FEDERAL COURT OF AUSTRALIA

Tarkine National Coalition Inc v Minister for Sustainability, Environment, Water, Population and Communities and Another

[2013] FCA 694

Marshall J

1-2, 17 July 2013

Environment Law — Threatened species — Ministerial approval of proposal to develop and operate mine — Whether Minister failed to "have regard to" the Approved Conservation Advice for the Tasmanian devil — Minister had information before him referring to document, but not document itself — Decision invalid — Whether condition that mining company donate funds to appeal maintaining Tasmanian devil insurance population valid — Environment Protection and Biodiversity Conservation Act 1999 (Cth), ss 134, 139.

The respondent Minister approved a proposal by a mining company to develop and operate a mine in northwest Tasmania, provided that the company donated significant funds to an appeal aimed at maintaining the insurance population of the Tasmanian devil. The applicant opposed the validity of the Minister's decision. It claimed firstly that the Minister had failed to "have regard to" the approved conservation advice for the Tasmanian devil (the Advice) in deciding to approve an action that would have or was likely to have a significant impact on the threatened species, as required by s 139(2) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the Act). The fact that the Minister had before him information that referred to most of the material contained in the Advice, as opposed to having before him the document itself, was said to be insufficient for the purposes of s 139(2).

Secondly, the applicant argued that the condition placed on the approval, which dealt with Tasmanian devils in captive or "insurance" populations and not those in the wild, was invalid. In particular, it argued that the condition was not authorised by s 134 of the Act (which required the condition to be necessary or convenient for repairing or mitigating damage to a "matter protected", including a listed threatened species in the endangered category), did not satisfy Australia's *in-situ* (as opposed to *ex-situ*) conservation obligations under the international *Convention on Biological Diversity 1992*, done at Rio de Janeiro on 5 June 1992 (the Convention), and was otherwise unreasonable.

Held: (1) The Minister was required by s 139(2) of the Act to give genuine consideration to the Advice, such that his failure to have regard to the document itself for the purpose of making his decision was fatal to its validity. [49]

Lansen v Minister for Environment and Heritage (2008) 174 FCR 14; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, applied.

(2) The condition imposed on the proposed action was authorised by s 134 of the Act, was consistent with Australia's obligations under the Convention and was otherwise reasonable. [80], [86]

Cases Cited

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.

Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2) (2012) 187 LGERA 161.

Drake-Brockman v Minister for Planning (2007) 158 LGERA 349.

Immigration and Citizenship, Minister for v Khadgi (2010) 190 FCR 248.

Immigration and Citizenship, Minister v Li (2013) 87 ALJR 618.

Lansen v Minister for Environment and Heritage (2008) 174 FCR 14.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294.

Taxation, Federal Commissioner of v Futuris Corporation Ltd (2008) 237 CLR 146.

Application

R Niall SC with *E Nekvapil* and *L Papaelia*, for the appellant.

S Pritchard SC with *F Gordon*, for the first respondent.

S McElwaine SC, for the second respondent.

Cur adv vult

17 July 2013

Marshall J.

1 The proposal by the second respondent, Shree Minerals Ltd ("Shree") to develop and operate a magnetite and hematite (iron ore) mine near Nelson Bay River in north-west Tasmania is a controversial one. Those supporting the proposal are concerned about the development of industry and employment in the State of Tasmania. Those opposing it are concerned about damage to the iconic threatened species, the Tasmanian devil. It is not the task of the Court to adjudicate on or resolve that controversy. The task of the Court is to determine the application made by Tarkine National Coalition Inc ("TNC") under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the ADJR Act") and the *Judiciary Act 1903* (Cth). The application challenges the validity of the respondent Minister's decision under s 133(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the Act") to approve the taking of an "action" under the Act. The action in question is the development and operation of the mine referred to earlier in this paragraph.

2 Although the proceeding was lodged in the Tasmania District Registry of the Court, the hearing of the application took place in Melbourne, by consent, to suit the majority of the legal practitioners involved.

3 The critical issues for determination in the proceeding are:

- Whether, in deciding to approve the taking of the action, the Minister had regard to a document called "Approved Conservation Advice for *Sarcophilus harrisii* (Tasmanian Devil)" and in the event of failure to do so, the consequences of such failure;
- Whether, in approving the taking of the action, the Minister was entitled to attach conditions which require Shree to donate money to a program known as the Save the Tasmanian Devil Program Appeal ("the program").

Standing of TNC

4 TNC is a "person aggrieved" within the meaning of s 487(3) of the Act. It is an association incorporated in Tasmania under the *Associations Incorporation Act 1964* (Tas). At least in the two years immediately preceding the Minister's decision to approve the action, TNC has engaged in a series of activities in Tasmania for the protection or conservation of the environment. The objectives of TNC at the time of the Minister's decision included the protection or conservation of, or research into the environment: see s 487(3)(c) of the Act. According to the terms of its constitution, TNC aims to:

> … protect and restore the natural environment of the area referred to as the Tarkine, including but not limited to the National Estate Listed Tarkine.

5 From 20 October 2011 to 12 November 2012, TNC made various submissions to the Minister's Department of Sustainability, Environment, Water, Population and Communities ("the Department") and a state department concerning environmental issues in north-west Tasmania. No issue is taken by either respondent concerning TNC's standing for the purposes of s 39B of the *Judiciary Act*.

The approval decision in its statutory context

6 On 18 December 2012, the then Minister (the Hon Tony Burke MP) approved the taking of the proposed action by Shree and described the action in the following way:

> to develop and operate a magnetite and hematite mine near Nelson Bay River in north western Tasmania, located approximately seven kilometres northeast of Temma (see referral EPBC 2011/5846).

7 The approval was subject to several conditions, including Conditions 14 and 20(c). Condition 14 provided:

> To compensate for unavoidable impacts on Tasmanian devils and their habitat, [Shree] must donate no less than $350,000 (GST exclusive) in funding to the Save the Tasmanian Devil Program Appeal, in accordance with any approved Tasmanian devil recovery plan and explicitly for the purpose of "maintenance of the Tasmanian devil Insurance Population".
>
> At least 20% of this sum must be donated within twelve (12) months of *commencement* of the action, and the balance within seven (7) 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 Save the Tasmanian Devil Program Appeal Committee …

Condition 20(c) is one element of Condition 20. All of the conditions which the Minister attached to the approval are set out in Appendix A to these reasons for judgment.

