

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 28/07/2021 12:24:31 AM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Originating Application for Judicial Review - Form 66 - Rule 31.01(1)
File Number:	NSD758/2021
File Title:	THE ENVIRONMENT CENTRE NT INC v MINISTER FOR RESOURCES AND WATER & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Dated: 28/07/2021 2:55:44 PM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

## No. of 2021

Filed on behalf of (name & role of party) The Environment Centre NT Inc

Prepared by (name of person/lawyer) Sean Ryan

Law firm (if applicable) Environmental Defender's Office

Tel \_\_\_\_\_ Fax \_\_\_\_\_

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**Address for service** Level 5, 263 Clarence street, SYDNEY NSW 2000  
(include state and postcode)



The Applicant applies to the Court under section 5(1) and/or section 6(1) of the *Administrative Decision (Judicial Review) Act 1977* (Cth) (**ADJR Act**) and/or section 39B(1) and/or (1A) of the *Judiciary Act 1903* (Cth) to review the decision of the First Respondent:

1. to make the *Industry Research and Development (Beetaloo Cooperative Drilling Program) Instrument 2021* (Cth) (the **Instrument**); and
2. to approve grants to Imperial Oil and Gas in the amount of up to \$21 million pursuant to the Beetaloo Cooperative Drilling Program (the **Decision**).

### **Details of claim**

The Applicant is aggrieved by the decisions because:

1. The Applicant is incorporated in, or otherwise established in, Australia.
2. The Applicant is the peak community sector environmental organisation in the Northern Territory, and the conservation council for the Northern Territory.
3. The Applicant engages in activities aimed at protecting and conserving the environment in the Northern Territory, including in relation to climate change.
4. The Applicant and its representatives have undertaken extensive activities in relation to the impact of gas activities in the Northern Territory generally, and in the Beetaloo sub-basin in particular, on biodiversity and climate change, including by:
  - a. making written submissions in relation to projects in the Beetaloo region;
  - b. working with traditional owners in the Beetaloo and Borroloola region;
  - c. making written submissions on existing and proposed laws and policies relevant to the development of the Beetaloo gas resource, fracking and climate change;
  - d. advocacy, campaigning and lobbying on behalf of the Applicant's members in relation to development of the Beetaloo gas resource, fracking and climate change; and
  - e. representing the Applicant's members and the Northern Territory environment in respect of the Beetaloo gas resource, fracking and climate change.

### **Grounds of application**

#### **The Instrument and the Decision**

1. The Instrument was made in purported exercise of the Minister's power under s 33 of the *Industry Research and Development Act 1986* (Cth) (the **IRD Act**) to prescribe a program in relation to industry, innovation, science or research, including in relation to the expenditure of Commonwealth money under such programs.



2. Once a program is prescribed by the Minister under s 33 of the IRD Act, s 34(1) allows the Commonwealth to make, vary or administer arrangements in relation to activities under the prescribed program.
3. The Instrument was made on 11 May 2021. It purports, at cl 5(1), to prescribe the Beetaloo Cooperative Drilling Program (the **Program**) and states, at cl 5(2), that "The program provides funding for exploration activities to be undertaken in the Beetaloo sub-basin to support the development of the Northern Territory gas industry". The purpose of the Program, as stated at cl(3), is "to encourage and facilitate gas exploration in the Beetaloo sub-basin".
4. The Program is purportedly governed pursuant to the Grant Opportunity Guidelines issued by the Department of Industry, Science, Energy and Resources released on 18 March 2021.
5. Pursuant to the Program:
  - a. Grants of up to \$7.5 million per well may be made in relation to exploration and appraisal wells in the Beetaloo sub-basin.
  - b. Applications made pursuant to the Program are assessed on a first-come-first served basis against established assessment criteria.
  - c. Grants are also assessed to determine whether they represent value with relevant money.
  - d. The Program is non-competitive in nature and funding decisions are determined without reference to the comparative merits of other applications.
6. Spending decisions under the Program are made by the First Respondent, taking into account the recommendations of an independent assessment committee.
7. On 7 July 2021, the Minister made the Decision. The grants approved pursuant to the Decision will provide up to \$21 million to Imperial Oil and Gas in relation to three exploration wells.

