FEDERAL COURT OF AUSTRALIA

Tarkine National Coalition Inc v Minister for the Environment and Others*

[2015] FCAFC 89

Kenny, Jessup and Middleton JJ

13 November 2014, 26 June 2015

Environment Law — Environmental approval — Decision of Court dismissing application for judicial review of approval — Where Minister approved proposal with conditions — Where application assessed in accordance with bilateral agreement — Whether Minister required to consider "cumulative impact" of proposal under s 136 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) — Whether a mistake regarding the extent of the Board's powers constitutes a failure to conform to s 25 of the Environmental Management and Pollution Control Act 1994 (Tas) — Whether conditions beyond power under s 134(1)(b) of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) — Environment Protection and Biodiversity Conservation Act 1999 (Cth), ss 34, 67, 82(1), 134(1)(b), 136, 136(1), 136(2)(e), 527E(1) — Environmental Management and Pollution Control Act 1994 (Tas), s 25.

This was an appeal from a judgment of the Court dismissing the applicant's application for judicial review of the decision of the Minister for Environment (the Minister) to approve a proposed action subject to conditions. The first question for consideration was whether s 136 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act) required the Minister to consider the "cumulative impact" of the proposal in making his or her decision to approve the action. Two subsections were of particular relevance to this question. First, s 136(1) set out matters the Minister had to consider, including matters relevant to any controlling provision for the action. Section 67 of the EPBC Act stated that a controlling provision was one which prohibited certain actions without approval. Secondly, under s 136(2)(e), the Minister had to take into account any other information the Minister had on the relevant impacts of the action. "Relevant impacts" were defined in s 82(1) of the EPBC Act as the impacts that the action had or would have or would be likely to have on the matter protected by the relevant controlling provisions. Further, "impact" was defined in s 527E(1) of the EPBC Act as an event or circumstance which was a direct consequence of the action or that was an indirect consequence of the action such that the action was a substantial cause of that event or circumstance. The appellant alleged that it was not sufficient for the Minister to have looked only at the consequences of the proposal in isolation. Rather, it was necessary for him to have looked at the end situation actually or prospectively arrived at as a result of the proposal considered

*[EDITOR'S NOTE: See also (2013) 214 FCR 233.]

together with any other actions, known or reasonably anticipated, which also had or were likely to have consequences for the matter protected by the controlling provision in question.

The appellant's second argument related to the bilateral agreement between the Commonwealth and Tasmania (the bilateral agreement). Section 47 of the EPBC Act provided that a bilateral agreement could specify the manner of assessment of actions. The action had been assessed under s 25 of the *Environmental Management and Pollution Control Act 1994* (Tas) (Pollution Control Act) by the Board of the Environment Protection Authority (the Board) as provided for in Sch 1, Pt B to the bilateral agreement. Section 25 set out the procedure for such assessment. The appellant argued that the Board had mistakenly considered that it had no power to consider the "cumulative impacts" of the proposal and consequently that the assessment did not comply with s 25 and was not assessed in accordance with the bilateral agreement.

The final point of appeal made by the appellant related to the conditions attached to the approval. Relevantly, s 18(3) was a controlling provision in relation to the proposal. It provided that a person could not take an action that had, would have, or was likely to have a significant impact on a listed threatened species included in the endangered category. The Tasmanian devil was such a species. The Minister imposed a condition under s 134(1)(b) of the EPBC Act which (read with s 34) provided that the Minister could attach conditions to the approval of an action if he or she were satisfied that the condition was necessary or convenient for repairing or mitigating damage to a listed threatened species in the endangered category. It was argued that the conditions imposed on the action were in support of the maintenance of a population of Tasmanian devils in captivity, whereas the power under s 134(1)(b) was limited to the imposition of conditions which were directed to repairing or mitigating damages to this species if it existed in the wild. Accordingly, it was submitted that the approval was beyond power and invalid.

Held: By Jessup J, Kenny and Middleton JJ agreeing: (1) When making an approval decision in light of s 136(1)(a) of the EPBC Act, so long as the Minister proceeds by reference to the categories in s 136(1), the decision cannot be assailed on the ground that some particular matter, falling within s 136(1) has not been considered. [1], [45], [70]

(2) Under s 136(2)(e) (read together with ss 82(1) and 527E(1)) of the EPBC Act, the Minister is required to take into account any other information that he or she has on the consequences that the proposal will have or is likely to have, on the matter protected by each provision which was a controlling provision in relation to the proposal, being consequences that are either direct in relation to that matter or, if indirect, substantially causative in relation thereto. [1], [39], [53], [70]

(3) It is no point of criticism under s 136(2)(e) if the Minister does not consider the extent to which the existing circumstances were brought about by previous actions of the kind for which approval was, or might have been required or the consequences of any other action, present or anticipated. [1], [42]-[43], [70]

(4) To the extent that the Board makes a mistake about its powers, that mistake will not be a mistake about a matter required or permitted by s 25 of the Pollution Control Act, rendering the assessment contrary to the bilateral agreement. [1], [57], [70]

(5) Whether a particular measure was necessary or convenient for repairing or mitigating damage to a listed threatened species in the endangered category under s 134(1)(b) of the EPBC Act is a judgment for the Minister in light of all manner of environmental, biological and policy considerations and not a legal question. [1], [67], [70]

Appeal against decision of Tracey J, (2014) 202 LGERA 244, dismissed.

Cases Cited

Blue Wedges Inc v Minister for Environment, Heritage and the Arts (2008) 167 FCR 463.

NEAT Domestic Trading Pty Ltd v AWB Ltd (2003) 216 CLR 277.

Tarkine National Coalition Inc v Minister for Sustainability, Environment, Water, Population and Communities (2013) 214 FCR 233.

Appeal

K Walker with *E Nekvapil*, for the appellant.

R Lancaster SC with *K Richardson*, for the first respondent.

SB McElwaine SC with *CJ Gunson*, for the second respondent.

ME O'Farrell SC with *J Rudolf*, for the third respondent.

26 June 2015

Kenny J.

1 I have had the advantage of reading in draft the reasons for judgment of Jessup J. I respectfully agree with his Honour's conclusions with respect to the appellant's three grounds of appeal. Accordingly, I would dismiss the appeal, substantially for the reasons that his Honour has given.

Jessup J.

2 This is an appeal from a judgment of the Court given on 15 May 2014, in which the application of the appellant, Tarkine National Coalition Inc, for judicial review of a decision made on 3 August 2013 by the then federal Minister for the Environment, Heritage and Water ("the Minister") approving a proposed action by the second respondent, Venture Minerals Ltd ("Venture"), to develop and to operate a hematite mine in the Tarkine area of north-western Tasmania ("the proposal") was dismissed. The proceeding below was brought under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth).

3 An understanding of the character of the decision made by the Minister on 3 August 2013 requires some consideration to be given to the relevant operation of the Act under which it was made, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act"). By s 67 of the EPBC Act:

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

Section 75(1) of the EPBC Act provided as follows:

> The Minister must decide:
>
> (a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and
>
> (b) which provisions of Part 3 (if any) are controlling provisions for the action.

