AUSTRALIAN CONSERVATION FOUNDATION INC v MINISTER FOR THE ENVIRONMENT and Another

FEDERAL COURT OF AUSTRALIA

GRIFFITHS J

3, 4 May, 29 August 2016 — Brisbane

[2016] FCA 1042

Environment — Environmental protection — Controlled actions — Assessment of impacts — Operation and effect of ss 81, 82 and 83 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) — Minister approved construction of coal mine and associated infrastructure — Proper approach to Minister's reasons for decision for approving action — Minister concluded that action did not give rise to relevant "impact" — Precautionary principle not enlivened — Proper approach to compliance with obligations under World Heritage Convention — (CTH) Environment Protection and Biodiversity Conservation Act 1999 ss 82, 133, 136, 137, 391, 527E.

Words and phrases — "relevant impacts" — "impacts" — "substantial cause" — "precautionary principle".

The first respondent made a decision pursuant to the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act) to approve the second respondent taking certain action; namely, the construction of an open-cut and underground coal mine and associated infrastructure. The applicant sought judicial review in the Federal Court under both the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act) and the Judiciary Act 1903 (Cth) (the Judiciary Act) on the grounds that the first respondent failed to comply with Pts 9 and 16 of the EPBC Act, particularly having regard to alleged likely impacts of the action on the Great Barrier Reef and in relation to combustion emissions. At issue was whether or not those grounds were established.

Held, dismissing the application:

(i) The absence of any direct or explicit reference to s 82 or s 527E of the EPBC Act in the first respondent's reasons did not demonstrate error, especially in so far as the language of those reasons reflected the statutory language, and there was no obligation to make any such explicit reference to any particular statutory provision: at [155]–[166].

> *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; 136 ALR 481; 41 ALD 1, applied.
>
> *Soliman v University of Technology, Sydney* (2012) 207 FCR 277; 296 ALR 32; [2012] FCAFC 146; *Sadsad v NRMA Insurance Ltd* (2014) 67 MVR 601; [2014] NSWSC 1216; *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437; 308 ALR 280; 139 ALD 50; [2014] FCAFC 1, distinguished.

(ii) The intention and effect of s 81 of the EPBC Act is to preserve the operation of s 82 in the assessment of a controlled action notwithstanding that the balance of Pt 8 does not apply because of the operation of s 83, such that the definition of "relevant impacts" in s 82 applies in accordance with the relevant terms of that provision even where all the other provisions in Pt 8 are displaced by the operation of s 83: at [167]–[174].

> *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254; 321 ALR 551; [2015] FCAFC 89, considered.

(iii) The absence of any explicit reference in the first respondent's reasons to having taken into account the precautionary principle in relation to combustion emissions did not mean that the decision was invalid, because the first respondent's determination that the combustion emissions were not an "impact" for the purposes of s 527E of the EPBC Act meant that the principle was not enlivened in the circumstances: at [175]–[186].

> *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510; 93 ALD 84; [2006] FCA 736; *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2009) 165 LGERA 203; [2009] FCA 330; *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 196 LGERA 372; [2013] FCAFC 111, applied.
>
> *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; [2006] NSWLEC 133, considered.

(iv) For the purposes of s 137 of the EPBC Act, Arts 4 and 5 give considerable latitude to state parties as to the precise actions they may take to implement their "obligations" under the relevant provisions of the World Heritage Convention (WHC), such that it is a matter for the minister to form a view, on proper legal grounds, whether or not giving approval to the taking of an action and any conditions which are attached would have the effect of creating an inconsistency with Australia's obligations under the WHC: at [187]–[204].

> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; 72 ALJR 841; [1998] HCA 28; *Commonwealth v Tasmania* (1983) 158 CLR 1; 46 ALR 625, considered.

(v) Obiter: The issue of compliance with s 137 of the EPBC Act is justiciable in the Federal Court: at [205].

S Holt QC, *C McGrath* and *E Nekvapil* instructed by *Environmental Defenders Office (Qld) Inc* for the applicant.

R Lancaster SC and *G Del Villar* instructed by *Australian Government Solicitor* for the first respondent.

D Clothier QC and *S Webster* instructed by *Ashurst Australia* for the second respondent.

Griffiths J.

Introduction

[1] The applicant (Australian Conservation Foundation Incorporated (**ACF**)) seeks judicial review of the decision of the Minister for the Environment (the **Minister**) made on 14 October 2015 to approve the proponent (Adani Mining Pty Ltd (**Adani**)) taking an action. The action is the proposed construction of a new open-cut and underground coal mine at Moray Downs in central Queensland and a rail link and associated infrastructure designed to transport coal between the mine and certain coal export terminals (the **action**). Most, if not all, of the coal is destined to be sent overseas where it will be combusted.

[2] ACF's application is brought under both the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act) and s 39B of the Judiciary Act 1903 (Cth) (the Judiciary Act). In broad terms, ACF claims that the Minister failed to comply with particular requirements of Pts 9 and 16 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act). As will emerge, at the heart of the ACF's case is a concern regarding the likely impacts

of the action on the Great Barrier Reef (the **Reef**), with particular reference to the likely impacts of greenhouse gas emissions arising from the transport and combustion overseas of coal produced at the mine (the **combustion emissions**).

[3] By way of background, it is to be noted that a previous ministerial approval dated 24 July 2014, of the proposed action, was set aside in this Court by consent on 4 August 2015.

[4] It is important to emphasise at the outset the restricted character of this proceeding. On a judicial review application, the Court cannot step into the shoes of the Minister and decide for itself whether Adani's action should be approved and, if so, what conditions should apply. The Parliament has conferred that task and responsibility on the Minister and the Minister alone. This Court's function on a judicial review is significantly more limited, confined as it is to a review of the legality, and not the merits, of the Minister's decision. Ultimately, it is the Minister who must accept responsibility and be accountable for the merits of his decision.

[5] Before outlining the submissions of the parties, it is desirable to describe some relevant provisions in the EPBC Act. There should be a forewarning that the legislation was aptly described by the Full Court recently as "complex" (*Esposito v Commonwealth* (2015) 235 FCR 1; 328 ALR 600 ; [2015] FCAFC 160 at [22] per Allsop CJ, Perram and Flick JJ).

Relevant provisions in the EPBC Act

[6] The EPBC Act creates a complicated and tightly regulated scheme in relation to a range of activities which have or are likely to have significant impacts upon the environment and to ensure that such activities are assessed in accordance with its requirements.

[7] The overall structure of the EPBC Act may be summarised as follows:

- Ch 1 — preliminary;
- Ch 2 — protecting the environment, which by Pt 3 specifies requirements for environmental approvals, and by Pt 4 specifies those cases in which environmental approvals are not needed;
- Ch 3 — bilateral agreements;
- Ch 4 — environment assessments and approvals, including by Pt 7 which deals with deciding whether approval of actions is needed, by Pt 8 which deals with assessing impacts of controlled actions, by Pt 9 which deals with approval of actions, by Pt 10 which deals with strategic assessments and by Pt 11 which deals with miscellaneous rules;
- Ch 5 — conservation of biodiversity and heritage;
- Ch 5A — the list of overseas places and historic significance to Australia;
- Ch 5B — declared commercial fishing activities;
- Ch 6 — administration, which includes Pt 16 which deals with the precautionary principle and other considerations to be considered by the Minister in making decisions, Pt 17 which deals with enforcement, and Pt 18 which deals with remedying environmental damage;
- Ch 7 — miscellaneous; and
- Ch 8 — definitions.

[8] The objects of the EPBC Act are set out in s 3. Relevantly to this proceeding, they include the objects of:

(a) providing for the protection of those aspects of the environment that are of national environmental significance (s 3(1)(a));
(b) promoting ecologically sustainable development through the conservation and ecologically sustainable use of natural resources (s 3(1)(b)); and
(c) assisting in the co-operative implementation of Australia's international environmental responsibilities (s 3(1)(e)).

[9] To achieve these and the other objects of the legislation, the EPBC Act explicitly recognises the Commonwealth's particular role by focusing its involvement on matters of national environmental significance and on Commonwealth actions and areas (s 3(2)(a)) and by providing for intergovernmental accreditation of environmental assessment processes (s 3(2)(c)). It is further provided that, in order to achieve its objects, the legislation adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that have or are likely to have significant impacts on the environment are properly assessed (s 3(2)(d)).

[10] It is desirable at this point to note some definitions which are relevant to these provisions. The term "environment" is defined in s 528 as including the following matters:

(a) ecosystems and their constituent parts, including people and communities; and
(b) natural and physical resources; and
(c) the qualities and characteristics of locations, places and areas; and
(d) heritage values of places; and
(e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).

[11] The concept of "ecologically sustainable development", as referred to in s 3(1)(a), is defined in s 3A:

> 3A *Principles of ecologically sustainable development*
>
> The following principles are *principles of ecologically sustainable development*:
>
> (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
> (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;
> (c) the principle of inter-generational equity — that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
> (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
> (e) improved valuation, pricing and incentive mechanisms should be promoted.

[12] It may be noted that the principles of ecologically sustainable development include in paragraph (b) what is commonly referred to as "the precautionary principle". That particular principle is defined in s 391(2) (which is located in Pt 16) in substantially similar terms to those in s 3(1)(b) (the terms of s 391(2)

are set out in [34] below). One of the ACF's complaints is that the Minister failed to take account of the precautionary principle in deciding to approve the project, contrary to s 391(1).

[13] The scheme of the EPBC Act is to render unlawful an action that has, will have or is likely to have a significant impact on particular aspects of the environment, including matters of national environmental significance. Such conduct may attract civil penalties and criminal offences. Part 3 provides for the categories which must be protected by prohibiting the taking of certain actions without ministerial approval.

[14] The term "action" is defined inclusively in s 523 (which is to be found in Div 1 of Pt 23):

> 523 *Actions*
> (1) 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).

[15] An action that requires approval is called a "controlled action" (s 67). Anyone proposing to take an action that they think may be a controlled action must refer the proposal to the Minister for a decision about whether or not it is a controlled action (s 68(1)). The Minister is obliged to determine whether or not the action is a "controlled action", as well as which provisions, if any, of Pt 3 are the "controlling provisions" for the action (s 75(1)). When making such a determination, the Minister must consider all adverse impacts (if any) that the action has or will have or is likely to have on any matter protected by Pt 3 (s 75(2)). When the Minister makes a decision under s 75 that an action is a controlled action, the Minister must designate a person as a proponent of the action (s 75(3)). Normally that person will be the person who proposes to take the action (s 75(4)). In this particular case, the Minister's delegate decided on 6 January 2011 that Adani's action was subject to the following controlling provisions:

- world heritage properties (ss 12 and 15A);
- National Heritage places (ss 15B and 15C);
- wetlands of international importance (Ramsar) (ss 16 and 17B);
- listed threatened species and ecological communities (ss 18 and 18A);
- listed migratory species (ss 20 and 20A); and
- the Great Barrier Reef Marine Park (ss 24B and 24C).

[16] This list of controlling provisions was later expanded to include ss 24D and 24E following the commencement on 21 June 2013 of the Environment Protection and Biodiversity Conservation Amendment Act 2013 (Cth) (the 2013 Amendment Act). These amendments deal with where a proposed action is likely to have a significant impact on water resources.

[17] Once a determination is made under s 75, the provisions of either Pt 8 and/or Pt 9 apply to the assessment of the "relevant impacts" of the action. Pt 8 does not apply in specified circumstances, including where the action is covered by a relevant bilateral agreement which is in force and satisfies s 45 (s 83). There is a bilateral agreement between the Commonwealth and the State of Queensland which was relevant to Adani's action.

[18] It is convenient to set out ss 81, 82 and 83, all of which are in Pt 8 of the EPBC Act:

81 *Application*

(1) This Part applies to the assessment of the relevant impacts of an action that the Minister has decided under Division 2 of Part 7 is a controlled action.

(2) This section has effect subject to sections 83 and 84.

(3) This section does not limit section 82.

82 *What are the relevant impacts of an action?*

If the Minister has decided the action is a controlled action

(1) If the Minister has decided under Division 2 of Part 7 that an action is a controlled action, the *relevant impacts* of the action are the impacts that the action:

(a) has or will have; or

(b) is likely to have;

on the matter protected by each provision of Part 3 that the Minister has decided under that Division is a controlling provision for the action.

If the Minister has not decided whether the action is controlled

(2) If an action is a controlled action or would be apart from Division 1, 2, 3 or 3A of Part 4 (which provide that approval under Part 9 is not needed for an action covered by a bilateral agreement or declaration) — the relevant impacts of the action are impacts that the action:

(a) has or will have; or

(b) is likely to have;

on the matter protected by each provision of Part 3 that is a controlling provision for the action or would be apart from whichever of those Divisions is relevant.

Relationship between subsections (1) and (2)

(3) Subsection (1) has effect despite subsection (2).

(4) For the purposes of subsections (1) and (2), if subsection 15B(3), 15C(5), 15C(6), 23(1), 24A(1), 24D(3), 24E(3), 26(1) or 27A(1) is, or would be, a controlling provision for the action, then the impacts of the action on the matter protected by that provision are only those impacts that the part of the action that is taken in or on a Commonwealth area, a Territory, a Commonwealth marine area or Commonwealth land:

(a) has or will have; or

(b) is likely to have;

on the matter.

(5) For the purposes of subsections (1) and (2), if subsection 24B(1) or 24C(1) or (3) is or would be a controlling provision for the action, then the impacts of the action on the matter protected by that provision are only those impacts that the part of the action that is taken in the Great Barrier Reef Marine Park:

(a) has or will have; or

(b) is likely to have;

on the matter.

