FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: QUEENSLAND
DIVISION: GENERAL

No: QUD1017/2015

AUSTRALIAN CONSERVATION FOUNDATION INC
Applicant

MINISTER FOR THE ENVIRONMENT
and another named in the schedule
Respondents

OUTLINE OF APPLICANT'S SUBMISSIONS

Introduction and summary of grounds

1. The Applicant (**ACF**) seeks review of the decision (the **decision**) of the First Respondent (the **Minister**) made on 14 October 2015 under ss 130(1) and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**) to approve the taking by the Second Respondent (**Adani**) of an action to develop an open-cut and underground coal mine (the **mine**), rail link and associated infrastructure (the **action**).

2. In making the decision, the Minister failed to comply with specific legislative requirements under Parts 9 and 16 of the EPBC Act, in respect of the likely impacts of the action on the Great Barrier Reef[1]. Those failures enliven the

[1] More precisely, the Minister approved the taking of the action in respect of three sets of controlling provisions relating to the three categories of attributes of the Great Barrier Reef protected under Part 3 of the EPBC Act: first, ss 12 and 15A protect the world heritage values of the Great Barrier Reef World Heritage Area; secondly, ss 15B and 15C protect the National Heritage values of the Great Barrier Reef; and finally, ss 24B(2) and 24C(5) and (7) protect the Great Barrier Reef Marine Park from actions taken outside the Marine Park. In this outline, we have used the expression "Great Barrier Reef" to include all of these protected attributes, unless we specifically refer to only one category.

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Court's jurisdiction to quash the decision.[2]

3. The Great Barrier Reef is "one of the richest and most complex natural ecosystems on earth, and one of the most significant for biodiversity conservation",[3] and is included in the World Heritage List because of its outstanding universal values.[4]

4. Australia is obliged, under the World Heritage Convention,[5] to "do all it can … to the utmost of its own resources" to *ensure* the protection of the Great Barrier Reef World Heritage Area and "to *ensure* that effective and active measures are taken" for its protection, "so far as it can with the resources available to it",[6] including by endeavouring to take appropriate legal measures necessary for that purpose.[7] The Commonwealth has power to pass laws for the purpose of meeting Australia's obligations under that Convention,[8] and has done so primarily by enactment of the EPBC Act[9] and (in respect of the Great Barrier Reef specifically) the *Great Barrier Reef Marine Park Act 1975* (Cth), and the exercise of powers conferred on the Executive under those Acts.

5. Greenhouse gas emissions significantly contribute to anthropogenic climate change, which causes seawater to become warmer. Carbon dioxide emissions

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2 Under s 16(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**), s 39B of the *Judiciary Act 1903* (Cth), or both.

3 Statement of Outstanding Universal Values, annexure MCB-1 to the affidavit of Michael Berkman, affirmed and filed 8 February 2016 (the **Berkman Affidavit**).

4 World Heritage Committee, Fifth Session, 5 January 1982 (CC-81/CONF/003/6) at 15 [4].

5 "World Heritage Convention" is defined in s 528 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**) to mean the *Convention for the Protection of the World Cultural and Natural Heritage* done at Paris on 23 November 1972, as amended and in force for Australia from time to time.

6 Emphasis added. See, in particular, articles 4, 5, 6(1) and (2), 11 and 12 of the World Heritage Convention: see *Commonwealth v Tasmania* (1983) 158 CLR 1 at 226, 228 (Brennan J). See also 134 (Mason J); 178 (Murphy J); and 228 (Deane J).

7 World Heritage Convention, article 5(d): *Commonwealth v Tasmania* (1983) 158 CLR 1 at 262 (Deane J).

8 World Heritage Convention, article 34(a) and Commonwealth Constitution, s 51(xxix): (1983) 158 CLR 1 at 136 (Mason J); 178 (Murphy); 228 (Brennan J); 263-264 (Deane J).

9 *Booth v Bosworth* (2001) 114 FCR 39 at 67 [114] (Branson J). The EPBC Act also gives effect to Australia's obligations under other treaties, including, relevantly, the Biodiversity Convention (see, in respect of ss 15B(5)-(6) and 15C(9)-(14), *Secretary to the Department of Sustainability and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth)* (2013) 209 FCR 215 at 249 [125]-[126]) and the Ramsar Convention (see *Minister for the Environment and Heritage v Greentree (No 2)* (2004) 138 FCR 198 at 230 [117]).

cause seawater to become more acidic.[10] The warming and acidification of seawater are the two most serious threats to the Great Barrier Reef,[11] and are the only threats that the *Great Barrier Reef Outlook Report 2014*[12] (the **Outlook Report**) rated as "almost certain" to occur and as having "catastrophic" consequences.[13]

6. The action was not assessed under Part 8 of the EPBC Act. Rather, it was assessed by the Coordinator-General of Queensland (the **Coordinator-General**) under the *State Development and Public Works Organisation Act 1971* (Qld) (the **State Development Act**), pursuant to a bilateral agreement made by the Minister with Queensland under s 45 of the EPBC Act (the **Bilateral Agreement**). Adani prepared an Environmental Impact Statement (the **EIS**), which the Coordinator-General evaluated and then prepared a report (the **Assessment Report**).

7. The EIS and Assessment Report:

   7.1. considered greenhouse gas emissions arising at the mine site in the construction and operation by Adani of the mine, and emissions arising elsewhere from the production by other companies of energy used by Adani in constructing and operating the mine (the **mining emissions**); but

   7.2. expressly did not consider greenhouse gas emissions arising from transport and combustion of the coal produced at the mine (the **combustion emissions**).

8. This approach was consistent with the terms of reference prepared by the Coordinator-General, which determined the scope of the EIS. The Minister accepted and applied this same approach when he first purported to approve the action, on 24 July 2014 (the **first decision**).

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[10] See Expert Report of Professor Ove Hoegh-Guldberg for LSCC [Document 167]; Outlook Report at [6.3.2], Figure 9.1 at 49, Figure 9.2 at 50, Appendix 7 ("Ocean acidification" at 69, 74 and "Sea temperature increase" at 70, 74). Documents included in the Minister's decision brief, which was provided electronically on USB drive as exhibit DK-1 to the Affidavit of Dean Knudson, affirmed on 10 December 2015 (**Knudson Affidavit**), will be referenced in this outline by using the description of the relevant document provided in exhibit DK-2, followed by the document reference number, shown in square brackets.

[11] Statement of reasons [Document 293] (**Reasons**) at [131]; second reading speech for *Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008*, by which ss 24B and 24C were inserted (Commonwealth, *House of Representatives*, 18 June 2008 at 5129 (Peter Garrett).

[12] Annexure MCB-2 to the Berkman Affidavit.

[13] Outlook Report at [9.3.1], [9.4.1], and Appendices 6 and 7.

9. After the first decision was set aside, the Minister was given new material about the impact of greenhouse gas emissions on the Great Barrier Reef. Among other things, this material showed that:

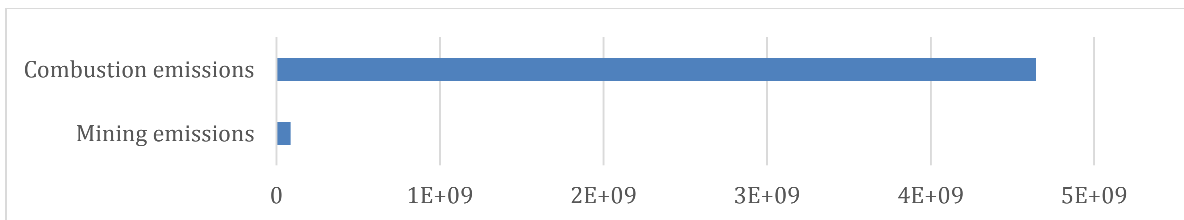
9.1. mean global temperature rises of 3˚C above pre-industrial levels "would result in scenarios where any semblance of reefs to the coral reefs of the Great Barrier Reef Marine Park today would vanish"[14];

9.2. at current global emissions rates (and assuming no further growth in emissions), the global emissions budget to limit mean global temperature rises beneath 2˚C above pre-industrial levels will be exceeded within 20 years,[15] which would still be a very dangerous level of warming for the Reef;[16]

9.3. in order to limit warming to beneath 2˚C above pre-industrial levels, no more than 850 billion tonnes (**Gt**) of carbon dioxide equivalent greenhouse gas emissions (**CO_2-e**) could be emitted globally after 2015;[17]

9.4. the combustion emissions would be about 4.64 Gt of CO_2-e,[18] or about 1/183 of the total available global emissions if warming is to be limited to 2 ˚C; and

9.5. the combustion emissions (4.64 Gt of CO_2-e) would be about 54 times greater than the mining emissions (0.086 Gt of CO_2-e), as shown in the below graph.[19]



[14] Expert Report of Professor Ove Hoegh-Guldberg for LSCC [Document 167] at [33], [43]-[46].

[15] Greenhouse Gas Emissions Joint Expert Report [Document 164] at [20]. The global goal of stabilising mean global temperature rises beneath 2°C is described as "highly unrealistic" in the Expert Report provided by Dr Chris Taylor for Adani [Document 165] at [4.1.3.2]. See also Strategic assessment report for GBR Coastal Zone [Document 170] at 5-154, where the Queensland Government estimated an increase in average surface temperature of between 2.2 ˚C and 5 ˚C by 2070.

[16] Expert Report of Professor Ove Hoegh-Guldberg for LSCC [Document 167] at [2], [33], [39]-[45].

[17] Greenhouse Gas Emissions Joint Expert Report [Document 164] at [15].

[18] Greenhouse Gas Emissions Joint Expert Report [Document 164] at [17].

[19] To be clear, this graph is simply a graphical representation of the figures set out by the Minister at [136] of the Reasons.

10. In making the decision, the manner in which the Minister evaluated the new information about the consequences for the Great Barrier Reef of the combustion emissions was at odds with the statutory scheme constraining the exercise of the power to make that decision, in at least the following three ways.

