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 REPLY

SUMMARY OF APPLICANT'S ARGUMENT

1. The Applicant's argument is based on four propositions:

   (a) ***First***, s 5 of the *Environmental Protection Act* 1994 (Qld) (**EPA**) imposed an obligation on the delegate to be positively satisfied that she was performing the function and exercising the power under s 194 for the site specific application for the Carmichael Coal Mine in the way that best achieves the object of the EPA 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*).[1]

   (b) ***Second***, the delegate was not positively satisfied she was complying with the obligation imposed by s 5 in performing the function and exercising the power under s 194 when she decided to approve the site specific application for the Carmichael Coal Mine on stated conditions that are different to the conditions in the draft environmental authority.[2]

   (c) ***Third***, the delegate's failure to comply with the obligation imposed by s 5 when performing the function and exercising the power under s 194 was an error of law in two ways:[3]

      (i) by misconceiving the obligation imposed by s 5; and

      (ii) a jurisdictional error in that the delegate failed to apply herself to the real question to be decided pursuant to s 5.

   (d) ***Fourth***, it cannot be said that these errors of law are so insignificant they could not have materially affected the decision.[4]

[1] The construction of s 5 was addressed in the Applicant's Outline of Argument at [57]-[69], [85]-[93] & [110].
[2] See the Applicant's Outline of Argument at [33]-[53], [87]-[111], [118]-[122], [125] and [126].
[3] See the Applicant's Outline of Argument at [53], [85], [89], [100]-[123], [125] and [126].

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2. The Applicant's construction of s 5 applies the ordinary rules of construction based on the ordinary language of s 5 read in the context of the whole Act.[5]

THE COMMON THREADS OF THE RESPONDENTS' ARGUMENTS

No dispute that the elements of s 5 are engaged by a decision under s 194

2. Neither respondent disputes the fact that all of the elements of s 5 are engaged by a person making a decision under s 194 of the EPA.[6] That is:

   (a) The administering authority is *a person* within the meaning of s 5;[7]

   (b) Section 194 confers *a function or power* on the administering authority;

   (c) The function or power in s 194 is conferred *under* the EPA.

   (d) In making the decision under s 194 the delegate was *performing a function or exercising a power* under the EPA.

Both respondents argue that s 5 has no work to do in s 194

3. A common thread of the respondents' submissions is that s 5 imposes no obligation of any substance on a person making a decision under s 194.

4. That is inconsistent with the normal approach to interpretation. As McHugh, Gummow, Kirby and Hayne JJ stated in *Project Blue Sky*:[8]

> … a court construing a statutory provision must strive to give meaning to every word of the provision[9]. In *The Commonwealth v Baume*[10] Griffith CJ cited *R v Berchet*[11] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

5. The Second Respondent says, at [62], "It is accepted that s.5 has some work to do in the EPA" but this is a *non sequitur* in the Second Respondent's submissions as the Second Respondent's construction would make s 5 meaningless in relation to s 194.

Respondents' construction of ss 190, 191 and 194 is inconsistent

6. The First Respondent relies upon the Land Court's consideration of ss 3 and 5 of the EPA in making its decision under ss 190 and 191 before stating:[12]

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[4] See the Applicant's Outline of Argument at [128] and [129].
[5] As stated in, e.g., *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382, [69]-[71] per McHugh, Gummow, Kirby and Hayne JJ; *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573 at 592-593 [44]-[46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; and *Thiess v Collector of Customs & Ors* (2012) 250 CLR 664 at 671-672 [22]-[23] per French CJ, Hayne, Kiefel, Gageler and Keane JJ.
[6] This issue was addressed in the Applicant's Outline of Argument at [79]-[80].
[7] This issue was addressed in the Applicant's Outline of Argument at [68].
[8] *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ. Footnotes in original.
[9] *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ, 419 per O'Connor J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12-13 per Mason CJ.
[10] (1905) 2 CLR 405 at 414.
[11] (1688) 1 Show KB 106 [89 ER 480].
[12] First Respondent's Outline of Argument at [32](b). The Second Respondent also relies upon the consideration of ss 3 and 5 by the Land Court to support the delegate's decision at [40] and [46] of its submissions.

