SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 4189/16

Applicant: **LAND SERVICES OF COAST AND COUNTRY INC**

AND

First Respondent: **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION**

AND

Second Respondent: **ADANI MINING PTY LTD**

APPLICANT'S OUTLINE OF ARGUMENT

INTRODUCTION

Basis of the application

1. The Applicant seeks a statutory order of review pursuant to s 20 of the *Judicial Review Act* 1991 (Qld) (**JRA**) against the grant of an environmental authority under s 194 of the *Environmental Protection Act* 1994 (Qld) (**EPA**) for the Carmichael Coal Mine (**the decision**).[1]

2. The Applicant was an objector to the environmental authority.[2] A delegate of the First Respondent (**the delegate**) made the decision to grant the environmental authority on 2 February 2016 and provided a statement of reasons (**the reasons**) on 29 March 2016.[3] The Second Respondent is the proponent of the mine.

3. The central issue for the application is whether the delegate complied with the obligation imposed by s 5 of the EPA in making the decision.

4. Section 5 of the EPA provides that if, under the Act, a function or power is conferred on a person, the person must perform the function or exercise the power in the way that best achieves the object of the Act.

5. The object of the Act, stated in s 3, is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development).

6. The delegate's reasons did not refer to ss 3 or 5 of the EPA explicitly, implicitly or in substance.

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[1] The environmental authority is Exhibit DD-2, pp 140-249, to the affidavit of Derec Fay Vaughn Davies, affirmed and filed 26 April 2016 (**the affidavit of Derec Davies**).
[2] In relation to the Applicant's standing to bring the application see the affidavit of Derec Davies at [15]-[18].
[3] The reasons are Exhibit DD-4, pp 251-259, to the affidavit of Derec Davies.

APPLICANT'S OUTLINE OF ARGUMENT
Filed on Behalf of the Applicant

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7. The Application for a Statutory Order of Review that was originally filed was drafted on the basis of the delegate's reasons. It included a ground that the delegate had failed to consider a relevant consideration, namely the command in s 5 of the EPA, when exercising her power under s 194.

8. After the proceedings were commenced the delegate affirmed an affidavit in which she responded to the grounds of the application and stated she "took into account and applied the objects" of the EPA as stated in s 3 in making her decision and that she was "aware" of the obligation in s 5 at the time she made her decision.[4]

9. Even taking the delegate's additional reasons set out in her affidavit at their highest, her decision misapprehended the nature of the obligation in s 5. She did not consider or determine the right question.

10. In response to the new evidence contained in the delegate's affidavit, the Applicant seeks leave to file an amended application to raise the following grounds to address the errors it submits are apparent in the delegate's affidavit read in the context of her earlier reasons:[5]

    Ground 1

    The decision involved an error of law in that the delegate misconceived ss 3 and 5 of the EPA, in particular the delegate failed to appreciate that she was required to consider and be positively satisfied her decision to approve (with or without conditions) or refuse the application for the environmental authority was the best way to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological process on which life depends.

    Ground 2

    The decision involved a jurisdictional error in that the delegate failed to apply herself to the real question to be decided pursuant to s 5 of the EPA when performing the function and exercising the power under s 194 of the EPA. Section 5 required her to be positively satisfied that in making the decision she was performing her function and exercising her power in the way that best achieves the object of the EPA. This required her to consider and determine whether, in performing the function and exercising the power in that way, she would be adopting the best way of protecting Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends. However, the delegate did not do this. She did not consider and determine this question.

11. The following submissions are based on these grounds of review.

BACKGROUND

The application for an environmental authority for the mine

12. The proposed mine is located in the north Galilee Basin approximately 160 km north-west of Clermont in Central Queensland. The mine is proposed to be an open cut and

[4] See paragraphs [14] and [15] of the affidavit of Katherine Jean Bennink affirmed 16 June 2016 and filed 17 June 2016 (**the delegate's affidavit**).
[5] Both grounds are based on s 20(2)(f) (error of law) of the JRA.

underground coal mine which will extract approximately 60 million tonnes of coal per annum and will have an operating life of approximately 60 years.[6] The coal from the mine is thermal coal to be exported for electricity production in India.[7]

13. The mine was declared a significant project (later renamed "coordinated project") in 2010 and assessed by an environmental impact statement prepared during 2011-2013 under the *State Development and Public Works Organisation Act* 1971 (Qld).[8]

14. The Second Respondent applied for a site-specific environmental authority under s 125 of the EPA on 9 July 2013.[9]

15. The application was publicly notified under s 152 of the EPA and the Applicant made a submission under s 160 of the EPA objecting to the grant of an environmental authority for the mine.[10]

16. The administering authority made a preliminary decision under ss 172 and 176 of the EPA that the application for the environmental authority be granted. It issued a draft environmental authority on 28 August 2014.[11]

17. The Applicant gave an objection notice under s 182 that its submission be taken to be an objection to the application and the application was referred to the Land Court under s 184, together with a similar objection to a mining lease under the *Mineral Resources Act* 1989 (Qld).

Objections decision hearing in the Land Court considered wide range of issues in the context of s 5 and directly relevant to it

18. The Land Court held an objections decision hearing from 31 March – 1 May 2015 and closing submissions were delivered on 14 May 2015.

