
Appendix H

Observations on GHG Emissions and Climate Change Impact

Monday, 14 April 2025

Ms Jennifer Pearson

Director - Northern NSW Assessments

Nature Positive Regulation Division | Environment Assessments NSW and ACT Branch

Department of Climate Change, Energy, the Environment and Water

Dear Ms Pearson,

Re: HVO Continuation Project – Observations on GHG Emissions and Climate Change Impacts

1 Introduction and Purpose

- 1.1 This document has been prepared to accompany HV Operations Pty Ltd's (**HVO's**) referrals of the HVO North Continuation Project and the HVO South Continuation Project (the **Projects**) under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).
- 1.2 The purpose of this document is to:
- (a) set out HVO's observations on relevant case law regarding the consideration of greenhouse gas (**GHG**) emissions and climate change in the context of assessing impacts on matters of national environmental significance (**MNES**) under the EPBC Act; in particular the Full Federal Court's recent decision in *Environment Council of Central Queensland Inc v Minister for the Environment and Water* [2024] FCAFC 56; (2024) 304 FCR 91 (the **Environment Council Decision**); and
 - (b) explain why the Minister can be satisfied that the GHG emissions generated by the Projects will not have a significant 'impact' (as that term is defined in the EPBC Act) on any MNES under the EPBC Act, such that any MNES that will be adversely affected by an increase in the physical effects of climate change, but are not likely to be directly impacted by the Projects, should not be 'controlling provisions' for the purposes of the Minister's decision under section 75 of the EPBC Act.

2 Executive Summary

- 2.1 As confirmed by the Full Court in a series of decisions, the Minister has the ability to reason in a broad manner when making decisions under the EPBC Act, including decisions under section 75. This necessarily includes considering whether the indirect consequences of an action are an 'impact' as defined in section 527E of the EPBC Act.
- 2.2 There is an insufficient causal link between the GHG emissions that will be generated by the Project (including Scope 3 GHG emissions, which account for the majority of GHG
-

emissions) and any increase in total global GHG emissions and increased global average temperature. Any increase in total global GHG emissions or any increase in global average temperatures are not impacts of the Project as defined in section 527E.

- 2.3 With regards to GHG emissions from the Projects, it would be open for the Minister to reason in the following manner when making a decision under section 75 of the EPBC Act:
- (a) **First**, that the Scope 3 GHG emissions from the Projects (arising predominantly from the downstream burning of coal and representing by far the largest component of GHG emissions associated with the Projects), will be an indirect, rather than direct consequence of the proposed action (within the meaning of section 527E(2) of the EPBC Act);
 - (b) **Second**, that the Projects will not be a 'substantial cause' of a global increase in GHG emissions and any corresponding physical effects of climate change because they:
 - (i) will not cause a net increase in global GHG emissions and global average temperature since there are multiple other variables that will determine whether this does or does not occur; or alternatively,
 - (ii) represent only a very small contribution to global GHG emissions; and
 - (c) **Third**, that the adverse effects on MNES resulting from a global increase in GHG emissions and the corresponding exacerbation of the physical effects of climate change are therefore not impacts (within the meaning of section 527E(1) of the EPBC Act) from the carrying out of the Projects (including its Scope 3 GHG emissions); and therefore
 - (d) **Fourth**, any MNES that will be adversely affected by an increase in the physical effects of climate change, but are not likely to be directly impacted by the Projects, are not 'controlling provisions' for the purposes of the Minister's decision under section 75 of the EPBC Act.

3 Glossary

Abbreviation	Definition
ACF Decision	Australian Conservation Foundation Inc v Minister for the Environment and Energy [2017] FCAFC 134; (2017) 251 FCR 359
Anvil Hill Decision	Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2008] FCAFC 3; (2008) 166 FCR 54
Environment Council Decision	Environment Council of Central Queensland Inc v Minister for the Environment and Water [2024] FCAFC 56; (2024) 304 FCR 91
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999 (Cth)
Full Court	Full Court of the Federal Court of Australia
GHG	Greenhouse gas

Abbreviation	Definition
Minister	Commonwealth Minister for the Environment and Water
MNES	Matter of national environmental significance
Mount Pleasant Optimisation Project	The action the subject of EPBC Referral 2020/8735
Narrabri Underground Extension Project	The action the subject of EPBC Referral 2019/8427
NGER Act	National Greenhouse and Energy Reporting Act 2007 (Cth)
Projects	HVO North Continuation Project and the HVO South Continuation Project
SSD Applications	NSW State Significant Development Applications SSD-11826681 and SSD-11826621-
Tarkine Decision	Tarkine National Coalition Inc v Minister for the Environment and Others [2015] FACFC 89; (2015) 233 FCR 254