> If there is no error in the approach of the Land Court, then to the extent that the decision-maker adopted the recommendations of the Land Court, she received the guidance of the Land Court in making her decision.

7. The Second Respondent also relies on the Land Court's consideration of the obligation imposed by s 5 in making its decision under ss 190 and 191.[13]

8. The Second Respondent refers to the Land Court's consideration of s 5 in making its decision under ss 190 and 191[14] and then states:[15]

> It is not suggested that the Land Court's approach was wrong.

9. Neither ss 190 or 191 refer to s 5.

10. While s 191 does refer to a longer list of matters to be considered by the Land Court than s 194(4) refers to, including the standard criteria, none of the matters listed in ss 190, 191 or 194 refer to s 5. None of the standard criteria impose the obligation stated in s 5.

11. It is inconsistent to adopt the Land Court's reasoning on the obligation in s 5 being applicable to the Land Court's decision under ss 190 and 191, while at the same time arguing the obligation in s 5 has no application to a decision by the administering authority under s 194.

The delegate had "regard to", "considered" and "read" the Land Court's reasons but did not "adopt" them

12. The First Respondent submits (emphasis added):[16]

> The decision maker had the advantage of reading, **applying and adopting** the Land Court's objection decision which carefully considers the application of ss. 3 and 5 of the EP Act …

13. The First Respondent then proceeds to dispute there was any obligation imposed by s 5 of the EPA for the delegate to be positively satisfied that the decision was the way that best achieved the object of the EPA[17] before stating (emphasis added):

> .. it is apparent that sections 3 and 5 were **taken into account**. Indeed, that has been deposed to by the decision maker.[18]
>
> … On a number of occasions in her reasons the delegate referred to having **considered or had regard to** [the reasons of the Land Court].[19]

14. The First Respondent concludes it submissions by stating (emphasis added):[20]

> … there is no criticism, in the Applicant's outline about the process of reasoning of the President of the Land Court in consideration and application of ss. 3 and 5 of the EP Act. If that is the case, then **in adopting the recommendations of the Land Court** there can be no valid criticism made of the decision-maker in this case, especially given

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[13] Second Repondent's Outline of Submssions at [63] and [64].
[14] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 at [49]-[58].
[15] Second Repondent's Outline of Submssions at footnote 74.
[16] First Respondent's Outline of Argument at [32](b).
[17] First Respondent's Outline of Argument at [33]-[37].
[18] First Respondent's Outline of Argument at [40].
[19] First Respondent's Outline of Argument at [45].
[20] First Respondent's Outline of Argument at [46].

> her evidence that she had **read and considered** the recommendations decision of the Land Court …

15. The Second Respondent makes similar submissions, such as (emphasis added):[21]

> It is plain that the delegate **adopted** the Land Court's recommendations and absurd to suggest that she did so divorced from the reasoning that underpinned them.

16. These submissions by the First Respondent and the Second Respondent do not accurately reflect what the delegate states in her reasons and affidavit she *actually did*.[22]

17. The delegate's reasons state that she "considered" the Land Court objections decision.[23]

18. The delegate's reasons state that her decision to impose all of the additional conditions recommended by the Land Court (with more definitive wording) was made "[h]aving regard to the Land Court objection decision …".[24]

19. The delegate's reasons state that she "considered it would be appropriate to adopt the Land Court objection decision recommendations" in relation to the insertion of conditions about the BTF species management plan with a revised wording.[25]

20. In the delegate's later affidavit she stated at [14] (emphasis added):[26]

> 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.

21. A statement that the delegate "read and considered" the Land Court's recommendations is not an adoption of the Land Court's findings, reasons or recommendations in whole.

22. At no point in the delegate's reasons or later affidavit did she "adopt" the Land Court's findings of fact, the Land Court's reasons or recommendations generally.

23. Neither did she adopt the Land Court's reasons in relation to ss 3 and 5 of the EPA even when she deposed her affidavit responding to the application for judicial review.

24. Read fairly, the delegate adopted specific parts of the Land Court's findings, reasons and recommendations and that did not extend to the question posed by s 5.