4 In the present case, Venture had made the proposal on 4 April 2012, and, on 24 July 2012, the Minister (then, the Minister for Sustainability, Environment, Water, Population and Communities) determined that the action involved therein was a controlled action, and that the controlling provisions were ss 18

and 18A, and ss 20 and 20A, of the EPBC Act. Under the relevant parts of those provisions, implementation of the proposal would have been prohibited, but, by ss 19(1) and (2), 20(2) and 20A(4), the prohibitions would not apply if the proposal had been approved under Pt 9 of the EPBC Act. Additionally, s 67A provided that a person:

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

5 The Minister's decision to approve the proposal was made under s 133(1) (in Pt 9) of the EPBC Act, which provided:

> 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.

Relevantly to the present case, s 133(8) provided that the expression "assessment documentation" meant, if the controlled action were the subject of an assessment report, that report. Under s 130(2), the expression "assessment report" meant, again relevantly, a report given to the Minister under s 47(4).

6 Section 47(4) was in Pt 5 of the EPBC Act, headed "Bilateral agreements". Section 45 empowered the Minister to enter into a "bilateral agreement", that is to say:

> a written agreement between the Commonwealth and a State or a self-governing Territory that:
>
> (a) provides for one or more of the following:
>
> (i) protecting the environment;
>
> (ii) promoting the conservation and ecologically sustainable use of natural resources;
>
> (iii) ensuring an efficient, timely and effective process for environmental assessment and approval of actions;
>
> (iv) minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (or vice versa); and
>
> (b) is expressed to be a bilateral agreement.

7 Section 47 provided as follows:

> 47 Agreement may declare classes of actions do not need assessment
>
> Declaration of actions that do not need further assessment
>
> (1) A bilateral agreement may declare that actions in a class of actions identified wholly or partly by reference to the fact that they have been assessed in a specified manner need not be assessed under Part 8.
> Note: A declaration described in subsection (1) can accredit practices, procedures, systems of the State or self-governing Territory for environmental assessment.
>
> Prerequisite to declaration
>
> (2) The Minister may enter into a bilateral agreement declaring that actions assessed in a specified manner need not be assessed under Part 8 only if he or she is satisfied that assessment of an action in the specified manner will include assessment of the impacts the action:
>
> (a) has or will have; or

(b) is likely to have;

on each matter protected by a provision of Part 3.

Assessment approaches that may be accredited

(3) The manner of assessment of actions that may be specified in a bilateral agreement between the Commonwealth and a State or Territory for the purposes of subsection (1) includes:

(a) assessment by any person under a law of the State or Territory; and

(b) assessment by any person under an agreement or other instrument made under a law of the State or Territory; and

(c) assessment by any person in accordance with criteria specified in an instrument agreed by the parties to the bilateral agreement.

This does not limit subsection (1).

Report on actions that do not need further assessment

(4) If a bilateral agreement has (or could have) the effect that an action need not be assessed under Part 8 but the action must still be approved under Part 9, the agreement must provide for the Minister to receive a report including, or accompanied by, enough information about the relevant impacts of the action to let the Minister make an informed decision whether or not to approve under Part 9 (for the purposes of each controlling provision) the taking of the action.

8 These provisions were relevant also under Pt 8 of the EPBC Act, which provided for the assessment of the environmental impacts of proposed controlled actions. In that Part, s 83(1) provided as follows:

This Part does not apply in relation to an action if:

(a) the action is to be taken in a State or self-governing Territory; and

(b) a bilateral agreement between the Commonwealth and the State or Territory declares that actions in a class that includes the action need not be assessed under this Part; and

(c) the provision of the bilateral agreement making the declaration is in operation in relation to the action.

Relevantly to the facts of the present case, there was such a bilateral agreement ("the bilateral agreement") between the Commonwealth and Tasmania.

9 Clause 9.1 of the bilateral agreement provided as follows:

Pursuant to subsection 47(1) of the EPBC Act, it is declared that an action in a class of actions, need not be assessed under Part 8 of the EPBC Act if the action has been assessed in the manner described in Schedule 1 to this agreement. This clause has effect subject to subclause 9.3.

In Sch 1 to the agreement, it was provided as follows:

For the purposes of subclause 9.1 of this bilateral agreement, an action in a class of actions is assessed in the manner specified in this Schedule if it is assessed in accordance with the requirements set out in Part A, Part B, or Part C below.

In the present case, the assessment was carried out under Pt B of the Schedule. Clause 1 of that Part provided as follows:

The assessment is carried out under section 24, section 25, or section 27 of the Tasmanian *Environmental Management and Pollution Control Act 1994* (whether as a result of a permit application under the *Land Use Planning and Approvals Act 1993*, or as a result of a referral of the activity to the Board for assessment).

I shall refer to the *Environmental Management and Pollution Control Act 1994* (Tas) as "the Pollution Control Act".

10 Clause 6.3 of Sch 1, Pt B of the bilateral agreement was also relevant on the facts of the present case. It provided as follows:

> The Assessment Report contains enough information about the relevant impacts of the proposed action to enable the Commonwealth Environment Minister make [sic] an informed decision whether or not to approve the taking of the action under the EPBC Act, including:
>
> (a) a description of:
>
> (i) the action; and
>
> (ii) the places affected by the action; and
>
> (iii) any matters of national environmental significance that are likely to be affected by the action; and
>
> (b) a summary of the relevant impacts of the proposed action; and
>
> (c) a description of feasible mitigation measures, changes to the action or procedures to prevent or minimise environmental impacts on relevant matters of national environmental significance proposed by the proponent or suggested in public submissions; and
>
> (d) to the extent practicable, a description of any feasible alternatives to the action that have been identified through the assessment process, and their likely impact on matters of national environmental significance; and
>
> (e) a statement of conditions for approval of the action that may be imposed to address identified impacts on matters of national environmental significance; and
>
> (f) a statement of State approval requirements and conditions that apply, or are proposed to apply, to the action when the report is prepared, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the action.

11 By letter dated 6 August 2012, the Tasmanian Government advised that the proposal would be assessed under Sch 1, Pt B to the bilateral agreement. As the bilateral agreement provided, the assessment was under the Pollution Control Act. Section 25 of that Act provided, relevantly:

> (1) Where an application has been made to a planning authority under the *Land Use Planning and Approvals Act 1993* for a permit in respect of a use or development of land that is a permissible level 2 activity or a use or development of land that is on the same land as, and is not ancillary to, an existing level 2 activity, the planning authority must —
>
> …
>
> (b) refer the application to the Board.
>
> …
>
> (2) If the Board determines that it needs to assess the activity to which an application relates under this Act then, unless the application is refused under section 57(2) of the *Land Use Planning and Approvals Act 1993* —
>
> (a) the Board is to do the assessment in accordance with the Environmental Impact Assessment Principles and Division 1A and in consultation with the planning authority …
>
> …
>
> (f) the planning authority, notwithstanding any enactment to the contrary, is not required to assess any matter addressed in the Board's assessment under paragraph (a) …
>
> …
>
> (8) Where the Board has required conditions or restrictions to be contained in a permit or has directed a planning authority to refuse to grant a permit, the planning authority —

(a) must include any such condition or restriction in a permit granted by it or must not grant the permit; and

(b) must not include any other condition or restriction which is inconsistent with, or which extends the operation of, any conditions or restrictions which the Board requires to be contained in the permit; and

(c) must notify the Board of its decision to grant or refuse to grant a permit; and

(d) must, at the same time as it serves notice of its decision in accordance with section 57(7) of the *Land Use Planning and Approvals Act 1993*, notify in writing the applicant and any persons who made representations under section 57(5) of the *Land Use Planning and Approvals Act 1993* in respect of the application —

(i) of the conditions or restrictions that the Board requires to be contained in the permit or of the direction to the planning authority to refuse to grant the permit; and

(ii) of the reasons of the Board for requiring the conditions or restrictions to be contained in the permit or for giving the direction; and

(e) must not, if it grants the permit, exercise its power under section 56(2) of the *Land Use Planning and Approvals Act 1993* in respect of that permit without the prior written consent of the Board.