83 *This part does not apply if action covered by bilateral agreement*

(1) *This part does not apply in relation to an action if:* This par

(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.

Note 1: Subsection (1) also applies to actions to be taken in an area offshore from a State or the Northern Territory. See section 157.

Note 2: Section 47 deals with bilateral agreements making declarations described in paragraph (1)(b).

Note 2A: An action will be in a class of actions declared not to need assessment under this Part only if the action has been assessed in a manner specified in the bilateral agreement.

Note 3: Division 3 of Part 5 explains how the operation of a bilateral agreement may be ended or suspended. Also, under section 49, bilateral agreements do not operate in relation to actions in Commonwealth areas or in the Great Barrier Reef Marine Park, or actions taken by the Commonwealth or a Commonwealth agency, unless they expressly provide that they do.

(2) If the action is to be taken in 2 or more States or self-governing Territories, this section does not operate unless it operates in relation to each of those States or Territories.

[19] Provisions relating to decisions whether or not to approve an action and any conditions to attach to an approval are to be found in Pt 9 of Ch 4 of the EPBC Act. The provisions of Pt 9 are engaged in all cases where a s 75 determination has been made. Thus, even where Pt 8 does apply and has been complied with, Pt 9 is also then engaged. As noted above, however, there are circumstances where Pt 8 does not apply, including where the action is covered by a bilateral agreement, as is the case here. Pt 9 empowers the Minister to approve an action which the Minister has determined to be a controlled action under s 75 of the EPBC Act. Under s 130, the Minister must decide whether or not to approve the taking of an action for the purposes of each controlling provision under Pt 3 in respect of a controlled action, being an action which the Minister has decided to be a controlled action under s 75. Accordingly, the Minister must consider each relevant impact on each controlling provision and must do so according to certain timeframes, which can be extended.

[20] The Minister is obliged to give notice of his proposed decision and invite comments thereon. For example, under s 131, the Minister must inform any other relevant Minister of the proposed decision and invite the other Minister to comment. Moreover, s 131A provides that, before the Minister decides whether or not to approve, for the purposes of a controlling provision, the taking of an action and what conditions if any should attach to an approval, the Minister may publish on the internet the proposed decision and any conditions and invite anyone to give to the Minister within 10 business days any comments in writing on them. Provision is also made for the Minister to seek further specified information from various sources if the Minister believes on reasonable grounds that there is insufficient information to make an informed decision whether or not to approve the taking of the action (s 132).

[21] The Minister's power to approve for the purposes of a controlling provision the taking of an action by a person is to be found in s 133:

133 *Grant of approval*

Approval

(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.

(1A) If the referral of the proposal to take the action included alternative proposals relating to any of the matters referred to in subsection 72(3), the Minister may approve, for the purposes of subsection (1), one or more of the alternative proposals in relation to the taking of the action.

Content of approval

(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.

Note: The period for which the approval has effect may be extended. See Division 5.

Persons who may take action covered by approval

(2A) An approval granted under this section is an approval of the taking of the action specified in the approval by any of the following persons:

(a) the holder of the approval;

(b) a person who is authorised, permitted or requested by the holder of the approval, or by another person with the consent or agreement of the holder of the approval, to take the action.

Notice of approval

(3) The Minister must:

(a) give a copy of the approval to the person named in the approval under paragraph 133(2)(c); and

(b) provide a copy of the approval to a person who asks for it (either free or for a reasonable charge determined by the Minister).

Limit on publication of approval

(4) However, the Minister must not provide under subsection (3) a copy of so much of the approval as:

(a) is:

(i) an exempt document under section 47 of the Freedom of Information Act 1982 (trade secrets etc.); or

(ii) a conditionally exempt document under section 47G of that Act (business documents) to which access would, on balance, be contrary to the public interest for the purposes of subsection 11A(5) of that Act; or

(b) the Minister believes it is in the national interest not to provide.

The Minister may consider the defence or security of the Commonwealth when determining what is in the national interest. This does not limit the matters the Minister may consider.

Notice of refusal of approval

(7) If the Minister refuses to approve for the purposes of a controlling provision the taking of an action by the person who proposed to take the action, the Minister must give the person notice of the refusal.

Note: Under section 13 of the Administrative Decisions (Judicial Review) Act 1977, the person may request reasons for the refusal, and the Minister must give them.

Definition

(8) In this section:

assessment documentation, in relation to a controlled action, means:

(a) if the action is the subject of an assessment report—that report; or

(b) if Division 3A of Part 8 (assessment on referral information) applies to the action:
(i) the referral of the proposal to take the action; and
(ii) the finalised recommendation report relating to the action given to the Minister under subsection 93(5); or
(c) 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; or
(d) if Division 5 of Part 8 (public environment reports) 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; or
(e) if Division 6 of Part 8 (environmental impact statements) 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.

[22] The Minister's power to attach any condition to an approval is to be found in s 134. This provision is only engaged if the Minister has decided to approve the taking of the action by the person under s 133 (see *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14; 106 ALD 232; ; [2008] FCAFC 189 (*Lansen*) at [22] per Moore and Lander JJ). Moreover, the Minister's power to impose a condition only arises if, relevantly, the Minister is satisfied that the condition is necessary or convenient for protecting a matter which is protected by a provision in Pt 3 for which the approval has effect.

[23] Section 136, which is located in Pt 9, is an important provision. It regulates the Minister's power to grant approval and attach conditions to the taking of an action. In *Tarkine National Coalition Incorporated v Minister for the Environment* (2015) 233 FCR 254; 321 ALR 551; [2015] FCAFC 89 (*Tarkine on appeal*), Jessup J (with whom Kenny and Middleton JJ agreed) described (at [20]) how the statutory framework which governed the making of the Minister's decision under s 133 as "a detailed and prescriptive one" and added that "[l]ittle, if any, room was left for implication". His Honour then further observed that the decision-making process was "tightly regulated" by the series of provisions in ss 136–140A. Section 136 provides:

136 *General considerations*

Mandatory considerations

(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.

Factors to be taken into account

(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.

Note: The Minister must also take into account any relevant comments given to the Minister in response to an invitation under paragraph 131AA(1)(b). See subsection 131AA(6).

Person's environmental history

(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.

Minister not to consider other matters

(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.

[24] As will emerge below, three matters of particular significance in this proceeding relate to the meanings of the following matters:

(a) the term "action";

(b) when an event or circumstance is an "impact" of an action; and

(c) the "relevant impacts" of an action.

[25] The relevant meanings are given in the dictionary to the EPBC Act, which is in s 528. Each of the relevant definitions is expressed to be subject to a contrary intention.

[26] The term "action" is defined as having the meaning given by Subdiv A of Div 1 of Pt 23. The term is then defined (non-exhaustively) in s 523 (which is located in that Subdivision), and is set out in full in [14] above.

[27] The term "impact" is defined in s 528 as having the meaning given by s 527E. Justice Mortimer described the definition in s 527E as "almost impenetrable" and "tortured" (see *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* (2016) 337 ALR 96; [2016] FCA 168 at [33], [227]).

[28] Section 527E provides:

527E *Meaning of impact*

(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.

[29] It is important to note that the term "impact" is defined by reference to whether an event or circumstance is an impact of an action and a distinction is drawn between an event or circumstance which is a direct consequence of an action as opposed to an event or circumstance that is an indirect consequence of an action. It is the latter part of that distinction which is particularly relevant in this proceeding. An event or circumstance that is an indirect consequence of an action will be an "impact", subject to s 527E(2), only if the action is "a substantial cause of that event or circumstance" (s 527E(1)(b)). Subsection 527E(2) provides for when there is a primary action and a secondary action which is taken by a different person as a consequence of the primary action and when an event or circumstance consequential upon the secondary action is an impact of the primary action.

[30] For completeness, it might also be noted that there is no definition in the EPBC Act of "an event or circumstance", hence those words are to be given their ordinary meanings.

[31] Section 528 defines "relevant impacts" of an action as having the meaning given by s 82. The terms of s 82, as well as the related provisions in ss 81 and 83, are set out in [18] above.

[32] The definition (or perhaps more accurately, the identification) of what are relevant impacts of an action depends upon whether or not the Minister has decided that the action is a controlled action.

[33] It is convenient to now summarise relevant provisions in the EPBC Act relating to:

(a) the Minister's obligation to take account of the precautionary principle; and

(b) the prohibition on the Minister acting inconsistently with Australia's obligations under the World Heritage Convention (the ***WHC***).

These matters are relevant to grounds 1 and 3 of the amended originating application for judicial review.

[34] The Minister's obligation to take account of the precautionary principle and the definition of that principle are to be found in s 391(1) and (2) respectively (noting also that there is a substantially similar definition of the precautionary principle in s 3A as an element of the principles of ecologically sustainable development, which by s 136(2)(a) are a mandatory consideration in deciding whether or not to approve the taking of an action):

> 391 *Minister must consider precautionary principle in making decisions*
>
> *Taking account of precautionary principle*
>
> (1) The Minister must take account of the precautionary principle in making a decision listed in the table in subsection (3), to the extent he or she can do so consistently with the other provisions of this Act.
>
> *Precautionary principle*
>
> (2) The *precautionary principle* is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

[35] These provisions are relevant to the Minister's decision here because a decision under s 133 of the EPBC Act (ie whether or not to approve the taking of an action) is one of the decisions which is set out in s 391(3) as being a decision in relation to which the precautionary principle must be considered (see Item 2 of s 391(3)).

[36] The Minister's obligation to act not inconsistently with the *WHC* is to be found in s 137 of the EPBC Act:

> 137 *Requirements for decisions about World Heritage*
>
> 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.

[37] It is appropriate to now set out some relevant parts of the *WHC*. Articles 4 and 5 impose obligations on State Parties with respect to their natural and cultural heritage. These articles relevantly state:

> Article 4
>
> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.
>
> Article 5
>
> To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:
>
> …
>
> (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage

Summary of background facts

[38] In November 2010, Adani referred to the then Minister for the Environment a proposal to develop and operate a coal mine and rail infrastructure project at Moray Downs in central Queensland. As noted above, on 6 January 2011, the then Minister's delegate determined that the proposed action was a controlled action for the purposes of s 75 of the EPBC Act and various controlling provisions were identified. After the controlling provisions were expanded to include the newly enacted ss 24D and 24E of the EPBC Act, on 24 October 2013 the Minister found that the proposed action was likely to have a significant impact on water resources.

[39] Adani's proposed action was available for public comment for ten business days from 18 November 2010. Six public submissions were received regarding the potential impacts of the proposed action.

[40] On 26 November 2010, the Queensland Coordinator-General declared the project to be a significant project for the purposes of s 26(1)(a) of the State Development and Public Works Organisation Act 1971 (Qld) (the SDPWO Act). This declaration triggered the statutory environmental impact evaluation procedure in Pt 4 of that Act, which required Adani to prepare an environmental impact statement (**EIS**) for the proposed project.

[41] On 26 November 2010, the Queensland Government stated that the proposed project would be assessed at the level of an EIS under Pt 4 of the SDPWO Act and that such assessment would be accredited under the bilateral agreement between the Commonwealth and Queensland in relation to environmental impact assessment. That bilateral agreement, which was made under s 47 of the EPBC Act, is dated 17 December 2009.

[42] Delegates of the Minister agreed to several subsequent requests by Adani to vary the proposed action.

[43] Adani's EIS for the proposed project was made available for public comment between 15 December 2012 and 11 February 2013. On 26 March 2013, the Queensland Coordinator-General requested that Adani submit additional information to address issues raised in its EIS and in regard to advice which had been received on 29 June 2012 from the Interim Independent Expert Scientific Committee on Coal Seam Gas and Large Mining Development.

[44] The information additional to Adani's EIS was made available for public comment for a period of approximately three weeks in late 2013.

[45] As noted above, on 24 October 2013, the Minister found that the proposed action, being a large coal mining development, was likely to have a significant impact on water resources and determined, in accordance with transitional provisions in the 2013 Amendment Act, that ss 24D and 24E were also controlling provisions.

[46] Following a request by the Minister's delegate under s 131AB of the EPBC Act, on 16 December 2013 the Queensland Coordinator-General and the Independent Expert Scientific Committee (**IESC**) on Coal Seam Gas and Large Coal Mining Development provided advice to the Department on the proposed action. Adani provided a response to that advice on 7 February 2014.

[47] On 7 May 2014, the Queensland Coordinator-General provided his assessment report of the proposed project to the Department (**Coordinator-General's report**). He recommended that the proposed project proceed, subject to conditions. Neither Adani's EIS nor the Coordinator-General's report considered greenhouse gas emissions arising from the transport and combustion overseas of the exported coal.

[48] The Coordinator-General's report also reviewed the IESC advice and included a peer review of that advice from an expert, Dr Noel Merrick. On 19 May 2014, the IESC wrote to the Minister and outlined some residual concerns relating to the potential impacts of the proposed project.

[49] The Minister visited the site of the proposed action and met with Adani and other interested persons.

[50] On 24 July 2014, the Minister approved the proposed action, with conditions. The Minister adopted the same approach as that of the Coordinator-General in that he did not explicitly address the impact of combustion emissions resulting from the transport and combustion overseas of the coal produced at the mine. In early 2015, that decision was challenged in judicial review proceedings in the Court. On 4 August 2015, by consent, the original approval decision was set aside by the Court.

