



## **Polly Talking Too Much – Decision Quashed**

You often hear people commenting and complaining about politicians talking too much.

The recent Federal Court decision of **Asset Energy Pty Ltd v Commonwealth Minister for Resources** [2023] FCA 86 proves the point.

Asset Energy held an interest in **Petroleum Exploration Permit NSW/PEP – 11** (the Permit) and had made application for a variation and suspension of certain conditions under the Permit (the Application).

Whether to grant the application was political, as the area affected by the Permit was primarily to do with an area off the coast of Sydney and its environs which involved a number of electorates in which independents were running for the 2022 Federal election.

Various politicians and others expressed their views, primarily against the extension or variation of the Permit.

Included in those politicians was the Honourable Scott Morrison, former Prime Minister, who regularly expressed opposition to the renewal of the Permit.

The Application had significant to and fro with the relevant Government Department acting on behalf of the Commonwealth – New South Wales Offshore Petroleum Joint Authority (the Joint Authority) which was the ultimate decision-maker.

The Minister for Resources (for the Commonwealth) The Honourable Keith Pitt MP was responsible for the administration of the relevant legislation but in April 2021 the Governor General approved the appointment of Mr Morrison as an additional Minister for the relevant legislation.

The relevant legislation gave the Joint Authority power to vary or suspend any conditions to which the permit was subject. The Joint Authority was effectively required to give written notice to permit holders if it was to refuse an application.

In the period before the Joint Authority made its decision Mr Morrison made various public statements concerning his opposition to the extension of the Permit

On 14 December 2021 Mr Morrison signed a memorandum prepared by the relevant department indicating that the preferred decision was to “*refuse the title*” and to advise the New South Wales joint authority Minister of his intent to do so. However, that letter recommended that Asset Energy be given 30 days to respond to the notice of intent to refuse.

Yet on the same day Mr Morrison held a press conference announcing “*after careful consideration, the Government has taken, through my own decision, the first step to formally reject an application*” for the permit

That same day as to Morrison issued a media release which included the words “*the Petroleum Exploration Permit PEP – 11 will not go ahead under the steps taken by the Morrison government to reject the project*”.

In January 2022, Asset Energy replied to the Joint Authority making submissions on why the Application should be granted.

Following internal Commonwealth government decisions of February and March 2022 by Mr Morrison, as the relevant decision maker on behalf of the Commonwealth, the Joint Authority on 30 March 2022 gave written notice of rejection of the Application.

Asset Energy engaged us to commence proceedings for Judicial Review of the decision of the Joint Authority.

Many comments by the Honourable Scott Morrison were in terms adverse to granting the Application.

Given the preponderance of statements, the parties to the proceedings agreed that the decision to reject the application was one in breach of the rules of natural justice.

The particular ground of breach of natural justice was to do with the decision having been *“infected by apprehended bias”*.

Whilst the parties to the proceedings were in agreement that the decision had to be quashed, the Federal Court had to be satisfied of same and was, as detailed in the case report in question. The judge said *“the well-established test of apprehended bias is whether a fair-minded person, properly informed as to the nature of the process, might reasonably apprehend that the decision-maker might not abroad an impartial mind the decision.”*

The parties and the Court were clearly of the view that the various comments by the former Prime Minister fell within those words. The decision of the joint authority has been quashed in the matter has been referred back for redetermination.

### **The Takeaway – Loose Lips Sink Ships**

Whilst the fact situation might a little unique, it proves the point that politicians who are decision-makers should be very careful about anything and everything they say about something in respect to which they have to make an administrative decision.

In short, various comments by the former Prime Minister critical of the idea of extending the Permit, so clearly muddied the water as to suggest that the Joint Authority may not abroad an independent mind to the consideration of the Application. Accordingly, the decision could not stand.

### **Queries**

Eakin McCaffery Cox acted for Asset Energy in instituting Judicial Review proceedings.

Eakin McCaffery Cox can provide expert and comprehensive advice about disputes with respect to government and administrative law issues.

If you have any queries, feel free to contact your usual **Eakin McCaffery Cox** contact, or Greg Ross or send an email to [info@eakin.com.au](mailto:info@eakin.com.au) or call (02) 9265 3000.



**Gregory Ross**

**24/2/23**

*The above was prepared by Greg Ross  
and is intended to provide a broad general overview of issues only.  
It is not intended, and or must not be relied upon, as definitive legal advice.*