SUPREME COURT
OF WESTERN AUSTRALIA
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This statement is not intended to be a substitute for the reasons of the Court of Appeal or to be used in any later consideration of the Court's reasons.

15 March 2011

JUDGMENT SUMMARY:

The court today dismissed two applications by Mr Joseph Roe challenging decisions by the CEO of the Department of Environment and Conservation (CEO) to grant permits to Woodside Energy Ltd and to the Commissioner of Main Roads to clear native vegetation in the Kimberly region.

In 2007 the Western Australian Government created the Northern Development Taskforce to identify potential sites in the West Kimberly suitable for the location of a natural gas processing precinct. This precinct was itself intended to be suitable for the future construction of infrastructure by commercial parties to process gas extracted from the Browse Basin off the Kimberly coast.

In February 2008 the Commonwealth and the State of Western Australia signed an agreement to assess the environmental impacts of this plan. At that time, 43 potential locations were in consideration. In March 2008 the plan was referred to the Environmental Protection Authority of Western Australia (EPA). In December 2008 the Premier announced that the preferred site was an area of land north of Broome known as James Price Point.

In 2010 the CEO granted the two permits to clear native vegetation. The permit granted to Woodside Energy Ltd allowed the clearing of up to 25ha of land to allow investigations to aid in the design of the proposed precinct. The permit granted to the Commissioner of Main Roads was for the construction of a ‘trace line’. The ‘trace line’ would involve clearing an area 4 m wide and 19 km long to enable environmental, engineering and Aboriginal heritage investigations to be conducted in relation to an access road to the proposed precinct.

The proceedings raised two issues for resolution by the court.

The first issue involved s 51F of the *Environmental Protection Act 1986* (the Act). Under this section, in effect, the CEO cannot grant a clearing permit that is ‘related to’ a proposal which has been referred to the EPA if that proposal is a ‘significant proposal’. The Act provides that a ‘significant proposal’ is a proposal which, if implemented, is likely to have a significant impact on the environment. Initially, when the plan was

referred to the EPA, it had determined that the plan was a ‘strategic proposal’ not a ‘significant proposal’. A ‘strategic proposal’ is a future proposal which, if implemented, will be a significant proposal.

Mr Roe challenged the grant of both clearing permits on the ground that the plan was a ‘significant proposal’. The court was therefore asked to determine whether the plan was ‘significant proposal’ or a ‘strategic proposal’.

The court unanimously held that the proposal was a ‘strategic proposal’. The Chief Justice found that the plan amounted to a proposal to designate land for a possible use in the future and to investigate the environmental impacts of such a use. This meant that it was not itself a proposal which, if implemented, would cause a significant impact on the environment. However, the plan envisaged that further proposals might be advanced in the future by commercial parties to construct gas processing infrastructure in the precinct area. These proposals would be likely, if implemented, to have a significant effect on the environment.

The Chief Justice also found that, even if the proposal were a ‘significant proposal’ neither clearing permit was sufficiently ‘related to’ the proposal because neither permit would have had the effect of causing or allowing the proposal to be implemented.

Buss JA expressed his own reasons for concluding that the CEO had power to issue the clearing permits.

Murphy JA agreed with the Chief Justice.

The second issue the court was asked to resolve involved s 51E of the Act. Under this section the CEO of the Department of Environment and Conservation is required to give notice to any person who has, in the opinion of the CEO, a direct interest in the subject matter of an application.

Mr Roe additionally challenged the grant of the clearing permit granted to the Commissioner of Main Roads on the basis that the CEO had actually formed an opinion that as a ‘Senior Law Boss and Law Keeper’ for the Northern Tradition he had a ‘direct interest’ in the application for the clearing permit, and that the CEO had failed to properly notify him.

The court was, therefore, asked to determine whether CEO had formed this opinion.

The Chief Justice held that the evidence did not show that the CEO formed this opinion and that there was, therefore, no breach of any requirement to give notice to Mr Roe.

Buss and Murphy JJA agreed with the Chief Justice on this point.

The full judgment of the Court of Appeal is available on the Supreme Court of Western Australia website at www.supremecourt.wa.gov.au