FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: QUEENSLAND
DIVISION: GENERAL **NO QUD 1017 OF 2015**

AUSTRALIAN CONSERVATION FOUNDATION INCORPORATED
Applicant

MINISTER FOR THE ENVIRONMENT
First Respondent

ADANI MINING PTY LTD ACN 145 455 205
Second Respondent

FIRST RESPONDENT'S OUTLINE OF SUBMISSIONS

INTRODUCTION

1. In November 2010, Adani Mining Pty Ltd ('Adani') referred to the then Minister for the Environment ('the Minister') a proposal to develop and operate the Carmichael Coal Mine and Rail Infrastructure Project ('proposed action'). The proposal involved the construction of a new open-cut and underground coal mine located at Moray Downs in central Queensland and a rail link and associated infrastructure designed to transport coal between the mine and certain coal export terminals.

2. On 6 January 2011, a delegate of the then Minister determined that the proposed action was a controlled action under s 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('the EPBC Act') and was subject to the following controlling provisions:

   (i) World heritage properties (ss 12 and 15A)
   (ii) National Heritage places (ss 15B and 15C)
   (iii) Wetlands of international importance (Ramsar) (ss 16 and 17B)
   (iv) Listed threatened species and ecological communities (ss 18 and 18A)
   (v) Listed migratory species (ss 20 and 20A)
   (vi) Great Barrier Reef Marine Park (ss 24B and 24C)

Filed on behalf of the First Respondent
File ref: 15205003
Prepared by:
Australian Government Solicitor.

Address for Service:
Australian Government Solicitor,
Level 21, 200 Queen Street
Melbourne VIC 3000

Telephone: 03 9242 1316
Lawyer's Email: emily.nance@ags.gov.au
Facsimile: 03 9242 1265
DX 50 Melbourne

3. On 24 October 2013, the Minister found that the proposed action, being a large coal mining development, was likely to have a significant impact on water resources and expanded the controlling provisions to include ss 24D and 24E of the EPBC Act.

4. On 24 July 2014, the Minister approved the proposed action, subject to conditions. That approval was set aside by consent by the Federal Court of Australia on 4 August 2015.

5. On 14 October 2015, the Minister approved the taking of the proposed action under s 130(1) and s 133 of the EPBC Act subject to 36 conditions.

6. On 10 November 2015, the applicant, the Australian Conservation Foundation Inc (‘ACF’) filed an application for judicial review of the Minister’s approval, which was subsequently amended.

7. The ACF advances three grounds of review:

    (i) that the Minister made an error of law by failing to ask himself whether the impact of ‘combustion emissions’ on the Great Barrier Reef was a ‘relevant impact’ within the meaning of ss 82 and 527E of the EPBC Act and thereby required to be taken into account under s 136(2)(e).[1] The applicant’s submissions define combustion emissions as ‘greenhouse gas emissions arising from transport and combustion of the coal produced at the mine’ (para 7.2) and ground 2 in the amended application indicates that the combustion in question occurs ‘overseas’;

    (ii) that the Minister failed to take account of the precautionary principle, which is a relevant consideration under the EPBC Act;[2] and

    (iii) that the Minister failed to comply with s 137 of the EPBC Act in respect of the effect of combustion emissions on the Great Barrier Reef World Heritage Area.[3]

8. For the reasons developed below, each of the grounds advanced by the applicant should be rejected.

---

[1] Ground 2 of the amended originating application for judicial review filed on 28 January 2016 (‘the amended application’). The grounds of the amended application are addressed in these submissions in the order in which they are relied upon in the applicant's submissions. Ground 4 and associated paragraphs 23 to 30 of the amended application have been abandoned by the applicant.

[2] Ground 3 of the amended application.

[3] Ground 1 of the amended application.

STATEMENT OF ARGUMENT

Overview of the legislative scheme

9. Before addressing each of the grounds, it is convenient to provide an overview of the relevant legislative provisions and context.

10. The EPBC Act was first introduced in 1999. It includes three important aims, which were endorsed in principle in 1997 at the meeting of the Council of Australian Governments. First, the EPBC Act was designed to define the areas of Commonwealth environmental responsibility and, hence, the role of the Commonwealth in environmental matters. Secondly, it sought to integrate State and Commonwealth environmental laws by providing mechanisms for Commonwealth accreditation of State assessment processes. Thirdly, the EPBC Act sought to provide a new and more efficient assessment and approval process.