25. The respondents' submissions that the delegate "adopted" the Land Court's reasons in relation to ss 3 and 5 are inconsistent to what the delegate states she did in her reasons and her affidavit.

Reference to "best way" in grounds of application merely paraphrases s 5 of the EPA

26. The First Respondent takes issue with the use of words "best way" rather than "the way that best achieves" the object of the EPA in the grounds of the amended application for

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[21] Second Respondent's Outline of Submissions at [12].
[22] The Applicant's Outline of Submissions at [109] set out what the delegate's reasoning indicates at its highest.
[23] See p 4 of the delegate's Statement of Reasons (p 255 of the affidavit of Derec Davies).
[24] See p 7 of the delegate's Statement of Reasons (p 258 of the affidavit of Derec Davies).
[25] See p 7 of the delegate's Statement of Reasons (p 258 of the affidavit of Derec Davies).
[26] See paragraphs [14] and [15] of the delegate's affidavit.

which leave to amend is sought (**the amended application**).[27] The latter phrase mirrors the language of s 5 precisely and is used in Ground 2 of the amended application.

27. The Second Respondent also takes issue with the paraphrasing of ss 3 and 5 as performing a function or exercising a power "in the best way to protect Queensland's environment …" in the grounds of the application.[28]

28. The grounds of the amended application use these phrases, interchangeably, as follows:

> **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 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.

29. To confirm this matter so there is no doubt: the Applicant intends the phrase "best way" as a paraphrase of the phrase "in the way that best achieves" and there is no material difference between the two in the context of ss 3 and 5. To the extent there is considered to be any difference in the language of these two phrases the Applicant adopts the latter as it precisely reflects the language of s 5 of the EPA rather than paraphrasing it.

30. The Applicant relies on the plain language of s 5 of the EPA as the basis of its case read in the context of the subject-matter, scope and purpose of the EPA.

"Positively satisfied" is the same as "satisfied"

31. The First Respondent also takes issue[29] with the Applicant's use of the words "positively satisfied"[30] to describe the nature of the obligation imposed by s 5 for a decision under s 194.

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[27] First Respondent's Outline of Argument at [2], [3], [29] and [32]-[35]. While the First Respondent takes issue with the use of "best way" at those parts of its outline, the First Respondent acknowledges at [22] of its outline the language of a question it understands as being asked in relation to ss 3 and 5 of the EPA involves the exercise of the power under s 194 "in the way that best achieves" the legislative object "to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in the way that maintains the ecological processes on which life depends".

[28] Second Respondent's Outline of Submissions at [9].

32. The Applicant uses "positively" in this context as an adverb for emphasis on the obligation to be satisfied but does not seek to impose an addition obligation on the state of satisfaction. The phrase "positively satisfied" is the same as "satisfied" in the Applicant's submission and the word positively can be deleted without material affect to it arguments.

The obligation under s 5 is not a "superadded requirement"

33. The First Respondent argues, at [36], that a construction of ss 3 and 5 that requires a state of positive satisfaction for a decision under s 194 is (emphasis added):

> [an] attempt to impose into the statute the **superadded requirement** that the persons exercising powers have a specific state of mind [that] is not justified.

34. The Second Respondent also frames its argument, at [54], to dispute s 5 imposing (emphasis and footnote in original):

> a super-added mandatory consideration, or essential precondition, requiring a decision maker under s. 194 to be "*positively satisfied*"[31] of some additional matter.

35. The Applicant's construction of ss 3, 5 and 194 does not impose a "superadded requirement". It merely construes the obligation imposed by s 5 in the context of s 194 and the whole Act. The Applicant's construction relies purely on the plain language of the EPA and applying ordinary principles of statutory interpretation. It adds nothing to what the Act itself provides.

36. Having identified these common threads of the respondent's arguments, so as to avoid confusion over the differences in the First Respondent's and the Second Respondent's submissions, we will address them separately from this point.

