo Industries Pty Ltd* [2010]78 NSWCA 190; 78 NSWLR 393 at [34]-[36] per Spigelman CJ. This is because s 71(1) imposes a prohibition rather than a positive requirement. *Gedeon* and *Chase Oyster Bar* both highlight the distinction between a provision which conditions the conferral of a power on the existence of a fact and a provision which prohibits the exercise of a power in particular circumstances. As Kourakis J (as his Honour then was) stated in *Ilic v City of Adelaide* [2010] SASC 139; 107 SASR 139 at [58], in the former instance it is a more open question whether the satisfaction of the decision-maker as to the existence of the fact is sufficient to enliven it whereas, in the latter case, “the very nature of a legislative prohibition suggests that it is the objective existence of the circumstances which will deny the power”. That is not to say, however, that where there is a statutory prohibition on the exercise of a power, it necessarily constitutes an objective pre-condition. Other matters relevant to the task of statutory construction may point in a different direction. As Spigelman CJ said in *Pallas Newco* at [61] after referring to various authorities on what constitutes a jurisdictional fact (emphasis added):

… in each case it was the **overall statutory context that proved determinative** as to whether or not Parliament intended the existence of the fact to both objectively exist and be essential, notwithstanding the element of fact and degree, or even of judgement, that was required in the process of determining whether or not the relevant fact existed.

1. I will approach the question on the basis of whether or not the first step in s 71(1) imposes an objective jurisdictional pre-condition to an exercise of power to which that provision applies. In addressing that question, it may be relevant to take into account principles which have developed concerning the question whether or not a matter constitutes a jurisdictional fact, while not losing sight of the relevant observations regarding nomenclature in cases such as *Gedeon* and *Pallas Newco*.
2. Whether something is an “objective” pre-condition is a question of statutory construction. In *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65; 202 FCR 200 (***AIPA v FWA***) (relying upon Black CJ’s dissenting judgment in *Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456 at 466-467, which was unanimously approved by the High Court in *Australian Heritage Commission v Mount Isa Mines Ltd* [1997] HCA 10; 187 CLR 297 at 303-304), Perram J explained at [147] (in the context of determining whether or not a matter is a jurisdictional fact) that where compliance with a stipulated condition:

… is a difficult and complicated [task] involving the careful assessment of complex facts and the formation of opinions and value judgments on a potentially wide range of matters, this will suggest that Parliament intended that the decision-maker would have power to make its own determination of that matter …

Justice Perram also stated that the “the inconvenience which may attend the conclusion that a matter is a jurisdictional fact is itself an indicator that this is unlikely to have been what Parliament had intended”.

1. I do not accept the applicant’s submission that the observations of Perram J in *AIPA v FWA* are inapplicable to the present case because they were made in the specific context of a decision made by a federal industrial tribunal. Justice Perram’s observations have been applied with approval in different statutory contexts: see, for example, *Director of Public Prosecutions (ACT) v Martin* [2014] ACTSC 104; 9 ACTLR 1 at [258] per Murrell CJ, Katzmann and Wigney JJ and *Chattaway v Minister for Health and Ageing* [2020] SASCFC 63; 136 SASR 347 at [18] per Kourakis CJ, Peek and Stanley JJ.
2. The following features of s 71 should be emphasised. First, the applicant correctly emphasised the primary importance of the text. It submitted that it was significant that the reference in s 71(1) to the Minister’s satisfaction relates to the second step (i.e. whether the expenditure would be a proper use of relevant money), as opposed to “after making reasonable inquiries”, which provides for an ancillary step. As Spigelman CJ stated in *Chase Oyster Bar* at [40]:

The first textual indicator that is always of significance is the mode of expression of the element directly in issue. Substantial, indeed often, but not always, determinative, weight must be given to language which is in mandatory form. See, for example:

*David Grant v Westpac* supra esp at 276-277, where the formulation was “may only”.

*City of Enfield* supra at [6], [28] and [32]-[33], where the formulation was “must not be granted”.

*SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; (2005) 228 CLR 294 at [68], [136], [173] and [206], where the language “must give” was described as “imperative”.

1. Secondly, and perhaps most significantly, the context in which the issue of the making of reasonable inquiries in relation to the proper use of relevant money falls to be determined by a Minister will vary greatly, may be finely balanced, and may be infused with complex policy considerations. The requirement that “reasonable inquiries” be made is necessarily intertwined with the Minister’s determination of whether the proposed expenditure is a “proper use” of the relevant money. It is also not without significance that the provision is directed towards a Minister, who is politically accountable for the exercise of that power in familiar ways. That is an important indicator that the question whether or not reasonable inquiries have been made is one for the Minister to determine subjectively, *albeit* subject to general judicial review principles but not on the basis that the matter is to be determined objectively.
2. Thirdly, and relatedly, it is important to recognise that s 71(1) is an ambulatory provision in the sense that its application is not confined to the particular statute in which the provision arises. Rather, both the particular statutory provision and the *PGPA Act* itself have the potential to apply across the whole range of Commonwealth ministerial expenditure decisions. That is to be contrasted with statutory provisions of the kind considered in cases such as *Gedeon*, *Pallas Newco* and *Chase Oyster Bar* (and the cases referred to at [40] of that latter decision). Those cases all involve the construction of a statutory prohibition which operated within the context of the particular enabling statute (*albeit* with respect to a potentially wide range of factual circumstances). That is a significant point of distinction. Section 71(1) of the *PGPA Act* is to be construed in a way which accommodates the fact that the prohibition and requirements of that statutory provision have the potential to apply in an extremely wide range of circumstances with reference to different kinds of projects which may attract expenditure of public money as determined by the appropriate Minister. The different subjects of such expenditures will necessarily affect the nature and scope of the “reasonable inquiries” which are to be made before the Minister determines that a particular expenditure constitutes a proper use of public money. In my view, this strongly supports the Commonwealth’s construction that s 71(1) is not an objective jurisdictional pre-condition but rather is one which turns on the Minister’s opinion or judgement (which is, in turn, subject to judicial review but not on the basis of the matter being objective). In other words, the opinion or judgement will need to be reasonably and rationally formed and be based on probative material (see, for example, *SHJB v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 303; 134 FCR 43 at [22] per Carr, Finn and Sundberg JJ).
3. Fourthly, it is relevant to note that “proper” is defined in s 8 of the *PGPA Act* to mean “efficient, effective, economical and ethical” — all of which, in the context of government expenditure of public money in an extensive range of circumstances, involve matters about which reasonable minds may differ. This is inconsistent with the notion that an “objective” standard of “reasonable inquiries” was intended to govern the lawfulness of decisions by Ministers to approve expenditures of money. Moreover, the assessment of what is “efficient, effective, economical and ethical” potentially raises the need to weigh competing considerations, some of which will have a heavy policy or political content.
4. Fifthly, the central concern of s 71, in the context of making reasonable inquiries, is making a decision that “proposed” expenditure “would be” a “proper use” of public money, a matter which is inherently prospective and contingent on future events which might not occur for some time. Moreover, as has been mentioned, the concept of “reasonable inquiries” in the context of determining a “proper use” of money is highly evaluative and may involve a weighing of competing policy and political considerations.
5. Sixthly, the “making” of reasonable inquiries is a procedural and facilitative step wholly directed to the formation of the Minister’s state of satisfaction about the propriety of spending public money on that proposal. That is not to say that “reasonable inquiries” is appropriately described as an essential “preliminary”, that is “extrinsic” or “ancillary”, to the Minister’s state of satisfaction (see *Pallas Newco* at [48] and *Chase Oyster Bar* at [44]). As stated by Spigelman CJ in *Pallas Newco* at [47], “[t]he word preliminary does not, in this context, refer to the chronological sequence of events, but to a matter that is **legally antecedent** to the decision-making process” (emphasis added). I do not accept that “reasonable inquiries” is legally antecedent to the Minister’s state of satisfaction under s 71 of the *PGPA Act*. Therefore, contrary to the applicant’s contention, the fact that “making reasonable inquiries” must chronologically occur before the Minister’s decision as to “proper use” does not support the construction of “reasonable inquiries” as an objective jurisdictional pre-condition.
6. Seventhly, and perhaps less significantly, s 71 contains no requirement for the Minister to record or report upon what inquiries were made, were not made, why, when, and with what results. Section 71(2)(a) simply requires the terms of an approval itself to be recorded in writing. I accept the Commonwealth’s submission that, if the legislature intended to impose an obligation of compliance with an objective standard of reasonableness it could readily have stipulated reporting requirements to enable the Auditor-General, Parliament itself, courts and members of the public to assess and enforce compliance. That is not to say, however, that familiar avenues of political accountability are not available in the absence of any reporting requirement.
7. Eighthly, I accept the Commonwealth’s submission that s 71 does not refer to a Minister making “all reasonable inquiries with respect to all relevant matters”. While not determinative, this perhaps reflects a legislative recognition that the nature and extent of any inquiries will necessarily be influenced and informed by the Minister’s then-subjective state of mind and understanding.
8. I accept the Commonwealth’s submission that it is most unlikely that the Parliament intended that:
9. s 71 would operate by reference to such a such an uncertain interplay between objective and subjective requirements; and
10. the lawfulness of any expenditure to which s 71 applies would ultimately depend upon an *ex post facto* judicial assessment of the objective reasonableness of inquiries made by the Minister.
11. Moreover, as the Commonwealth submitted, a subjective approach accords with following other features of the *PGPA Act*: see *Chase Oyster Bar* at [42] per Spigelman CJ.
12. First, s 50, which sets out a guide to Part 2-4 of the *PGPA Act*, including Div 9, states that s 71 “has requirements that apply to a Minister when the Minister is approving proposed expenditure”. It does not provide that s 71 seeks to impose objectively based pre-conditions on decision-making by Ministers, nor does it say “before” or “if”, which might have indicated a pre-condition to the valid exercise of power by the Minister.
13. Secondly, the *PGPA Act* does not define the meaning of “efficient”, “effective”, “economical” and “ethical” or make it clear whether they comprise a composite expression. These words should be given their ordinary meaning.
14. These words apparently have their origins in s 44 of the (now repealed) *Financial Management and Accountability Act 1997* (Cth) (***FMA Act***) (the predecessor to the *PGPA Act*), which was headed “Promoting efficient, effective and ethical use of Commonwealth resources”. Section 44 provided that “[a] Chief Executive must manage the affairs of the Agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible” and defined “proper use” to mean “efficient, effective and ethical use”. The Explanatory Memorandum to the Financial Management and Accountability Bill 1996 explained (at [45]) that:

… Recognition of the need to manage to achieve qualitative outcomes has underpinned many of the public sector reforms of recent years and will continue to be a feature of future management focus. This clause seeks to reflect and reinforce that focus within the ambit of Commonwealth financial management.