11. *Ground 2.* The Minister asked himself the wrong question when approaching that information. He[20] had to ask whether those consequences were "relevant impacts" of the action on the Great Barrier Reef, within the meaning of ss 82 and 527E of the EPBC Act, in order to comply with s 136(2)(e). Instead, he applied a range of criteria not sourced in the EPBC Act, on the basis of which he effectively dismissed from further consideration the consequences of the action that posed the greatest threat to the Great Barrier Reef, and information about those consequences. This misdirection constituted an error of law sufficient to ground relief. See paragraphs 48 to 71 below.

12. *Ground 3.* In making the decision, the Minister was required to take account of the "precautionary principle".[21] This principle was unequivocally engaged by the Minister's conclusion (in respect of the combustion emissions) that it was "difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant matters of national environmental significance which might occur as a result of an increase in global temperature".[22] But the Minister did not realise this, and instead relied on the Coordinator-General's conclusion – contrary to his own – that there was sufficient scientific information to conclude that the action would not result in threats of serious or irreversible environmental damage to the Great Barrier Reef. His failure to take account of the precautionary principle constituted an error of law sufficient to ground relief. See paragraphs 72 to 82 below.

13. *Ground 1.* Section 137(a) of the EPBC Act required the Minister, in making the decision, to not act inconsistently with Australia's obligations under the World Heritage Convention. This obligation required, at the very least, that he attempt to quantify the likely impact of the combustion emissions on the world heritage values of the Great Barrier Reef (and other World Heritage places), taking account of the precautionary principle to the extent of any scientific uncertainty,

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[20] In this outline, for the sake of clarity, we have used the masculine pronoun when referring to "the Minister" as a statutory authority in the abstract or to Mr Hunt as "the Minister".

[21] The principle "that lack of full scientific certainty should be not used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage": EPBC Act, ss 3A(b), 136(2)(a), and 391(1) and (3), item 2.

[22] Reasons at [140].

and to consider what conditions or other measures might be used to avoid, mitigate or repair that damage. His failure to turn his mind to what Australia's obligations required constituted a contravention of s 137 and thereby an error of law, which vitiated the decision. See paragraphs 83 to 116 below.

The legislative scheme

14. Relevant sections of the EPBC Act are set out in the Minister's reasons for decision. In addition, the provisions relevant to this application were usefully summarised by Moore and Lander JJ in *Lansen v Minister for Environment and Heritage*[23] and Jessup J in *Tarkine National Coalition Inc v Minister for the Environment*.[24]

15. The EPBC Act has a number of objects, including to provide for the protection of "those aspects of the environment that are matters of national environmental significance"[25] and of heritage.[26] But it does not pursue those objects at all costs.[27] In particular, another object is "to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources".[28] The EPBC Act contains a complex scheme that seeks to balance these different objects, which represent distinct public interests.[29]

16. In simple terms, where a proposed action is likely to have a significant impact on matters of national environmental significance or heritage, and a person refers the action to the Minister to avoid the threat of sanctions, the parliamentary intent evident in the legislative scheme is:

    16.1. to entrust the balancing of competing interests to the Minister, in the exercise of a broad discretion; but

    16.2. to require that the discretion be exercised on the basis of a well-informed evaluation of relevant likely harms and benefits, and in a manner consistent with Australia's obligations under the World Heritage Convention.

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23 (2008) 174 FCR 14 at [37]-[39], [41]-[46], [50]-[53], [59]-[61], [63]-[64].

24 (2015) 233 FCR 254 at [3]-[8], [20]-[33].

25 EPBC Act, s 3(1)(a).

26 EPBC Act, s 3(1)(ca).

27 *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632-633 [40]-[41].

28 EPBC Act, s 3(b).

29 See, similarly, *Kline v Official Secretary to the Governor General* (2013) 249 CLR 645 at 661 [37], 662-663 [42]-[44] (French CJ, Crennan, Kiefel and Bell JJ).

17. The core parts of the legislative scheme directed to that purpose are as follows.

17.1. Part 3 of the EPBC Act contains "controlling provisions", such as ss 12 and 15A, which prohibit and penalise certain actions.[30] Most of these prohibit an action that has, will have, or is likely to have, a significant impact on the "matters protected" by the provision.[31] To this extent, the provisions may be characterised as purely protective.

17.2. The prohibitions may be avoided, however, if the Minister is persuaded to make one of two decisions (see paragraphs 17.3 and 17.7 below), which can be made only if the person proposing to take the action has referred the proposal to the Minister.[32] This impels persons proposing to take an action that might have a significant impact on a matter protected to refer the matter to the Minister so that the competing interests may be balanced by him.[33]

17.3. On referral the Minister must make an informed[34] decision whether the action is a "controlled action" – one that would be prohibited under Part 3, unless approved under Part 9 – at which stage the Minister is required to consider the adverse impacts the action has, will have, or is likely to have on the matter protected.[35]

17.4. If he decides that the action is not a controlled action in respect of any controlling provision,[36] then the prohibitions in Part 3 do not apply, and the person may take the action with impunity.[37] This decision is in the

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30 For ease of reference, the table in s 34 of the EPBC Act sets out the provisions (in column 2) by which action affecting the "matters protected" (identified in column 3) is prohibited. The provisions in column 2 are the potential "controlling provisions" within the meaning of s 67.

31 See, for relevant examples, ss 12(1), 18(1) and 24B(2).

32 Once the proposal is referred, it is an offence to take the action while the referral is with the Minister for decision: s 74AA.

33 In *Minister for the Environment & Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24, Black CJ, Ryan & Finn JJ held at [53]-[57] that impacts could include the consequences of related actions by third parties. In response, the Act was amended by the *Environment and Heritage Legislation Amendment Act (No. 1) 2006* to provide that a person is not liable under Part 3 for the consequences of secondary actions of third parties (see ss 25AA and 28AB) but to define "impact" to include such consequences, in accordance with the Court's holding (see s 527E).

34 See, for example, EPBC Act, ss 72-74 and 76.

35 Where the controlling provision refers to impacts on the matter protected: EPBC Act, s 75(2).

36 In which case, he must give a notice under s 77 to that effect.

37 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480; (2007) 243 ALR 784 at 788 [10] (Stone J). More specifically, the controlling

nature of a ruling from the Minister that the matter does not fall within the scope of the prohibitions.

17.5. If he decides that the action is a controlled action with respect to one or more controlling provisions, then the machinery of Part 8 is engaged, unless s 83 or s 84 result in it not applying.[38] This ensures that the "relevant impacts" of the action – the impacts the action has, will have, or is likely to have[39] – are assessed,[40] and the results of that assessment are given to the Minister, for consideration before deciding whether to approve the taking of the action.[41]

17.6. The existence of "relevant impacts" of an action are a fundamental thread running through the protective scheme of the EPBC Act. At first, they are an element to be objectively proved to the satisfaction of the Court in enforcement of the controlling provisions.[42] But once a matter is referred to the Minister, it is then for the Minister, not the Court, to decide whether the action will have "relevant impacts".[43] If he decides that it will, the "relevant impacts" must then be assessed, and taken into account by the Minister in considering the matters relevant to the "matters protected", when deciding whether to approve the taking of the action.[44]

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provisions do not apply where (taking s 12(2)(c) as an example), "there is in force a decision of the Minister under Division 2 of Part 7 that this section is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner".

38 EPBC Act, s 81(1) and (2).

39 EPBC Act, s 82.

40 See ss 87, which applies unless s 83 or s 84 applies. If s 83 applies, then s 47(2) is intended to ensure that relevant impacts are assessed under a bilateral agreement. If s 84(1) applies, then s 84(3) is intended to ensure that relevant impacts are assessed by the Commonwealth or a Commonwealth agency.

41 The Minister cannot approve an action under s 133(1) until after receiving the "assessment documentation" (as defined in s 133(8)), and is required to take that documentation into account in making the decision (s 136(2)(b)-(d)).

42 For example, if the Minister applied under s 148(1) for a civil penalty for contravention of s 12(1), he would have to prove on the balance of probabilities that the action taken by the respondent had, would have, or was likely to have a significant impact on the world heritage values of a declared World Heritage property.

43 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480; (2007) 243 ALR 784 at 800-803 [59]-[73] (Stone J); *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2008) 166 FCR 54 at 59 [20], 60 [26] (Tamberlin, Finn, Mansfield JJ).

44 EPBC Act, s 136(2)(b)-(e). See also *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 at 265-266 [25]-[28] (Jessup J, with whom Kenny and Middleton JJ agreed). ACF formally contends that the Court should not follow

17.7. After the relevant impacts have been assessed, the Minister must decide[45] (for the purposes of each controlling provision) whether or not to exercise the discretion under s 133(1) to approve the taking of the action, and what conditions to attach to the approval. If the Minister decides, for the purposes of a controlling provision, to approve the taking of the action, then that controlling provision no longer applies to the action.[46]

18. The power in s 133 is not conditioned on the Minister reaching a particular state of satisfaction.[47] In practice, a decision under s 133 to approve the taking of an action is usually premised on a finding that, in light of relevant conditions directed to avoiding, mitigating, repairing or compensating for adverse impacts, "the proposed action will not have an unacceptable impact on" each of the matters protected.[48] This finding is often also the basis for the Minister's conclusion that the approval decision is not inconsistent with Australia's treaty obligations.[49] The expression "unacceptable impacts" is found in s 74B(1) of the EPBC Act, which creates "a kind of summary process" allowing the Minister to give "an early indication if an action is not likely to receive approval",[50] where "it is clear that the action would have unacceptable impacts on a matter protected".[51] The expression does not appear in s 130(1) or s 133(1). Whether or not it is properly called a "finding", the conclusion that a relevant impact on a matter protected is acceptable expresses the outcome of the Minister's evaluation: by approving the action, the Minister "accepts" the adverse impact on the matter protected in exchange for the perceived positive outcomes of allowing the action to proceed.