19. The learned President recommended under ss 190 and 191 of the EPA that the application for the environmental authority be granted subject to further conditions in relation to monitoring of impacts on a threatened bird species, the Black-throated Finch (**BTF**). The topics addressed by the President's reasons included:

    (a) the legal framework for the Land Court's objection decision, including the application of ss 3 and 5 of the EPA;[12]

    (b) the source aquifer of a groundwater springs complex known as "Doongmabulla Springs";[13]

    (c) groundwater modelling;[14]

    (d) impacts of the mine on spring flow;[15]

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[6] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [1]-[2] (MacDonald P). This decision is Exhibit DD-1, pp 8-11, to the affidavit of Derec Davies.
[7] See the discussion of energy markets in *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [489]-[498].
[8] Reasons, pp 1-2 (see pp 252-253 of the affidavit of Derec Davies).
[9] Reasons, p 2 (see p 253 of the affidavit of Derec Davies).
[10] The grounds of objection are summarised in *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [15].
[11] Reasons, p 2 (see p 253 of the affidavit of Derec Davies).
[12] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [29]-[58].
[13] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [64]-[181].
[14] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [182]-[235].

(e) springs ecology;[16]

(f) the impacts of the mine on a threatened plant species, the Waxy Cabbage Palm;[17]

(g) the impacts of the mine on the BTF;[18]

(h) climate change;[19]

(i) financial capability of the proponent of the mine;[20]

(j) energy markets;[21] and

(k) economic impact.[22]

20. These topics were addressed within the context of the obligation in s 5, which the Land Court set out[23] and discussed[24] in her reasons for recommending approval of the mine. The Learned President concluded at [58]:

> "… I accept that the Court must exercise its powers in the way that best achieves the object of that Act. That is, the Court must recognize that the object of that Act is to protect Queensland's environment while allowing for development that is ecologically sustainable. The relevant development here is the operation of the mine and associated activities, which will be enabled if the mining leases are granted. The first question for the Court to determine is whether the mine can be developed in an ecologically sustainable way. It is unnecessary for me to determine, at this point, the consequences, if I were to conclude that the development would be unsustainable."[25]

21. The recommendation and reasons given by the Land Court did not bind the delegate in making her decision under s 194. Nor did they absolve the delegate of the obligation imposed by s 5 of the Act to perform the function or exercise the power under s 194 in the way that best achieves the object of the Act.

Decision to grant the environmental authority

22. Following the objection decision the delegate decided to grant the environmental authority under s 194 of the EPA on 2 February 2016.[26]

Delegate's statement of reasons omitted ss 3 and 5 of the EPA entirely

23. The Applicant applied under s 32 of the JRA for a statement of reasons for the decision on 1 March 2016.[27]

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[15] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [236]-[275].
[16] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [276]-[322].
[17] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [323]-[353].
[18] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [354]-[419].
[19] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [420]-[457].
[20] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [458]-[488].
[21] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [489]-[498].
[22] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [499]-[575].
[23] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [24], [26] and [50].
[24] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [49]-[58].
[25] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [58] read in context of [49]-[57].
[26] The environmental authority is Exhibit DD-2, pp 140-249, to the affidavit of Derec Davies.

24. The delegate provided her reasons for the decision 29 March 2016.[28]

25. On the face of the reasons they were at least ostensibly claimed to be in accordance with the obligation under s 34 of the JRA, which requires that the "statement must contain the reasons for the decision." "Reasons" are defined in s 3 of the JRA as:

> ***reasons***, in relation to a decision, means—
>
> (a) findings on material questions of fact; and
>
> (b) a reference to the evidence or other material on which the findings were based;
>
> as well as the reasons for the decision.

26. The statutory context of a statement of reasons provided under s 34 of the JRA lays the foundation for acceptance of the statement as evidence of the truth of what it says, namely, that the findings made, the evidence referred to and the reasons set out were those actually made, referred to and relied upon in coming to the decision and that no finding, evidence or reason which was of any significance to the decision has been omitted.[29] Similarly, where a decision-maker fails to mention a matter in their statement of reasons it may be inferred that they regarded it as irrelevant, immaterial or failed to consider it.[30]

27. In contrast to the wide range of issues considered in the Land Court's objection decision, summarized above at [19], the reasons of the delegate are remarkably short and very limited in what factual issues they consider.

28. The reasons set out the legislative framework considered relevant by the delegate by reference only to ss 190-194 and 200.[31]

29. The reasons failed to mention the object of the EPA stated in s 3 or the obligation in s 5 that in performing the function or exercising the power under s 194 of the EPA the delegate must perform the power or exercise the function in the way that best achieves the object.

30. In ostensibly setting out the "material and other evidence" that the delegate considered the reasons referred to the draft environmental authority and the Land Court objections decision before stating:

> "Two significant issues were addressed by the Land Court objection decision. The first is with respect to the uncertainty of the source of the aquifer of the Doongmabulla Springs Complex (**DSC**), and [sic] second is with respect to the serious or irreversible environmental damage to the continued survival of any BTF [Black-throated Finch, an endangered species of birds] in the mining lease area."[32]

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[27] The request is exhibit DD-3, p 250, to the he affidavit of Derec Davies.

[28] The reasons are Exhibit DD-4, pp 253-259, to the affidavit of Derec Davies.

[29] *Minister for Immigration, Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 179 per French J (as his Honour then was), discussing a statement of reasons prepared under s 13 of the ADJR Act.

[30] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 330-331 [5] per Gleeson CJ; at 338 [37] per Gaudron J; and 346 [69] per McHugh, Gummow and Hayne JJ; and *Mees v Kemp* (2005) 141 FCR 385 at 403, [58] per French, Merkel and Finkelstein JJ.

