

# FEDERAL COURT OF AUSTRALIA

## Australian Conservation Foundation Incorporated v Minister for the Environment and Energy [2017] FCAFC 134

Appeal from: *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042

File number: QUD 726 of 2016

Judges: **DOWSETT, MCKERRACHER AND ROBERTSON JJ**

Date of judgment: 25 August 2017

Catchwords: **ADMINISTRATIVE LAW** – appeal from a decision dismissing a judicial review challenge – where the Minister’s decision was to approve a coal mine project – alleged error by the Minister in failing to determine the “impact” of combustion emissions on the Great Barrier Reef – consideration of s 527E of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) – where the Minister’s reasons reflect a proper discharge of his statutory duty – appeal dismissed

Legislation: *Acts Interpretation Act 1901* (Cth) s 19  
*Administrative Decisions (Judicial Review) Act 1977* (Cth)  
*Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 24B, 44, 47(1), 67, 67A, 68, 75, 77, 82, 83, 130, 136, 137, 137A, 391, 523(1), 527E  
*Judiciary Act 1903* (Cth) s 39B

Cases cited: *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254

Date of hearing: 3 March 2017

Registry: Queensland

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human rights

Category: Catchwords

Number of paragraphs: 62

Counsel for the Appellant: Mr S Holt QC with Mr E Nekvapil

Solicitor for the Appellant: Environmental Defenders Office (Qld) Inc

Counsel for the First Respondent: Mr R Lancaster SC with Mr G del Villar

Solicitor for the First Respondent: Australian Government Solicitor

Counsel for the Second Respondent: Mr D Clothier QC with Mr S Webster

Solicitor for the Second Respondent: Ashurst Australia

# ORDERS

QUD 726 of 2016

**BETWEEN:**            **AUSTRALIAN CONSERVATION FOUNDATION  
INCORPORATED**  
Appellant

**AND:**                **MINISTER FOR THE ENVIRONMENT AND ENERGY**  
First Respondent

**ADANI MINING PTY LTD ACN 145 455 205**  
Second Respondent

**JUDGES:**            **DOWSETT, MCKERRACHER AND ROBERTSON JJ**

**DATE OF ORDER:**   **25 AUGUST 2017**

## **THE COURT ORDERS THAT:**

1. the appeal be dismissed;
2. within 14 days of this order the appellant file and serve submissions, limited to 3 pages, on the question of costs; and
3. within a further 14 days, the respondents file and serve submissions, limited to 3 pages, on the question of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# REASONS FOR JUDGMENT

## THE COURT:

### INTRODUCTION

1 The second respondent (“Adani”) proposes to develop and operate a coal mine and associated infrastructure in Central Queensland (the “Proposal”). As one might expect, such a proposal requires consultation with, and approval by, the Commonwealth and Queensland governments and/or government agencies. At Commonwealth level, the Proposal engages the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the “Conservation Act”). That Act requires consideration of the Proposal in connection with, amongst other matters, its effects upon the environment. These proceedings are concerned with the effects or likely effects on the Great Barrier Reef (the “Reef”).

### THE LEGISLATIVE REGIME

2 Section 67 of the Conservation Act identifies actions described as “controlled actions”. In general, they are actions which would have, or be likely to have a “significant impact” upon certain identified matters. A provision which prohibits such an act is called a “controlling provision”. Division 1 of Pt 3 is divided into numerous subdivisions. Each of subdivisions A-G addresses a particular matter of national significance. For present purposes, the relevant subdivisions are:

- subdivision A, dealing with declared World Heritage properties;
- subdivision B, dealing with National Heritage places; and
- subdivision FA, dealing with the Great Barrier Reef Marine Park.

3 In each subdivision there is a prohibition upon the taking of action that has, will have, or is likely to have a significant impact on:

- in the case of subdivision A, the World Heritage values of a declared World Heritage property;
- in the case of subdivision B, the National Heritage values of a National Heritage place; and
- in the case of subdivision FA, the environment.

4 For relevant purposes, the Reef area is a World Heritage property and a National heritage place.

5 In subdivision FA, there is an apparent anomaly in the use of the word “environment”. In s 24B(1) the relevant prohibition is on conduct which occurs in the Great Barrier Reef Marine Park (the “Marine Park”) which action has, will have or is likely to have a significant impact on “the environment”. In s 24B(2) the prohibition is on conduct outside of the Marine Park, but within the “Australian jurisdiction”, which conduct has, will have or is likely to have a significant impact on “the environment in the [Great Barrier Reef] Marine Park”. For present purposes, however, the apparent anomaly is of no significance.

6 The prohibitions in all of these subdivisions do not apply if the action in question has been approved pursuant to Pt 9 of the Conservation Act. In Pt 9, s 130 provides that the “Minister” may give such approval. It seems that pursuant to s 19 of the *Acts Interpretation Act 1901* (Cth) (the “Acts Interpretation Act”), the first respondent (the “Minister”) was the relevant minister.

7 Concerning the word “action” s 523(1) provides:

Subject to this Subdivision, 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).

8 The Proposal is, itself, an “action”. The word “impact” is defined in s 527E as follows:

- (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.