4 Assessment Framework under the EPBC Act

- 4.1 The EPBC Act sets out the statutory framework under which the Minister must assess and determine a referral of a proposed action. This framework requires, amongst other things, the consideration of the 'impacts' of a proposed action. The Minister must undertake this consideration on multiple occasions from referral through to approval of a proposed action.
- 4.2 The EPBC Act prohibits the taking of actions that would have, or are likely to have, an impact on a matter protected by a provision of Part 3 of the EPBC Act (which are commonly known as matters of national environmental significance, or MNES) without an approval granted by the Minister.
- 4.3 Following referral of a proposed action for assessment under the EPBC Act, the Minister must make the following decisions under the EPBC Act:
- (a) a decision whether the proposed action is a 'controlled action' (section 75 of the EPBC Act);
 - (b) if the action is a controlled action, a decision on the appropriate assessment pathway for the proposed action (section 87 of the EPBC Act); and
 - (c) a decision whether to approve the proposed action (section 133 of the EPBC Act).
- 4.4 Section 67 of the EPBC Act defines a 'controlled action' as follows:

An action that a person proposes to take is a controlled action if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be (or would, but for section 25AA or 28AB, be) prohibited by the provision. The provision is a controlling provision for the action.

- 4.5 The decision made under section 75 of the EPBC Act informs the scope of the matters that the Minister must consider when deciding under section 133 of the EPBC Act whether to approve the taking of an action. Section 136(1)(a) of the EPBC Act provides that (underlining added) '...the Minister must consider...matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action'.
- 4.6 When making a decision under section 75 of the EPBC Act, section 75(2) provides that, amongst other things, the Minister must consider all adverse 'impacts' (if any) the action:
- (a) has or will have; or
 - (b) is likely to have;
- on a MNES.
- 4.7 'Impact' is defined in section 527E of the EPBC Act:
- (1) For the purposes of this Act, an event or circumstance is an **impact** of an action taken by a person if:
 - (a) the event or circumstance is a direct consequence of the action; or
 - (b) for an event or circumstance that is an indirect consequence of the action--subject to subsection (2), the action is a substantial cause of that event or circumstance.
 - (2) For the purposes of paragraph (1)(b), if:
 - (a) a person (the **primary person**) takes an action (the **primary action**);
and
 - (b) as a consequence of the primary action, another person (the **secondary person**) takes another action (the **secondary action**); and
 - (c) the secondary action is not taken at the direction or request of the primary person; and
 - (d) an event or circumstance is a consequence of the secondary action;
then that event or circumstance is an **impact** of the primary action only if:
 - (e) the primary action facilitates, to a major extent, the secondary action;
and
 - (f) the secondary action is:
 - (i) within the contemplation of the primary person; or
 - (ii) a reasonably foreseeable consequence of the primary action;
and
 - (g) the event or circumstance is:
 - (i) within the contemplation of the primary person; or

- (ii) a reasonably foreseeable consequence of the secondary action.

5 Relevant Case Law

Environment Council of Central Queensland Inc v Minister for the Environment and Water [2024] FCAFC 56; (2024) 304 FCR 91 (the *Environment Council Decision*)

- 5.1 In the Environment Council Decision, the Full Court considered a legal challenge to two separate decisions made by the Minister under the reconsideration power contained in section 78 of the EPBC Act, relating to:
- (a) the Mount Pleasant Optimisation Project; and
 - (b) the Narrabri Underground Extension Project.
- 5.2 The appellant, pursuant to section 78A of the EPBC Act, requested that the Minister reconsider her decisions under section 75 for both of the projects. In this request, the appellant provided significant information relating to the relationship between increased GHG emissions, global average temperature and the increased physical effects of climate change on MNES.
- 5.3 Whilst the Minister accepted that the appellant had provided 'significant new information', the Minister did not revoke the original section 75 decisions made for the projects because the information did not relate to the 'impacts' of the proposed action, as defined under section 527E of the EPBC Act.
- 5.4 In dismissing the appellant's appeals from the primary judgment of Justice McElwaine, the majority of the Full Court, Chief Justice Mortimer and Justice Colvin, considered that (underlining added):¹
- There is no basis in the legislative scheme to discern a constraint on the way the Minister should reason, nor to discern a constraint on the nature of the information she may select from what is before her, provided as we have explained, it meets the threshold of probative material, and is used in a rational and legally reasonable way in making the decision.
- 5.5 Importantly, the majority explained that 'provided she applied the statute correctly, it was for the Minister to evaluate what aspects of the information before her she found most persuasive about any causal link between the extended operation of the mine and indirect adverse consequences on MNES.'²
- 5.6 Mortimer CJ and Colvin J also relevantly stated that (underlining added):³
- On any view, including on the appellant's case to the Minister and then on review and appeal, there were a wide variety of scenarios about how much coal would continue to be burned around the world and by whom, where the coal would be sourced from,

¹ Environment Council Decision at 120 [133] (Mortimer CJ and Colvin J).