[31] Reasons, pp 3-4 and 6 (see pp 254-255 and 257 of the affidavit of Derec Davies). Emphasis in original.

[32] Reasons, p 5 (see p 256 of the affidavit of Derec Davies).

31. The delegate proceeded in her reasons to consider only how the impacts on the Doongmabulla Springs Complex and Black-throated Finch (**BTF**) would be addressed through the conditions of approval for the mine.

32. The delegate concluded by ostensibly stating the "reasons for decision" based on "careful consideration of the material and other evidence identified above, and having made the above findings of fact".

The delegate's reasons ignored or considered irrelevant disputed issues central to applying s 5 in the circumstances of the application

33. The very nature of judicial review means that analysis of the delegate's reasons must not descend into de facto merits review. For instance, it would be impermissible to make a detailed analysis at a micro-level of the findings of fact made and the evidence or other material on which the findings were based. The Applicant does not seek to do that.

34. However, it is perfectly legitimate to analyse the delegate's reasons at a macro-level to determine whether her identification of what she considered to be relevant matters demonstrates that she asked herself the wrong question and misconstrued her functions and powers in making her decision under section 194 of the EPA by failing to take into account relevant matters given the language of ss 3 and 5 of the EPA.[33]

35. In this sense the Applicant notes that the delegate's reasons did not refer at any stage to economics, nor the major changes in economic evidence and jobs numbers that had been accepted by the Land Court.[34] These matters were logically centrally relevant to determining, in accordance with the obligation in s 5 of the EPA, whether the mine "was development that improves the total quality of life, both now and in the future".

36. The delegate's reasons also did not at any stage refer to climate change, the greenhouse gas emissions from burning of the coal from the mine (scope 3 emissions) or related issues:

    (a) which the Applicant raised in its objection to the mine;

    (b) which had been major issues before the Land Court;

    (c) the evidence for which had changed substantially since the draft environmental authority was issued by the administering authority;[35] and

    (d) that had featured in the Land Court's decision.[36]

37. These matters were also logically relevant to determining, in accordance with the obligation in s 5 of the EPA, whether the mine was "development that improves the total

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[33] *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 338-340 [37]-[41] per Gaudron J, and 346 [69], 348-349 [75] and 351-352 [82]-[84] per McHugh, Gummow and Hayne JJ; *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26 at [25] and [42] per Hayne J and [90] per Crennan and Bell JJ.

[34] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [499]-[575], [585] and [586].

[35] The evidence on climate change presented to the Land Court was summarised in *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [420]-[437]. Except in relation to calculations of direct (Scope 1) emissions from the mine and indirect emissions from electricity usage at the mine (scope 2 emissions), none of this evidence was before the administering authority at the time it decided to issue the draft environmental authority.

[36] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [420]-[457].

quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends”.

38. The delegate did not state whether she accepted the Land Court’s reasoning or findings on economics or the contribution of the mine to the environmental harm caused by climate change.

39. The delegate was required by s 194(4)(a)(i) of the EPA to “have regard” to the objection decision.

40. It is submitted the obligation to apply s 5 in making her decision under s 194 is stronger than merely to “have regard” to s 5.

41. It is submitted that the delegate was required by s 5 of the EPA to be *positively satisfied* that her decision to approve or refuse the environmental authority for the mine under s 194 *best achieved* the object of the Act.

42. While the delegate could naturally have been informed by the recommendation and findings of the Land Court, it is submitted that she was required by s 5 of the Act to weigh these matters up in deciding whether approval of the environmental authority best achieved the object of the Act stated in s 3. On the face of the findings in her reasons she appears not to have done so.

43. The delegate adopted the Land Court’s findings in a limited way. She considered it “appropriate” to adopt the Land Court’s objection decision recommendations regarding the BTF species management plan with revised wording without stating any apparent test for what this meant.[37]

44. The delegate also considered “that the monitoring, research, plans, recording, reporting and mitigation measures required by the conditions of the EA [environmental authority] will ensure there are sufficient measures in place to manage the environmental issues and impacts” without stating any apparent test for what “sufficient” or “manage” meant or on what basis these were judged.

45. The delegate’s reasons suggest that she did not engage with the central question posed by s 5 of the EPA; did the approval *best achieve* the object of the Act?

The delegate’s affidavit at its highest does not address the question posed by section 5

46. While the delegate’s reasons did not refer to ss 3 or 5 of the EPA in her later affidavit she supplemented her reasons and referred to ss 3 and 5 for the first time.

47. The delegate stated at paragraph [5] of her affidavit that she has “read the application for judicial review” and paragraph [15] is directly responsive to the errors in her reasoning process set out in the application.

48. The delegate did not claim in her affidavit that the references to “appropriate” or “sufficient” or any other part of her reasons were an implicit reference to ss 3 and 5 of the EPA.

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[37] Reasons, p 7 (see p 258 of the affidavit of Derec Davies).

49. The delegate's affidavit makes a stand-alone claim to have considered and applied both s 3 and s 5 of the EPA in making her decision.[38] Relevantly, she stated:

> "14. In considering my decision on approving the Environmental Authority to Adani, I read and considered the recommendations decision of the Land Court. Relevantly for present purposes, I read paragraphs [24]-[28] and [49]-[58] of the recommendations decision, which include the provisions of section 3 and section 5 of the EP Act.
>
> 15. I took into account and applied the objects of the EP Act as stated in section 3 of the EP Act, when making my decision to approve the Environmental Authority to Adani. The purpose of the conditions of the Environmental Authority is to balance protection of the environment against the nature of the Carmichael Coal Mine proposed by Adani, and to minimize and mitigate the potential adverse environmental effects of that Mine to the receiving environment. I am regularly called upon to make decisions under the EP Act and I am aware of the objects of that Act. I am also aware that the Act requires that when functions are to be performed or powers are to be exercised under the Act, they are to be performed or exercised in the way which best achieves the objects. I was aware of these matters at the time when I made the decision to approve the Environmental Authority to Adani."

