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**

SECOND RESPONDENT'S OUTLINE OF SUBMISSIONS

Overview

1. The applicant (**LSCC**) applies under the *Judicial Review Act* 1991 (**JRA**) to set aside a decision of a delegate of the first respondent (**Chief Executive**) made under s.194(2)(ii) of the *Environmental Protection Act* 1994 (**EPA**). The decision, made on 2 February 2016, was to approve an application by the second respondent (**Adani**) for an Environmental Authority (**EA**) for the development and operation of the Carmichael mine in the Galilee Basin (the **Mine**).

2. LSCC's challenge is based on the alleged failure by the delegate to properly consider or apply ss.3 and 5 of the EPA. They provide:

> **3 Object**
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> 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***).
>
> **5 Obligations of persons to achieve object of Act**
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> 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.

3. The decision was the "*final decision*" made under Chapter 5, Part 5 of the EPA[1]. It was preceded by an extensive process which included (i) the Mine being declared a project of State significance under the *State Development and Public Works Organisation Act* 1971 (**SDPWOA**) (ii) the preparation (by Adani) of an Environmental Impact Statement (**EIS**) under the SDPWOA (iii) the assessment of the EIS by the Coordinator-General in an assessment report; (iv) a recommendation by the Coordination-General in his assessment report that the Mine be approved subject to conditions; (v) a decision by the Commonwealth Environment Minister under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (**EPBC Act**) to approve the Mine under that Act subject to conditions; (vi) an application by Adani for an EA in respect of the Mine; (vii) the making of public submissions in response to the application for an EA, including by LSCC (viii) a decision by the administering authority under the EPA to issue a draft EA for the Mine; (ix) a full and lengthy hearing by the Land Court of objections to an EA, including by LSCC; and (x) a recommendation from the Land Court, supported by extensive reasons, that an EA be issued subject to conditions.

4. LSCC's objection before the Land Court was to the effect that issuing an EA is contrary to ss.3 and 5 of the EPA in that the Mine is not ecologically sustainable development. It based that contention on allegations about the impacts of the Mine on water (surface and ground), fauna and flora species and climate change and allegations about Adani's financial capacity and the economic viability of the Mine. The Land Court concluded that the Mine will cause no impact to climate change and that the impacts on water and flora and fauna species will be managed through conditions. It concluded that Adani has the financial capacity to develop and operate the Mine and that the benefits of the Mine outweigh any adverse consequences of it[2]. The Land Court recommended that the EA be issued subject to the conditions in the draft EA and some additional ones[3]. In making its recommendations the Land Court expressly applied ss.3 and 5 of the EPA.

5. Under s.194(2) of the EPA, the delegate was required to decide between three alternatives (to approve the application for an EA on the basis of the draft EA, to

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1 See s.194 of the EPA.

2 *Adani Mining Pty Ltd v LSCC* [2015] QLC 48 at [58], [266] – [275], [316] – [322], [347] – [353], [406] – [419], [447] – [457], [549] – [575], [623] – [626]; exhibit DD-4 to the affidavit of Derec Fay Vaughn Davies affirmed 26 April 2016 at 1 (**CD2**).

3 *Adani*, order 2.

approve the application with different conditions, or to refuse the application) and had 20 days to make the decision after receiving the Land Court's decision[4]. Under s.194(4)(a), the delegate was obliged to have regard to three mandatory considerations: the Land Court's decision, certain advice (if any) from two other Ministers, and the draft EA. It is uncontroversial that the delegate considered the first and third documents and that, as no advice was provided by the Ministers, the second consideration did not arise.

6. The delegate decided on the second alternative under s.194(2)(a), viz. that the application for the EA be approved on stated conditions different to the draft EA conditions. The different conditions were those recommended by the Land Court, but with "*more definitive wording… to ensure the conservation of the species [of the Black Throated Finch] across the [mining lease] area and approved offset areas"*. The delegate considered it appropriate to adopt the substance of the Land Court's recommendations but with some different wording for the recommended additional conditions. The delegate concluded[5]:

> I consider that the monitoring, plans, recording, reporting and mitigation measures required by the conditions of the EA will ensure there are sufficient measures in place to manage the environmental issues and impacts resulting from mining activities proposed as part of the Carmichael Mine.

7. By a proposed amended application[6], LSCC challenges the delegate's decision on the basis she committed an "*error of law*"[7]. That error is put in two slightly different ways in the proposed grounds of review, but in substance involves the following contentions[8]:

   a. That ss.3 and 5 of the EPA required the delegate to be positively satisfied her decision "*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 which maintains the ecological process on which life depends*"[9].