² Environment Council Decision at 115 [107] (Mortimer CJ and Colvin J).

³ Environment Council Decision at 115 [107] (Mortimer CJ and Colvin J).

whether with or without the burning of coal global emissions would increase or decrease, what the likely rate of global warming would be, and the range of adverse effects of global warming on MNES.

- 5.7 The Environment Council Decision makes it clear that it is a matter for the Minister to assess the 'impacts' of an action under the EPBC Act, provided she acts within the bounds of legal reasonableness, including by acting on sufficiently probative material when making her decision. Specifically, the majority in the Environment Council Decision found no legal error arose by the Minister:
- (a) accepting evidence that there is a causative link between the global combustion of coal and/or gas and the effects of climate change (such as ocean acidification or coral bleaching);⁴ and
 - (b) assessing the link (required by section 527E of the EPBC Act) between the GHG emissions of the proposed action and the physical effects of climate change by considering:⁵
 - (i) whether those GHG emissions would result in a net global increase in GHG emissions; and/or
 - (ii) the proportion of global GHG emissions that the proposed action's GHG emissions amount to, and whether the proposed action will therefore be a substantial cause of the physical effects of climate change on MNES.
- 5.8 Justice Horan, writing separately, reached a similar conclusion to the majority,⁶ albeit did not distinguish the Anvil Hill Decision as the majority did. Accordingly, the Full Court was unanimous in finding no legal error in the primary judgment or the Minister's exercise of the reconsideration power under section 78 of the EPBC Act, which necessarily involved the application of sections 75 and 527E.
- 5.9 The High Court refused an application for special leave to appeal on 8 August 2024.⁷ Accordingly, the Environment Council Decision is binding appellate authority on the Minister's broad power when considering the 'impacts' of a proposed action and the validity of the approach and reasoning of the Minister in that case. Whilst the Environment Council Decision concerned a reconsideration request made under section 78A of the EPBC Act, the Full Court's reasoning equally applies to the Minister's consideration of impacts when making decisions under section 75 of the EPBC Act, given the reconsideration power specifically applies to decisions under that section.

⁴ Environment Council Decision at 100 [36] (Mortimer CJ and Colvin J).

⁵ Environment Council Decision at 102-103 [47] to [53] (Mortimer CJ and Colvin J).

⁶ Environment Council Decision at 132 [182] to [183]; 133 [188]; 134 [190] to [192]; 135 [194].

⁷ [2024] HCASL 201.

Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources
[2008] FCAFC 3; (2008) 166 FCR 54 (the Anvil Hill Decision)

5.10 In the Anvil Hill Decision, the Full Court heard an appeal in relation to a decision of the Minister under section 75 of the EPBC Act that the Anvil Hill project (a coal mine and colliery facility) in the Hunter Valley was not a controlled action.

5.11 Relevantly, the statement of reasons of the Minister's delegate stated:⁸

I found that, while it is clear that, at a global level, there is a relationship between the amount of carbon dioxide in the atmosphere and warming of the atmosphere, the climate system is complex and the processes linking specific additional greenhouse gas emissions to potential impacts on matters protected by Part 3 of the EPBC Act are uncertain and conjectural. In light of this, and in light of the relatively small contribution of the proposed action to the amount and concentration of greenhouse gases in the atmosphere, I found that a possible link between the additional greenhouse gases arising from the proposed action and a measurable or identifiable increase in global atmospheric temperature or other greenhouse impacts is not likely to be identifiable.

5.12 In the primary judgment, Justice Stone made the following observation in dismissing the application for judicial review (underlining added):⁹

Section 527E(1)(a) of the Act states that an event or circumstance is an “impact” of an action if it is a direct consequence of the action. An indirect consequence of an action is also an “impact” if, (subject to s 527E(2) which is not relevant here) the action is “a substantial cause of that event or circumstance”: s 527E(1)(b). As outlined in [26]–[27] above, the delegate accepted that greenhouse gases in the atmosphere are affecting global climate but, although not expressed in these words, she clearly found that the emissions from the proposed mine would not be a substantial cause of climate change affecting matters protected under Pt 3 of the Act.