REPLY TO FIRST RESPONDENT'S INDIVIDUAL SUBMISSIONS

The Applicant does not ask the Court to determine whether the decision best achieves the object of the EPA

37. Contrary to the First Respondent's submissions[32] the Applicant does not contend that *the Court* should determine whether the decision of the delegate is one which best achieves the object of the EPA.[33]

38. The Applicant submits that, in performing the function or exercising the power under s 194, the delegate should have asked and answered the question of whether her decision was the way that best achieves the object of the EPA, not that the Court should answer that question on the delegate's behalf.

39. There is nothing unusual in the Court being asked to determine whether an administrative decision-maker has asked the right question, as the Applicant asks the Court to determine in this case. As noted in the Applicant's outline of argument, it is well established that where an administrative decision-maker is under a duty but misconceives the nature of

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[29] First Respondent's Outline of Argument at [4], [36] and [37].
[30] See the grounds of the amended application and the Applicant's Outline of Argument at [10], [41], [89]-[93], [118]-[122], [125] and [126].
[31] Applicant's submissions at paragraph 41.
[32] First Respondent's Outline of Argument at [2].
[33] The Applicant's Outline of Argument emphasised it is not arguing the merits at [33], [106] and [123].

the duty or has not applied themselves to the question which the law prescribes their decision or action may be set aside by judicial review.[34]

40. For instance, in *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 (***Sinclair***) the regulations in dispute required the mining warden, an administrative decision-maker, to form an opinion about how "the public interest or right" would be affected by the grant of a mining lease.

41. In *Sinclair* the mining warden had found, as a matter of fact, that the objector, Mr Sinclair, represented only the views of a section of the public interest and his evidence did not establish that the interests of the public as a whole would be prejudicially affected by the granting of the mining leases. The High Court unanimously set aside the mining warden's decision because he had misconceived his duty.

42. Barwick CJ (with whom Murphy J agreed) stated at 478 and 480:

> It is settled law that if the person having a duty to hear and consider misconceives what is his relevant duty, he will have failed to perform that duty and may be compelled by mandamus to perform it according to law.
> … In my opinion, [the mining warden] has not considered the real question which was his duty to consider, namely, whether the granting of the application would prejudicially affect the public interest.

43. Gibbs J stated at 483:

> In my judgment it appears from [the mining warden's] reasons that in making his recommendation the warden was laboring under a misconception as to his duty, so that he did not apply himself to all the matters that the regulations required him to consider. There was thus a purported but not a real exercise of his functions and he has failed to perform his duty according to law.
>
> In conclusion I would, with respect, adopt what was said by Lucas J. in the Supreme Court, that the courts are not concerned with the question of the desirability of permitting sand mining to take place or with the question whether the recommendation of a warden is right or wrong, provided that he has performed the duty case on him by the law. In the present case the warden failed to perform his duty and should therefore now be directed to proceed with the hearing in accordance with the provisions of the regulations.

44. Stephen J stated at 486:

> … The question for the warden was not, however, to discover what were the views of the public as a whole or of those who may properly represent the public as a whole: he had but to form an opinion concerning the existence of prejudice to "the public interest or right" and this he precluded himself from doing by the erroneous view he took of his function.

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[34] *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at 242 per Rich, Dixon and McTeirnan JJ; *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 per Barwick CJ (with whom Murphy J agreed) at 478-483, Gibbs J at 483, Stephen J at 484-486, and Jacobs J at 486-487; *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.

> In these circumstances it may properly be said that the hearing by the warden so miscarried that no effective recommendation as contemplated by the legislation was made to the Minister, it being vitiated by the warden's misconception of his task. This is therefore a proper case for mandamus to go. …

45. Similarly, Jacobs J stated at 486:

> There is sufficient indication in the language used by the mining warden that he mistook the question which fell to be determined by him in making his recommendation to the Minister. … if it appears that he mistook his statutory duty then mandamus will lie to require him to perform that duty according to law.

46. There is, therefore, no doubt that it is proper for a court exercising judicial review functions to determine whether an administrative decision-maker has asked the right question.