8 Chapter 2 of the Act is headed, "Protecting the environment". Section 11 provides "a simplified outline" of the chapter. It relevantly provides:

> This Chapter provides the basis for the Minister to decide whether an action that has, will have or is likely to have a significant impact on certain aspects of the environment should proceed.
>
> It does so by prohibiting a person from taking an action without the Minister having given approval or decided that approval is not needed (Part 9 deals with the giving of approval).

9 Under s 68, a person who proposes to take an action that the person thinks may be or is a "controlled action" must refer the proposal to the Minister for the Minister's decision concerning whether or not the action is a "controlled action".

10 Section 67 provides:

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

11 Section 67A provides:

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

12 Part 3, Div 1, Subdiv C of the Act (in ss 18, 18A and 19) deals with listed threatened species. Under s 18(3), a person must not take an action which will have a significant impact on a listed threatened species included in the endangered category. That subsection will not apply if an approval of the taking of the action is in operation: see s 19(1).

13 On 16 February 2011, the Department received a referral for the proposed action under s 68 of the Act.

14 Pursuant to s 75(1) of the Act, the Minister must decide whether the action is a controlled action and which provisions of Pt 3 are controlling provisions for the action. On 17 March 2011, the Minister decided that the proposed action was a controlled action. He also decided that the controlling provisions for the action were ss 18 and 18A (listed threatened species and communities) and ss 20 and 20A (listed migratory species). In March 2011 and today, the Tasmanian devil is a threatened species in the endangered category.

The assessment and decision-making process in relation to the Tasmanian devil

15 Under s 87, the Minister must decide on an assessment approach to assess the relevant impacts of a controlled action. On 17 March 2011, the Minister decided that the proposed action would be assessed by Environmental Impact Statement ("EIS") under Div 6 of Pt 8 of the Act: see s 87(1)(d).

16 The EIS assessment process occurred between April 2011 and March 2012. In July 2011, the Minister approved guidelines for the preparation of a draft EIS by Shree after a process which included public consultation. In December 2011, a delegate of the Minister approved the publication of the revised draft EIS which Shree had provided to the Department on 22 November 2011. In accordance with s 103 of the Act, the Minister approved the publication of the draft EIS for public comment.

17 On 12 March 2012, Shree gave the Minister the finalised EIS, a submission from TNC in respect of the draft EIS and Shree's submission in response. In May 2012, a delegate of the Minister requested further information from Shree pursuant to the Minister's power to seek more information to make an informed decision about whether to approve the taking of the action: see s 132 of the Act. Shree provided further information between May and October 2012.

18 Mr James Tregurtha, an Assistant Secretary of the Department provided the Minister with a brief on or about 9 November 2012 which recommended that the Minister approve the taking of the action, subject to conditions. On 27 November 2012, the Minister informed Shree that he intended to approve the taking of the action subject to conditions and invited comments on the proposed decision. Shree provided further comment on 5 December 2012.

19 On 14 December 2012, Mr Tregurtha prepared a brief concerning the Minister's final decision. Among other things, it provided the Minister with a proposed revised approval decision notice for his approval and signature. The Minister published his decision on 18 December 2012 in line with the draft provided by Mr Tregurtha.

20 On 21 January 2013, TNC, pursuant to s 13 of the ADJR Act, requested a statement of reasons for the Minister's decision to approve the proposed action. On 4 March 2013, the Minister sent his statement of reasons to TNC.

The grounds of review

21 During the course of oral submissions, TNC relied on a further amended originating application for judicial review. The remaining live grounds may be described in shorthand as follows:

- *Ground 1A* — failure to have regard to a mandatory consideration in s 139(2) of the Act;
- *Ground 1* — approval with Conditions 14 and 20(c) was not authorised by s 133 of the Act;
- *Ground 5* — inconsistency with the *Convention on Biological Diversity 1992*, done at Rio de Janeiro on 5 June 1992 (the Biodiversity Convention);
- *Ground 6* — irrationality and unreasonableness.

22 As will be seen below, the Court accepts TNC's submissions on Ground 1A. Although it is not strictly necessary to do so, the Court's reasons for rejecting the applicant's challenge to the Minister's decision based on Grounds 1, 5 and 6 are set out below.

Ground 1A

23 In Ground 1A of its further amended application, TNC alleges that the decision of the Minister should be set aside due to his failure to have regard to the Approved Conservation Advice for the Tasmanian devil ("the approved conservation advice") in deciding whether to approve the taking of the action.

Statutory context

24 The critical provision to examine for current purposes is s 139(2) of the Act. It provides:

> 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.

25 Section 528 provides:

In this Act, unless the contrary intention appears:

approved conservation advice has the meaning given by subsection 266B(2).

26 Section 266B(1) places an obligation on the Minister to ensure that there is an approved conservation advice for each listed threatened species at all times while the species continues to be listed. Section 266B(2) then provides:

For this purpose, *approved conservation advice* is a document, approved in writing by the Minister (and as changed from time to time in accordance with subsection (3)), that contains:

(a) a statement that sets out:

(i) the grounds on which the species or community is eligible to be included in the category in which it is listed; and

(ii) the main factors that are the cause of it being so eligible; and

(b) either:

(i) information about what could appropriately be done to stop the decline of, or support the recovery of, the species or community; or

(ii) a statement to the effect that there is nothing that could appropriately be done to stop the decline of, or support the recovery of, the species or community.

The Minister may approve changes to the approved conservation advice in writing: see s 266B(3). Under s 266B(4), the Minister is obliged to consult the Scientific Committee about "the document". The document is also required to be published on the internet: see s 266B(6).

27 Under s 528, "Scientific Committee" means "the Threatened Species Scientific Committee established by section 502". Its functions include advising the Minister "in accordance with Division 5 of Part 13 in relation to recovery plans, threat abatement plans and approved conservation advice".