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4 That is, within 10 days after the end of the 10 day period prescribed in s.193(3)(a) of the EPA.
5 Reasons at [8]: exhibit DD-4 to the affidavit of Davies at 259.
6 The amendment is not opposed.
7 As described in s.20(2)(f) of the *Judicial Review Act* 1991: see grounds 1 and 2 of the proposed amended application.
8 See proposed amended application, grounds 1 and 2; applicant's submissions at paragraphs 86, 91.
9 See applicant's submissions at paragraphs 89, 110.

b. That that this state of satisfaction was a "*mandatory consideration*"[10] and that in the absence of an express finding in terms of it, it can be concluded that the delegate "*misconceived*", "*failed to appreciate*" and "*failed to apply herself to the real question to be decided pursuant to*" s.5 of the EPA, namely whether her decision would "*best achieve*" the objects of the EPA.

8. LSCC's contentions should be rejected.

9. ***First***, LSCC misconstrues ss.3 and 5. Section 5 does not provide that a function or power conferred on a person by the EPA must be performed or exercised in "*the best way to protect Queensland's environment …*". It provides that the function or power must be performed or exercised "*in the way that best achieves the object of the Act*", being the object set out in s.3.

10. ***Secondly,*** s.5 of the EPA is not expressed in terms imposing a mandatory consideration, or essential precondition, requiring a decision maker to be "*positively satisfied*"[11] of something before making a particular form of decision. It is directed (generically) to "*the way*" in which the functions and powers under the EPA are to be performed and exercised. This is not the language the EPA uses in other sections (including s.194) to identify mandatory considerations or essential preconditions. It is language directed in a general way to process.

11. ***Thirdly,*** s.5 cannot be understood to impose requirements which are inconsistent with s.194. LSCC suggests, in effect, that the general terms of s.5 mean that a person making a final decision under s.194(2)(a) must identify and weigh afresh all the matters which have already been considered at an earlier point or points in the statutory process[12]. That cannot be right. The delegate under s.194(2)(a) of the EPA is given a focused and time constrained task, at the end of a substantial process, of reviewing confined material and making an expeditious decision based on an assessment of that material. Significantly, a person making the final decision under s.194(2)(a) is not obliged to have

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10 Applicant's submissions at paragraphs 86, 91.

11 See proposed amended application, grounds 1 and 2; applicant's submissions at paragraphs 41, 89, 91, 110.

12 See the applicant's submissions at paragraphs 35 – 37, 103.

regard to the "*standard criteria*"[13], something which must be considered at the earlier draft EA stage[14] and in the Land Court[15]. Nor is such a person obliged to have regard to the large volume of materials considered at earlier stages, such as the EIS, any EIS assessment report, any objections or any evidence before the Land Court in connection with any objections. The statutory scheme is that these matters are considered in a detailed way at earlier points in the process. In this way, as s.4 of the EPA makes plain, the generally expressed object in s.3 is given particular content by the detailed statutory process that leads to the final decision. LSCC's submissions do not give proper scope for the operation of this legislative scheme.

12. ***Fourthly,*** the delegate's reasons, when read fairly as a whole, admit only of the conclusion that the delegate considered that her decision to approve the draft EA with additional conditions was in accordance with the object stated in s.3 of the EPA. The only other decisions available to the delegate were to refuse the EA (a course advocated by LSCC but rejected by the Land Court) or to approve the EA on the existing conditions (a course not advocated by LSCC and rejected the Land Court) or to impose some additional conditions of an indeterminate kind (a course not advocated by LSCC and not adopted by the Land Court). It is plain that the delegate adopted the Land Court's recommendations and absurd to suggest that she did so divorced from the reasoning which underpinned them. It was unnecessary for the delegate to refer expressly to ss.3 and 5: *Hill v Woolhara Municipal Council* (2003) 127 LGERA 7 at [53]. She was plainly aware of those provisions since they are expressly considered in the Land Court's reasons – which she read[16] – and she has confirmed as much in her affidavit[17].

Background

13. The general background is summarised both in the Land Court's decision: *Adani Mining Pty Ltd v LSCC* [2015] QLC 48[18] and in the briefing paper given to the delegate[19].