19. But the discretion of the Minister is not at large. Parliament has struck a balance – protecting the environment and heritage on the one hand, while allowing for ecologically sustainable development on the other – by enacting a careful and

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Blue Wedges Inc v Minister for the Environment, Heritage and the Arts (2008) 167 FCR 463 at 489-492 [113]-[123] (North J) to the extent that it stands for the proposition that s 136(1)(a) leaves entirely to the Minister the question whether or not to consider "relevant impacts".

45 EPBC Act, s 130(1).

46 See, for example, s 12(2)(a).

47 Compare, for example, s 65(1)(a) of the *Migration Act 1958* (Cth): see, for example, *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 207 ALR 12 at 20 [37] (Gummow and Hayne JJ).

48 Reasons at [48], [53], [56], [59], [62], [84], [94], [115], [116], [122], [130], [170], [174].

49 Reasons at [177], [182].

50 *Secretary to the Department of Sustainability and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth)* (2013) 209 FCR 215 at 235-236 [62]-[69] (Kenny J).

51 EPBC Act, s 74B(1)(a).

prescriptive scheme conditioning the approval decision on a process of assessment and evaluation, which informs the decision.

19.1. In making a decision under s 133, the Minister is bound to consider certain matters[52] and take into account certain matters,[53] permitted to consider other matters,[54] required to not act inconsistently with certain treaty obligations,[55] and prohibited from considering any matters that the Minister is not required or permitted by Divn 1 of Part 9 to consider;[56] this has been described as a "closed system" of matters the Minister is required and permitted to consider and take into account.[57]

19.2. By the time the Minister comes to exercise the discretion under s 133, he will ordinarily have decided that: (a) the action would cause significant, adverse relevant impacts on "matters protected" (otherwise, he would not have decided that the action was a "controlled action"[58]); and (b) that the action would, if approved, have net economic and social benefits (otherwise, he would presumably have concluded under s 74B(1)(a) that the significant adverse impacts were "unacceptable", and given notice to that effect). Further, the relevant impacts will have been thoroughly assessed,[59] and may be avoided or ameliorated by appropriate conditions.

20. That is the context for the requirement that the Minister:

20.1. consider matters relevant to any matter protected[60] (which will pull in favour of a decision to protect environmental and heritage matters[61] by refusing to approve the action);

20.2. consider economic and social matters[62] (which pull in favour of a decision to allow use and development, subject to appropriate conditions – thereby

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52 For example, the matters in s 136(1).

53 For example, the matters in s 136(2). See also s 391.

54 For example, s 136(4).

55 For example, ss 137(a), 137A, 138, 139(1)(a) and 140.

56 EPBC Act, s 136(5).

57 *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 at 266 [28] (Jessup J).

58 EPBC Act, ss 67 and 75.

59 See paragraph 17.5 above.

60 EPBC Act, s 136(1)(a).

61 Thus furthering the objects in s 3(1)(a) and (ca).

62 EPBC Act, s 136(1)(b).

ensuring "ecologically sustainable development"[63] – by approving the action);

and in so doing,

20.3. take into account the "principles of ecologically sustainable development" (set out in s 3A), which are the "high-level principles of the approach which has to be taken in the decision-making process";[64]

20.4. take into account the detailed assessment documentation prepared in relation to relevant impacts[65] (in this case, the Assessment Report);

20.5. take into account "any other information the Minister has on the relevant impacts of the action";[66] and

20.6. take into account other information (if any) of the kind specified in s 136(2)(f)-(g).

21. In addition, ss 137-140 require the Minister, in making a decision under s 133 and deciding what conditions to attach under s 134, to not act inconsistently with relevant treaty obligations.

Judicial review of decisions under s 133

22. ACF seeks judicial review of a particular exercise of statutory power. ACF recognises that it is neither useful nor appropriate to submit that the Minister fell into error, by reference only to generalised grounds, such as "had regard to an irrelevant consideration" or "was so unreasonable that no reasonable Minister could have made it."[67] ACF's grounds identify limits that are express or arise by implication from the text of the EPBC Act (understood in context and by reference to its evident purposes), and how those limits were exceeded in making the decision.

23. Because the power under s 133 is not conditioned on the Minister's satisfaction of any particular evaluative conclusion or matter, the principles identified by

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[63] EPBC Act, s 3(1)(b).

[64] *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 at 266 [29] (Jessup J).

[65] EPBC Act, s 136(2)(b)-(d).

[66] EPBC Act, s 136(2)(e).

[67] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 648 [122] (Gummow J).

Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*[68] do not arise in the same way as they do, for example, on judicial review of a decision not to grant a refugee visa under the *Migration Act 1958* (Cth).[69]

24. Instead of conditioning the power under s 133 on the existence of a state of mind, Parliament has required it to be exercised by reference to the carefully expressed considerations and criteria set out in the "closed system" contained in ss 136-140A (and s 391).[70] These are the "grounds upon which [the power] is to be exercised",[71] and are the limits by which the protective purposes of the EPBC Act are achieved, once an action likely to significantly impact matters protected is referred to this Minister. This scheme gives effect to the principle that "the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making".[72]

25. In other words, the requirements of ss 136-140A set out the "framework of rationality" provided by the EPBC Act for the making of a decision under s 133.[73] It sets out what considerations are mandatory, what considerations are irrelevant, and expressly conditions the decision-making process.[74] If the Minister decides to approve the taking of an action, but does not properly apply the framework of rationality contained in those provisions, he has exceeded the limits on the power conferred by s 133(1).[75] He fails to properly apply the framework if he fails to properly direct himself as to the requirements of those provisions[76] or fails to

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[68] (1944) 69 CLR 407 at 432.

[69] See, for example, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 [130]-[131]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 620 [23] (Gummow A-CJ and Kiefel J); *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 207 ALR 12 at 20 [37] (Gummow and Hayne JJ).

[70] *The Queen v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170 at 219 (Mason J).

[71] Compare *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348-349 [23] (French CJ).

[72] EPBC Act, s 3A(d).

[73] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350 [26] (French CJ).

[74] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350 [26] (French CJ).

[75] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350 [27] (French CJ).

[76] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 (Lord Greene MR), explained in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 365 [66] (Hayne, Kiefel and Bell JJ) and 350 [27] (French CJ). This was the species of error identified in *Minister for the Environment & Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24 at 38 [53]. See also *Craig v South Australia* (1995) 184 CLR 163 at 179; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 572 [67] and 574-575 [74].

consider a matter he is bound by those provisions to consider.[77] These failures belong to "recognised species of … error in the decision making process", and do not involve an attack on the outcome of that process.[78] In terms of the grounds in s 5 of the ADJR Act, they might be characterised as belonging to the species of error identified in s 5(1)(b) ("procedures that were required by law to be observed in connection with the making of the decision were not observed") or s 5(1)(f) ("that the decision involved an error of law").

26. Provided the Minister has properly understood and applied the framework in ss 136-140A, there is then a relatively wide (though not unconstrained) "area of decisional freedom",[79] which may for that reason be difficult to interfere with on judicial review.[80] The Court cannot set aside a decision under s 133(1) only because it disagrees with the weight the Minister placed on a particular matter, or the evaluative judgment made by him on the basis of the relevant matters.[81]

27. In this case, the Minister has provided a carefully considered statement of reasons for his decision.[82] A primary purpose for providing reasons is to provide sufficient information to parties affected by the decision to enable them to determine whether a challengeable error has been made.[83] That is evidently so where there is an obligation to give reasons on application under s 13 of the ADJR Act by a person with standing to apply under that Act for judicial review of that decision. The obligation to provide reasons serves a range of other public interests.[84]

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77 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 (Lord Greene MR), explained in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 365 [66] (Hayne, Kiefel and Bell JJ) and 350 [27] (French CJ). This was the species of error grounding relief in *Lansen v Minister for Environment & Heritage* (2008) 174 FCR 14 at 32 [74] (Moore and Lander JJ) and *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 214 FCR 233 at 237-244 [23]-[64] (Marshall J)].

78 See *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28 at [60] (Allsop CJ, Griffiths and Wigney JJ). To be clear, ACF should not be taken, by relying on decisions such as *Li*, to be contending that the Minister's decision was "unreasonable" in any generalised sense.

79 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [28] (French CJ). See also at 363 [66] (Hayne, Kiefel and Bell JJ).

80 *Buck v Bavone* at 118-119 (Gibbs CJ).

81 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332at 351 [30] (French CJ).

82 The Reasons [Document 293].

83 *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 at 642 [154] (Warren CJ).

84 *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 at 661 [225] (Ashley and Redlich JJA, quoting Kirby J in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 242).

28. The manner in which reasons provided by a Commonwealth Minister are to be construed depends on the facts and circumstances of each case. Here, the Reasons have been prepared by the Minister's Department, in the expectation that they will be carefully analysed, and have been drafted by those with considerable expertise. They have been prepared in conjunction with a carefully drawn Legal Considerations Report, [85] and Departmental Advice on Matters of National Environmental Significance, [86] and in consultation with lawyers. [87] In those circumstances, the Reasons should be construed with considerable care, and without significant hesitation about the degree of scrutiny to be applied to them.[88]

Assessment of climate change impacts in the EIS and the Assessment Report

29. Grounds 1, 2 and 3 relate to the particular manner in which the Minister dealt in the Reasons with the combustion impacts. That aspect of the Reasons must be understood in light of the way in which climate change impacts were assessed under the Bilateral Agreement.

30. On 26 November 2010:

    30.1. the Coordinator-General declared the action to be "a significant project for which an EIS is required" under s 26(1)(a) of the State Development Act.[89] Consequently, among other things, Adani was required to prepare the EIS addressing the Coordinator-General's terms of reference,[90] and the Coordinator-General was required to prepare the Assessment Report evaluating the EIS.[91]

    30.2. the Queensland Government advised the Minister that the Bilateral Agreement was engaged.[92]

31. Mr Knudson deposes that on 6 January 2011 (the same day the Minister decided that the action was a controlled action) a delegate of the Minister decided that the

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85 EPBC Act legal considerations report [Document 005].