28 It can be discerned from the legislative scheme that the approved conservation advice for a threatened species is an important document which is intended to be used to inform the Minister's decision-making process. A fuller examination of that scheme and its consequences for the Minister's decision in the present matter is discussed below.

The approved conservation advice

29 On 19 May 2009, the then Minister (the Hon Peter Garrett MP) approved a document in writing entitled, "Approved Conservation Advice for *Sarcophilus harrisii* (Tasmanian Devil)".

30 The approved conservation advice commences:

> This Conservation Advice has been developed based on the best available information at the time this Conservation Advice was approved; this includes existing plans, records or management prescriptions for this species.

31 Under the heading, "Conservation Status" the following is set out:

> This species is eligible for listing as *endangered* under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) (EPBC Act) as, in 2009, the Minister considered the Threatened Species Scientific Committee's (TSSC) advice under section 189 of the EPBC Act and amended the list under section 184 to include the Tasmanian Devil. The TSSC determined that this species met criteria 1 and 5 of the eligibility criteria based on the severe decline in population numbers, principally as a result of the impact of Devil Facial Tumour Disease (DFTD) and modelling that indicates that there is a strong possibility that the Tasmanian Devil will be extinct within a timeframe of approximately 25-35 years, if trends in DFTD spread and population decline continue (TSSC, 2009) The species is also listed as endangered under the Tasmanian *Threatened Species Protection Act 1995*.

32 The approved conservation advice notes, under the heading, "Threats" that there is "currently no effective treatment, vaccine or cure for [devil facial tumour disease]".

33 Under the heading, "Research Priorities" the approved conservation advice says:

> Current research priorities are set out in the "Save the Tasmanian Devil" Program Scientific Research Strategy 2007, the "Save the Tasmanian Devil" Program Strategic Plan 2007 and the "Save the Tasmanian Devil" Program Business Plan 2007-2008. For further information go to *www.tassiedevil.com.au*.

34 The reason for highlighting these particular extracts from the approved conservation advice will become apparent later in these reasons.

Did the Minister "have regard to" the approved conservation advice?

35 The approved conservation advice was not contained in the proposed decision brief provided to the Minister in November 2012 or in the final decision brief provided to the Minister in December 2012. It was not provided to the Minister at all for the purposes of making his decision and he did not have a copy of the document before him for any such purpose.

36 The Minister referred to the approved conservation advice in two places in his statement of reasons for decision under the heading, "Miscellaneous considerations".

37 First, at [56], the Minister said:

> In deciding whether or not to approve the taking of the proposed action, I took into account (among other matters) the conditions imposed on the proposed action under Tasmanian legislation, principles of ecologically sustainable development as required under section 136(2)(a) of the EPBC Act, any relevant conservation advice, threat abatement and recovery plans as required by section 139, and the precautionary principle as required under section 391 of the EPBC Act.

The Minister's reference to "*any* relevant conservation advice" may reflect the fact that the action had the potential to affect listed threatened species other than the Tasmanian devil.

38 Second, at [61], the Minister said:

> Likely impacts, as well as avoidance, mitigation and offset measures have been considered in light of recovery plans, threat abatement plans and conservation advices where relevant.

39 Counsel for TNC submit that the Minister did no more than pay lip service to his obligation under s 139(2) of the Act. They submit that, as the Minister did

not have the approved conservation advice before him when he made his decision, he cannot be said to have had regard to it for the purpose of making that decision.

40 Counsel for the Minister and Shree contend that the Minister had information before him for the purpose of making his decision which referred to all of the material which is contained in the approved conservation advice with some few exceptions. Those exceptions are the matters set out at [48] below and discussed at [31]-[33] above.

41 Counsel for TNC submit that s 139(2) requires the Minister to give weight to the approved conservation advice as a fundamental element in making his decision. They contend that, at the very least, it required the Minister to turn his mind to the document and give it genuine consideration.

42 In *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 at [57], the Full Court referred to the expression "have regard to" for the purposes of s 109(1)(c) of the *Migration Act 1958* (Cth). At [61], the Full Court observed that the expression is capable of having different meanings depending on its statutory context. Sometimes the statutory context will require that the matter to which a decision-maker is to have regard is a fundamental element in the decision-making process. On other occasions the matter will require mere consideration by the decision-maker, not being a fundamental element in the decision-making process.

As the Full Court said in *Khadgi* at [58]:

> In the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard, it is generally for him or her to determine the appropriate weight to be given to them: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 (per Mason J).

43 In *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, a Full Court considered the consequences of the Minister's failure to consider matters in s 134(4) of the Act in deciding to attach a condition to an approval. At [33], the majority (Moore and Lander JJ) said:

> The question as to whether a decision made in breach of a condition regulating the exercise of a statutory power is invalid involves a question of statutory construction to determine whether the purpose of the legislation is to invalidate any act done in breach of the condition.

At [34], their Honours continued:

> Not all acts done in breach of a legislative requirement which require the prior performance of a condition are invalid. The validity of any act done in breach of a statutory condition will depend upon whether it was intended by the legislature that such an act would be invalid. Sometimes the intention of the legislature will be evident from the language of the provision providing the power. However, the intention of the legislature is not ascertained merely because the legislature has couched the doing of the condition precedent in imperative language. It is not a useful test to determine the purpose of the legislation by asking whether compliance with the condition precedent is mandatory or directory. Such an approach may "deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid": *Project Blue Sky* 194 CLR 355 at 390. Moreover, little assistance can be obtained from a consideration of other statutes.

At [35], their Honours summarised the effect of relevant High Court authority by concluding:

> The test for determining whether an act done in breach of a condition is answered by determining whether the purpose of the legislation that an act done in breach of a condition should be invalid: *Project Blue Sky* 194 CLR 355 at 390; *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 82 ALJR 1177. The purpose of the legislation will be gleaned from the scope and object of the EPBC Act which gives the power to do that act. The ascertained purpose will determine whether the act done in breach of a condition precedent in the EPBC Act is valid or invalid.