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13 That this is a deliberate legislative decision is evident by comparing s.194(4)(a) with s.194(4)(b)(ii)(D).
14 EPA, s.176.
15 EPA, s.191.
16 *Adani* at [49] – [58].
17 See affidavit of Katherine Jean Bennink affirmed 16 June 2016 at [14] (**CD7**).
18 *Adani* at [1] – [19].
19 See exhibit KB-4 to the affidavit of Bennink.

14. Adani proposes to develop a coal mine located in the north Galilee Basin, approximately 160 kilometres north-west of Clermont in Central Queensland, called the Carmichael mine. Between 2010 and 2013 Adani applied for three mining leases under the provisions of the *Mineral Resources Act* 1989 (**MRA**)[20] for the mine.

15. On 26 November 2010, the Mine and related rail aspects were gazetted as a coordinated project under the SDPWOA[21]. The project was subject to the environmental impact assessment process under the SDPWOA and Adani was obliged to prepare an EIS.

16. In November 2012 Adani submitted an EIS[22] which was subject to public notification[23]. Adani provided a supplementary EIS and further additional information for the EIS to the Coordinator-General[24].

17. On 9 July 2013, Adani applied for an EA for the Mine. LSCC provided a submission pursuant to s.160 of the EPA, objecting to the grant of an EA[25].

18. The Coordinator-General released his report evaluating Adan's EIS on 7 May 2014. The Coordinator-General recommended the Mine be approved subject to the conditions and recommendations set out in the report[26].

19. On 28 August 2014 the Chief Executive's delegate issued a draft EA to Adani. The draft EA was 109 pages long and consisted of 139 detailed conditions and extensive rehabilitation requirements[27]. The Chief Executive considered that the conditions proposed in the draft EA were reasonable, necessary and desirable to deal with the impacts of the Mine[28].

20. LSCC elected for its submission objecting to the draft EA to be taken as an objection to the draft EA under s.182 of the EPA. Consequently, Adani's application for an EA was

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20 Adani applied for mining lease ML 70441 on 8 November 2010, and ML 70505 and ML 70506 on 9 July 2013: see *Adani* at [1], [3]; Reasons at 1.
21 *Adani* at [4]; Reasons at 1.
22 *Adani* at [6]; Reasons at 1 – 2.
23 *Adani* at [6]; Reasons at 1 – 2.
24 *Adani* at [6]; Reasons at 1 – 2.
25 *Adani* at [11] – [12]; Reasons at 2.
26 *Adani* at [8]; Reasons at 2.
27 Exhibit KB-3 to the affidavit of Bennink.
28 *Adani* at [10].

referred to the Land Court pursuant to s.184 for an objections hearing. The Land Court heard Adani's application for an EA at the same time as its applications for the three mining leases pursuant to the MRA which was the subject of similar objections from LSCC.

21. The objections hearing took place in the Land Court over 21 days from 31 March to 14 May 2015, with further submissions provided on 14 May, 28 May and 15 June 2015. The Land Court's decision was delivered on 15 December 2015. The Land Court recommended that the Chief Executive issue Adani a final EA in the terms of the draft EA with a number of additional conditions.

22. The Land Court's objections decision was provided to the MRA Minister and the State Development Minister pursuant to s.192 of the EPA[29]. The MRA Minister and State Development Minister had ten business days to provide the Chief Executive with any advice that they considered may assist the Chief Executive in making the decision whether to grant Adani a final EA and, if so, on what conditions[30]. No advice was provided[31].

23. On 27 January 2016 the Chief Executive sought further advice from expert departmental ecologists regarding the recommended conditions of the Land Court in relation to the Black-throated Finch (**BTF**), an endangered species of bird[32]. The conditions were altered in accordance with that expert advice with the practical effect that the conditions with respect to the BTF were more definitive, quantitative and ultimately onerous[33].

24. On 2 February 2016, the delegate issued a final EA to Adani pursuant to s.194(2)(ii) of the EPA[34]. The final EA included:

    a. the conditions in the draft EA; and

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29 Reasons at 2 – 3.
30 EPA, s.193.
31 Reasons at 2 – 3.
32 Exhibit KB-4 to the affidavit of Bennink.
33 See Reasons at 7; affidavit of Bennink, exhibit KB-4.
34 Exhibit DD-2 to the affidavit of Davies.

b. the recommended conditions of the Land Court as altered in accordance with the expert ecological advice.

25. On 1 March 2016, LSCC requested reasons for the delegate's decision, pursuant to s.32 of the JRA[35]. On 29 March 2016 the delegate provided her reasons[36].