86 Departmental Advice on Matters of National Environmental Significance [Document 073].

87 Proposed approval decision brief [Document 002] at [17]-[19].

88 *Jaffarie v Director General of Security* [2014] FCAFC 102 at [42]-[43], [45] (Flick and Perram JJ; *Soliman v University of Technology, Sydney* [2012] FCAFC 146 at [57] (Marshall, North and Flick JJ).

89 Affidavit of Dean Knudson, affirmed on 10 December 2015 (**Knudson Affidavit**) at [12].

90 State Development Act, s 32(1)(a).

91 State Development Act, s 35(3).

92 Reasons at [7].

project was to be assessed under s 47 of the EPBC Act.[93] If the Queensland Government's earlier advice was correct, s 83(1) had the effect of disapplying Part 8 without the need for any decision by the Minister. The Bilateral Agreement is not before the Court, and ACF is prepared to assume, without accepting, that the conditions in s 83(1)(b) and (c) were met in respect of the action.

The terms of reference

32. The terms of reference relevantly provided as follows:[94]

> Provide an inventory of projected annual emissions for each relevant greenhouse gas, with total emissions expressed in 'CO2 equivalent' terms for the following categories:
>
> - scope one emissions, where 'scope one emissions' means direct emissions of greenhouse gases from sources within the boundary of the facility and as a result of the facility's activities
>
> - scope two emissions, where 'scope two emissions' means emissions of greenhouse gases from the production of electricity, heat or steam that the facility will consume, but that are physically produced by another facility.
>
> Briefly describe method(s) by which estimates were made…

33. It then set out detailed requirements about mitigation measures, including a requirement that the environmental management plan in the EIS include a specific module addressing greenhouse gas abatement, by reference to six specific measures.

The EIS

34. Accordingly, Adani's EIS:

 34.1. included documents containing a precise inventory of the mining emissions, a detailed analysis of mitigation and abatement measures, and an environmental management plan containing specific commitments directed to mitigation and abatement.[95]

 34.2. contained no information or evaluation in respect of the combustion emissions.

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[93] Knudson Affidavit at [14].

[94] EIS Volume 4, Appendix B: Final terms of reference for the environmental impact statement [Document 034] at 56-57 [3.6].

[95] EIS Volume 3, Section 8: Greenhouse Gas Emissions [Document 34] and EIS Volume 3, Section 13: Draft Environmental Management Plan [Document 34] at [13.5.8].

The Assessment Report

35. The Coordinator-General also confined the evaluation in the Assessment Report to "scope 1" and "scope 2" emissions. He noted that a number of submissions received about the EIS[96] raised issues about the adequacy of the emissions analysis, the lack of consideration of the combustion submissions, and the effects of the emissions, including global warming and climate change.[97] (In fact, of 14,396 online submissions received, 7,368 related to greenhouse gas emissions and/or climate change.[98])

36. In the Assessment Report, he explained the limitation to scope 1 and 2 emissions (ie, the mining emissions):

> The proponent is required to report on GHG [greenhouse gas] emissions under the provisions of the [*National Greenhouse and Energy Reporting Act 2007* (Cth) (the **NGER Act**]. The NGER Act prescribes an accounting methodology and requires the publication of results.
>
> Under the NGER Act, boundaries have been established to assist in determining emissions attributable to a project. In terms of emissions boundaries, three scopes have been identified:
>
> - Scope 1 (direct) emissions-includes the release of GHG emissions as a direct result of activities undertaken at a facility. They are emissions over which the entity has a high level of control.
> - Scope 2 (energy direct) emissions-includes the release of GHG emissions from the generation of purchased electricity, steam, heating or cooling consumed by a facility, but do not form part of the facility. Scope 2 emissions are indirect emissions that entities can easily measure and significantly influence through energy efficiency measures.
> - Scope 3 (indirect) emissions-includes all indirect emissions that are not included in Scope 2. They are a consequence of the activities of the facility, but occur at sources or facilities not owned or controlled by the entity. Scope 3 emissions are not defined in the NGER Act because reporting them is not mandatory.
>
> In accordance with the NGER Act accounting methodology framework and the [terms of reference] for the project, the proponent did not include Scope 3 emissions in the assessment of GHG emissions.

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[96] Section 34(1) of the State Development Act provided that, during the submission period, any person could make a submission to the Coordinator-General about the EIS.

[97] Assessment Report [Document 004] at [5.3.1] at 218. See also Table 3.2 at 18.

[98] I-Public Comment Submissions/074-A-I1-EIS subs/074 Electronic submissions/EIS subs_online/Categorisation of online submissions.xls [Document 74].

37. Having then carefully evaluated Adani's treatment of the mining emissions, he continued:

> Consideration of Scope 3 emissions is not a requirement of either Australian Government or state government legislation or policy. I am satisfied that the GHG emissions and climate change assessments provided in the EIS and AEIS adequately quantify impacts [ie, of Scope 1 and Scope 2 emissions] as a result of the project. I note that the TOR for the EIS does not require Scope 3 emissions to be included in the proponent's assessment of GHG emissions.
>
> I am satisfied that the control strategies provided in the mine, off-lease and rail EMPs and the Proponent Commitments Register (Appendix 7) will minimise GHG emissions and provide for the effective management of climate change impacts.

Basis of the Coordinator-General's approach

38. The Assessment Report has two functions. Under the State Development Act, it had to evaluate the matters addressed by Adani in the EIS. Under the Bilateral Agreement, it had to assess the "relevant impacts" of the action for the purpose of informing the Minister's decisions under s 133 of the EPBC Act.

39. It is likely that the Co-ordinator General limited the terms of reference to the mining emissions either because he applied the accounting approach under the NGER Act, or because he applied decisions of the Land Court of Queensland (the **Land Court**) under the *Mineral Resources Act 1989* (Qld) (the **Mineral Resources Act**), or both. Either way, the limitation was alien to, and at odds with, the task of assessing "relevant impacts" as defined in ss 82 and 527E of the EPBC Act.[99]

40. The purpose of the NGER Act is "to introduce a single national reporting framework for the reporting and dissemination of information related to greenhouse gas emissions, greenhouse gas projects, energy consumption and energy production of corporations" in order to accomplish specified objects.[100] It requires a "controlling corporation" to become registered,[101] and then to provide regular reports,[102] if the total amount of greenhouse gases emitted from the operation of facilities under the "operational control" of entities that are members

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[99] *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 at 268 [39] (Jessup J).

[100] NGER Act, s 3.

[101] NGER Act, ss 12(1) and 17(1).

[102] NGER Act, s 19.

of the controlling corporation's group exceed certain thresholds.[103]

41. The scope of the reporting obligations is limited by defining "emission of greenhouse gas" to mean only "a scope 1 emission of greenhouse gas" or "a scope 2 emission of greenhouse gas",[104] and leaving the definition of "scope 1 emission" and "scope 2 emission" to the regulations made under the NGER Act.[105] They are defined as follows:[106]

41.1. "scope 1 emission of greenhouse gas, in relation to a facility, means the release of greenhouse gas into the atmosphere as a direct result of an activity or series of activities (including ancillary activities) that constitute the facility"; and

41.2. "scope 2 emission of greenhouse gas, in relation to a facility, means the release of greenhouse gas into the atmosphere as a direct result of one or more activities that generate electricity, heating, cooling or steam that is consumed by the facility but that do not form part of the facility".

42. After the Coordinator-General completed the Assessment Report, the Land Court heard an objection to the grant to Adani of mining leases under s 268(1) and (2) of the Mineral Resources Act. In an expert report relied on by Adani, Dr Christopher Taylor explained that:[107]

> [the terms of reference] followed convention in Australian GHG reporting by not requiring an assessment of Scope 3 emissions, such as those associated with the combustion of product coal. It should also be noted that this convention is adopted internationally and is consistent with the internationally accepted Greenhouse Gas Protocol developed by the World Resources Institute. Scope 3 emissions inventories are typically prepared to help an organisation understand its value chain (upstream and downstream) emissions. As briefly outlined in the joint report, an organisation has control over its direct Scope 1 emissions; however it only has influence (rather than control) over its indirect emissions. An organisation can, therefore, exert influence over how its product is used, but under accepted carbon accounting principles, it does not take responsibility for value chain emissions.

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[103] NGER Act, s 12(1) and 13(1). A group entity has "operational control" over a facility if, among other things, it has the authority to introduce and implement operating policies, health and safety policies and/or environmental policies: s 11(1)(a). Alternatively, a group entity has operational control over a facility if the Regulator makes a declaration to that effect under s 55.

[104] NGER Act, s 7 (definition of "emission").

[105] NGER Act, s 10(1)(a) and (aa).

[106] *National Greenhouse and Energy Reporting Regulations 2008* (Cth), regs 2.23 and 2.34, respectively.

[107] Expert Report of Information provided by Dr Chris Taylor for Adani [Document 165 –] at [4.1.1.2]-[4.1.1.4].

> The emission of GHG from a power station supplied by a coal mine is just one example of value chain or Scope 3 emissions. Considering other examples of value chain emissions demonstrates that it is entirely inappropriate for an organisation to take responsibility for such emissions. For example, a local petrol station would be accountable for emissions from the primary production and transport of oil, the refining process, fuel distribution and vehicle emissions from private and commercial vehicles.
>
> The ToR and EIS approach is also consistent with EIS GHG assessments prepared for other resource projects in Queensland in recent years. By all normal GHG accounting principles, the Scope 3 emissions from the burning of product coal are and should be attributed to the power station burning the coal and not to the mine itself.
>
> From this perspective, the impacts of the mine are those resulting from Scope 1 and Scope 2 emissions and the EIS assessment is adequate. This being the case, there was (and is) no need for the EIS to assess climate change impacts as Scope 1 and Scope 2 emissions from the mine are insignificant in a global context. As Scope 1 and Scope 2 emissions from the mine are insignificant, the mine will not cause serious and material environmental harm by contributing to climate change and ocean acidification.