5.13 The Full Court dismissed the appeal from the primary judgment, finding that the Minister's determination of whether an 'impact' was a 'significant impact' was not a jurisdictional fact, and therefore was not a prerequisite in making a decision under section 75 of the EPBC Act.¹⁰ In considering the statutory framework, the Full Court noted that '[t]he decision regarding the breadth of the [Minister's power under section 75(1)] is one for the legislature, and if a statute is clear in its provisions, it should not be read down by a court.'¹¹

5.14 While the majority in the Environment Council Decision considered the primary judge's reliance in that case on the Anvil Hill Decision to be misplaced, they did not consider the principles of law arising in the Anvil Hill Decision to be wrong (instead, the difference in the Minister's findings and statements of reasons reflected developments in (and acceptance of)

⁸ Anvil Hill Decision at 57 [10].

⁹ *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 97 ALD 398 at 408 [38].

¹⁰ Anvil Hill Decision at 59 [20].

¹¹ Anvil Hill Decision at 62 [34].

the science underlying the impacts of GHG emissions on the physical effects of climate change).¹² The Anvil Hill Decision therefore remains good law.

Australian Conservation Foundation Inc v Minister for the Environment and Energy [2017] FCAFC 134; (2017) 251 FCR 359 (the ACF Decision)

5.15 The ACF Decision concerned the judicial review of the Minister's decision to approve, under section 133 of the EPBC Act, Adani's Carmichael Coal Mine in the Galilee Basin. The Full Court dismissed the appeal from the primary judgment, upholding the Minister's decision. The appellant sought judicial review, arguing that, amongst other things, the Minister erred in:¹³

- (a) characterising the combustion emissions from coal sourced from the proposed action as 'not' a direct consequence of the proposed action; and
- (b) failing to consider the relevant impacts from those combustion emissions under section 136(2)(e) of the EPBC Act.

5.16 Relevantly:

- (a) on appeal, no party disputed the contention that overseas GHG emissions from the combustion of coal sourced from the proposed action (i.e. Scope 3 GHG emissions) were an indirect consequence of the proposed action; and
- (b) the Full Court summarised the findings made by the Minister, in relation to the approval decision, as (underlining added):¹⁴
 - greenhouse gas emissions pose an existential threat to the Reef;
 - the extent and persistence of such impacts depend to a large degree on how effectively the issue of rising levels of greenhouse gases is addressed worldwide;
 - the transportation and combustion overseas of the coal to be mined, would produce substantial quantities of greenhouse gases;
 - those overseas emissions would be indirect consequences of the Proposal;
 - any increase in greenhouse gas emissions in excess of current emissions, caused by the overseas emissions would depend upon a number of variables including:
 - whether the mined coal would replace coal currently provided by other suppliers;
 - whether the burning of the mined coal would be a substitute for other energy sources;
 - the efficiency of coal burning power plants; and
 - the international obligations of coal burning countries to address the emissions within their respective borders;

¹² Environment Council Decision at 106 [70].

¹³ *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308 at 331 [63].

¹⁴ ACF Decision at 377-378 [60].



- it is not possible to draw robust conclusions as to the likely extent to which the Proposal would contribute to increased global temperatures as a result of the overseas emissions; and
- it is therefore difficult to identify a relationship between the Proposal and any impacts on relevant matters of national environmental significance which may occur as the result of any increase in global temperature.

5.17 Whilst the decision under review in the ACF Decision was a decision to approve the taking of an action (rather than a decision under section 75 of the EPBC Act), it involved considerations regarding the indirect consequences of GHG emissions. Relevantly, the primary judgment concluded (underlining added):¹⁵

In substance, the ACF's complaint seems to be that the Minister erred in not accepting and acting upon the new information as establishing that the combustion emissions would, or were likely to, have an adverse impact on the Reef. I cannot accept this contention. The ACF did not submit that the determination whether or not the combustion emissions would or were likely to have such an impact within the meaning of ss 82 and/or 527E was a jurisdictional fact. It was a matter for the Minister to make relevant findings of fact, including whether or not to accept that the new material established that the combustion emissions would, or were likely to, have the adverse impact on the Reef claimed by the ACF. The Minister explained why he considered that he could not make that finding, with particular reference to the various identified variables and, implicitly, by applying both ss 82 and 527E. Having regard to the limited role of the Court in reviewing findings of fact in a proceeding such as this I am not satisfied that the ACF has demonstrated any reviewable error concerning this aspect of the Minister's reasoning or his approval decision.

5.18 The primary judgment also confirmed that the Minister was not required to reason in a specific manner, and the lack of direct engagement with section 527E of the EPBC Act in the Minister's reasons was not (in this case) an error of law.¹⁶ Instead, the decision, and the reasoning for the decision, must be informed by the statutory framework and the matters that are relevant to the decision at hand. Relevantly, the Full Court stated:¹⁷

There may be good grounds for disagreeing with the Minister's decision, but that is not our concern in an appeal limited to the lawfulness of that decision. We see no justification for the assertion that he did not take into account the possible impacts of the overseas emissions on the level of greenhouse gases in the atmosphere, the consequences thereof and their impact on the Reef and on the protected matters. In our view the Minister's reasons reflect a proper discharge of his statutory duty.