26. On 26 April 2016 LSCC applied, pursuant to s.20(2)(f) of the JRA, for a statutory order of review of the delegate's decision on 2 February 2016 on the ground that the delegate failed to consider and apply the obligation in s.5 of the EPA[37]. As identified, LSCC seeks to proceed by way of an amended application. Leave to rely on this is not opposed. The grounds are:

> **Ground 1**
>
> The decision involved an error of law in that the delegate misconceived sections 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**
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> The decision involved a jurisdictional error in that the delegate failed to apply to herself to the real question to be decided pursuant to section 5 of the EPA when performing the function and exercising the power under section 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 objects 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.

Legislative framework and principles

27. The delegate's decision was made pursuant to s.194(2) of the EPA which relevantly provides:

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35 Exhibit DD-3 to the affidavit of Davies.
36 Exhibit DD-4 to the affidavit of Davies.
37 Originating application filed 26 April 2016 (**CD1**).

194 Final decision on application

(2) The administering authority must decide—

(a) if a draft environmental authority was given for the application—

(i) that the application be approved on the basis of the draft environmental authority for the application; or

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

(iii) that the application be refused; or

…

28. As set out above, the delegate's decision was to adopt the outcome contemplated by subs. (a)(ii) – to approve the application with additional stated conditions.

29. In making that decision, the delegate was required to take into account the matters stated under s.194(4)(a):

(4) 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…

30. The enumeration of those three matters should be contrasted with the additional considerations which appear in s.194(4)(b) if (unlike this case) a draft EA has not previously been issued. The additional matters are:

(A) the application;

(B) any standard conditions for the relevant activity or authority;

(C) any response given for an information request;

(D) the standard criteria.

31. Where, as in this case, a draft EA has been issued, these matters are taken into account at that earlier stage, rather than at the state of the final decision: see s.176(2)(b) of the

EPA[38]. The administering authority in making the final decision must instead have regard to that draft EA itself, in the context of the "*objections decision*", (that is, the Land Court's decision), and any subsequent ministerial advice.

32. The Land Court, in making its objections decision, is also required to consider a range of matters which overlap with those considered at the draft EA stage. Under s.191 of the EPA the Land Court is required to consider:

> (a) the application;
>
> (b) any response given for an information request;
>
> (c) any standard conditions for the relevant activity or authority;
>
> (d) any draft environmental authority for the application;
>
> (e) any objection notice for the application;
>
> (f) any relevant regulatory requirement;
>
> (g) the standard criteria;
>
> (h) the status of any application under the Mineral Resources Act for each relevant mining tenure.

33. The "*standard criteria*" are defined in Schedule 4 of the EPA to include:

> (a) the following principles of environmental policy as set out in the Intergovernmental Agreement on the Environment—
>
> (i) the precautionary principle;
>
> (ii) intergenerational equity;
>
> (iii) conservation of biological diversity and ecological integrity; and
>
> …
>
> (d) any relevant [EIS], assessment or report; and
>
> (e) the character, resilience and values of the receiving environment; and
>
> (f) all submissions made by the applicant and submitters; and
>
> (g) the best practice environmental management for activities under any relevant instrument, or proposed instrument, as follows—
>
> (i) an environmental authority;
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> …
>
> (h) the financial implications of the requirements under an instrument, or proposed instrument, mentioned in paragraph (g) as they would relate to the type of

[38] It is common ground that the EA in this case was a "*site specific*" EA.

activity or industry carried out, or proposed to be carried out, under the instrument; and

(i) the public interest;

…

34. One of the matters to be taken into account by both the Land Court and the administering authority at the draft EA stage as part of the "*standard criteria*" is the EIS. Under s.40 of the EPA, the purposes of an EIS are (inter alia)[39]:

(a) to assess—

(i) the potential adverse and beneficial environmental, economic and social impacts of the project; and

(ii) management, monitoring, planning and other measures proposed to minimise any adverse environmental impacts of the project;

(b) to consider feasible alternative ways to carry out the project;

(c) to give enough information about the matters mentioned in paragraphs (a) and (b) to the proponent, Commonwealth and State authorities and the public;

(d) to prepare or propose an environmental management plan for the project;

(e) to help the administering authority decide an environmental authority application for which the EIS is required;

…

35. An EIS is then assessed – either by the Chief Executive (ss.57-59 of the EPA) or by the Coordinator-General under s.34D of the SDPWOA. This assessment report, too, is to be considered as part of the "*standard criteria*"[40].