Earlier decisions of the Land Court

43. The objector in the Land Court relied on the severe adverse environmental impacts of direct and indirect emissions from the mine.[108] It called expert evidence about the impacts of the emissions, including the combustion emissions, on the Great Barrier Reef (including evidence of the matters summarised in paragraph 9 above), which was then also provided to the Minister before he made the decision. Among other things, the objector contended that the impact of the combustion emissions on the Great Barrier Reef constituted an "adverse environmental impact caused by" the operations carried on under the authority of the proposed mining lease, within the meaning of s 269(4)(i) and (j) of the Mineral Resources Act. The Land Court rejected the objector's contentions,[109] following its earlier decision in *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-Op Ltd*.[110]

44. In *Xstrata*, the objectors submitted that the Land Court should give the word "impact" (as used in s 269(4)(j) of the Mineral Resources Act) the meaning given to that word (as used in s 75 of the EPBC Act) in *Minister for Environment and Heritage v Queensland Conservation Council Inc*[111] (the ***Nathan Dam case***). In the *Nathan Dam case*, the Full Court held that "impact" was broad enough to

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108 See *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48 at [420]-[421].

109 *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48 at [441]-[446].

110 (2012) 33 QLCR 79.

111 (2004) 139 FCR 24.

include consequences "which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not".[112] The objectors in *Xstrata* submitted that s 269(4)(j) of the Mineral Resources Act should similarly be construed "so as to permit the Court to consider the impacts of transporting and burning the coal, which are the actions of others and not the applicants in this case".[113] The Land Court disagreed, noting the significant differences between the Mineral Resources Act and the EPBC Act.[114] That point of distinction now appears on the face of the EPBC Act, because s 527E was enacted, in effect to give statutory force to the construction of "impact" adopted in the *Nathan Dam case*.

45. Whether the Coordinator-General's approach to assessment of the impact of the combustion emissions was based on the NGER Act, the construction of the Mineral Resources Act in *Xstrata*, or both, he did not direct himself to the question whether that impact was a "relevant impact" within the meaning of the EPBC Act (as defined by ss 82 and 527E), which therefore needed to be assessed in a report meeting the description in ss 47(4), 130(2) and 136(2)(b) of the EPBC Act.

The Minister adopted the same approach in making the first decision

46. In making the first decision, the Minister effectively adopted the Coordinator-General's approach and excluded consideration of the impact on the Great Barrier Reef of the combustion emissions, without considering whether this was a "relevant impact" required under the Bilateral Agreement to be assessed in the Assessment Report.

47. This is significant because the Reasons are substantially based on the statement of reasons for the first decision, but with a superadded section on climate change[115] and with the words "and after giving consideration to the greenhouse gas emissions from mining operations and from the burning of the mined coal," inserted into three paragraphs.[116] Importantly for grounds 1 and 3, the passages of

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112 *Nathan Dam case* (2004) 139 FCR at 39 [57].

113 *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-Op Ltd* (2012) 33 QLCR 79 at [541].

114 *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-Op Ltd* (2012) 33 QLCR 79 at [543]-[549]. This reasoning was upheld by the Supreme Court of Queensland in *Coast and Country Association of Queensland Inc v Smith* [2015] QSC 260 at [38]-[39] (Douglas J).

115 Compare paragraph [34] of the statement of reasons for the first decisions (Annexure MCB-3 to the Berkman Affidavit) and Reasons at [40], [131]-[141].

116 Reasons at [48], [53] and [56].

the Reasons with respect to the precautionary principle and consistency with Australia's obligations under the World Heritage Convention are drafted substantially in accordance with the reasons for the first decisions and take no account of the significance of the new information provided to the Minister about the impact of the combustion emissions.

Ground 2: the Minister misdirected himself in respect of ss 82, 136(2)(e) and 527E

48. The Minister failed to ask himself whether the impact of the combustion emissions on the Great Barrier Reef was a "relevant impact", within the meaning of ss 82 and 527E, or indeed whether it was an "impact" at all. This led to a failure to correctly characterise the significant new information as falling squarely within s 136(2)(e), and a failure to take account of that information *as information about relevant impacts of the action*.

49. The scheme in s 136(2)(b)-(g) is drafted on the assumption that the specific documents or information referred to contains the information relevant to the Minister when considering the matters in s 136(1).[117] In particular, the scheme is premised on the assumption that the "assessment documentation" referred to in s 136(2)(b)-(d) will contain an assessment of the relevant impacts on matters protected, of a kind commensurate with the nature of the application.[118]

50. Where s 83 applies, the Minister is required by s 136(2)(b) to take into account an assessment report, prepared under the provisions of the bilateral agreement required by s 47(4). The Coordinator-General's approach in this case may be contrasted with the Tasmanian authority's approach in *Tarkine National Coalition Inc v Minister for the Environment*,[119] where that authority (wrongly) concluded that it did not have power under the Tasmanian Act to assess cumulative impacts, but went on to do so for the purpose of informing the Minister's decision under Part 9 of the EPBC Act.[120] Here, the Coordinator-General concluded that the impact of the combustion emissions on the Great Barrier Reef was beyond the scope of the EIS, and did not evaluate those impacts,

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[117] *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 at 265 [27].

[118] Where Part 8 applies, s 87 requires the Minister to consider which approach is appropriate. By reaching the state of satisfaction in s 47(2), and exercising the power under s 45(1) to enter into a bilateral agreement, the Minister has, in a sense, predetermined that the report provided for in the bilateral agreement in compliance with s 47(4) will appropriately assess the relevant impacts of the actions falling within its scope.

[119] (2015) 233 FCR 254.

[120] See *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 at 274-275 [56]-[57].

or provide any information about them to the Minister. As a result, the Assessment Report failed to assess the most significant relevant impact of the action for the Great Barrier Reef.

51. This highlights the importance of the obligation under s 136(2)(e), which requires the Minister, in considering the matters mandated by s 136(1), to take into account "any other information the Minister has on the relevant impacts of the action". In this case, the Minister first had to take into account the information about relevant impacts in the Assessment Report (under s 136(2)(b)), and then had to determine whether he had any information about "relevant impacts" of the action, other than that contained in the Assessment Report.[121]

52. He could only correctly undertake this task if he understood the meaning of "relevant impacts", as defined in ss 82 and 527E.[122] If he misdirected himself in this regard, the decision-making process miscarried.[123] Or, to put it another way, such misdirection would result in him failing to engage in "an active intellectual process" directed at the subject-matter of s 136(2)(e), by failing to give weight to the information – as information about the relevant impacts of the action – "as a fundamental element in making his determination".[124]

53. But the Minister approached the task quite differently. He applied a range of criteria from outside the EPBC Act to justify a differential treatment of the combustion emissions, whereby he did not need to quantify their impacts or adopt any measures (such as conditions) to mitigate or repair the damage they will cause to the Reef.

54. The outcome of this differential treatment may be most clearly seen in the contrast between:

    54.1. the detailed mitigation measures imposed on Adani under the environmental management plans it prepared in respect of scope 2 emissions (one category of emissions arising as an "indirect

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[121] EPBC Act, s 136(2)(e).

[122] *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 at 268 [39].

[123] See *Nathan Dam case* at 39 [56].

[124] *Sino Iron Pty Ltd v Secretary of the Department of Infrastructure and Transport* [2014] FCAFC 103 at [124] (Perry J). See also *Commissioner of Police (NSW) v Industrial Relations Commission (NSW)* [2009] NSWCA 198; (2009) 185 IR 458 at 469 [73] (Spigelman CJ); *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCAFC 59; (2011) 180 LGERA 99 at [44]; *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 244 [52] (Gleeson CJ, Heydon and Crennan JJ) and 256 [102] (Gummow and Hayne JJ).

consequence”[125] of the action); and

54.2. the complete absence of any conditions or other mitigation or offset measures imposed on Adani in respect of the combustion emissions (another category of emissions arising as an indirect consequence of the action).

55. In the superadded portion of the Reasons dealing with climate change,[126] the Minister:

55.1. acknowledged that climate change is the most serious threat to the Great Barrier Reef;[127]

55.2. noted that the EIS related only to scope 1 and scope 2 emissions,[128] and described the operation of the NGER Act;[129]

55.3. set out the quantification by Dr Taylor (for Adani) of the combustion emissions, as compared to the mining emissions;[130]

55.4. explained that the mining emissions would occur within Australia, whereas the combustion emissions were expected to occur mostly overseas, and referred to the measures identified by the proponent in its EIS and environment management plans to minimise the mining emissions.[131]

56. In respect of the combustion emissions, the Minister should then have asked whether they were impacts – within the meaning of s 572E – that the action would have, or was likely to have, on the “matters protected” in respect of the Great Barrier Reef.

57. The consequences for the Great Barrier Reef of climate change resulting from the combustion emissions are impacts of the action of the same species as the “downstream” consequences considered in the *Nathan Dam case* (which species has now been given statutory effect in s 527E(2)).

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[125] EPBC Act, s 527E(1)(b).

[126] Reasons at [131]-[141].

[127] Reasons at [131].

[128] Reasons at [132].

[129] Reasons at [133]-[135].

[130] Reasons at [136].

[131] Reasons at [137].

58. Had the Minister applied s 527E, he would have realised that the consequences for the Reef of other companies transporting and burning the coal produced by the action were "relevant impacts" of the action[132] just as much as scope 1 emissions or water runoff. He would have realised that the impacts of the combustion emissions were "indirect consequence" impacts of the action in the same way as scope 2 emissions. This did not require him to give those impacts any particular weight in reaching his decision, but without understanding that they were relevant impacts, he could not properly comply with s 136(2)(e).