The "Board" was the Board of the Environment Protection Authority ("the Board") established under the Pollution Control Act.

12 By s 51 of the *Land Use Planning and Approvals Act 1993* (Tas), Venture was prohibited from commencing the development involved in the proposal unless a permit had been granted by the relevant planning authority, the West Coast Council ("the Council") and that permit was in effect. Venture applied for such a permit in respect of the proposal. By s 25(1)(b) of the Pollution Control Act, the Council was required to refer Venture's application to the Board, and it did so on 8 November 2012. By s 25(2)(a) of the Pollution Control Act, if the Board decided that it needed to assess the proposal, it was required to carry out that assessment in accordance with Div 1A of Pt 3 of that Act, and in consultation with the Council. In relation to the proposal, the Board did so decide.

13 Division 1A of Pt 3 of the Pollution Control Act was headed "Assessment of activities", but the provisions thereof, ss 27A to 27K, were procedural in nature. The relevant substantive provisions were to be found in Pt 5 of the Pollution Control Act, headed "Environmental Impact Assessments". Section 73 provided that a requirement "under any law" for an environmental impact assessment to be undertaken in respect of a proposed environmentally relevant activity was to be read as a requirement for the authority responsible for assessing the proposed activity to undertake an environmental impact assessment "in accordance with the Environmental Impact Assessment Principles". These principles were to be found in s 74 of the Pollution Control Act, subss (2), (3), (4) and (9) whereof provided as follows:

(2) The level of assessment which may be required is to be appropriate to the degree of significance of the proposed environmentally relevant activity to the environment and the likely public interest in the proposed activity.

(3) Preparation of the case required for assessment of the proposed

environmentally relevant activity must be undertaken by the proponent in accordance with the requirements of the authority responsible for assessing the proposed environmentally relevant activity.

(4) An authority responsible for assessing the proposed environmentally relevant activity must provide the proponent of the proposed activity with guidance on —

(a) the potential environmental impacts arising from the proposed activity; and

(b) the issues arising from the proposed activity which might give rise to public concern; and

(c) the level of assessment required; and

(d) the timing for each stage of the assessment.

…

(9) The environmental impact assessment is to establish the information base for decision-making on —

(a) the environmental impacts of the proposed environmentally relevant activity; and

(b) whether the proposed activity should proceed; and

(c) any restrictions or conditions under which the proposed activity should proceed; and

(d) the management regime under which the proposed activity should proceed.

14 In relation to the proposal, a requirement of the Board under s 74(3) of the Pollution Control Act was that Venture prepare a "Development Proposal and Environmental Management Plan" ("DPEMP"). Pursuant to s 74(4), the Board promulgated, in October 2012, a document entitled "Guidelines for the preparation of a Development Proposal and Environmental Management Plan for Venture Minerals Limited Riley's Creek Hematite DSO Mine off Pieman Road, West Coast Tasmania" to assist Venture in preparing a plan for the proposal. Of those guidelines, the primary judge said at [66]:

> They drew attention to the Commonwealth's interest in the assessment and the need for approval to be given under the EPBC Act. It referred to the fact that the proposal had been determined by the Commonwealth Minister to be a controlled action under the EPBC Act because it was likely to have a significant impact on listed threatened species and communities and listed migratory species. Attention was directed to the provisions of ss 18, 18A, 20 and 20A of the EPBC Act. The guidelines referred to the bilateral agreement and advised that the proposal would be assessed in accordance with that agreement. It continued:
>
> > The DPEMP must therefore specifically describe the impacts of the proposal on the relevant EPBC Act controlling provisions … including a separate chapter that exclusively and fully addresses the matter specified in Schedule 4 of the Commonwealth Environment Protection and Biodiversity Conservation Regulations 2000 as attached (see s 5 EPBC Act requirements).
>
> The guidelines then set out a series of topics which Venture Minerals should deal with in its DPEMP. One of these was headed "Cumulative and Interactive Effects". Under this head Venture Minerals was advised that:
>
> > Where relevant, this section should contain an assessment of the potential cumulative effects of the proposal, based on existing and other formally proposed developments in the region, which have not been addressed in previous sections. Interactions between biophysical, socio-economic and cultural effects of the proposal should be discussed.

> Towards the end of the guidelines there was a separate section headed "EPBC ACT REQUIREMENTS". Under this heading there was a sub-heading entitled "Cumulative Impacts". Under this sub-heading Venture Minerals was advised that:
>
> > The DPEMP should consider the cumulative impacts on protected matters, of the proposal with other current or planned developments in the vicinity of the site (particularly the Livingstone DSO Hematite Project … and the Mt Lindsay Tin-Tungsten-Magnetite-Copper Mine …). Such impacts may include the potential increase of traffic between mine sites that will have a likely impact on Tasmanian Devils, Spotted-tailed Quolls and Wedge-tailed Eagles.

15 In accordance with these guidelines, Venture prepared a DPEMP for the proposal. Of that DPEMP, the primary judge said at [68]:

> A substantial section (pages 149-171) was devoted to the cumulative and interactive effects of the proposed mine. At the beginning of this section Venture Minerals provided a summary of other activities, current and proposed, in the area of the Riley Creek mine. They included the Rosebery, Renison Bell and Mt Bischoff mines and some Forestry Tasmania coups. Some of these other projects were over 10 kilometres away from the Riley Creek mine site. There followed sections which covered the cumulative impact of developments in the area on air emissions, water drainage, sediment loss, noise, traffic, flora and fauna (including the effect on Tasmanian devils) and on roadkill.

Venture later (in March 2013) supplied supplementary information as part of the DPEMP.

16 On 15 May 2013, the Board provided the Minister's department with its final assessment report with respect to the proposal. In that report, the Board recommended that certain conditions be attached to any approval of the proposal. On 21 May 2013, the Council approved the proposal subject to the conditions which the Board had recommended. On 5 June 2013, the appellant lodged an appeal against the Council's decision with the Tasmanian Resource Management and Planning Appeal Tribunal ("the Tribunal").

17 In the federal sphere, the Board report was an "assessment report" for the purposes of the EPBC Act, and the receipt of it by the Minister (on 15 May 2013) gave him 30 business days, or such longer period as he specified in writing, within which to decide "whether or not to approve, for the purposes of each controlling provision for a controlled action, the taking of the action" referred to in the report: EPBC Act, s 130(1), (1A) and (1B)(a). On 3 August 2013 the Minister decided "to approve, subject to conditions, the taking of the proposed action for sections 18 and 18A and sections 20 and 20A of the EPBC Act". On 4 September 2013, the Minister provided a statement of reasons for his decision.