11. These aims are reflected in the objects of the EPBC Act. One of the objects of the EPBC Act is to provide for the protection of those aspects of the environment that are of national environmental significance.[4] To achieve its objects, the EPBC Act recognises the role of the Commonwealth by focusing Commonwealth involvement on matters of national environmental significance,[5] and providing for intergovernmental accreditation of environmental assessment processes.[6] It also seeks to achieve the objects by adopting an efficient and timely Commonwealth environmental assessment and approval process that ensures that activities that are likely to have significant impacts on the environment are properly assessed.[7]

12. Part 3 of the Act prohibits the taking of certain actions[8] without ministerial approval. The actions are those which have, will have, or are likely to have significant environmental impact. For example, s 12 of the EPBC Act (which is found in Part 3) makes it an offence for a person to take an action that has or will have a significant impact on the world heritage values of a declared World Heritage property, or that is likely to have a significant impact on those values. The prohibition does not, however,

---

4 EPBC Act, s 3(1)(a)

5 EPBC Act, s 3(2)(a)

6 EPBC Act, s 3(2)(c)

7 EPBC Act, s 3(2)(d)

8 An action includes a project, development, undertaking, activity or series of activities, or an alteration of any of those: EPBC Act, s 523.

apply if an approval of the taking of the action is an operation under Part 9 of the EPBC Act.[9]

13. An action that requires approval is called a 'controlled action'.[10] A person proposing to take an action that they consider may be a controlled action must refer the proposal to the Minister for a decision about whether the action is or is not a controlled action.[11]

14. The Minister must decide whether the action is a controlled action, and which provisions of Part 3 are the 'controlling provisions' for the action.[12]

15. Part 8 of Chapter 4 of the EPBC Act provides for assessing the impacts of a controlled action, in order to provide information for decisions about whether or not to approve the taking of the action. In simple terms, the Minister must decide which assessment process is to be used[13] unless the action is covered by a bilateral agreement[14] or a declaration.[15] In this case, the action was covered by a bilateral agreement between the Commonwealth and the State of Queensland.

16. Part 9 of Chapter 4 of the EPBC Act provides, among other things, for decisions on approvals and conditions. The relevant provisions are found in Division 1 of Part 9. Under s 130, the Minister must decide whether or not to approve the taking of a controlled action and must do so according to certain timeframes, which can be extended.

17. Under s 133, the Minister may, after receiving the assessment documentation relating to a controlled action, approve the taking of the action for the purposes of a controlling provision. Under s 134, the Minister may attach conditions to the approval if he or she is satisfied, for example, that the condition is necessary or convenient for protecting a matter protected by a provision of Part 3.

18. The power of the Minister to grant approval and to attach conditions is expressly regulated by the EPBC Act. Section 136 is entitled 'General considerations'. It relevantly provides:

---

9 The EPBC Act indicates that it is possible to get an approval under Part 9 to take such an action; otherwise the defence provided by s 12(2)(a) would be otiose.

10 EPBC Act, s 67

11 EPBC Act, s 68(1)

12 EPBC Act, s 75(1)

13 EPBC Act,s 87(1).

14 EPBC Act, s 47, s 83.

15 EPBC Act, s 84

Mandatory considerations

> (1) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must consider the following, so far as they are not inconsistent with any other requirement of this Subdivision:
>
> (a) matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action;
>
> (b) economic and social matters.

Factors to be taken into account

> (2) In considering those matters, the Minister must take into account:
>
> (a) the principles of ecologically sustainable development; and
>
> (b) the assessment report (if any) relating to the action…
>
> (e) any other information the Minister has on the relevant impacts of the action (including information in a report on the impacts of actions taken under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under Part 10 (about strategic assessments)); and
>
> (f) any relevant comments given to the Minister in accordance with an invitation under section 131 or 131A; and…
>
> *Minister not to consider other matters*
>
> (5) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must not consider any matters that the Minister is not required or permitted by this Division to consider.

19. The balance of Subdivision B of Division 1 of Part 9 (which is entitled 'Considerations for approvals and conditions') contains five sections addressing 'requirements' for specific protected matters[16] and one section providing that there is to be no approval for certain nuclear installations.[17]

Ground 2: 'combustion emissions'

20. The ACF contends that the Minister asked himself the wrong questions when considering the information about the impact of greenhouse gas emissions on the Great Barrier Reef. The argument proceeds in this way:

    (i) the Minister acknowledged that climate change was the most serious threat to the Great Barrier Reef and noted that the proponent had calculated that

---

[16] EPBC Act, ss 137-140.

[17] EPBC Act, s 140A.

overseas emissions associated with the mine — from the transport and from burning of the coal — was 4.64 GT of carbon dioxide over the life of the mine;[18]

(ii) the Minister then failed to apply s 527E of the EPBC Act to determine whether the action would have any impacts on the matters protected in respect of the Great Barrier Reef.[19] If he had done so, he would have realised that the consequences for the Great Barrier Reef of other companies transporting and burning the coal produced by the proposed mine were relevant impacts of the action, just as much as scope 1 emissions or water runoff.[20] But instead of applying s 527E, the Minister directed himself to several criteria alien to, and at odds with, that provision;[21]

(iii) the failure of the Minister to apply s 527E in this way led him to fail to consider 'any other information the Minister has on the relevant impacts of the action' as required by s 136(2)(e);[22] and

(iv) accordingly, the decision was invalid and should be quashed.

