

**WILDLIFE PRESERVATION SOCIETY OF QUEENSLAND
PROSERPINE/WHITSUNDAY BRANCH INC v MINISTER FOR THE
ENVIRONMENT AND HERITAGE and Others**

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FEDERAL COURT OF AUSTRALIA

DOWSETT J

28 October 2005, 15 June 2006 — Brisbane

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[2006] FCA 736

Environment — Coal mine — Whether controlled action — Whether likelihood of significant impact — (CTH) Environment Protection and Biodiversity Conservation Act 1999 ss 3A, 12, 16, 20, 67, 68, 74, 75, 77, 183, 188, 523 — (CTH) Administrative Decisions (Judicial Review) Act 1977 s 5 — (CTH) Acts Interpretation Act 1901 s 15AB.

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The applicant sought review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) of two decisions of a delegate of the minister pursuant to s 75 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act). In each case a proposal for a new coal mine had been referred by the proponent under s 68 of the EPBC Act for a decision as to whether it was a “controlled action”. The applicant had made submissions pursuant to s 74 of the EPBC Act in relation to both projects, addressing concerns regarding impact on particular threatened species and greenhouse gas emissions arising both from the extraction process and the eventual burning of the extracted coal. The delegate decided neither proposed action was a controlled action.

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Held, in dismissing the application for review:

(i) The delegate had considered the possible impact of greenhouse gases generated in the extraction, transportation and burning of coal won from each proposed coal mine and concluded there was no significant impact for the purposes of Pt 3 of the EPBC Act.

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(ii) Part 3 of the EPBC Act provided protection in circumstances in which an action had, or would have, or was likely to have, a significant impact on a protected matter. There was no basis for undermining the requirement that there be, at least, a likely significant impact in order to engage Pts 8 and 9 of the Act by reading “likely” in s 12 and the other proscriptive provisions of Pt 3 as “possible” or “barely possible”.

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(iii) It was not clear that the principles of ecologically sustainable development contained in s 3A of the EPBC Act, particular the precautionary principle identified in para (b), could be applied to the decision-making process prescribed by s 75. In any event, it had not been established that either project would cause serious or irreversible damage.

(iv) The EPBC Act required the delegate to address the impact of the proposed action, not the impact of the worldwide burning of coal. The relevant impact was the difference between the position if the action occurred and the position if it did not.

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(v) There was no reason to introduce notions of causation into the process prescribed by s 75.

(vi) There was no suggestion that the mining, transportation or burning of coal from either proposed mine would directly affect any protected matter, nor was there any attempt to identify the extent (if any) to which the emissions from such mining, transportation and burning might aggravate the greenhouse gas problem.

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Minister for Environment and Heritage v Queensland Conservation Council Inc (2004) 139 FCR 24; [2004] FCAFC 190, distinguished.

S Keim SC and *C McGrath* instructed by the *Environmental Defenders Office* for the applicant.

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M Hinson SC and *M Swan* instructed by the Australian Government Solicitor for the first respondent.

D Jackson QC and *D Rangiah* instructed by *Allens Arthur Robinson* for the second respondent.

D Gove QC and *D Clothier* instructed by *Clayton Utz* for the third respondent.

Dowsett J.

Statutory background

[1] The Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act) seeks to protect the Australian environment and Australian heritage. The primary mechanism for achieving this result is the prohibition of actions which have, or are likely to have, adverse consequences for identified aspects of such environment or heritage. Those aspects are hereinafter referred to as “protected matters”. The principal operative provisions are found in Pt 3 and, in particular, Div 1.

[2] Division 1 is divided into subdivs A to I. Subdivision A deals with World Heritage properties. Section 12 prohibits actions which have, will have, or are likely to have, a significant impact on the World Heritage values of a declared World Heritage property. However, if the minister has, pursuant to Pt 9 of the EPBC Act, approved the relevant action, the prohibition will not apply. The EPBC Act provides a mechanism for determining, in advance, whether a proposed action will be “controlled” by any provision of Pt 3. If the minister has decided, pursuant to Pt 7, that a proposed action is not so controlled, then such action is not prohibited. Similar provisions in other subdivisions deal with National Heritage places, wetlands, threatened species and communities, listed migratory species and other matters.

[3] Section 67 (in Pt 7) provides:

67 What is a controlled action?

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 prohibited by the provision. The provision is a *controlling provision* for the action.

[4] Pursuant to s 523, and subject to certain exceptions, the word “action” includes:

- (a) a project; and
- (b) a development; and
- (c) an undertaking; and
- (d) an activity or series of activities; and
- (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).

[5] Section 68 provides that a person (the “proponent”) proposing to take an action which he or she thinks may be, or is, a controlled action must refer the proposal to the minister for a decision as to whether or not it is a controlled action. If the proponent believes that the proposed action is not a controlled action, he or she may similarly refer the proposal to the minister for a decision. Pursuant to s 74, upon receiving such a referral the minister must give notice to various persons and invite public comment.