18 On about 24 September 2013, the Tribunal upheld the Council's decision.

19 The appellant's first ground of appeal was that the primary judge had erred in holding that the EPBC Act did not require the Minister, in deciding whether to give his approval under s 133, to consider the "cumulative impacts" of the proposal. What the appellant meant by the quoted expression — not a term of art under the EPBC Act — was all the impacts which the proposal itself, any other action past or present, and any known prospective action, would cumulatively have. The primary judge noted that such a requirement was not explicit in the EPBC Act, and held that it was not implicit. His Honour held,

therefore, that the Minister was not obliged to give consideration to the "cumulative impacts" in this sense. In the present appeal, the appellant challenges that holding.

20 The statutory framework which governed the making of the Minister's decision under s 133 of the EPBC Act was a detailed and prescriptive one. Little, if any, room was left for implication. The relevant provisions were to be found in Div 1 of Pt 9 of that Act, headed "Decisions on approval and conditions". Subdivision A, headed "General", contained ss 130 to 135A (including, obviously, the provision under which the power to decide was exercised). Subdivision B was headed "Considerations for approvals and conditions", and contained a series of provisions, ss 136 to 140A, which tightly regulated the decision-making process.

21 Although not all of the provisions of s 136 itself were relevant to the circumstances of the Minister's decision to approve the proposal, they should all be noted. Section 136 provided as follows:

> 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.

22 Sections 137, 137A and 138 dealt with special areas of the EPBC Act of no present concern.

23 Sections 139 and 140 were, however, potentially of present interest. They provided as follows:

139 Requirements for decisions about threatened species and endangered communities

(1) In deciding whether or not to approve for the purposes of a subsection of section 18 or section 18A 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:

(i) the Biodiversity Convention; or

(ii) the Apia Convention; or

(iii) CITES; or

(b) a recovery plan or threat abatement plan.

(2) If:

(a) the Minister is considering whether to approve, for the purposes of a subsection of section 18 or section 18A, the taking of an action; and

(b) the action has or will have, or is likely to have, a significant impact on a particular listed threatened species or a particular listed threatened ecological community;

the Minister must, in deciding whether to so approve the taking of the action, have regard to any approved conservation advice for the species or community.

140 Requirements for decisions about migratory species

In deciding whether or not to approve for the purposes of section 20 or 20A the taking of an action relating to a listed migratory species, and what conditions to attach to such an approval, the Minister must not act inconsistently with Australia's obligations under whichever of the following conventions and agreements because of which the species is listed:

(a) the Bonn Convention;

(b) CAMBA;

(c) JAMBA;

(d) an international agreement approved under subsection 209(4).

24 The remaining section in Subdiv B, and the final provision in Div 1, s 140A, dealt with a subject of no present concern.

25 Returning to s 136, I would make four observations about the structure and content of this section. First, subss (1) and (2) made a distinction between the matters that the Minister "must consider" (subs (1)) and the things that the Minister "must take into account" in considering those matters (subs (2)). The purpose of subs (1), as it seems to me, was to mark out the broad categories of consideration to which the Minister was required to turn his mind, and specifically to require consideration not only of the matters protected by Pt 3 of the EPBC Act but also of matters that, otherwise, appear to be of no concern under that Act, namely, "economic and social matters". Neither para (a) nor para (b) of s 136(1) dealt, at the level of detail, with particular matters that required consideration. For example, what, if any, particular "social matter" might have required consideration in a proposal that came before the Minister was, it seems, a matter for the Minister.

26 Secondly, the expression "matters relevant" in s 136(1) was not defined in the EPBC Act. By contrast, the expression "relevant impacts", used in s 136(2)(e), was defined and gave content, at the level of detail, to the Minister's obligation to take things into account. I shall return to this definition below.

27 Thirdly, while the range of things that the Minister was to take into account under subs (2) was extensive, with the exception of those referred to in paras (a) and (e), each was a concrete document or some similar existing artefact. In effect, what the Minister had to take into account were the contents of those documents or artefacts. This approach to regulation is to be contrasted with a situation in which the things to be taken into account were identified by description, or generically, such as, for example, where a decision-maker was required to take account of the condition of the habitat of a particular species. Subject to the exceptions mentioned, the scheme of s 136 was one in which it was assumed that specific subjects of this and similar kinds were already dealt with in the documents or artefacts referred to. The role of the Minister was to take into account the things that were before him in this way, rather than being either obliged or entitled to undertake additional research or investigations.

28 Fourthly, the terms of s 136(5) should be noted. While they require no further explanation, they confirm the impression that Subdiv B established a closed system of the matters that the Minister was to consider in making his decision, and the things that should be taken into account.

29 With respect to the particular things mentioned in s 136(2), to the extent presently relevant, I commence with para (a). The "principles of ecologically sustainable development" were defined in s 3A of the EPBC Act as the following:

> (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.

As the label applied to them implied, these were very high-level principles of the approach which had to be taken in the decision-making process. Understandably, the appellant made no reference to them in the present appeal.

30 Under s 136(2)(b), the "assessment report" was, in the facts of the present case, the report of the Board produced on 15 May 2013.

31 Because the assessment of the proposal proceeded conformably with the bilateral agreement, paras (ba), (bc), (c), (ca) and (d) of s 136(2) were not relevant in the present case.

32 With respect to para (e) of s 136(2), s 82(1) of the EPBC Act provided the definition of the expression "relevant impacts". It provided as follows:

> 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.

33 In s 527E, the EPBC Act contained a definition of "impact" in the following terms:

> (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.

34 Paragraph (f) of s 136(2) of the EPBC Act was relevant in the circumstances of the present case, and the Minister did receive comments of the kind referred to. However, this aspect of the legislation was not controversial before the primary judge, and nothing further needs to be said about it here.

35 Neither do paras (fa) and (g) of s 136(2) require further mention for the purposes of the present appeal.

36 Although associated with a separate point run by the appellant below (corresponding with the appellant's second ground of appeal), its challenge to the way the primary judge treated its "cumulative impacts" point focused upon the following paragraph in his Honour's reasons:

> Part 8 of the EPBC Act does not, in terms, impose on the Minister an obligation to take into account all "cumulative" impacts of a proposed action. The Minister is required to direct his attention to the direct or indirect consequences of the action. In order for an event or circumstance to be an indirect consequence of the action, it must be demonstrated that "the action is a substantial cause of that event or circumstance" (see s 527E(1)(b)) and that the criteria prescribed by s 527E(2) are met. There is, therefore, no general requirement imposed on the Minister to take into account all impacts of an action. It may be, however, that, in a particular case, an indirect consequence of an action will include the cumulative impact of a secondary action as defined. In such a case the Minister must have regard to such an impact.

37 On appeal, it was submitted that his Honour had, in effect, treated "cumulative impacts" as no more than one instance of indirect consequences within the meaning of s 527E(1)(b) of the EPBC Act. It was submitted that cumulative impacts might be either direct or indirect consequences, depending on the circumstances.

38 It is now necessary to identify more precisely what the appellant meant by "cumulative impacts". As mentioned, this term did not appear in the EPBC Act. The term "impact" did not appear in s 136(1)(a). In the setting of the provisions which governed the Minister's approval under s 133, where was the statutory point of anchorage which the appellant's first ground implicitly invoked? I say "implicitly" because, with respect to those involved, the location of this point of anchorage was by no means a conspicuous element in the submissions advanced on behalf of the appellant. As counsel for the appellant herself said in oral submissions, "the term 'cumulative impacts' in fact masks what is really at the heart of this".

39 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.