59. Instead of applying ss 82 and 527E, the Reasons stated:[133]

> 138. While the proponent has identified a quantity of overseas GHG emissions that may result from burning the coal, these emissions are not a direct consequence of the proposed action. The actual quantity of emissions that is likely to be additional to current global GHG emissions depends on a range of variables. They include: whether the coal replaces coal currently provided by other suppliers, whether the coal is used as a substitute for other energy sources, and the efficiency of the coal burning power plants. The international multilateral environment agreements, the United Nations Framework Convention on Climate Change and its Kyoto Protocol, provide mechanisms to address climate change globally. Under these agreements, the nations responsible for burning the coal produced from the proposed mine would be expected to address the emissions from transport by rail, shipping and combustion of the product coal in their own countries.
>
> …
>
> 140. I found that the quantity of overseas GHG emissions from the Carmichael Coal Mine and Rail project proceeding is subject to a range of variables. It is possible to determine a possible total quantity of these emissions that may occur, as provided under paragraph 136. However, determining the actual net emissions from transport by rail, shipping and combustion of the product coal that would occur as a result of the project, after taking account of the variables outlined above, is speculative at this stage. It is therefore not possible to draw robust conclusions on the likely contribution of the project to a specific increase in global temperature. As a result it is difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant matters of national environmental significance which may occur as a result of an increase in global temperature.

60. In this passage, the Minister directed himself by reference to several criteria alien to, and at odds with s 527E,[134] which led to his "difficulty" in identifying the

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132 The mine and rail link facilitate to a major extent the transport and combustion of the coal (s 527E(e)); they are within the contemplation of Adani, and a reasonably foreseeable consequence of the mine (s 527E(f); and the impact on the reef is (at least after the filing and service of [Document 167 – Expert Report of Professor Ove Hoegh-Guldberg for LSCC]) within the contemplation of Adani and a reasonably foreseeable consequence of the transport and combustion of the coal (s 527E(g)).

133 Reasons at [138] and [140].

134 Compare *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480; (2007) 243 ALR 784 at 794 [37] (Stone J), where her Honour noted

relationship (clearly identified, relevantly to his considerations, in ss 82 and 527E) between the taking of the action and the identified likely effect on the Great Barrier Reef of global warming and ocean acidification.

61. First, the Minister asked himself whether approving the action would cause a net increase in global emissions, in light of a number of "variables", including whether the coal from the mine would replace coal from other suppliers. But that question is irrelevant to the question he should have asked under ss 82 and 527E. If the action is approved, a consequence of the actions of the companies that transport and burn the coal will be emission of 4.64 GT of CO_2-e into the atmosphere, which will result in warming, which will adversely affect the Great Barrier Reef. It is the CO_2-e contained in coal from this mine – not another mine that might otherwise supply the power plant – that is likely to adversely impact the Reef. As the joint expert report filed in the Land Court noted, "All Emissions from the burning of product coal from this Mine will have a climate impact in the physical cause-effect sense".[135]

that nothing in the Minister's reasons indicated that she had given the term "impact" a meaning different to that in s 527E. It may also be noted that at [39] her Honour refused to distinguish the earlier decision of Dowsett J in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736; (2006) 232 ALR 510 on the facts, noting that – under s 75 – the question for the Minister was "not whether there is an impact but whether that impact is, will be or is likely to be significant". In this case, of course, the question for the Minister *was* whether there was likely to be an impact from the transport and combustion of the product coal, and *not* whether that impact would be "significant".

135 Greenhouse Gas Emissions Joint Expert Report [Document 164] at [12]. Where notions of causation are established by statute (such as in s 527E of the EPBC Act), they are to be understood by reference to the statutory subject, scope and purpose of that Act rather than applying common law principles of causation: *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 581-587 [41]-[55] (McHugh J) and 596-598 [95]-[101] (Gummow, Hayne and Heydon JJ). That said, the decision of the House of Lords in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 (recently discussed in *Amaca Pty Ltd v Booth* (2011) 246 CLR 36 at 62-63 [70]-[71] and *Williams v The Bermuda Hospitals Board* [2016] UKPC 4 at [26]-[40]) illustrates the underlying logic, as applied to the text and scheme of the EPBC Act. If (a) extreme coral bleaching is caused by anthropogenic climate change, and (b) anthropogenic climate change is predominantly caused by greenhouse gas emissions, then (c) coral bleaching is a consequence of an action that results in significant greenhouse gas emissions. Or to put it a different way: Parliament cannot have intended that a catastrophic consequence, resulting in an indivisible way from multiple actions, was not – for that reason - intended to be an impact of any of those actions. See *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 at [38].

62. Second, the harm to the Great Barrier Reef caused by the combustion emissions is a relevant impact in respect of the Reef unless:

62.1. it is not likely to occur (this is what Kiefel J meant, when her Honour observed in *Queensland Conservation Council Inc v Minister for the Environment and Heritage*[136] that the Minister would "exclude from further consideration those possible impacts which lie in the realms of speculation"); or

62.2. it did not meet the test in s 527E(2)((e), (f) or (g)) (this is, in effect, what was meant by the Appellant in the *Nathan Dam case*, when he submitted that "the impacts of the actions of presumptive irrigators [lay] 'in the realms of speculation'"[137]).

63. When the Minister characterised the determination of combustion emissions as "speculative at this stage", he applied neither of these criteria. The Minister applied a different and extraneous criterion, seemingly informed by questions of responsibility for global emissions, rather than focusing on the effect on matters protected of the emissions arising as a consequence of the action.

64. Third, the Minister considered various domestic and international schemes by which responsibility for addressing climate change is allocated to different polities. The attribution of responsibility is not relevant to the concept of "relevant impacts" in the EPBC Act.[138] The provisions enabling proper consideration by the Minister of "relevant impacts" are concerned with protection rather than the attribution of responsibility.[139]

65. Fourth, the Minister maintained the distinction between the mining emissions (scope 1 and scope 2 emissions under the NGER Act) and the combustion emissions, without considering whether the distinction, introduced by the Coordinator-General, was based on either:

65.1. the NGER Act, in which case the distinction was completely alien to the scheme of the EPBC Act, and had no footing in s 527E; or

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136 [2003] FCA 1463 at [39].

137 At 35 [39].

138 See *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736; (2006) 232 ALR 510 at 522 [57] (Dowsett J).

139 *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 at [35] (Kiefel J).

65.2. the decision of the Land Court in *Xstrata*, in which case he failed to appreciate that the Land Court expressly declined to apply the meaning of "impact" identified in the *Nathan Dam case* (and now reflected in s 527E), which he was bound to apply.

66. Instead of considering the basis of the distinction, the Minister sought to further bolster it on the basis that mining emissions would occur mainly in Australia (and Australia was therefore responsible for addressing them) whereas combustion emissions would occur mainly overseas (and the countries where they occurred would be responsible for addressing them). Again, this criterion is irrelevant to, and at odds with, the terms of s 527E. Climate change occurring as a consequence of emissions from the transport or combustion of coal in India or China will harm the Reef in the same way as climate change occurring as a consequence of scope 1 or scope 2 emissions.

67. The Minister would not – indeed could not – have made these errors if he had applied s 527E of the EPBC Act to combustion emissions.

68. And finally, the Minister appears to have taken into account a range of matters that might have been properly considered *after* the information had been properly taken into account – as information about relevant impacts – in determining that it was difficult to identify any "relevant impacts" on the Great Barrier Reef. As a result, he did not attach any conditions directed to mitigating, repairing, offsetting or compensating for those impacts.

69. The Minister's failure to treat the effect on the Great Barrier Reef of the combustion emissions as a "relevant impact" is also evident in the structure of the Reasons. The relevant impacts on the Reef in each of its manifestations as a matter protected under Part 3 are discussed sequentially, early in the Reasons, adopting a structure relevantly equivalent to the structure of the statement of reasons for the first decision. Climate change is then cordoned off in the superadded section.[140] Despite the insertion of the words "and after giving consideration to the greenhouse gas emissions from mining operations and from the burning of the mined coal," in the final sentence of each part dealing with a relevant matter protected, this add-on approach led to a failure to properly consider climate change impacts on the Reef.

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[140] Reasons at [131]-[141].

70. For example, the Minister's findings about impacts on the world heritage values of the Great Barrier Reef World Heritage Area, are made in a world where climate change does not apparently exist. This is most evident in the Minister's continual references to the distance between the mine and the Great Barrier Reef, a matter completely irrelevant to the "catastrophic" and "almost certain" threats[141] posed by climate change:[142]

> I found that given the expanses of terrestrial and aquatic habitat that separates the proposed action and the GBRWHA, the proposed action will not impact on the world heritage values of the GBRWHA as it is unlikely to impact on visual amenity (both above and below the ocean surface), seabirds, dugongs, whales, dolphins or marine turtles …
>
> I found that given that the proposed action does not include shipping, anchoring of vessels, dredging or sediment movement, the proposed action is unlikely to impact on the world heritage values of the GBRWHA, as it is unlikely to impact on coral or marine hydrodynamic processes …
>
> I found that given that the proposed action does not include shipping or anchoring of vessels, dredging or sediment movement, the proposed action is unlikely to impact on the world heritage values of the GBRWHA, as it is unlikely to impact on coral reef diversity, seagrass meadows, listed threatened species or migratory species…
>
> I found that given the distance that separates the proposed action and the GBRWHA, the proposed action will not impact on the Integrity of the GBRWHA.

71. It is not possible to conclude that, had the Minister properly directed himself to the question whether the impacts on the Great Barrier Reef of the combustion emissions were "relevant impacts", and then taken account of the new information (including the compelling expert evidence) – as information about relevant impacts – it would not have made a difference to the manner in which he considered that information in making his decision. The error was therefore material, and is sufficient to ground the Court's jurisdiction to quash the decision.

Ground 3: the Minister failed to take account of the precautionary principle

72. In any event, the Minister's conclusion that determining the actual combustion emissions was "speculative at this stage", that it was "therefore not possible to draw robust conclusions on the likely contribution of the project to a specific increase in global temperature", and that, as a result, it was "difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant matters of national environmental significance which may

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141 Outlook Report at [9.3.1], [9.4.1], and Appendices 6 and 7.