1. The PGPA EM at [100] explains that the definition of “proper” in the *PGPA Act* is similar to the definition in s 44 of the *FMA Act*, save for the phrase “not inconsistent with the policies of the Commonwealth” (which was inserted into s 44(3) of the *FMA Act* by item 49 of Sch 1 of the *Financial Framework Legislation Amendment Act 2008* (Cth)).
2. With the legislative history in mind, I accept the Commonwealth’s submission that, in the context of provisions about financial management, and having regard to their ordinary meanings, the relevant words should be understood as being directed to matters such as probity, integrity, honesty and value-for-money in the pursuit of policy choices. The requirement of “proper use” guards against the squandering or pilfering of public money. The expressions do not encompass matters which go to whether or not a particular policy choice should be pursued. I accept the Commonwealth’s submission that governments are entitled to make policy choices informed by ideological or political values and preferences: see generally, in different statutory contexts, the High Court’s statements in *Wilkie v Commonwealth* [2017] HCA 40; 263 CLR 487 at [109]-[120], [129]-[131] and [134]-[138] and *Australian Broadcasting Corporation v Redmore Pty Ltd* [1989] HCA 15; 166 CLR 454 at 458-459 per Mason CJ, Deane and Gaudron JJ.
3. Thirdly, there is considerable force in the Commonwealth’s submission that the applicant’s position threatens to draw the Court into a form of merits-based assessment of Ministerial expenditure decisions across the full gamut of Commonwealth policy areas. The applicant’s preferred construction would require a Court to consider whether a matter is “relevant” or “of significant consequence”, whether funding “represents value for money” and/or is “efficient, effective, economical and ethical”, the objective “reasonableness” of inquiries into such matters, as well as whether the Minister is or should have been on notice of a particular matter. These are all matters which may impermissibly draw courts into merits review.
4. I accept the Commonwealth’s submission that the applicant’s position is inconsistent with the difficulty, contestability and complexity of the notion of “objectivity” in this context. The Court is not being asked to identify “relevant considerations” as a matter of statutory construction (a task with which it is familiar). In essence the Court is being asked to assess whether, and to what extent, matters of apparent or potential “relevance” or “significance” to good decision-making should have been inquired into, noting that any assessment of actual “relevance” or “significance” is itself likely to be informed, quite iteratively, by what inquiries are made and the outcome of them.
5. Generally speaking, courts lack the institutional competence to determine such questions. Their resolution is ordinarily vested in the executive arm of government. Had the Parliament intended courts to superintend administration of Commonwealth expenditure in the manner contended by the applicant, one would expect clear language and explicit reference to the factors to be taken into account.
6. Another relevant consideration is the practical inconvenience which may result if the applicant’s position is accepted. Ministers, third party stakeholders and the public could not be sure, in many cases, that “proposed” expenditure of relevant money was validly authorised until after a court decision. Even after downstream “commitment” decisions, recipients of money under contracts entered into in the exercise of executive power (or pursuant to statutory powers predicated on compliance with s 71) could never be sure that they might not be exposed to a claim for money had and received on the basis recognised in *Auckland Harbour Board v R* [1924] AC 318. The extent of the uncertainty and risk may vary, emphasising again that s 71 potentially applies in a wide range of subject areas across the spectrum of Commonwealth ministerial expenditure decisions.
7. The applicant’s position is also inconsistent with the following passage in the Explanatory Statement which accompanied the insertion in 2010 of the expression “after making reasonable” in place of “after reasonable” into reg 9 of the *Financial Management and Accountability Regulations 1997* (Cth) by item 13 of Sch 1 to the *Financial Management and Accountability Amendment Regulations 2010 (No 3)* (Cth):

Item [13] inserts “after making reasonable” instead of “after reasonable”. This insertion clarifies the action that is required, that is, “making” reasonable inquiries. Regulation 9 does not require external inquiries to be made where approvers, in the absence of any such inquiries, can satisfy themselves that giving effect to the spending proposal would be a proper use of public money. The primary meaning of ‘inquiry’ is ‘an investigation into a matter’. Accordingly, as a matter of ordinary language regulation 9 simply requires an approver to reasonably investigate whether the proposed expenditure would be a proper use of public money. The reference to ‘reasonable inquiries’ indicates that there are limits to the extent to which approvers need to satisfy themselves that proposed expenditure is proper.

This passage continues to carry weight in the construction of s 71 of the *PGPA Act*, which uses the identical phrase “after making reasonable inquiries”, in circumstances where [345] of the PGPA EM made clear that s 71“elevated into primary legislation … duties on Minister like those imposed by FMA Regulations 9 and 12”.

1. I accept the Commonwealth’s submission that this passage indicates an intention that expenditure approvers be self-directing as to the making of reasonable inquiries. Indeed, if they are able to “satisfy themselves that giving effect to the spending proposal would be a proper use of public money” without making any “external inquiries”, expenditure could be approved on the basis of their subjective, cognitive evaluation.
2. For all these reasons, I do not accept the applicant’s contention that the requirement in s 71(1) that reasonable inquiries be made before determining whether an expenditure of public money would be a proper use of relevant money constitutes an objective jurisdictional pre-condition on the exercise of the Minister’s power. As I have already emphasised, however, that does not mean that the Minister’s subjective assessment of what inquiries need to be made is insusceptible of judicial review on other grounds.

### (b) Does s 71(1) of the PGPA Act (and the 2017 Guidelines) apply to the Instrument?

1. The applicant contended that the obligations imposed by s 71(1) of the *PGPA Act* applied not only to the Approval Decision, but also to the making of the Instrument. It contended that this was because the Minister was approving, for the purposes of s 71(1), expenditure of approximately $50 million on the Program and that, although the Program envisaged that there would be a group of grants as opposed to a single grant, both s 71(2) and the Guidelines contemplated that an approval of expenditure may relate to a “group of grants”. The applicant did not claim that every instrument made under the *IRD Act* would attract s 71. It submitted that this would depend on the terms of the particular instrument and whether there is sufficient specificity for it to be characterised, at that time, as an approval of expenditure by the Minister. The applicant added that s 71(1) could also apply to an instrument which is a legislative instrument, as is the case here.
2. Section 71(1) of the *PGPA Act* applies where a Minister “approve[s] a proposed expenditure of relevant money”. I accept the Commonwealth’s submission that the *PGPA Act* is concerned with the use and management of public resources by the Commonwealth and its entities in their executive capacities. That does not mean, however, that s 71(1) has no application at all to an instrument which is properly characterised as a legislative instrument. I accept the applicant’s submission that the distinction between legislative and administrative actions may not have any particular utility in this statutory context.
3. For the following reasons, however, I do not consider that the making of the Instrument itself constituted the Minister approving a proposed expenditure of relevant money for the purpose of s 71(1) of the *PGPA Act*. This is primarily because the construction of the Instrument as a “proposed expenditure of relevant money” does not sit well with the statutory context of the *IRD Act*. The Minister made the Instrument pursuant to s 33(1) of the *IRD Act*. Once a program is prescribed, the Commonwealth may make, vary or administer an arrangement in relation to the carrying out of activities by a person under the program and the payment of money to that person: s 34(1). The express terms of ss 33(1) and 34 indicate that the legislative prescription of a program under s 33(1) is generally anterior to its financial management and administration by the Commonwealth and its entities. As noted above, the *PGPA Act* is concerned with the financial management of public resources, as opposed to policy decisions such as the prescription of the Program under the Instrument. It is notable that the terms of the Instrument are relatively brief and do little more than prescribe the Program. The Instrument is best understood as permitting the Minister to approve proposed expenditure in relation to the Program.
4. I accept the Commonwealth’s submission that this is reinforced by other textual and contextual considerations. First, ss 33(4)(c) and (d) provide that an instrument may make provision in relation to eligibility criteria relating to a program and the process for making applications in relation to that program. This indicates that an instrument made under s 33 provides a legislative framework, in respect of which approvals might be made. Secondly, at the time the Minister makes an instrument, the terms of any proposed expenditure under the prescribed program are unlikely to be known.
5. I also accept the Commonwealth’s submission that cll 2.3, 2.4 and 4.10 of the 2017 Guidelines do not apply to the Instrument. The word “grant” is defined in cl 2.3 in terms which are set out at [42] above. In my view, the making of the Instrument does not come within that definition. The purpose of the Instrument was to prescribe the Program. The direct source of the power to make the grants was s 34 of the *IRD Act*. The Instrument itself is not an “arrangement” for the provision of Commonwealth financial assistance within the meaning of the definition in cl 2.3. The Instrument simply prescribed the Program to which the subsequent grants of money related.

### (c) The nature and ambit of s 71(1) of the PGPA Act

1. The applicant contended that in making both the Instrument and the Approval Decision, the Minister failed to make reasonable inquiries in relation to the following matters associated with climate change (which I will describe collectively hereafter as climate change risks and economic risks):
2. whether, and if so, the extent to which, emissions produced from the extraction and subsequent use of gas from the Beetaloo sub-basin would result in a material increase in risks associated with climate change, including damage to the environment, human health and economic harm;
3. whether, and if so, the extent to which, those emissions would also undermine Australia and the other signatories’ ability to meet their commitments under the 2016 Paris Agreement; and
4. whether, and if so, the extent to which, the changing global attitude to greenhouse gas emissions would result in a reduction in demand for fossil fuels (including gas), the imposition of trade measures against countries who fail to meet their obligations under the Paris Agreement, and/or economic divestment from high greenhouse gas emitting assets, such that they are no longer able to provide an economic return.
5. The applicant contended that these matters were directly relevant to whether the Minister’s approved expenditure was a “proper” use of relevant money, in the sense of being an efficient, effective, economical and ethical use of that money and also whether the expenditure represented value for relevant money.
6. For the following reasons, I do not accept the applicant’s submissions regarding the alleged failure of the Minister to make reasonable inquiries in relation to the matters associated with climate change risks and economic risks as summarised at [86] above. I have already explained why I do not accept that s 71 of the *PGPA Act* or the 2017 Guidelines apply to the making of the Instrument.
7. The matter is more complicated when attention is turned to the Approval Decision. But even if the requirement to conduct “reasonable inquiries” is viewed as an objective jurisdictional pre-condition upon the exercise of the power (contrary to the view I have expressed above), and even if matters associated with climate change were relevant, ground 1 would still fail. There was no requirement for the Minister to make reasonable inquiries into the matters claimed by the applicant (see [86] above) in relation to the making of the Approval Decision (or, indeed, the Instrument itself) in circumstances where:
8. The funding is not with respect to activities that involve or relate to the carrying out of extraction and subsequent use of gas from the Beetaloo sub-basin. Rather, the funding relates to exploration and appraisal activities and there is no evidence before the Court to suggest that those activities themselves contribute to climate change risks of the kind identified by the applicant.
9. Some of those matters would be considered by Northern Territory ministers when making decisions to grant and extend EP187 so as to authorise substantive extraction activities (under, for example, the *Petroleum Act*, the *Petroleum (Environment) Regulations 2016* (NT) and the *Environment Protection Act 2019* (NT)). Those matters would, to the extent of their relevance, arise for consideration in the context of downstream decision-making specifically directed to the management of ecological and environmental risks in respect of the substantive recovery, extraction and use of gas from the Beetaloo sub-basin. It is uncertain at present whether there will be a need for any such downstream decision-making, simply because that may depend on the outcome of the exploration and appraisal activities, which are the subject of the funding under the Contracts Decision.
10. Nor do I accept that the Minister was required to make “reasonable inquiries” into the risks associated with the economic viability of the extraction of gas from the Beetaloo sub-basin as outlined in the Hutley Report. In the particular circumstances of this case, these economic risks (as well as the related climate change risks) were not directly relevant to whether the grants to Imperial were a “proper” use of relevant money at the time of the making of the Approval Decision. The Minister in making the Approval Decision was merely required to be satisfied that the grant or grants to Imperial were a “proper use” of relevant money in the context of the Program and its outcomes and objectives, or as opposed to some other application for funding by another company holding an exploration permit in the Beetaloo sub-basin.

###  (d) Did the Minister contravene the 2017 Guidelines in making the Approval Decision?

1. The applicant advanced three alternative submissions in support of its claim that there were contraventions of the 2017 Guidelines in making the Approval Decision (as opposed to the Instrument). I will explain why I reject each of those contentions in turn.
2. First, the applicant contended that if there was a contravention of s 71(1) of the *PGPA Act*, there must necessarily be a contravention of cl 3.3 of the 2017 Guidelines which, in effect, reaffirms that statutory provision. For the reasons given above, I do not accept there was a contravention of s 71(1) of the *PGPA Act* in making the Approval Decision.
3. Secondly, the applicant contended that, even if there was no contravention of s 71(1), there would be a breach of cl 4.10 of the 2017 Guidelines (when read together with cl 4.6(d)) because none of the advice given to the Minister related to the climate change risks or economic risks associated with the viability of gas extraction described in the Hutley Report. The applicant contended that this meant there was a failure to give the Minister advice on the merits of the proposed grants relative to the key principle of achieving value with relevant money. For similar reasons as set out at [89]-[90] above, I reject the proposition that the Minister needed to be briefed on the climate change risks or economic risks advanced by the applicant in relation to “achieving value with relevant money” in making the Approval Decision. The relevant question was whether the grants were “achieving value with relevant money” in the context of the Program objectives and outcomes. The assessment committee assessed and found that Imperial’s applications met this requirement, subject to certain conditions (Attachment A to the Department’s Brief) (see [120]-[122] below).
4. Thirdly, in oral address, Mr Herzfeld SC submitted that there had been a failure to comply with cl 4.10 of the 2017 Guidelines because, in making the Approval Decision, no advice was given to the Minister regarding the outline of the selection process followed, how the allocation method was developed, how implementation issues were considered and an outline of risk mitigation strategies (see footnote 35 to cl 4.6(c), which applies to “demand-driven grant opportunities”). The Commonwealth did not appear to contest that the Program is a “demand-driven” grant opportunity. It is arguable that the Department’s Brief did not contain all of the information identified in footnote 35 to cl 4.6(c). However, the fact that the statement that advice under cl 4.6(c) should include such information is contained in a footnote rather than a substantive clause, contains ambulatory phrases of imprecise meaning (eg. “implementation issues” and “risk mitigation strategies”), and uses the imperative “should” instead of “must”, strongly suggests that it was not intended to be a mandatory requirement for compliance with cl 4.6(c). In my view, it is better seen as an indicator of “best practice”, which accords with other uses of footnotes within the 2017 Guidelines (see, eg, footnotes 31, 37 and 39). As such, any failure of the Department’s Brief to comply with footnote 35 does not constitute a jurisdictional error, or invalidate the Approval Decision.