9 For present purposes, subs 527E(1)(b) is the central part of the definition of the word “impact”.

### **SEEKING APPROVAL**

10 There is a somewhat complex procedural route which must be taken in order to obtain an approval for the taking of an action. As would be expected, before the Minister can grant an approval, the proposed action must be assessed. Part 8 of the Act deals with “Assessing impacts of controlled actions”. Part 9 deals with “Approval of actions”. Part 8 identifies a number of different assessment methods. The Minister must identify the method to be adopted in any particular case. However s 83(1) provides that Pt 8 does not apply in relation to an action if:

...

- (a) the action is to be taken in a State or self governing Territory; and
- (b) a bilateral agreement between the Commonwealth and the State or Territory declares that actions in a class that includes the action need not be assessed under this Part; and
- (c) the provision of the bilateral agreement making the declaration is in operation in relation to the action.

...

11 Not infrequently, the Commonwealth and the State or Territory in which a proposed action is to occur, will both have interests in its assessment and approval. Chapter 3 authorizes the making of a “bilateral agreement” between the Commonwealth and a relevant State or Territory. Section 44 provides:

The object of this Part is to provide for agreements between the Commonwealth and a State or self governing Territory that:

- (a) protect the environment; and
- (b) promote the conservation and ecologically sustainable use of natural resources; and
- (c) ensure an efficient, timely and effective process for environmental assessment and approval of actions; and
- (d) minimise duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (and vice versa).

12 Section 47(1) provides:

A bilateral agreement may declare that actions in a class of actions identified wholly or partly by reference to the fact that they have been assessed in a specified manner need not be assessed under Part 8.

13 It is accepted that the Proposal was assessed pursuant to such a bilateral agreement between the Commonwealth and the State of Queensland (the “Queensland Bilateral Agreement”).

14 Chapter 4 of the Conservation Act deals with environmental assessments and approvals. Section 67, to which we have already referred, provides:

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.

15 Section 67A provides:

A person must not take a controlled action unless an approval of the taking of the action by the person is in operation under Part 9 for the purposes of the relevant provision of Part 3.

...

16 Section 68 provides:

- (1) A person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister for the Minister’s decision whether or not the action is a controlled action.
- (2) A person proposing to take an action that the person thinks is not a controlled

action may refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action.

- (3) In a referral under this section, the person must state whether or not the person thinks the action the person proposes to take is a controlled action.
- (4) If the person states that the person thinks the action is a controlled action, the person must identify in the statement each provision that the person thinks is a controlling provision.
- (5) Subsections (1) and (2) do not apply in relation to a person proposing to take an action if the person has been informed by the Minister under section 73 that the proposal has been referred to the Minister.
- (6) This section is affected by section 68A.

17 Subsequent sections prescribe actions which the Minister must take in connection with such a referral. Division 1A contemplates a situation in which the Minister summarily decides that the proposed action would have unacceptable impacts on a matter protected by a provision of Pt 3 (a "protected matter"). Section 34 identifies such matters. Relevantly, they include:

- the world heritage values of a declared World Heritage property;
- the national heritage values of a National Heritage place; and
- the environment in the Great Barrier Reef Marine Park.

18 Part 7 Div 2 is headed "Ministerial decision whether action needs approval". Section 75 provides relevantly as follows:

- ...
- (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.

- ...
- (1A) In making a decision under subsection (1) about the action, the Minister must consider the comments (if any) received:
    - (a) in response to the invitation under subsection 74(3) for anyone to give the Minister comments on whether the action is a controlled action; and

- ...
- (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

- (b) must not consider any beneficial impacts the action:
  - (i) has or will have; or
  - (ii) is likely to have;

on the matter protected by each provision of Part 3.

19 Section 77 provides:

...

- (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:
  - (a) give written notice of the decision to:
    - (i) the person proposing to take the action; and
    - (ii) if the Minister has designated as proponent of the action a person who does not propose to take the action—that person; and
    - (iii) if the Minister decided that the action is a controlled action because of Division 1 of Part 3 (which deals with matters of national environmental significance)—the appropriate Minister of each State or self governing Territory in which the action is to be taken; and
  - (b) publish notice of the decision in accordance with the regulations.

...

- (2) If the decision is that the action is a controlled action, the notice must identify each of the controlling provisions.

...

- (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.

20 Following the Minister's decision that a proposed action is a controlled action, the proposed action will be assessed, either pursuant to a bilateral agreement or pursuant to Pt 8. As there was such an agreement between the Commonwealth and the State of Queensland, Pt 8 was

not engaged, and so assessment of the Proposal proceeded in accordance with the requirements of the Queensland Bilateral Agreement. Although s 83 suggests that Pt 3 did not apply to the Proposal, the primary Judge concluded that the combined effect of ss 528, 81 and 82 was that s 82 defined the term “relevant impact” for all purposes under the Conservation Act. That term is used in provisions of the Conservation Act which are presently relevant, particularly s 136(2)(e). We agree with his Honour’s reasons concerning this question of construction. We do not understand that conclusion to be challenged on appeal.

21 Section 130 provides:

...

(1) The Minister must decide whether or not to approve, for the purposes of each controlling provision for a controlled action, the taking of the action.

(1A) The Minister must make the decision within the relevant period specified in subsection (1B) that relates to the controlled action, or such longer period as the Minister specifies in writing.