44 In *Lansen*, the majority carefully considered the relevant statutory context and concluded that the Minister was obliged to have regard to the matters referred to in s 134(4)(a) and (b). In arriving at their decision, the majority took into account the provisions of s 134(5) which provided that "a failure to consider information as required by para (4)(aa) does not invalidate a decision about attaching a condition to the approval". The absence of such provision with reference to s 134(4)(a) and (b) was noted. At [72], the majority said:

> The only provision in Pt 9 relating to the imposition of conditions which is couched in mandatory language but which is said by the EPBC Act itself not to lead to invalidity if breached is s 134(4)(aa). It is our view that is further evidence that Parliament intended paragraphs (a) and (c) of s 134(4) to be observed for the validity of a decision under s 134.

45 In the current matter, counsel for TNC pointed to a lack of indication from the terms of s 139(2) that failure to have regard to an approved conservation advice would not lead to invalidity. That is one consideration which supports the view that failure to comply with s 139(2) leads to the decision being invalid.

46 There are other indications from the legislative scheme which support that view. The approved conservation advice is given an important status in the Act. It is a document which is approved by the Minister after advice from a scientific committee. Such an advice, prepared specifically in relation to a threatened species, would ordinarily be expected to be a significant document to take into account in making a decision which has the capacity to affect that species.

47 Section 139(2) in mandatory language requires that, in deciding whether to approve the taking of the action, the Minister *must* have regard to any approved conservation advice for the species. Given the significance of the approved conservation advice in the context of the Act, it is not enough that the vast majority of the material provided to the Minister by his department overlapped with material in the approved conservation advice. The Minister was obliged to give genuine consideration to the document. Simply to say in a statement of reasons that he took into account "any relevant conservation advice" does not answer the question whether he considered that the approved conservation advice in relation to the Tasmanian devil was relevant to his decision. As noted at [37] above, there were other threatened species considered by the Minister in making his decision to approve the taking of the action.

48 Counsel for each of the Minister and Shree highlight the fact that most of the material contained in the conservation advice was before the Minister by other means. The exceptions are:

- the timetable for possible extinction;
- the lack of effective cures for devil facial tumour disease; and
- research priorities.

These matters were referred to in the approved conservation advice but not in any of the materials provided to the Minister prior to the making of the decision.

49 Given the Court's view of the significance of the approved conservation advice in the Minister's decision-making process in the statutory scheme, it is irrelevant for the purposes of s 139(2) that most of the material in the advice was before the Minister by other means. The Act requires the Minister to have regard to the conservation advice. This means that genuine consideration must be given to the document. The Minister's failure to have regard to the document for the purpose of making his decision is fatal to its validity.

50 The failure may be characterised as a failure to comply with a statutory obligation in the sense described in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [92] and [93] per McHugh, Gummow, Kirby and Hayne JJ. In accordance with *Project Blue Sky*, it is the intention of the provisions of the Act dealing with the protection of threatened species that an act done in breach of the requirement imposed by s 139(2) should be invalid.

51 Apart from the matters already referred to, there are several indicators in the Act which point to the protection of protected species as being a matter of considerable importance.

52 Section 3 is headed, "Objects of the Act". Those objects include s 3(1)(a) which is "to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance". In s 3(2)(d) and (e), reference is made to achieving the objects of the Act, by, among other things, adopting an environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; and enhancing Australia's capacity to ensure the conservation of its biodiversity by including provisions to:

> (i) protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species) and ensure the conservation of migratory species …

53 Section 18(3) prohibits the taking of an action which will have significant impact on a listed threatened species or is likely to have such an impact. It creates a civil penalty for breach of that provision.

54 Section 18A creates offences for the taking of an action that has or will have a significant impact on a listed threatened species. Section 19 makes ss 18 and 18A inapplicable to certain action which is the subject of an approval under Pt 9. Such approvals are not lightly given and are subject to the complicated statutory process referred to in the introductory paragraphs of these reasons. This is a further indication of the importance of the concept of the protection of threatened species in the legislation.

55 Section 34 identifies a listed threatened species as a matter protected by the provisions of Pt 3 referable to s 18(3). Under s 34D, the Minister is entitled to make declarations relevant to a listed threatened species to promote its survival and enhance its conservation status. Section 53 empowers the Minister to enter into a bilateral agreement containing a provision concerning a listed threatened species to promote its survival and enhance its conservation status, among other things.

56 Given the foregoing provisions, it is unsurprising that Parliament would require the Minister to have regard to any approved conservation advice from a scientific committee concerning a threatened species before approving an action which will have, or is likely to have a significant impact on that species.

57 In addition, Pt 13 of Ch 5 deals with the process of listing threatened species and ecological communities. Section 179 is headed "Categories of threatened species" and creates the following categories:

- extinct;
- extinct in the wild;
- critically endangered;
- endangered;
- vulnerable; and
- conservation dependent.

58 The criteria for native species to be classified in the critically endangered or vulnerable categories are set out in part of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth). Under Item 1 of reg 7.01, an "endangered species" will have undergone, is suspected to have undergone, or is likely in the immediate future to undergo a severe reduction in numbers. Under Item 5, its probability of extinction in the wild is at least 20% in the near future.

59 The important characteristic of each category of threatened species referred to in s 179 is, with the exception of the extinct category, that the species requires protection from actions which may significantly impact on it. The Minister has a duty to keep such matters in the forefront of his or her mind in the decision-making process, in addition to other objects of the Act including sustainable development. The requirement to have regard to any approved conservation advice relevant to a threatened species before approving action which may have impact on that species is a pivotal element of that system of protection.

60 Another way of characterising the failure of the Minister to comply with s 139(2) of the Act is to regard it as evidencing the Minister's failure to take into account a relevant consideration that he was bound to take into account: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42 per Mason J.