40 The appellant submitted that it was not sufficient for the Minister to have looked only at the consequences of the proposal itself, in isolation as it were. It was necessary for him to have looked at the end situation actually or prospectively arrived at as a result of the proposal considered together with any other actions, known or reasonably anticipated, which also had, or were likely to have, consequences for the matter protected by the controlling provision in question. In the present case, for example, the consequences of the proposal for Tasmanian devils, including for their habitat, were on any view a subject which the Minister had to take into account under s 136(2)(e) of the EPBC Act. It was the submission of the appellant that he was obliged to look at how that habitat had been affected by existing actions, how it would be, or would be likely to be, affected by the proposal itself, and how it would be, or would be likely to be, affected by other actions of which the Minister was aware but which, at the time of his decision, lay only in the future.

41 Relevantly to the matter presently under discussion, a consequence is a result or effect. An obligation to take a consequence into account necessarily implies an existing situation, or base line, against which the result or effect occurs. For a fair-skinned person, a consequence of being exposed to the sun over an extended period is sunburn. In such an example, the assumed base line is a person who is not sunburnt. For an urban metropolis, a consequence of staging a hugely popular international event will, absent ameliorative measures, usually be overcrowded public transport. In such an example, the assumed base line is the metropolis with its normal, resident, population. Likewise, for an endangered species, consideration of the consequences of some action would normally proceed from a base line constituted by the existing circumstances of that species, whether they had been brought about by the natural course of events, by previous human actions which had their own "impacts", or a combination of the two.

42 This level of reasoning is, however, a matter of common sense rather than of statutory injunction. So far as the EPBC Act provided, the Minister was required to take into account the consequences of the action under consideration — in the present case, the proposal. If he or she did that, it would be no point of criticism that he or she did not consider the extent to which the existing circumstances were brought about by previous actions of the kind for which approval was, or might have been, required.

43 But the burden of the appellant's argument in the present case was concerned not so much with what had happened in the past as with other actions, present and future, that might also be expected to have, potentially at least, some consequences of the kind to which the EPBC Act referred. Here the position is, in my view, quite clear. One needs only to express the argument in the language of the statute, as I have done in [39] above, to see that it was the consequences of the proposal as such — or, at the general level, of the "action" under consideration — that had to be the subject of the Minister's attention under

s 136(2)(e). The Minister was under no obligation to take account of the consequences of any other action, present or anticipated. In this sense I agree with counsel for the appellant that use of the metaphor "cumulative impacts" tended to mask what lay at the heart of the appellant's contention, namely, that the Minister was obliged to take account of circumstances which were not consequences of the proposal at all, but which presumptively came about by other actions. In my view, that contention should be rejected.

44 In what I have written above, I have taken a course through the terms of the legislation that appears, to me at least, to have the greatest potential to yield a positive outcome for the appellant. In that regard, I have focused on s 136(2)(e) of the EPBC Act. In their submissions, counsel for the appellant placed some emphasis on para (a) of subs (1) of this section. As already suggested, I do not regard this as a provision from which the Minister's obligation to take particular matters into account, at the level of detail, may be discerned. Rather, its purpose was, in a sense, categorical. The very same statutory formula was to be found in other, analogous, provisions of the EPBC Act: ss 37B(1), 145D(3) and 146F(1).

45 With respect to s 136(1)(a), the primary judge referred to, and adopted, what had been said by North J in *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* (2008) 167 FCR 463 at [115]:

> Section 136(1)(a) left it to the Minister to decide what were the matters relevant to the protected matters which he should take into account. The section does not suggest that there was a defined set of specific matters to be taken into account such as might be intended if the section had referred to "all matters relevant" or "the matters relevant".

While I would not dissent from anything here said by North J (although, with respect, I would not tie myself to the proposition that some difference might have been made by the use of the definite article), it will be apparent that I would, for my own part, take a more direct, and less contestable, route to the conclusion that s 136(1)(a) could not be used as a means to make the Minister's choice of subject matter justiciable in a court. I do not regard this provision as the source of any obligation to take particular matters into account, in point of detail. So long as the Minister, in making his or her approval decision, proceeded by reference to the categories in s 136(1), the decision could not be assailed on the ground that some particular matter, falling within either para (a) or para (b), had not been considered. The particular matters that had to be taken into account were the concern of subs (2).

46 To date in this compartment of my reasons, I have dealt only with the question of law whether s 136 of the EPBC Act required the Minister to consider the "cumulative impacts" of the proposal, as that term was used in the appellant's case on appeal. For the reasons I have given, I would answer that question in the negative.

47 In the proceeding below, the question also arose, in the alternative as it were, whether the Minister had in fact considered the "cumulative impacts" of the proposal. In point of fact, he did consider actions apart from the proposal itself, and he did so under the rubric of the cumulative impacts of the proposal. This led to an argument by the appellant on appeal which, in my respectful view, demonstrated the unwisdom of the construction of the EPBC Act for which it contended. The appellant found, in material of which the Minister was, presumably, said to be either actually or constructively aware, some limited commentary upon actions other than those he considered. Because he did not

consider them, it was submitted on behalf of the appellant that he had not complied with the implicit statutory injunction to consider cumulative impacts.

48 As it was developed on appeal, the appellant's submission with regard to the cumulative impacts of the proposal came down to this. In the DPEMP, Venture had given explicit consideration to what it described as "cumulative and interactive effects". It said:

> The project area is located approximately 16 km west of the township of Tullah (approximately 25 km by road), and 125 km southwest of Burnie in north western Tasmania.
>
> The Rosebery base metal mine and the Renison Bell tin mine, located south of Tullah on the Murchison Highway, are approximately 10 km directly east and 5 km directly south of the Riley DSO Hematite Mine project respectively.
>
> There are two other mine proposals in the local region, the Mt Lindsay Tin-tungsten-magnetite mine project and the Livingstone DSO mine project, which are located west of the proposed Riley mine along Pieman Road, approximately 10 km and 12 km respectively (Figure 28).
>
> The proposed Riley mine will be located in a region that has a history of forestry, hydro-electric, exploration and mining development. Tullah and Rosebery townships service these activities, and provide stop over points for tourists travelling the West Coast of Tasmania.

The DPEMP provided a "brief summary" of other activities in the area, "current and proposed". It included:

> Forestry Tasmania has several coups in State Forest in the Helilog and South Merton Rd areas along Pieman Rd, that are planned for harvesting operations in 2012, 2013 and 2014 (Figure 28). Future management of State Forest in the Helilog and South Merton Rd areas has been discussed by the TFIA round table group. Depending on the outcome of the TFIA, the planned operations in this area for 2012, 2013 and 2014 may change.
>
> Rosebery base metal mine, approximately 10 km directly east of the proposed Riley mine, is an underground mine with capacity to produce approximately 700,000 tonnes of ore a year [footnote omitted]. The ore is processed on site into zinc concentrate, lead concentrate, gold and silver ore and some copper concentrate. Concentrates are transported to the port of Burnie by rail.
>
> Renison Bell tin mine, approximately 5 km south of the proposed Riley Mine, is an underground tin mine. The mine has had several periods of closure since operations began in the 1890s. A $38 million development program was undertaken during the 1990s to access deeper ore bodies. The project was expected to extend the mine life to at least 2007, but the mine closed in 2003. Production recommenced in February 2005 but operations were again suspended in October 2005.
>
> Mining recommenced in 2008/2009, with the company also operating an open-cut mine at Mt Bischoff, located next to the town of Waratah (35 kms north of the Riley mine), to provide ore feed for the processing plant located at Renison Bell mine (the Renison Tin Concentrator), which was brought up to full production in 2009 [footnote omitted]. In 2009/2010 a total of 392,000 tonnes of ore was mined at the Renison Bell mine, with a further 198,000 tonnes mined at Mt Bischoff, leading to 6,267 tonnes of tin in concentrate being produced [footnote omitted].
>
> The owners of Renison Bell, Metals X limited, have also proposed a project (the Rentails project) aimed at re-processing and recovery of tin from an estimated 19 million tonnes of tailings from the historic processing of tin ores from the mine. The company completed a Detailed Feasibility Study (DFS) in 2008.