The First Respondent's argument about justiciability mischaracterizes the Applicant's case

47. The First Respondent also mischaracterizes the justiciability of the issues raised by these proceedings.[35]

48. Again, the Applicant *does not ask* the Court to determine "whether the decision of the delegate is one which 'best achieves' the object of [the EPA]".[36]

49. The Applicant *does not ask* the Court to determine "numerous political and value judgments relating to environmental protection and the balancing of commercial development" as the First Respondent alleges.[37]

50. The Applicant asks the Court to determine the nature of the duty imposed by s 5 of the EPA and how this duty affects a decision made under s 194 of the Act.[38]

51. The proper construction of ss 3 and 5 of the EPA and what requirements these sections imposed on the delegate in making her decision under s 194 are clearly justiciable in the normal process of judicial review under the *Judicial Review Act* 1991 (Qld) (**JRA**). These sections provide the "judicially manageable norms by which a determination"[39] by the Court can be made.

52. The cases cited by the First Respondent in relation to justiciability[40] have no application to the issues raised in these proceedings because no issue being raised by the Applicant goes beyond normal questions for judicial review involving errors or law and the proper construction of statutory obligations.

53. Again, the decision in *Sinclair* is instructive both for the authoritative statements of relevant principles and as the issues raised in these proceedings are analogous to the issues raised in *Sinclair*. Each member of the High Court in *Sinclair* discussed how

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[35] First Respondent's Outline of Argument at [2] and [21]-[26].
[36] First Respondent's Outline of Argument at [2].
[37] First Respondent's Outline of Argument at [2] and [22].
[38] The Applicant's Outline of Argument emphasised it does not raise a merits argument at [33], [106] and [123].
[39] First Respondent's Outline of Argument at [22].
[40] First Respondent's Outline of Argument at [23]-[26].

determining the public interest involved weighing up of competing interests.[41] The members of the court did not seek to weigh up those competing interests themselves, merely to explain how this should be done and why the reasons of the mining warden displayed error.

54. In addition to the passages from the judgment set out above, Stephen J noted that the court could inquire into how the mining warden came to recommend the grant of the mining leases applied for and:

> To ask this question is not to canvass the correctness of his decision but rather to seek an understanding of the warden's approach to his function in conducting the hearing and in making his recommendation.[42]

55. The Applicant in the present proceedings asks the Court to do the same thing as in *Sinclair*; not to canvas the correctness of the delegate's decision as a matter of fact or merit but whether the delegate asked the right question and complied with the duty imposed by s 5 of the EPA as a matter of law.

56. In these proceedings, as in *Sinclair*, the Applicant asks the Court to set aside the delegate's decision and remit the matter to the First Respondent to be determined according to law. At that stage the First Respondent or their delegate will weigh up the matters raised in ss 3 and 5 of the EPA. The Applicant does not ask the Court to *itself* answer the question posed by s 5 of the EPA. That is a matter that is rightly left to the First Respondent once the Court has determined the nature of the duty imposed by s 5.

The First Respondent misunderstands the nature of the duty imposed by section 5

57. The First Respondent's submissions at paras 34-36 are the core of the legal reasoning and the crux of the issues the Court must determine in these proceedings.

58. The First Respondent submits the delegate did not consider whether her decision was the "best way to protect Queensland's environment …" because she was not required to answer that question.[43]

59. The First Respondent submits that ss 3 and 5 "cannot be blended to change the object of the Act as ensuring that the powers be exercised in the 'best way to protect the environment' etc."[44]

60. The First Respondent's submissions on the construction of ss 3 and 5 contradict the plain language of s 5 which *does require* s 5 to be read together with s 3 because that is what the section says. The First Respondent characterises reading ss 3 and 5 together as some form of impermissible "blending".

61. Section 5 provides:

> **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.

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[41] *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 per Barwick CJ (with whom Murphy J agreed) at 478-483, Gibbs J at 483, Stephen J at 484-486, and Jacobs J at 486-487.
[42] *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at per Stephen J at 484.
[43] First Respondent's Outline of Argument at [35].
[44] First Respondent's Outline of Argument at [34].

62. The reference to "the object of this Act" in s 5 can only be read as a reference to the object of the Act in s 3:

> **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***).

63. The grounds of the application[45] – which the First Respondent takes great umbrage to – merely do what s 5 requires and cross-reference to the object in s 3.

64. The grounds are based on the plain words of ss 3 and 5.

65. Section 5 uses the phrase "in the way that best achieves the object of this Act". Section 5 must be interpreted by reference to s 3 because that is what s 5 plainly requires.