(1B) The relevant period, in relation to a controlled action, is as follows:

- (a) if the action is the subject of an assessment report—the period of 30 business days beginning on the first business day after the Minister receives the assessment report;
- (b) if Division 3A of Part 8 (assessment on referral information) applies to the action—the period of 20 business days beginning on the first business day after the Minister receives the finalised recommendation report under subsection 93(5);
- (c) if Division 4 of Part 8 (assessment on preliminary documentation) applies to the action—the period of 40 business days beginning on the first business day after the Minister receives the documents under subsection 95B(1) or the statement under subsection 95B(3), as the case requires;
- (d) if Division 5 (public environment reports) or Division 6 (environmental impact statements) of Part 8 applies to the action—the period of 40 business days beginning on the first business day after the Minister receives the finalised public environment report or the finalised environmental impact statement, as the case requires;
- (e) if a commission has conducted an inquiry relating to the action—the period of 40 business days beginning on the first business day after the Minister receives the report of the commission.

...

(2) An assessment report is a report given to the Minister as described in:

- (a) subsection 47(4) (about assessments under a bilateral agreement); or

- (b) subsection 84(3) (about assessments in a manner specified in a declaration); or
- (c) subsection 87(4) (about assessments by accredited assessment processes).

...

- (4) If the Minister specifies a longer period for the purposes of subsection (1A), he or she must:
  - (a) give a copy of the specification to the person proposing to take the action; and
  - (b) publish the specification in accordance with the regulations.

...

- (4A) If, under section 131AB, the Minister is required to obtain advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development before making a decision whether or not to approve the taking of an action, a day is not to be counted as a business day for the purposes of subsection (1B) if it is:
  - (a) on or after the day the Minister requested the advice; and
  - (b) on or before the day on which the Minister obtains the advice.

...

- (5) If, under section 132, the Minister has requested more information for the purposes of making a decision whether or not to approve the taking of an action, a day is not to be counted as a business day for the purposes of subsection (1B) if it is:
  - (a) on or after the day the Minister requested the information; and
  - (b) on or before the day on which the Minister receives the last of the information requested.

22 Section 130 prescribes an apparently tight timeframe within which a decision as to approval must be made, although the Minister may extend the relevant period. In making his decision, the Minister will have the benefit of a report of the kind contemplated in s 130(2). In the present case the relevant report was that prepared in accordance with the requirements of the Queensland Bilateral Agreement. In some circumstances the Minister may be obliged to seek advice from another nominated source and/or to invite comments from identified parties. Section 132 permits the Minister, “on reasonable grounds”, to seek further information before making a decision. He or she must invite public comment. The approval of the proposed action must be, “for the purposes of each controlling provision”.

23 Section 133 provides relevantly:

- (1) After receiving the assessment documentation relating to a controlled action,

or the report of a commission that has conducted an inquiry relating to a controlled action, the Minister may approve for the purposes of a controlling provision the taking of the action by a person.

...

- (2) An approval must:
- (a) be in writing; and
  - (b) specify the action (including any alternative proposals approved under subsection (1A)) that may be taken; and
  - (c) name the person to whom the approval is granted; and
  - (d) specify each provision of Part 3 for which the approval has effect; and
  - (e) specify the period for which the approval has effect; and
  - (f) set out the conditions attached to the approval.

...

24 Section 136 relevantly provides:

- (1) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must consider the following, so far as they are not inconsistent with any other requirement of this Subdivision:
- (a) matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action;
  - (b) economic and social matters.
- (2) In considering those matters, the Minister must take into account:
- (a) the principles of ecologically sustainable development; and
  - (b) the assessment report (if any) relating to the action; and
  - (ba) if Division 3A of Part 8 (assessment on referral information) applies to the action—the finalised recommendation report relating to the action given to the Minister under subsection 93(5); and
  - (bc) if Division 4 of Part 8 (assessment on preliminary documentation) applies to the action:
    - (i) the documents given to the Minister under subsection 95B(1), or the statement given to the Minister under subsection 95B(3), as the case requires, relating to the action; and
    - (ii) the recommendation report relating to the action given to the Minister under section 95C; and
  - (c) if Division 5 (public environment reports) of Part 8 applies to the action:

- (i) the finalised public environment report relating to the action given to the Minister under section 99; and
    - (ii) the recommendation report relating to the action given to the Minister under section 100; and
  - (ca) if Division 6 (environmental impact statements) of Part 8 applies to the action:
    - (i) the finalised environmental impact statement relating to the action given to the Minister under section 104; and
    - (ii) the recommendation report relating to the action given to the Minister under section 105; and
  - (d) if an inquiry was conducted under Division 7 of Part 8 in relation to the action—the report of the commissioners; and
  - (e) any other information the Minister has on the relevant impacts of the action (including information in a report on the impacts of actions taken under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under Part 10 (about strategic assessments)); and
  - (f) any relevant comments given to the Minister in accordance with an invitation under section 131 or 131A; and
  - (fa) any relevant advice obtained by the Minister from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development in accordance with section 131AB; and
  - (g) if a notice relating to the action was given to the Minister under subsection 132A(3)—the information in the notice.
- (4) In deciding whether or not to approve the taking of an action by a person, and what conditions to attach to an approval, the Minister may consider whether the person is a suitable person to be granted an approval, having regard to:
- (a) the person’s history in relation to environmental matters; and
  - (b) if the person is a body corporate—the history of its executive officers in relation to environmental matters; and
  - (c) if the person is a body corporate that is a subsidiary of another body or company (the parent body)—the history in relation to environmental matters of the parent body and its executive officers.
- ...
- (5) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must not consider any matters that the Minister is not required or permitted by this Division to consider.