[6] Concerning any such referral, s 75 provides:

- 75 Does the proposed action need approval?*
- Is the action a controlled action?
- (1) The Minister must decide:
- (a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and
- (b) which provisions of Part 3 (if any) are controlling provisions for the action. 5
- (1AA) To avoid doubt, the Minister is not permitted to make a decision under subsection (1) in relation to an action that was the subject of a referral that was not accepted under subsection 74A(1).
- Minister must consider public comment
- (1A) In making a decision under subsection (1) about the action, the Minister must consider the comments (if any) received: 10
- (a) in response to the invitation (if any) under subsection 74(3) for anyone to give the Minister comments on whether the action is a controlled action; and
- (b) within the period specified in the invitation.
- Considerations and decision 15
- (2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:
- (a) the Minister must consider all adverse impacts (if any) the action:
- (i) has or will have; or
- (ii) is likely to have;
- on the matter protected by each provision of Part 3; and 20
- (b) must not consider any beneficial impact the action:
- (i) has or will have; or
- (ii) is likely to have;
- on the matter protected by provision of Part 3. 25
- [7] Section 77 relevantly provides: 25
- 77 Notice and reasons for decision*
- Giving notice
- (1) Within 10 business days after deciding whether an action that is the subject of a proposal referred to the Minister is a controlled action or not, the Minister must: 30
- (a) give written notice of the decision to:
- (i) the person proposing to take the action; and
- ...
- (b) publish notice of the decision in accordance with the regulations.
- ...
- ... [There is no subs (3)] 35
- (4) The Minister must give reasons for the decision to a person who:
- (a) has been given the notice; and
- (b) within 28 days of being given the notice, has requested the Minister to provide reasons.
- The Minister must do so as soon as practicable, and in any case within 28 days of receiving the request. 40

The application

- [8] This application is brought pursuant to the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act). The applicant seeks review of 45
- two decisions by the minister's delegate pursuant to s 75 of the EPBC Act. In each case the delegate decided that the referred proposal was not a controlled action. The first referral (received by the minister on 7 April 2005) concerned a proposal by the second respondent (Bowen Coal) to develop a new coal mine near Moranbah (the Isaac Plains project). The second referral (received by the 50
- minister on 13 April 2005) concerned a proposal by the third respondent (QCoal)

to develop a new coal mine near Collinsville (the Sonoma project). I will outline each proposal and the reasons for the delegate's decision in each case.

Isaac Plains project

[9] In referring the proposal to the minister, Bowen Coal indicated that it did not consider the proposal to be a controlled action because:

The site does not support any of the MNES [matters of national environmental significance] listed in the EPBC Act, with exception of listed threatened/migratory fauna species that may occasionally make use of the site. Given the limited extent and poor condition of remnant habitats within the study area, it is not anticipated that the study area represents critical habitat for any rare, threatened or migratory species. Furthermore, the project requires disturbance of "not of concern" remnant vegetation only. Considering the mitigation measures that will be employed, it is not anticipated that the project will lead to significant impacts on rare, threatened or migratory species, communities or populations listed under the EPBC Act.

[10] Pursuant to s 74(3), the minister published the referral on the Internet and invited comment. The applicant responded, raising concerns about certain mammals, birds and tortoises, threatened ecological communities, wetlands, land clearance and water quality. In most cases, it asserted that more investigation was necessary in order to ensure that the proposed development would have no unacceptable impact. Two other areas of concern were addressed. The first concerned World Heritage Areas, specifically the Great Barrier Reef World Heritage Area and the Wet Tropics Heritage Area. The applicant urged consideration of the fact that over the proposed 9-year life of the mine, 18 million t of coal would be won and exported. The applicant asserted that the ultimate purpose was to burn such coal in power generation and that:

The production of greenhouse gases is almost certain to occur as a result of the action and can reasonably be imputed as within the contemplation of the proponent of the action.

[11] The applicant continued:

The burning of 18 million tonnes of coal will have an impact on global warming, how much of an impact the production of this amount of greenhouse gases will have on global warming and, consequently, on matters of national environmental significance is more difficult to determine but must, at the very least, be considered when assessing the likely impacts of the action.

Consideration of the impacts of the action under section 75 of the EPBC Act must consider the potential impacts of greenhouse gas emissions from the burning of the coal on global warming and the consequential impacts on matters of national environmental significance.

We contend that when the ultimate greenhouse gas emissions are considered the proposed action is likely to have a significant impact on matters of national environmental significance, including the World Heritage Areas.