¹⁵ *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308 at 352 [174].

¹⁶ *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308 at 349-350 [162].

¹⁷ ACF Decision at 378 [61].

Tarkine National Coalition Inc v Minister for the Environment and Others [2015] FACFC 89
(the *Tarkine Decision*)

- 5.19 In the *Tarkine Decision*, the Full Court confirmed that the Minister is not required to take into consideration the 'cumulative impacts' of a proposed action – being circumstances which are not consequences of the proposed action at all but that have come about by other actions¹⁸ – when making a decision to approve an action under section 133 of the EPBC Act.
- 5.20 Following the Minister's approval of a hematite mine in Tasmania, the appellant commenced judicial review proceedings, contending that the Minister was required to also consider the cumulative impacts on MNES from 11 other existing or proposed projects, in addition to the proponent's proposed mine.¹⁹
- 5.21 Justice Jessup concluded the following (underlining added):²⁰
- So far as the EPBC Act provided, the Minister was required to take into account the consequences of the action under consideration— in the present case, the proposal. If he or she did that, it would be no point of criticism that he or she did not consider the extent to which the existing circumstances were brought about by previous actions of the kind for which approval was, or might have been, required.
- 5.22 The primary judge stated the following regarding the assessment of 'impacts' of a proposed action, in the context of a decision made under Part 8 of the EPBC Act (underlining added):²¹
- The Minister is required to direct his attention to the direct or indirect consequences of the action. In order for an event or circumstance to be an indirect consequence of the action, it must be demonstrated that “the action is a substantial cause of that event or circumstance” (see s 527E(1)(b)) and that the criteria prescribed by s 527E(2) are met. There is, therefore, no general requirement imposed on the Minister to take into account all impacts of an action. It may be, however, that, in a particular case, an indirect consequence of an action will include the cumulative impact of a secondary action as defined. In such a case the Minister must have regard to such an impact.
- 5.23 As the primary judgment notes, in some circumstances an indirect consequence of an action referred to the Minister may include the cumulative impact of a secondary action. However, unless the action is a substantial cause of those cumulative impacts, they are not 'impacts' for the purposes of section 527E that the Minister must have regard to.
- 5.24 In construing section 527E in context with the relevant statutory framework relating to the approval of an action, Justice Jessup stated:²²
- Reading ss 82(1) and 527E into s 136(2)(e), the Minister was required to take into account any other information that he had on the consequences that the proposal

¹⁸ *Tarkine Decision* at 269 [44].

¹⁹ *Tarkine National Coalition Inc v Minister for the Environment* (2014) 202 LGERA 244 at 270 [106].

²⁰ *Tarkine Decision* at 268 [42] (Kenny and Middleton JJ agreeing).

²¹ *Tarkine National Coalition Inc v Minister for the Environment* (2014) 202 LGERA 244 at 263 [86].

²² *Tarkine Decision* at 268 [39] (Kenny and Middleton JJ agreeing).

would have, or was likely to have, on the matter protected by each provision which was a controlling provision in relation to the proposal, being consequences that were either direct in relation to that matter or, if indirect, were substantially causative in relation thereto.

- 5.25 Whilst the Tarkine Decision concerned the judicial review of an approval decision, the Full Court's reasoning regarding the interpretation of section 527E of the EPBC Act is equally applicable to decisions made under section 75. The EPBC Act does not require the Minister to consider the 'cumulative impacts' on MNES of actions other than the proposed action referred to the Minister. Rather, the Minister's task is to make a decision under section 75, having regard to, amongst other things, the considerations in section 75(2), construed in accordance with section 527E.

6 Summary of Case Law Principles

- 6.1 The following clear principles can be derived from the cases discussed in section 5:
- (a) there is no basis in the legislative scheme under the EPBC Act to discern a constraint on the way the Minister should reason (the Environment Council Decision at [133]);
 - (b) it is for the Minister to evaluate what aspects of the information before her that she finds most persuasive about any causal link between the extended operation of a mine and indirect adverse consequences on MNES (the Environment Council Decision at [107]);
 - (c) the Minister would not commit a legal error if she:
 - (i) accepted evidence that there is a causative link between the global combustion of coal and/or gas and the effects of climate change (such as ocean acidification or coral bleaching); and
 - (ii) assessed the link (required by section 527E of the EPBC Act) between the GHG emissions of the proposed action and the physical effects of climate change by considering:
 - (A) whether those GHG emissions would result in a net global increase in GHG emissions; and/or
 - (B) the proportion of global GHG emissions that the proposed action's GHG emissions amount to, and whether the proposed action will therefore be a substantial cause of the physical effects of climate change on MNES,(the Environment Council Decision at [36]); and
 - (d) it is open to the Minister to conclude that:
 - (i) a proposed action involving coal mining will not cause a net increase in global GHG emissions and global average temperature (and therefore, the

relevant physical effects of climate change on MNES) given the multitude of variables that determine that outcome; and