142 Reasons at [41], [43].

occur as a result of an increase in global temperature"[143] clearly engaged the precautionary principle: "that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage".[144]

73. In *Telstra Corporation Limited v Hornsby Shire Council*, Preston CJ observed that:[145]

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

74. Preston CJ also set out the following list of factors that might be considered in assessing "the seriousness or irreversibility of environmental damage":[146] (a) the spatial scale of the threat (eg local, regional, statewide, national, international); (b) the magnitude of possible impacts, on both natural and human systems; (c) the perceived value of the threatened environment; (d) the temporal scale of possible impacts, in terms of both the timing and the longevity (or persistence) of the impacts; (e) the complexity and connectivity of the possible impacts; (f) the manageability of possible impacts, having regard to the availability of means and the acceptability of means; (g) the level of public concern, and the rationality of and scientific or other evidentiary basis for the public concern; and (h) the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts, and the difficulty and expense of reversing the impacts.

75. The expert evidence and the Outlook Report demonstrate the existence of "threats of serious or irreversible environmental damage",[147] and each of the above factors also strongly favours the view that the first condition triggering the precautionary principle was overwhelmingly satisfied.

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143 Reasons at [140].

144 EPBC Act, ss 3A(b), 136(2)(a) and 391(1) and (2).

145 [2006] 67 NSWLR 256 at 269 [128].

146 *Telstra Corporation Limited v Hornsby Shire Council* [2006] 67 NSWLR 256 at 269-270 [129]-[131].

147 Compare *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2009] FCA 330 at [41] (Tracey J).

76. The Minister took no action to prevent or mitigate the impacts (for example, refusing the action or attaching conditions requiring Adani to offset the emissions), on the basis of his own conclusion to the effect that there was uncertainty about the relationship between the (quantified) combustion emissions and the (quantified) harm to the Great Barrier Reef of climate change and ocean acidification.[148] The second condition triggering the precautionary principle was therefore also satisfied.

77. But the passage of the Reasons dealing with the precautionary principle is in relevantly identical terms to the statement of reasons for the first decision:[149]

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

78. As the Assessment Report expressly did not evaluate the impact of the combustion emissions, this reliance on the Coordinator-General's consideration of the precautionary principle entirely ignores the threat posed by the combustion emissions – a threat of serious and irreversible damage to the Great Barrier Reef, as yet unquantified by the Minister.

79. Further, the above passage of the Reasons contains no reference to the discussion in the superadded portion dealing with climate change and, in particular, the conclusions quoted in paragraph 72 above.

80. The Minister is not required by ss 391 and 136(2)(a) to "accord pre-eminence" to the precautionary principle, when making a decision under s 133.[150] Provided that he takes that principle into account where the preconditions for its application are met, it is a matter for him what weight he gives to it.[151]

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[148] Reasons at [140].

[149] Reasons at [164].

[150] *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2009] FCA 330 at [36].

[151] [2009] FCA 330 at [36].

81. But the obligations in ss 391 and 136(2)(a) were not satisfied here by the adoption of the Coordinator-General's conclusions, where:

81.1. material that was not before the Coordinator-General showed in a compelling manner that the preconditions for the precautionary principle were met; and

81.2. the Coordinator-General's conclusion is contradicted by the Minister's own conclusions.

82. In those circumstances, it is evident that the Minister did not engage in an "active intellectual process" of the kind required by ss 391 and 136(2)(a). This error is also sufficient to ground the Court's jurisdiction to quash the decision.

Ground 1: the Minister acted inconsistently with Australia's obligations under the World Heritage Convention

83. Section 137(a) of the EPBC Act provided that, "[i]n deciding whether or not to approve, for the purposes of section 12 or 15A, the taking of an action and what conditions to attach to such an approval, the Minister must not act inconsistently with … Australia's obligations under the World Heritage Convention".

84. Articles 4 and 5(d) of the World Heritage Convention relevantly provide:

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

85. These provisions are interpreted "in good faith, in accordance with the ordinary meaning of its terms in context and in light of the treaty's object and purpose".[152]

86. Primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered.[153] International instruments should be interpreted in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation.[154]

87. Applying those principles, Australia's obligations under the World Heritage Convention include to *ensure*[155] that the cultural and natural heritage of the Great Barrier Reef World Heritage Area is *protected,*[156] and to do all it can to this end, to the *utmost of its resources*.

88. The EPBC Act reflects, among other things, "recognition by the Australian Parliament of Australia's international obligations under the World Heritage Convention".[157] Those obligations are fulfilled in part by the prohibitions in ss 12-15A (coupled with the procedural protections limiting the discretionary power in s 133 to lift that prohibition), Division 1 of Part 15, and a range of other provisions in the EPBC Act.

89. But according to ordinary interpretative principles, s 137(a) cannot be regarded as being superfluous; it must be given some separate work to do. The ordinary meaning of the provision is that it imposes an additional limit on an otherwise lawful exercise of the powers under ss 133(1) and 134 of the EPBC Act.[158] As Moore and Lander JJ noted in *Lansen v Minister for Environment and Heritage*, the provision is "couched in imperative language",[159] suggesting a limit the

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[152] See the authorities cited in *Secretary to the Department of Sustainability and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth)* (2013) 209 FCR 215 at 261 [171] (Kenny J).

[153] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (***Applicant A***) at 254 and 256 per McHugh J. The principle of good faith is not in itself a source of obligation where none otherwise would exist: *MIMIA v QAAH of 2004* (2006) 231 CLR 1 at 17 [42] per Gummow A-CJ, Callinan, Heydon and Crennan JJ.

[154] *Applicant A* (1997) 190 CLR 225 at 255 per McHugh J.

[155] The ordinary meaning of "ensure" is "to make certain": *Webster's Third New International Dictionary of the English Language Unabridged* (Merriam-Webster, 1971), p 756; *The Oxford English Dictionary* (2nd ed, 1989), Vol V, p 284; *Macquarie Dictionary* (6th ed, 2013), p 492.

[156] The ordinary meaning of "protection" is "preservation from injury or harm": *Macquarie Dictionary* (6th ed, 2013), p 1178; *The Oxford English Dictionary* (2nd ed, 1989), Vol XII, p 678.

[157] *Booth v Bosworth* (2001) 114 FCR 39 at 67 (Branson J).

[158] Compare *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 214 FCR 233 at 246 [80] (Marshall J).

[159] (2008) 174 FCR 14 at 32 [70]-[71]

contravention of which would lead to invalidity.

90. Where an Act is intended to give effect to an international obligation, it should be construed – where possible – to give effect to that obligation. That proposition is reinforced where the international obligation is the source of legislative power for making the Act. Section 137 should, accordingly, be construed as far as possible to give effect to Australia's obligations under the World Heritage Convention which enliven the power under s 51(xxix) to pass the provisions of the EPBC Act protecting world heritage.

91. A consideration of Australia's obligations under the World Heritage Convention, fulfilment of which is the evident intention of s 137(a), and the relevant legislative history, supports the proposition that s 137(a) is intended – in furtherance of those obligations – to impose a substantive limit on the Minister's power to approve the taking of an action.

The World Heritage Convention

92. The context and history of the World Heritage Convention is discussed in the *Tasmanian Dam case*.[160] Justices Mason, Murphy, Brennan and Deane each held (in separate judgments) that (a) the Convention imposed obligations on Australia, and (b) the Commonwealth therefore had power under s 51(xxix) of the Constitution to make laws giving effect to those obligations; (c) a provision prohibiting prescribed acts in relation to certain properties was validly made in exercise of that power.[161] The first two holdings were followed in *Richardson v Forestry Commission*.[162]

93. The following observations, drawn from the majority judgments in those decisions, indicate the nature and extent of the obligation, and the correlative legislative power:

    93.1. "once a property answering the Convention description of cultural heritage or natural heritage is identified, the primary obligation of the [State] Party is quite precise: it is to protect and conserve the property so far as it can with the resources available to it".[163]

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[160] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 172-177 (Murphy J).

[161] *Commonwealth v Tasmania* (1983) 158 CLR 1, per Mason, Murphy, Brennan and Deane JJ.

[162] (1988) 164 CLR 261.

[163] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 228 (Brennan J).

93.2. “The obligation being to take appropriate legal measures for the protection and conservation of the property, the power is to make laws which are conducive to that end rather than to make laws which are thought by the Commonwealth to be conducive to that end”.[164]

93.3. “the Convention imposes particular duties on each State with respect to the world heritage on its territory. Thus Art. 4 involves each State in acknowledging that the duty of *ensuring* the identification, protection, conservation and presentation of the world heritage situated on its territory belongs primarily to that State. And Art. 5, with a view to *ensuring* the protection, conservation and presentation of the heritage, requires each State to take appropriate legal and other measures necessary to bring this about”.[165]

93.4. “the reference to ‘appropriate ... measures’ in Art. 5(d) leaves some element of judgment to the State Party to the Convention in respect of the particular [legal] measures that are appropriate”.[166]

93.5. “Implementation of the Convention, and of the obligation which it imposes on Australia in relation to the property, calls for the establishment of a regime of control which will ensure protection and conservation of the property. No doubt there are a variety of methods of control which will achieve this result. But it is not for the Court to choose between them, or to prefer one to another.”[167]

93.6. “The legislative prohibition of acts inimical to the preservation and conservation of the property as a property forming part of the world cultural and natural heritage is not only consistent with the provisions of the Convention but is also a discharge of Australia's obligation under Art. 5 of the Convention”.[168]

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164 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 231 (Brennan J).

165 *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289 (Mason CJ and Brennan J).

166 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 143 (Mason J).

167 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 138 (Mason J).

168 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 138 (Mason J).

94. Article 11 of the Convention provides a scheme for the nomination by States Parties of properties for inclusion in the World Heritage List, and the inclusion by the World Heritage Committee in the List of those properties "which it considers as having outstanding universal value".[169] In *Queensland v The Commonwealth*,[170] the High Court held that a decision by the World Heritage Committee to include the Wet Tropical Rainforests of North-East Australia in the World Heritage List was determinative of the existence of Australia's obligations under the Convention in respect of that property (and, therefore, determinative of the question whether a proclamation protecting that property was authorised under the external affairs power).