66. The First Respondent says that is a construction that fails "*in limine*" but the construction advanced by the First Respondent appears to ignore the plain language of s 5.

67. The First Respondent's submissions contradict the words of s 5 and, indeed, an interpretation that would best achieve the objects of the EPA.[46]

Section 5 of the EPA does not impose a "jurisdictional condition"

68. The First Respondent submits at para 36 that (emphasis added):

> … there is nothing in ss.3 and 5 which imposes a **jurisdictional condition** on the exercise of any power under the EPA to the effect that the decision maker or person exercising the power reaches a positive satisfaction that their decision or exercise of power will achieve the object of the Act. …

69. The Applicant understands the First Respondent's reference to "jurisdictional condition" to be a reference to a jurisdictional fact.

70. The Applicant does not argue that s 5 creates a jurisdictional fact for s 194 or any function or power under the EPA.

71. The Applicant submits, however, that s 5 requires a person performing the function or exercising the power under s 194 to reach "a positive satisfaction that their decision or exercise of power will achieve the object of the Act." That matter is not a jurisdictional fact.

72. The reasons for that submission require some further explanation with reference to the case law on jurisdictional facts and the application of relevant principles to ss 5 and 194.

73. On the basis that s 5 is not a mere nullity and, conversely, that it imposes an obligation on a decision-maker under s 194 of the EPA, two alternative constructions of the obligation imposed by s 5 of the EPA in this context are that:

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[45] Set out above in this Reply at [28].

[46] As required by s 14A of the *Acts Interpretation Act* 1954 (Qld). See *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573 at 592-593 [44]-[46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

(a) Section 5 creates a jurisdictional fact in the sense that it must exist in fact (objectivity) and that the legislature intends that the absence or presence of the fact will invalidate action under the statute (essentiality);[47] or

(b) Section 5 creates a matter that Parliament intended a person performing a function or exercising a power under the EPA must be satisfied of but that person authoritatively determines the existence or non-existence of the fact.

74. In this context the "fact" is that the performance of the function or exercise of the power in question is the way that best achieves the object of the EPA in the individual circumstances of each case.

75. Spigelman CJ considered the principles of jurisdictional facts in an environmental context in *Timbarra Protection Coalition Inc v Ross Mining NL and Others* (1999) 46 NSWLR 55, relevantly at 64, [40]-[41]:

> [40] Where the process of construction leads to the conclusion that parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts.
>
> [41] Where the process of construction leads to the conclusion that parliament intended that the primary decision-maker could authoritatively determine the existence or non-existence of the fact then … a court with a judicial review jurisdiction will inquire into the reasonableness of the decision by the primary decision-maker (in the *Wednesbury* sense *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223), but not itself determine the actual existence or non-existence of the relevant facts.

76. The Applicant submits that the correct construction of the EPA is that s 5 does not create a jurisdictional fact for s 194 or any other provision.

77. That is, the Applicant submits that Parliament intended a person performing a function or exercising a power conferred under the EPA must be positively satisfied of compliance with s 5 but that person authoritatively determines the existence or non-existence of that fact.

78. While s 5 of the EPA does not use a statutory formulation containing words involving the mental state of the primary decision-maker such as "opinion", "belief" or "satisfaction", which gives some support to it creating a jurisdictional fact, this is not, in itself, conclusive.[48]

79. The construction that s 5 does not create a jurisdictional fact is reinforced by two factors:

(a) First, Parliament will not ordinarily be treated as having made as jurisdictional complex facts which involve value judgments.[49]

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[47] See *Timbarra Protection Coalition Inc v Ross Mining NL and Others* (1999) 46 NSWLR 55 at 63-64, [37]-[40] (Spigelman CJ).

[48] *Timbarra Protection Coalition Inc v Ross Mining NL and Others* (1999) 46 NSWLR 55 at 64, [43] (Spigelman CJ).

[49] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (the Malaysian Declaration Case) at 179-180 [57]-[58] per French CJ.