- (ii) even if the proposed action would cause a net increase in global GHG emissions and global average temperature, where the contribution of the proposed action to global GHG emissions would be very small, the 'substantial cause' requirement under section 527E of the EPBC Act will not be satisfied.

7 Consideration of GHG Emissions from the Projects

7.1 The Projects will involve the emission of GHGs into the atmosphere. These emissions include:

- (a) the Scope 1 emissions from the operation of the Projects, including fugitive gas releases and vehicle exhaust emissions;
- (b) the Scope 2 emissions from the generation of purchased electricity consumed by the Projects; and
- (c) the Scope 3 emissions that are a consequence of the Projects (occurring at sources owned or controlled by other entities), such as upstream emissions from providers of energy and materials for, and transport to the HVO Mine, and downstream emissions from the transport and combustion of coal. As noted by the Full Court in the ACF Decision,²³ Scope 3 GHG emissions are indirect (rather than direct) consequences from the extraction of coal.

7.2 HVO has modelled the predicted Scope 1, Scope 2 and Scope 3 GHG emissions that are likely to result from the Projects. The estimated GHG emissions of the Projects are as follows:

Period	Estimated GHG emissions (Mt CO ₂ -e) (2027 - 2045)			
	Scope 1	Scope 2	Scope 3	Total
Annual Average	0.79	0.01	41.78	42.58
Total over life of the Project	15.05	0.22	793.74	809.01

7.3 However, it does not necessarily follow that these emissions will lead to an increase in net global GHG emissions. Whether there will be an increase in net global emissions will depend on a number of factors that are external to the Projects including:

- (a) whether the emissions generated from the combustion of coal from the Projects will be offset, mitigated or abated, including by having regard to the domestic governmental policies and regulations, and industry commitments, regarding GHG

²³ ACF Decision at 372 [38].

emissions within the countries where coal from the Projects is exported to and combusted;

- (b) whether the levels of GHG emissions from sources (both coal mine and non-coal mine) other than the Projects will change; and
- (c) whether coal from the Projects would meet demand that would otherwise be met by alternative (potentially lower quality) supplies of coal. In this respect, HVO notes the Minister's conclusion in the Mt Pleasant Optimisation Project and Narrabri Underground Extension Project reconsideration decisions that it is likely that, if these projects do not proceed, prospective buyers will purchase an equivalent amount of coal from a supplier other than the proponent, which would result in an equivalent amount of GHG emissions when combusted, or may in fact produce more GHG emissions given demand would likely be met by coal of lower calorific value. This conclusion applies equally to the Projects.²⁴

7.4 Having regard to the Full Court's reasoning in the Environment Council Decision, HVO contends that because of the interplay of these and multiple other variables, it is not possible to conclude that the GHG emissions from the Projects will cause an increase in global GHG emissions.

7.5 Alternatively, even if it could be demonstrated that the Projects will result in a global increase in GHG emissions, HVO contends that the Minister should be satisfied that the Projects' contribution to global GHG emissions is so very small that it does not satisfy the requirements of section 527E(1)(b) of the EPBC Act (i.e. it is not a substantial cause of those emissions and therefore of any consequent increase in global temperature and associated impacts of climate change).

7.6 It would be open for the Minister to consider the following factors in reaching this state of satisfaction:

- (a) the total estimated annual GHG emissions from the Projects as a percentage of global annual GHG emissions;
- (b) the increase in global average temperature that would result from the Project's GHG emissions, assuming those emissions did in fact represent a net increase in global GHG emissions and that the relationship between GHG emissions and global temperatures is linear; and
- (c) the coal output from the Projects as a percentage of global coal consumption estimates (and forecasts of future demand).