[12] In a separate section headed "Greenhouse Gas Emissions" the applicant asserted that Australia was vulnerable to the impact of climate change and continued:

Potentially significant impacts include those of our agricultural productivity, coastal communities, threats to human health, and the imposition of further survival pressures on a range of native plants and animals.

[13] The applicant asserted that as a signatory to the Convention on Biological Diversity, Australia must adhere to Art 3 of the Convention which apparently provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

[14] It was asserted that Australia also had obligations under the World Heritage Convention. The applicant asserted that consideration had to be given to greenhouse gas emissions from both the extraction process and the eventual burning of the extracted coal and that:

This development must be declared a “controlled action” for the following reasons:

1. It will have impact on World Heritage property;
2. It will impact on listed Threatened Species;
3. It will impact on listed Threatened Ecological Communities;
4. It will have impacts on Migratory Species;
5. It will have impacts on Wetlands of International Significance; and
6. Australia has international obligations to uphold.

[15] An officer of the department considered the proposal and the applicant’s submission. He prepared a minute in which he advised the delegate to determine that the proposal was not a controlled action. Of the applicant’s submission the officer observed:

Comments submitted by the Proserpine/Whitsunday branch of the Wildlife Preservation Society of Queensland raise concerns regarding the loss of habitat for threatened and migratory species, impacts upon the Shoalwater and Corio Bays Ramsar Wetlands, and consequential impacts from global warming.

The mine site is located in the catchment of the Isaac River which flows south into the Fitzroy River and hence into the sea at Rockhampton (a distance of about 300 kms). The proposed action incorporates measures to minimise impacts on the quality of water being discharged into the Isaac River. The Shoalwater and Corio Bays Ramsar site lies about 50 to 100 km north of the mouth of the Fitzroy River. The ecological character of the Ramsar site will not be affected given the minimal nature of discharges and distances/dilution factors involved.

[16] The reference to the “Ramsar site” is to a site which has significance under a United Nations treaty made at Ramsar in Iran: see s 528. Such sites are mentioned in Subdiv B of Div 1 of Pt 3.

[17] Under the heading “Issues”, the officer concluded that “significant impacts on matters protected under the EPBC Act are not likely”. He then dealt specifically with threatened species including, in particular, vegetation and animal habitats, the Squatter Pigeon, reptiles, including the Fitzroy tortoise, various plants and migratory species. In each case he concluded that significant impacts were not likely. Finally, the officer considered “Secondary or consequent impacts”, observing:

The comments from the Wildlife Preservation Society of Queensland suggest that the impacts of climate change, as a consequence of the burning of coal produced from the mine, on the world heritage values of the Great Barrier Reef World Heritage Area should be considered. The nature of induced climate change from the referred coal mining operation, and impacts on world heritage values, are speculative.

[18] He then recommended that the delegate decide that the proposed action was not a controlled action. The delegate, Mr Flanigan, accepted that recommendation, writing on the minute the following words:

I regard the likelihood of significant impacts on NES arising from the marginal addition of greenhouse gases to be extremely small, in addition to speculative.

[19] The applicant was presumably advised of the decision and requested reasons pursuant to s 13 of the ADJR Act. At para 7 of the reasons, Mr Flanigan referred to the applicant's submission, observing that:

One public submission was received from the Proserpine/Whitsunday Branch of the Wildlife Preservation Society of Queensland. This submission raised concerns regarding loss of habitat for threatened and migratory species and impacts upon the Shoalwater and Corio Bays Ramsar site, and considered that the proposal should be a controlled action.

[20] At para 10 he said:

The evidence or other material upon which my findings were based are listed below:

- a brief from the Department dated 4 May 2005, including the following:
- a copy of the referral for the proposed action and associated figures and maps;
- a copy of a paper entitled Environmental Management Overview Strategy by Matrix Consulting, March 2005;
- a copy of a paper entitled Isaac Plains Project, Flora and Fauna Assessment by Ecotone Environmental Services Pty Ltd, February 2005;
- a copy of the public comment submitted on the referral; and
- advice from the Department relating to the potential impacts of the proposed action on matters protected under the EPBC Act.

[21] Under the heading "Findings on material questions of fact and reasons for my decision" Mr Flanigan said:

11. I found that there is no likelihood of the proposed action having a significant impact on a matter protected by any provision of Part 3 of the EPBC Act other than, potentially, sections 18 and 18A (Listed threatened species and ecological communities), and sections 20 and 20A (List of migratory species).
12. I formed the view that significant impacts on the heritage values of the Great Barrier Reef World Heritage Area or on the ecological character of the Shoalwater and Corio Bays Ramsar site are not likely given the nature and location of the proposed action. In this respect, I found that the mine area is within the catchment of the Isaac River, which flows south into the sea at Rockhampton (a distance of about 300 kms). I considered that the nature of any indirect impacts on world heritage values or the ecological character of a Ramsar site associated with the referred action are speculative.