50. The delegate's affidavit at [16] and [17] refers to an internal departmental briefing note about the approval that the delegate considered in making the decision. That document was titled "Request for Statutory Approval" and it is exhibit KB-4, pp 122-128, of the delegate's affidavit.

51. The internal departmental briefing note exhibited as KB-4 to the delegate's affidavit does not assist the delegate in relation to having correctly addressed the obligation imposed by s 5 of the EPA. There is no reference to ss 3 or 5 in the document. It merely sets out and justifies proposed changes to conditions. The legislative provisions referred to in the document are limited to ss 194 and 195 of the EPA. The entire focus of the document appears to have been merely changes to the conditions of the environmental authority with no consideration given to the broader questions posed by s 5 of the EPA. That, however, is consistent with the reasoning process apparent on the face of the delegate's reasons.

52. The delegate's affidavit at [14]-[17] clearly attempts to respond directly to the errors identified in the application as well as the delegate is able to. Put another way, the delegate's statements at [14]-[17] are the best answer she appears able to give to the application based on failing to consider or apply s 5 of the EPA. As the high water mark for her reasons the delegate's reasoning remains flawed because she does not address the correct question posed by s 5.

53. The delegate's affidavit, read fairly in conjunction with her reasons, reveals she misunderstood the nature of the obligation in s 5. This can be characterized in different ways – though with a common thread – as an error of law and an error of law involving a jurisdictional error.

54. These errors will be addressed below after considering the legal nature of the obligation in s 5 and the statutory process leading to the decision under s 194 of the EPA.

[38] See paragraphs [14] and [15] of the delegate's affidavit.

THE DELEGATE WAS REQUIRED TO CONSIDER AND APPLY SECTION 5

55. The delegate appears not to dispute that she was required to consider and apply s 5 of the EPA in making her decision under s 194 of the Act but that remains a question of law for the Court to determine. The reasons why as a matter of ordinary statutory construction s 5 is required to be considered and applied are set out here.

56. As a point of clarification, note that the EPA was substantially amended on 31 March 2013,[39] including renumbering of relevant chapters and sections and amending the standard criteria. The decision was made under the amended structure. The reasons of the Land Court that preceded the decision[40] provide the first consideration of the new structure of the EPA. No previous court judgments have considered the nature of the decision of the administering authority under s 194 of the EPA.[41]

Construing the subject-matter, scope and purpose of the EPA

57. The subject-matter, scope and purpose of the legislation[42] indicate that s 5 is a relevant consideration for a decision under s 194 of the EPA.

58. The object of the EPA is stated in s 3 of the Act:

> **3 Object**
>
> The object of this Act is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (***ecologically sustainable development***).

59. Section 4 of the EPA outlines four cyclical phases for achieving the object of the Act by an integrated management program that is consistent with ecologically sustainable development. A decision under s 194 is part of Phase 3 (Implementing environmental strategies and integrating them into efficient resource management) of this cyclical process but simply making a decision under s 194 does not mean that the object of s 3 is achieved automatically. Such a construction would leave no work for s 5 to do.

60. Section 5 imposes an obligation on any person performing a function or exercising a power under the Act:

> **5 Obligations of persons to achieve object of Act**
>
> If, under this Act, a function or power is conferred on a person, the person must perform the function or exercise the power in the way that best achieves the object of this Act.

61. It is significant that the language of s 5 is mandatory: the person ***must*** perform the function or exercise the power in the way that ***best achieves*** the object of the Act.

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[39] By the commencement of the *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012*.

[40] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 (MacDonald P).

[41] A recent decision of the Court concerning another decision under the EPA involved the earlier structure: *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 (Douglas J) (note: judgment on an appeal from this decision is currently reserved).

[42] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J.

62. The *Environmental Protection Bill 1994 Explanatory Notes* confirmed the ordinary meaning. It stated in relation to s 5:[43]

> *Section 5* requires all people who are given power under this Act, to use that power to protect the Queensland environment and to do so consistent with the principles of ESD.

63. The nature of the statement of a mandatory obligation to exercise functions or powers conferred on a person under legislation in the terms of s 5 of the EPA is clearly different to the normal principle of statutory interpretation to prefer an interpretation that will best achieve the purpose of the Act to any other interpretation.[44]

64. There has been little judicial consideration of the nature of the obligation imposed under s 5 of the EPA since the Act commenced. The most significant consideration of the nature of the obligation imposed by s 5 was given by the learned President of the Land Court in her reasons for recommending approval of the mine,[45] the ultimate conclusion for which was set out earlier at [20].

65. Section 5 must have some work to do. It imposes a mandatory obligation on all persons performing a function or exercising a power under the Act. It is stated in broad terms and involves a balancing exercise that goes to the heart of the EPA.

66. To treat s 5 as immaterial or a mere motherhood statement that does not impose a real obligation that a person performing a function or exercising a power must engage with would fly in the face of both the language of the section and the subject-matter, scope and purpose of the Act.