7.7 There is no reason why the Minister should depart in a general sense from her approach in reasoning in the Mount Pleasant Optimisation Project and Narrabri Underground Extension Project reconsideration decisions when making a section 75 decision for the Projects. This is because, notwithstanding the total GHG emissions from the Projects are expected to

²⁴ The Minister could refer to the International Energy Agency's *Coal 2024 Report* as a source of information in relation to global coal demand, including considerations regarding the quality of coal being consumed.

exceed those for the Mount Pleasant Optimisation Project (534.8 Mt CO₂-e) and Narrabri Underground Extension Project (475.03 Mt CO₂-e), the:

- (a) GHG emissions of the Projects remain a proportionally very small component of global GHG emissions. For example, the global GHG emissions in 2021 (the latest year available from Climate Watch's Historical GHG emissions data) were 49.6 Gt CO₂-e. Proportionally, the Projects' annual GHG emissions amount to 42.579, or 0.086% of the estimated global 2021 emissions. ;
- (b) any net increase in global average temperature as a result of the Projects' emissions will be extremely small; and
- (c) coal output from the Projects represents a proportionally very small component of global coal demand. For example, the International Energy Agency's *Coal 2024 Report*,²⁵ states that global coal demand had increased to 8,687 Mt in 2023, and was forecast to increase to 8,771 Mt in 2024, and 8,873 Mt in 2027. Proportionally, the Projects' maximum annual output is proposed to be 26 Mt per annum of Run of Mine coal, or 0.299%, 0.296% or 0.293% of global coal demand across 2023, 2024 and 2027 respectively.

7.8 Importantly, as recognised by the Full Court in the Tarkine Decision, the Minister is not required to consider the 'cumulative' impacts of the Projects' GHG emissions and the impacts of emissions generated by other historical and future actions on global average temperature and MNES. The Minister's task, in relation to a decision made under section 75 of the EPBC Act, is to consider the impacts that the Project has, will have, or is likely to have on MNES, being consequences that are direct or, if indirect, will be substantially caused by the Projects.²⁶

7.9 It is of course open to the Minister to conclude, as she did in the reconsideration decisions under review in the Environment Council Decision²⁷ that:

- (a) the combustion of coal or gas on a global scale results in GHG emissions;
- (b) GHG emissions increase the physical effects of climate change and in turn adversely affect many MNES.

7.10 However, it does not follow from these two conclusions that the Projects are a substantial cause of these emissions or, in turn, an increase in global average temperature and the physical effects of climate change on MNES. The necessary 'substantial' causal link between these impacts and the Projects is not present, such that any MNES that are adversely affected by climate change, but are not likely to be directly impacted by the Projects, are not controlling provisions for the Projects.

7.11 HVO expects that some public comments received in relation to the referral of the Projects will draw attention to, or include, empirical modelling that suggests there is a linear

²⁵ Available here: <https://iea.blob.core.windows.net/assets/a1ee7b75-d555-49b6-b580-17d64ccc8365/Coal2024.pdf>.

²⁶ Tarkine Decision at 268 [39] (Jessup J).

²⁷ Environment Council Decision at 100 [35]-[36] (Mortimer CJ and Colvin J).

relationship between the GHG emissions from the Projects and adverse impacts on MNES (for example, the adverse effects of coral bleaching on the Great Barrier Reef). However, a submission to this effect is flawed as:

- (a) it assumes that those emissions are responsible for, and are a substantial cause of, an increase in global temperature and the global phenomenon of climate change (and all its effects), independently of other sources of GHG emissions; and
- (b) it ignores the uncertainty regarding whether the GHG emissions from a specific source will result in a net increase global GHG emissions – which is an outcome that is determined by multiple variables.

7.12 Modelling of this kind, to the extent that it can be considered 'probative', can only demonstrate the adverse effect of additional global net GHG emissions on MNES. In light of the Full Court's findings in the Environment Council Decision, such modelling cannot and should not be relied on to seek to causally link the GHG emissions from the Projects to specific climate-related impacts on MNES, such as the Great Barrier Reef.²⁸

8 Controlling Provisions for the Projects

8.1 HVO contends that any increase in the effects of climate change on MNES from increases in global GHG emissions is not an 'impact' of the Projects for the purposes of the EPBC Act. Accordingly, the Minister is not required to decide that those MNES that are subject to adverse impacts from climate change, but are not likely to be directly impacted by the Projects, are controlling provisions for the proposed actions.

8.2 Consistent with the EPBC Act, as interpreted by the courts, HVO respectfully submits that the Minister should consider the effects of the GHG emissions from the Projects in the following manner:

- (a) **First**, that the Scope 3 GHG emissions from the Projects (arising predominantly from the downstream burning of coal and representing by far the largest component of GHG emissions associated with the Projects), will be an indirect, rather than direct consequence of the proposed action (within the meaning of section 527E(2) of the EPBC Act);
- (b) **Second**, that the Projects will not be a 'substantial cause' of a global increase in GHG emissions and any corresponding physical effects of climate change because they:
 - (i) will not cause a net increase in global GHG emissions and global average temperature since there are multiple other variables that will determine whether this does or does not occur; or alternatively,
 - (ii) represent only a very small contribution to global GHG emissions; and
- (c) **Third**, that the adverse effects on MNES resulting from a global increase in GHG emissions and the corresponding exacerbation of the physical effects of climate

²⁸ EPBC Act ss 24B and 24C.

change are therefore not impacts (within the meaning of section 527E(1) of the EPBC Act) from the carrying out of the Projects (including its Scope 3 GHG emissions); and therefore

- (d) **Fourth**, any MNES that will be adversely affected by an increase in the physical effects of climate change, but are not likely to be directly impacted by the Projects, are not 'controlling provisions' for the purposes of the Minister's decision under section 75 of the EPBC Act.