[22] Mr Flanigan then referred to various specific matters, not including greenhouse gas emission or climate change. The applicant submitted that the absence of any such express reference suggests that those matters were not considered. I will return to this question. I observe, however, that in para 12, Mr Flanigan clearly referred to two classes of possible impact. He first considered possible impact via the Isaac River, presumably as the result of pollution. He then considered "indirect impacts". In cross-examination he said that he used the term "indirect impacts" to include the issue of greenhouse gas emission and climate change. That he considered those matters also appears from the note which he made on the departmental minute. Such matters were referred to in the minute as "(s)econdary or consequent impacts".

[23] Mr Flanigan has sworn an affidavit in these proceedings. In it he explained the process by which he considered the greenhouse gas and climate change issues. He holds an honours degree in geography. In reading for that degree he studied geomorphology, climatology and ecology. In such studies he addressed the possible effects of rising sea levels and the accumulation of greenhouse gases in the atmosphere. He has made many delegated decisions under the EPBC Act dealing with coal mining, oil and gas projects, loading facilities and power stations, including a decision or decisions concerning development in the Bowen Basin. He described himself as having “a sound general knowledge and understanding of the issues associated with greenhouse gas emission and climate change”. There is no reason to doubt that statement. He set out in some detail his process of reasoning in this case. As he said in cross-examination, “It takes longer to write it down and get it in writing than to think it”. I infer that Mr Flanigan meant that, on the basis of his training and experience, he has previously considered and formed general views about these matters, and that such previous consideration informed these decisions.

[24] In its submission concerning the proposal, the applicant had addressed these issues in a broad way, asserting little more than that the burning of 18 million t of coal would contribute, to some extent, to the production of greenhouse gases, and that this might contribute to climate change which might, in turn, produce an impact of the kind contemplated in Pt 3. Such an expression of concern should not necessarily have led to a full scientific investigation and definitive determination of the matter. The decision-maker must always consider whether further investigation is necessary having regard to his or her duty under the relevant legislation.

[25] Where a person has specialised training and expertise in a particular area, and has dealt with a variety of problems which commonly arise in that area, it is inevitable that he or she will bring past experience to bear upon similar problems. Of course, the decision-maker must consider all relevant aspects of the matter in hand, especially those which may differentiate it from cases which he or she has previously considered.

Sonoma project

[26] On 13 April 2005 QCoal referred the proposed Sonoma Project to the minister, indicating that it considered that it was not a controlled action. It asserted that such action would not impact on any World Heritage properties, National Heritage places, wetlands of international significance, Commonwealth marine areas, Commonwealth land, Commonwealth Heritage places, Commonwealth or State reserves, critical habitats or regional forest areas. QCoal also did not expect that the proposal would have significant impact on any threatened species, ecological communities or their habitats. The proposal would involve some clearing of existing vegetation, 68% of which was regrowth. Riparian vegetation and an environment buffer zone beyond the riparian vegetation were to remain undisturbed.

[27] Again, the applicant made submissions. It held “concerns regarding all species listed in the Threatened Species List in the EPBC Act Protected Matters Report obtained on 15 April 2005”. However, the applicant made submissions concerning only two aspects which, it said, highlighted “the need for further environmental assessment”. These were the squatter pigeon and a threatened ecological community. The precise nature of the ecological community is not entirely clear, but that may not matter for present purposes. Under the heading

“World Heritage Areas” the applicant suggested that global warming was already “impacting on matters of national environmental significance” with specific reference to the Great Barrier Reef and the Wet Tropics World Heritage Area. It asserted that consideration had to be given to the impact on global warming of the coal to be mined in the project, most of which would be exported. Under the heading “Greenhouse Gas Emissions” the applicant asserted that Australia had an obligation under the Convention on Biological Diversity. There was detailed reference to ice melting in the Antarctic and elsewhere. There was also discussion of effects on wildlife, particularly birds, and water quality.

[28] A minute was prepared by the departmental officer who had advised in connection with the Isaac Plains project. Of the applicant’s comments, the officer recorded:

Comments were received from Ian and Dympna Lee of the Proserpine/Whitsunday Branch of the Wildlife Preservation Society of Queensland, raising a number of general concerns in relation to the state of the environment in Australia. More specifically, in relation to possible impacts on matters of NES, concerns were raised regarding the Squatter pigeon (southern), black box (*Eucalyptus raveretiana*) and the listed endangered ecological community Brigalow (*Acacia harpophylla*).

[29] The matters of concern raised by Mr and Mrs Lee were discussed in detail. Under the heading “Secondary or Consequent Impacts” the officer said:

The comments from the Wildlife Preservation Society of Queensland suggest that the impact of climate change, as a consequence of the burning of coal produced from the mine, on the world heritage values of the Great Barrier Reef World Heritage Area should be considered. The nature of induced climate change from the referred coal mining operation, and impacts on world heritage values are speculative. The quantum contribution to induced climate change directly attributable to the referred action is minute and not likely to be measurable against the context of existing and reasonably foreseen contributors.