[51] Subsequently, 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] QLC 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 (**$CO_{2\text{-}e}$**) could be emitted globally after 2015 (joint expert report in the Land Court);
- the combustion emissions would be about 4.64 Gt of $CO_{2\text{-}e}$ (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 $CO_{2\text{-}e}$) would be about 54 times greater than the mining emissions from the coal mine directly (0.086 Gt of $CO_{2\text{-}e}$).

[52] On 21 September 2015, the Minister came to the view that he proposed to approve the proposed action subject to conditions. He invited comments on his proposed decision from various persons, including Adani.

[53] On 14 October 2015, the Minister approved, subject to conditions, the taking of the proposed action under ss 130(1) and 133 of the EPBC Act. The approval has effect until 30 June 2090.

Summary of minister's statement of reasons

[54] The Minister provided a detailed statement of reasons dated 14 October 2015 in respect of his approval decision. He annexed copies of some legislative provisions relating to his decision. He stated in footnote 1 of his statement of reasons that the legislation "does not form part of my reasons but is provided as contextual background to my decision". As will emerge below, the ACF pointed to the fact that the legislative extracts did not include s 82 of the EPBC Act.

[55] The body of the statement of reasons comprises 37 pages. Annexure A to the statement (which annexure totals 71 pages), comprises the extracts from the EPBC Act which, the Minister stated, "were taken into account when making my decisions".

[56] The statement is divided into various sections. The first section sets out the background to the matter. The second addresses the evidence or material on which the Minister's findings were based. It is stated in [31] that the Minister's decision to approve the proposed action was based on consideration of the final approval decision brief dated 13 October 2015 prepared by his Department (the **brief**).

[57] The contents of the brief are identified in [32] as follows (noting that the material provided by environmental groups as described in [51] above, including the ACF, was included as Tab M1):

> 32. The final approval decision brief comprised the following:
>   1. Responses from the proponent and Commonwealth Ministers
>   2. Final decision notice
>   3. Letters to proponent and other Commonwealth Ministers
>   4. Statement of Reasons for approval decision
>   5. Proposed approval cover brief and appendices:
>   - A: Queensland Coordinator-General's Assessment Report
>   - B: EPBC Act legal Considerations report
>   - C: Independent Expert Scientific Committee advice, responses and analysis
>   - C1: Independent Expert Scientific Committee advice
>   - C2: Table of responses to Independent Expert Scientific Committee advice
>   - C3: Letter from Independent Expert Scientific Committee Chair to the Minister
>   - C4: Advice from Office of Water Science to the Department
>   - CS: Letter from the proponent on advice from the Office of Water Science
>   - C6: Office of Water Science advice
>   - D: Recommended decision
>   - D1: Recommended decision notice
>   - D2: Summary of proposed conditions
>   - D3: Comparison of proposed conditions with the Coordinator-General's recommendations table
>   - D4: Tracked change version of decision notice showing changes since previous approval decision
>   - E: Letters to proponent, Queensland Coordinator-General and Commonwealth Ministers
>   - F: Maps on project location
>   - G: Proponent's Assessment Documentation and Additional information
>   - G1: Environmental Impact Statement
>   - G2: Supplementary Environmental Impact Statement
>   - G3: Additional Information
>   - H: Departmental Advice on MNES
>   - I: Public comment submissions
>   - I1: EIS submissions
>   - I2: AEIS submissions
>   - I3: Public comment submissions summary
>   - J: Recovery Plans, Threat Abatement Plans and Conservation Advice
>   - J1: Recovery Plans
>   - J2: Threat Abatement Plans
>   - J3: Approved Conservation Advices
>   - K: Departmental advice from Economics and Behavioural insights Section
>   - L: Timeline of relevant events
>   - M: Additional information provided after previous approval decision
>   - M1: Additional information from environmental groups and Adani

M2: Plans provided post previous decision to comply with previous conditions
M3: Office of Water Science hydrogeological reports
M4: Queensland Draft environmental authority for Carmichael Coal Mine

N: Legislative provisions
O: Letters to proponent requesting further information

6. Addendum to proposed approval brief and the attachment to that brief:
   A: Letters to proponent, Queensland Coordinator-General and relevant Ministers

[58] The statement contains the Minister's findings on material questions of fact relating to such topics as the Great Barrier Reef World Heritage Area, the Great Barrier Reef National Heritage Place and climate change and greenhouse gas emissions. It is sufficient to focus on the latter topics, given their prominence in the proceeding. The following paragraphs in the Minister's statement of reasons relate to those topics (without alteration and emphasis added in text):

40. A number of submissions raised concerns about the proponent's assessment of greenhouse gas emissions in relation to possible impacts on the Great Barrier Reef. My consideration of greenhouse gas emissions is at paragraphs 131 to 141.

…

Conclusion

47. In making my decision I considered the proponent's EIS, the Coordinator-General's Report, additional information provided by the proponent and other parties and the Department's briefing material.
48. Based on this information, and with consideration of the distance of the GBRWHA from the project and the mitigation measures and conditions imposed by the Coordinator General, **and after giving consideration to the greenhouse gas emissions from mining operations and from the burning of the mined coal**, I found that the proposed action would not have an unacceptable impact on the world heritage values of the Great Barrier Reef World Heritage Area.

National Heritage places

Great Barrier Reef National Heritage Place

49. In May 2007, the Great Barrier Reef was placed on the National Heritage List. This list comprises natural and cultural places that contribute to our national identity, providing a tangible link to past events, processes and people.
50. The Great Barrier Reef was one of 15 World Heritage properties including in the National Heritage List in 2007. The Great Barrier Reef National Heritage place has national heritage values in respect of the following national heritage criteria, which are prescribed in regulation 10.01A of the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) for the purposes of section 324D of the EPBC Act.
    i. the place has outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history;
    ii. the place has outstanding heritage value to the nation because of the place's possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;
    iii. the place has outstanding heritage value to the nation because of the place's potential to yield information that will contribute to an understanding of Australia's natural or cultural history;

iv. the place has outstanding heritage value to the nation because of the place's importance in demonstrating the principal characteristics of:
   i. a class of Australia's natural or cultural places; or
   ii. a class of Australia's natural or cultural environments; and
   v. the place has outstanding heritage value to the nation because of the place's importance in exhibiting particular aesthetic characteristics valued by a community or cultural group.

51. The heritage values that cause the Great Barrier Reef National Heritage place to meet the above criteria (its **national heritage values**), are the same heritage values that cause it to meet the world heritage criteria set out above.
52. Therefore, I found that the potential impacts to the Great Barrier Reef National Heritage place are commensurate to the potential impacts from the proposed action on the Great Barrier Reef World Heritage property. Mitigation and management measures equally apply to the Great Barrier Reef National Heritage place.
53. In making my decision I considered the proponent's EIS, the Coordinator-General's Report, additional information provided by the proponent and other parties and the Department's briefing material. Based on this information, **and after giving consideration to the greenhouse gas emissions from mining operations and from the burning of the mined coal**, I found that the proposed action would not have an unacceptable impact on the national heritage values of the Great Barrier Reef National Heritage place.

…

Climate change and greenhouse gas emissions

131. The 2014 Great Barrier Reef Outlook Report identifies climate change as the most serious threat to the Great Barrier Reef. The report states that climate change is already affecting the Reef and is likely to have far-reaching consequences in the decades to come. **Sea temperatures are on the rise and this trend is expected to continue, leading to an increased risk of mass coral bleaching; gradual ocean acidification will increasingly restrict coral growth and survival; and there are likely to be more intense weather events. The extent and persistence of these impacts depends to a large degree on how effectively the issue of rising levels of greenhouse gases is addressed worldwide**. The impacts of increasing ocean temperatures and ocean acidification will be amplified by the accumulation of other impacts such as those caused by excess nutrient run-off.
132. The proponent has identified the direct emissions of the proposed action (Scope 1 emissions) and the direct emissions resulting from energy required to undertake the proposed action (Scope 2 emissions). This approach is consistent with the provisions of the National Greenhouse and Energy Reporting Act 2007 (Cth) (NGER Act).
133. The NGER Act prescribes a single, national framework for corporations to report on greenhouse gas emissions, energy consumption and energy production data. The NGER Measurement Determination 2008 made under subsection 10(3) of the NGER Act sets out the principles, methods and criteria for the estimation of greenhouse gas emissions reported by corporations that meet specific legislative emissions and/or energy thresholds.
134. For each facility under its operational control, the NGER Act requires a corporation to identify whether its emissions are:
   - **Scope 1 (direct) emissions** — includes the release of greenhouse gas emissions as a direct result of activities undertaken at a facility. They are emissions over which the entity has a high level of control; or
   - **Scope 2 (energy direct) emissions** — includes the release of greenhouse gas emissions from the generation of purchased electricity, steam, heating or cooling consumed by a facility, but do not form part

of the facility. Scope 2 emissions are indirect emissions that entitles can easily measure and significantly influence through energy efficiency measures.

135. The NGER Act does not require reporting of **Scope 3 (indirect) emissions**. The proponent has characterised Scope 3 emissions as including emissions from the transport of the product coal from the mine to overseas destinations and the combustion of the product coal at those destinations. Such emissions would not be covered by the characterization of Scope 3 contained in the National Greenhouse Accounts Factors Workbook published by the Department.

136. The proponent has provided the following information on scope 1, 2 and overseas emissions associated with the proposed action.

Greenhouse gas emissions (tonnes CO^2— equivalent)

SCOPE	ANNUAL AVERAGE EMISSIONS (tCO2-e)	LIFE OF MINE EMISSIONS (tCO2-e)
Scope 1	628,723	37,723,358
Scope 2	808,898	48,533,904
Overseas emissions associated with the Mine, from transport by rail, shipping and combustion of the product coal	77,395,516	4,643,730,979
Scope 1+2	1,437,621	86,257,262
Scope 1+2+overseas emissions	78,833,137	4,729,988,241

Source: Joint Report to the Land Court of Queensland on “Climate Change Emissions” (page 8)

137. Scope 1 and 2 GHG emissions are expected to occur within Australia, and emissions resulting from transport by rail, shipping and combustion of the product coal are expected to mostly occur overseas. GHG emissions within Australia are being addressed through the Government’s climate change policy framework which includes the Emission Reduction Fund. In addition, the Queensland Government requires the proponent to implement control strategies to minimise GHG emissions from the Carmichael Coal Mine and Rail project.

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.**

Conclusion

139. I found that Scope 1 and 2 greenhouse gas emissions are likely to occur if the proposed action proceeds. Australia has set a target to reduce GHG emissions

through a climate change policy framework that includes the Emissions Reduction Fund. Therefore while the project will have scope 1 and 2 GHG emissions, this will occur within a national framework of modelled reductions in net GHG emissions. In addition the Queensland Coordinator-General recommended conditions that will require the proponent to implement emission control strategies.

140. **I found that the quantity of overseas GHG 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.**

[59] The statement of reasons also contains the following paragraphs concerning the precautionary principle:

Precautionary principle — Section 391

163. In making my decision whether to approve the proposed action, I considered the precautionary principle in accordance with section 391 of the EPBC Act — "that lack of full scientific certainty should be not used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage."

164. I agreed with the conclusions of the Coordinator-General's Report that there is sufficient scientific information to conclude that the proposal will not result in threats of serious or irreversible environmental damage to the Great Barrier Reef World Heritage Area, the Great Barrier Reef World National Heritage Place, listed migratory species, listed threatened species and communities, wetlands of international importance and the Great Barrier Reef Marine Park.

165. In relation to the likely impacts of the proposed action on water resources, the application of the precautionary principle is reflected in the approval conditions which require a Groundwater Management and Monitoring Program and in establishing a groundwater drawdown limit at the Doongmabulla Springs Complex. I also included conditions to provide additional protection and to improve the scientific understanding regarding the potential impacts on matters of national environmental significance likely to be impacted by the proposed action. In particular, I required an adaptive management approach for mitigation, monitoring, review and offsets to deal with any uncertainties over the proposed 60 year life of the proposed action.

…

Reasons for decision

191. In deciding whether or not to approve the taking of the proposed action, I took into account (among other matters) the principles of ecologically sustainable development … and the precautionary principle as required under section 391 of the EPBC Act.

[60] This material is relevant to ground 3 of the amended originating application for judicial review.

[61] The final relevant section of the statement of reasons relates to the Minister's consideration of s 137 of the EPBC Act, and the prohibition on him acting inconsistently with Australia's obligations under the *WHC* (to which ground 1 relates). The relevant paragraphs are as follows:

> *Requirements for decisions about World Heritage properties and National Heritage places — Sections 137 and 137A*
>
> 168. In accordance with section 137 of the EPBC Act, in deciding whether to grant an approval for the proposed action, and what conditions to attach to such an approval, I cannot act inconsistently with Australia's obligations under the World Heritage Convention, the Australian World Heritage management principles; or a plan that has been prepared for the management of a declared World Heritage property under section 316 or as described in section 321.
> 169. A plan of management for the GBRWHA has not been prepared under section 316 or section 321 of the EPBC Act.
> 170. The proposed action was assessed by EIS which provided for periods for public comment. It involved a thorough assessment of impacts on the Great Barrier Reef World Heritage Area and its world heritage values. Based on the assessment of environmental impacts, and the mitigation measures proposed by the Queensland Government, the proposed action will not have any unacceptable impacts on the world heritage values of the Great Barrier Reef World Heritage Area.
> 171. I was therefore satisfied that the granting of approval for the proposed action, and the conditions of that approval, are not inconsistent with Australia's obligations under the World Heritage Convention, the Australian World Heritage management principles, or a plan that has been prepared for the management of a declared World Heritage property under section 316 or as described in section 321.
> 172. In accordance with section 137A of the EPBC Act, in deciding whether to grant an approval for the proposed action, and what conditions to attach to such an approval, I cannot act inconsistently with the National Heritage Management principles, an agreement to which the Commonwealth is a party in relation to a National Heritage place or a plan prepared for the management of a National Heritage place under section 324S or as described in section 324X.
> 173. The Commonwealth has not reached agreement with any party in relation to the management of the National Heritage values of the Great Barrier Reef, and a management plan for the Great Barrier Reef has not been prepared under section 324S or section 324X of the EPBC Act.
> 174. The proposed action was assessed by EIS which provided for periods for public comment. It involved a thorough assessment of impacts on the National Heritage values of the Great Barrier Reef National Heritage Place. Based on the assessment of environmental impacts, and the mitigation measures proposed by the Queensland Government, the proposed action will not have any unacceptable impacts on the National Heritage values of the Great Barrier Reef National Heritage Place.
> 175. I was therefore satisfied that the granting of approval for the proposed action, and the conditions of that approval, are not inconsistent with the National Heritage management principles, an agreement to which the Commonwealth is a party in relation to a National Heritage place or a plan prepared for the management of a National Heritage place under section 324S or as described in section 324X.