21. The ACF's submissions should be rejected. They ignore an important aspect of s 527E and proceed on a mistaken construction of the Minister's statement of reasons.

22. Section 82 of the EPBC Act relevantly provides:

> *If the Minister has decided the action is a controlled action*
>
> (1) If the Minister has decided under Division 2 of Part 7 that an action is a controlled action, the ***relevant impacts*** of the action are the impacts that the action:
>
> (a) has or will have; or
>
> (b) is likely to have;
>
> on the matter protected by each provision of Part 3 that the Minister has decided under that Division is a controlling provision for the action.

23. Section 527E of the EPBC Act provides:

Meaning of impact

---

[18] ACF's submissions, para 55.

[19] ACF's submissions, para 56.

[20] ACF's submissions, para 58.

[21] ACF's submissions, para 60-71.

[22] ACF's submissions, para 52.

(1) For the purposes of this Act, an event or circumstance is an ***impact*** of an action taken by a person if:

(a) the event or circumstance is a direct consequence of the action; or

(b) for an event or circumstance that is an indirect consequence of the action—subject to subsection (2), the action is a substantial cause of that event or circumstance.

(2) For the purposes of paragraph (1)(b), if:

(a) a person (the ***primary person***) takes an action (the ***primary action***); and

(b) as a consequence of the primary action, another person (the ***secondary person***) takes another action (the ***secondary action***); and

(c) the secondary action is not taken at the direction or request of the primary person; and

(d) an event or circumstance is a consequence of the secondary action;

then that event or circumstance is an impact of the primary action only if:

(e) the primary action facilitates, to a major extent, the secondary action; and

(f) the secondary action is:

(i) within the contemplation of the primary person; or

(ii) a reasonably foreseeable consequence of the primary action; and

(g) the event or circumstance is:

(i) within the contemplation of the primary person; or

(ii) a reasonably foreseeable consequence of the secondary action.

24. In *Tarkine National Coalition Incorporated v Minister for the Environment*, Tracey J observed of s 527E:[23]

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

[23] [2014] FCA 468, (2014) 202 LGERA 244 at [86] (emphasis added).

25. The correctness of that construction was not questioned on appeal. Indeed, the Full Court treated it as correct.[24]

26. In this case, the physical effects associated with climate change, such as increased ocean temperature and ocean acidification, comprise the relevant events or circumstances for the purpose of s 527E. Those climate change effects are obviously not a direct impact of the proposed action and ACF does not contend that they are. They can therefore only be an 'impact' if the proposed action is a 'substantial cause' of them and the criteria prescribed by s 527E(2) are met.

27. The Minister's statement of reasons demonstrates that he gave explicit consideration to the prospect of 'combustion emissions'; that is, he noted and considered that greenhouse gas emissions may occur overseas as a result of burning the coal produced from the proposed action. However, the Minister did not consider that the proposed action would be a substantial cause of climate change effects. The Minister evaluated the potential impacts of emissions that would arise from the transport and burning of coal overseas, and adopted the terminology used by the proponent of 'scope 3 emissions'.[25] He pointed out that those emissions were not a direct consequence of the proposed action and stated:[26]

> 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 produce coal in their own countries.
>
> …
>
> 140. I found that the quality of overseas GHG emissions from the Carmichael Coal Mine and Rail project proceeding is subject to a range of variables. It is

[24] *Tarkine National Coalition v Minister for the Environment* [2015] FCAFC 89, (2015) 233 FCR 254 at [39] (Jessup J), with whom Kenny J agreed at [1] and Middleton J agreed at [70].

[25] Statement of reasons, paras 134-135.

[26] Statement of reasons, paras 138, 140 (emphasis added). The conclusion that the emissions were not a direct consequence of the proposed action means that climate change would not fall within s 527E(1)(a) of the EPBC Act.

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 outlines 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.

28. These passages, fairly construed,[27] reveal that the Minister found that it was impossible to regard the emissions from the transport and burning of the coal overseas as having any significant or identifiable adverse impact on matters of Australian national environmental significance. He did so because, given the many variables that could affect the actual net global emissions in the future, to find any increase in net global emissions (and any consequential increase in global temperature) from the proposed action would be speculative.[28]

29. The relevant section of the statement of reasons ends with the Minister recording in the last sentence of para 140 that 'it is difficult to identify the necessary relationship between the taking of the action and any possible impacts ... as a result of an increase in global temperature', from which it is clear that the Minister found that climate change was neither a direct nor indirect impact of the proposed action. No doubt the ACF disagrees strongly with that conclusion on its merits, but the matter was expressly considered and the Minister found specifically that 'any possible impacts' arising from global temperature increases did not have the 'necessary relationship' with the proposed action. That expression of the reasons demonstrates the Minister was considering and applying s 527E in the context of 'combustion emissions'.