The DPEMP proceeded to consider, as "cumulative and interactive effects", air emissions, acid drainage, liquid waste and sediment loss to the environment, noise, traffic, flora and fauna and road kill.

49 In the submission of the appellant on appeal, given the treatment of these matters in the DPEMP, "one would have expected an intellectual engagement with them evident in the reasons of the Minister".

50 Next in point of time after the DPEMP was the Board's report of 15 May 2013. Under the heading "Cumulative impacts", that report stated as follows:

> The following information is provided for the purpose of determination under the EPBC Act. The Board cannot and has not taken the information in this section into account in its decision making.
>
> Cumulative Impacts
>
> The Board notes that it can only consider potential impacts from existing sources in relation to any environmental aspect.
>
> The total cumulative land clearance associated with 3 proposed venture minerals mines, 2 potential forestry operations and the Bastyan rail siding is estimated in section 4.22.5 of the DPEMP as 489 ha. This is reported as less than 0.61% of the combined area of reserves in the region and less than 0.15% of the Pieman catchment.
>
> The cumulative effect of land clearance on the devil and spotted-tailed quoll is temporary loss of foraging habitat. This would be lower than 489 ha due to the staging of operations and progressive rehabilitation. It is estimated that less than 5 devils may be temporarily displaced by the combination of the proposals.
>
> It is concluded in the DPEMP that the proposals, either individually or combined, would not cause changes to the environment that would increase the rate of spread of DFTD.
>
> The total number of dusk to dawn vehicle movements form [sic] all proposals is estimated at 107 vehicles during a 12 hour period. On the basis of previous studies, as listed in section 4.22.6 of the DPEMP it is concluded that the proposed roadkill mitigation measures, when implemented for all Venture Mineral's proposals, are likely to be very effective at mitigating the total potential roadkill impact.
>
> Bastyan rail siding
>
> A botanical survey and fauna habitat assessment was also conducted for the Bastyan rail siding for the purposes of the EPBC Act. This study is included in Appendix H of the DPEMP. The rail siding is not being considered by the EPA Board as part of the Riley proposal as it is subject to a separate planning application process.
>
> The proposed siding area is entirely covered by *E. nitida* forest over leptospermum. No threatened plant species or communities were found. The threatened flora species *Barbearia australis*, listed under the EPBC Act as critically endangered, was not found on the site and it is considered no suitable habitat is present.
>
> The proposal would result in the loss of about 2.3 ha of foraging habitat for the Tasmanian devil and spotted-tailed quoll. The likelihood of any fauna species listed under the EPBC Act being present was considered low to none, depending on the species.

The second sentence in this extract, concerned with the extent of the Board's power, raises another issue in the present appeal, and I shall return to it. What

should be noted here, however, is that the report commented upon the impacts of three proposed mines by Venture, of two potential forestry operations and of the Bastyan rail siding.

51 Finally in this area, I refer to the Minister's statement of reasons of 4 September 2013. Under the heading "Cumulative Impacts", the Minister said:

> 61. The DPEMP considered the cumulative impacts of the three Venture proposals planned on Pieman Road, the Riley DSO Hematite mine, the Mount Lindsay tin-tungsten-magnetite-copper mine (EPBC 2011/6178) and the Livingstone DSO Hematite Mine (EPBC 2012/6342). I note that the Mt Lindsay and Livingstone proposals will be dependent on market conditions and financing and therefore cannot be guaranteed to go ahead at this point in time. Nevertheless, I have considered the cumulative impact of these developments in my assessment of the Riley proposal.
>
> 62. I considered the cumulative impact of habitat loss in the region on the Tasmanian devil. The EPA assessment report noted that the total estimated land clearance resulting from the three Venture proposals and two forestry operations in the vicinity of the proposed action would be 489 ha or 0.61% of the combined area of reserves in the region.
>
> 63. The DPEMP found, conservatively, that vegetation clearance in an area of this size could displace between 4 and 5 Tasmanian devils (based on estimated devil density and total area likely to be disturbed). However, as this clearance would be progressive and as a result of the likely sequencing of the three Venture proposals, the number of displaced individuals at any one point in time would be less.
>
> 64. Habitat loss is not a main threat to the Tasmanian devil except when it results in the loss of maternal dens, once DFTD become established in an area. The Tasmanian devil habitat within the proposed Venture sites is generally considered sub-optimal foraging habitat. Due to this and given that overall vegetation clearance would be small in scale (at the regional level), occur in stages, and be dispersed over a number of areas, I found that any adverse cumulative impact resulting from habitat loss from all three Venture proposals is insignificant. Moreover (and noting that future approval decisions cannot be pre-empted), cumulative impacts resulting from the loss of habitat are likely to be able to be adequately mitigated and managed. Further consideration of this issue will be undertaken in future assessments.
>
> 65. I also considered the cumulative impact of roadkill on the Tasmanian devil. The DPEMP stated that the Riley Mine and the Livingstone proposal have the most significant transport task and would therefore have the largest impact on traffic on Pieman Road. The DPEMP states that operations at Livingstone are not planned to commence until after the completion of mining at the Riley Mine.
>
> 66. As a result of scheduling changes since publication of the DPEMP, operations at the Riley Mine are likely to overlap with operations at Livingstone. However, during this period, product mined at Livingstone would be stockpiled on site, resulting in no increase in cumulative vehicle movements. To ensure this occurs, future conditions on the Livingstone proposal (if approved) could restrict traffic movements until transportation of product from Riley is completed.
>
> 67. Overlap however between transportation of product at the Riley Mine and transportation of product at Mount Lindsay is likely to occur. The DPEMP states that traffic associated with product transportation at Mount Lindsay would be a significantly lower volume as Mount Lindsay is producing a processed product as opposed to raw ore. As such, product transportation

at Mount Lindsay has been predicted to add an additional 40 truck movements per day to Pieman Road. These movements would be confined to daylight hours only. The maximum total number of vehicle movements from all three Venture proposals was estimated in the DPEMP at 107 over the 12 hour dusk to dawn period.

68. The EPA assessment report noted that the Board of the EPA can only consider potential impacts from existing sources in relation to any environmental aspect. However the assessment concluded that on the basis of previous studies referred to in the DPEMP, the proposed roadkill mitigation measures, when implemented for all three Venture proposals, are likely to be very effective at mitigating the total potential roadkill impact.

52 I now return to the submissions made about this on behalf of the appellant. The error which the Minister is said to have made was his omission to consider impacts arising from two existing mines which were referred to in the DPEMP but not in the report of the Board: the Rosebery base metal mine and the Renison Bell tin mine, 10 km and 5 km respectively from the new mine proposed by Venture. In essence, it was not the Minister's refusal to consider cumulative impacts of which the appellant complained before the primary judge: it was the omission of these two mines from the impacts which he considered.