(b) Second, the construction is consistent with the objects of the EPA and consistent with the procedures generally in the Act, such as the application process for a site specific application in Ch 5 of the EPA leading to a decision by the administering authority under s 194.

80. To construe s 5 as imposing a jurisdictional fact (that is, a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion) for a decision under s 194 of the EPA would cause significant difficulties for the operation of the EPA. It would allow third parties to effectively engage in *de facto* merits review of decisions under s 194. The Applicant submits that construction is not correct.

81. On the other hand, construing satisfaction of s 5 as a matter that a person performing a function or exercising a power under the EPA can authoritatively determine (i.e. a non-jurisdictional fact) does not create any such difficulties for the operation of the EPA.

82. Provided a person performing a function or exercising a power under the EPA, such as under s 194, asks the right question as required by s 5, their positive satisfaction of compliance with s 5 is determinative in anything other than *Wednesbury* unreasonableness sense (which is not alleged to be the case here).

The delegate was not required to engage in an "academic legal exegesis"

83. The First Respondent suggests that the Applicant's construction of the obligation under s 5 would require a person making a decision under s 194 to engage in an "academic legal exegesis on the effect of sections 3 and 5 of the EP Act" and an "esoteric discussion" of those sections.[50]

84. That mischaracterizes the Applicant's case.

85. The Applicant says the delegate was required to address the question posed by s 5 of the Act and to be satisfied her decision was the way that best achieves the object of the EPA.

86. That was not an "academic" or "esoteric" question but the obligation imposed on her by the Act.

87. The Applicant's case is that the delegate did not engage with the obligation imposed by s 5.

REPLY TO SECOND RESPONDENT'S INDIVIDUAL SUBMISSIONS

Second Respondent does not dispute justiciability

88. It is noted that the Second Respondent does not adopt or support the First Respondent's submissions that the issues raised in the proceedings are not justiciable.

Section 5 is not a motherhood statement

89. The Second Respondent submits, at [10], that s 5 "is language directed in a general way to process".

90. The Second Respondent also submits, at [59]:

[50] First Respondent's Outline of Argument at [42] and [43].

> … 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.

91. The Second Respondent refers, at [42], to the cyclical process in s 4 of the EPA for achieving the object of the Act to suggest s 5 of the Act is over-ridden by the "specific mechanism" in s 194.[51]

92. The Second Respondent's submissions in these regards are inconsistent with the language of s 5 and inconsistent with an interpretation that best achieves the object of the EPA.[52]

93. Construed according to its terms and in the context of the whole Act, s 5 imposes a specific obligation on any person performing a function or exercising a power under the EPA. It is a specific obligation and not directed in a general way to process or merely at a "high level" or "generic".

94. As the Applicant submitted in its Outline of Argument, at [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.

95. The application of the obligation imposed by s 5 in the context of different functions and powers conferred by the EPA is addressed further below, commencing at [118].

Section 5 imposes a specific obligation on a decision under s 194

96. The Second Respondent also submits, at [53], that "the EPA imposes no particular '*test*' in relation to a decision under s. 194(2)" of the EPA.

97. The Second Respondent also submits, at [62], that "[b]road provisions stating or giving effects to the objects of an Act must be approached with some caution."[53]

98. Again, the Applicant's submission is that s 5 imposes a specific obligation for the performance of any function and the exercise of any power conferred on a person under the EPA, including under s 194.

99. The Applicant's construction of ss 5 and 194 of the EPA still gives a decision-maker "a wide '*area of decisional freedom*'".[54]

100. As noted above, at [81]-[82], the Applicant submits that satisfaction of s 5 is a matter that a person performing a function or exercising a power under the EPA can authoritatively determine provided their decision is not affected by an error of law or another ground of judicial review.

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[51] Section 4 of the EPA was addressed in the Applicant's Outline of Argument at [59] where the point was made that simply making a decision under s 194 does not mean that the object of the EPA is achieved automatically.
[52] *Acts Interpretation Act* 1954 (Qld), s 14A. See *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573 at 592-593 [44]-[46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[53] The two NSW cases cited by the Second Respondent (at footnote 73) to support this proposition involved very different legislative schemes and are of little assistance in interpreting ss 5 and 194 of the EPA.
[54] Second Respondent's Outline of Submissions at [53], citing *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).