[There is no subs 136(3)].

25 Sections 137 and 137A provide:

137

In deciding whether or not to approve, for the purposes of section 12 or 15A, the taking of an action and what conditions to attach to such an approval, the Minister must not act inconsistently with:

- (a) Australia's obligations under the World Heritage Convention; or
- (b) the Australian World Heritage management principles; or
- (c) a plan that has been prepared for the management of a declared World Heritage property under section 316 or as described in section 321.

137A

In deciding whether or not to approve for the purposes of section 15B or 15C the taking of an action, and what conditions to attach to such an approval, the Minister must not act inconsistently with:

- (a) the National Heritage management principles; or
- (b) an agreement to which the Commonwealth is party in relation to a National Heritage place; or
- (c) a plan that has been prepared for the management of a National Heritage place under section 324S or as described in section 324X.

26 In summary, in making a decision concerning a proposed action, the Minister:

- must or may consider identified matters;
- must not consider any other matters;
- must not act inconsistently with World Heritage obligations, principles and management arrangements; and
- must not act inconsistently with National Heritage management principles, agreements and plans.

27 The Minister must also consider the precautionary principle set out in s 391. However that matter is not relevant for the purposes of this appeal.

28 There are no criteria as to which the Minister must be satisfied in order to grant approval. By definition, the approval is of an action which has, will have or is likely to have a significant impact upon the protected matters identified by the controlling provisions.

### **THE MINISTER'S DECISION**

29 On 24 July 2014, the Minister approved the Proposal, subject to conditions. It seems that in the assessment and decision-making process, there had been no consideration of greenhouse

gas emissions from the transportation and combustion, in other countries, of the coal to be produced (the “overseas emissions”). At some stage, the possible relevance of such matters (the “new information”) was drawn to the attention of the Minister. As a result, on 4 August 2015, the decision was, by consent, set aside. On 14 October 2015, the Minister again approved the Proposal and published reasons for his decision. In those reasons, the Minister set out the circumstances which had led to the setting aside of the earlier decision. The primary Judge summarised those circumstances as follows:

[Subsequent to the earlier decision], Adani and several environmental groups, including the ACF, provided additional information to the Minister relating to environmental impacts of Adani’s proposed action. This material (much of which had been put into evidence in earlier proceedings in the Land Court of Queensland in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLD 48), suggested that:

- mean global temperature rises of 3°C above pre-industrial levels “would result in scenarios where any semblance of reefs to the coral reefs of the Great Barrier Reef Marine Park today would vanish” (expert report of Professor Ove Hoegh-Guldberg in the Land Court);
- at current global rates (and assuming no further growth in emissions), the global emissions budget to limit mean global temperature rises beneath 2°C above pre-industrial levels would be exceeded within 20 years (joint expert report of Dr Chris Taylor and Associate Professor Malte Meinshausen, which was put in evidence in the Land Court) (**joint expert report in the Land Court**)), which would still be a very dangerous level of warming for the Reef (expert report of Professor Hoegh-Guldberg in the Land Court);
- in order to limit warming to beneath 2°C above pre-industrial levels, no more than 850 billion tonnes (**Gt**) with carbon dioxide equivalent greenhouse gas emissions (**CO2-e**) could be emitted globally after 2015 (joint expert report in the Land Court);
- the combustion emissions would be about 4.64 Gt of CO2-e (joint expert report in the Land Court) or about 1/183 of the total available global emissions if warming is to be limited to 2°C; and
- the combustion emissions (4.64 Gt of CO2-e) would be about 54 times greater than the mining emissions from the coal mine directly (0.086 Gt of CO2-e).

30 Pursuant to s 136(1)(a) the Minister was obliged to consider, “matters relevant to any matter protected by a provision of Part 3”, which provision was a controlling provision for the Proposal. It seems that the Minister accepted that the additional information was, at least possibly a relevant matter for the purposes of s 136(1)(a). Arguably, the new information also fell within s 136(2)(e). Hence the Minister was obliged to consider the effect of the new information as it related to the protected matters, together with the other material which was before him.

## THE APPLICATION FOR REVIEW

31 On 10 November 2015, the appellant (ACF”) applied for review of the Minister’s decision, seeking an order in the nature of certiorari, calling up and quashing the decision, and an injunction, restraining the Minister from taking any steps to give effect to the decision. An amended application was filed on 28 January 2016. At first instance the application was treated as being pursuant to both s 39B of the *Judiciary Act 1903* (Cth) (the “Judiciary Act”) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the “ADJR Act”). Review grounds 1-3 were as follows:

### Review ground 1

The [Minister] made an error of law in failing to apply the statutory command in section 137 of the [Conservation] Act to his consideration of the effect of emissions from transport by rail, shipping and combustion of the product coal overseas on the World Heritage Values of the Great Barrier Reef World Heritage Area, that is the command to not act inconsistently with:

- a. Australia's obligations under the World Heritage Convention, in particular Australia's obligation in Article 4 to do "all it can to the utmost of its resources" to identify, protect, conserve, present, and transmit to future generations the outstanding universal value of the Great Barrier Reef World Heritage Area; and
- b. The World Heritage Management Principles, in particular that the identification, protection, conservation, presentation and transmission to future generations must be the "primary purpose" of the management of the Great Barrier Reef World Heritage Area.