53 If I am wrong in the conclusion which I expressed in [46] above, I would nonetheless reject the appellant's argument that the Minister misdirected himself when he made no reference to the Rosebery and Renison Bell mines in his reasons of 4 September 2013. In this part of the appeal, if the appellant cannot succeed by reliance on s 136(2)(e) of the EPBC Act, it surely could not succeed under subs (1)(a) of the section, or under any other arguably relevant provision. For reasons I have given earlier, under s 136(2)(e), the question would be whether the Minister was possessed of information that showed that the operations of these other mines would contribute, or were likely to contribute, to 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. In the present case, the Minister did, it seems, have a copy of the DPEMP, but whether that contained information which answered the statutory description was, in my view, a question for the Minister to decide. Only if that question were answered in the affirmative would the Minister have then come under an obligation to take account of the consequences referred to. Some circularity may be discerned in all of this, of course, but it does not mean that it is sufficient for the appellant, in later court proceedings, to point to some arguably relevant fact or circumstance which was not taken into account as a basis for assailing the validity of the Minister's decision.

54 For the above reasons, I would reject the appellant's first ground of appeal.

55 As developed in argument, the appellant's second ground of appeal was that the primary judge was in error in not holding that, on the facts of the case, s 83(1) of the EPBC Act did not "disapply" Pt 8 of that Act in respect of the proposal. In short, the point was that the Board took the view that it was neither required nor permitted, in its role under the Pollution Control Act, to take the "cumulative impacts" of the proposal into account, that this was an erroneous view of the Board's powers in that it was at least permitted to take such impacts into account, that the Board's assessment was not, therefore, done "under" s 25

of the Pollution Control Act as required by cl 1 of Pt B of Sch 1 to the bilateral agreement, that the proposal was not, therefore, assessed in the manner prescribed in that Schedule within the meaning of cl 9.1 of the bilateral agreement, and, finally, that the provision of the bilateral agreement making the declaration (cl 9.1) was not, therefore, "in operation" in relation to the proposal for the purposes of s 83(1)(c) of the EPBC Act.

56 In his reasons of 15 May 2014, the primary judge rejected this argument at the third step. That is to say, his Honour took the view that the fact (which he accepted) that the Board was mistaken in the view that it was not permitted to take cumulative impacts into account did not produce the result that its assessment was not done "under" s 25 of the Pollution Control Act. His Honour said:

> 90 In any event there is an air of unreality about the submission that the Board failed to conduct its assessment, to the extent that it involved consideration of cumulative impacts, under s 25 of the EMPC Act. There can be no doubt that the Board conducted the assessment process under s 25. As part of the assessment process it promulgated guidelines which required Venture Minerals to provide information and submissions relating to the cumulative impact of the mine development and other adjacent projects on aspects of environmental concern. Venture Minerals responded by providing extensive information and comment.
>
> 91 It is true that, when the Board came to prepare its report, it took the view, mistakenly in my opinion, that it was not able to have regard to such considerations for the purpose of making its assessment for the purposes of the EMPC Act. As a result it did not do so. Nonetheless, it undertook an assessment of the cumulative impact of the Riley Creek mine and two other proposed and adjacent mines. It did so because, as had been anticipated in the guidelines, this was information which the Board knew the Minister would need to take into account when he made his decision under the EPBC Act.
>
> 92 In *NEAT Domestic Trading Pty Ltd v AWB Limited* (2003) 216 CLR 277 at 288 Gleeson CJ dealt with competing contentions as to what considerations a statutory body was required to take into account in making a particular decision. The question, his Honour said (at 288), was "what, if anything, the Act requires, or permits, or forbids [the authority] to take into account in giving effect to its role in the system." On its proper construction s 25 of the EMPC Act neither required nor forbad the Board from having regard to cumulative impacts of the proposed mines on matters of environmental concern. The Board was, therefore, permitted, had it wished to do so for the purposes of its assessment, to have regard to these matters. Although it chose not to do so it, nevertheless, included in its assessment report an analysis of the combined impact of three proposed mines including that at Riley Creek. It did so to assist the Minister in making his decision under Part 9 of the EPBC Act. It could also have done so for the purposes of reaching its decision under the EMPC Act. The fact that it did not does not mean that assessment was not carried out under s 25. It was. The resultant report was provided to the Minister in accordance with the provisions of the bilateral agreement. The Board's mistaken view as to the extent of its powers under s 25 could have no bearing on the efficacy of the Minister's decision to approve the development.

57 I agree with his Honour that the circumstance that the Board mistakenly considered that it had no power to consider what have been described as

"cumulative impacts" did not mean that its assessment was not done under s 25 of the Pollution Control Act. Section 25 was not concerned with the subject or content of the Board's assessment: its concern was largely with process. To the extent that the Board made a mistake about the extent of its powers, that was not a mistake about a matter required or permitted by s 25. In the circumstances of the present case, what the Board was permitted or required to consider, in point of subject matter, was prescribed by cl 6.3 of Pt B of Sch 1 to the bilateral agreement (see [10] above).

58 Clause 6.3 was self-evidently reflective of the structure and requirements of the EPBC Act. When the clause used the term "relevant impacts", it did so in the defined sense under the EPBC Act. It was that term which marked out the scope of the assessment with which cl 6.3 was concerned. For reasons which I have given earlier, the term did not draw into the scope of the assessment the matter of "cumulative impacts" in the sense advanced by the appellant in this proceeding. The Board's assessment, therefore, was conformable with the requirements of cl 6.3, notwithstanding that it took no account of such impacts (other than by way of providing further information to the Minister, as mentioned in [50] above).

59 For those reasons, I would reject the appellant's second ground of appeal.

60 The appellant's third ground of appeal relates to two conditions to which the Minister's approval of the proposal under s 133 of the EPBC Act was made subject. It was submitted on behalf of the appellant that the Minister did not have power to impose those conditions, the result of which was that the approval itself was beyond power and invalid. A like submission had been made, and rejected, in *Tarkine National Coalition Inc v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 214 FCR 233. Before the primary judge in the present case, the submission was made as a matter of formality, it not being suggested that the earlier judgment was clearly wrong. Uncontroversially, his Honour followed the earlier judgment, at the same time expressing his own opinion that it was correct. It is now submitted, on appeal, that that judgment should be overruled.

61 To understand this ground, it will be necessary to refer to some additional provisions of the EPBC Act, and to the facts of the matter to the extent that the appellant relied on them. As mentioned earlier in these reasons, s 18 was a "controlling provision" in relation to the proposal. Relevantly to this ground, s 18(3) provided that a person must not take an action that had, would have, or was likely to have, a significant impact on "a listed threatened species included in the endangered category". The Tasmanian devil was such a species.

62 The conditions to which the Minister made his approval subject in the present case were imposed under s 134 of the EPBC Act, subss (1) and (2) of which provided as follows:

> Generally
>
> (1) The Minister may attach a condition to the approval of the action if he or she is satisfied that the condition is necessary or convenient for:
>
> (a) protecting a matter protected by a provision of Part 3 for which the approval has effect (whether or not the protection is protection from the action); or
>
> (b) repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage has been, will be or is likely to be caused by the action).