30. Those conclusions necessarily meant the Minister found that the proposed action would not be a substantial cause of any climate change effects (within the meaning of s 527E(1)(b)) and would not have a relevant impact on the Great Barrier Reef. That being so, the Minister's decision satisfied the requirements of s 82 and s 527E.

---

27 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. The ACF refers to authorities to support the proposition that the reasons should be construed with considerable care, and without significant hesitation about the degree of scrutiny to be applied to them: see ACF's submissions, para 28 (referring to *Jaffarie v Director-General of Security* [2014] FCAFC 102, (2014) 226 FCR 505 at [42]-[43], [45]; *Soliman v University of Technology, Sydney* [2012] FCAFC 146, (2012) 207 FCR 277 at [57]). None of these authorities, however, detract from the principle that reasons need to be read fairly.

28 Statement of reasons, paras 138-140.

31. The ACF's complaint may well have its genesis in the absence from para 140 of the reasons of express citation of 'indirect consequences under s 527E(2)', but reading reasons for decision in that way is not legitimate and a decision maker need not litter reasons with constant reference to statutory provisions. [29] The context and expression of the reasons shows that the Minister did not make the errors asserted in ground 2 of the amended application.

32. Further, the Court would not accept any of the ACF's more specific criticisms of the Minister's decision (some of which appear to travel outside ground 2 as it is expressed in the amended application).

33. First, the Minister made no mistake by asking whether approving the action would cause a net increase in global emissions.[30] That question was not irrelevant to the inquiry required by s 82 and s 527E; it was essential to it. The combustion of coal from the proposed mine could only exacerbate climate change and have an adverse impact on the Great Barrier Reef if it resulted in a net increase in global greenhouse gas emissions and had consequential effects, such as raising ocean temperatures. As the joint expert report filed in the Land Court explained:[31]

> The fundamental question that must be answered is to what extent a project or policy will result in a change in global emissions. There is a net change to global emissions to the extent emissions associated with the Mine are not offset by a reduction in emissions elsewhere, or to the extent that they would otherwise occur even if the Mine were not approved. All Emissions from the burning of product coal from this Mine will have a climate impact in the physical cause-effect sense. If those climate impacts *are additional to what would have occurred in the absence of the Mine's approval depends on the extent the Mine increases global coal consumption*. The calculated cumulative emissions associated with the project, therefore, should be seen as a worst-case net change in global emissions.

34. It is thus wrong for ACF to claim that if the action were to be approved, a consequence of the actions of the companies that transport and burn the coal would be the 'emission of 4.64 GT of carbon dioxide into the atmosphere, which [would] result in warming, which [would] adversely affect the Great Barrier Reef'.[32] The last two of those consequences could not follow unless the burning of coal from the mine resulted in a

---

29 Note that the Minister identified s 527E as one of the provisions of the EPBC Act that he took into account in making his decision: see Annexure A to the statement of reasons.

30 Contrast ACF's submissions, para 61.

31 Greenhouse Gas Emissions Joint Expert Report at [12] [document 164 in exhibit DK-2 to the affidavit of Dean Knudson affirmed on 10 December 2015] (emphasis added).

32 ACF's submissions, para 61.

substantial net increase in global emissions of carbon dioxide. The Minister took the approach that whether any net increase would occur depends on a raft of factors. These include whether the party that burns the coal from the mine decides to offset or capture the greenhouse gases released from burning the coal, and whether the party purchasing the coal would have obtained an equivalent quantity of coal from elsewhere in any event.[33] It was open to the Minister to conclude, as he did, that any net increase in global emissions from the proposed action was speculative and there would be no impact on the matters of national environmental significance. Again, the ACF may not in these judicial review proceedings attack the merits of that decision, which complied with the relevant legal obligations regulating the Minister's assessment of the proposed action.

35. Secondly, the suggestion that the Minister could not have considered various domestic and international schemes for addressing climate change is mistaken.[34] Those schemes reinforced the Minister's view that there would be no relevant impact from the proposed action on the Great Barrier Reef because they provided mechanisms for countries that imported coal to manage and mitigate consequential greenhouse gases associated with burning the coal. That interpretation of the reasons is supported by the fact that the discussion of those mechanisms follows immediately after the Minister's statement that the actual quantity of emissions that was likely to be additional to current global emissions depended on a range of variables.[35] It follows that the reference to climate agreements does not indicate that the Minister directed himself to criteria alien to the EPBC Act.[36]

36. Thirdly, it is wrong to suggest, as ACF does,[37] that the Minister distinguished between scope 1, 2 and 3 emissions with regard to the relevant impacts of the proposed action. Nothing in his reasons suggests that the Minister treated scope 1 and 2 emissions, as opposed to scope 3 emissions, as 'relevant impacts' for the purposes of s 82. He did not say that scope 1 and 2 emissions were relevant impacts; instead, he referred to Australia's climate change framework that included the Emissions Reduction Fund.[38]

---

33 As to this particular point, see the Expert Report of Dr Chris Taylor for Adani filed in the Land Court at [4.1.1.6] and [5.1.1.3] (pointing out that if global coal demand does not change as a result of commissioning the mine, then the effects of the mine on climate change will be negligible) [document 165 in exhibit DK-2 to the affidavit of Dean Knudson affirmed on 10 December 2015].