### Review ground 2

The [Minister] made an error of law by:

- a. characterising emissions from transport by rail, shipping and combustion of the product coal overseas as "not a direct consequence of the proposed action", without applying the test in section 527E of the [Conservation] Act;
- b. failing to comply with the requirement in s 136(2)(e) of the [Conservation] Act in respect of the information about those emissions and the impact those emissions would have or were likely to have on the matter protected.

### Review ground 3

Having found in relation to climate change that "it is difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant matters of national environmental significance" the [Minister] made an error of law in failing to consider or apply the precautionary principle to that conclusion as he was required to do by section 136(2)(a) and section 391 of the [Conservation] Act.

...



32 Review ground 4 was abandoned before the commencement of the hearing at first instance. We do not understand there to be any appeal in connection with either review ground 1 or review ground 3.

33 Review ground 2 is in two parts. The first asserts that the Minister “characterised” the overseas emissions as not being “a direct consequence” of the proposed action without applying the test in s 527E of the Conservation Act. ACF does not allege that the Minister’s characterisation was wrong; only that he made the decision without applying the “test” in s 527E. ACF does not now submit that the overseas emissions or their effects would be direct consequences of the Proposal. The second part of review ground 2 asserts that the Minister failed to comply with the requirements of s 136(2)(e) “in respect of” the overseas emissions. The way in which the Minister allegedly failed is not disclosed in the application. The Minister certainly considered the possibility that the overseas emissions might adversely affect the protected matters. He also referred to the new information concerning the overseas emissions. See paras 48, 53 and 56 of the reasons. The Minister’s reasoning is at paras 131-141. He found that:

- the Proposal would not have an unacceptable impact on the World Heritage values of the Reef (para 170);
- the grant of approval was not inconsistent with Australia’s obligations under the *World Heritage Convention*, the Australian World Heritage managed principles or a plan for the management of a declared World Heritage property (para 171); and
- the Proposal would not have an unacceptable impact on the National Heritage values of the Reef, and that the grant of approval would not be inconsistent with National Heritage management principles, any agreement to which the Commonwealth was a party, or any plan prepared for the management of a National Heritage place (paras 174 and 175).

34 The Minister identified three categories of greenhouse gas emissions, namely:

- Scope 1 emissions created by the Proposal;
- Scope 2 emissions generated by the energy required to carry out the Proposal; and
- the overseas emissions.

35 The Minister concluded that Scope 1 and Scope 2 emissions could be dealt with pursuant to existing or future local arrangements. As to the overseas emissions, the Minister said at paras 138, 140 and 141:

138. While the proponent has identified a quantity of overseas GHG emissions that may result from burning the coal, these emissions are not a direct consequence of the proposed action. The actual quantity of emissions that is likely to be additional to current global GHG emissions depends on a range of variables. They include: whether the coal replaces coal currently provided by other suppliers, whether the coal is used as a substitute for other energy sources, and the efficiency of the coal burning power plants. The international multilateral environment agreements, the United Nations Framework Convention on Climate Change and its Kyoto Protocol, provide mechanisms to address climate change globally. Under these agreements, the nations responsible for burning the coal produced from the proposed mine would be expected to address the emissions from transport by rail, shipping and combustion of the product coal in their own countries.

...

140. I found that the quantity of [overseas emissions] from the Carmichael Coal Mine and Rail project proceeding is subject to a range of variables. It is possible to determine a possible total quantity of these emissions that may occur, as provided under paragraph 136. However, determining the actual net emissions from transport by rail, shipping and combustion of the product coal that would occur as a result of the project, after taking account of the variables outlined above, is speculative at this stage. It is therefore not possible to draw robust conclusions on the likely contribution of the project to a specific increase in global temperature. As a result it is difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant matters of national environmental significance which may occur as a result of an increase in global temperature.

141. I found that direct and consequential greenhouse gas emissions associated with the project will be managed and mitigated through national and international emissions control frameworks operating in Australia and within countries that are the import market for coal from the project.

### **THE PRIMARY JUDGE'S REASONS**

36 The primary Judge summarised the ACF's submissions concerning review ground 2 at [66]-[76]. The salient points were that the Minister:

- had asked himself the wrong question in evaluating the new information, and that s 136(2)(e) required that he ask whether the consequences for the Reef of the overseas emissions were relevant impacts of the Proposal within the meaning of ss 82 and 527E;
- wrongly "applied a range of criteria which were not sourced in the [Conservation Act]";

- ought to have asked whether the overseas emissions were relevant impacts within the meaning of ss 82 and 527E;
- could only properly undertake the task of taking into account information about relevant impacts, and then determining whether there was additional information about relevant impacts of the Proposal, if he correctly understood the meaning of the term “relevant impacts” as defined in s 82 and s 527E;
- ought not to have applied a range of criteria beyond the Conservation Act to justify a different treatment of overseas emissions so that he did not have to quantify the impact of those emissions, or impose conditions to mitigate or repair damage which they would cause to the Reef;
- incorrectly enquired whether the overseas emissions would create a net increase in global emissions;
- failed to apply criteria contained in subss 527E(2), e, (f) and (g);
- wrongly treated as relevant the responsibilities of different parties for addressing climate change;
- in distinguishing between Scope 1 and Scope 2 emissions on the one hand and the overseas emissions on the other, failed to consider the basis for that distinction “which led him to not apply s 527E” of the Conservation Act; and
- wrongly took into account a range of matters which might have been properly considered after the new information had properly been taken into account in determining that it was difficult to identify any “relevant impacts” on the Reef.