**Rates of increase in carbon dioxide (CO<sub>2</sub>) concentration and surface temperatures**

8. From about 1750, large-scale industrial activity began in the United Kingdom and then spread throughout the world (the **Industrial Revolution**). As a result of the Industrial Revolution, the burning of coal, and later the burning of oil and natural gas, drove: (a) a transformation in human activity and prosperity; and (b) a sustained increase in CO<sub>2</sub> concentration.





9. When burned to produce energy or for industrial purposes: (a) natural gas produces CO<sub>2</sub>; and (b) CO<sub>2</sub> is emitted into Earth's atmosphere, where a substantial portion of it persists for centuries.
10. During the 800,000 years before the Industrial Revolution, CO<sub>2</sub> concentration in the atmosphere ranged from 170-300 parts per million (ppm). But for human activity, CO<sub>2</sub> concentration would likely have remained in the same range from 1750 until 2150 (the **relevant period**).
11. Since 1750, CO<sub>2</sub> concentration in the atmosphere has increased from about 278ppm to about 410ppm (in 2019), greater than the CO<sub>2</sub> concentration at any previous time in the last 2 million years. Those increases were caused by human activities.
12. For 7,000 years before the Industrial Revolution, Earth's global mean surface temperature (**surface temperature**) changed by about 0.01°C per century. But for human activity, surface temperature would likely have remained in the same range during the relevant period. Since the Industrial Revolution, the surface temperature has increased by greater than 1°C and is currently increasing at 0.2°C per decade.
13. The rate of CO<sub>2</sub> accumulation in the atmosphere has increased with every passing decade since atmospheric measurements began.
14. Unless the extraction and burning of fossil fuels is constrained, increases in CO<sub>2</sub> concentrations in the atmosphere and surface temperatures will continue.
15. The burning of gas has caused, causes, and unless constrained will continue to cause, a material proportion of those increases.

#### **Effects of CO<sub>2</sub> emissions**

16. Humans, by emitting CO<sub>2</sub> into the atmosphere:
  - a. Have changed, and will continue to change during the relevant period, Earth's systems, as compared to the way those systems would have changed naturally.
  - b. In particular, are: (a) heating Earth's surface and oceans; (b) acidifying oceans; (c) changing precipitation patterns; (d) raising sea levels; (e) increasing the incidence and intensity of heatwaves, droughts, bushfires, violent storms, storm-surge flooding and other extreme weather events; (f) eroding soil; (g) melting ice on land and sea, and permafrost; and (h) harming and destroying non-human ecosystems, species and beings.
  - c. Have, in Australia: (a) caused the climate to warm on average by  $1.44 \pm 0.24$  °C since national records began in 1910; (b) caused unprecedented temperatures and heatwaves; (c) increased the regularity and intensity of heatwaves, extreme



fire weather days, bushfires, floods, droughts, extreme storms and rain events\* and other extreme climatic and weather events; (d) reduced cool-season rainfall in southeast and southwest Australia, increased wet-season rainfall in northern Australia, and increased the proportion of total Australian rainfall caused by heavy rainfall since the 1970s; and (e) caused rates of sea level rise to the north and southeast of Australia that have been significantly higher than the global average of 25 cm since 1880, while rates of sea level rise along the other coasts of the continent have been closer to the global average.

- d. Increasingly risk triggering tipping points, including the Amazon tipping point, the Boreal forest tipping point, thawing of global permafrost, reduction in Arctic and East Antarctic sea ice, disintegration of the West Antarctic and Greenland ice sheets, and large-scale coral reef die offs, that will cause massive additional increases in CO<sub>2</sub> concentration, sudden major shifts in the Earth's natural systems, or both.
  - e. Will, unless constrained from doing so, harm – with increasing regularity, scope and intensity – humans and non-human beings, species and ecosystems.
17. The harm arising from climate change unless CO<sub>2</sub> concentrations stabilize and reduce will likely include, alternatively there is a significant risk that it will include, all or some of the following:
- a. more, longer and more intense:
    - i. bushfires, storm surges, coastal flooding, inland flooding, marine heat waves and other extreme weather events;
    - ii. periods of extreme heat;
    - iii. periods of drought;
  - b. further sea-level rise;
  - c. fewer tropical cyclones, but a greater proportion projected to be of high intensity, with ongoing large variations from year to year;
  - d. increasing loss of non-human species and ecosystems, on land and in oceans;
  - e. systemic breakdowns and overwhelming of infrastructure networks and critical services, including electricity, water supply, internet, health care, and emergency services;
  - f. food insecurity and breakdown of food systems;