34 ACF's submissions, para 64.

35 See statement of reasons, para 138.

36 Contrast ACF's submissions, paras 60 and 64.

37 ACF's submissions, para 66.

38 Statement of reasons, para 139.

Nor did he impose any conditions to mitigate the impacts of scope 1 and 2 emissions, as might have been expected if he had considered that such emissions amounted to a relevant impact. Furthermore, this understanding of the Minister's reasons is consistent with the Attachment B to his proposed decision brief, which he read and annotated. That Attachment addressed emissions under the heading of economic and social matters under s 136(1)(b) of the EPBC Act rather than as relevant impacts.[39]

37. Fourthly, and relatedly, the ACF's complaint that the Minister attached no conditions for mitigating, repairing, offsetting or compensating for climate change impacts[40] ignores the fact that the Minister had found that the proposed action would have no relevant impact on the Great Barrier Reef. Put simply, because any increase in net global greenhouse gas emissions was a matter of speculation, there was no need for or utility in the imposition of conditions.

38. Finally, the structure of the reasons does not assist the ACF's case.[41] The reasons, like any document, must be read fairly and as a whole. When that is done, it is evident that the Minister considered whether climate change impacts would be caused by the proposed action and found that they would not.[42]

39. Accordingly, the Minister did not commit the error alleged. The challenge based on ground 2 must fail.

Ground 3: precautionary principle

40. The ACF also contends that the Minister failed to take into account the precautionary principle as required by s 391 and s 136(2)(a) of the EPBC Act.[43] It contends that the Minister was obliged to consider that principle because there was a threat of serious or irreversible environmental damage and the Minister had concluded, among other things, 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'.[44] The submission should not be accepted.

---

39 See Attachment B to the proposed brief ('Considerations relating to Decision-making under Part 9 of the EPBC Act'), pp 8 and 11 [document 2 in exhibit DK-2 to the affidavit of Dean Knudson affirmed on 10 December 2015].

40 ACF's submissions, para 68.

41 Contrast ACF's submissions, para 69.

42 See statement of reason, paras 48, 53, 56 and 131-141.

43 ACF's submissions, paras 72-82.

44 Statement of reasons, para 140.

41. As s 391(2) of the EPBC Act makes clear, the precautionary principle ensures that 'the 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. It is, in short, a principle that authorises particular measures being taken to protect the environment notwithstanding the lack of full scientific certainty.[45] It does not require the Minister to take measures or consider taking measures if he finds that a proposed action would not have any adverse effect on matters of national environmental significance.[46]

42. The Minister addressed each of s 136(2)(a) and s 391 in his statement of reasons.[47] He plainly took them into account. Although he did not draw an express link between s 136(2)(a) and s 391 and the effect of emissions from the transport and burning of the coal from the proposed action, he did not need to.[48] He had already concluded that, given the variables that would affect actual net emissions from transport by rail, shipping and combustion of the product coal, it would be mere speculation to find that the emissions would have any impact on matters of national environmental significance.[49]

43. Consistent with that conclusion, the Minister agreed with the conclusions of the Queensland Coordinator-General's report.[50] The reasons of the Minister cannot be read as somehow contradicting that report.[51]

44. The words used by the Minister in his reasons—'difficult to identify'—were obviously not words that were used for the purpose of indicating that there were circumstances of scientific uncertainty for the purposes of the precautionary principle; rather, those words were the Minister's way of expressing his conclusion that there was no requisite

---

[45] *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111, (2013) 215 FCR 301 at [192].

[46] Furthermore, as the ACF accepts, the weight to be given to the precautionary principle is a matter for the Minister: see *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2009] FCA 330, (2009) 165 LGERA 203 at [36] (Tracey J).

[47] At paras 163-167.

[48] Contrast the suggestion in ACF's submissions, para 79.

[49] Statement of reasons, para 140.

[50] Statement of reasons, para 164: 'I agreed with the conclusions of the Coordinator General's Report that there is sufficient scientific certainty 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.'

[51] Contrast ACF's submissions, para 81.2.

relationship between combustion emissions and increases in global temperature and the taking of the action.

45. It follows that ACF's complaint about the precautionary principle lacks merit and ground 3 of the amended application should be rejected.