[30] The officer recommended that Mr Flanigan decide that the proposed action was not a controlled action. A “Supporting Advice” was attached to the paper. It dealt with numerous aspects of the proposal, but not with greenhouse gas emission or climate change. On 10 May 2005 Mr Flanigan decided that the proposed action was not a controlled action and subsequently, the applicant sought reasons. Those reasons were dated 21 June 2005. In para 13 Mr Flanigan dealt with the Great Barrier Reef World Heritage Area. Again, he seems to have distinguished between direct and indirect impacts. He first dealt with water quality issues (presumably a matter of direct impact) and then said:

I considered that the nature of any indirect impacts on world heritage values associated with the referred action are speculative.

[31] In his affidavit Mr Flanigan said that in considering this application, he had proceeded in the same way as he had in considering the Isaac Plains project.

Cross-examination

[32] I permitted cross-examination of Mr Flanigan, limited to three aspects, namely:

- whether the process of reasoning set out in paras 16–29 of his affidavit took place;
- whether the statement in the first sentence of para 30 of his affidavit was true; and

- whether Mr Flanigan’s notation on the departmental minute concerning the Isaac Plains project was made by him without his having followed the reasoning process outlined in his affidavit.

[33] The first sentence of para 30 of Mr Flanigan’s affidavit reads as follows:

The annotation I made, to which I refer in par 28 above was based on the reasoning process outlined above.

[34] In para 28, Mr Flanigan said that he wrote the notation at the same time as he noted on the minute his approval of the recommendation contained in it. I am not sure whether the applicant challenges that assertion.

[35] In cross-examination, Mr Flanigan agreed that greenhouse gases would be emitted as a result of the mining operation itself. Apparently gases caught in the coal seam are released during mining. Other greenhouse gases would be emitted as a result of the transportation of the coal. Those emissions come from the means of transport rather than the coal. Burning of the coal will also produce greenhouse gases. Mr Flanigan said that he addressed all of those aspects. He considered that burning the coal would produce much greater greenhouse gas emission than would the mining process or transportation.

[36] I derived little assistance from the cross-examination of Mr Flanigan. It was primarily designed to permit Mr Flanigan to comment upon matters to be put in final submissions. That was entirely proper. I should refer to one aspect of the cross-examination. At one stage counsel said:

I don’t want to make this a legal quiz, but I just want to put to you some of the things that have been said in the cases and just see whether you accept that as a value which you are required to apply in the process.

[37] I considered that such a line of questioning was potentially argumentative and unfair to the witness. I therefore inquired as to its relevance to the three issues about which I had permitted cross-examination. Counsel said that it went to credit, and that it concerned Mr Flanigan’s understanding of his obligations. I indicated that I would not allow questioning of that kind, by which I meant the process of putting to the witness observations made in judicial decisions (presumably concerning quite different proposals) to see whether he “accepted” them. I have explained this interlocutory ruling because my meaning may not be entirely clear from the transcript.

[38] I saw no reason to doubt Mr Flanigan’s truthfulness or reliability as a witness. In particular, I saw no reason to doubt that his affidavit accurately reflected the basis upon which he made his decisions or that the annotation on the minute was made at the time of the decision and was based on the same reasoning process. As I have said, it is possible that some parts of his reasoning were based on expertise and past experience. That does not, in any way, undermine the validity of his decisions. Greenhouse gases and climate change are matters of great public controversy. It would be surprising if somebody in Mr Flanigan’s position had not considered them and formed general views as to their significance in his work.

The applicant’s case

[39] The applicant’s first ground for review was that Mr Flanigan did not take account of the “adverse impacts the Isaac Plains Coal Project and the Sonoma Coal Project are likely to have on the matters protected by Pt 3 of the EPBC Act due to the mining, transport and use of the coal from the mines emitting a large

amount of greenhouse gases contributing to global warming”. The second ground was that in making the decision Mr Flanigan erred in law in that he treated the expression “all adverse impacts the action is likely to have on the matter protected by each provision of Pt 3”, in s 75(2) of the EPBC Act, as not including the adverse impacts the [proposals] are likely to have on the matters protected by Pt 3 of the EPBC Act due to the mining, transport and use of the coal from the mines emitting a large amount of greenhouse gases contributing to global warming”.