37 The primary Judge, at [70], said:

In essence, the ACF’s core proposition with respect to ground 2 was that the Minister failed properly to consider whether the impacts of the combustion emissions on the Reef were “relevant impacts” in circumstances where the new information before him showed that they were “relevant impacts”.

38 Notwithstanding the suggestion in review ground 2 that the Minister erred in characterising the overseas emissions as not being a direct consequence of the Proposal, the primary Judge appears to have understood ACF’s case as being that the overseas emissions were indirect consequences, as they clearly were. We do not understand the ACF to have submitted otherwise on appeal.

39 His Honour noted the circumstances in which s 527E was inserted into the Conservation Act and the Explanatory Memorandum which states:

This item inserts new section 527E into the Act. This section inserts a definition of “impact”. The purpose of the amendment is to clarify the extent to which impacts which are indirect consequences of actions must be considered or dealt with under the Act. Section 527E applies to all direct and indirect consequences of the taking of an action by a person, which meet the criteria in the section. Subsection 527E(2) only applies in relation to impacts of actions by third parties which are an indirect consequence of the taking of an action by the first person.

40 His Honour also referred to the following passage from the reasons of Jessup J in *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 at [39] as follows:

On my reading of the relevant provisions of the [Conservation] Act, the heart of it is to be found in s 136(2)(e). 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 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.

41 The word “causative” may not be entirely appropriate, at least if it is read as qualifying the word “consequences”. It is the proposal which must be causative of the consequences. However his Honour’s meaning is clear enough. At [158]-[159] the primary Judge observed:

158 It was common ground that the relevant events or circumstances here relating to combustion emissions were the physical effects associated with climate change, particularly increased ocean temperature and ocean acidification as well as more extreme weather events.

159 These events and circumstances can only be an “impact” if Adani’s action is a substantial cause of those events or circumstances.

42 In the language adopted in s 527E(1) only an “event” or “circumstance” may be an impact of an action. The *New Shorter Oxford English Dictionary* defines the word “impact” as, “the striking of one body as against another, a collision ... the [strong] effect of one thing, person, action, etc, on another; an influence; an impression”. It is a little difficult to describe increased ocean temperature, ocean acidification or more extreme weather events as impacts on World Heritage values, National Heritage values or the Marine Park environment, although one may readily accept that those events or circumstances might cause impacts upon such matters. However the case appears to have been conducted on the basis outlined at [158]-[159]. This possible anomaly is explained at [134] where his Honour said:

The ACF’s reply submissions may be summarised as follows. First, it was confirmed

that the ACF's position is that the relevant "event or circumstance" is "damage by greenhouse gas emissions", which he confirmed was the same as saying an increase in sea temperature and ocean acidification caused by climate change and that, therefore, the ACF approached this issue no differently from the Minister.

43 The primary Judge's reasons for rejecting review ground 2 appear at [155]-[174]. His Honour considered that ACF's criticism was largely based upon the Minister's failure to refer directly in his reasons to s 82 or s 527E. At [160]-[161], his Honour gave the following summary of the Minister's reasons concerning the overseas emissions:

160 Applying the principles discussed above as to how the Minister's statement of reasons should be read, I consider that the Minister found that he could not determine that that action would be a substantial cause of the relevant events or circumstance for the reasons which he set out in [140] of his statement of reasons for decision.

161 In my view, [138] of the statement of reasons indicates that the Minister proceeded on the basis that the combustion emissions could not be regarded as a direct consequence of the proposed action. It is evident that the Minister then proceeded to determine whether or not the relevant events or circumstances flowing from the combustion emissions were the "impact" of the action within the meaning of s 527E. The Minister explained in [140] that the quantity of overseas gas emissions was subject to a range of variables and that, although it was possible to determine a possible gross quantity of such emissions that may occur (as set out in [136] of the statement of reasons), the range of variables relevant to such a determination meant that the quantity of actual net emissions was speculative at that time. Consequently, so the Minister found, it was not possible for him to draw firm conclusions as to the likely contribution of Adani's action to a specific increase in global temperature. This meant, in turn, that it was difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant environmental matters, including the Reef.

44 The primary Judge concluded that the Minister had, in effect, adopted the language of s 527E and then addressed the meaning of the phrase, "substantial cause". His Honour, in effect:

- held that the Minister had concluded that the overseas emissions would have no relevant impact on the Reef;
- rejected the ACF's submission that the Minister had not considered whether the consequences of the overseas emissions were relevant impacts; and
- rejected the suggestion that the Minister had not considered the additional information concerning the overseas emissions.