### (e) The effect of any non-compliance

1. It is unnecessary to determine this issue having regard to my conclusions regarding the previous four issues.

### (f) Conclusion on ground 1

1. For these reasons, the applicant’s claims under ground 1 must fail.

## Ground 2 – Legal unreasonableness/illogicality/irrationality in making the Instrument and/or Approval Decision

1. The following issues arise:
2. Whether the Instrument is legally unreasonable?
3. Whether the Approval Decision can be reviewed for legal unreasonableness?
4. Whether the Approval Decision is legally unreasonable?
5. I shall address each of those issues in turn.

### (a) Whether the Instrument is legally unreasonable?

1. The applicant contended that because the Minister failed to consider the climate change risks and economic risks described at [86] above, he failed to act in a way that had an “evident and intelligible justification” in making the Instrument (citing *Minister for Immigration and Citizenship v* ***Li***[2013] HCA 18; 249 CLR 332 at [76] per Hayne, Kiefel and Bell JJ). It submitted that no reasonable decision-maker in the Minister’s position could simply ignore those matters and not make any inquiry at all into them.
2. For the following reasons, I reject the applicant’s contention. First, the applicant has misstated the standard of review for unreasonableness of a legislative instrument (such as the Instrument), as opposed to an administrative decision. The Instrument is a form of delegated legislation, and so the standard is higher than mere unreasonableness in the *Li* sense. As I recently stated in *Athavle v State of New South Wales* [2021] FCA 1075 at [96]:

… the proper test is not one of expediency but whether there is a power to make the subordinate instrument. Where there are difficult choices to be made, it is essential that the Court does not usurp the role of the maker of the impugned subordinate instrument.

(See also *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; 249 CLR 1 at [48] ff per French CJ; *City of Brunswick v Stewart* [1941] HCA 7; 65 CLR 88 at 97 per Starke J and *Clements v Bull* [1953] HCA 61; 88 CLR 572 at 577 per Williams ACJ and Kitto J.)

1. Secondly, as the Commonwealth contended, nothing in the *IRD Act* (under which the Instrument was made) suggests that the Minister had to consider any of the various matters identified by the applicant. The issue of unreasonableness is not to be determined by reference to whether or not the Court thinks that it may have been prudent or desirable for the Minister to make inquiries into such matters before making the Instrument. The question is one of power.
2. The applicant has not persuaded me that the Instrument is unreasonable in the appropriate legal sense.

### (b) Whether the Approval Decision can be reviewed for legal unreasonableness?

1. The applicant’s primary contention was that the Approval Decision was made pursuant to s 33 of the *IRD Act* and was susceptible to judicial review for legal unreasonableness. It relied upon the following matters:
2. The Minister’s approval of the expenditure was a key component of the Program and, in prescribing the Program in the Instrument, the Minister should not be taken to have intended to confer upon himself a power to approve expenditure in a legally unreasonable way. It contended that the Approval Decision was made against the background of the prescription of the Instrument and was necessary to give statutory force to an expenditure decision which otherwise would have been beyond Commonwealth power, which meant that approving the grants was necessarily something which occurred under the statutory provisions of the *IRD Act*.
3. Additionally, the applicant contended that even if the Approval Decision was not made under a statutory power, it could be reviewed for legal unreasonableness (citing ***Jabbour*** *v Secretary, Department of Home Affairs* [2019] FCA 452; 269 FCR 438 at [87]-[101] per Robertson J). After the Court reserved judgment in the present proceeding, the Full Court affirmed the correctness of this aspect of *Jabbour* in ***Davis*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213.
4. The Commonwealth submitted that the ground of review for legal unreasonableness was inapplicable to the Approval Decision because, in the Commonwealth’s view, it lacked a statutory foundation. Although, as the applicant pointed out, there may have been some ambiguity in the Commonwealth’s position on this matter, the Commonwealth appeared to suggest that the legal source of the Approval Decision was s 61 of the *Constitution.* The Commonwealth submitted that s 61 does not provide a touchstone for the derivation or explication of an implied constraint of reasonableness, because s 61 describes, but does not define, Commonwealth executive power. The range of matters it embraces (including statutory power, prerogative powers and other executive capacities) cannot accommodate a uniform requirement of reasonableness, let alone a requirement with a uniform standard, so submitted the Commonwealth.
5. The Commonwealth submitted that *Jabbour* isdistinguishable on the following two grounds. First, it is uncontroversial that the legal standard of reasonableness is determined by construing the statute under which the decision has been made (citing *Li* at [26] and [67]). In the present case, although the Minister’s power to make the Approval Decision was not made under s 71 of the *PGPA Act*, unlike the power in *Jabbour* the Minister’s power to approve expenditure is regulated by s 71, and in terms which expressly deal with the topic of “reasonableness”. Properly construed, s 71 deals with the topic by reference to subjective ministerial satisfaction. Section 71(1) therefore supplants (or exhaustively defines) any standard of reasonableness which might otherwise have applied in making the Approval Decision, so submitted the Commonwealth.
6. Secondly, the Commonwealth submitted that the nature of the exercise of executive power in *Jabbour* was different from the Approval Decision. In *Jabbour*, “[t]he interests and potential rights of the applicants were affected by the administrative action”, there were guidelines said to inform “the nature of that administrative action” and “the circumstances [were] “more closely related to justice to the individual than with political, social and economic concerns”” (at [91]-[92]). The Approval Decision affected no rights and its making is much more closely related to political, social and economic concerns than justice to a particular individual.
7. The Commonwealth then contended that, if *Jabbour* is not distinguishable, it should not be followed because it is plainly wrong.
8. For the following reasons, I accept the applicant’s contention that the Approval Decision is amenable to review for legal unreasonableness. First, having regard to the Full Court’s decision in *Davis*, and the nature and character of the Approval Decision, I consider that ground of review is available whether the Approval Decision was made in the exercise of a statutory power or made in the exercise of the Commonwealth’s executive power.
9. Secondly,contrary to the Commonwealth’s submission, I do not consider that *Jabbour* is plainly wrong. Indeed, as noted above, the correctness of that decision was recently affirmed by the Full Court in *Davis*.
10. Thirdly, consistently with *Davis*, I do not suggest that all non-statutory powers are amenable to review for legal unreasonableness. Significantly, however, the Approval Decision was made in the context of a heavily regulated statutory regime for Ministerial expenditure decisions, as outlined above. The Approval Decision was made against the background of the making of the Instrument under s 33 of the *IRD Act* and as an antecedent step to the execution of the Imperial Contracts under s 34 of the *IRD Act*.
11. Fourthly, I consider that my observations in *Davis* at [88] apply generally to the Approval Decision. The central question is whether the Approval Decision was legally unreasonable (whether or not it was made under the exercise of a statutory or non-statutory power), a question to which I now turn.

### (c) Whether the Approval Decision is legally unreasonable?

1. The applicant contended that the Approval Decision was legally unreasonable on the same grounds it advanced in claiming that the Instrument was legally unreasonable (see [99] above). For the following reasons, I do not accept that submission.
2. As stated in *Minister for Immigration and Border Protection v* ***SZVFW*** [2018] HCA 30; 264 CLR 541, the “test for unreasonableness is necessarily stringent” and “courts will not lightly interfere with the exercise of a statutory power involving an area of discretion” (at [11] per Kiefel CJ). There is “an area within which the decision-maker has a genuinely free discretion which resides within the bounds of legal reasonableness”, and the court does not determine for itself how the power should have been exercised, or interfere “just because the court would have exercised the discretion in a different way” (at [86] and [97] per Nettle and Gordon JJ).
3. While the Approval Decision can be reviewed for unreasonableness, I accept the Commonwealth’s submission that nothing in s 61 of the *Constitution*, ss 33 and 34 of the *IRD Act* or the Instrument itself suggests that the Minister was required, when making the Approval Decision, to consider the climate change risks and economic risks advanced by the applicant (see [86] above). Even if there was, having regard to the matters outlined at [89]-[90] above, I consider that it was not unreasonable for the Minister not to consider those matters. The contention that those matters were significant and directly “relative to the Minister’s decision” reveals disagreement with the merits of the Approval Decision, not legal unreasonableness.
4. For these reasons, ground 2 is rejected.

## Ground 4 – In making the Approval Decision did the Minister act upon erroneous advice?

1. The applicant contended that the advice given to the Minister upon which he relied in making the Approval Decision was erroneous in the following two respects:
2. The advice that Imperial’s three drilling projects “will likely generate over $70 million of additional investment” was incorrect. The true position is that the projects would **accelerate** additional investment of this amount by at least 12 months.
3. The Minister was also advised that the assessment committee and his Department were satisfied that the spending proposal represented value for money, a proper use of Commonwealth resources and was an efficient, effective, economical and ethical use of resources that is consistent with the Commonwealth’s policies. This advice was given notwithstanding that the assessment committee did not make any assessment at all on those matters, save for stating that the three applications “were value for money and would achieve the program objectives and outcomes”. It saw its task as being limited to determining whether the assessment criteria for the Program were met.
4. The applicant contended that these two matters were “centrally relevant to the mandatory relevant considerations (identified by s 71 of the *PGPA Act* and paragraph 4.6 of the 2017 Guidelines) for the Minister in making his decision”.
5. For the following reasons, I reject the applicant’s claims that these factual errors amount to jurisdictional errors.

### (a) First alleged factual error

1. As the Commonwealth correctly acknowledged in oral submissions, the statement in [4] of the Department’s Brief that the “three drilling projects will likely generate over $70 million of additional investment” (see [20] above) was “unfortunate language” and “is capable of conveying the meaning that it involved an investment that would otherwise never occur”. However, in context, I accept the Commonwealth’s submission that it was “very unlikely to have a misleading effect” on the Minister. The Minister would have been well aware, including from his own press releases, that the purpose of the Program was to “accelerate” and “bring forward” investment in the Beetaloo sub-basin, not necessarily generate new investment. Indeed, this fact was repeated in the last sentence of [1] of the Department’s Brief. I therefore do not accept that this statement, when viewed in context, could give rise to jurisdictional error.

### (b) Second alleged factual error

1. The Department’s Brief to the Minister stated: “The assessment committee … assessed the three eligible applications against the BCDP assessment criteria (which includes environmental approvals and other NT Government regulatory requirements), value for money and the program objectives and outcomes”. The assessment criteria of the Program Guidelines required an applicant to demonstrate:
2. the extent to which its project will contribute to understanding petroleum resource prospects in the Beetaloo sub-basin;
3. its capacity, capability and resources to deliver the project for which it is applying, which was to be demonstrated through identifying a credible project plan and budget; and
4. the impact of the grant funding on its project.
5. I accept the Commonwealth’s submission that the content and requirements of the Program assessment criteria necessarily meant that the assessment committee had assessed the proposed spending as representing a proper use of Commonwealth resources.
6. There is another reason why the second alleged error should be rejected. Mr Oliver Jones (the applicant’s junior counsel) confirmed in oral address that this alleged error related to the assessment committee alone, and not to the advice provided by the Department. Accordingly, it is difficult to see how the alleged error relating to the assessment committee would constitute a material error so as to amount to a jurisdictional error, where the applicant does not challenge the accuracy of the Department’s advice to the Minister on the same matters.