- g. adverse impacts on:
    - i. national and global economies;
    - ii. financial markets;
    - iii. industries, businesses and professions; and
    - iv. living costs;
  - h. social and political unrest; and
  - i. mental and physical injury, including ill-health or death, related to the above.
18. The matters referred to in paragraph 17 above are referred to herein as the “**Climate Change Risks**”.

#### **The Paris Agreement**

19. Australia is a signatory to the United Nations Paris Agreement (the **Paris Agreement**), which aims to strengthen the global response to the threat of climate change, including by, pursuant to Article 2(1)(a):
- “Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change”.
20. The current emissions trajectory for Australia is not in line with the international goal of limiting global temperature rise to 1.5°C above pre-industrial levels.
21. At the current trajectory, Australia is on track for 4.4°C warming this century.

#### **Economic transition away from fossil fuels**

22. As a result of global efforts to reduce greenhouse gas emissions in accordance with the Paris Agreement:
- a. 191 countries, covering more than 90% of global energy-related and industrial process CO<sub>2</sub> emissions, including Australia, submitted National Determined Contributions (**NDCs**) which outline their emissions reduction targets; and
  - b. at least 44 countries and the European Union (accounting for approximately 70% of the global CO<sub>2</sub> emissions and GDP) have pledged to meet a net-zero emissions target.





23. It is likely that, alternatively there is a significant risk that, the steps taken in paragraph 22 above will result in:
- a. a reduction in the demand for fossil fuels, including gas, both globally and in Australia; and/or
  - b. the imposition of trade measures by importing countries against countries who fail to meet their commitments under the Paris Agreement (**Trade Measures**); and/or
  - c. economic divestment from high CO<sub>2</sub> and greenhouse gas emitting assets, which are likely to become, alternatively there is a significant risk they will become, "stranded assets" (i.e. assets that are no longer able to earn an economic return prior to the end of their useful economic life).

24. The matters referred to in paragraph 23 above are referred to herein as the "**Transition Risks**".

**Likely harm if gas is extracted from the Beetaloo sub-basin**

25. The extraction and subsequent use, namely, 'the life cycle', of gas results in the emission of greenhouse gases (**GHG**) including methane and CO<sub>2</sub>.
26. On 17 December 2020, the First Respondent announced that it was estimated that the Beetaloo sub-basin could hold more than 200,000 petajoules of gas.
27. The *Scientific Inquiry into Hydraulic Fracturing of Onshore Unconventional Reservoirs in the Northern Territory* (**Fracking Inquiry**) estimated the life cycle GHG emissions for a new shale gasfield in the Northern Territory that produced either 365 or 1,240 petajoules per year (**PJ/y**) of gas.
28. The key findings identified by the Fracking Inquiry were that:
- a. GHG emissions from any new onshore shale gasfield in the Northern Territory producing 365 PJ/y would contribute around 26.5 million tonnes of CO<sub>2</sub> equivalent emissions per year (**Mt CO<sub>2</sub>e/y**) or 4.5% of Australia's annual GHG emissions (as at 2018);
  - b. for a gasfield or gasfields producing 1,240 PJ/y (with liquid natural gas (**LNG**) exports of 80% and domestic consumption of 20%), the Australian component of emissions would be around 38.9 Mt CO<sub>2</sub>e/y or 6.6% of Australia's annual GHG emissions (as at 2018); and
  - c. for a gasfield or gasfields producing 1,240 PJ/y, the total GHG emissions (i.e. emitted in both Australia and overseas) would result in 98.8 Mt CO<sub>2</sub>e/y.
29. Such emissions are likely to result in a material increase to the likelihood of the Climate Change Risks occurring.