45 His Honour dismissed the review application.

## **THE APPEAL**

46 The grounds of appeal are as follows:

1. The primary judge:
  - a. erred by interpreting the Statement of Reasons as including a determination by the Minister as to whether or not the physical effects of climate change on the Great Barrier Reef were an "impact" of the action within the meaning of s 527E of the [Conservation] Act;
  - b. should have found that the Minister failed to apply s 527E when considering the physical effects of climate change on the Great Barrier Reef.
2. Alternatively, if, on a proper interpretation of the Statement of Reasons, the Minister did purport to determine whether or not the physical effects of climate change on the Great Barrier Reef were an "impact" of the action within the meaning of s 527E of the [Conservation] Act, then the primary judge:
  - a. erred by failing to hold that the Minister misdirected himself as to the correct question under, or that he misapplied, ss 82(1), 136(2)(e) and 527E of the [Conservation] Act; or
  - b. erred by failing to hold that, on the facts as found by the Minister in paragraphs 131-141 of the Statement of Reasons, it was not open to the Minister to determine that the physical effects of climate change on the Great Barrier Reef were not an "impact", within the meaning of ss 82(1) and 527E, properly construed.

47 In its written submissions on appeal at paras 6 and 7, ACF asserted that the Minister had found that:

6. [T]he harmful effects of climate change (increased ocean temperature and acidification) are the most serious threat to the Great Barrier Reef; (b) these effects will get worse, and their extent and persistence depends on how effectively the issue of rising levels of greenhouse gases is addressed worldwide (that is, the Minister accepted the effects were caused by greenhouse gas emissions); (c) it was possible to determine a possible total quantity of greenhouse gas emissions from transport and combustion of the coal from the mine, being 4.64 billion tonnes of carbon-dioxide-equivalent greenhouse gas emissions (**CO<sub>2</sub>-e**) over the life of the mine.
7. These three findings were sufficient for, and necessitated, the conclusion that future harmful effects of climate change on the Great Barrier Reef were potential "impacts" (within the meaning of s 527E(1)(b) and (2) of the Act) of the action. Had the Minister appreciated this, he would then have had to consider whether the impacts were "likely", and therefore "relevant impacts" (Footnotes omitted.)

48 At paras 8 and 9, ACF then submitted:

8. Instead, the Minister considered "[t]he actual quantity of emissions that is likely to be additional to current global GHG emissions" or "the actual net emissions", after taking into account the following "variables": (a) "whether the coal replaces coal currently provided by other suppliers"; (b) "whether the coal is used as a substitute for other energy sources"; and (c) "the efficiency of the coal burning power plants".

9. The apparent relevance of (c) is that the amount of emissions might be less than 4.64 billion tonnes CO<sub>2</sub>-e, but the Minister did not suggest that the resultant amount would be so reduced that climate change effects from the emissions would be insubstantial. The relevance of (a) and (b) is that, if the mine did not proceed, the same amount of greenhouse gas emissions might be produced from other sources instead. This is what the Minister meant by the “actual quantity of emissions that is likely to be additional to current global GHG emissions” and “the actual net emissions”: the harm to the Great Barrier Reef might be the same, but be caused by someone else.

49 Curiously, ACF does not assert, as a ground of appeal, that the Minister failed to take account of relevant matters, or took into account irrelevant matters. Rather, it asserts that the Minister did not have regard to the definition of the term “impact” in s 527E, and so did not identify the effects of the overseas emissions as being impacts. ACF submits that the primary Judge adopted an unduly generous approach to the adequacy and/or effect of the Minister’s reasons. His Honour gave close consideration to decisions concerning the proper judicial approach to reasons for administrative decisions. We have previously set out his Honour’s understanding of the effect of the Minister’s reasons. We see no reason to conclude that his Honour in any way misconstrued them. It follows that we consider ACF’s submission to be without merit.

50 In considering the Minister’s reasons, one must keep in mind the fact that the decision authorised by s 130 is, by definition, a decision to allow, or not to allow a proposed action which will, or is likely to, have a significant impact on a matter protected by a provision in Pt 3. It cannot be a valid criticism of any such decision that it permits an action which will, or is likely to, produce such an impact. Whilst the matters relevant to the decision are prescribed, primarily in Pt 9, there is no particular matter of which the Minister must be satisfied. The Minister is not required to make intermediate decisions concerning “impacts” or the causes of impacts. The decision may well have political consequences. That is a matter for the Minister and the government. We make these observations simply because much of ACF’s case seems to be based on the proposition that the decision cannot be correct because the Proposal will, or is likely to, cause some damage to the Reef.

51 The Minister’s reasons are relatively short but are obviously based on extensive evidence, which evidence had been assessed pursuant to the Queensland Bilateral Agreement. An important aspect of the Minister’s reasoning concerned the existence in Australia of governmental measures which would regulate the anticipated Scope 1 and Scope 2 emissions. Similarly, the Minister understood that the provisions of the *United Nations Framework Convention on Climate Change* and the *Kyoto Protocol*, place responsibility for dealing with the overseas emissions upon the countries consuming the coal. Paragraph 141 of the reasons

demonstrates that the Minister considered that those national and international arrangements would manage and mitigate emissions in Australia and the overseas emissions. In its submissions, ACF largely overlooks that aspect of the reasons.