## Ground 5 – Legal unreasonableness/illogicality/irrationality in making the Contracts Decision

1. As noted above, on 9 September 2021 the Commonwealth and Imperial entered into the Imperial Contracts. The applicant claims that, in making the Contracts Decision on that date, the Commonwealth acted in a way that was legally unreasonable, illogical and/or irrational. As will emerge, the applicant’s primary contention is that there was no evident and intelligible justification for the timing of the Contracts Decision in context of the current proceedings and the correspondence between the applicant and the Commonwealth.
2. There was no dispute that the legal source of the Commonwealth’s power to make the Imperial Contracts was s 34(1) of the *IRD Act*. Accordingly, there was no dispute that the making of the Imperial Contracts involved the exercise of a statutory discretionary power on the part of the Commonwealth. Nor was there any contest that an element of the Commonwealth’s power to enter into a contract in the exercise of its statutory power under s 34 of the *IRD Act* was the decision as to the timing of the exercise of that power. Finally, I did not understand the Commonwealth to dispute the applicant’s claim that the exercise of the power under s 34 is subject to an implied condition of legal reasonableness.
3. Other matters relating to ground 5 were, however, strongly contested. In particular, the Commonwealth contended that the applicant’s contentions in support of ground 5 had not been properly pleaded, omitted various necessary particulars and involved procedural unfairness. The Commonwealth also disputed what matters the Court should take into account in determining whether or not the applicant had made good its claims under ground 5.
4. The determination of ground 5 requires careful attention to the circumstances surrounding the execution of the Imperial Contracts on 9 September 2021, the context of the litigation in which that occurred and the way in which the applicant presented this part of its case at the trial. This is consistent with the now well settled principle that the determination of a claim of legal unreasonableness turns not only on the subject matter and purpose of the relevant statutory power but is also highly fact dependent: see, for example, *Minister for Immigration and Border Protection v* ***Singh***[2014] FCAFC 1; 231 FCR 437 at [42] and [48] per Allsop CJ, Robertson and Mortimer JJ and *SZVFW* at [84] per Nettle and Gordon JJ).

### (a) Some undisputed facts

1. On 7 July 2021, the Minister publicly announced, by way of media release, his decision that had been made on or about 17 June 2021 to approve grants to Imperial in the amount of up to $21 million pursuant to the Program (i.e. the Approval Decision).
2. The present proceeding was commenced on 28 July 2021 by the filing of an originating application for judicial review under both the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and ss 39B(1) and (1A) of the ***Judiciary Act*** *1903* (Cth). The Minister for Resources and Water and the Commonwealth were named as respondents (for convenience, I will generally refer to them collectively as the **Commonwealth**). The applicant challenged the Instrument and the Approval Decision. At that time, the applicant did not challenge any contract entered into by the Commonwealth and Imperial relating to the Program simply because no such contract had been executed at that time. Accordingly, Imperial was not named as a respondent at this stage of the proceedings, but the applicant notified Imperial’s parent company on 29 July 2021 of the proceedings.
3. On 28 July 2021, the applicant’s solicitor wrote a detailed letter to the Minister personally concerning the proceeding which it had commenced that same day. The letter, which was sent by email, summarised the applicant’s claims as to the Instrument and the Approval Decision.
4. At paragraph 22 of the letter, it was stated that the Minister’s “failings would invalidate any contract or agreement purportedly entered into in reliance on the Instrument, whether pursuant to s 34 of the *IRD Act* or otherwise”. The letter added that if a contract was entered into, the counter-party to the contract would be on notice that it was receiving money paid under a void contract and would be liable to repay any such money received.
5. Paragraph 24 of the letter is important. It stated:

In those circumstances, we seek your confirmation that no contract has been entered into pursuant to the Decision, and your undertaking that no contract will be entered into pursuant to the Decision, or funds transferred under the Instrument, until the determination of the Application. All our client’s rights are reserved.

1. On 6 and 16 August 2021, the Court made case management orders by consent with a view to the matter progressing to a hearing. A further case management hearing was listed for 14 October 2021.
2. In their concise statement in response dated 30 August 2021, the Commonwealth said at [10] that the Minister approved the grant applications on 17 June 2021, subject to a final assessment as to the amount for which Imperial was eligible. It then stated that the Commonwealth “has not yet entered any contract or arrangement with [Imperial] in relation to the carrying out of activities by [Imperial] pursuant to the Decision or the payment of funds”.
3. It was not until 3 September 2021 that the Commonwealth responded to the applicant’s solicitor’s letter dated 28 July 2021. The five weeks delay is unexplained. The response letter, which was written by the Australian Government Solicitor (**AGS**), referred to the applicant’s letter dated 28 July 2021 and the applicant’s request for confirmation that no contract had been entered into pursuant to the Minister’s announcement dated 7 July 2021. It also referred to the applicant’s request for an undertaking that no contract would be entered into pursuant to that announcement pending the outcome of the present proceeding. The AGS letter then stated (emphasis added):

We are **instructed** that the Minister intends to enter into a grant agreement with Imperial Oil and Gas consistent with his decision of 7 July 2021. **We anticipate that this grant agreement will be entered into within the next 2-3 weeks**.

1. On 7 September 2021, the applicant’s solicitor replied by letter to the AGS letter dated 3 September 2021. After noting the advice that the Minister “presently anticipates that he will enter into a grant agreement with Imperial Oil and Gas within the next 2-3 weeks”, the applicant’s solicitor stated that, in light of that information, it was “prudent” for the parties to seek an expedited hearing so that the applicant’s claims could be determined on an expedited basis “prior to the Minister entering into any agreement with Imperial Oil and Gas”. The letter stated (emphasis added):

As the Minister presently anticipates that the grant agreement will be entered into more than 3 months after his decision was made on 17 June 2021, we see no basis for any contention that the Minister would suffer any prejudice as a result of taking this course. **To the contrary, it will be contrary to the interests of justice for an agreement to be entered into in circumstances where the question of the Minister’s power to enter into any such agreement is before the Court**, particularly where the matter can now be resolved swiftly.

1. The letter then stated that the applicant would write to the Court and seek to have the matter re-listed at the Court’s earliest convenience in the week commencing 13 September 2021, in order to seek an expedited hearing. The letter asked that the AGS advise of the Minister’s position as to this proposal by noon on 8 September 2021.
2. The AGS responded by an email shortly before noon on 8 September 2021. The applicant’s solicitor was advised that the AGS was “seeking instructions on the expedition question from the Minister personally, and have not yet been able to obtain those instructions due to his limited availability this morning”. The applicant’s solicitor was advised that the Minister’s solicitor anticipated being able to respond later that day.
3. Having received no response from the Commonwealth, by an email sent shortly after 4:00 pm, the applicant’s solicitor informed the AGS that it would proceed to have the matter re-listed in the week commencing 13 September 2021 in order to seek an expedited hearing. The applicant’s solicitor set out the terms of an email which it proposed to send to my associate regarding the re-listing, which included a reference to the AGS letter dated 3 September 2021. The proposed email to the Court included the following statements (emphasis added):

On 3 September 2021, we received a letter from the Respondents’ solicitors indicating that the First Respondent intends to enter into a grant agreement consistent with his decision of 7 July 2021, which is the subject of review in these proceedings, within the next 2-3 weeks.

**Given this**, the applicant respectfully requests that the matter be relisted at the earliest convenient time for the Court in the week of 13 September 2021, so the applicant may seek a variation of the existing timetable in order that the hearing of the matter be set down on an expedited basis.

1. The email notified the AGS that, given the urgency of the matter and in circumstances where the applicant had not yet heard from the AGS as to the Commonwealth’s position, the proposed email would be sent to the Court by 4.30 pm on 8 September 2021.
2. It appears that the AGS did not respond to the applicant’s email and the proposed email was sent to my associate in the late afternoon of 8 September. At 6.46 pm on that day, my associate notified the parties by email that the proceedings had been re-listed for a case management hearing at 9.30 am on 14 September 2021.
3. The next day, at 3.06 pm on 9 September 2021, the applicant’s solicitor forwarded to the AGS draft short minutes of order proposing a timetable for the hearing to be conducted on an expedited basis. The email included the following paragraphs (emphasis added):

**We note that the Applicant would be content to propose these orders to the Court provided the Respondents agree not to enter into any contracts/Grant Agreements or transfer any funds to Imperial Oil and Gas Pty Ltd and/or Empire Energy Group Ltd**, in accordance with the Instrument and Decision the subject of review in these proceedings, until the proceedings have been finally determined by the Court on the expedited basis proposed (including judgment having been handed down).

**If the Respondents are not willing to provide an undertaking in this regard, the Applicant reserves the right to seek interlocutory relief preventing the Respondents from doing so**.

Could you please provide your client’s position on the draft orders and other matters raised in this email by 12pm on Friday 10 September 2021.

1. On 9 September 2021, and without notice to the applicant, the Commonwealth, acting through a Ministerial delegate, entered into the three contracts with Imperial. The evidence does not show precisely when the three contracts were executed by the Commonwealth on 9 September 2021, but it is evident that Imperial executed the three contracts electronically on that day. The applicant learned of the Contracts Decision for the first time when Imperial’s parent company made an announcement to the Australian Stock Exchange on 10 September 2021.
2. On 13 September 2021, the applicant sent a letter to the AGS seeking confirmation whether or not the Commonwealth had entered into the Imperial Contracts. Shortly thereafter at 12.15 pm, AGS advised by letter that it was instructed that three grant agreements were entered into on 9 September 2021. It added that, under those agreements, initial progress payments are not to be made until 31 December 2021 (with no payments to be made prior to that date). The letter added that, in the light of the significant time before any payment was to be made, the Commonwealth proposed amended short minutes of order with a view to the hearing being conducted for a single day on any of the various days suggested between 5 and 22 October 2021.
3. At 4.25 pm on 13 September 2021, the applicant’s solicitor emailed the AGS and enclosed proposed amended consent orders providing for an expedited hearing and preparatory steps. It added that, in the light of the confirmation that the three grant agreements had been entered into, the applicant sought an undertaking from the respondents that no payments would be made to Imperial and/or Empire pursuant to any grant agreement relating to the Program and the decisions the subject of review in the proceedings, before 31 December 2021.
4. Shortly before 5.00 pm, the AGS replied by way of an email stating that they would not be in a position to consent to the applicant’s proposed amended consent orders by 5.00 pm and that they were continuing to take instructions.

###  (b) Case management hearing on 14 September 2021 and the Quinn Affidavit

1. In the circumstance described above, the matter was urgently re-listed for a case management hearing on 14 September 2021: see *The Environment Centre NT Inc v Minister for Resources and Water* [2021] FCA 1121.
2. During the course of the case management hearing, and against the background of the exchange of correspondence described above, the Court asked the Commonwealth’s then counsel to explain why the Imperial Contracts had been entered into on 9 September and without prior notice to the applicant. The Commonwealth’s counsel responded by saying that she was “not in a position to provide an explanation for that”. When pressed as to why the applicant had not been given notice of the Contracts Decision, the Commonwealth’s counsel said that “all I can do at this stage is to apologise that that was not done, and events have occurred as they have occurred”.
3. Against that background, the Court ordered the Commonwealth to file and serve an affidavit, by 5.00 pm on 17 September 2021, from a person with knowledge of relevant events, which provided an explanation of the change in the Commonwealth’s position from that stated in the AGS letter dated 3 September 2021 to that stated in its letter of 13 September 2021, including as to the absence of notice of that change of position being given to the applicant. On the same day, the Court listed the matter for hearing for two days commencing on 2 November 2021 and directed the applicant to file and serve any amended originating application and concise statement by 21 September 2021. Orders were also made for the filing of evidence by the parties.
4. On 17 September 2021, the Commonwealth (not the Minister) filed an affidavit affirmed by Mr Daniel Thomas Quinn (the **Quinn Affidavit**). Mr Quinn is the General Manager of the Department’s Resources Strategy Branch, Resources Division. Mr Quinn chaired the assessment committee which assessed Imperial’s applications for grants. Mr Quinn deposed that he was authorised to make the affidavit on behalf of the Commonwealth. The affidavit was written largely on the basis of information and belief and purported to explain the circumstances surrounding the execution of the Imperial Contracts on 9 September 2021. It will be necessary to say something more concerning the evidentiary weight of the Quinn Affidavit.
5. At the trial, the Commonwealth tendered copies of the three grant agreements dated 9 September 2021. Each of the agreements was executed by Mr Stephen Stoddart on behalf of the Commonwealth. There is no issue that Mr Stoddart was an authorised delegate of the Minister and was authorised to enter into the Imperial Contracts. Mr Stoddart is described as holding the position of Program Management and Delivery in the Department. The contracts were signed by Mr Andrew Phillips on behalf of Imperial.
6. Mr Stoddart did not provide an affidavit at any stage of the proceeding. Apparently, the Commonwealth took a considered forensic decision not to adduce any direct evidence from the person who executed the Imperial Contracts on behalf of the Commonwealth, nor has that person given direct evidence as to his reasons for executing the Imperial Contracts on 9 September 2021 in contrast with the indications as to timing given in the AGS letter dated 3 September 2021.
7. Significantly, at the hearing of the substantive matter, neither party sought to read the Quinn Affidavit. Accordingly, Mr Quinn was not cross-examined. The Commonwealth’s senior counsel submitted, however, that the Quinn Affidavit had been provided at the Court’s direction and that the Court’s “access” to it “does not depend upon [the Commonwealth] reading it”. He said that the Court could have regard to the affidavit, even though it had not been read, if the Court “is still concerned about compliance with model litigant standards”. Senior counsel acknowledged that the affidavit had been provided at an interlocutory level and that it “was never produced in a form for the Commonwealth to just be able to rely upon in response to the substantive grounds”. Senior counsel then added:

MR HOWE: The final thing I will say, your Honour, is that to the extent that the explanation here might involve discoordination or wrong communication, the left arm and the right arm within multi-personnel agencies being unaware of what’s happening, that is to be regretted and that does not excuse the conduct, but it is relevant to an alternative explanation for the wrongdoing, and your Honour ought not accept the interpretation the applicant places on the events if there is an available alternative explanation.