> Conditions to protect matters from the approved action
>
> (2) The Minister may attach a condition to the approval of the action if he or she is satisfied that the condition is necessary or convenient for:
>
> (a) protecting from the action any matter protected by a provision of Part 3 for which the approval has effect; or
>
> (b) repairing or mitigating damage that may or will be, or has been, caused by the action to any matter protected by a provision of Part 3 for which the approval has effect.
>
> This subsection does not limit subsection (1).

Subsection (3) set out a number of non-limiting examples of conditions that might be attached to an approval under s 133.

63 It will be noted that each of subss (1) and (2) of s 134 used the expression "matter protected by a provision of Part 3". That was a term of art under the EPBC Act, its meaning, relevantly to the appellant's third ground, being "a listed threatened species in the endangered category" (s 34). Reading that definition into s 134(1)(b) — to take the provision upon which the appellant's argument principally focused — it was said that the Minister's power to attach conditions was, relevantly, limited to those that were, in the Minister's view, necessary or convenient for repairing or mitigating damage to the Tasmanian devil, considered as a listed threatened species in the endangered category.

64 The Minister made his approval of the proposal subject to conditions which included the following:

> 24. To compensate for unavoidable impact to the Tasmanian devil through roadkill, the person taking the action must contribute no less than $144 000 (GST exclusive) in funding to the Save the Tasmanian Devil Program, in accordance with any approved Tasmanian devil recovery plan and explicitly for the purpose of "Maintenance of the Tasmanian devil Insurance Population".
>
> At least 50% of this sum must be contributed within twelve (12) months of *commencement* of the action, and the balance within two (2) years of *commencement* of the action.
>
> Note: It is acknowledged that the details of how the funds will be spent will be decided, within the parameters specified by these conditions, by the save the Tasmanian Devil Program. There is no objection to the person taking the action discussing the specific direction of these funds with the program.
>
> …
>
> 28. In the event of the following excess *EPBC species* roadkill deaths over any 12 month period recorded in accordance with Condition 19, occurring within *the mine site*, or caused by an *authorised vehicle* travelling to or from *the mine site*, the following associated contingency compensation response must be undertaken:
>
> …
>
> c. for each Tasmanian devil death beyond three (3) in any twelve (12) month period, the person taking the action must contribute an additional $48 000 (GST exclusive) in funding to the Save the Tasmanian Devil Program Appeal (or other conservation organisation approved by *the minister*), explicitly for the purpose of "Maintenance of the Tasmanian devil Insurance Population".

65 In his reasons of 4 September 2013, the Minister explained why these, and other, conditions were imposed:

69. Despite the DPEMP and EPA assessment report's conclusions that the mitigation measures outlined above would be effective in reducing the proposed action's impact on the Tasmanian devil; I found that a residual significant impact on the Tasmanian devil from roadkill could still eventuate. In making this conclusion, I note that the predicted roadkill impacts are uncertain and unproven and, as such, decided a conservative approach should be taken.
70. In the DPEMP, the proponent proposed a contingency offset that would be triggered in the event that Tasmanian devil roadkill levels along Pieman Road between the Riley site and the rail loading facility exceeded one Tasmanian devil death in any 12 month period. If this trigger was met, the proponent committed to contribute $5000 to the STDP. The proponent's proposed offset amount was based on the cost of constructing one enclosure divided by the minimum number of devils that it could house.
71. I did not consider that this proposed offset amount would be sufficient to compensate for the loss of devils, as it was supposed to compensate for the loss of one disease free Tasmanian devil from the wild. The cost involved in maintaining one disease free Tasmanian devil as part of the STDP insurance population would not only need to cover housing of the animal, but also include maintenance costs (including enclosure maintenance and food and veterinary supplies) over the average Tasmanian devil life span (approximately 6 years). I was advised that this amount is approximately $8000 per individual per year.
72. As such, I have attached conditions to my approval requiring the proponent to contribute $144 000 towards maintenance of the Tasmanian devil insurance population to compensate for residual impacts of the proposed action on the Tasmanian devil through roadkill. This amount equates to the maintenance of 6 Tasmanian devils (at an average age of 3 years) in the STDP insurance population, which is the number I estimated may be impacted due to the increase of traffic on Pieman Road as a result of the mine over its two year operating life. I consider the maintenance of the insurance program is likely to provide the best conservation outcome for the species.
73. In addition, given the uncertainty surrounding the proposed action's roadkill impacts I also conditioned for an additional contingency measure. This condition requires the proponent to contribute $48 000 towards the maintenance of the Tasmanian devil insurance population for any Tasmanian devil death by a mine vehicle above 3 in any 12 month period on Pieman Road.
74. The offsetting measures in my approval are consistent with the approved conservation advice and draft recovery plan for the Tasmanian devil, as well as more recent documentation of recovery priorities as reflected for example in strategic plans and reports of STDP, which identify maintenance of the insurance population and monitoring of Tasmanian devils and DFTD in the wild as priority actions for recovery. Although a number of other priority actions such as research into potential vaccines and establishment of semi-wild "island" populations are underway, I consider that the maintenance of the insurance population would best address the offset principles from the *Environment Protection Biodiversity Conservation Act 1999 Environment Offsets Policy* (October 2012). The proposed measures meet the principles of the offset policy by delivering an overall conservation outcome that improves or maintains the viability of the protected matter, effectively accounting for and managing the risks of the offset not succeeding, and delivering a tangible and measurable on-ground conservation gain.

> 75. The proposed action is not expected to result in any permanent removal of habitat, will not generate acid mine drainage, and will not create any open pits, rock dumps, dams or shafts. As such, I did not consider any rehabilitation offset to be necessary in this instance (although standard end-of-life rehabilitation is required, as discussed in paragraphs 153 to 155).
> 76. I found that with the implementation of the conditions in my approval, any impacts on the Tasmanian devil as a result of the proposed action would be acceptable.

66 The appellant's point was that the conditions referred to above were in support of the maintenance of a population of Tasmanian devils in captivity, whereas the power under s 134(1)(b) was limited to the imposition of conditions which were directed to repairing or mitigating damage to this species as it existed in the wild.

67 I would reject this ground of appeal. The construction of s 134(1)(b) which we are asked by the appellant to accept would be, in my view, an overly narrow one, particularly in legislation with such broad purposes as the EPBC Act clearly has. Whether a particular measure was necessary or convenient — and the broader aspect of this formula, "convenient", would be sufficient for present purposes — for repairing or mitigating damage to the Tasmanian devil, considered as a species which was threatened in the wild, was a judgment to be made by the Minister. It would involve all manner of environmental, biological and policy considerations upon which the Court would be incompetent to rule. It was not a legal question.

68 In my view, the imposition of the conditions to which objection was taken by the appellant was within the Minister's power under s 134 of the EPBC Act.

69 For the reasons I have given, I would dismiss the appeal.

Middleton J.

70 I have had the advantage of reading in draft the reasons for judgment of Jessup J. I agree with the conclusion his Honour has reached. I would dismiss the appeal, substantially for the reasons that his Honour has given.

Orders accordingly

Solicitors for the appellant: *Bleyer Lawyers Pty Ltd*.

Solicitors for the first respondent: *Australian Government Solicitor*.

Solicitors for the second respondent: *Shaun McElwaine + Associates*.

Solicitors for the third respondent: *Director of Public Prosecutions*.

SALWA MARSH