Consequence of the Minister's failure to comply with s 139(2)

61 Counsel for each of the Minister and Shree contend that a finding in favour of TNC on Ground 1A would be one which elevates form over substance and would lead to a highly artificial result. They submit that the material before the Minister addressed the substance of the approved conservation advice with some minor exceptions. They submit that the Minister's decision would not have been materially affected had he considered the actual document. Counsel refers to the judgment of Jagot J in *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349 at 375, where her Honour (when sitting in the New South Wales Land and Environment Court) held that the failure to include an extra sentence in a report did not lead to relevant invalidity. Her Honour's judgment depended on the particular applicable statutory context. In any event, the current matter is far removed from the simple concept of adding an additional sentence to a report. It deals with a fundamental aspect of the Minister's role in protecting endangered species in the context of an Act which has the achievement of such a purpose as one of its central tenets.

62 There is no reason why the Court should exercise its discretion to decline relief to TNC. As occurred in *Lansen* at [196] and [197], the successful applicant has established that a decision has been made in circumstances of jurisdictional error. It is appropriate to make a declaration that the decision was invalid and of no effect as well as an order setting aside the decision.

63 During the hearing of the application, the Minister who made the decision under challenge was replaced by a new Minister, the Hon Mark Butler MP. It is by no means certain that when the new Minister considers the proposed action and gives genuine consideration to the approved conservation advice, he will necessarily reach the identical conclusion of the former Minister, including as to the formulation of conditions attached to an approval, if any.

64 Where the breach of a legislative condition has given rise to a jurisdictional error which results in an invalidity, there is no reason to withhold discretionary relief under s 39B of the *Judiciary Act*: see *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at [25] and [84] per McHugh J. No other reason was advanced as to why relief should be refused in the Court's discretion.

Ground 1

65 Ground 1 of the further amended application is as follows:

> 1. The decision was not authorised by s 133 of the Act because s 134 of the Act did not authorise the Minister to approve the action subject to Condition 14 *and Condition 20(c)* or at all or otherwise involved an error of law.

66 TNC contends that the Minister erred in two ways:

- by imposing conditions without first identifying and responding to the relevant matter protected;
- by imposing conditions for the payment of compensation, being conditions of a type not authorised by s 134.

67 TNC submits that the conditions attached to the approval must relate to the matter protected by the relevant controlling provisions. Hence, the conditions must be necessary or convenient for protecting "the matter protected" or for repairing or mitigating damage to the matter protected. Counsel referred to s 34 of the Act. Section 34 is headed "What is *matter protected* by a provision of Part 3?" The section provides a table with three headings: *Item*, *Provision* and *Matter Protected*. As counsel observe, each subsection of s 18 refers to a distinct "matter protected". Item 5 of s 34 concerns s 18(3). The matter protected is "a listed threatened species in the endangered category".

68 It is not in contest that the Tasmanian devil is a threatened species in the endangered category. However, counsel for TNC submit that the matter protected is the Tasmanian devil facing a very high risk of extinction in the wild in the near future. Counsel refer to s 179(4) of the Act which provides:

> (4) A native species is eligible to be included in the *endangered* category at a particular time if, at that time:
>
> (a) it is not critically endangered; and
>
> (b) it is facing a very high risk of extinction in the wild in the near future, as determined in accordance with the prescribed criteria.

69 Counsel submit that the Tasmanian devil *per se* is not the matter protected by s 18(3). That submission is rejected. The "protected matter" is a listed threatened species in the endangered category. The Tasmanian devil is such a

species. Concerns for the Tasmanian devil's protection formed a basis for the decision of the Minister on 17 March 2011 that the action was a controlled action.

70 TNC refers to the different categories of threatened species referred to in s 18 of the Act. It observes that s 18(1) refers to "a listed threatened species in the extinct in the wild category". TNC highlights that to be eligible for such a category, a species must be dependent upon ex-situ conservation members for its survival while endangered species are defined by reference to the degree of immediacy of the risk of becoming extinct in the wild. Such latter species are capable of assistance by in-situ conservation measures. Thus, TNC objects to the use of a condition or conditions dealing with "an insurance population" for the Tasmanian devil because the Tasmanian devil is not a threatened species extinct in the wild. This submission lacks merit. As counsel for the Minister observe, the more robust the insurance population, the less severe the threat of extinction. It is noted that the insurance policy involves the establishment of populations outside Tasmania which may be reintroduced to assist with the preservation of the species.

71 The Court rejects the submission that Conditions 14 and 20(c) were not able to be imposed by the Minister having regard to the status of the Tasmanian devil under s 18(3) of the Act.

72 TNC also alleges that the impugned conditions were not authorised by s 134. It says that the Minister has misdirected himself as to the meaning of s 134. It submits that under s 134, the Minister must be satisfied that the condition is necessary or convenient either to protect the relevant matter protected or to repair or mitigate damage to the relevant matter protected. TNC contends that the Minister failed to identify the relevant matter protected by not distinguishing Tasmanian devils in the wild from those in captive or "insurance" populations. Consequently, so the argument ran, the Minister ignored the "hierarchy" the Act gives to "threatened species in the wild" as opposed to the development of captive populations.

73 In response, counsel for the Minister referred to s 134(1)(b) and (2)(b) of the Act. Section 134(1)(b) enables the Minister to attach a condition to the approval of the action if satisfied that the condition is necessary or convenient for repairing or mitigating damage to a matter protected by a provision of Pt 3 for which the approval has effect. Section 134(2)(b) makes a similar provision.

74 The Court accepts the submission of counsel for the Minister that the effect of s 134(1)(b) and (2)(b) is that even if the impugned conditions are seen as mitigating damage to the Tasmanian devil, they fall within s 134. Ground 1 is not accepted. The use of an introduced population is capable of protecting, repairing or mitigating damage to the Tasmanian devil as a threatened species notwithstanding that the Tasmanian devil is not currently extinct in the wild.

Ground 5

75 Ground 5 of the further amended application states:

> The decision was not authorised by s 133 of the Act because the Minister acted inconsistently with arts 8 and 9 of the *Convention on Biological Diversity* done at Rio de Janeiro on 5 June 1992, as amended and in force for Australia from time to time (the *Biodiversity Convention*), contrary to s 139(1)(a)(i) of the Act.