The ACF's judicial review grounds

[62] The ACF's amended originating application for judicial review contained four grounds. It is sufficient to focus on the first three grounds because ground 4 was abandoned before the hearing commenced. The grounds are described in the same order in which they were presented at the hearing.

[63] Ground 2 claims that the Minister made an error of law by:

(a) characterising the combustion emissions as "'not a direct consequence of the proposed action', without applying the test in section 527E of the EPBC Act"; and

(b) "failing to comply with the requirement in s 136(2)(e) of the EPBC 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".

[64] Ground 3 relates to the precautionary principle. The ACF claims that, having found in [140] of his statement of reasons 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 ss 136(2)(a) and 391 of the EPBC Act.

[65] Ground 1 relates to the prohibition imposed by s 137 of the EPBC Act on the Minister acting inconsistently with the *WHC*. The ACF claims that the Minister made an error of law in failing to apply that statutory prohibition in his consideration of the effect of the combustion emissions overseas on the World Heritage Values of the Great Barrier Reef World Heritage Area. It claims that the Minister's decision was inconsistent with:

(a) Australia's obligations under the *WHC*, particularly the obligation under Art 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, particularly 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.

The ACF's written and oral submissions summarised

[66] In support of ground 2 of the amended originating application for judicial review, the ACF submitted that the Minister had asked himself the wrong question in evaluating the new information which he received after his first approval decision was set aside by consent. It submitted that, in order to comply with s 136(2)(e), the Minister had to ask whether the consequences for the Reef of the combustion emissions were "relevant impacts" of the proposed action on the Reef, within the meaning of ss 82 and 527E of the EPBC Act. Instead, so the ACF contended, the Minister applied a range of criteria which were not sourced in the EPBC Act. This caused him to dismiss from further consideration the consequences of the proposed action notwithstanding that they "posed the greatest threat to the Great Barrier Reef".

[67] The ACF submitted that the Minister could only properly undertake the task of taking into account information about relevant impacts in the Co-ordinator General's report (s 136(2)(b)) and then determine whether there was additional information about "relevant impacts" of the proposed action if he

correctly understood the meaning of "relevant impacts" as defined in ss 82 and 527E. The ACF submitted that, instead of applying these provisions, the Minister's approach involved the application of a range of criteria beyond the EPBC Act to justify a differential treatment of the combustion emissions. Under this approach, the Minister determined that he did not need to quantify the impacts of combustion emissions or impose any conditions to mitigate or repair the damage they will cause to the Reef. The ACF submitted that the proper approach would have been for the Minister, having taken into account the additional information, to have then asked whether the combustion emissions were impacts within the meaning of s 527E. It submitted that the consequences for the Reef of climate change resulting from the combustion emissions were impacts of the action of the same species as the "downstream" consequences in previous litigation relating to the Nathan Dam: *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (*Nathan Dam case at first instance*) and, on appeal, *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; [2004] FCAFC 190 (*Nathan Dam case on appeal*).

[68] The ACF submitted that the Minister's failure to apply ss 82 and 527E of the EPBC Act was manifested clearly in [138] and [140] of his statement of reasons (see [58] above). Mr Saul Holt QC (who appeared together with Dr Chris McGrath and Mr Emrys Neckvapil for the ACF) submitted that the Minister's erroneous approach to the matter involved the following steps:

(a) the Minister asked himself whether the proposed action would create a net increase in global emissions, in light of the variables which he identified in [140] of his statement of reasons, but that question is irrelevant to the proper question arising under ss 82 and 527E because, as the joint expert report in the Land Court noted: "All Emissions from the burning of product coal from this Mine will have a climate impact in the physical cause-effect sense";

(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;

(c) the Minister's attribution to different polities of responsibility for addressing climate change was not relevant to the concept of "relevant impacts" in the EPBC Act;

(d) the distinction drawn by the Minister between mining emissions (ie scope 1 and scope 2 emissions under the National Greenhouse and Energy Reporting Act 2007 (Cth) (the NGER Act)) and the combustion emissions (scope 3) failed to consider the basis for that distinction which led him to not apply s 527E of the EPBC Act; and

(e) the Minister took into account a range of matters that 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.

[69] The ACF further submitted that the Minister's failure to treat the effect on the Reef of the combustion emissions as a "relevant impact" was reflected in the structure of his statement of reasons, which substantially reflected the structure of the Minister's statement of reasons for his first approval decision.

[70] 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".

[71] The Minister was criticised for the obscurity of [138] to [140] of his statement of reasons and his failure to make any explicit reference to s 527E. More broadly, ground 2 involved a complaint by the ACF that the Minister impermissibly "front-end loaded" his determination of whether combustion emissions would be a relevant impact within the meaning of s 82, thereby precluding himself from having to conduct an assessment of those likely impacts as he would have been required to do if he had adopted the approach favoured by the ACF. The ACF contended that if its approach had been applied conditions may have been imposed aimed at mitigating the otherwise adverse impacts of climate change on the Reef. The ACF contended that the EPBC Act created a distinction between a *determination* under the EPBC Act whether there is an "impact", as opposed to an *assessment* of that impact.

[72] The ACF submitted that there are effectively two causation elements in s 527E, one which is implicit in the notion of "indirect consequence" and the other in the express reference to "substantial cause". It also submitted that the Minister misconstrued the phrase "substantial cause" by apparently considering that it required something to be weighty or big, as opposed to something which is simply not de minimus. In this context, the ACF relied upon Deane J's comments in *Tillmann's Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 382–3; 42 FLR 331 at 348 (*Tillmann's Butcheries*) on the ambiguity of the term "substantial".

[73] The ACF sought to take advantage of the different approaches taken by the Minister and Adani in their written submissions. As to the claimed misapplication of s 527E, the ACF contended that the Minister's position was that his reasons ought to be interpreted as saying that combustion emissions were not an impact because the proposed action was not a "substantial cause" of the adverse effects which climate change might have on the Reef. In contrast, Adani's position was that the Minister found that the connection between combustion emissions and any actual adverse impact on the Reef was "speculative"; however, combustion emissions would be managed and integrated through national and international emissions control frameworks.

[74] The ACF contended that the notion of "net emissions" is an irrelevant consideration in the application of s 527E and that, in any event, the Minister did not apply that provision. It submitted that there is no actual finding by the Minister that net emissions will be zero; rather, the statement of reasons leaves matters shrouded in uncertainty.

[75] The ACF contended that, although the statement of reasons does not explicitly state that the Minister found that greenhouse gas emissions were not a relevant impact, that is what he now says in his submissions. It contended that the Minister simply never asked the question whether the combustion emissions

were a relevant impact or, alternatively, if he did address that question and then concluded that they were not likely to have any impact, he did so without applying ss 82 or 527E.

[76] On the issue of the proper reading of the Minister's reasons, the ACF relied upon a series of cases which, it submitted, modified the application of the well settled principle to the effect that the reasons of an administrative decision-maker should be given a beneficial construction. Those cases included the Full Court's decision in *Soliman v University of Technology, Sydney* (2012) 207 FCR 277; 296 ALR 32; [2012] FCAFC 146 (*Soliman*); the NSW Supreme Court's decision in *Sadsad v NRMA Insurance Ltd* [2014] NSWSC 1216 (*Sadsad*) at [47] and the Full Court's decision in *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437; 139 ALD 50; 308 ALR 280; [2014] FCAFC 1 (*Singh*) at [45]–[47].

[77] The ACF submitted that, even if ground 2 failed, this did not mean that ground 3 must also fail.

[78] In support of ground 3 (ie, the alleged failure of the Minister to take into account the precautionary principle), the ACF submitted that [164] of the Minister's statement of reasons was in relevantly identical terms to the Minister's first statement of reasons concerning his earlier decision to approve the project. This is in circumstances where the first statement of reasons did not involve any evaluation of the impact of combustion emissions. The ACF's written submissions suggested that the only passage in the second statement of reasons dealing with the precautionary principle is [164]. (That is not correct. As noted in [59] above, there is also a reference to the precautionary principle in [191] of the second statement of reasons). The ACF submitted that the Minister's reliance on the Coordinator-General's report and consideration of the precautionary principle was confined to scope 1 and scope 2 emissions and necessarily involved a failure to deal with the precautionary principle in respect of the combustion emissions, which resulted in a failure to comply with ss 136(2)(a) and 391 of the EPBC Act.

[79] It is convenient at this point to note that, despite the Minister's objection, I consider that the first statement of reasons should be admitted into evidence on a non-hearsay basis. Those reasons are relevant to the ACF's contention that their structure, when compared with the Minister's later statement of reasons, reveals legal error on the Minister's part.

[80] The ACF relied upon Preston CJ's analysis of the precautionary principle in *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; [2006] NSWLEC 133 (*Hornsby Shire Council*) and, in particular, the following passage from his Honour's judgment at [128]:

> The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipate threat of environmental damage, but it should be proportionate.

[81] The ACF contented that both these thresholds were satisfied here because:

(a) the existence of "threats of serious or irreversible environmental damage" to the Reef by increased greenhouse gas emissions and climate change were demonstrated by the material which the ACF provided to

the Department under cover of its letter dated 27 August 2015, including in particular the Great Barrier Reef Outlook Report 2014 dated August 2014 and the expert evidence filed in the Land Court; and

(b) the Minister took no action to prevent or mitigate the impacts of combustion emissions because of his finding that there was uncertainty about the relationship between the quantified combustion emissions and the quantified harm to the Reef of climate change and ocean acidification.

[82] The ACF acknowledged that ss 391 and 136(2)(a) did not oblige the Minister to accord "pre-eminence" to the precautionary principle when making a decision under s 133 of the EPBC Act, but it contended that he was obliged to take that principle into account and determine what weight to give to it where the preconditions for its application exist.

[83] As to ground 1, the ACF referred to the discussion of the context and history of the WHC in *Commonwealth v Tasmania* (1983) 158 CLR 1; 46 ALR 625 (*Tasmanian Dam case*), as well as the history of the replacement of the World Heritage Properties Conservation Act 1983 (Cth) by the EPBC Act. Under both legislative schemes, in order to give effect to Australia's obligations, the mechanism was adopted of prohibiting actions which were likely adversely to impact the world heritage values of a place on the World Heritage List, coupled with a Ministerial discretion to allow the action to take place. The ACF contended that a significant difference between the two legislative regimes is that the EPBC Act requires the Minister to have regard not only to protection of world heritage values, but also to social and economic values.

[84] The ACF submitted that the Minister failed to comply with s 137 of the EPBC Act because, as is evident in [168] and [170] of his reasons for decision, the Minister relied entirely on the assessment in Adani's EIS and the evaluation in the Coordinator-General's report, but those materials contained no consideration of the combustion emissions.

[85] In his oral submissions regarding ground 1, senior counsel for the ACF contended that the Minister's position regarding the proper construction of Art 4 of the WHC was plainly wrong, citing Deane J's observations in the *Tasmanian Dam case* at CLR 262–3; ALR 807–8, which were to the effect that that provision imposed actual obligations.

[86] Senior counsel confirmed that the ACF did not contend that the obligation imposed by s 137 of the EPBC Act was a jurisdictional fact.

[87] In relation to the issue whether or not non-compliance with s 137 would result in the Minister's decision being invalid, the ACF relied upon the observations of Moore and Lander JJ in *Lansen* at [36].

Minister's written and oral submissions summarised

[88] The Minister's outline of written submissions addressed the three remaining grounds of judicial review in the same order as did the ACF.

[89] As to ground 2, the Minister submitted that the ACF's claim that the Minister failed to apply s 527E of the EPBC Act involves a misconstruction of both this provision and his statement of reasons. The Minister relied upon Tracey J's analysis of s 527E in *Tarkine National Coalition Inc v Minister for the Environment* [2014] FCA 468 (*Tarkine at first instance*) at [86], where his Honour said:

> … In order for an event or circumstance to be an indirect consequence of the action, it must be demonstrated that "the action is a substantial cause of that event or circumstance" (see s 527E(1)(b)) and that the criteria prescribed by s 527E(2) are met.

[90] The Minister submitted that, on appeal, Tracey J's construction was regarded by the Full Court as correct (see *Tarkine on appeal* at [39] per Jessup J, with whom Kenny and Middleton JJ agreed).