36. After consideration of all the above matters, the Land Court is required to provide a decision in the form of a recommendation mirroring the final decision to be made by the delegate. That is, under s.190(1)(a) of the EPA, the Land Court must make a recommendation as between three alternative courses, being that:

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

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

(iii) the application be refused; …

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39 See also ss 29A to 35A of the SDPWOA.

40 EPA Schedule 4, definition of "*standard criteria*", item (d).

37. The scheme of the EPA, as it applies to the present case, may therefore be summarised as follows.

38. The administering authority of the EPA may issue a draft EA only once it has taken into account the mandatory considerations under s.176(2)(b), which include the "*standard criteria*". These include the EIS (which itself is directed to weighing and assessing the pros and cons of the project and alternatives), the EIS assessment report, best practice environmental management, and the public interest.

39. Assuming there are extant objections, the Land Court must then conduct an objections hearing and make recommendations to the administering authority about whether the application for an EA be approved on the basis of the draft EA; approved but on conditions different to the draft EA; or refused: see ss. 182, 185 and 190 of the EPA. The Land Court is required to take into account a variety of matters, including the objections made and, once again, the "*standard criteria"*. That is, its statutory task is to investigate and weigh all relevant matters and provide a final recommendation by reference to the draft EA and the conditions in it.

40. Once the Land Court makes its objections decision, it must provide a copy to administering authority, and the Ministers administering the MRA and the SDPWOA. These Ministers have 10 days to provide any further advice to the administering authority for the EPA. The administering authority has 10 days from the end of that period to make its final decision. The administering authority is not required to re-consider the "*standard criteria*" but must consider the Land Court's decision, any advice from the Ministers and the draft EA.

41. It is in this very specific statutory context that ss.3 and 5 are to be understood and given effect.

42. Section 4 of the EPA describes how the object stated in s.3 is to be "*achieved*" and relevantly provides that it is achieved through an "*integrated management program that is consistent with ecologically sustainable development*". The program is cyclical and involves four different "*phases*"[41]. A decision under s.194 is part of "*phase 3*", which

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41 EPA, s.4(2).

is achieved by (inter alia) "*ensuring all reasonable and practicable measures are taken to protect environmental values from all sources of environmental harm*" [42]. That is, s.4 expressly recognises that specific mechanisms are set out throughout the EPA which are themselves formulated to see that the overall object in s.3 is "*achieved*".

The delegate's decision

43. On 2 February 2016 the delegate decided to[43]:

> approve an application made by Adani Mining Pty Ltd for a site-specific Environmental Authority (**EA**) EPML01470513 for the Carmichael Mine.

44. The EA, dated 2 February 2016, appears at exhibit DD-2 to the affidavit of Mr Davies (pp 140 – 248).

45. As we have identified above, the decision occurred in circumstances in which:

a. a draft EA had been previously granted by the delegate after the delegate had considered not only principles of environmental policy, Commonwealth and State government environmental protection standards and the public interest, but also the Coordinator-General's report and conditions, Adani's EIS, and LSCC's submissions which formed the basis of its objections in the Land Court[44].

b. The Land Court, after 21 hearing days, produced a 626 paragraph decision considering:

(i) the source aquifer of a groundwater springs complex;
(ii) groundwater modelling;
(iii) impacts of the Mine on spring flow;
(iv) springs ecology;
(v) the impacts of the Mine on a threatened plant species;
(vi) the impacts of the Mine on the BTF;
(vii) climate change;
(viii) the Mine's financial capability;
(ix) energy markets; and
(x) the Mine's economic impact.

46. Following a request from LSCC[45], the delegate gave reasons for her decision on 29 March 2016 (the **Reasons**). They identify that:

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42 EPA, s.4(6).
43 Exhibit DD-4 to the affidavit of Davies at p 252.
44 EPA, s.176(2), sch 4 (definition of "*standard criteria*").
45 Exhibit DD-4 to the affidavit of Davies.

a. the delegate addressed the legislative framework in which she was required to make her decision. In doing so, the delegate noted the mandatory considerations to which the Land Court was required to have regard, and the (different) mandatory considerations to which she was to have regard: Reasons at pp 3 – 4.

b. the delegate considered the Land Court's decision and the draft EA[46] and recognised the Land Court had recommended that the EA be approved on stated conditions. She summarised the relevant recommendations made by the Land Court and identified two "*significant issues*" addressed in the Land Court's decision: effects on the aquifer of the Doongmabulla Springs Complex (**DSG**) and effects on the BFT: Reasons at pp 4 – 5.

c. in respect of the DSG issue, the delegate recognised that the Land Court had concluded that the conditions in the draft EA were[47] appropriate: Reasons at p 5.

d. in respect of the BTF issue, the delegate recognised that the Land Court had recommended additional conditions to address concerns about the effect of the Mine: Reasons at pp 5 – 6.

e. the delegate sought "*EHP expert advice*" about the BTF and, on the basis of that advice, decided to adopt the Land Court's recommended conditions with "*more definitive*" revised wording that strengthened the terms of the conditions: Reasons at 7.