67. On its face the legislature intended s 5 to be central to the operation of the EPA and by doing so engage all persons performing a function or exercising a power under the Act to have the object of the Act at the forefront of their decision-making.

The delegate was "a person" to whom the obligation in s 5 of the EPA applied

68. The obligation stated in s 5 of the EPA clearly applied to functions or powers exercised by any delegate of the "administering authority" under the EPA because:

    (a) "administering authority" is defined in Sch 4 (Dictionary) of the EPA as:

    > ***administering authority*** means—
    >
    > (a) for a matter, the administration and enforcement of which has been devolved to a local government under section 514—the local government; or
    >
    > (b) for another matter—the chief executive.

    (b) "chief executive" is the chief executive (i.e. Director-General) of the public sector entity administering the EPA, the Department of Environment and Heritage;[46]

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[43] Section 5 in the Bill was stated in identical terms as s 5 in the current version of the EPA.
[44] *Acts Interpretation Act* 1954 (Qld), s 14A.
[45] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [49]-[58]. Note: these reasons were given in an administrative rather than judicial capacity: *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107 (Philip McMurdo J).
[46] *Acts Interpretation Act 1954* (Qld), s 33(11).

(c) pursuant to s 23 of the *Acts Interpretation Act* 1954 (Qld) (**AIA**) the functions or powers of the chief executive are exercised by the *person* occupying that office:

> **23 Performance of statutory functions etc.**
>
> (1) If an Act confers a function or power on a person or body, the function may be performed, or the power may be exercised, as occasion requires.
>
> (2) If an Act confers a function or power on a specified officer or the holder of a specified office, the function may be performed, or the power may be exercised, by the person for the time being occupying or acting in the office concerned.

(d) section 27A(3C) of the AIA provides that:

> Laws apply to the delegate, and to other persons in relationship to the delegate, in the performance of the delegated function or in the exercise of a delegated power as if the delegate were the delegator.

(e) section 518 of the EPA allows delegation by the administering authority, relevantly to "an authorized person or public service officer".

69. As the "administering authority" is the chief executive, a person, clearly the obligation in s 5 applies to powers and functions exercised by the administering authority under the EPA.

The statutory process leading to the decision

70. To achieve the object of the EPA stated in s 3, the body of the Act creates a "toolbox" of mechanisms, including many functions and powers conferred on a variety of persons.[47]

71. It is noteworthy that none of the functions and powers created by the EPA refer to the obligation stated in s 5 of the EPA. The Act must be read as a whole and through the lens of ss 3 and 5.

72. The "toolbox" of mechanisms to achieve the object of the EPA includes, relevantly, licensing systems for a range of activities that may harm the environment, of which mining is one. The process of applying for an environmental authority for mining activities is now contained in Ch 5 of the EPA.

73. Ch 5 provides different processes for different types of applications.[48] The mine was applied for as a "site-specific application" under s 125.

74. Applications for environmental authorities for mining leases are required to be publicly notified under s 152 of the EPA and any person may make a submission under s 160 of the Act.

75. Section 172 provides for the administering authority to make a preliminary decision on whether to grant an environmental authority for a site-specific application. The criteria for

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[47] There are over 100 functions and powers are created by the EPA under, *inter alia*, ss 19, 21A(3), 26, 34, 42, 43, 44, 46, 48, 49, 50, 51(3), 55, 56, 56A, 56B, 57, 60(3)(b), 62, 63, 68, 72, 85, 89, 98, 99, 101, 104, 128, 130, 131, 133, 134, 140, 143, 145, 147, 152(3), 159, 168, 170, 171, 172, 175, 176, 181, 185, 188, 189, 190, 193, 194, 203, 211, 212, 212A, 213, 215, 219, 227A, 228, 230, 233(3), 237(1)(b), 240, 247, 250C, 254, 258(2), 261(2), 265, 266, 271, 273, 274, 277A, 278, 280, 281, 282, 284C, 292, 295, 299, 301, 304, 305, 306, 307, 307A, 308, 310, 311, 314, 315, 318, 318A, 318DA, and 318E.

[48] EPA, s 112.

a preliminary decision on a site-specific application (as well as a variation application) are stated in s 176 and include the "standard criteria" as defined in Sch 3 (Dictionary) to the EPA. The standard criteria are defined to include broad matters such principles of environmental policy as set out in the Intergovernmental Agreement on the Environment[49] and the public interest. There is no express reference to the obligation in s 5 stated in s 176 or the standard criteria.

76. Following the administering authority's decision to grant a draft environmental authority, a person who made a submission about the application may give a notice that its submission be treated as an objection under s 182.

77. If that occurs, the application and the objection are referred to the Land Court to make an objections decision under s 190 of the EPA and the matters to be considered by the Land Court are listed in s 191. Again, the list of matters include the "standard criteria" as defined in Sch 3 of to the EPA but there is no express reference to the obligation in s 5 stated in s 191.

78. Following the Land Court's objection decision, notice of the decision is given to the MRA Minister and the State Development Minister who are able to provide advice to the administering authority,[50] and the application returns to the administering authority to make a final decision whether to grant the environmental authority and on what conditions under s 194.

The delegate was performing a function or power under s 194 to which s 5 applied

79. The delegate was clearly performing a function and exercising a power under the EPA in making a final decision under s 194(2)(a) that the application be either:

    (a) approved on the basis of the draft environmental authority for the application; or

    (b) approved, but on stated conditions that are different to the conditions in the draft environmental authority; or

    (c) refused.