1. I do not accept that it is open to me, in determining ground 5, to have regard to the Quinn Affidavit. As noted above, it was not read by any party in the proceeding. The Commonwealth presumably made a considered forensic decision not to seek to read the affidavit in the substantive hearing, possibly because large parts of it would be inadmissible in a final hearing.
2. I do not accept the Commonwealth’s submission that I am entitled to have regard to the Quinn Affidavit in assessing compliance with the Commonwealth’s common law model litigant obligations (noting that this issue formed part of the applicant’s challenge under ground 5). The affidavit was not formally read and was therefore not adduced into evidence at the substantive hearing: see, for example, *Sealed Air Australia Pty Ltd v Aus-lid Enterprises Pty Ltd* [2020] FCA 29; 375 ALR 324 at [177] per Kenny J; *Kingston v Australian Capital Territory* [2011] ACTSC 165 at [70]-[76] per Refshauge J and *Barristers’ Board (WA) v Tranter Corporation Pty Ltd* [1976] WAR 65 at 67 per Brinsden J. I consider that it would be erroneous in law for me to give it or any of its annexures which were not otherwise admitted into evidence any weight in determining ground 5.
3. Moreover, it is notable that the Commonwealth’s submissions regarding the significance of the Quinn Affidavit were limited to its suggested relevance to compliance with model litigant obligations. That topic formed only one part of the applicant’s challenge under ground 5 (see at [159] below). Significantly, the applicant made plain that ground 5 also included an allegation that the Contracts Decision was legally unreasonable, illogical and/or irrational. Nothing said on behalf of the Commonwealth indicated that I would be entitled to have regard to the Quinn Affidavit in respect of those allegations. I should make it clear that I have paid no regard to the Quinn Affidavit (including its annexures) in determining any aspect of ground 5.
4. Consequently, there is no evidence before the Court as to the reason why the Contracts Decision was made when it was. Thus this is not a case where, in determining a claim of legal unreasonableness, the Court is able to analyse the reasoning process of the delegate who made the Contracts Decision at the time that he did. Rather, this case attracts the alternative limb of legal unreasonableness, which focusses upon the outcome of the exercise of statutory power. The following observations of the Full Court in *Singh* at [45] are directly apposite (emphasis added):

**In circumstances where no reasons for the exercise of power, or for a decision, are produced, all a supervising court can do is focus on the outcome of the exercise of power in the factual context presented, and assess, for itself, its justification or intelligibility bearing in mind that it is for the repository of the power, and not for the court, to exercise the power but to do so according to law**. This was the position in, for example, *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353: see at 359-360. Where there are reasons, and especially where a discretion is being reviewed, the court is able to follow the reasoning process of the decision-maker through and identify the divergence, or the factors, in the reasons said to make the decision legally unreasonable.

### (c) The parties’ pleadings and submissions concerning ground 5 summarised

1. In light of the Commonwealth’s complaint that some parts of ground 5 as presented by the applicant were beyond the “pleadings” and involved procedural unfairness, it is necessary to spend a little time describing the applicant’s claims in support of ground 5.

#### The applicant’s pleadings and written submissions

1. The matters relied upon by the applicant in support of ground 5 were particularised in its further amended originating application, which was filed on 24 September 2021. They included the fact that the Contracts Decision was made against the background of the parties’ correspondence, including the letters and emails dated 3 and 8 September 2021 described above. Imperial was joined as the third respondent in the proceeding in the further amended originating application.
2. In the further amended originating application, the applicant claimed that the entry by the Commonwealth into the Imperial Contracts without prior notice to the applicant (or the Court):
3. constituted a breach of the Commonwealth’s obligations at common law to act as a model litigant; and/or
4. arose from a breach by the Secretary of the Department, acting on the Commonwealth’s behalf, to govern the Department in a way that promotes the proper use and management of public resources as required by s 15 of the *PGPA Act*; and/or
5. was legally unreasonable, illogical and/or irrational.
6. The applicant sought a declaration that the Contracts Decision is invalid and/or void, an order or writ quashing or setting aside the Contracts Decision and a declaration that the Imperial Contracts are void.
7. To further understand how the applicant put ground 5, it is necessary to refer to the applicant’s further amended concise statement, which was also filed on 24 September 2021. It confirmed that the applicant was challenging the lawfulness of the Contracts Decision. The bases of that claim as set out at [30] to [36] of the further amended concise statement are substantially similar to the relevant parts of the further amended originating application concerning ground 5.
8. The applicant’s outline of submissions filed on 19 October 2021 substantially repeated the relevant matters set out in the further amended originating application and further amended concise statement, subject to one qualification. Although the applicant persisted with its claim that the Contracts Decision was “legally unreasonable”, it stated in footnote 45 of its outline of submissions that it no longer relied upon the particulars concerning the Commonwealth’s model litigant obligations and s 15 *PGPA Act* (see [159] above), “save as indicators as to reasonable conduct in the circumstances”.

#### The Commonwealth’s pleadings and written submissions

1. The Commonwealth’s contentions regarding ground 5, as set out in its concise statement dated 5 October 2021 in response to the applicant’s further amended concise statement, may be summarised as follows. First, it submitted that its obligations at common law to act as a model litigant are not a matter which gives rise to or reaches any substantive legal right or interest of the applicant. Nor does it impinge on the Commonwealth’s ability to exercise and enforce its substantive rights, such as entering into the Contracts Decision (citing ***Wodrow*** *v Commonwealth* [2003] FCA 403; 129 FCR 182 at [42] and [43] per Stone J; *Australian Securities and Investments Commission v* ***Hellicar***[2012] HCA 17; 247 CLR 345 at [240] per Heydon J and ***Elston*** *v Commonwealth* [2014] FCA 704 at [72] per Katzmann J).
2. Secondly, if the applicant was seeking to deploy the Quinn Affidavit, the Commonwealth contended that it was being deployed for a different purpose than that which led to the issue of the Court’s direction made on 14 September 2021. I interpolate that nothing more needs to be said about that contention because the Quinn Affidavit was not read by any party at the substantive hearing.
3. Thirdly, the Commonwealth contended that the delegate’s power to enter into the Imperial Contracts under s 34 of the *IRD Act* was not conditioned upon any of the following matters:
4. the Minister having first given approval for any proposed expenditure under prospective arrangements;
5. the Commonwealth acting as a model litigant in these proceedings; and/or
6. the Secretary governing the Department consistently with s 15 of the *PGPA Act* (which, in any event, was denied).
7. In its outline of written submissions dated 26 October 2021, in response to ground 5, the Commonwealth emphasised that a claim of legal unreasonableness did not justify the Court determining for itself how the power should have been exercised or whether the Court would have exercised the discretion differently. Proper allowance had to be made for the fact that there is “an area within which the decision-maker has a genuinely free discretion which resides within the bounds of legal reasonableness” (citing *SZVFW* at [58] per Gageler J and at [86] and [97] per Nettle and Gordon JJ). The Commonwealth contended that the Contracts Decision was not legally unreasonable merely because the applicant had been told six days prior to the execution of the agreements that the agreements “would be made in 14 to 21 days instead of six and the applicant was not then informed of the changed position”. It repeated that the conduct of litigation is not a condition of the validity of action taken under s 34(1) of the *IRD Act* nor are common law model litigant obligations and compliance with s 15 of the *PGPA Act*. It said that these matters do not bear upon the legal reasonableness of decisions made under s 34 of the *IRD Act*.

### (d) The hearing and ground 5

#### The applicant’s oral address

1. The applicant’s oral address in respect of ground 5, which was put by Mr Jones, may be summarised as follows. First, he submitted that there was no evident and intelligible justification for the Commonwealth to have entered into the Imperial Contracts on 9 September 2021. Secondly, because of the controversy which it generated, it is appropriate to note the following submission made by Mr Jones (emphasis added):

And the second area of significance is that we say – **we say your Honour doesn’t need to go this far**, but nevertheless, we do say that your Honour should – the evidence before the court justifies an inference that these contracts were entered into in order to stymie the litigation and to lock the contracts in before this court had an opportunity to determine whether the Commonwealth had power to enter into them. And the absence of any evidence, including an attempt to rely on the affidavit of Mr Quinn, is something that would give comfort to your Honour in drawing the inference that we say is available on the material before you.

1. Thirdly, Mr Jones said the applicant itself did not read the Quinn Affidavit because he considered that it was sufficient that the chronology of events provided the basis for drawing the inference described above. Mr Jones then described the chronology of events relevant to the applicant’s claims under Ground 5, which included: the fact that in the Commonwealth’s concise statement dated 30 August 2021, it was said that no contracts had been entered into with Imperial; the contents of the AGS’s letter dated 3 September 2021; the applicant’s solicitor’s letter dated 7 September 2021; the AGS email dated 8 September 2021 (where the AGS stated that it was seeking instructions from the Minister personally on the applicant’s proposal to have the matter re-listed to seek an expedited hearing); and having the matter re-listed on 14 September 2021.
2. Mr Jones submitted that the Quinn Affidavit “is now essentially irrelevant in the sense that no party is reading it before your Honour”. As stated above, I accept that submission.
3. After referring to these and other matters, including the Commonwealth’s response to the applicant’s notice to produce dated 1 October 2021 (which ultimately was not pressed by the applicant and in respect of which nothing more needs to be said), Mr Jones made the following submissions (emphasis added):

So your Honour, everything in the evidence before the court pointed in favour of not entering into the contracts on the day they were entered into, and nothing has been advanced by the Commonwealth which would provide an evident or intelligible justification for entering into them on that date and there is indeed no such justification. Now, your Honour, **I flagged earlier that in my submission, your Honour doesn’t need to go this far**. But the evidence, in my submission, also supports an inference that there is a causal relationship between the applicant’s communication seeking expedition and interim relief on the one hand and the entry into the contracts on the other, and that the contracts were entered into on 9 September not because of a legitimate and urgent need arising from the program itself, but in order to stymie the applicant’s claims in this litigation, and in an effort to get the contract locked in before this court have the opportunity to determine whether the Minister had the power to enter into them in the first place.

1. In response to a question from the Court, Mr Jones confirmed that the applicant was not alleging bad faith, but that its case was that there was no evident and intelligible justification for the Commonwealth’s decision and actions in executing the Imperial Contracts on 9 September 2021.

#### The Commonwealth’s oral address

1. The Commonwealth’s primary submissions in oral address regarding ground 5 may be summarised as follows. First, the Commonwealth submitted that the applicant’s case alleging unreasonableness relied not only upon objective facts concerning the course of the litigation and the exchange of correspondence, but also by reference to a “newly-added allegation about the subjective state of mind” of Mr Stoddart or the Minister. Senior counsel clarified that this referred to the applicant’s claim that the Contracts Decision were provoked by “a desire to interfere with the applicant’s access to the court to obtain orders to protect its interests”. The Commonwealth contended that, as a matter of substance, this complaint of legal unreasonableness involved an allegation that “is unquestionably an allegation that is serious that involves an absence of good faith”. The Commonwealth submitted that any allegation of subjective wrongdoing with respect to the timing of the Contracts Decision had not been adequately pleaded.
2. I do not consider that the applicant’s case regarding ground 5 went so far as to include such an allegation, as was made clear by Mr Herzfeld SC in his oral address in reply. Mr Herzfeld said:

MR HERZFELD: … We do not need from your Honour a finding that the reason the Commonwealth entered into the contracts was to stymie the applicant’s case. What we say is this is an obvious inference from the events, and, in the face of that inference, it’s incumbent on the Commonwealth to explain why those events happened, if there is some intelligible justification, and that has not occurred either by the reading of Mr Quinn’s affidavit or by the producing of documents in response of our notice to produce …

…

… But the point is that in light of the damning chronology it is for the Commonwealth to explain why it did what it did, and it has read no evidence before your Honour seeking to do so. And so, in those circumstances, your Honour ought to conclude that there was no evident or intelligible justification for the contracts to be entered into at the time they were, and it is telling in this regard that Mr Howe ventured no explanation to your Honour whatsoever by reference to the matters in evidence before your Honour why the contracts were entered into when they were, and that silence speaks volumes.