47. The delegate concluded as follows:

> After careful consideration of the material and other evidence identified above, and having made the above findings of fact, I decided to approve the application for a site-specific EA – EPML01470513 for Carmichael Mine, on stated conditions that are different to the conditions in the draft EA, under section 194(2)(a)(ii) of the EP Act.
>
> I consider that the monitoring, plans, recording, reporting and mitigation measures required by the conditions of the EA will ensure there are sufficient measures in place to manage the environmental issues and impacts resulting from mining activities proposed as part of the Carmichael Mine.

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46 The draft EA is exhibit KB-3 to the affidavit of Bennink. That Ms Bennick considered the part of the Land Court's reasons which specifically dealt with ss.3 and 5 of the EPA appears from Ms Bennick's affidavit at paragraph [14].

47 Together with conditions under the EPBC Act.

48. LSCC criticises the Reasons in three main respects.

49. ***First,*** the Reasons are criticised because they make no express reference to ss.3 and 5 of the EPA[48]. But, as we have said, a decision maker is not obliged to refer to particular statutory provisions in reasons, and the fact that express reference to a provision is not made does not mean it was ignored. In *Hill v Woolhara Municipal Council* (2003) 127 LGERA 7, Hodgson JA said at [53][49]:

> So long as the body in question does address the question it is required to address, it does not have to refer explicitly to the statute or instrument that poses the question: the body is required to address the substance of the question, not the fact that the question is posed by a particular statute or instrument… absence of such reference does not of itself indicate that it did not [consider the question].

50. The cases upon which LSCC relies[50] concern a failure to set out findings of fact in statements of reasons, not whether a decision maker must refer explicitly to statutory provisions. In addition, the Reasons should not be read *"with an eye keenly attuned to the perception of error"*[51]. The Reasons are not a pleading, judgment or a statute. As the delegate's affidavit identifies, for those making decisions under the EPA regularly, the content of ss. 3 and 5 is plainly familiar.

51. ***Secondly***, the Reasons are criticised because they do not refer to each of the discrete topics dealt with by the Land Court, and because they do not record whether the delegate "*accepted the Land Court's reasoning or findings on economics, or the contribution of the mine to the environmental harm caused by climate change*"[52]. It is said the Reasons are "*remarkably short and very limited in what factual issues they consider*"[53].

52. But under s.194(4)(a) of the EPA it was unnecessary for the delegate to weigh afresh the detailed matters considered by the Land Court[54] (or at the draft EA stage). The draft EA had previously been accepted by the administering authority as containing

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48 Applicant's submissions at paragraphs 94 – 100.
49 See also *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349 at [132].
50 At footnote 54 on page 14 of the applicant's submissions.
51 Per Sackville J in *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 69 FCR 28 at 57G – 58D (Sackville J). See also *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at 272 and *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [8].
52 Applicant's submissions at paragraphs 35 and 38.
53 Applicant's submissions at paragraph 27.
54 Compare s.191(e) of the EPA and item (f) in the definition of "*standard criteria*" in Schedule 4 to the EPA.

conditions that were reasonable, necessary and desirable to deal with the impact of the Mine.[55] The final decision of the delegate therefore involved consideration of a document (the draft EA) that, after careful prior consideration, had been thought to contain sufficient conditions to ensure the Mine was ecologically sustainable. The Land Court then considered the draft EA and made recommendations for additional conditions for the EA in relation to one matter only – the BTF. The delegate engaged with this topic directly. The Land Court was otherwise satisfied that the balance of the objections which had been raised were satisfactorily dealt with by existing conditions[56]. The delegate plainly read the Land Court's reasons and came to the same view. The absence of reference to each individual matter traversed before the Land Court is therefore of no moment. In these circumstances there is no error revealed by the fact that the Reasons do not canvass each objection or topic considered by the Land Court or considered at the draft EA stage.