Ground 1: compliance with s 137

46. The third contention that the ACF presses is that the Minister breached s 137 of the EPBC Act. The ACF essentially makes two arguments in this respect: the Minister breached s 137 by failing to turn his mind to the threat posed by the mine to the world heritage values of the Great Barrier Reef;[52] and the Minister's uncertainty about the impact could not logically permit a conclusion that approval was 'not inconsistent' with Australia's obligations under Article 4 of the World Heritage Convention.[53]

47. These submissions, however, mistake the scope of Australia's international obligations and the operation of s 137.

Australia's international obligations

48. Articles 4 and 5 of the World Heritage Convention impose obligations on State Parties with respect to their natural and cultural heritage. Those Articles relevantly state:

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

---

[52] ACF's submissions, paras 112-113.

[53] ACF's submissions, paras 114-115.

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage;

49. Article 2 defines 'natural heritage' as follows:

> For the purposes of this Convention, the following shall be considered as "natural heritage":
>
> *natural features* consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
>
> *geological and physiographical formations* and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
>
> *natural sites* or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

50. Australia is a State Party to the Convention, which it ratified on 22 August 1974. The Great Barrier Reef was included on the United Nations Educational, Scientific and Cultural Organisation ('UNESCO') World Heritage List in October 1981. The World Heritage Committee accepted Australia's submission that the Great Barrier Reef satisfied the criteria for the inclusion of natural heritage.[54] Accordingly, there are particular attributes of the Great Barrier Reef that justify its inclusion in the World Heritage List and Australia is obliged to protect and conserve those attributes under Articles 4 and 5 of the Convention.[55]

51. Under international law, the general rule of treaty interpretation, as set out in Article 31 of the Vienna Convention on the Law of Treaties 1969, is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. The proper interpretation of Articles 4 and 5 is to proceed on the basis of this general rule.[56]

---

[54] For the relevant criteria, see the Minister's statement of reasons, para 41.

[55] These world heritage values are also protected by ss 12(1)(a) and 15A(1) of the EPBC Act.

[56] *Commonwealth Minister for Justice v Adamas* (2013) 253 CLR 43 at [32]. The EPBC Act does not incorporate the text of the Convention in a Schedule or purport to reduce its obligations to statutory form. If it did, the ordinary rules of statutory construction would apply: see *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at [65] (Gummow, Crennan, Kiefel and Bell JJ); *Maloney v The Queen* (2013) 252 CLR 168 at [23] (French CJ), [134] (Crennan J); *Commonwealth Minister for Justice v Adamas* (2013) 253 CLR 43 at [31].

52. This general rule of treaty interpretation is a 'single rule', in that an interpretation must consider all of its elements (that is, good faith, ordinary meaning, context, and object and purpose) together and not give greater weight or primacy to any one element.[57]

53. The requirement to interpret terms in their context directs the interpreter's attention to the whole of the text of the treaty, including consideration of the surrounding provisions.[58] The treaty interpreter must therefore 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously'.[59]

54. Contrary to what is suggested by the ACF,[60] Article 4 cannot be interpreted merely literally. Whilst the *ordinary meaning* of the terms of Article 4 is relevant, and is from a practical perspective the starting point, the terms must also be interpreted in *good faith*, in their *context*, and in light of the World Heritage Convention's *object and purpose*. A result of this unitary interpretation is that 'the meaning of a word or phrase is not solely a matter of dictionaries and linguistics',[61] and there must be 'an element of reasonableness qualifying the dogmatism that can result from purely verbal analysis'.[62]

55. The terms of Article 4, therefore, must be construed in their context, including in light of Article 5. The latter is designed to ensure that 'effective and active measures' are taken for the protection and conservation of natural heritage.[63] The chapeau to Article 5, however, reveals that a State party's obligations are confined: 'each State party shall endeavour, in so far as possible, and as appropriate for each country' to do the matters specified. Article 5(d), moreover, refers to each State party taking 'the appropriate legal, scientific, technical, administrative and financial measures necessary' for the protection and conservation of natural heritage. It is plain from the open language of Article 5 that State parties are not required to implement the article in a uniform way, and have considerable latitude as to the precise actions that they may take to implement their obligations.[64] This flexibility or 'margin of appreciation' in

---

57 Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed, Cambridge University Press (2013) at 206, 208; Richard Gardiner, *Treaty Interpretation*, Oxford University Press (2008) at 36, 141-142; *Aguas del Tunari v Bolivia* (ICSID ARB/02/03), Award of 21 October 2005, para 91.

58 Gardiner, *Treaty Interpretation* (2008) at 177-178.

59 *Korea-Definitive Safeguard Measure on Imports of Certain Dairy* Products AB-1999-8 WT/DS98/AB/R, p 24, paragraph 81 (1999) (original emphasis).