[91] Accordingly, the Minister submitted that, in the circumstances here, the relevant "events or circumstances" for the purpose of s 527E are the effects of climate change in producing increased ocean temperatures, ocean acidification and more intense weather events and that these events or circumstances can only be an impact if the proposed action is a "substantial cause" of them within the meaning of s 527E.

[92] The Minister submitted that the relevant parts of his statement of reasons should be construed as involving a finding on his part that the proposed action would not be a substantial cause of climate change effects. This was because he found that it was impossible to regard the combustion emissions as having any significant or identifiable impact on matters of Australian national environmental significance. The impossibility of this task related to the variables which could affect the actual net global emissions in the future, as identified by him in [140] of his statement of reasons, so the Minister submitted.

[93] The Minister contended that, fairly construed, his reasons demonstrate that he did consider and apply s 527E in the context of combustion emissions and that he found that the proposed action would not be a substantial cause of any climate change effects within the meaning of s 527E(1)(b) and would not have a relevant impact on the Reef. Accordingly, the ACF's contention that the Minister failed to apply ss 82 and 527E should be rejected.

[94] The Minister observed that the ACF's complaint as encapsulated in ground 2 may have its genesis in the absence of any direct reference in [140] of the statement of reasons to "indirect consequences under s 527E(2)", but it was submitted that it was not necessary to "litter reasons with constant reference to statutory provisions".

[95] It was submitted that the reference to "necessary relationship" in [140] could only be a reference to "substantial cause" as it appears in s 527E and that there is no requirement for the Minister to explicitly use that phrase itself, or, indeed, to make any direct reference to s 527E.

[96] In further response to the ACF's case relating to combustion emissions, the Minister contended that:

(a) there was no error in him asking whether approving the proposed action would cause a net increase in global emissions because that question was "essential" to ss 82 and 527E;

(b) there was no error in his considering various domestic and international schemes for addressing climate change because those matters reinforced his conclusion that there would be no relevant impact from the proposed action on the Reef;

(c) it was incorrect of the ACF to contend that he treated scope 1 and 2 emissions differently from scope 3 emissions in the sense that he determined that, unlike scope 3 emissions, scope 1 and 2 emissions were "relevant impacts" for the purposes of s 82. The Minister denied that he had concluded that the scope 1 and 2 emissions were relevant impacts.

He pointed to the fact that no conditions were imposed by him to mitigate the impacts of scope 1 and scope 2 emissions, which conditions might have been expected if he considered that these specific emissions were relevant impacts;

(d) no significance should attach to the fact that he attached no conditions which addressed climate change impacts in circumstances where he found that the proposed action would have no relevant impact on the Reef; and

(e) contrary to the ACF's submission, the structure of the statement of reasons does not assist its case, because the statement must be read fairly and as a whole.

[97] In his oral address, Mr Richard Lancaster SC (who appeared with Mr Gim Del Villar for the Minister) submitted that the central flaw in the ACF's case was its mistaken reading of [138] and [140] of the Minister's statement of reasons.

[98] Senior counsel for the Minister acknowledged that s 82 of the EPBC Act was not included in the extracts of legislative provisions in Annexure A of the Minister's statement of reasons, but he said that this was of no consequence (for reasons which will be developed below).

[99] A central submission made on the Minister's behalf was the necessity of clearly identifying the relevant "event or circumstance" for the purposes of applying s 527E. The Minister submitted that the ACF's position was misguided in contending that climate change itself constituted that event or circumstance. Rather, the Minister submitted, the relevant "event or circumstance" was the effect of climate change, being the increase in sea temperature and ocean acidification. Consequently, the ACF's criticisms of the Minister's reasons relating to net emissions was misdirected, because it is not the emissions themselves which are the relevant event or circumstance, but rather the matters described immediately above, so the Minister submitted. Senior counsel submitted that the Minister's approach was that there was no event or circumstance within the meaning of s 527E if there was no net increase in emissions in circumstances where the relevant event or circumstance is the consequences of climate change increasing sea temperature and ocean acidification.

[100] It was submitted by the Minister that, on a fair reading of his statement of reasons, the references in [140] could only be directed to s 527E and the ACF proffered no explanation as to what otherwise the paragraph relates to.

[101] Emphasis was placed by the Minister on the fact that s 527E is a definitional provision which then attaches to relevant substantive provisions in which the concept of "impact" arises, such as s 133.

[102] The Minister relied on other references in [40]–[48] and [131]–[141] of his statement of reasons to his consideration of greenhouse gas emissions. The ACF's submission that the statement of reasons was substantially identical to the relevant parts of the Departmental brief was challenged. In particular, the Minister highlighted the fact that there is no reference to the concept of "necessary relationship" in the Departmental brief as there is in [140] of his reasons.

[103] Senior counsel then explained why the Minister contended that s 82 was not material in the circumstances of this case. The first reason was that, because of the Minister's finding that the combustion emissions would not have an impact on the Reef, there was simply no need then to go to the next step of considering

"relevant impacts" under s 82. The Court was taken to parts of the new information which was before the Minister which, it was submitted, supported his conclusion that there would be no impact, including the joint expert report in the Land Court at [19] and [21]; the report of Professor Hoegh-Guldberg at [49] and [52], as well as an affidavit by Mr Jonathan Stanford. This information was placed before the Minister by the ACF under cover of a letter dated 27 August 2015 (Exhibit 2).

[104] The Minister gave another reason in support of his contention that s 82 did not arise. That is because of the terms of s 83, which provide that Pt 8 does not apply where there is in place a bilateral agreement, as was the case here. The complexities of the inter-relationship between ss 81 and 82 were acknowledged, but senior counsel submitted that it was unnecessary to resolve those difficulties here having regard to the unequivocal terms of s 83. Senior counsel also highlighted an assumption which appears to have been made in the *Tarkine at first instance* litigation to the effect that s 82 could apply in a s 83 case. If s 82 has no application because of s 83, it was submitted that the reference in s 136(2)(c) to "relevant impacts" cannot be a reference to that term as defined in the dictionary and as referred to in s 82, and must therefore be given its ordinary meaning.

[105] On the issue of the proper construction of "a substantial cause", it was submitted that even if the ACF's construction was accepted, it did not assist its case because the Minister did not make a finding that the impact was more than de minimus; rather, he found that there would be no impact.

[106] The Minister placed some reliance upon parts of the Explanatory Memorandum to the Environment and Heritage Legislation Amendment Act (No 1) 2006 (No 165 of 2006) (Cth) (the 2006 Amendment Act) which inserted s 527E. In particular, reference was made (see [156] below) which states that a purpose of the relevant amendment was to clarify when indirect impacts are needed to be taken into account. The Minister submitted that this is a plain reference to s 527E and is not consistent with the ACF's case that s 527E was, in effect, open-ended and permitted matters to be carried through to the assessment stage.

[107] It was submitted that [140] of the Minister's statement of reasons should not be interpreted as the ACF did, as involving a balancing of adverse and beneficial effects. Rather, the Minister was saying that he could not identify any impact at all of the combustions emissions having regard to the variables which he identified.

[108] As to ground 3, the Minister submitted that his obligation to take account of the precautionary principle did not require him to take measures or consider taking measures if he found that a proposed action would not have any adverse effect on matters of national environmental significance (citing *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301; [2013] FCAFC 111 (*Buzzacott*) at [192]). The Minister also relied upon the fact that in [163] to [167] of his statement of reasons, he addressed ss 136(2)(a) and 391 of the EPBC Act and stated that he agreed with the conclusions in the Coordinator-General's report (which, as noted above, dealt only with scope 1 and scope 2 emissions and not scope 3).

[109] With respect to the phrase "difficult to identify" which appears in [140] of the statement of reasons, the Minister submitted that this phrase was not used to indicate that there were circumstances of scientific uncertainty for the purposes

of the precautionary principle, but rather that the phrase involved his way of expressing his conclusion that there was not the requisite relationship between combustion emissions and increases in global temperature and the taking of the proposed action.

[110] The Minister relied upon the observations of the NSW Court of Appeal in *Minister for Planning v Walker* (2008) 161 LGERA 423; [2008] NSWCA 224 (*Walker*) at [43]–[55] in support of his contention that it was unnecessary to apply that principle to every issue which arises in the decision-making process. Moreover, he submitted that the ACF's complaint of non-compliance with ss 136(2)(a) and 391 of the EPBC Act cannot be reconciled with his acceptance of the threat posed by climate change, hence there was no relevant scientific uncertainty to which the precautionary principle could attach in the circumstances of this case.

[111] As to ground 1 and the alleged breach of s 137 of the EPBC Act, the Minister submitted that ground 1 was based on a misapprehension of both Australia's international obligations and the operation of s 137.

[112] On the first of those matters, the Minister submitted that the *WHC* had to be construed in accordance with general principles of treaty interpretation, as set out in Art 31 of the Vienna Convention on the Law of Treaties 1969. Applying that approach to the interpretation of Art 4 of the *WHC*, the Minister submitted that this provision had to be construed in its context, including in the light of Art 5, which created a "flexibility or 'margin of appreciation'" in implementing the WHC obligations (citing the *Tasmanian Dam case* at CLR 225; ALR 776 per Brennan J). The Minister criticised the ACF's literal interpretation of Art 4 and contended that, when Arts 4 and 5 were construed so as to produce a harmonious operation, it was not envisaged that operative provisions of the *WHC*, including Arts 5 and 6, meant absolute protection, as opposed to a level of protection "that took account of economic, scientific and technical limitations, and the integration of heritage protection into broader economic and social decision making".

[113] As to the second matter (i.e. the operation of s 137 of the EPBC Act), the Minister submitted that this provision does not have the effect of making any inconsistency with Australia's obligations under the *WHC* a jurisdictional fact, but rather required the Minister to determine whether the giving of approval for the taking of the proposed action and the conditions to attach to any such approval would be inconsistent with Australia's obligations under the *WHC*. The Minister submitted that, on its proper construction, s 137 did not impose a requirement of consistency with Australia's treaty obligations that could be subject to independent judicial determination. In any event, even if that were wrong, the Minister submitted that nothing in Art 4 of the *WHC* suggested that his decision to approve the taking of the action placed Australia in breach of its obligations because, on its proper construction, Art 4 imposed an overarching duty not to act in the manner manifestly contrary to the purposes of the *WHC*. The Minister submitted that he had properly concluded that the proposed action should not be refused having regard to the speculative nature of any net increase in global greenhouse gas emissions resulting from the relevant combustion emissions.

[114] In relation to ground 1, the Minister's essential position was that the prohibition imposed by s 137 simply did not arise in circumstances where he concluded that the proposed action would not affect the Reef, for the reasons set

out in [138] to [140] in particular, but also by a reference in [48], which necessarily picked up his conclusion in [140].

[115] The Minister advanced alternative contentions in respect of his position that he had complied with s 137. One such alternative was that, if in fact s 137 raised a justiciable issue (which the Minister denied saying that the question of compliance with the *WHC* was essentially a matter for a member State and not a court), it was a matter for the State to interpret and give effect to provisions such as Arts 4 and 5. Justice Deane's observations in the *Tasmanian Dam case*, as relied on by the ACF, were explicable, so it was submitted, on the basis that his Honour was responding to an argument by Tasmania that no obligation was imposed by those provisions.

[116] Finally, the Minister submitted that, even if the Court was satisfied that there had been non-compliance with s 137, this would not necessarily result in invalidity of his decision, having regard to the relevant principles in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28 (*Project Blue Sky*).

Adani's written and oral submissions summarised

[117] Adani's primary submissions may be summarised as follows.

[118] First, the Minister's statement of reasons indicates that, in relation to the topic of combustion emissions, the Minister:

- (a) took into account the relevant statutory provisions and the constraints they imposed on his decision-making;
- (b) considered the factual information before him which was relevant to his decision;
- (c) analysed the factual information to come to conclusions about the potential impacts of combustion emissions on the Reef;
- (d) concluded on the material before him that any potential impacts were indirect and speculative (see [138] and [140] respectively of the statement of reasons), such that there was a real difficulty in identifying an actual relationship between the project and an impact on the Reef;
- (e) concluded that, even though no relevant impacts were found, direct and indirect greenhouse gas emissions resulting from the proposed action would be managed and mitigated through national and international emission control frameworks; and
- (f) concluded on that basis that the proposed action would not have an unacceptable impact on the Reef.

[119] As to ground 2, Adani submitted that the ACF's case on this ground misunderstood the Minister's conclusion and also involved an attempt to have the Court review the merits of the Minister's conclusions regarding combustion emissions. In particular, Adani submitted that [138] to [140] of the statement of reasons demonstrate that ss 82 and 527E of the EPBC Act were analysed and addressed. Adani submitted that the Minister concluded that combustion emissions were "not a direct consequence" of the proposed action, that the future extent of climate change was itself uncertain and that determining actual (as opposed to possible) net emissions was "speculative at this stage". Accordingly, it was "not possible to draw robust conclusions on the likely contribution of the project to a specific increase in global temperature". Adani submitted that the ACF's case was predicated on a proposition that combustion emissions will have relevant impacts and that the extent of those impacts can be assessed, whereas the Minister made findings of fact to the contrary.

[120] As to s 527E, Adani submitted that the Minister concluded that combustion emissions were not a direct consequence of the project and that the matter was to be analysed by reference to the contribution which combustion emissions might make to climate change and the impact of climate change on the Reef. This reasoning necessarily meant that any contribution combustion emissions might make to climate change and their impact on the Reef was not a direct consequence of the project — any potential impact would be indirect. This involved no misconstruction of s 527E and, indeed, is consistent with the distinction drawn therein, so Adani submitted.