1. Secondly, the Commonwealth emphasised that the statement in the 3 September 2021 letter to the timing of the contracts being executed “was expressed by reference to an anticipation, not an assertion, that nothing was going to happen”.
2. Thirdly, through its senior counsel, the Commonwealth accepted that: “what happened involved a departure from model litigant standards”; “the Commonwealth did not cover itself in glory, and it fell short of this court’s judicial expectations of the Commonwealth as a model litigant”; and “what happened involved disrespect to the court and disrespect to the applicant, and the Commonwealth has apologised for that”.
3. Fourthly, through its senior counsel, the Commonwealth accepted that the effect of the entry into the Imperial Contracts on 9 September 2021 denied the applicant an opportunity to come to the Court to seek interlocutory relief. It submitted, however, that if the applicant had sought interlocutory relief to preclude the contracts from being executed, it would have had to give an undertaking as to damages. Moreover, the Commonwealth submitted that there was no evidence that the applicant intended to make any application for interlocutory relief and simply reserved its position in respect of that possibility. Senior counsel then added:

MR HOWE: … Now, your Honour might think that that’s nit-picking, but with respect, there’s a substantial difference. There was never at any point an expression of an intention to actually seek interlocutory relief, and one would not have to wonder why that intention might not have ever existed and hasn’t been the subject of evidence, and that is because any such application would have attracted the inevitable quid pro quo of an undertaking as to damages.

1. Fifthly, the Commonwealth acknowledged, however, that its conduct in entering into the Imperial Contracts, against the background of the exchange of correspondence concerning that subject, was relevant to the applicant’s case of legal unreasonableness. It accepted that the entry into the Imperial Contracts “put the opportunity to seek an injunction to prevent that very thing beyond reach”. The Commonwealth’s senior counsel explicitly stated, however, that the Commonwealth did not accept that this “state of affairs was brought about as a result of the subjective state of mind of anyone in the Commonwealth that was determined upon that course of action”.
2. Sixthly, the Commonwealth submitted that its conduct in litigation was not relevant to the exercise of the statutory power under s 34 of the *IRD Act*, nor did it produce invalidity in the exercise of that power. It said that it was open to the applicant to seek interlocutory injunctive relief preventing the payment of any money under the Imperial Contracts. Senior counsel then confirmed his earlier acknowledgement that what had happened should not have happened. He added (emphasis added):

MR HOWE: … What the Commonwealth should have done when the opportunity to enter the contracts was brought forward was to write to the applicant and give them notice – reasonable notice – of that so that they could make an application for interlocutory relief, and the Commonwealth could attach a time limit to it, and that should have happened, your Honour, and it didn’t and **that was quite regrettable conduct that involved a departure from model litigant standards** …

1. Finally, the Commonwealth submitted that it was well established that Ministers occupy particular and special positions and that the Court should not properly expect their availability and willingness to file affidavits in connection with issues that arise in the course of proceedings concerning matters in their portfolio (citing *EWV20 as litigation representative for AFF20 v Minister for Home Affairs (No 3)* [2021] FCA 866 at [66] per Griffiths J and the Full Court’s observations in *Commonwealth v Fernando* [2012] FCAFC 18; 200 FCR 1 at [113] ff per Gray, Rares and Tracey JJ).
2. In his oral submissions in reply, Mr Herzfeld SC said that the applicant did not know that the Commonwealth proposed not to read the Quinn Affidavit at the final hearing until 21 October 2021. Mr Herzfeld explained that, in that context, the applicant provided its written submissions in reply and, in particular, [33] to [35] thereof. To make good ground 5, the applicant relied upon inferences to be drawn from the events that occurred and the fact that the Commonwealth had failed to provide any evidence which demonstrated that there was an evident and intelligible justification for the Commonwealth entering into the Imperial Contracts on 9 September 2021.

## Consideration and determination of ground 5

### (a) Some relevant principles summarised

1. The plurality judgment in ***Li*** (Hayne, Kiefel and Bell JJ) makes it clear at [76] that, unless the implied condition of legal reasonableness has been displaced, a decision made in the exercise of a statutory power is unreasonable in the legal sense when it lacks “an evident and intelligible justification”. To similar effect, French CJ stated at [28] that a decision is legally unreasonable if it is arbitrary, capricious or devoid of common sense. Further, as Kiefel CJ stated in *SZVFW* at [10], legal unreasonableness may be established “where a decision is one which no reasonable person could have arrived at, although an inference of unreasonableness can only be drawn where a decision appears to be irrational”.
2. Some of the other relevant legal principles relating to judicial review for legal unreasonableness or irrationality are summarised at [118] and [119] of my reasons for judgment in *National Home Doctor Service Pty Ltd v Director of Professional Services Review* [2020] FCA 386; 276 FCR 388, which I understood no party in the present proceeding to dispute:

118 The parties were in general agreement as to the relevant principles guiding the application of these grounds for judicial review. Leading relevant cases include *Minister for Immigration and Citizenship v* ***Li*** [2013] HCA 18; 249 CLR 332; *Minister for Immigration and Citizenship v* ***SZMDS*** [2010] HCA 16; 240 CLR 611; *Minister for Immigration and Border Protection v* ***SZVFW*** [2018] HCA 30; 264 CLR 541; ***Plaintiff M64/2015*** *v Minister for Immigration and Border Protection* [2015] HCA 50; 258 CLR 173; *Minister for Immigration and Border Protection v* ***Stretton*** [2016] FCAFC 11; 237 FCR 1 and *Minister for Immigration and Border Protection v* ***Singh*** [2014] FCAFC 1; 231 FCR 437.

119 Some of the relevant principles which emerge from those cases may be summarised as follows:

(a) Both grounds of judicial review are stringent and confined and require the judicial review court “to assess the quality of the administrative decision by reference to the statutory source of the power exercised in making the decision” (*SZVFW* at [79] per Nettle and Gordon JJ) and on the basis of the factual information before the decision-maker (*Stretton* at [7]-[13]).

(b) Where reasons are provided, as is the case here with respect to both the ss 89C and 93 reports, they are the focal point for the assessment of legal unreasonableness (*SZVFW* at [84] per Nettle and Gordon JJ and *Singh* at [47] per Allsop CJ, Robertson and Mortimer JJ).

(c) Although the standard of legal unreasonableness applies across a range of statutory powers, the indicia of legal unreasonableness must be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case and the reasoning process in review for legal unreasonableness is inevitably fact dependent (*Singh* at [48]).

(d) Legal unreasonableness can either be “outcome focussed” (without necessarily identifying another underlying jurisdictional error) or it can focus on an examination of the reasoning process by which the decision-maker arrived at the exercise of power (*Singh* at [44]-[47]).

(e) In a case where a decision-maker’s statutory function calls for a “broad and subjective” evaluation, the task of demonstrating the requisite lack of an “evident and intelligible justification” becomes a “virtually insuperable hurdle” (*Plaintiff M64/2015* at [55]-[57]).

(f) Legal unreasonableness requires the Court to acknowledge that there is “an area of decisional freedom” vested in the decision-maker in exercising a statutory discretionary power (*Li* at [28] per French CJ and *Singh* at [44]).

1. The limits of statutory power and the limits of the Court’s judicial review function are critical matters. As Allsop CJ stated in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at [7] and [8] (emphasis added):

7 … There is “an area of decisional freedom” of the decision-maker, within which minds might differ. The width and boundaries of that freedom are framed by the nature and character of the decision, the terms of the relevant statute operating in the factual and legal context of the decision, and the attendant principles and values of the common law, in particular, of reasonableness …

8 The content of the concept of legal unreasonableness is derived in significant part from the necessarily limited task of judicial review. **The concept does not provide a vehicle for the Court to remake the decision according to its view as to reasonableness (by implication thereby finding a contrary view unreasonable). Parliament has conferred the power on the decision-maker. The Court’s function is a supervisory one as to legality: see *Li* at [30], [66] and [105]**.

1. It is also desirable to set out some important principles emphasised by the Full Court (Rares, Anastassiou and Stewart JJ) in *Stewart v Minister for Immigration, Citizenship, Migrant Service and Multicultural Affairs* [2020] FCAFC 196; 281 FCR 578 at [65] and [66], with particular reference to the important need for judicial self-restraint in reviewing administrative action for legal unreasonableness:

65 The ground of judicial review known as “legal reasonableness” derives from a statutory implication. The implication that a statutory power be exercised within the bounds of (legal) reasonableness arises through a common law presumption: *ABT17* at [19]; *Li* at [29] per French CJ, [63] per Hayne, Kiefel and Bell JJ and [88] per Gageler JJ; *SZVFW* at [53] per Gageler J, [80] per Nettle and Gordon JJ and [131] per Edelman J. Where a statutory power is exercised in a manner that is legally unreasonable, the exercise of the power is beyond the jurisdiction conferred upon the repository of that power; that is, the repository committed a jurisdictional error: *SZVFW* at [51] per Gageler J and [80] per Nettle and Gordon JJ. There are different ways of formulating the expression of legal reasonableness. These include that unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification (*Li* at [76]), and that reasonableness is the minimum to be expected of any reasonable repository of the power (*SZVFW* at [52] and [134]). It has been repeatedly emphasised that the test for unreasonableness is necessarily stringent (*Li* at [108]; *SZVFW* at [108]). In *ABT17* at [19] Kiefel CJ, Bell, Gageler and Keane JJ said:

[t]he implied condition of reasonableness is not confined to why a statutory decision is made; it extends to how a statutory decision is made” [quoting Li at [91]] such that “[j]ust as a power is exercised in an improper manner if it is, upon the material before the decision-maker, a decision to which no reasonable person could come, so it is exercised in an improper manner if the decision-maker makes his or her decision in a manner so devoid of plausible justification that no reasonable person could have taken that course” [*Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 273 at 290, citing *Prasad v Minister for Immigration and Ethnic Affairs* [1985] FCA 46; 6 FCR 155 at 169-170, cf *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; 83 ALJR 1123 at [20]-[25]].

66 Importantly for present purposes, French CJ held in *Li* as follows (at [30]):

The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker.

1. The confined nature of the Court’s task in reviewing the exercise of power for legal unreasonableness was also emphasised by Nettle and Gordon JJ in *SZVFW* at [80] (footnotes omitted, emphasis in original):

Parliament is taken to intend that a statutory power will be exercised reasonably by a decision-maker. The question with which the legal standard of reasonableness is concerned is whether, in relation to the particular decision in issue, the statutory power, properly construed, has been *abused* by the decision‑maker or, put in different terms, the decision is beyond power. That question is critical to an understanding of the task for a court on review.

1. Reference should also be made to French CJ’s observations in *Li* at [30] where, after referring to the joint judgment of Gleeson CJ and McHugh J in *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611, the Chief Justice said that characterisation of a person’s reasoning as illogical or unreasonable may simply be an emphatic way of expressing disagreement with it and “may have no particular legal consequence”.
2. The Full Court’s recent judgment in *Davis* contains further helpful guidance with respect to legal unreasonableness (see at [30]-[39] per Kenny J, [80]-[81] per Griffiths J and [292] ff per Charlesworth J). It is well to repeat what Kenny J said in *Davis* at [36]:

For all these reasons, subject to general constitutional and common law constraints (some of which are mentioned below) and any applicable statutory limitations, there should be no continuing doubt that an exercise of executive power (whatever its source) is amenable to judicial review on the unreasonableness ground. Such an exercise of power may be challenged on this ground either because the reasons given by the decision-maker disclose no “intelligible justification” in the *Li* sense or because the outcome is such that the circumstances disclose legal unreasonableness, as in *Rooke’s Case* referred to earlier. The long common law history of the unreasonableness ground confirms that it is separate and distinct from the procedural fairness ground. In the context of these appeals, the fact that the decision of the High Court in *Plaintiff S10/2011* precludes reliance on the procedural fairness ground in relation to the decisions under challenge does not of itself prevent reliance on the unreasonableness ground.