60 ACF's submissions, paras 87, 115-116.

61 *Aguas del Tunari v Bolivia* (ICSID ARB/02/03), Award of 21 October 2005, para. 91.

62 Gardiner, *Treaty Interpretation* (2008) at 151.

63 The introductory clause—'[t]o ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage'—connects the purpose of obligations in Article 5 with the obligation contained in the preceding Article.

64 See *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam Case*) at 132-133 (Mason J), 225 (Brennan J); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 290 (Mason CJ and

implementing the obligations of the Convention was recognised by Brennan J in the *Tasmanian Dam Case*:[65]

> The language of [Articles 4 and 5] is non-specific; the Convention does not spell out either the specific steps to be taken for the protection, conservation and presentation of the cultural and natural heritage situated on a State Party's territory nor the measure of the resources which are to be committed by the State Party to that end. The variety of properties that are part of the…natural heritage, the economic differences among States Parties and the varying demands upon their respective resources no doubt made it impossible to secure common specific commitments from all States Parties.

56. If Article 4 were interpreted literally, narrowly, and in isolation, as the ACF urges, a State party could comply with Article 5(d) of the Convention by endeavouring to take appropriate steps for the protection and conservation of natural heritage but could still breach Article 4 simply because it did not do all it could, 'to the utmost of its resources', to ensure the protection and conservation of that heritage. That result would render the qualifications expressed in Article 5 nugatory and make obligations imposed on a State party by different but closely related Articles of the Convention conflict. In short, Article 5, although more specific than Article 4, would be rendered superfluous.

57. The structure of the Convention also functions as relevant context for the interpretation of Article 4 and supports a different interpretation from that advanced by the ACF. Article 4 is found in Part II of the Convention, which is entitled 'National Protection and International Protection of the Cultural and Natural Heritage'. It is the first Article to impose obligations to protect and conserve natural heritage, and it recognises that those obligations lie 'primarily' with the State party in whose territory the natural heritage is located.[66] Article 5 imposes a series of obligations on each such party in order to ensure the effective protection and conservation of that heritage.[67] Article 6 then addresses the obligations of other State parties—those in whose territory the natural heritage is not located—to cooperate internationally and to give help upon request. This basic structure suggests that Article 4 was intended to do no more than

---

Brennan J), 327 (Dawson J). See also Guido Carducci, 'Articles 4-7: National and International Protection of the Cultural and Natural Heritage' in Francesco Francioni (ed.), *The 1972 World Heritage Convention: A Commentary*, Oxford University Press, 2008, 103 at 117 (observing that Article 5 reflects 'sensitivity to cultural and/or social and/or economic variables' among State parties).

[65] (1983) 158 CLR 1 at 225.

[66] *Tasmanian Dam Case* (1983) 158 CLR 1 at 224 (Brennan J).

[67] *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289 (Mason CJ and Brennan J): '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.'

provide an overarching duty not to act in a manner manifestly contrary to the purposes of the Convention, while Articles 5 and 6 were intended to set out more specific obligations.[68]

58. Unlike the applicant's apparently literal interpretation of Article 4, this interpretation allows Articles 4 and 5 to operate harmoniously. It means that State parties have a duty not to act in a manner manifestly contrary to the Convention but they must endeavour, in so far as possible, and as appropriate, to take particular kinds of measures in relation to natural heritage located in their territory so as to advance that duty. The preamble and the operative provisions of the Convention, including in particular Articles 5 and 6, show that States Parties did not envisage absolute protection, but rather a level of protection that took account of economic, scientific and technical limitations, and the integration of heritage protection into broader economic and social decision making.[69]

59. Accordingly, the proper interpretation of Article 4, pursuant to the general rule of treaty interpretation, is that it imposes only an overarching duty not to act in a manner manifestly contrary to the purposes of the Convention. That means that there will be a high threshold before any breach of Article 4 is committed. The general nature of the obligation arising from Article 4, which is confirmed in the authorities,[70] provides Australia with a margin of appreciation as to the measures it chooses to implement and comply with Article 4.

Construction of s 137

60. Section 137 of the EPBC Act relevantly provides:

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

---

[68] Compare *Tasmanian Dam Case* (1983) 158 CLR 1 at 132-133 (Mason J).

[69] For instance, Article 5(a) requires States Parties to 'adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes'.

[70] *Tasmanian Dam Case* (1983) 158 CLR 1 at 225 (Brennan J); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 327 (Dawson J).

