

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 9/11/2015 9:10:08 AM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Originating Application for Judicial Review - Form 66 - Rule 31.01(1)
File Number:	QUD1017/2015
File Title:	Australian Conservation Foundation Incorporated v Minister for the Environment
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Case Management Hearing
Time and date for hearing:	18/11/2015, 9:30 AM
Place:	Court No. 2, Level 7, Harry Gibbs Commonwealth Law Courts Building Level 6, 119 North Quay, Brisbane



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 10/11/2015 3:59:30 PM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



## Originating application for judicial review

No. of 2015

Federal Court of Australia  
District Registry: Queensland  
Division: General

### AUSTRALIAN CONSERVATION FOUNDATION INCORPORATED

Applicant

### MINISTER FOR THE ENVIRONMENT

Respondent

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

**Time and date for hearing:**

**Place:** Harry Gibbs Commonwealth Law Courts Building, 119 North Quay, Brisbane

The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority  
of the District Registrar

Filed on behalf of  
Prepared by  
Law firm  
Tel 07 3211 4466  
Email  
Address for service

The Applicant, Australian Conservation Foundation Incorporated  
Michael Berkman (solicitor)  
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The Applicant applies to the Court to review the decision of the Respondent under section 130 and section 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("**EPBC Act**") to approve with conditions ("**decision**") a proposal to develop and operate a new open-cut and underground mine based on Moray Downs, a property 160km northwest of Clermont, a 189km rail link and associated infrastructure – the Carmichael Coal Mine and Rail project ("**Project**").

#### **Details of claim**

The Applicant is a person who is aggrieved by the decision, pursuant to section 487 of the EPBC Act, because:

1. The Applicant is incorporated in Australia.
2. During the 2 years immediately before the decision the Applicant has engaged in a series of activities in Australia for protection or conservation of, or research into, the environment.
3. At the time of the decision the objects or purposes of the Applicant included the protection or conservation of, or research into, the environment.

#### **The decision**

4. On 18 November 2010 Adani Mining Pty Ltd ("**Proponent**") referred the Project to the Respondent pursuant to section 68 of the EPBC Act.
5. On 6 January 2011 the Respondent's delegate decided that the Project was a "controlled action" under section 75 of the EPBC Act subject to the following controlling provisions:
  - a. Sections 12 and 15A of the EPBC Act (World Heritage properties);
  - b. Sections 15B and 15C of the EPBC Act (National Heritage places);
  - c. Sections 16 and 17B (Wetlands of international importance);
  - d. Sections 18 and 18A of the EPBC Act (Listed threatened species and ecological communities);
  - e. Sections 20 and 20A of the EPBC Act (Listed migratory species); and
  - f. Sections 24B and 24C of the EPBC Act (Great Barrier Reef Marine Park).
6. An action is a "controlled action" pursuant to section 67 of the EPBC Act if the taking of the proposed action without an approval would contravene a controlling provision in Part 3 of the EPBC Act.



7. On 24 October 2013 the Respondent found that the Project was also subject to the controlling provisions in section 24D and 24E of the EPBC Act because it was a “large coal mining” project that was likely to have a significant impact on a water resource.
8. On 24 July 2014 the Respondent approved the Project in respect of each of the controlling provisions (“**first approval**”). On 4 August 2015 the first approval was set aside by the Federal Court with the consent of the Respondent.
9. On 14 October 2015 the Respondent approved the Project in respect of each of the controlling provisions (“**second approval**”). The Respondent made the second approval subject to conditions.

#### **Consideration of greenhouse gas emissions from transport by rail, shipping and combustion of the product coal overseas**

10. The Respondent decided to approve the Project with respect to the controlling provisions in sections 12 and 15A of the EPBC Act.
11. Those controlling provisions applied because the Respondent’s delegate had earlier found that the Project was at least “likely to have a significant impact” on the World Heritage Values of the Great Barrier Reef World Heritage Area.
12. Section 136(1) of the EPBC Act required the Respondent to consider any matters relevant to matters protected by those controlling provisions, namely the World Heritage Values of the Great Barrier Reef World Heritage Area.
13. The Respondent noted that climate change has been identified as the most serious threat to the Great Barrier Reef. He further noted that the extent and persistence of impacts caused by climate change and ocean acidification depends “to a large degree on how effectively the issue of rising levels of greenhouse gases is addressed worldwide.”
14. Section 136(2)(e) of the EPBC Act, when read with sections 82(1) and 527E, required the Respondent, in considering the matters under section 136(1), to take into account any other information that he had on the consequences that the Project would have, or was likely to have, on the matter protected – the World Heritage Values of the Great Barrier Reef World Heritage Area – being consequences that were direct within the meaning of section 527E(1)(a) or indirect within the meaning of section 527E(1)(b) and (2).
15. The Respondent had information that overseas emissions associated with the Project, from transport by rail, shipping and combustion of the coal produced by the Project (“**product coal**”) would result in the emission of 4,643,730,979 tonnes of carbon dioxide over the life of the mine.