53. ***Thirdly***, the Reasons are criticised because the delegate's conclusion (set out above) did not state "*any apparent test for what 'sufficient' or 'manage' meant or on what basis these were judged*"[57]. However, the EPA imposes no particular "*test*" in relation to a decision under s.194(2). The decision maker has a wide "*area of decisional freedom*"[58]. The mandatory considerations to be taken into account under s.194(4)(a) are limited to particular documents. The significance of this was explained by Jessup J (Kenny and Middleton JJ agreeing) in relation to s 136 of the EPBC Act (emphasis added):[59]

> each was a concrete document or some similar existing artefact. In effect, what the Minister had to take into account were the contents of those documents or artefacts. This approach to regulation is to be contrasted with a situation in which the things to be taken into account were identified by description, or generically, such as, for example, where a decision-maker was required to take account of the condition of the habitat of a particular species. Subject to the exceptions mentioned, the scheme of s 136 was one in which it was assumed that specific subjects of this and similar kinds were already dealt with in the documents or artefacts referred to. The role of the Minister was to take into account the things that were before him in this way, rather than being either obliged or entitled to undertake additional research or investigations.

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55 *Adani* at [10].
56 *Adani* at [58], [623] – [626].
57 Applicant's submissions at paragraph 44; see also a similar point in paragraph 43.
58 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [28] (French CJ). See also at 363 [66] (Hayne, Kiefel and Bell JJ).
59 *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 at [27].

54. Accordingly, this complaint only has force if s.5 imposes a super-added mandatory consideration, or essential precondition, requiring a decision maker under s.194 to be *"positively satisfied"*[60] of some additional matter. We turn to consider that now.

Section 5 of the EPA

Section 5 does not impose a mandatory consideration, or essential precondition, requiring positive satisfaction

55. LSCC contends that s.5 of the EPA imposes a mandatory consideration, or essential precondition, which requires the decision maker under s.194(2) to consider and be positively satisfied that their decision is the *"best way*" to protect Queensland's environment[61].

56. In substance, LSCC contends this requires "*active engagement with the question*"[62] posed by s.5, which is said to require the delegate to:

a. re-consider and weigh matters already dealt with in earlier draft EPA and Land Court stages, in particular to[63]:

> 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 harm caused by greenhouse gas emissions from the burning of the coal from the mine.

b. having done so, be "*positively satisfied*" that the delegate was adopting the *"best way"* to protect Queensland's environment[64].

57. This construction of the EPA should be rejected as inconsistent with the language of s.5 and the structure of the EPA.

58. LSCC runs ss.3 and 5 together to create a different requirement to that one actually contained in the EPA. Section 5 requires functions and powers to be performed and

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60 Applicant's submissions at paragraph 41.
61 Amended application grounds 1 and 2; applicant's submissions at paragraphs 86 and 89.
62 Applicant's submissions at paragraph 93.
63 Applicant's submissions at paragraph 103, see also paragraphs 35 and 38.
64 Applicant's submissions at paragraph 41.

exercised in "*the way that best achieves*" the object of the EPA – not to be satisfied that a decision is the "*best way to protect Queensland's environment…*".

59. The way in which s.5 is expressed stands in contrast to the way in which the EPA otherwise imposes mandatory considerations, or essential preconditions, by using words such has *only if [the person] considers…"*[65], "*must have regard to"*[66],*"only if satisfied that*"[67] or "*[the person] must consider…*"[68]. By contrast, s.5 describes in a high level and generic way the manner in which all powers and functions under the EPA are to be exercised – consistently with the statutory purpose in the way which best achieves it. This does not dictate the *content* of the considerations applicable to every decision under the EPA by imposing a free-standing mandatory consideration or essential preconditions. The relevant mandatory considerations are specifically set out throughout the EPA.

60. This is borne out by the variety of provisions under the EPA which are not easy to reconcile with the construction advanced by LSCC. For example, under s.49 of the EPA the Chief Executive must decide, after the submissions of an EIS, whether to allow the EIS to proceed to the next stage, and may only do so if he or she "*considers it addresses the final terms of reference in an acceptable form*". Assume the Chief Executive forms this view. On LSCC's case the decision may still be infected by legal error (and set aside) if the Chief Executive does not go on to ask himself or herself the distinct question – "is allowing the EIS to proceed the best way achieve the object of the EPA?" Or, under s.99 of the EPA, the administering authority may decide to accredit an environmental risk management plan (**ERMP**) only if the authority is satisfied it complies with the ERMP content requirements. But assuming the administering authority is so satisfied, it is unlikely that s.5 is to be read as imposing a further mandatory consideration which must be independently satisfied by the formation of a positive view by the decision maker that approving the ERMP is "*the best way to protect Queensland's environment*…".