80. On the face of the language in s 5, the obligation in that section applied to the performance of the function and the exercise of the power under s 194.

81. However, as with all other powers and functions created under the EPA, s 194 itself does not expressly refer to s 5.

82. Section 194(4) provides the criteria for the decision where, as for the application for an environmental authority for the Carmichael Coal Mine, a draft environmental authority was given for the application:

[49] The definition of the IGAE in the EPA notes that "A copy of the Intergovernmental Agreement on the Environment is in the *National Environment Protection Council (Queensland) Act 1994*, schedule."
[50] EPA, ss 192 and 193.

> In making the decision, the administering authority must—
>
> (a) have regard to—
>
> (i) the objections decision, if any; and
>
> (ii) all advice, if any, given by the MRA Minister or the State Development Minister to the administering authority under section 193; and
>
> (iii) if a draft environmental authority was given for the application—the draft environmental authority;

83. The obligation in s 5 is not listed in s 194(4) of the EPA. As the statute expressly states the considerations to be taken into account it is necessary for the Court to decide whether those enumerated factors are exhaustive or merely inclusive according to its subject-matter, scope and purpose.[51]

84. It is noteworthy that, read in the context of surrounding provisions of the EPA, s 194 is clearly not a complete statement of the matters to be considered in making the final decision on whether to grant an environmental authority following an objections hearing. For instance, ss 203 and 205 provide constraints on the power to impose conditions on the environmental authority, which would appear to apply to any conditions imposed under s 194(2)(a)(ii).

85. It is clear that the enumerated factors in s 194(4) are not exhaustive and are merely inclusive at least in relation to:

    (a) the obligation imposed under s 5 of the EPA that the administering authority ***must*** perform the function or exercise the power under s 194 in the way that ***best achieves*** the object of the Act stated in s 3, to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development); and

    (b) the requirements for conditions stated in ss 203 and 205.

86. Clearly, the obligation stated in s 5 of the EPA is required to be applied as a legal command and required to be considered as a mandatory consideration in exercising the power or function under s 194 of the Act.

THE DELEGATE MISUNDERSTOOD THE OBLIGATION IMPOSED BY SECTION 5

Section 5 must do some work

87. As noted earlier, at [65], s 5 must have some work to do. It imposes a mandatory obligation on all persons performing a function or exercising a power under the Act. It is stated in mandatory terms and requires best achieving the object of the Act.

88. To comply with the statutory command in s 5, a person performing a function or exercising a power under the EPA must engage with the question posed by the section.

89. To comply with s 5, a person performing a function or exercising a power *must* be positively satisfied that the performance of their function or exercise of their power is the best way to protect Queensland's environment while allowing for development that

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[51] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).

improves the total quality of life, both now and in the future, in a way that maintains the ecological process on which life depends.

90. The language of s 5 is clearly adaptable to the particular function and power in question and the circumstances of each individual case. There is no "one-size-fits-all" to meet the obligation in s 5 for the multitude of functions and powers under the Act and the variety of projects that are assessed under it.

91. The question any person performing a function or exercising a power under the EPA must ask themselves is: am I performing this function or exercising this power in a way that best achieves the object of the Act? They must be positively satisfied that they are doing so to comply with s 5.

92. For minor, administrative functions and powers under the EPA it would logically require little to be positively satisfied the obligation in s 5 was being met. That is not the case here.

93. For major final decisions to approve or refuse large, complex projects potentially causing serious and irreversible environmental harm, such as the Carmichael Coal Mine, the state of positive satisfaction required for s 5 must require, at a minimum, active engagement with the question posed by the section in the context of the function being performed, the power being exercised and the circumstances of the individual case.

The reasons did not refer to ss 3 or 5 explicitly, implicitly or in substance

94. As noted earlier the delegate's reasons did not refer to s 3 or s 5 of the EPA explicitly, implicitly or in substance.

95. The reasons of an administrative decision-maker are meant to inform, and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy might be gleaned from the way in which the reasons are expressed.[52]

96. The application of a beneficial construction depends on the facts and circumstances of each case. Here, the delegate's reasons were prepared following lengthy and complex litigation in the Land Court and would have been prepared in the expectation that they would be carefully analysed.

97. In the circumstances, the reasons should be construed with considerable care, and without significant hesitation about the degree of scrutiny to be applied to them.[53]

98. Ordinarily the failure to refer to a matter in a statement of reasons prepared in accordance with the obligation under s 34 of the JRA would lead to the inference being drawn that the decision-maker did not consider it or considered it irrelevant or immaterial.[54]

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[52] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan, Toohey, McHugh and Gummow JJ.

[53] *Jaffarie v Director General of Security* (2014) 226 FCR 505 at 519-521, [42]-[43], [45] (Flick and Perram JJ); *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at 295-296, [57] (Marshall, North and Flick JJ).

[54] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 330-331 [5] per Gleeson CJ; at 338 [37] per Gaudron J; and 346 [69] per McHugh, Gummow and Hayne JJ; and *Mees v Kemp* (2005) 141 FCR 385 at 403, [58] per French, Merkel and Finkelstein JJ.

99. The normal inference is that no finding, evidence or reason which was of any significance to the decision has been omitted from a statement of reasons prepared under s 34 of the JRA.[55]

100. Applying these principles, in the absence of the delegate's later affidavit, the delegate's reasons indicate that she failed to apply or consider the obligation in s 5 of the EPA. The delegate's failure to refer to s 5 in her reasons clearly indicates this.

