HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **OIL BASINS LTD**
Appellant

and

ESSO AUSTRALIA RESOURCES PTY LTD (ACN 091 829 819) & ORS
Respondents

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I CERTIFICATION

10 1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II OUTLINE OF ORAL SUBMISSIONS

The reasoning below

2. The primary judge applied a "light touch", forming a "general view" without construing the agreement or assessing the rival claims and responses as to its scope, and treating New York law as "entirely irrelevant": PJ [44], [63], [68]. The Court of Appeal endorsed that approach: CA [4], [56]–[61]. Both assumed Model Law Art 16 requires arbitrators to rule first: PJ [56]; CA [79], [83].

Section 7 of the IAA

3. Section 7 implements Art II of the New York Convention and predates the Model Law.

20 4. In s 7(2), the phrase "a matter that, in pursuance of the agreement, is capable of settlement by arbitration" imposes two conditions that must be satisfied for a stay:

(a) the matter involved in court must fall within the scope of the arbitration agreement so as to be capable of settlement by arbitration; and

(b) that matter must be of a character that permits arbitration under Australian law: AS [20], [43]; cf RS [22]–[23].

5. Section 7(5) commands the court not to order a stay in the circumstances it identifies.

6. To determine whether the conditions in s 7(2) are satisfied and whether any of the circumstances in s 7(5) exist, the court must construe the arbitration agreement.

Article 16 (Grounds 1 and 3)

7. Article 16(1) provides that arbitrators *may* rule on jurisdiction. It does not *require* arbitrators to rule, first or at all. All the more where: (i) parties agree that a court will decide scope questions; and (ii) a court must decide scope questions to apply s 7(2)(b): *Dallah* at [84] [JBA6/50/1748]. If Art 16 required arbitrators to rule first, s 7(2) and (5) would be otiose: see Born at 1189 [JBA11/88/4092]; cf ACICA [8]–[15].

8. The submission that arbitrators must rule first is derived from the so-called "negative effect" of competence-competence. But the New York Convention and Model Law are silent on the alleged negative effect, and national jurisdictions take differing approaches. Commentators describe the negative effect as "very controversial" and opine that, in light of consent as the fundamental basis of arbitration, parties should be able to agree that scope disputes will be decided by a court, not arbitrators: Kröll and Keller at 775, 788–789 [JBA13/103/4918, 4931–4932]; Born at 1189, 1313 [JBA11/88/4092, 4216]; Barceló at 846–847 [JBA10/83/3748–3749].

9. ACICA's submission that Art 16 requires a *prima facie* approach to s 7(2)(b) is: (i) not supported by its text or Australian authorities; (ii) illogical (s 7(2) applies also where there is no competence-competence); and (iii) inconsistent with s 7(5), which requires a decision in the usual way, finding facts on the balance of probabilities: *Carmichael* at [25] [JBA3/28/569].

The "light touch" approach is erroneous (Ground 1)

10. The primary judge did not construe the arbitration agreement, saying it is "a matter within the jurisdiction of the arbitral tribunal and not the Court": PJ [68]. Endorsing this, the Court of Appeal erroneously held that the "matter" was the substantive dispute in the arbitration, rather than the dispute involved in the Supreme Court, and that the purpose of s 7(2)(b) was to prevent the court deciding a question of scope: CA [76].

11. Case law demonstrates that, under s 7(2) or State equivalents, the court must construe the arbitration agreement: *Sportsgirl* at [28]–[30] [JBA6/55/1983–1984]; *Tianqi* at [88], [127]–[128] [JBA8/73/2722–2723, 2733]. The court must decide questions of law and make findings of fact on the balance of probabilities. If *Hancock* suggests that s 7(2)(b) attracts a variable standard of fact-finding or interpretation, it is wrong: cf *Hancock* at [145] [JBA7/57/2152]. Alternatively, if s 7(2) requires a *prima facie* approach subject to an exception for questions of law, the application below raised a question of law.

Choice of law (Ground 2)

12. The governing law of the arbitration agreement is determined by applying Australian common law conflicts rules: AS [36]. There is no implied statutory rule drawn from s 8(5)(b): *Trina Solar* at [182]–[183] [JBA8/77/2939–2940].

13. Under Australian conflicts rules, governing law is a matter of party choice. Express and implied choices are "species of the one genus": *Akai* at 440–441 [JBA3/27/545–546].

14. This Court should adopt *Enka* at [43] [JBA6/52/1870]: where a contract contains a governing law clause and an arbitration clause, "it is natural to interpret such a governing law clause, in the absence of good reason to the contrary, as applying to the arbitration clause for the simple reason that the arbitration clause is part of the contract which the parties have agreed is to be governed by the specified system of law".

15. The parties chose New York law in cl 18 [ABFM3/9/1024]. There is no good reason why this does not apply to the arbitration agreement in cl 19. And there is good reason why it does: the antecedent Royalty Agreement contains a materially identical governing law clause [ABFM1/1/8] that was held to choose New York law without distinction between the arbitration agreement and the balance; the arbitration agreement works with other clauses of the Settlement Agreement (notably cls 1, 5 and 12) that on any view are governed by New York law: AS [39], [41].

The parties agreed that a court would decide scope (Ground 3 and Notice of Contention)

16. New York law contains an interpretive rule that parties to an arbitration agreement are presumed to agree that a court, not arbitrators, decides scope questions unless there is "clear and unmistakable" evidence to the contrary: *First Options* at 944–945 [ABFM4/16/1659–1660]; *Howsam* at 83 [ABFM4/16/1712]. Express words or the adoption of arbitral rules that empower arbitrators to decide scope can constitute clear and unmistakable evidence, but adopted rules do not where there is an arguably applicable exception to the arbitration agreement: *NASDAQ* at 1031–1032 [ABFM5/17/1931–1932]; *DDK* at 318–319 [ABFM5/17/1998–1999]. Clause 19 does not contain clear and unmistakable evidence. The parties chose an arbitral regime that did not empower arbitrators to decide scope. Alternatively, if the choice of Melbourne as seat or the Appointment Agreement [ABFM3/10/1047] are treated as the choice of rules empowering arbitrators to decide scope, there is an arguably applicable exception.

Dated: 11 November 2026

Neil J Young | Mark Costello

SCHEDULE OF PARTIES

WOODSIDE ENERGY (BASS STRAIT) PTY LTD (ACN 004 228 004)

Second Respondent

WOODSIDE ENERGY (NORTH WEST SHELF) PTY LTD (ACN 004 514 489)

Third Respondent

BHP GROUP LTD (ACN 004 028 077)

10 Fourth Respondent