[121] On the issue of s 82, Adani submitted that, on a proper reading of the statement of reasons, the Minister did not conclude that the project will have or is likely to have an indirect impact on the Reef because of the many variables and uncertainties inherent in any such conclusion but, rather, was based on the concepts contained in ss 82 and 527E.

[122] With specific reference to the ACF's submission that the Minister took into account a range of factors which he should have considered only after other information was taken into account, Adani submitted that:

(a) the submission assumes that the Minister found or should have found that there will be or is likely to be an impact but no such finding was made and the merits of the Minister's conclusion are not judicially reviewable;

(b) the EPBC Act does not require the Minister to adopt the sort of staged approach advanced by the ACF, involving the assessment of relevant impacts followed by a consideration of other relevant matters followed by a consideration of conditions; and

(c) consistently with the precautionary principle, the Minister considered what response was appropriate in light of the uncertainties which he identified.

[123] Adani submitted that it was wrong of the ACF to contend that there was a failure on the Minister's part to treat the effect on the Reef as a "relevant impact". Rather, Adani submitted that the Minister concluded that no robust conclusion could be reached as to the likely existence or extent of impact on the Reef in consequence of the combustion emissions. The ACF's case was flawed as it assumed that there will be a "relevant impact", which is contrary to the Minister's finding, so Adani submitted.

[124] Adani submitted that it was necessary to read the Minister's statement of reasons as a whole, in which case the Minister's ultimate conclusions at [48], [53] and [56] are "plainly informed" by the discussion of combustion emissions at [131] to [141].

[125] In oral address Mr Damian Clothier QC (who appeared with Mr Stewart Webster for Adani) submitted that the ACF's case on ground 2 rested on two key propositions. The first was that the wrong test had been applied by failing to consider s 527E and the taking into account of the net emissions was an irrelevant consideration when in fact it was not. The second was the structure and terms of the Minister's statement of reason and the absence of any explicit reference to s 527E.

[126] Senior counsel emphasised the importance of the structure of the EPBC Act and the fact that s 133 was informed by s 136. He submitted that it was essentially a question of fact for the Minister to decide whether or not there was an impact and, only if there was, did he need to consider or assess that impact.

[127] As to the absence of any express reference in the statement of reasons to s 527E, it was submitted that such a reference was not essential. Adani supported the Minister's submission that the ACF was unable to identify to what the Minister was referring in [138] to [140] if it was not a reference to the matters presented by the definition in s 527E.

[128] Adani emphasised the context in which the issue had arisen in the circumstances of this case, involving climate change which is a global phenomenon. Accordingly, it was not irrelevant for the Minister to take into account what other countries might do in mitigating the impact of greenhouse gas emissions.

[129] Adani placed reliance on other cases in which net emissions have been regarded as a relevant consideration, albeit in respect of provisions other than s 137, including *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510; 93 ALD 84; [2006] FCA 736 (*Queensland Proserpine* case) at [55] per Dowsett J (where the issue was one of identifying whether something was a "controlled action"), and *Coast and Country Association of Queensland Inc v Smith* [2015] QSC 260 at [46] per Douglas J.

[130] With reference to the phrase "necessary relationship" in [140] and the difficulty of coming to any conclusion on that matter, Adani contended that the Minister's reasoning was that, because he could not reach a conclusion that the combustion emissions were a "substantial cause" within the meaning of s 527E, the matter could be taken no further. In other words, it was not a case of the Minister saying that they were not a substantial cause but rather him saying that, because of the variables, he could not be satisfied that it would be a substantial cause, with the consequence that s 527E was not satisfied.

[131] As to the omission of the terms of s 82 in Annexure A to the statement of reasons, Adani drew attention to the fact that the legislative extracts did include the definition of "relevant impacts" in s 528, which in turn, referred to s 82.

[132] As to ground 3, Adani emphasised that the Minister stated in [163] of the statement of reasons that he had considered the precautionary principle. Furthermore, contrary to the ACF's submission, Adani contended that [164] of the statement of reasons indicates that the Minister did not confine his consideration of the precautionary principle to the Coordinator-General's report alone. Adani also drew attention to [191] of the statement of reasons, where there is a further express reference to the precautionary principle having been applied by the Minister, which, it was contended, effectively shifts the onus to the ACF to demonstrate that this unequivocal statement was somehow ineffectual.

[133] As to ground 1, Adani made the following submissions in rejecting the ACF's claims that the Minister did not act in accordance with s 137:

(a) contrary to the ACF's submission, the Minister's statement of reasons needs to be read as a whole and, when it is, the matters which are set out in [131] to [141] were not put to one side when the Minister reached his conclusion in [171]; and

(b) the ACF's approach offends well established principles regarding the proper approach to the construction of such reasons.

Summary of ACF's submissions in reply

[134] 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.

[135] Secondly, senior counsel reiterated the ACF's earlier submissions relating to the meaning of "speculative" in [140] of the statement of reasons.

[136] Thirdly, it was clarified that the ACF's criticisms of the Minister's reference to net emissions was not that they were an irrelevant consideration, but rather that they did not form part of s 527E. In this context, the Court was urged to apply Jessup J's analysis in [39] of *Tarkine on appeal*.

[137] Fourthly, the ACF's case was not that s 527E had been applied incorrectly, but rather that the Minister had misapplied s 136(2)(e).

[138] Finally, despite s 83, s 82 did apply and that it did so by reference to the dictionary in s 528 and the definition of "relevant impacts" being that in s 82.

[139] As to ground 1, the ACF contended that there were differences between the obligation of the Australian Broadcasting Authority in *Project Blue Sky* to act consistently with Australia's international obligations and the prohibition imposed by s 137 of the EPBC Act on the Minister acting inconsistently with Australia's obligations under the WHC.

Consideration

[140] It is important at the outset to restate the well-established principles which guide the approach to be taken by the Court in exercising its judicial review function where there is available a statement of reasons which explains the basis upon which an impugned decision was made, as is the case here.

[141] The leading authority, of course, is that of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; 136 ALR 481; 41 ALD 1 (*Wu Shan Liang*). In that case, which involved judicial review of three decisions by ministerial delegates concerning the refugee status of three applicants, each of the delegates provided detailed written statements of reasons. Those statements explained why, although it was accepted that each applicant feared punishment for reasons of imputed political opinion if he were returned to China, those fears were not well-founded. Each delegate indicated that he/she considered that certain matters which were relied upon by the applicants were "speculative", including that if the applicants were returned to a particular part of China they would be subjected to excessively punitive fines which would amount to persecution.

[142] Below, the Full Court had set aside the decisions on the basis that the reference to "speculative" and "speculation" in the statements of reasons revealed that the delegates had not applied the "real chance" test in accordance with *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 413; 87 ALR 412 at 434 (*Chan*). This conclusion was reached notwithstanding that it acknowledged that the delegate had started and finished with a correct test, but the Full Court regarded the references to "speculative" and "speculation" as demonstrating that the delegate's assessment had shifted from one of an assessment of "real chance" to an assessment of "balance of probabilities".

[143] On appeal, the following propositions were described by the High Court at 272 as "well settled":

(a) the Court should not be concerned with looseness in language nor with unhappy phrasing in the reasons of an administrative decision-maker (citing *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287; 115 ALR 1 at 9; and

(b) the reasons for an administrative decision which is the subject of judicial review "are not to be construed minutely and finally with an eye keenly attuned to the perception of error".

[144] The High Court described (at CLR 272; ALR 491; ALD 9) these propositions as recognising:

> … the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.

[145] The Court added that in subjecting a decision about refugee status to judicial review, the Court must "beware" of turning a review of the reasons of the decision-maker upon principles into a reconsideration of the merits of a decision.

[146] It was held that the Full Court had fallen into error because of the meaning and significance it attributed to the references in the delegates' statements of reasons of the word "speculative". Rather than suggesting that the delegates had misapplied the correct test in their assessment of the future chances of persecution, the High Court concluded (at [43]) that, in the particular context, it was equally the case that the word was used to refer to "the probative force of the material before the delegate". This meaning would not indicate that the delegates had departed from the *Chan* test. The Court proceeded on the basis that this construction of the delegates' reasons was one which was **equally available** to that found by the Full Court. Evidently, the Court considered it unnecessary to go further and determine whether the alternative meaning was the **only** meaning. This ambiguity in the proper meaning of "speculative" formed a central part of the Court's view that the reasons did not disclose reviewable error in the application of the *Chan* test. The plurality (Brennan CJ, Toohey, McHugh and Gummow JJ) observed at CLR 278; ALR 495; ALD 13:

> There is certainly nothing which would suggest such a conclusion in sufficiently strong terms to overcome a properly "beneficial construction" of the delegates' reasons.

[147] It is important to note that the High Court justified the need for a restrained approach in construing an administrator's statements of reasons by reference to the limited nature of judicial review and the need to avoid a judicial review court straying into an impermissible review of the merits of an administrative decision. This approach to construing statements of reasons has been applied in many subsequent cases involving judicial review of administrative decisions, not confined to decisions relating to refugee status.

[148] Understandably, the ACF did not deny the force and relevance of these principles, however, it sought to dilute them to some extent in the particular circumstances of this case by reference to events leading up to the Minister making his fresh decision in October 2015. In particular, the ACF relied upon the fact that the Minister's earlier decision to approve the project was the subject of litigation which led to the matter having to be reconsidered. The ACF also contended that significance should attach to the fact that the Minister's decision

and statement of reasons must have been the subject of close scrutiny by his lawyers and it was reasonable to assume that legal advice was provided in respect of how those reasons were expressed. The ACF submitted that the following observations of the Full Court in *Soliman* at [57] supported its position:

> Just as reasons for an administrative decision should not be read with an eye keenly attuned to discerning error (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271–2; 136 ALR 481 at 490; 41 ALD 1 at 9 per Brennan CJ, Toohey, McHugh and Gummow JJ), eyes should not be so blinkered as to avoid discerning an absence of reasons or reasons devoid of any consideration of a submission central to a party's case. Two factors, in particular, dictate the conclusion that the reasons of the Vice President fail to give any real consideration to the submissions advanced on behalf of Dr Soliman as to mitigating circumstances, namely:
>
> > the fact that the findings and reasons provided were written by an experienced, senior member of Fair Work Australia with legal qualifications and a person who had the considerable benefit of written submissions filed by experienced legal practitioners: *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576; 290 ALR 326; 128 ALD 571; [2012] FCA 764 at [36]; *Yum! Restaurants Australia Pty Ltd v Full Bench of Fair Work Australia* [2012] FCAFC 114 at [37] per Lander, Flick and Jagot JJ;
>
> and, irrespective of any consideration being given to the qualifications and experience of the person who prepared those findings and reasons:
>
> > the fact that any reading of the findings and reasons of the Vice President disclose no real attempt to engage with the submissions being advanced on behalf of Dr Soliman.
>
> The submissions advanced on behalf of Dr Soliman as to mitigating circumstances were not considered by the Vice President. The decision of the Full Bench gives no greater consideration to those submissions. Both the decision of the Vice President and the decision of the Full Bench, it is concluded, should be quashed.

[149] Those observations do not provide any material assistance to the ACF's position. In particular, the circumstances here are quite different from those in *Soliman* because:

(a) Here the Minister provided a statement of reasons in respect of an administrative decision made by him based upon information obtained by his Department not only from the proponent, but also from other government agencies and the public, including information supplied by the ACF. This decision-making process is far removed from that in an adversarial hearing before Fair Work Australia under the Workplace Relations Act 1996 (Cth), as in *Soliman*. The ACF provided the Minister and his Department with various information concerning the assessment and approval of the project. In particular, the ACF wrote to the Department on 27 August 2015 in response to an invitation to provide further material which outlined the ACF's concerns with the project. The ACF provided a summary of its key issues of concern, including on the topic of environmental impacts. It also provided new evidence in the form of some of the materials which had been adduced in the Land Court proceeding concerning the extent of greenhouse gas emissions caused by the project and likely impacts on the Reef. The ACF submitted that the impacts of climate change on the Reef were of such significance that the Minister should refuse to approve the project. Significantly, and in contrast with the position in *Soliman*, the ACF did not provide any specific submissions as to how this material should be

assessed by the Minister within the particular legal framework of the EPBC Act, including in respect of the operation of specific provisions such as ss 82, 136(2)(e) and 527E which now form the subject of ground 2 of its judicial review application.

(b) In *Soliman*, one of the parties had provided detailed legal submissions on the topic of mitigating circumstances which was described by the Full Court as a submission which was "central to a party's case". In circumstances where the Vice President made no express reference to those submissions in his written statement of reasons, the Full Court inferred that the submission had not been addressed and this amounted to jurisdictional error.

[150] The other two authorities cited by the ACF with a view to diluting or modifying the *Wu Shan Liang* principles do not take the matter any further. In *Sadsad*, which involved judicial review of a medical assessor's assessment (and reasons) under the Motor Accidents Compensation Act 1999 (NSW), the critical issue was whether the medical assessor had properly applied a particular clause in permanent impairment guidelines which were binding on him. In concluding that the medical assessor's reasons did not disclose the pathway of reasoning by which the assessor applied the relevant clause, Hamill J made the following observations at [47]:

> It is one thing to give a "beneficial construction" to the reasons of an administrative decision maker. It is another to fill in the gaps in the path of reasoning by reference to an assumption that the decision was made according to the relevant law (in this case cl 2.5). This accords with the approach taken by Stone J in *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 at [26]:
>
>> The Minister urged a 'beneficial' construction of the Tribunal's reasons and referred to comments made in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*, in particular at CLR 271–72; ALR 490; ALD 9. The phrase 'beneficial construction', as used in Wu Shan Liang has a specific meaning, and was certainly not intended to mean that any ambiguity in the Tribunal's reasons be resolved in the Tribunal's favour. Rather, the construction of the Tribunal's reasons should be beneficial in the sense that the Tribunal's reasons would not be over-zealously scrutinised, with an eye attuned to error. In this sense a 'beneficial' approach to the Tribunal's reasons does not require this Court to assume that a vital issue was addressed when there is no evidence of this and, indeed, the general thrust of the Tribunal's comments suggest that the issue was overlooked.