52 We consider that ACF's focus on ss 82, 136(2)(e) and 527E has led it into error. The Conservation Act identifies three phases in the process leading to a decision to approve or not approve an action. First, the Minister must decide whether the proposed action needs approval. If he or she so decides, then he or she must identify the relevant controlling provisions. Second, an assessment report will be prepared pursuant to s 47(4), s 84(3) or s 87(4). See s 136(2)(b) and s 130(2). In each case, the assessment report must address the relevant impacts which are, as we have observed, impacts on the protected matters identified by the Minister pursuant to s 75. Third, the Minister makes his or her decision, based upon the matters identified in s 136 and, perhaps, elsewhere in the Conservation Act.

53 The Minister is directed by s 136 to consider, "matters relevant to any protected matter". He or she is not required to decide, at that stage, whether or not a particular event or circumstance is an "impact" or "relevant impact", save for the purpose of deciding whether s 136(2)(e) has been engaged: that is, for the purpose of deciding whether there is material identified by that provision, which material, he or she must consider. In this case the new information was such material. The identification of controlling provisions and relevant impacts are primarily steps designed to provide a structure within which the assessment of the relevant action may be conducted. Those concepts will generally be irrelevant to the Minister's decision pursuant to s 130. Of course, the likely consequences of the overseas emissions had to be considered, but that exercise did not necessarily involve applying either s 82 or s 527E. However, as the primary Judge found, the Minister adopted some of that statutory language.

54 ACF's submissions contain two anomalous aspects.

55 The primary Judge observed at [68] that ACF had submitted that the Minister's erroneous approach involved certain steps, including:

...

- (b) the harm to the Reef caused by the combustion emissions is a relevant impact in respect of the Reef unless:
  - it is not likely to occur (as Kiefel J found in *Nathan Dam* at first instance at [39]); and



- it did not meet the test in any of ss 527E(2)(e), (f), (g), and the Minister's characterisation of the determination of combustion emissions as "speculative at this stage" did not involve an application of these criteria ...

...

56 Although that proposition is said to be evidence of the Minister's error, we think it more likely that ACF meant that the Minister's reasons were inconsistent with it. For the reasons that we have given, we do not consider that the Minister needed to have specific regard to those provisions. However the effects of the Proposal were to be considered pursuant to s 136. We do not understand the relevance of ss 527E(e), (f) and (g) for present purposes. They prescribe some of the circumstances necessary in order that an event or circumstance be an impact. We doubt very much that there could have been any dispute concerning these matters. We readily infer that the Minister assumed that those conditions were satisfied for the purposes of his consideration of the new information.

57 In ACF's submissions on appeal, at paras 38 and 39, it seems to submit, at least tacitly, that the overseas emissions should have been "referred" for "assessment". It is not clear to us whether the submission is that the matter should have been referred for assessment pursuant to the Queensland Bilateral Agreement, or whether the submission is that the Minister should have, himself, assessed the matter. The former course would be authorized by s 132. In our view, the Minister took the latter course. There is no attack upon his failure to proceed pursuant to s 132.

58 Section 136(1)(a) required the Minister to consider matters relevant to any protected matter. Section 136(2)(e) limited the "other information" to be considered by requiring that it be "on" the relevant impacts, namely impacts on the protected matters. In this case, it was not necessary that the Minister decide whether the overseas emissions were relevant impacts. He rather had to consider whether the new information was "on the relevant impacts" of the Proposal. In our view he accepted, or perhaps assumed, that the new information was "on the relevant impacts", and so he addressed it in his consideration of matters relevant to the protected matters. Whilst ss 82 and 527E(2) were part of the statutory framework pursuant to which the Minister granted the approval, there was no need, in this case, for a detailed consideration of those provisions in connection with the process prescribed in ss 130 and 136. Further, nothing in the reasons suggests that the decision was based on any erroneous view of the effects of those provisions. We find it difficult to avoid the conclusion that ACF's submissions are based on the proposition that the Minister could not reasonably have reached

the decision which he did, absent some misunderstanding. Its submissions concerning ss 82 and 527E seem to be little more than an attempt to characterise as a procedural error, criticism concerning the merits of the decision.

59 Consideration of the new information concerning the overseas emissions involved evaluation by the Minister of the likely impact of such emissions upon the protected matters. That is the process which the Minister undertook at paras 131-141. The outcome of the evaluation is set out in paras 140 and 141. No doubt, that outcome formed part of the basis upon which he decided to grant the approval. It follows that both grounds of appeal must fail.

60 In any event, we consider that the primary Judge correctly outlined the Minister's reasons. In effect the Minister found that:

- 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 gasses;
- 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;
- 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.

61 It is important to note that the Minister's understanding of the material before him was that the "issue" was rising levels of greenhouse gasses. That understanding of the material has not been challenged. The Minister was not satisfied that the overseas emissions would contribute to increased levels of greenhouse gases and, therefore, further rises in temperature. He did not say that the overseas emissions would not contribute to the maintenance of current levels of greenhouse gas emissions and present temperature levels. 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.

#### **ORDERS**

62 The appeal must be dismissed. Senior counsel for ACF informed the Court that he wished to be heard on the question of costs. We therefore direct that within 14 days of the date of this order the appellant file and serve such submissions, limited to 3 pages, and that the respondents file and serve their submissions, limited to 3 pages, within a further 14 days. The Court will determine the question of costs on the papers.

I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett, McKerracher and Robertson.

Associate:



Dated: 25 August 2017