76 The particulars to that ground are as follows:

> (a) Article 8 of the Biodiversity Convention is headed "In-situ Conservation";

art 8(d) requires Australia, as far as possible and appropriate, to promote the maintenance of viable populations of species in natural surroundings.

(b) Article 9 of the Biodiversity Convention is headed "Ex-situ Conservation"; it requires Australia to adopt certain ex-situ conservation measures predominantly for the purpose of complementing in-situ measures.

(c) By reason of the matters in (b) to (h) of the particulars to ground 4 above, the Minister acted inconsistently with arts 8 and 9 of the Biodiversity Convention by approving an action that threatens the survival of the "in-situ" wild population of the Tasmanian devil, purportedly on the basis that this damage would be mitigated or repaired by Condition 14, which is an "ex-situ" measure.

77 In response, the Minister refers to Art 2 of the Biodiversity Convention which gives the following definitions:

- "Ex-situ conservation" — means the conservation of components of biological diversity outside their natural habitats;
- "In-situ conservation" — means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.

78 The Minister's counsel drew attention to the numerous conditions attached to the approval decision in addition to Condition 14. They are set out in Appendix A to these reasons for judgment. Many of them are directed to protecting the Tasmanian devil "in situ". Condition 14 complements those other conditions. The Court accepts the contention of the Minister that it was open for him to conclude that in situ conservation measures might be insufficient to protect the Tasmanian devil from the threat of the continued spread of devil facial tumour disease.

79 There is no reason why Condition 14 would not be capable of making a positive contribution to the continued existence of the Tasmanian devil.

80 It is not necessary to determine whether, in the event that the above analysis is erroneous, the Biodiversity Convention could be incorporated into domestic law to override what is otherwise a course open to the Minister under s 134. The Court rejects the submission of TNC that Condition 14 was not authorised by s 134. It also rejects the contention that the condition is inconsistent with Australia's obligations under the Biodiversity Convention.

Ground 6

81 In Ground 6 of the further amended application, TNC alleges that "the decision was irrational or so unreasonable that no reasonable person could have so exercised the power under s 133 of the Act". In particulars provided under that ground, TNC says:

> It is irrational, unreasonable or perverse to approve an action that may directly threaten or hasten the extinction of a species, on the basis that the damage or threat is ameliorated by requiring the proponent to contribute to establishing a captive population of the species, for reintroduction in the event the species does become extinct.

82 Counsel for TNC submit that the Minister understood that by approving the action he was increasing the risk of devil facial tumour disease in one of the last areas in the wild where the Tasmanian devil is unaffected by the disease. TNC submits that the Minister compensated that damage by requiring that Shree

contribute to the maintenance of an insurance population. It is contended that such a decision falls "outside the framework of rationality provided by the statute" calling in aid the judgment of French CJ in *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618 at [26].

83 In response, the Minister makes the following points:

- The Minister did not find that the action posed a significant threat to the survival of the Tasmanian devil. His conclusion was that "any residual significant impacts of the proposed action on Tasmanian devils are acceptable".
- The insurance policy was advocated in the 2007 Strategic Plan to safeguard Tasmanian devils in the wild and the program to be funded by Condition 14 was referred to in the plan as the "Rescue Program". Further, the Minister had advice from the Department that the insurance population was the most practical means of combating the threat of the spread of the disease. Counsel for the Minister also noted that there was material before the Minister which showed that the threat of the spread of the disease was potentially inevitable regardless of the action.
- The decision and conditions must be read as a whole, including those conditions aimed at minimising road kill and keeping carcasses clear of the roadside to assist in the prevention of the spread of the disease.

84 The above response is a persuasive one, at least in the latter two points. It is difficult to see how the decision could be characterised as irrational or so unreasonable that no decision-maker would make it. As Gageler J said in *Li* at [113] "judicial determination of *Wednesbury* unreasonableness in Australia has in practice been rare. Nothing in these reasons should be taken as encouragement to greater frequency. This is a rare case".

85 The major problem with Ground 6 is that it invites the Court in effect to substitute its own view of the merits of imposing Condition 14. That was a decision for the Minister. It is not appropriate for the Court to intervene, unless it can be demonstrated that the decision was so unreasonable or irrational that no reasonable decision-maker could have arrived at it with Condition 14 included.

86 Leaving aside any consideration of a failure to comply with s 139(2), the Court considers that it was reasonably open to the Minister on the material before him, having regard to the nature and purpose of the Act, to make his decision subject to Condition 14 in combination with the other conditions he imposed.

87 As counsel for Shree noted, Besanko J recently observed that the Act contains a "very wide" power to impose conditions which are "necessary" or "convenient": see *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* (2012) 187 LGERA 161; 291 ALR 314 at [44] and [58].

88 In addition, counsel for Shree relies on the evidence of Mr Nick Mooney. Mr Mooney is a wildlife biologist and widely respected expert on the Tasmanian devil. The effect of his evidence is that the decision of the Minister to impose Condition 14, when considered objectively, is not irrational, unreasonable or perverse. This evidence reinforces the view of the Court that it is inappropriate for it to delve into matters relevant to the merits of the Minister's decision as distinct from assessing whether the decision was attended by any legal error.

Conclusion and costs

89 Having regard to the applicant's success on Ground 1A of the application and notwithstanding the rejection of its other claims, the Court will declare the impugned decision to be invalid and of no effect and set it aside. An order will be made that the first respondent pay the applicant's costs of the proceeding.

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*.

SARAH SOMERSET

Appendix A

Conditions attached to the approval

Conditions relating generally to the protection of *EPBC species*

1. *The person taking the action* must develop an environmental induction training and awareness program that instructs *staff, contractors and visitors* on the importance of protecting *EPBC species* at, and while travelling to and from, *the mine site*. The program must include face-to-face sessions, prominently displayed posters and glovebox guides, and must address at least the following matters:
    a) clear images and simple descriptions (including distinguishing features) for the identification of *EPBC species*;
    b) maps of high risk *EPBC species* roadkill locations, identified and updated annually in consideration of monitoring data collected subject to these conditions and any information published by the Save the Tasmanian Devil Program;
    c) practical instruction on how to avoid or reduce incidences of *EPBC species* roadkill;
    d) information and supporting documentation on roles and responsibilities (including recording and reporting obligations) under these conditions; and
    e) reference to the penalties imposed for any workers found causing intentional harm to *EPBC species*, including legal and *onsite* environmental responsibilities.