16. The Respondent considered that the overseas emissions associated with the Project, from transport by rail, shipping and combustion of the product coal were “not a direct consequence of the proposed action”.
17. The Respondent did not consider whether these overseas emissions associated with the Project, from transport by rail, shipping and combustion of the product coal constituted an impact within the meaning of section 527E of the EPBC Act.
18. The Respondent referred to the *National Greenhouse and Energy Reporting Act 2007* the United Nations Framework Convention on Climate Change and its Kyoto Protocol, finding that the countries in which the product coal was burnt would be expected to address the emissions from such burning.
19. He found that determining “actual net emissions” is “speculative” and that it is therefore “not possible to draw robust conclusions on the likely contribution of the project to a specific increase in global temperature” such that “it is difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant matters of national environmental significance”.
20. The Respondent concluded that “direct and consequential greenhouse emissions associated with the project will be managed and mitigated through national and international emissions control frameworks operating in Australia and within countries that are the import market for coal from the project.”
21. The Respondent considered the precautionary principle in section 391 of the EPBC Act. In relation to the World Heritage Values of the Great Barrier Reef World Heritage Area the Respondent did so by expressing agreement with the conclusion reached by the Queensland Coordinator-General. The Queensland Coordinator-General had not considered the effect on the Great Barrier Reef of emissions from transport by rail, shipping and combustion of the product coal overseas.
22. The Respondent considered section 137 of the EPBC Act. In relation to the World Heritage Values of the Great Barrier Reef World Heritage Area the Respondent did so by referring to the EIS assessment. The EIS had not assessed the effect on the Great Barrier Reef of emissions from transport by rail, shipping and combustion of the product coal overseas.

### **Ground 1**

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



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

## **Ground 2**

The Minister made an error of law by:

- a. characterising emissions from transport by rail, shipping and combustion of the product coal overseas as "not a direct consequence of the proposed action", without applying the test in section 527E of the EPBC Act;
- b. failing to comply with the requirement in s 136(2)(e) of the EPBC Act in respect of the information about those emissions.

## **Ground 3**

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

## **Consideration of the impact of the Project on the Black-throated Finch**

23. The Respondent decided to approve the Project with respect to the controlling provisions in sections 18 and 18A of the EPBC Act.
24. Those controlling provisions applied because the Respondent's delegate had earlier found that the Project was at least "likely to have a significant impact" on listed threatened species and ecological communities including the Black-throated Finch.
25. Section 136(1) of the EPBC Act required the Respondent to consider any matters relevant to matters protected by those controlling provisions, namely the protection of the Black-throated Finch from the likelihood of significant impact.
26. Section 136(2)(e) of the EPBC Act required the Respondent, in doing so, to take into account any information the Respondent had on the relevant impacts of the Project.



27. The Respondent concluded that the Project “would not have any unacceptable impacts on listed threatened species in view of all relevant avoidance, mitigation and compensation (offset) measures to be adopted”.
28. The Black-throated Finch has a Recovery Plan made under Division 5, Part 13 of Chapter 5 of the EPBC Act. The Recovery Plan was before the Respondent and the Respondent was obliged by section 139(1)(b) of the EPBC Act not to act inconsistently with the Recovery Plan.
29. The Recovery Plan records the existence and membership of a Black-throated Finch Recovery Team. The Recovery Team made a submission to the Respondent that included the following statements:
  - a. “It is the informed view of the Black-throated Finch Recovery Team that the Black-throated Finch is under very serious threat from planned mining developments in the Galilee Basin and, in particular, the Carmichael mine project. Assessment processes conducted to date have not accurately reflected the national significance of the population or the substantial threats now posed to this population. The measures proposed to manage and mitigate against the threats are inadequate.”
  - b. “Mining developments approved or imminent in the Galilee Basin will have serious detrimental and irreversible consequences for the Black-throated Finch in the region and nationally”.
  - c. “Proposed offset strategies and policy for the Black-throated Finch will not mitigate against the loss of habitat and other negative consequences associated with the mine development, and therefore not adequately address legislated obligations to protect this threatened species”.
  - d. “The development of the Carmichael Coal Mine and other adjacent mines will further reduce the habitat, distribution, population and total numbers of the Black-throated Finch, which is likely to accelerate the trajectory of the species to becoming critically endangered”.
30. The Respondent's reasons did not refer to the content of the Black-throated Finch Recovery Team's submission.

#### **Ground 4**

The Respondent failed to take into account a relevant consideration namely the content of the submission by the Black-throated Finch Recovery Team.

**Orders sought**

1. An Order in the nature of certiorari calling up and quashing the decision.
2. An Order by way of injunction restraining the Respondent from taking any steps to give effect to the decision.
3. An order that the Respondent pay the Applicant's costs of and incidental to the application.

This application was prepared by Saul Holt QC and Emrys Nekvapil of counsel.

**Applicant's address**

The Applicant's address for service is:

Place: Environmental Defenders Office (Qld) Inc.

30 Hardgrave Road

West End QLD 4101

Email: edoqld@edo.org.au; mberkman@edo.org.au

The Applicant's address is Level 1, 60 Leicester Street, Carlton VIC 3053.

**Service on the Respondent**

It is intended to serve this application the Respondent.

It is also intended to serve this application on Adani Mining Pty Ltd as a person whose interests may be affected by a decision in the proceedings.

Date: 9 November 2015

  
Signed by Sean Ryan  
Lawyer for the Applicant