[40] In its submissions the applicant had focused on the effect of greenhouse gas emission and climate change on the Great Barrier Reef World Heritage Area and Ramsar wetlands. However, in its application for review, the applicant did not identify which of the protected matters identified in Pt 3 were likely to suffer significant impact as a result of either development. Argument proceeded on the basis that s 12 was the relevant controlling provision. It relates to World Heritage properties of which the Great Barrier Reef World Heritage Area is one. Section 16 concerns Ramsar wetlands. The applicant’s submissions focused on greenhouse gas emission, leading to climate change but, as in the application, it paid little or no attention to the actual effect on any identified protected matter. Part 3 focuses upon impact on such matters. The likely significance of the impact of any action will vary, depending upon which protected matter is being considered. In other words, it will usually be erroneous to speak of a “significant impact” for the purposes of Pt 3 as if a particular action and its consequences might affect all protected matters in the same way and to the same extent. Mr Flanigan did not adopt this potentially erroneous approach in his reasons, but he did so, to some extent, in his affidavit, presumably influenced by the form of the application for review. In argument the parties all addressed the matter on that basis. While such an approach has the potential capacity to cause error, there is no suggestion that any such error infected Mr Flanigan’s decisions.

[41] The applicant’s first ground of review (outlined above) is somewhat misleading. It purports to rely on s 5(1)(e) and (2)(b) of the ADJR Act which concern failure to take account of relevant considerations. However the applicant’s complaint seems to be that Mr Flanigan failed to consider whether either project would have, or was likely to have, a significant impact upon any protected matter: in other words, that he failed to address the proper question, rather than that he failed to take account of relevant considerations in so doing. The second ground alleges that Mr Flanigan acted on a misconstruction of s 75 in that he did not consider the adverse impacts of greenhouse gas generation and climate change “in the matters protected by Pt 3 of the EPBC Act”. The two grounds raise the same issue, namely whether Mr Flanigan addressed the question posed by s 75.

[42] The alleged error is said to be disclosed by the absence from Mr Flanigan’s reasons of any detailed discussion of the greenhouse gas and climate change issues. The applicant, at least tacitly, submitted that I should reject Mr Flanigan’s affidavit as an *ex post facto* rationalisation of his decisions rather than as an honest account of his reasons. However, it is clear that in each case the departmental officer raised the greenhouse gas issue for his consideration, although limited to the consequences of burning the coal. Mr Flanigan asserted that he also considered greenhouse gas emissions resulting from the mining and transportation processes. Given his training and experience in the area, it would be surprising if he were not aware of all of these potential sources of greenhouse

gases. I accept that Mr Flanigan's reference in his reasons to the so-called "indirect" impacts on World Heritage values were to greenhouse gas emission from all sources and its potential for causing climate change. In other words he considered the possibility that greenhouse gas emission might cause climate change and consequential effects upon protected matters. 5

[43] Understandably, the applicant sought to advance its case by pointing to the paucity of detail concerning these matters in the reasons. It may well have been better had Mr Flanigan said rather more than he did. However, as I have previously observed, the applicant raised the matter as one of general concern. Mr Flanigan concluded that the possibility of increased concentration of greenhouse gases in the atmosphere resulting from each project was speculative and merely "theoretically possible". There was no suggestion that the mining of coal pursuant to these proposals would increase the amount of coal burnt in any particular year, or cumulatively. It was not suggested that in the absence of coal from these sources, less coal would be burnt. Mr Flanigan also considered that if there were any such increased emissions, the additional impact on protected matters would be very small and therefore not significant. 10 15

[44] Given my acceptance of Mr Flanigan's evidence, it follows that I accept that he considered the possible impact of greenhouse gases generated in the extraction, transportation and burning of coal won from each proposed mine and concluded that there was no significant impact for the purposes of Pt 3. The applicant must fail on each of its first two grounds. 20

[45] The other grounds of review are somewhat garbled. One suspects that they were drafted so as to utilise as many as possible of the individual grounds identified in s 5 of the ADJR Act, regardless of whether they were fairly applicable in this case. The applicant also sought to colour its argument concerning those grounds by reference to five factors said to indicate the proper approach to the task prescribed by s 75. 25 30

[46] First, the applicant referred to s 15AB(2)(d) of the Acts Interpretation Act 1901 (Cth). That section, in effect, provides that in construing an Act a court may have regard to "any treaty or other international agreement that is referred to in the Act". By s 520(3) of the EPBC Act, the Governor-General is authorised to make regulations "for and in relation to giving effect to any of the following agreements". Relevantly, such "agreements" include the World Heritage Convention, the Ramsar Convention, the Biodiversity Convention and the Framework Convention on Climate Change done at New York on 9 May 1992. The applicant relies primarily upon the last-mentioned Convention, Art 3, para 3 of which provides: 35 40

3. The Parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried cooperatively by interested Parties. 45 50

[47] That provision, and the Convention generally, offer little assistance in the task of construing the EPBC Act. Part 3 of that Act is a mechanism adopted by the parliament for the purposes of protecting certain aspects of the Australian environment and heritage. It chose to provide such protection in circumstances in which an action has, will have, or is likely to have, a significant impact upon a protected matter. I see no basis for undermining the requirement that there be, at least, a likely significant impact in order to engage Pts 8 and 9. The thrust of the applicant's argument in this regard, as in others, seemed to be that "likely" in s 12 and the other proscriptive provisions of Pt 3 should be read as "possible" or, perhaps, as "barely possible". I reject that approach to the construction of those sections.