101. The substance of the delegate's reasons would, absent the delegate's later affidavit, render this conclusion overwhelming. On any reading of the reasons it is submitted the delegate took a very narrow view of the factual issues that she was required to determine and ignored major issues before the Land Court, summarized above at [19], such as the environmental harm cause by the burning of coal contributing to climate change and the potential economic benefit of the mine.

102. The delegate's very narrow and limited consideration of the facts of the application in her reasons indicates that, absent her later affidavit, in substance and not merely in form, she failed to apply or consider the obligation in s 5.

103. Had the delegate correctly understood and applied the obligation in s 5, she would have been required to weigh improvements to the total quality of life, such as through employment generated by the mine, against the environmental harm caused to ecological processes on which life depends, such as the harm caused by greenhouse gas emissions from the burning of the coal from the mine.

104. The reasons for the decision ignored these issues entirely; in substance the delegate did not correctly apply the obligation in s 5 of the EPA as she was required to do.

105. This failure goes to the heart of the EPA and the heart of the delegate's function in considering whether to approve or refuse the application for the environmental authority. It cannot be said to be so insignificant that the failure to take it into account could not have materially affected the decision.[56]

106. To make these points is not to descend into a merits argument about the delegate's reasons but to infer from her reasons whether she performed the function and exercised her power under s 194 of the EPA correctly. Put another way, the question is whether she made her decision according to law.

107. The delegate's identification of what she considered to be relevant matters demonstrates that she asked herself the wrong question and misconstrued her functions and powers in making her decision under section 194 of the EPA by failing to take into account relevant matters given the language of ss 3 and 5 of the EPA.[57]

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[55] *Minister for Immigration, Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 179 per French J (as his Honour then was), discussing a statement of reasons prepared under s 13 of the ADJR Act.

[56] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J).

[57] *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 338-340 [37]-[41] per Gaudron J, and 346 [69], 348-349 [75] and 351-352 [82]-[84] per McHugh, Gummow and Hayne JJ; *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26 at [25] and [42] per Hayne J and [90] per Crennan and Bell JJ.

Errors of law remain apparent in the delegate's affidavit taken at its highest

108. As noted earlier, at [52], the delegate's affidavit at [14]-[17] clearly attempts to respond directly to the errors identified in the application as well as the delegate is able to. This appears to be the best that the delegate can provide.

109. At its highest the delegate's reasoning at paragraph [15] of her affidavit indicates:

(a) The delegate "took into account and applied the objects of the [EPA] as stated in section 3 of the [EPA]" when making her decision to approve the environmental authority under s 194. This is not what s 5 required. The delegate was required to be positively satisfied that the decision to approve (with or without conditions) or refuse the mine was "the way that ***best achieves***" the singular object of the Act (emphasis added).

(b) "The purpose of the conditions of the Environmental Authority is to balance protection of the environment against the nature of the Carmichael Coal Mine proposed by Adani, and to minimise and mitigate the potential adverse environmental effects of that Mine to the receiving environment." It is unclear what this means but if it is meant to refer to the test in s 5 in the context of making a decision whether to approve or refuse the mine under s 194 of the EPA it in no way does this.

(c) The delegate is "regularly called upon to make decisions under the [EPA]" and the delegate is "aware of the objects of that Act". This is not what s 5 required.

(d) The delegate is "also aware that the Act requires that when functions are to be performed or powers are to be exercised under the Act, they are to be performed or exercised in the way which best achieves the objects." The delegate does not say that she applied this test in deciding to approve or refuse the mine in this case.

(e) The delegate "was aware of these matters at the time when I made the decision to approve the Environmental Authority to Adani." Again, the delegate does not ask the right question. She skirts around the issue and merely states she "was aware" of the obligation in s 5 of the EPA when she made her decision under s 194. She does not say she actually asked the question posed by s 5 or was positively satisfied that the decision to approve the mine was the way that best achieved the object of the Act.

110. Section 5 of the EPA required the delegate to consider and be positively satisfied her decision to approve (with or without conditions) or refuse the application for the environmental authority was the best way to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological process on which life depends.

111. However, the delegate did not do this. She did not consider and determine this question. In doing so she misapprehended the nature of her function and fell to jurisdictional error.[58]

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[58] *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 338-340 [37]-[41] per Gaudron J, and 346 [69] and 351-352 [82]-[84] per McHugh, Gummow and Hayne JJ; *FTZK v Minister for*

Relevant principles for establishing jurisdictional error here

112. It is well established that where an administrative decision-maker is under a duty but misconceives the nature of the duty or has not applied themselves to the question which the law prescribes their decision or action may be set aside.[59]

113. Brennan, Deane, Toohey, Gaudron and McHugh JJ stated in *Craig v South Australia* (1995) 184 CLR 163 (***Craig***) at 179:

> If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

114. Gaudron J stated in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (***Yusuf***) at 339-340 [41]-[44] (citations omitted):

> … there is said to be a "constructive failure to exercise jurisdiction" when a tribunal misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form. A constructive failure to exercise jurisdiction may be disclosed by the Tribunal taking an irrelevant consideration into account. Equally, it may be disclosed by the failure to take a relevant matter into account.
>
> … it may be that the failure of the Tribunal to take a particular matter into account indicates that, in the circumstances, the Tribunal has misunderstood its duty or applied itself to the wrong question and has, on that account, failed to conduct a review as required …
>
> … the failure of the Tribunal to make findings with respect to a particular matter may, at the same time, reveal failure to exercise jurisdiction, whether actual or constructive, and, also, failure to conduct a review as required by the Act. …

115. McHugh, Gummow and Hayne JJ in *Yusuf* at 352 [84], after quoting the passage from *Craig* set out above and discussing various aspects of jurisdictional error, stated:

> If the Tribunal identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material in such a way as affects the exercise of its powers, that will very often reveal that it has made an error in its understanding of the applicable law or has failed to apply that law correctly to the facts it found. If that is so, the ground [of error of law] is made out.