30. Further, such emissions are likely to materially undermine Australia and/or the world's ability to meet commitments under the Paris Agreement (the **Paris Agreement Risks**).

### **Knowledge**

31. The Minister knows, or ought reasonably to know, the matters in paragraphs 8 to 30 above.

### **Ground 1 – non-compliance with s 71 of the Public Governance, Performance and Accountability Act 2013**

32. Section 71(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (the **PGPA Act**) provides that 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.
33. Pursuant to s 8, a “proper” use of money is one that is “efficient, effective, economical and ethical”.
34. Pursuant to s 105C of the PGPA Act, the Finance Minister may, by written instrument, make provision about grants by the Commonwealth.
35. Pursuant to that power, the Finance Minister has made the Commonwealth Grants and Rules Guidelines 2017 (the **Grants Guidelines**).
36. The Grants Guidelines provide:
- a. That they contain requirements that apply to Ministers (paragraphs 1.3 and 3.10);
  - b. That the PGPA Act requires that a Minister *must* not approve proposed expenditure of relevant money unless satisfied, after reasonable inquiries, that the expenditure would be a ‘proper’ use of relevant money (paragraph 3.11);
  - c. In addition to the requirements under the PGPA Act, that where the proposed expenditure relates to a grant or group of grants, the Minister must not approve the grant without first receiving written advice from officials on the merits of the proposed grant or group of grants that meets the requirements of the Grant Guidelines, including paragraph 4.6 (paragraph 4.10). The advice contemplated by paragraph 4.6 includes advice as to whether the grant or grants achieves value with relevant money.
37. The making of the Instrument and/or the Decision constituted an approval by the Minister of a proposed expenditure of relevant money within the meaning of s 71 of the PGPA Act.



38. Prior to giving the approval constituted by the making of the Instrument and/or the Decision, the Minister failed to make reasonable inquiries in respect of the Climate Change Risks, the Transition Risks and/or the Paris Agreement Risks.
39. As a consequence, in making the Instrument and/or the Decision, the Minister failed to comply with s 71 of the PGPA Act and/or the Grants Guidelines.
40. As a result:
  - a. the procedures that were required by law to be observed in connection with the making of the decision(s) were not observed;
  - b. the person who made the decision(s) did not have jurisdiction to make the decision(s);
  - c. the decision(s) were not authorised by the enactments in pursuance of which they were purported to be made; and/or
  - d. the decision(s) involved an error of law.

**Ground 2 – legal unreasonableness and/or illogicality and/or irrationality**

41. In making the Instrument and/or the Decision the Minister was not authorised to act in a way that was legally unreasonable and/or illogical and/or irrational.
42. In making the Instrument and/or the Decision, the Minister acted in a way that was legally unreasonable and/or illogical and/or irrational in that the Minister did not have regard, alternatively did not have adequate regard, to the Climate Change Risks, the Transition Risks and/or the Paris Agreement Risks.
43. As a result:
  - a. the person who made the decision(s) did not have jurisdiction to make the decision(s);
  - b. the decision(s) were not authorised by the enactments in pursuance of which they were purported to be made; and/or
  - c. the decision(s) involved an error of law.

**Orders sought**

1. A declaration that the Instrument is invalid and/or void.
2. An order or writ quashing or setting aside the Instrument.
3. A declaration that the Decision is invalid and/or void.



4. An order or writ quashing or setting aside the Decision.
5. Costs.
6. Such further or other orders as this Court thinks fit.

**Applicant's address**

The Applicant's address for service is:

Place: Level 5, 263 Clarence street, SYDNEY NSW 2000

Email:

The Applicant's address is Level 5, 263 Clarence street, SYDNEY NSW 2000.

**Service on the Respondents**

It is intended to serve this application on all Respondents.

Date: 27 July 2021

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Signed by Sean Ryan  
Lawyer for the Applicant

**Schedule**

No.

of 2021

Federal Court of Australia  
District Registry: NSW  
Division: General

**Respondents**

Second Respondent:

**The Commonwealth of Australia**

Date: 27 July 2021