61. The section does not make inconsistency with Australia's obligations under the World Heritage Convention a jurisdictional fact.[71] Instead, as its language suggests,[72] it requires the Minister to form a view on whether giving approval for the taking of an action and the conditions to be attached to such an approval would be inconsistent with Australia's obligations under the World Heritage Convention. If the Minister is satisfied that the giving of approval on certain conditions would not breach those obligations, then s 137 will not invalidate the decision to approve.[73]

62. Such a construction is reinforced by two principal factors. First, Parliament will not ordinarily be treated as having made as jurisdictional complex 'facts' which involve value judgments.[74] Article 5 of World Heritage Convention, however, requires State parties to make value judgments, often involving economic and social factors, about the appropriate measures for the protection and the conservation of cultural and natural heritage in their territory.

63. Secondly, the construction is consistent with the objects of the EPBC Act and falls well within the latitude conferred on Australia in determining how to implement its obligations to protect and conserve the world heritage values of the Great Barrier Reef under Articles 4 and 5 of the Convention.

64. Once these matters are understood, the ACF's submissions must be rejected.

---

[71] For an explanation of the concept of jurisdictional fact in the context of environmental law, see *Timbarra Protection Coalition Inc v Ross Mining NL and Others* (1999) 46 NSWLR 55 at [37]-[40] (Spigelman CJ).

[72] The words '[in] deciding whether or not to approve…the taking of an action and what conditions to attach to an approval' demonstrate that the Minister must form views about the inconsistency of granting approvals and attaching conditions with Australia's obligations. That tends against the view that inconsistency is a jurisdictional fact: see *Timbarra Protection Coalition Inc v Ross Mining NL and Others* (1999) 46 NSWLR 55 at [44] (Spigelman CJ).

[73] It is unclear precisely how the ACF considers s 137 should be construed. It appears to submit, however, that s 137 should be given the same construction as s 13(1) of the *World Heritage Conservation Act 1983* (Cth): see ACF submissions, para 107. Subsection 13(1) provided:

> In determining whether or not to give a consent pursuant to section 9 in relation to any property to which that section applies, the Minister shall have regard only to the protection, conservation and presentation, within the meaning of the Convention, of the property.

Section 137 is not, however, drafted in the same way and it need not be given an identical construction.

[74] *Ilic v City Of Adelaide* [2010] SASC 139 at [53] (Kourakis J); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [57]-[58] (French CJ); *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200; [2012] FCAFC 65 at [147] (Perram J); *Harbour Radio Pty Limited v Australian Communications and Media Authority* (2012) 202 FCR 525 at [84] (Griffiths J).

65. Section 137 requires the Minister to be satisfied that his approval and the conditions to be attached to the approval will not place Australia in breach of Articles 4 and 5 of the Convention. The Minister addressed s 137 expressly.[75] He also concluded, after considering the greenhouse gas emissions from mining operations and the burning of the mined coal, that there would be no unacceptable impact on the world heritage values of the Great Barrier Reef.[76] That accorded with his conclusion that the impacts from the proposed mine on climate change were speculative.[77] In those circumstances, he complied with s 137.

66. Even if s 137 were to be interpreted as imposing a requirement for consistency with treaty obligations that can be the subject of independent judicial determination (contrary to the Minister's construction set out above), nothing in Article 4 of the World Heritage Convention suggests that the Minister's decision to approve the taking of the action would place Australia in breach of its obligations. For the reasons outlined above,[78] Article 4 imposes an overarching duty not to act in a manner manifestly contrary to the purposes of the Convention. Such a duty is entirely compatible with the Minister reaching the view that the proposed action should not be refused because, given the speculative nature of any net increase in global greenhouse gas emissions resulting from the overseas combustion of coal from the mine and consequential rise in global temperatures, that action would not have any identifiable or possible impacts on the Great Barrier Reef. No logical inconsistency of the kind asserted by the ACF therefore arises.[79]

67. Accordingly, the Minister complied with s 137 of the EPBC Act.

68. In any event, contrary to the applicant's unjustified assumption,[80] non-compliance with the stipulation in s 137 would not lead to invalidity of the decision. ACF makes no attempt to set out or explain why, as a matter of statutory construction, non-compliance with the section goes to the validity of the decision. Given the subject matter of the section (a Minister's consideration of the Australia's international obligations in the course of making a decision) and its context (s 137 imposes a

---

75 Statement of reasons, paras 168-171. See also Annexure A (identifying s 137 as one of the legislative provisions that the Minister took into account in making his decision).

76 Statement of reasons, para 48. It should be recalled that Articles 4 and 5 are directed to the protection and conservation of these world heritage values.

77 Statement of reasons, para 140.

78 Paragraph 54 and following.

79 ACF's submissions, paras 114-115.

80 ACF's submissions, paras 113 and 115.

requirement that sits outside the mandatory considerations described in s 136), it would not be inferred that a failure to comply with the section would cause the decision to be invalid.

69. The application should be dismissed with costs.

Richard Lancaster SC

Gim Del Villar

Counsel for the First Respondent

Date: 26 April 2016

....
Emily Nance
AGS Lawyer
for and on behalf of
the Australian Government Solicitor
Solicitor for the First Respondent