8.3 HVO considers that it is open for the Minister to reason in this manner, whilst at the same time:

- (a) accepting that, amongst other things, the global combustion of coal results in GHG emissions, which increases the physical effects of climate change; and
- (b) accepting that an increase in the physical effects of climate change results, or is likely to result, in adverse effects to many MNES.

8.4 Reasoning in the above manner is consistent with the Minister's previous approach to reasoning in the Mount Pleasant Optimisation Project and Narrabri Underground Extension Project reconsideration decisions, and is supported by the decision of the Full Court of the Federal Court of Australia in the Environment Council Decision.

8.5 Adopting a similar approach to EPBC referrals for other coal mining-related actions, such as the Projects, would promote consistency in decision-making,²⁹ without detracting from the Minister's ability (and statutory duty) to consider the 'impacts' on MNES from a proposed action.

9 Further Assessment of GHG Emissions

9.1 The statutory framework of the EPBC Act does not require the Minister to have regard to other State or Federal laws when making a decision under section 75 of the EPBC Act, in relation to the controlling provisions for a proposed action. As stated above, the statute is concerned with an assessment of the impacts (as defined in section 527E of the EPBC Act) on MNES.

9.2 While the physical effects of climate change are not an 'impact' of the Projects and therefore should not be subject to assessment under the EPBC Act, this does not mean that the Projects' GHG emissions will not be otherwise assessed and/or regulated under Commonwealth and State laws and policies. In the ACF Decision, Justice Griffiths considered that national and international climate policies fell within the sphere of 'relevant matters' which could be considered in relation the assessment of the proposed action.³⁰

9.3 Under the NGER Act, the HVO Mine:

- (a) must report its Scope 1 and 2 GHG emissions annually; and

²⁹ See the comments of Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.

³⁰ *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308 at 351 [165].

-
- (b) is subject to the safeguard mechanism, which imposes an emissions baseline on covered facilities that will decline by a fixed amount of 4.9% per annum from FY2024 through to FY2030, and 3.285% through to FY2050.³¹ The safeguard mechanism is one of the Commonwealth Government's key policy tools for achieving net zero GHG emissions by 2050.
- 9.4 The NGER Act does not regulate Scope 3 emissions. However, these emissions will be another facility's Scope 1 emissions (whether in Australia or overseas – for example, a coal-fired power station will report GHG emissions from the combustion of coal from the Projects as Scope 1 GHG emissions, but these same GHG emissions will form part of the Projects' Scope 3 GHG emissions).
- 9.5 Accordingly, the Projects' Scope 3 GHG emissions, to the extent they form another entity's Scope 1 GHG emissions, will be reported, assessed and regulated:
- (a) for an entity located in Australia – under the NGER Act (including the safeguard mechanism where applicable); and
- (b) for an entity located overseas – in accordance with the domestic law of the relevant jurisdiction.³²
- 9.6 The Projects' GHG emissions, including Scope 3 GHG emissions, are also a matter which the Independent Planning Commission must consider when determining whether to grant development consent for the Projects under the *Environmental Planning and Assessment Act 1979* (NSW).³³
- 9.7 In sum, the GHG emissions from the Projects will be appropriately assessed and regulated under other State, Federal and foreign laws. The Minister should not be persuaded to inappropriately extend the language of section 527E of the EPBC Act to link the physical effects of climate change on MNES to an individual mine's GHG emissions for the purposes of a decision made under section 75.

³¹ From 2030, baseline decline rates will be set in five-year blocks, in line with Australia's nationally determined contributions under the *Paris Agreement*. 3.285% is the Department of Climate Change, Energy, the Environment and Water's indicative annual decline rate to achieve net zero by 2050.

³² For those countries that are a party to the *Paris Agreement*, the nationally determined contributions submitted by each party identify the domestic measures taken or intended to be taken to reduce the national emissions of that party.

³³ *Environmental Planning and Assessment Act 1979* (NSW) s 4.15(1)(b); *State Environmental Planning Policy (Resources and Energy)* s. 2.20. See *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110.