[151] This limitation on the operation of what, for convenience, might be described as the "beneficial construction principle" should be accepted. But it has no application to the circumstances here because, unlike Sadsad and the judgment of Stone J referred to by Hamill J, the relevant paragraphs of the Minister's statement of reasons are not devoid of material which indicates the Minister's path of reasoning. For reasons which will be given shortly, this is the case even though there is no explicit reference in those paragraphs to specific provisions in the EPBC Act, such as s 527E.

[152] As noted above, the ACF also relied upon some observations of the Full Court in *Singh* and, in particular, the following observations at [45] and [47] by Allsop CJ, Robertson and Mortimer JJ:

> 45 In circumstances where no reasons for the exercise of power, or for a decision, are produced, all a supervising court can do is focus on the outcome of the exercise of power in the factual context presented, and assess, for itself,

> its justification or intelligibility bearing in mind that it is for the repository of the power, and not for the court, to exercise the power but to do so according to law. This was the position in, for example, *Avon Downs Pty Ltd v Commissioner of Taxation* (1949) 78 CLR 353; [1949] ALR 792: see at CLR 359–60. Where there are reasons, and especially where a discretion is being reviewed, the court is able to follow the reasoning process of the decision-maker through and identify the divergence, or the factors, in the reasons said to make the decision legally unreasonable.
>
> …
>
> 47 This question highlights the distinctions made between reasonableness review which concentrates on the outcome of the exercise of power, and reasonableness review which concentrates on an examination of the reasoning process by which the decision-maker arrived at the exercise of power. Although it is not necessary for the purposes of this appeal to resolve the question whether those should be seen as two different kinds of review and what might flow from that, we are inclined to the opinion that, where there are reasons for the exercise of a power, it is those reasons to which a supervising court should look in order to understand why the power was exercised as it was. The "intelligible justification" must lie within the reasons the decision-maker gave for the exercise of the power — at least, when a discretionary power is involved. That is because it is the decision-maker in whom Parliament has reposed the choice, and it is the explanation given by the decision-maker for why the choice was made as it was which should inform review by a supervising court. It is not, as in *House v R* (1936) 55 CLR 499, on an appeal from an exercise of a judicial discretion, for the court to re-exercise the discretion. If a supervising court goes outside the reasons given by a decision-maker for another justification for the exercise of power, that court might then be seen to be placing itself in the position of the repository of the power and therefore acting impermissibly. Where there are reasons, either the reasons given by the decision-maker demonstrate a justification or they do not. It would, we think, be a rare case where the reasons demonstrate a justification but the ultimate exercise of the power would be seen to be legally unreasonable.

[153] These observations, which are uncontroversial, should be accepted but they do not advance the ACF's approach to the Minister's statement of reasons. The Full Court's observations were directed to a particular issue, namely the application of the judicial review ground of unreasonableness in a legal sense in cases where there either is or is not a statement of reasons for an impugned administrative decision. The ACF did not contend that the Minister's decision to approve the project was unreasonable in the legal sense as explained in decisions such as *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; 297 ALR 225; 139 ALD 181; [2013] HCA 18. The Full Court's observations in Singh should be read in their particular context.

[154] It is convenient to now address the remaining three grounds of review in the same order as did the parties and in the light of the principles established in *Wu Shan Liang*.

Ground 2 — Combustion emissions

[155] Ground 2 is based in large part on what the ACF contends is the obscurity of [140] and [141] of the Minister's statement of reasons and his consideration of the impact or likely impact of combustion emissions on the Reef. In particular, as elaborated upon in the ACF's submissions, ground 2 focuses on the absence in those paragraphs of any direct or explicit reference to s 82 or s 527E.

[156] The definition of "impact" in s 528, which adopts the meaning given in s 527E, was inserted into the EPBC Act by the 2006 Amendment Act. These amendments were inserted after the Full Court delivered its decision in Nathan Dam on appeal. It is evident from [519] of the Explanatory Memorandum to the Bill that the purpose of the amendments was to clarify the extent to which impacts which are **indirect consequences** of actions must be considered in carrying out assessments:

> 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.

[157] For an event or circumstance to be an indirect consequence of an action, it must be demonstrated that the action is a "substantial cause" of that event or circumstance (s 527E(1)(b)) **and** that the criteria prescribed by s 527E(2) are met. The full terms of s 527E are set out in [28] above. I accept the Minister's submission that this is the construction which Tracey J adopted of s 527E in *Tarkine at first instance* and that his Honour's approach was regarded as correct by the Full Court in *Tarkine on appeal*. At [39] in Jessup J's judgment (with whom Kenny and Middleton JJ agreed), the following pertinent observations were made concerning ss 82(1), 136(2)(e) and 527E (emphasis added):

> On my reading of the relevant provisions of the EPBC 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.

[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.

[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. 5

[162] Although no specific reference is made to s 527E in [140] of the statement of reasons, the reference in the final sentence of that paragraph to the difficulty of identifying "the necessary relationship between the taking of the action and any possible impacts …" is a sufficiently clear reference to the essential causal nexus which is reflected in the phrase "substantial cause of [the] event of circumstance" in that provision. There is force in the Minister's rhetorical question that if the reference to "necessary relationship" is not a reference to the causal requirement in s 527E(1)(b), then what is it referring to? Moreover, the explicit references to "direct" and "consequential greenhouse gas emissions associated with the project" in [138] and [141] respectively strongly indicate that this part of the Minister's statement of reasons was addressing s 527E. I also accept the Minister's related contention that he was not obliged to make explicit reference in his statement of reasons to that or any other particular statutory provision. 10 15 20

[163] For the following reasons, I consider that the ACF's reliance on *Tillman's Butcheries* was misplaced. The ACF appeared to contend that the Minister erred because he took the view that for a cause to be a "substantial cause" it had to be weighty or big and not something which was merely not de minimis. The ACF cited *Tillmann's Butcheries* in support of that contention. The contention should not be accepted for the following reasons: 25

(a) The Minister's statement of reasons does not disclose what specific meaning he gave to the phrase "substantial cause". As noted above, he did not use any of the particular language in s 527E and was content to refer to "the necessary relationship between the taking of the action and any possible impacts …". On a fair reading of [140] as a whole and in the broader context of this part of the statement of reasons, I consider that the Minister was saying that, because it was not possible to draw robust conclusions on the likely contribution of the action to a specific increase in global temperature, it was difficult to identify whether the taking of the action would be a substantial cause of the relevant events or circumstances produced by climate change. 30 35

(b) In any event, I do not consider that Deane J's observations in *Tillmann's Butcheries* provide any assistance in defining "substantial cause" in s 527E(1)(b). In that case, the Full Court considered the meaning of the term "substantial" in the context of s 45D of the Trade Practices Act 1974 (Cth), which relevantly provided that, subject to the section, a person shall not, in concert with another person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a corporation where the conduct is engaged in for the purposes, and would have or be likely to have the effect, **of causing substantial loss or damage to the business or corporation**. At ALR 382–3; FLR 348, Deane J made the following observations regarding the word "substantial" in that particular statutory context: 40 45 50

> In the context of s 45D (1) of the Act, the word “substantial” is used in a relative sense in that, regardless of whether it means large or weighty on the one hand or real or of substance as distinct from ephemeral or nominal on the other, it would be necessary to know something of the nature and scope of the relevant business before one could say that particular, actual or potential loss or damage was substantial. As at present advised, I incline to the view that the phrase, substantial loss or damage, in s 45D (1) includes loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal. It is, however, unnecessary that I form or express any concluded view in that regard since the ultimate conclusion which I have reached is the same regardless of which of the alternative meanings to which reference has been made is given to the word “substantial” in s 45D (1).

(c) The ambiguity which is inherent in the word “substantial” may be accepted, but I have great difficulty in seeing how Deane J’s observations regarding the meaning of that word in the context of s 45D has any relevance in the very different context of s 527E of the EPBC Act.

(d) The Minister did not need to address any ambiguity in the phrase “substantial cause” for the simple reason that he found that, because of the identified variables, it was difficult to identify any causal relationship between the proposed action and any possible environmental impacts resulting from increased global temperatures.

[164] The Minister added in [141] of his statement of reasons that he found that both direct or consequential greenhouse gas emissions associated with Adani’s project will be managed and mitigated through national and international emissions control frameworks both in Australia and in overseas countries to which Adani’s coal would be exported.

[165] There is no reviewable error in the Minister taking into account the management and mitigation of direct and consequential greenhouse gas emissions through national and international emission control frameworks. I accept the Minister’s submission that these matters reinforced his conclusion that the proposed action would have no relevant impact on the Reef. No reviewable error has been demonstrated in relation to the Minister’s adverse findings and reasoning in respect of these matters.

[166] Nor do I accept the ACF’s submission that the structure of the Minister’s statement of reasons indicates a failure on his part to consider whether the consequences of the combustion emissions were “relevant impacts” of the proposed action on the Reef because that structure substantially reflected the structure of the Minister’s statement of reasons for the first approval decision. As noted above, the first statement of reasons was admitted into evidence on a non-hearsay basis as being relevant to the case as put by the ACF. Contrary to the ACF’s submission, the structure of the two statement of reasons is not relevantly similar. In particular, it is notable that the first statement of reasons did not contain a separate section which dealt with climate change and greenhouse gas emissions, in contrast to [131] to [141] in the second set of reasons.

[167] Although there is no explicit reference to s 82 of the EPBC Act in the ACF’s formulation of ground 2 in its amended judicial review application (the alleged error is expressed there in terms of the Minister’s failure to apply the test in s 527E), the ACF’s case as presented claimed that the Minister also failed to ask whether the consequences for the Reef of the combustion emissions were “relevant impacts” within the meaning of s 82.

[168] This raises two questions. Did s 82 apply at all in this matter and, if it did, did the Minister comply with its requirements?

[169] The answer to the first question is not entirely straightforward. At first glance, it might be thought that where a bilateral agreement exists the effect of s 83 is to displace all of Pt 8, including s 82. The drafting of s 81 (see [18] above) is somewhat obscure. In my view, however, the intention and effect is to preserve the operation of s 82 in the assessment of a controlled action notwithstanding that the balance of Pt 8 does not apply because of the operation of s 83.

[170] Section 81 describes the "application of Part 8". It does so by way of the following three steps:

(a) the first is to provide that Pt 8 applies to the assessment of the relevant impacts of a controlled action;
(b) the second provides that s 81 has effect subject (relevantly) to s 83; and
(c) thirdly, and significantly, it also provides that s 81 itself does not limit s 82.

[171] In my opinion, this means that the definition of "relevant impacts" in s 82 applies in accordance with the relevant terms of that provision even where all the other provisions in Pt 8 are displaced by the operation of s 83. This view, which is inconsistent with the Minister's contentions, accords with the views of the Full Court in *Tarkine on appeal* at [39], noting that in that case there also existed a relevant bilateral agreement. The Full Court proceeded on the basis that ss 82(1) and 527E should both be read into s 136(2)(e).

[172] Applying that approach to the circumstances here, in considering whether or not to approve Adani's action, the Minister was obliged to give effect to the meaning given to "relevant impacts" in s 82 in discharging his obligation under s 136(2)(e) to take into account any other information which he had on the "relevant impacts" of the action. He was also obliged to give effect to s 527E.

[173] That information included the new information provided to the Department by various environmental groups, including the ACF. No sufficient basis has been established for not accepting what is stated in [40], [47], [48] and [131] to [141] of the Minister's statement of reasons. Fairly read, these paragraphs reveal that the Minister did have regard to the new information. In [47] the Minister stated that, in making his decision, he considered inter alia "additional information provided by… other parties and the Department's briefing material" (which included at Tab M1 the material provided by the environmental groups). Moreover, [136] sets out various data relating to overseas emissions which are explicitly sourced to the joint report in the Land Court of Queensland.

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

the Court in reviewing findings of fact in a proceeding such as this I am not satisfied that the ACF has demonstrated any reviewable error concerning this aspect of the Minister's reasoning or his approval decision.

Ground 3 — Precautionary principle

[175] As noted in [59] above there are several explicit references in the Minister's statement of reasons to him having taken into account the precautionary principle. I consider that the references to the precautionary principle in [163] to [165] of the statement of reasons should be read as references to the Minister's consideration of that principle in the context of his assessment of the direct impacts of the project and not to any indirect impacts such as greenhouse gas emissions. It is also to be noted that there is a broader reference in [191] of the statement of reasons to the precautionary principle (and the principles of ecologically sustainable development) having been taken into account in deciding whether or not to approve the taking of the proposed action. I consider that it is doubtful that the Minister was saying that he considered the precautionary principle with specific reference to the greenhouse gas effects caused by combustion emissions. There is no explicit reference to the precautionary principle in those parts of the statement of reasons which specifically address climate change and greenhouse gas emissions (particularly in [131] to [141]).