    The induction program must commence at or prior to the *commencement* of the action and be maintained for the life of the action (including mine closure and rehabilitation) to ensure that all *staff, contractors and visitors* who work, visit or travel to *the mine site* are inducted prior to any *onsite* activity. Details of inductions must be logged and maintained within an induction register to be kept *onsite*.
2. *The person taking the action* must ensure that monthly meetings are held prior to the commencement of each shift to maintain worker knowledge about the importance of avoiding and minimising impacts (particularly road kill) on *EPBC species* and of recording and reporting observations of *EPBC species*.

3. *The person taking the action* must engage a *suitably qualified or experienced expert* to prepare a plan for the management and protection of *EPBC species* at *the mine site* and during travel to and from *the mine site* by *authorised vehicles*. The plan must address:
    a) containment of vegetation clearance and operational activities within the nominated mine footprint;
    b) management of food waste;
    c) management of hazardous substances including fuels, tailings and poisons;
    d) management of open pits and excavations;
    e) protocols for dealing with injured fauna, including;
        i) animal welfare considerations;
        ii) initial response provisions;
        iii) expert care provisions;
    f) protocols for recording any sightings of *EPBC species* (including carcasses), including information on;
        i) species;
        ii) condition;
        iii) date;
        iv) time;
        v) location *coordinates*; and
        vi) any noteworthy circumstances including circumstances of injury or death where relevant and known.

    The plan must be approved by *the minister* prior to *commencement* of the action, and must be implemented.
4. *The person taking the action* must ensure that targeted pre-clearance surveys for *EPBC species* are undertaken by a *suitably qualified or experienced expert* prior to any *vegetation clearance*, except where clearance will clearly occur outside all relevant breeding seasons or potential habitat. Specific features to be targeted, along with a mandatory management response in parentheses, must include:
    a) masked owl nests (a minimum 50 metre exclusion zone where access or works are not allowed (other than for monitoring purposes) until the identified nest is vacated);
    b) spot-tailed quoll dens (a minimum 50 metre exclusion zone where access or works are not allowed (other than for monitoring purposes) until the identified nest is vacated);
    c) Tasmanian devil dens (a minimum 50 metre exclusion zone where access or works are not allowed (other than for monitoring purposes) until the identified nest is vacated); and
    d) wedge-tailed eagle nests (cessation of all access or works at *the mine site* (other than for monitoring purposes) until the identified nest is vacated).

    Pre-clearance surveys must be documented, including details of results, methodology and personnel (and their qualifications). The *person taking the action* should also be prepared to justify where surveys have not been undertaken prior to *vegetation clearance*.

Conditions relating to the protection of *EPBC species* from traffic impacts

5. *The person taking the action* must provide for each shift a bus service to transport *staff, contractors and visitors* between *the mine site* and (at least) the town of Smithton. The service must be:
    a) free of charge;
    b) advertised through the environmental awareness and induction program described in Condition 1; and
    c) capable of carrying all interested *staff, contractors and visitors*.
6. *The person taking the action* must ensure that all roads within *the mine site* are designed, built and maintained in a manner that minimises the potential for *EPBC species* roadkill, through deterrence and increased visibility, including in particular:
    a) clearly signposted speed limits of no more than forty (40) kilometres per hour;
    b) the use of a light coloured aggregate;
    c) installation of table drains to minimise the pooling of water and vegetation growth; and
    d) active management of vegetation within five (5) metres of the edge of the road.
7. *The person taking the action* must ensure that travel to and from *the mine site* by *authorised vehicles* other than light vehicles and buses driven by or for staff, only occurs during *daylight hours*, except in case of *emergency*.
8. *The person taking the action* must implement all reasonable measures to ensure that *authorised vehicles* do not exceed fifty (50) kilometres per hour from *the mine site* to the intersection of Wuthering Heights Road and Rebecca Roads.
9. *The person taking the action* must ensure that all roads from within *the mine site* to the intersection of Wuthering Heights and Rebecca Roads are visually inspected daily, and all carcasses (whether EPBC species or not) removed to at least 40 metres from the edge of the road.
10. *The person taking the action* must ensure that all *EPBC species* roadkill detected within *the mine site*, or killed by *authorised vehicles* travelling to or from *the mine site*, is recorded, including information on:
    a) species;
    b) date;
    c) time;
    d) location *coordinates*; and
    e) any noteworthy circumstances including circumstances of death where known.

Conditions relating to reporting

11. Prior to *commencement* of the action, *the person taking the action* must establish an *EPBC species* register on its website that includes all records of sightings of *EPBC species* (including carcasses), as collected under Conditions 3, 4, 10, 12 and 15. The register must be updated at least every three (3) months during the life of the mine (including mine closure and rehabilitation).

12. *The person taking the action* must engage a *suitably qualified or experienced expert* to prepare a Tasmanian devil monitoring strategy. The strategy must:
    a) be consistent and compatible with any relevant strategies of the Commonwealth or Tasmanian Governments or Save the Tasmanian Devil Program;
    b) provide for the placement and maintenance of at least ten (10) infrared monitoring cameras at locations relevant to the action;
    c) provide for monitoring the condition of any formally managed habitat areas, such as the fauna habitat protection zone described in the project's environmental impact statement;
    d) include measures for the detection and prompt reporting of Devil Facial Tumour Disease;
    e) include protocols for regular data retrieval and recording; and
    f) be supported by adequate funding and other resources.

    The strategy must be approved by *the minister* prior to *commencement* of the action, and must be implemented.
13. *The person taking the action* must make available any raw data relating to Tasmanian devils and the Devil Facial Tumour Disease, on request from any Commonwealth or Tasmanian Government agency or the Save the Tasmanian Devil Program.