### (b) Application of those principles

1. For the following reasons I find that, having regard to the circumstances and context in which it occurred, the Commonwealth’s decision to enter into the Imperial Contracts on 9 September 2021 was unreasonable in the legal sense (hence it is unnecessary to also consider the applicant’s alternative claims of irrationality and/or illogicality).
2. First, because the Commonwealth elected not to call the relevant decision-maker (Mr Stoddart), nor provide any admissible evidence explaining the reasons for the timing of the Contracts Decision, the limb of unreasonableness which arises here is that which focusses on the outcome of the decision-making process. I am not suggesting that there was any obligation on the Commonwealth to call Mr Stoddart as a witness or otherwise explain the timing of his decision. The applicant carries the onus of making good ground 5. The point I am making is that determination of ground 5 does not turn on an analysis of the Commonwealth’s reasoning process (which has not been revealed), but rather by reference to the outcome: see *Singh* at [44]-[47].
3. Secondly, as emphasised above, the applicant confirmed several times during the course of the trial that ground 5 did not require the Court to find that there was a subjective intention (presumably on Mr Stoddart’s part) to execute the Imperial Contracts on 9 September 2021 in order to stymie the litigation. Nevertheless, the applicant invited the Court to draw such an inference from the events which occurred. I am not prepared to draw any such inference. Even if the applicant’s case is not properly characterised as one alleging bad faith (which it expressly disavowed), I accept the Commonwealth’s submission that an allegation of a subjective intention on the part of the Commonwealth to stymie this part of the litigation is a very serious allegation. As I have stated, Mr Stoddart did not give evidence nor is there any admissible evidence before the Court which discloses the Commonwealth’s reasons for executing the Imperial Contracts on 9 September 2021. I am not prepared to infer from the surrounding circumstances and the events that occurred that there was any such subjective intention.
4. Thirdly, and significantly, that is not, however, the end of the applicant’s case under ground 5. The “subjective intention” claim was the high point of that case. As outlined above, the applicant also argued that the Contracts Decision was legally unreasonable because of the circumstances in which it occurred and the effect it had on the extant litigation. It contended that there was no evident and intelligible justification for the timing of the Contracts Decision. That alternative case should be accepted for reasons which I will now elaborate upon.
5. The applicant put the Commonwealth on clear notice of its concern that the execution of the Imperial Contracts be deferred until after the applicant’s challenge to the validity of the Instrument and Approval Decision were finalised. That concern was raised by the applicant’s solicitor in the correspondence described above, commencing with the letter dated 28 July 2021. The applicant’s solicitor sought an undertaking from the Minister in the terms set out in that letter at [131] above. The applicant was informed by the AGS letter dated 3 September 2021 that it was instructed that the Minister intended to enter into a grant agreement with Imperial and the AGS added that it “anticipated” that this will occur within the next “2-3 weeks”. To the Commonwealth’s knowledge the applicant then took prompt steps to seek to have the proceeding expedited to enable its judicial review claim “to be determined on an expedited basis prior to the Minister entering into any agreement with [Imperial]” (7 September 2021 letter).
6. The applicant’s solicitor also made clear in her letter dated 7 September 2021 to the AGS that the applicant’s position was that “it would be contrary to the interests of justice for an agreement to be entered into in circumstances where the question of the Minister’s power to enter any such agreement is before the Court, particularly where the matter can now be resolved swiftly”.
7. The exchange of correspondence on these matters is outlined at [129] to [145] above and need not be repeated. In brief, however, the applicant was told by the AGS that it was having difficulty obtaining instructions from the Minister personally on the question *inter alia* of an undertaking not to enter into any contract with Imperial because he was not available. The applicant’s solicitor made clear in her email to the AGS which was sent at approximately 3.00 pm on 9 September 2021 that the applicant was prepared to agree to case management orders with a view to achieving an expedited hearing, but on the basis that the Commonwealth agreed not to enter into any contracts with Imperial in the meantime. The letter stated that, absent the proffering of such an undertaking by the Commonwealth, the applicant reserved its rights to seek interlocutory injunctive relief.
8. Having regard to the terms of this correspondence, a reasonable inference can be drawn that the applicant’s solicitor was expecting a prompt response from the Commonwealth, including to the repeated requests for the Minister to give an undertaking not to enter into any contract pending finalisation of the proceeding. Such an expectation was reasonable in the circumstances.
9. Despite these matters, sometime on 9 September 2021, and without giving prior notice to the applicant, the Commonwealth (and Imperial) entered into the Imperial Contracts.
10. In the context of the litigation which was on foot and the correspondence described, the Commonwealth’s conduct in entering into the Imperial Contracts on 9 September 2021 was legally unreasonable or capricious. In particular:
11. the Commonwealth entered into the Imperial Contracts at a time when it was known, or ought reasonably to have been known, that the applicant had sought an undertaking from the Minister that this would not occur pending finalisation of the judicial review proceeding and the applicant was told that there were difficulties obtaining instructions from the Minister on this and related matters;
12. the applicant was led to believe by the AGS letter dated 3 September 2021 that, although the Minister had instructed the AGS that he intended to enter into an agreement with Imperial, it was “anticipated” that this would not occur for 2-3 weeks from 3 September 2021. Read in context, this “anticipation” must have been based on instructions given to the AGS by a Commonwealth officer; and
13. no evident and intelligible justification is evident for the Commonwealth’s decision to enter into the Imperial Contracts on 9 September 2021 and notwithstanding the fact that, at that time, the Commonwealth had not provided a substantive response to the applicant’s request that the Commonwealth give an undertaking not to execute any contract with Imperial pending finalisation of the judicial review proceeding.
14. If the applicant had been given prior notice of the Contracts Decision it could have sought urgent interlocutory injunctive relief, consistently with what its solicitor had said in the correspondence described above. The timing of the Contracts Decision had the effect of depriving the applicant of that opportunity and right.
15. I reject the Commonwealth’s submission that the significance of this right and/or opportunity was of little or no consequence because the applicant would have struggled to give an undertaking as to damages. In my view, it is far from clear that such an undertaking would have been required in the circumstances of this case, which could properly be described as public interest litigation: see, for example, *Yoong v Director, Professional Services Review* [2021] FCA 1445 at [26]-[38] per Collier J and the cases referred to by her Honour.
16. The applicant had made plain to the Commonwealth its view that the validity of any contract depended on the validity of the Instrument and the Approval Decision. Naturally, to obtain interlocutory injunctive relief, the applicant would have also needed to satisfy the Court that there was a serious question to be tried. The strength of any such question could have affected the balance of convenience. Consideration would also need to have been given to the effect of the grant of interlocutory injunctive relief on Imperial’s rights and expectations. As is evident from the lengthy discussion above of the applicant’s claims regarding the validity of the Instrument and the Approval Decision, the issues raised were strongly arguable (even if they have not prevailed).
17. I reject the Commonwealth’s submissions that the applicant’s lost opportunity to seek interlocutory injunctive relief was effectively meaningless. The effect of the Contracts Decision was to deprive the applicant of the right to seek the type of injunctive relief identified by the plurality in ***Project Blue Sky*** *Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [100] per McHugh, Gummow, Kirby and Hayne JJ. That right would have been available to the applicant if it were able to demonstrate that there was a serious question to be tried that the Instrument and Approval Decision contravened relevant statutory provisions, even if any such contravention did not produce invalidity in respect of the Instrument or the Approval Decision (or, indeed the Imperial Contracts themselves).
18. Nor do I accept the Commonwealth’s submission that the timing of the Contracts Decision was not legally unreasonable because the applicant could still seek to restrain the Commonwealth from making any payments of grant money to Imperial. In the circumstances described above, the timing of the Contracts Decision deprived the applicant of a meaningful opportunity to seek urgent interlocutory injunctive relief restraining the Commonwealth from executing the Imperial Contracts. I do not accept that the applicant’s legal rights and interests were sufficiently protected by its opportunity to seek such relief in respect of a subsequent and related step, namely the payment of grant monies. Furthermore, stronger discretionary considerations against the grant of interlocutory relief could arise if the subject of challenge was confined to the payment of the grant monies under the Imperial Contracts.
19. I shall now explain why I reject the balance of the Commonwealth’s submissions regarding ground 5.
20. First, having regard to ss 55ZG(2) and (3) of the *Judiciary Act*, I accept that compliance with the Commonwealth’s *Legal Services* ***Directions*** *2017* is not enforceable except by or upon the application of the Attorney-General and that the issue of non-compliance with any of those Directions may not be raised except by, or on behalf of, the Commonwealth: see ***Caporale*** *v Deputy Commissioner of Taxation* [2013] FCA 427; 212 FCR 220 and *Tran v Minister for Home Affairs* [2019] FCA 1126 at [34], where Derrington J stated that nothing mentioned in the very high standards of professional conduct set out in the *Legal Services Directions 2017* “creates rights for other parties to the litigation”.
21. But as Slattery J stated in *Secretary, Department of Social Services v Cassaniti (No 2)* [2015] NSWSC 1795 at [27], the *Directions* do not prevent a Court from considering whether the Commonwealth has complied with the Court’s expectation at general law that the Commonwealth will, and will be seen to, act as a model litigant. This also accords with Robertson J’s acceptance in *Caporale* at [51] of the following submission advanced by the respondent:

To the extent that the common law has recognised any principles that govern or regulate the conduct of bodies politic or other public bodies involved in litigation (as to which see *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342; *Scott v Handley* (1999) 58 ALD 373 at [43]–[44]), ss 55ZG(2) and (3) say nothing about who may seek to agitate, rely upon or enforce obligations said to arise under such principles forming part of the common law.

The sole effect of ss 55ZG(2) and (3) is in relation to obligations that arise under Legal Services Directions made under s 55ZF of the Judiciary Act.

1. The origins of common law model litigant obligations are traced in Michelle Taylor-Sands and Camille Cameron, “‘Playing fair’: government as litigants” (2007) 26 *Civil Justice Quarterly* 497 and Gabrielle Appleby, “The Government as Litigant” (2014) 37(1) *UNSW Law Journal* 94.
2. As the High Court’s decision in *Hellicar* demonstrates, while it may be accepted that the Commonwealth and its agencies, as model litigants, are obliged to conduct proceedings fairly, there is a need for caution in defining the content of any such duty and in identifying any non-compliance and its consequences. The High Court held that the duty did not extend to compelling ASIC to call a particular witness in the circumstances of that litigation. At [240], Heydon J noted that the Solicitor-General for the Commonwealth:

… correctly submitted that the duty to act as a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act fairly, with complete propriety and in accordance with the highest professional standards, but within the same procedural rules as govern all litigants. But the procedural rules are not modified against model litigants – they apply uniformly.

1. It is uncontroversial that the Commonwealth’s failure to meet expectations of conduct of a model litigant may be a relevant consideration in determining costs orders (see, for example, *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd (No 2)* [2010] FCA 1224; 190 FCR 11 at [48] per Logan J). In addition, there are some instances where common law model litigant standards have been applied more broadly. Thus, the Full Court made the following relevant observations regarding the common law obligations of a Commonwealth officer as a model litigant in ***Scott*** *v Handley* [1999] FCA 404; 58 ALD 373 at [43]-[45] (per Spender, Finn and Weinberg JJ):

43 … [A Commonwealth officer] is to be expected to adhere to those standards of fair dealing in the conduct of litigation that courts in this country have come to expect — and where there has been a lapse therefrom, to exact — from the Commonwealth and from its officers and agencies. The spirit of this “model litigant” responsibility, now long enshrined in a policy document of the Commonwealth, is perhaps best captured in the observations of Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342:

I am sometimes inclined to think that in some parts — not all — of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.

44 Insistence upon that standard is a recurrent theme in judicial decisions in this country in relation to the conduct of litigation by all three tiers of government: see eg *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155 at 166; 144 ALR 695; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 196–7; 146 ALR 1; *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346 at 368; 139 ALR 595; *Director of Public Prosecutions (Cth) v Saxon* (1990) 28 NSWLR 263 at 267; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 558-559; *P & C Cantarella Pty Ltd v Egg Marketing Board* *(NSW)* [1973] 2 NSWLR 366 at 383–384; see also *R v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd* [1988] AC 858 at 876–7.