[176] For the following reasons, however, I accept the Minister's submission that the absence of any explicit reference in the statement of reasons to him having taken into account the precautionary principle in relation to combustion or greenhouse gas emissions does not mean that his approval decision is invalid.

[177] The precautionary principle was comprehensively analysed and explained by Preston CJ in Hornsby Shire Council in the context of the formulation of that principle in s 6(2) of the Protection of the Environment Administration Act 1991 (NSW), as adopted by the Environmental Planning and Assessment Act 1979 (NSW). That formulation is substantially similar to the definition of the precautionary principle in s 391(2) of the EPBC Act. Preston CJ's analysis and discussion of the principles of ecological sustainable development were referred to approvingly in Walker at [42] per Hodgson JA (with whom Campbell and Bell JJA agreed).

[178] In *Hornsby Shire Council* at [128], Preston CJ stated that the application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of the following two "conditions precedent or thresholds":

(a) a threat of serious or irreversible environmental damage; and
(b) scientific uncertainty as to the environmental damage (the second threshold might more accurately be described in terms of not using the lack of full scientific certainty for postponing a measure to prevent environmental degradation).

[179] His Honour further emphasised at [149] that the following two points should be noted regarding the first condition precedent:

(a) it is not necessary that serious or irreversible environmental damage has actually occurred and it is sufficient that there is a threat of such damage; and
(b) the environmental damage threatened must attain the threshold of being serious or irreversible.

[180] His Honour also described how the assessment of whether there is a threat which is serious or irreversible "involves ascertaining whether scientifically reasonable (that is, based on scientifically plausible reasoning) scenarios or models of possible harm that may result have been formulated" and that the threat of environmental damage "must be adequately sustained by scientific evidence" (at [133] and [134] respectively).

[181] Preston CJ referred to the US Supreme Court's decision in *Daubert v Merrill Dow Pharmaceuticals Inc* (1993) 509 US 579 at 589–90 for the proposition that, in a case involving scientific evidence, the evidence must pertain to scientific knowledge. Preston CJ (at [135]) made the following observations on the meaning of the word "scientific" in this context:

> The adjective "scientific" implies a grounding in the methods and procedures of science and the word "knowledge" connotes more that (sic) subjective belief or unsupported speculation. The requirement that expert evidence pertain to scientific knowledge establishes a standard of evidentiary reliability.

[182] Significantly, at [137], Preston CJ emphasised the distinction between determining whether or not a threat of serious or irreversible environmental damage exists and an evaluation of the scientific uncertainty of the threat. The evaluation of the scientific uncertainty of the threat does not arise at the stage of assessing the first condition precedent; rather, it arises in the subsequent analysis. In other words, if there is no threat of serious or irreversible environmental damage, the precautionary principle is not triggered (see [137] and [138]). I respectfully agree with that analysis.

[183] As to the second condition precedent relating to scientific uncertainty, Preston CJ explained (at [140]) that the uncertainty relates to "the nature and scope of the threat of environmental damage". His Honour further explained that because "full" scientific certainty as to the threat of environmental damage is "an unattainable goal", the second threshold is "something less than full scientific certainty" and his Honour favoured a formulation expressed in terms of there being "considerable scientific uncertainty". His Honour made the following observations at [149] (omitting references):

> If there is no, or not considerable, scientific uncertainty (the second condition precedent is not satisfied), but there is a threat of serious or irreversible environmental damage (the first condition precedent is satisfied), the precautionary principle will not apply. The threat of serious irreversible environmental damage can be classified as relatively certain because it is possible to establish a causal link between an action or event and environmental damage, to calculate the probability of their occurrence, and to insure against them. Measures will still need to be taken but these will be preventative measures to control or regulate the relatively certain threat of serious or irreversible environmental damage, rather than precautionary measures which are appropriate in relation to uncertain threats…

[184] This Court has held in several cases that, for the purposes of s 391 of the EPBC Act, the precautionary principle is only enlivened in circumstances where there are threats of serious or irreversible environment damage (see *Queensland Proserpine* case at [53]–[54]; *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2009) 165 LGERA 203; [2009] FCA 330 at [41] per Tracey J (whose decision was upheld on appeal: see *Lawyers for Forest Inc v Minister for the Environment, Heritage and the Arts* (2009) 178 FCR 385; [2009] FCAFC 114) and *Buzzacott* at [192]). The Minister made no finding that there was any threat of serious or irreversible damage to the Reef which would

be caused by the combustion emissions. This was because of the multiple variables described by the Minister in [138] to [141]. In other words, having regard to the absence of any such finding, a necessary precondition to the application of the precautionary principle did not exist in this case. Consequently, even if it were to be assumed that the Minister did not take account of that principle in approving the project (at least insofar as his consideration of combustion emissions is concerned), this would not vitiate his decision because an essential precondition to the engagement of the principle did not exist. The position is different with respect to the Minister's assessment of scope 1 and 2 emissions, in relation to which the Minister explicitly stated that he had considered the precautionary principle.

[185] It may well be that another way of reaching the same conclusion is by reference to the fact that, in its terms, s 391(1) only imposes an obligation on the Minister to take account of the precautionary principle in making the approval decision "to the extent [the Minister] can do so consistently with the other provisions of this Act". Those other provisions include s 527E and the fact that, in the circumstances here and for the reasons set out in [131] to [141] of his statement of reasons, the Minister made a determination that the combustion emissions were not an impact for the purposes of s 527E.

[186] For these reasons, I reject ground 3.

Ground 1 — Consistency with international treaty obligations and compliance with s 137 of the EPBC Act

[187] For the following reasons ground 1 should be rejected.

[188] While it may be accepted (consistently with the *Tasmanian Dam case*) that the *WHC* imposes obligations on Australia, I consider that the ACF has overstated the nature of those obligations. Articles 4 and 5 of the *WHC* are set out in [37] above. The obligation of the Minister (s 137 under the EPBC Act) to act not inconsistently with the *WHC* is set out in [36] above.

[189] In *Project Blue Sky* at [96], McHugh, Gummow, Kirby and Hayne JJ made the following pertinent observations regarding the nature of obligations imposed by various international conventions or agreements (footnotes omitted):

> Furthermore, while the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate language as the result of compromises made between the contracting State parties. Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed. The problems that might arise if the performance of any function of the ABA carried out in breach of Australia's international obligations was invalid are compounded by Australia being a party to about 900 treaties.

[190] As the ACF pointed out, various Articles of the *WHC* were the subject of comment by various members of the High Court in the *Tasmanian Dam* case, including Arts 4 and 5 specifically. Several members of the Court commented on the non-absolute nature of the obligations imposed upon State Parties by those provisions. For example, Gibbs CJ commented at CLR 91; ALR 662 that Arts 4 and 5 left to a State Party itself the questions as to what a State Party can do, how far its resources extend, what is possible and what is appropriate in implementing the provisions. His Honour concluded at CLR 92; ALR 662–3 that, although *WHC* imposed certain obligations on State Parties, Arts 4 and 5 did not impose

on any State Party an obligation to take any specific action and it was left to each State Party to determine the extent of the obligations and the mode of their performance.

[191] Justice Wilson stated at CLR 190; ALR 746 that Art 4 was not expressed to impose a binding commitment on State Parties to discharge each of the responsibilities set out therein, rather, its purpose and function were to set "goals" in order to encourage and guide State Parties.

[192] After setting out the critical parts of Arts 4 and 5, Brennan J drew attention to the non-specific language of the provisions and the failure to spell out in either of them: (a) the specific steps which had to be taken for the protection, conservation and presentation of the cultural and natural heritage in a State Party's territory; or (b) the measure of the resources to be committed to that end. His Honour said at CLR 225; ALR 776 that:

> The want of specificity in Arts. 4 and 5 and the discretion which those articles leaves to each State Party as to the specific steps which each will take for the protection, conservation and presentation of the cultural and natural heritage situated on its territory raise the question whether the Convention is, at least in its provisions relating to the National Protection of the Cultural and Natural Heritage, merely hortatory.

[193] Justice Brennan then concluded at CLR 225; ALR 776, that there was "a clear obligation upon Australia to act under Arts. 4 and 5, though the extent of that obligation may be affected by decisions taken by Australia in good faith".

[194] The fact that international agreements are commonly not expressed with the precision of formal domestic documents as in English law was referred to by Deane J at CLR 261; ALR 807 in the *Tasmanian Dam* case. His Honour concluded that, by entering into the *WHC*, Australia assumed "real and substantive obligations", which included obligations imposed by Arts 4 and 5(d).

[195] At CLR 310; ALR 848 of the *Tasmanian Dam* case Dawson J described the *WHC* as recognising that "…there can be no absolute imperatives and that difficult decisions must be made which involve the compromise of environmental, social and economic values". He added that these "decisions are left to the individual Parties to the Convention with the exhortation that they should endeavour, in so far as possible, and as appropriate for each country, to identify and conserve their heritage".

[196] A majority of the High Court held that the nature of the obligations created by the *WHC* was sufficient to attract the external affairs power in the Constitution for the purposes of determining whether Commonwealth legislation giving effect to the *WHC* was valid.

[197] The ACF's claim that the Minister breached s 137(1) of the EPBC Act turned on the asserted inconsistency between the Minister approving Adani's project and the obligations imposed upon Australia by Art 4 of the *WHC*. In substance, the ACF invited the Court to adopt a literal construction of the obligations set out in that provision. For the following reasons that invitation should not be accepted.

[198] The general rule of treaty interpretation is set out in Art 31 of the Vienna Convention on the Law of Treaties 1969. That requires a treaty to be interpreted in good faith and in accordance with the ordinary meaning of the words of the treaty in their context and in the light of the treaty's object and purpose. It is appropriate to have regard for the whole of the relevant text of a treaty in construing a particular provision, which is simply an aspect of construing a provision in its context.

[199] Adopting that approach, in construing Art 4 it is relevant to have regard to Art 5. The chapeau to Art 5 makes plain that the obligations of a State Party to take appropriate measures to protect its cultural and natural heritage is qualified by the following words: "… each State Party to this *Convention* **shall endeavour, in so far as possible, and as appropriate for each country**…" to do the matters specified. The non-absolute nature of the obligation is reinforced by the terms of Art 5(d) which refer to each State Party taking "appropriate" measures necessary for the protection of their natural heritage. I accept the Minister's submission that, properly construed, Arts 4 and 5 give considerable latitude to State Parties as to the precise actions they may take to implement their "obligations" under the relevant provisions of *WHC*.

[200] I also accept the Minister's submission concerning the proper construction of these provisions, which was in the following terms:

> Unlike the applicant's apparently literal interpretation of Article 4, this interpretation allows Articles 4 and 5 to operate harmoniously. It means that State Parties have a duty not to act in a manner manifestly contrary to the Convention but they must endeavour, in so far as possible, and as appropriate, to take particular kinds of measures in relation to natural heritage located in their territory so as to advance that duty. The preamble and operative provisions of the Convention, including in particular Articles 5 and 6 show that State Parties did not envisage absolute protection, but rather a level of protection that took account of economic, scientific and technical limitations, and the integration of heritage protection into broader economic and social decision making.

[201] The ACF did not suggest that the prohibition imposed by s 137 had the effect of making inconsistency with Australia's obligations under the *WHC* a jurisdictional fact. It was a matter for the Minister to form a view, on proper legal grounds, whether or not giving approval to the taking of an action and any conditions which are attached would have the effect of creating an inconsistency with Australia's obligations under the *WHC*.

[202] The Minister was mindful of the prohibition imposed by s 137 when he made his decision. It is expressly referred to in [168] to [171] of his statement of reasons and is identified in Annexure A to that statement as one of the statutory provisions he took into account.

[203] The ACF contended that the Minister's consideration of s 137 was confined to the scope 1 and scope 2 emissions, as was said to be reflected by his references in [170] of his statement of reasons to Adani's EIS and the Queensland government's assessment of environmental impacts and proposed mitigation measures. It emphasised that these materials did not address the separate issue of combustion emissions.

[204] The omission of any reference to combustion emissions in [168] to [171] of the statement of reasons does not mean that the Minister did not turn his mind to combustion emissions in concluding that the approval would not be inconsistent with the *WHC*. That would involve reading the Minister's statement of reasons in a way that is inconsistent with the proper approach as described above. All the more so, in circumstances where it is plain that the Minister did give consideration to greenhouse gas emissions resulting from combustion emissions and made an express finding that the proposed action would not have an unacceptable impact on the world heritage values of the Reef (see [48] of his statement of reasons).

[205] For these reasons, I reject ground 1. It is implicit in this conclusion that I do not accept the Minister's contention that the issue of compliance with s 137 is non-justiciable in this Court. That contention is inconsistent with the approach taken to a similar issue in *Project Blue Sky*. In my view the ACF has failed to establish any breach of the statutory prohibition imposed by s 137. There is no need to determine whether, if there had been such a breach, it would have had the effect of invalidating the Minister's approval decision.

Conclusion

[206] For these reasons, the amended originating application for judicial review dated 28 January 2016 should be dismissed. The parties should seek to agree proposed orders as to costs and, if they are unable to do so, within seven days hereof they should each file and serve submissions not exceeding three pages in support of their individual proposed orders as to costs. That matter will then be dealt with on the papers.

Orders

1. The amended originating application for judicial review dated 28 January 2016 is dismissed.
2. The parties should seek to agree proposed orders as to costs and, if they are unable to do so, within seven days hereof they should each file and serve submissions not exceeding three pages in support of their individual proposed orders as to costs.

JUSTIN CARTER
BARRISTER