Legislative history

95. In the *Tasmanian Dam case,* the majority held that ss 6(2)(b) and (3), and 9(1)(h) of the *World Heritage Properties Conservation Act 1983 (Cth)* (the **World Heritage Act**) were "appropriate and adapted to the purpose of discharging the international obligation under the Convention to protect or conserve the relevant property" and therefore valid.[171]

96. In effect, those provisions made it unlawful to do a prescribed act in relation to a property forming part of the "cultural heritage" or "natural heritage" (within the meaning of the Convention), if the protection or conservation of the property by Australia was a matter of international obligation (whether by reason of the Convention or otherwise), and the Governor-General was satisfied that the property was being, or was likely to be, damaged or destroyed (and had consequently made a proclamation under s 6(3)).

97. Like the prohibitions in Part 3 of the EPBC Act, the prohibition in s 9(1)(h) of the World Heritage Act did not apply where the relevant Minister gave consent to the taking of the otherwise prohibited action. Section 13(1) provided: "In determining whether or not to give a consent … the Minister shall have regard only to the protection, conservation and presentation, within the meaning of the Convention, of the property".

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[169] World Heritage Convention, article 11(2).

[170] (1989) 167 CLR 232.

[171] *Commonwealth v Tasmania* (1983) 158 CLR 1 at 267 (Deane J). See also 143 (Mason J), 179 (Murphy J), 226 (Brennan J).

98. Justice Mason held that s 13(1) was:[172]

> … an expression of the judgment made by Parliament in respect of the regime of control which it regards as [an appropriate measure, for the purpose of art 5(d)]. The discretion which it confers on the Minister gives emphasis to the protection, conservation and presentation of the property. As such, it is the central element in a regime of control which is reasonable and falls well within the area of judgment left to Australia by Art. 5(d) of the Convention.

99. His Honour considered that, on the proper construction of s 13(1), the Minister was bound to refuse consent under s 9(1) when "(a) the applicant fails to satisfy the Minister that a proposed activity or development is consistent with the 'protection, conservation and presentation' of the property; or (b) the Minister's mind is evenly balanced on that issue."[173]

100. Justice Brennan held that the prohibitions in s 9(1)(a)-(g) of the World Heritage Act were invalid because they were "too wide".[174] His Honour noted that prohibitions too wide to be supported by a head of power can sometimes be saved from invalidity by a discretionary power to lift them, having regard only to the matters for which the law can validly provide.[175] But his Honour concluded that the Minister's power to lift the prohibitions in s 9(1) having regard to the matters in s 13(1) did not meet that description because the Act failed to provide an adequate administrative system "by which the discretion conferred on the Minister might ensure that the operation of the Act faithfully pursues the purpose of protection, conservation and presentation under the Convention".[176] In 1988, the invalid parts of s 9 were repealed.[177]

101. In *Friends of Hinchinbrook Society Inc v Minister for Environment*,[178] the applicant sought judicial review of a decision by the relevant Minister to consent under s 9 of the World Heritage Act to acts which would otherwise be prohibited by reason of a proclamation under s 6(3) of that Act. The prohibited acts would have occurred in the Great Barrier Reef World Heritage Area.

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172 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 143 (Mason J).

173 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 143 (Mason J).

174 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 236 (Brennan J).

175 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 237 (Brennan J).

176 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 237 (Brennan J).

177 *Conservation Legislation Amendment Act 1988* (Cth), s 6.

178 (1997) 69 FCR 28.

102. Justice Sackville held that "ss 9 and 13 of the World Heritage Act conferred upon the Minister the task *of determining whether granting consent to the relevant acts was consistent with the protection, conservation and presentation of the proclaimed area*".[179] His Honour also accepted that "s 13(1) of the World Heritage Act prevented the Minister from having regard to social and economic values in deciding to give consents under s 9(1) of the Act".[180]

Section 137

103. When the World Heritage Act was repealed in 1999,[181] the EPBC Act gave effect to Australia's obligations instead. A similar mechanism was adopted: a prohibition on actions likely to adversely impact the world heritage values of a place on the World Heritage List, coupled with a Ministerial discretion to allow the action to take place.

104. Like the discretion to consent under s 9(1) of the World Heritage Act, the discretion to approve under s 133(1) of the EPBC Act:

104.1. does not "depend upon the Minister forming a particular 'opinion' or being 'satisfied' as to a particular state of affairs";[182]

104.2. is conditioned on a closed system of mandated considerations.

105. But there is a significant difference between s 13(1) of the World Heritage Act and s 136(1) of the EPBC Act: the former required the Minister to have regard only to protection of the world heritage values, and not to social and economic values; the latter requires the Minister to consider both.

106. This distinction explains the enactment of s 137, which provided (when first enacted):

> In deciding whether or not to approve for the purposes of section 12 or 15A the taking of an action, and what conditions to attach to such an approval, the Minister must not act inconsistently with Australia's obligations under the World Heritage Convention.

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179 *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 69 FCR 28 at 62 (emphasis added). An appeal was dismissed: *Friends of Hinchinbrook Society Inc v Minister for Environment [No 3]* (1997) 77 FCR 153.

180 *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 69 FCR 28 at 75.

181 *Environmental Reform (Consequential Provisions) Act 1999* (Cth), Sch 6, enacted at the same time as the EPBC Act.

182 *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 69 FCR 28 at 62.

107. Where the matter protected is included in the World Heritage List, s 137 of the EPBC Act plays the role previously played by s 13(1) of the World Heritage Act, in meeting Australia's obligations under the Convention. At the very least, it requires the Minister to:

107.1. determine whether approving the taking of the action is consistent with Australia's obligations under the Convention to protect and conserve a declared World Heritage property (see paragraph 101 above); and

107.2. refuse to approve an action if (a) the applicant fails to satisfy the Minister that the action is consistent with those obligations, or (b) the Minister's mind is evenly balanced on that issue (see paragraph 99 above).

108. In this way, s 137 operates as an additional check on the balancing of the matters in s 136(1)(a) and (b), in order to "assure the protection of the property from social, economic and other pressures or changes that might negatively impact the Outstanding Universal Value, including the integrity and/or authenticity of the property."[183]

Failure to comply with s 137

109. The two greatest risks to the Reef – ocean acidification and sea temperature increase – arise as a consequence of greenhouse gas emissions. As the Minister put it:

> 131. The 2014 Great Barrier Reef Outlook Report identifies climate change as the most serious threat to the Great Barrier Reef. The report states that climate change is already affecting the Reef and is likely to have far-reaching consequences in the decades to come. Sea temperatures are on the rise and this trend is expected to continue, leading to an increased risk of mass coral bleaching; gradual ocean acidification will increasingly restrict coral growth and survival; and there are likely to be more intense weather events. The extent and persistence of these impacts depends to a large degree on how effectively the issue of rising levels of greenhouse gases is addressed worldwide. The impacts of increasing ocean temperatures and ocean acidification will be amplified by the accumulation of other impacts such as those caused by excess nutrient run-off.

110. Clear, uncontested expert opinions of the combustion emissions, their contribution to climate change, and the impact of climate change on the Reef, were provided to the Minister.

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183 *Operational Guidelines for the Implementation of the World Heritage Convention* at [98].

111. The passage of the Reasons dealing with the Minister's obligation under s 137(a) is as follows:

> 168. In accordance with section 137 of the EPBC Act, in deciding whether to grant an approval for the proposed action, and what conditions to attach to such an approval, I cannot act inconsistently with Australia's obligations under the World Heritage Convention…
>
> …
>
> 170. The proposed action was assessed by EIS which provided for periods for public comment. It involved a thorough assessment of impacts on the Great Barrier Reef World Heritage Area and its world heritage values. Based on the assessment of environmental impacts, and the mitigation measures proposed by the Queensland Government, the proposed action will not have any unacceptable impacts on the world heritage values of the Great Barrier Reef World Heritage Area.

112. It is apparent from this passage that the Minister has relied entirely on the assessment in the EIS and the evaluation in the Assessment Report in directing himself to the question of compliance with s 137, which included analysis of the mining emissions and proposed measures for reduction and mitigation in respect of them, but no consideration of the combustion emissions.

113. Whatever the content of the obligation imposed by s 137, by failing – when directing himself to that obligation – to even turn his mind to the most serious threat the mine poses to the World Heritage values of the Reef the Minister has failed to meet it. This error is also sufficient to ground the Court's jurisdiction to quash the decision.

114. Further, the Minister's expressed state of uncertainty, namely 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 which may occur as a result of an increase in global temperature" did not permit a decision to approve the project that was "not inconsistent" with Australia's obligations under the World Heritage Convention.

115. Such a state of uncertainty is logically unable to permit a conclusion that approval is "not inconsistent" with Australia's obligation to "do all it can … to the utmost of its own resources" to make certain that the cultural and natural heritage of the Great Barrier Reef will be preserved from harm or injury. A decision premised on such a state of uncertainty does not meet the description in s 137 and is not therefore a lawful decision.

116. Further, it is contrary to Australia's obligations under the World Heritage Convention to consider, as the Minister appears to have done, that the refusal of the mine would not, in itself, ensure that the Great Barrier Reef is protected or net greenhouse gas emissions will be reduced as emissions may come from other sources. This reasoning is contrary to the obligation on Australia to "do all it can … to the utmost of its own resources" to make certain that the cultural and natural heritage of the Great Barrier Reef will be preserved from harm or injury. The majority of the US Supreme Court made the point in *Massachusetts v. Environmental Protection Agency* that government decisions "do not generally resolve massive problems in one fell regulatory swoop."[184] The Minister was obliged by s 137 of the EPBC Act to ensure his decision to approve the mine was not inconsistent with Australia's obligations under the World Heritage Convention, even incrementally.

Ground 4

117. ACF no longer wishes to pursue ground 4 in its Amended Originating Application.

DATED: 5 April 2016

SAUL HOLT QC

DR CHRIS MCGRATH

EMRYS NEKVAPIL

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[184] 549 U. S. 497 (2007) at 524-526 (Stevens J with whom Kennedy, Souter, Ginsburg and Breyer JJ joined).

Schedule

No: QUD1017/2015

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: QUEENSLAND
DIVISION: GENERAL

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