45 As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases. The courts have, for example, spoken positively of a public body’s obligation of “conscientious compliance with the procedures designed to minimise cost and delay”: *Kenny’s* case, above, at 273; and of assisting “the court to arrive at the proper and just result”: *P & C Cantarella Pty Ltd v Egg Marketing Board*, above, at 383. And they have spoken negatively, of not taking purely technical points of practice and procedure: *Yong’s* case, above, at FCR 166; of not unfairly impairing the other party’s capacity to defend itself: Saxon’s case, above, at 268; and of not taking advantage of its own default: *SCI Operations Pty Ltd*,above, at FCR 368*.*

1. In *Scott,* non-compliance by a Commonwealth officer with model litigant obligations was seen to be relevant to the Full Court upholding an appeal from the trial judge’s refusal to grant an adjournment. In particular, the Full Court found (at [46]) that the conduct of a Commonwealth officer (the Secretary of a Commonwealth Department) in the litigation below had “fallen considerably short of the standard properly to be expected of the Commonwealth”. The Full Court was highly critical of the fact that the Commonwealth officer had not informed the trial judge of several defaults on his part in complying with the Court’s case management orders, which had the effect of withholding from the trial judge a matter which was material to his decision whether or not to grant an adjournment. The Full Court said at [48] that if the trial judge had been informed of the Commonwealth officer’s default, the trial judge “may well, and probably would, have taken an entirely different view of the adjournment application”. Accordingly, the appeal was allowed.
2. In the circumstances here, it is also relevant to note what Mahoney J said in *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 at 383 (emphasis added):

A duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, **or afford the citizen the opportunity of approaching the court, to clarify the matter**. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result.

1. As noted at [162] above, the applicant made clear in its pre-hearing outline of written submissions that it no longer relied upon the particular in its original originating application concerning the Commonwealth’s model litigant obligations (as well as the alleged contravention of s 15 of the *PGPA Act*) “**save as an indicator as to reasonable conduct in the circumstances**” (emphasis added). That more limited relevance of the Commonwealth’s common law model litigant obligations should be accepted. Where the Commonwealth or one of its officers or agencies is under a statutory duty to act reasonably in the exercise of a discretionary power (as is the case with s 34 of the *IRD Act*), the failure to comply with common law model litigant standards may inform the Court’s assessment as to whether the exercise of that statutory power was unreasonable in a legal sense. Naturally, each case will necessarily turn upon its own particular facts and circumstances. Not every departure from common law model litigant standards will lead to a conclusion of legal unreasonableness. The significance of the departure and the circumstances and context in which it occurred are all important matters.
2. Secondly, as a matter of statutory construction, the Commonwealth’s submission that the conduct of litigation is not a condition of the validity of the exercise of a power under s 34(1) of the *IRD Act* is well made. But it misses the point. The exercise of that statutory power is subject to an implied condition of legal reasonableness. In the particular circumstances here, the statutory power was exercised in the context of litigation which was on foot and involved the Commonwealth. Accordingly, the Commonwealth’s conduct in that litigation forms part of the relevant factual context in which to assess whether the power under s 34 has been exercised unreasonably in the legal sense.
3. Thirdly, the Commonwealth properly emphasised the need to make proper allowance for the concept of there being an area of “decisional freedom” in exercising a statutory power to which is attached a requirement of legal reasonableness. I fully accept that judicial intervention would not be justified merely because the Court disagreed with the merits of the timing of the Contracts Decision. Having regard to the relevant legal principles outlined above, I have addressed the issue of legal unreasonableness as one of power, and not merits.
4. Fourthly, the Commonwealth’s submissions regarding the need for the Court to take into account practical and pragmatic considerations bearing upon a Minister’s availability or willingness to provide affidavits in judicial review proceedings are well made. But they have no bearing here. The Contracts Decision was made by a delegate of the Minister. Moreover, I repeat what is said above regarding the Commonwealth’s decision not to call Mr Stoddart as a witness, with particular reference to the applicant’s onus of establishing jurisdictional error.
5. Fifthly, I do not consider that the three authorities relied upon by the Commonwealth (see [163] above) support any proposition that, as part of the relevant context in assessing whether the Commonwealth’s exercise of power is legally unreasonable, no regard can be paid to whether its conduct (in exercising its substantive rights) is inconsistent with its common law obligations as a model litigant. *Hellicar* is properly understood as a case where the appeal was allowed because the High Court held that ASIC’s failure to call a particular witness was not in breach of model litigant obligations. *Wodrow* stands for the proposition that the Commonwealth’s role as a model litigant does not impinge on its ability to enforce its substantive rights, but can influence the way in which it conducts litigation. The observations of Stone J in *Wodrow* referred to by the Commonwealth were also made in the specific context of determining whether the Commonwealth’s role as a model litigant was relevant to an assessment of costs. Likewise, *Elston* is a case that was directed to whether the Commonwealth’s status as a model litigant was inconsistent with it pursuing an application for security for costs, a context which is different from that here.
6. Sixthly, as to the Commonwealth’s submission that the AGS letter dated 3 September 2021 merely referred to an “anticipation”, when that statement is viewed in the context of the letter as a whole and, in particular, the reference to AGS having obtained instructions from the Minister, it is reasonable to construe that word as referring to the Minister’s then present intention and not merely some vague hope or aspiration.
7. For these reasons, I find that the Contracts Decision was legally unreasonable. No question arises as to the materiality of that error so as to avoid it being characterised as a jurisdictional error. Applying the approach in *Project Blue Sky* at [91] per McHugh, Gummow, Kirby and Hayne JJ, I accept the applicant’s submission that, where jurisdictional error is established in the exercise of the power under s 34 of the *IRD* Act, the Contracts Decision is invalid and, consequently, the Imperial Contracts themselves are void.
8. In the next section of these reasons for judgment I will address the relief to which the applicant is entitled having regard to this jurisdictional error, including the question whether or not the Court should exercise its discretion not to grant any relief having regard, among other things, to Imperial’s position.

### (c) The question of relief

1. Imperial contended that if the Court found the Contracts Decision to be invalid, it should nevertheless refuse relief in the exercise of its discretion. There is no dispute that the Court has a discretion to decline to grant declaratory relief: see, for example, *Bechara v Bates* [2021] FCAFC 34; 338 ALR 414 at [157]-[164] per Allsop CJ, Markovic and Colvin JJ. At [164], the Full Court set out a non-exclusive list of examples of instances in which the discretion to withhold relief has been exercised:

The following are examples of the discretion not to grant relief: unreasonable delay in bringing the application for relief: *R v Australian Broadcasting Tribunal; Ex parte Fowler* (1980) 31 ALR 565; where an appeal lies which has not yet been pursued: *R v Gray; Ex parte March* [1985] HCA 67; 157 CLR 351 at 375; *McGowan v Migration Agents Registration Authority* [2003] FCA 482; 129 FCR 118; where there is a suitable alternative remedy: *Phong v Attorney-General (Cth)* [2001] FCA 1241; 114 FCR 75; where an applicant has acquiesced in the conduct of proceedings known to be defective: *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; 209 CLR 372; where no “real injustice” has been suffered: *R v Aston University Senate; Ex parte Roffey* [1969] 2 QB 538 at 551 and 559; where the cost and injustice flowing from having to repeat the whole process would have been wholly disproportionate to the practical effect of the error: *NRMA Insurance Limited v Ainsworth* [2011] NSWCA 292; 59 MVR 195 [14]–[16] (though in relation to non-jurisdictional error); where an applicant does not come to the court with clean hands: *SZQBN* 213 FCR 297; undisclosed improper or fraudulent objects: *R v Commissioners of Customs and Excise; Ex parte Cook* [1970] 1 WLR 450; futility or lack of utility: *Aala* 204 CLR 82; *Prodduturi v Minister for Immigration and Border Protection* [2015] FCAFC 5; 144 ALR 243 at [38], or where events have overtaken the proceedings so as to render the issue moot: *Civil Aviation Safety Authority v Administrative Appeals Tribunal* [2001] FCA 1319; 33 AAR 439.

1. Imperial raised the following primary matters in support of its contention that declaratory relief should be withheld in the Court’s discretion:
2. Although it acknowledged that it was aware of the proceedings from 29 July 2021, there was no evidence that Imperial or its parent company was aware of the two to three week indication provided in the AGS letter dated 3 September 2021, nor did the applicant suggest that Imperial acted inappropriately or improperly in executing the Imperial Contracts on 9 September 2021.
3. There are sound practical reasons why Imperial was keen to execute the Imperial Contracts, with particular reference to seasonal conditions in the Northern Territory and the desirability of exploration being conducted promptly. Another reason for prompt action is the fact that the term of Imperial’s exploration permit was initially due to expire in March 2022, before being extended to September 2022.
4. Imperial acknowledged that its parent company was aware of a litigation risk relating to the Commonwealth’s actions when the parent Board decided on 14 September 2021 to make a capital investment decision. But that action was taken in circumstances where Imperial was understandably anxious to take advantage of the Commonwealth’s commercially important grant of funds and it was reasonable for Imperial to proceed on the basis that the Commonwealth was acting lawfully.
5. Imperial emphasised the significance of the substantial commercial and financial commitments it made in order to meet the milestones under the Imperial Contracts. These milestones and commitments were described in some detail in affidavits affirmed by Imperial’s managing director, Mr Underwood.
6. Imperial emphasised that no production permit had been granted to it under the *Petroleum Act* and that its activities under the Imperial Contracts were confined to exploration and not commercial gas production. It added that the climate change risks which were at the forefront of the applicant’s case did not arise from exploration and appraisal activities carried out in respect of the Imperial Contracts.
7. Finally, Imperial emphasised that the Imperial Contracts gave effect to “a valid and effective Instrument” and were “not opaque deals in pursuit of some idiosyncratic departmental scheme”. Rather, the Imperial Contracts advance and promote the Program, which it claimed would promote the “public interest” in advancing the gas industry in the Northern Territory and in turn the Australian economy.
8. The Court has some sympathy for Imperial’s position. As Mr Lancaster SC (who appeared for Imperial) pointed out, Imperial bears no responsibility for the Commonwealth’s conduct in the course of the litigation and with particular reference to its conduct post the AGS letter dated 3 September 2021. The Court also accepts that Imperial has acted *bona fide* and in what its parent Board saw as its best commercial interests, including by entering into contracts with third parties on the assumption that the Imperial Contracts were validly executed.
9. By the same token, however, I accept that the proceedings were brought expeditiously and in good faith by the applicant and that Imperial’s parent company was put on notice of the proceedings the day after they were commenced. The companies nevertheless chose to proceed with the exploration and appraisal activities to which the Approval Decision related, including after Imperial was joined as the third respondent. It may reasonably be inferred that the companies were prepared to take the commercial risk that the Imperial Contracts were invalid and void. I consider that these factors are also relevant to the exercise of the Court’s discretion regarding relief.
10. Perhaps even more importantly, however, is the importance of the public interest in ensuring that the Commonwealth is properly accountable for its executive conduct and actions. As stated by Gaudron and Gummow JJ in *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; 204 CLR 82 at [55] (footnotes omitted):

No doubt the discretion with respect to all remedies in s75(v) is not to be exercised lightly against the grant of a final remedy, particularly where the officers of the Commonwealth in question do not constitute a federal court and there is no avenue of appeal to this Court under s 73 of the Constitution. The discretion is to be exercised against the background of the animating principle described by Gaudron J in *Enfield City Corp v Development Assessment Commission*. Her Honour said:

Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.

1. I consider that compelling private interests would be necessary to outweigh that central public interest. I am not persuaded that Imperial’s private interests reach that level. Accordingly, I decline in the exercise of the Court’s discretion to withhold the declaratory relief sought by the applicant regarding the Imperial Contracts.

## Conclusion

1. For these reasons, ground 5 of the further amended originating application should be upheld and declaratory relief in the terms sought by the applicant should be made. Otherwise, the further amended originating application will be dismissed.
2. The parties should have an opportunity to consider these reasons for judgment and seek to agree orders for costs. If they are unable to do so within 28 days hereof, each is within that period to file and serve a written outline of submissions in support of their respective positions on costs, not exceeding three pages in length. Each will then be given an opportunity to file and serve a brief written outline of submissions in response, not exceeding two pages in length, within a further seven days thereof. The Court will then determine the issue of costs on the papers and without a further oral hearing.

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| I certify that the preceding two hundred and twenty-six (226) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Griffiths. |

Associate:

Dated: 23 December 2021