Conditions relating to compensation for unavoidable impacts

14. To compensate for unavoidable impacts on Tasmanian devils and their habitat, *the person taking the action* must donate no less than $350,000 (GST exclusive) in funding to the Save the Tasmanian Devil Program Appeal, in accordance with any approved Tasmanian devil recovery plan and explicitly for the purpose of "maintenance of the Tasmanian devil Insurance Population".

    At least 20% of this sum must be donated within twelve (12) months of *commencement* of the action, and the balance within seven (7) 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 Appeal Committee. There is no objection to the proponent discussing the specific direction of these funds with the committee.
15. *The person taking the action* must fund and implement their *Proposed contribution to orchid baseline research,* as provided with the finalised environmental impact statement prepared in relation to the action.

Conditions relating to mine closure and rehabilitation

16. The mine closure plan(s) identified in Schedule 3 of *Mining Lease 3M/2011* and section DC4 of *PERMIT Part B No. 8568* (including any revisions to the plan or to Schedule 3 itself) must be provided to *the minister* for information.
17. The decommissioning and rehabilitation plan identified in section DC5 of *Permit Part B No. 8568* (including any revisions) must be provided to *the minister* for information.

18. If *the minister* is not satisfied that the plans referred to in Conditions 16 and 17 will adequately provide for the permanent protection of *EPBC species*, he may require supplements to be prepared for his approval and implemented.

    Any supplements must be approved by *the minister* prior to *commencement* of the action, and must be implemented.

19. *The minister* may at any time review the security deposit lodged by the *person taking the action* pursuant to Schedule 3 of *Mining Lease 3M/2011*. If *the minister* is not satisfied that the security deposit lodged will adequately provide for the implementation of the plans referred to in Conditions 16 and 17, as well as any supplements as described in Condition 18, he may require that the *person taking the action* establishes an additional security deposit in trust, under conditions approved by himself.

    Note: It is anticipated that the security deposit will be reviewed every two (2) years from the commencement of the action, and that any increase required will be commensurate with estimated costs of mine closure, decommissioning and rehabilitation.

Contingency conditions

20. In the event of the following excess *EPBC species* road kill deaths over any twelve (12) month period recorded in accordance with Condition 10, occurring within *the mine site*, or caused by *authorised vehicles* travelling to or from *the mine site*, the following associated contingency compensation responses must be undertaken:

    a) for each wedge-tailed eagle death beyond (1) in any twelve (12) month period, *the person taking the action* must contribute to regional or statewide wedge-tailed eagle monitoring strategies as agreed to by *the department;*

       Note: The contribution can be expected to be in the order of $20,000.

    b) for each spot-tailed quoll death beyond two (2) in any twelve (12) month period, *the person taking the action* must fund a three (3) month program of feral dog and / or cat trapping and / or shooting; and

    c) for each Tasmanian devil death beyond two (2) 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, explicitly for the purpose of "maintenance of the Tasmanian devil Insurance Population".

    Any of the above responses must be undertaken in such a way as to avoid negative impacts on *EPBC species*, and (except in the case of direct financial contributions) in accordance with the advice of a *suitably qualified or experienced expert* and relevant Commonwealth and Tasmanian Government policies where relevant.

Administrative conditions

21. Within fourteen (14) days after the *commencement* of the action, *the person taking the action* must advise *the department* in writing of the actual date of *commencement.*

22. *The person taking the action* must maintain accurate records substantiating all activities associated with or relevant to these conditions, including measures taken to implement the *management documents* required by this approval, and make them available upon request to *the department*. Such records may be subject to audit by *the department* or an independent auditor in accordance with section 458 of the EPBC Act, or used to verify compliance with these conditions. Summaries of audits will be posted on *the department's* website. The results of audits may also be publicised through the general media.
23. *The person taking the action* must notify *the department* of any non-compliance with these conditions within fourteen (14) days of its occurrence, along with a proposed remediation response where appropriate. Once agreed with *the department*, any response must be implemented.
24. By 31 November of each year from *commencement* of the action until *completion* of the action, *the person taking the action* must publish on their website, and provide *the department* with, a compliance report addressing compliance with these conditions since the previous compliance report, including but not limited to the following:
    a) a summary of induction training and awareness activity undertaken or proposed;
    b) an extract for the reporting period of the *EPBC species* register established under Condition 11;
    c) details of progress against actions (including documentary evidence of payments) required under Conditions 12, 14, 15 and 19;
    d) details of any *emergency* travel undertaken outside *daylight hours* as allowed under Condition 7;
    e) information on compliance (and non-compliance) with *management documents;* and
    f) details of any other incidences of non-compliance with these conditions along with any associated remedial action undertaken, underway or proposed.
25. Upon the direction of *the minister, the person taking the action* must ensure that an independent audit of compliance with the conditions of approval is conducted and a report submitted to *the minister.* The independent auditor must be approved by *the minister* and the audit report must address the criteria to the satisfaction of *the minister.*
26. If *the person taking the action* wishes to carry out any activity otherwise than in accordance with *management documents* as specified in the conditions, *the person taking the action* must submit to *the department* for *the minister's* written approval a revised version of the *management document.* The varied activity shall not commence until *the minister* has approved the varied *management document* in writing. *The minister* will not approve a varied *management document* unless the revised *management document* would result in an equivalent or improved environmental outcome over time. If *the minister* approved the revised *management document*, that *management document* must be implemented in place of the *management document* originally approved.

27. If *the minister* believes that it is necessary or convenient for the better protection of *EPBC species* to do so, *the minister* may request that *the person taking the action* make specified revisions to any *management document* specified in these conditions and submit the revised *management document* for *the minister's* written approval. *The person taking the action* must comply with any such request. The revised approved *management document* must be implemented. Unless *the minister* has approved the revised *management document*, then the person taking the action must continue to implement the *management document* originally approved, as specified in the conditions.
28. If, at any time after five (5) years from the date of this approval, *the person taking the action* has not *substantially commenced* the action, then *the person taking the action* must not *commence* the action without the written agreement of *the minister.*
29. Unless otherwise agreed to in writing by *the minister, the person taking the action* must publish all *management documents* referred to in these of approval conditions on their website, within one (1) month of being approved.