[48] The applicant also referred to s 183(1) of the EPBC Act which provides:

183 *Listing of key threatening processes*

(1) The Minister must, by instrument published in the *Gazette*, establish a list of threatening processes that are key threatening processes.

[49] Pursuant to s 188(3):

(3) A process is a *threatening process* if it threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community.

[50] Section 188(4) defines the criteria for identifying a "key threatening process".

[51] It seems that global warming has been nominated as a key threatening process pursuant to s 183. However that offers no justification for construing s 12 as prohibiting conduct which is not likely to have significant impact on a protected matter.

[52] The third factor said to be relevant to the approach taken under the Act is the existence of Pt 8. It provides various methods for assessing the impact of individual controlled actions. It was said that in deciding whether or not a particular action is a controlled action (that is, whether or not any provision of Pt 3 controls it), regard should be had to the fact that in the event that it is a controlled action, it will be subject to a further process of assessment and evaluation pursuant to Pt 8, prior to any approval being given pursuant to Pt 9. All of that may be so, but as far as I can see it does not detract from the use, in the various controlling sections in Pt 3, of the notion of "likely" significant impact. Clearly, an action is only to be assessed pursuant to Pt 8 if it is a controlled action. The criteria for the application of Pts 8 and 9 to a proposed action are those found in Pt 3, not the views of the decision-maker as to the merits of applying Pts 8 and 9 to that action.

[53] Fourth, the applicant sought to rely upon the principles of ecologically sustainable development contained in s 3A of the EPBC Act, particularly that identified in para (b) which provides that it is a principle of ecologically sustainable development that:

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[54] It is not clear that this "principle" can be applied to the decision-making process prescribed by s 75. In any event it has not been established that either project will cause serious or irreversible environmental damage. Mr Flanigan has decided that there is no likely significant impact.

- [55] Finally, the applicant sought to make much of the fact that the threats posed by the emission of greenhouse gases are cumulative. It was argued that it was inappropriate to seek to identify the actual effect attributable to the action in question, as opposed to the general threat posed by greenhouse gas emission and climate change. However the EPBC Act required Mr Flanigan to address the impact of the proposed action, not the impact of the worldwide burning of coal. Second it was said that the impact of each action ought not be assessed having regard to the whole history of greenhouse gas emissions, but rather in comparison only to other contemporary emissions. Thus small coal mines might be preferred to larger mines. I see no merit in this argument. The relevant impact must be the difference between the position if the action occurs and the position if it does not. 5
- [56] Having discussed these general matters, I turn to the remaining grounds for review. Ground 3 claims an error of law in that Mr Flanigan failed to take “a common sense approach to causation of the greenhouse impacts appreciating that the purpose of the inquiry is to attribute legal responsibility for impacts to matters protected by Pt 3 of the EPBC Act in light of the subject, scope and objects of the Act”. 10 15
- [57] I am not sure that the purpose of Pt 3 is to attribute legal responsibility for the causation of adverse impacts. To my mind the purpose of the Act is to prevent or minimise such adverse impact. Be that as it may, there is no reason to believe that Mr Flanigan adopted other than a “common sense approach” to the issue of causation. Causation is, of course, not mentioned in s 12 or the other analogous sections in Pt 3. However, it was submitted that there is necessarily a causal relationship between an action and any relevant impact. That is probably so, but I see no reason to introduce notions of causation into the process prescribed by s 75. It is not necessary to go beyond the language of the relevant sections. In any event, Mr Flanigan accepted the possibility that the coal might be burnt, thereby producing additional greenhouse gases which might cause climate change. The point at which he disagreed with the applicant was as to the likelihood of any adverse impact upon a protected matter and the extent thereof. 20 25 30
- [58] Ground 4 claims an error of law in that Mr Flanigan “failed to treat the issue of causation, generally, and failed to construe references to ‘a significant impact’, in particular, in the context of the objects and purpose of the EPBC Act including the function of Pt 3 and s 75 thereof in the statutory environmental impact assessment process established by the EPBC Act”. I have already indicated that I consider this argument to be misconceived. 35
- [59] Ground 5 claims an error of law in that Mr Flanigan “failed to consider the greenhouse impacts operating cumulatively with other contributors to global warming”. Mr Flanigan clearly addressed that issue. Indeed, it was the point of his decision. 40
- [60] Ground 6 claims error of law in that Mr Flanigan “equated a finding that such an impact was extremely small, taken on its own, with its being insignificant”. While the adjectives “small” and “insignificant” have different meanings, Mr Flanigan was clearly satisfied that any possible impact would be insignificant. 45
- [61] Ground 7 claims an error of law in that Mr Flanigan “treated it as a prerequisite for such a conclusion that the greenhouse impacts ‘set in train climate change processes that may have impacts on matters protected by Pt 3’ when such processes are already in train and capable of being contributed to by the greenhouse impacts of the project”. 50

[62] Mr Flanigan clearly understood the position. He did not accept that either project would do so. There is nothing in this point.