116. Hayne J in *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26 (***FTZJ***) at [25] stated, citing the passages from *Craig* and Guadron J's reasons in *Yusuf* set out above:

> For the reasons which follow, the error of law the appellant identified was a jurisdictional error. The tribunal failed "to apply itself to the real question to be decided or [misunderstood] the nature of the opinion it [was] to form".

Immigration and Border Protection (2014) 310 ALR 1; [2014] HCA 26 at [25] and [42] per Hayne J and [90] per Crennan and Bell JJ.

[59] See, e.g., *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at 242 per Rich, Dixon and McTeirnan JJ.

117. Bell and Crennan JJ in *FTZK* at [90], in considering whether a jurisdictional error had been committed, stated (citations omitted):

> … empowering legislation can show that a tribunal's identification of what it considered to be relevant matters may demonstrate that it asked itself the wrong question, as explained [by Gaudron J at [69]] in *Yusuf*. Equally, it may demonstrate that a tribunal has misconstrued its functions and powers to decide, by taking into account matters which are irrelevant given the language of the empowering provision and the scope and purpose of the whole Act. Either form of error requires the impugned decision to be set aside.

Jurisdictional error is apparent in the delegate's reasons and affidavit

118. It is submitted that the delegate's decision involved an error of law that was a jurisdictional error in that the delegate failed to apply herself to the real question to be decided or misunderstood the nature of the opinion she was to form in applying s 5 of the EPA when exercising the power under s 194 of the EPA. This is apparent from the delegate's reasons and affidavit.

119. In addition to not addressing the critical question at paragraph [15] of her affidavit or elsewhere, there is nothing in the delegate's reasons to suggest she in any way engaged in the process or applied herself to the critical question posed by s 5.

120. There was no logical pathway from the delegate's findings on material questions of fact to a conclusion that the obligation in s 5 of the EPA was satisfied by the decision she made to grant the environmental authority.[60] This is because:

    (a) she made no findings that could support a conclusion that the mine was "development that improves the total quality of life, both now and in the future"; and

    (b) she made no findings that could have lawfully addressed the question of whether the mine was development "in a way that maintains the ecological processes on which life depends", such as any finding regarding the contribution that the burning of the coal from the mine would make to climate change.

121. Her identification of what she considered to be relevant matters demonstrates that she asked herself the wrong question and misconstrued her functions and powers in making her decision under section 194 of the EPA by failing to take into account relevant matters given the language of ss 3 and 5 of the EPA.[61]

122. This is because her findings on material questions of fact are inconsistent with her having engaged in the reasoning process required by ss 3 and 5 that her decision ***must*** be a decision that ***best achieves*** the protection of Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depend.

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[60] *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26 at [6], [13] and [17]-[19] per French CJ and Gageler J, and [39], [40] and [42] per Hayne J.

[61] *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 338-340 [37]-[41] per Gaudron J, and 346 [69], 348-349 [75] and 351-352 [82]-[84] per McHugh, Gummow and Hayne JJ; *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26 at [25] and [42] per Hayne J and [90] per Crennan and Bell JJ.

123. These matters are raised as an error of law not as a merits argument. To paraphrase what McHugh, Gummow and Hayne JJ said in *Yusuf*, the grounds of review here are concerned essentially with whether the decision-maker has properly applied the law.[62] They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision-maker acts or the merit of the decision.[63] The central issue is whether the delegate correctly understood the obligation imposed by s 5. It is submitted that from a fair reading of her reasons and affidavit that she did not.

THE GROUNDS OF REVIEW ARE MADE OUT

124. For the reasons given above, the grounds of review are made out.

125. The delegate misunderstood the nature of the obligation imposed on her by s 5 of the Act. She did not ask herself the question required to be answered by s 5 of the EPA and misunderstood what she was required to do in applying the legal obligation imposed by that section.

126. Given the very limited nature of the factors considered by the delegate in her reasons and later affidavit she cannot have engaged in the decision-making process required by s 5. There was no logical pathway from her findings on material questions of fact to a conclusion that the obligation in s 5 of the EPA was satisfied by the decision she made to grant the environmental authority.

127. As such her decision was affected by an error of law or errors of law involving jurisdictional error.

128. These errors go to the heart of the EPA and the heart of the delegate's function in considering the application for the environmental authority. They cannot be said to be so insignificant that the failure to take it into account could not have materially affected the decision.[64]

129. It is impossible to state that these failures or flaws in the reasoning could not have materially affected the decision.[65]

CONCLUSION

130. The grounds of review are made out and the Court should set aside the decision and remit the matter to the First Respondent to be determined according to law.

131. The Court should order the First Respondent pay the Applicant's costs.

Dr Chris McGrath
Counsel for the Applicant
1 July 2016

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[62] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 348 [74] per McHugh, Gummow and Hayne JJ.

[63] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 348 [74] per McHugh, Gummow and Hayne JJ.

[64] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J.

[65] *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26 at [97] per Hayne J.