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65 EPA, ss.49(3), 56A(4), 72(2).
66 EPA, ss.75(2), 194(4).
67 EPA, s.99(2).
68 EPA, ss.143(3), 191.

61. Further, in relation to a decision under s.194(2), imposing a mandatory consideration, or essential precondition, of the kind for which LSCC contends cuts across the statutory scheme (identified above), by which detailed consideration is required to be given to a wide range of matters at the draft EA stage and the Land Court stage, and which envisages a more confined and focussed final decision stage. It makes no sense to say that the delegate making a final decision under s.194(2)(a) is expressly not required to have regard to (inter alia) the "*standard criteria*", but must nonetheless weigh afresh all of the various pros and cons of the proposal[69]. That is simply not the statutory function which s.194(2) identifies[70].

62. It is accepted that s.5 has some work to do in the EPA[71]. But, as LSCC recognises[72], s.5 of the EPA relates to more than one hundred functions and powers. To say that it does not impose a mandatory consideration or essential precondition of the kind for which LSCC contends under s.194, does not mean it has no field of operation at all. Broad provisions stating or giving effects to the objects of an Act must be approached with some caution[73].

The delegate's decision complies with s.3 and 5 of the EPA

63. The delegate adopted, with the minor changes of expression referred to above, the recommendations of the Land Court after considering the Land Court's decision. Those reasons expressly deal with ss.3 and 5[74]. The Land Court considered that on the basis of the conditions it recommended, the Mine could be developed in an ecologically sustainable way and that the adverse consequences of the Mine would be outweighed by the benefits that would flow from the development of the Mine[75].

64. There is no complaint by LSCC that the Land Court misunderstood or misapplied s.3 and 5 or fell into legal error in its consideration of all the issues before it.

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

70 And, contrary also to the applicant's submissions, s 205 of the EPA does not identify further *relevant considerations* but rather deals with mandated inclusions (of the Coordinator-General's conditions under the SDPWOA). Section 205 does not provide a discretion to or consideration for the delegate.

71 Applicant's submissions at paragraphs 65, 87.

72 Applicant's submissions at paragraph 70.

73 See further *Ocean Shores Community Association Inc v Byron Shire Council (No 3)* [2015] NSWLEC 171 at [45]. See also *Arnold v Minister Administering Water Management Act 2000* [2014] NSWCA 386 at [84] – [86].

74 *Adani* at [49] – [58]. It is not suggested that the Land Court's approach was wrong.

75 *Adani* at [625].

65. The starting point then is that the delegate took into account the matters she was expressly required to consider. Her decision is otherwise presumed to have been made lawfully and in accordance with the EPA. In *Hill v Woolhara Municipal Council* (2003) 127 LGERA 7, Hodgson JA (Ipp JA and Davies AJA agreeing) said at [51]:

> …[W]hen a court comes to consider whether or not [a decision maker has breached an Act], the court will have regard to the presumption of regularity. This presumption was relevantly stated as follows by McHugh JA in *Minister for Natural Resources v NSW Aboriginal Land Council* (1987) 9 NSWLR 154 at 164 at follows:
>
> > Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled.
>
> See also *Morris v Kanssen* [1946] AC 459 at 475; *Western Stores Ltd v Orange City Council* [1971] 2 NSWLR 36 at 46-47.
>
> I do not accept Mr Walker's submission that this does no more than identify where the onus of proof lies. The presumption is a presumption of fact, associated with a reasonable inference based on what ordinarily happens in the ordinary course of human affairs: see *McLean Brothers & Rigg Ltd v Grice* (1906) 4 CLR 835 at 849-51 per Griffiths CJ. In deciding whether the presumption of regularity is rebutted, this inference from the ordinary course of human affairs carries some weight, which may vary according to the proved circumstances.

66. As set out in paragraph 46, the delegate complied with her mandatory obligation pursuant to s.194(4) of the EPA and considered the draft EA and the objections decision in issuing the second respondent a final EA.[76] LSCC does not contend otherwise.

67. As such, *prima facie*, the delegate's approval of the final EA must be accepted as having been lawfully made. For the reasons address above, none of the criticisms which LSCC makes of the Reasons provides any justification to depart from that presumption in this case.

D G Clothier QC

S J Webster

Counsel for the Second Respondent

22 July 2016

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[76] Exhibit KB-4 to the affidavit of Bennink.