[63] Ground 8 claims an error of law in that Mr Flanigan “having found that the greenhouse impacts would be likely to increase the concentration of greenhouse gases in the atmosphere, he ignored that finding to conclude that there was no possibility, in reality, that any impact on climate in the vicinity of matters protected by Pt 3 could ensue”.

[64] This is nothing more than a complaint that Mr Flanigan gave effect to the word “significant” in the section. He was obliged to do so.

[65] Ground 9 claims an error of law in that Mr Flanigan “treated as a prerequisite for such a finding that the particular impact on matters protected by Pt 3 of the EPBC Act be measurable, specifically identifiable; and demonstrable”.

[66] In my view he simply accepted that any impact had to be significant. Again, that is what the section required.

[67] Ground 10 claims that the decisions were improper exercises of the relevant power because Mr Flanigan failed to take a relevant consideration into account, namely that global warming is included as a key threatening process on the list established under s 183 of the EPBC Act and therefore failed to consider the serious threat that global warming poses when assessing greenhouse impacts from the proposed mines.

[68] I have already dealt with this argument. It is not necessary to say any more about it.

[69] Ground 11 claims improper exercise of the power in that Mr Flanigan took into account an irrelevant consideration, namely uncertainty as to the manner in which the coal would be used. This criticism appears to assume that it would have been possible to find out how the coal would be used and to assess the consequent greenhouse gas emission effect, and/or to attach conditions to the development pursuant to Pts 8 and 9. All of this may be true, but it seems to me that the matter was disposed of upon the basis that, on at least one scenario, all of the coal would be burnt. Whether or not contracts for the sale of the coal were already in place, I do not know. Nor do I know whether or not any potential, ultimate consumers would be less likely to produce greenhouse gases or likely to produce less greenhouse gases, than would others. One imagines that there is a possibility that the coal would be stockpiled rather than burnt, or perhaps burnt in circumstances in which greenhouse gas emission was reduced or eliminated, either by existing technology (if there is any such technology) or by technology yet to be developed. However I do not understand that Mr Flanigan placed any great weight upon the fact that the ultimate fate of the coal was unknown. In any event, it could not be said that such consideration was irrelevant to the task in hand.

[70] Finally, ground 12 claims that there was no evidence upon which the delegate could have been reasonably satisfied that greenhouse gas emissions were not likely to have a significant impact on the protected matters. In his affidavit, Mr Flanigan gave some indication of the factual basis of his decision. As I understand it, counsel for the applicant did not seek to cross-examine him concerning that aspect. There was good reason for his not doing so. The applicant’s primary case was that Mr Flanigan did not consider these matters at all. Cross-examination as to the factual basis of the decisions could well have undermined the applicant’s prospects of succeeding on that primary ground. The ground of lack of evidence has not been established.

[71] In the circumstances none of the grounds of review is established.

Connection between action and impact

[72] I have proceeded upon the basis that greenhouse gas emissions consequent upon the burning of coal mined in one of these projects might arguably cause an impact upon a protected matter, which impact could be said to be an impact of the proposed action. I have adopted this approach because it appears to have been the approach adopted by Mr Flanigan. However, I am far from satisfied that the burning of coal at some unidentified place in the world, the production of greenhouse gases from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter, can be so described. The applicant's concern is the possibility that at some unspecified future time, protected matters in Australia will be adversely and significantly affected by climate change of unidentified magnitude, such climate change having been caused by levels of greenhouse gases (derived from all sources) in the atmosphere. There has been no suggestion that the mining, transportation or burning of coal from either proposed mine would directly affect any such protected matter, nor was there any attempt to identify the extent (if any) to which emissions from such mining, transportation and burning might aggravate the greenhouse gas problem. The applicant's case is really based upon the assertion that greenhouse gas emission is bad, and that the Australian government should do whatever it can to stop it including, one assumes, banning new coal mines in Australia. This case is far removed from the factual situation in *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; [2004] FCAFC 190.

Orders

[73] In the circumstances the application must be dismissed. I will hear submissions as to costs.

Orders

The application be dismissed.

LINDA PEARSON
SOLICITOR