Section 5 does not create difficulty for timely decisions under s 194

101. The Second Respondent argues, at [11], that:

> 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.

102. The Second Respondent also argues, at [61], that (footnote omitted):

> 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.

103. The Applicant submits that the construction of the EPA that s 5 means what it says and imposes an over-arching test for all powers and functions under the EPA does not create a difficulty for timely decisions under s 194 or administrative impracticality as the Second Respondent suggests.

104. The Applicant does not suggest that the delegate was required to "weigh afresh all of the various pros and cons of the proposal" in some *de novo* manner that ignored the earlier process or the Land Court's findings and recommendations.

105. The Applicant's submission is that the delegate was required by s 5 to be positively satisfied that her decision under s 194 was the way of performing the function or exercising the power under that section that best achieved the object of the EPA. She could be informed in various ways in forming her opinion about this matter.

106. As noted in the Applicant's Outline of Argument at [42], the delegate could naturally have been informed by the recommendation and findings of the Land Court in making her decision.

107. However, in the circumstances of this case, the delegate failed to properly ask and answer the question posed by s 5.[55] As a consequence, she did not properly perform the function or exercise the power under s 194. For this reason, the decision should be set aside.

Applying s 5 to all functions and powers under the Act does not create difficulty

108. The Second Respondent suggests, at [60], that there are a:

> … variety of provisions under the EPA which are not easy to reconcile with the construction advanced by LSCC.

109. The Second Respondent refers to ss 49 and 99 of the EPA as examples of what it says is the difficulty of the construction submitted by the Applicant.

110. The Applicant submits the examples given by the Second Respondent do not support its argument.

[55] The Applicant's Outline of Argument at [109] summarised the delegate's consideration of ss 3 and 5 at its highest. The delegate never asked the right question and did not comply with the obligation imposed by s 5.

111. Before addressing those examples, the Applicant notes the submissions it made in its Outline of Argument at [89]-[93] regarding the variable nature of what s 5 requires for any person performing a function or exercising a power under the EPA.

112. 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.

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

114. 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.

115. 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.

116. Sections 49 and 99 of the EPA are useful examples of how the approach the Applicant submits s 5 requires would operate in practice.

117. To these examples chosen by the Second Respondent the Applicant adds s 195 as an example of the operation of the obligation in s 5 on a minor, administrative function and power conferred under the EPA. Given its relationship to s 194, it is a pertinent minor administrative function and power to contrast with ss 49, 99 and 194.

Sections 49, 99 and 195 of the EPA illustrate how s 5 operates in a different contexts

118. Under s 49 of the EPA the chief executive is required to decide whether an EIS may proceed. Section 49(3) provides:

> The chief executive may allow the EIS to proceed only if the chief executive considers it addresses the final terms of reference in an acceptable form.

119. When the chief executive is performing the function and exercising the power under s 49 the Applicant submits the obligation in s 5 informs the exercise of the chief executive's discretion and considerations such as what it means for the EIS to address the terms of reference in an "acceptable form".

120. The chief executive, therefore, could rightly decide that minor, technical contraventions of the terms of reference that did not affect the assessment of environmental impacts should not preclude the EIS proceeding.

121. In contrast, a major contravention that greatly affected the assessment of environmental impacts could lead to refusal on the basis that to allow the EIS to proceed would not be

performing the function or exercising the power under s 49 in the way that best achieves the object of the Act.

122. This approach does not create an impractical burden on decision-making under s 49. Requiring decisions to be made "in a way that best achieves" the object of the Act is a flexible and adaptable standard.

123. Section 99 of the EPA provides a second example of how the obligation in s 5 has work to do and does not create an impractical situation.

124. Under s 99 the administering authority must decide to accredit or refuse to accredit an Environmental Risk Management Plan (**ERMP**).[56]

125. An ERMP is a mechanism in Ch 4A (Great Barrier Reef protection measures) for reducing the impact of agricultural activities on the quality of water entering the Great Barrier Reef and to contribute to achieving water quality targets for the reef.[57]

126. A person carrying out an agricultural environmentally relevant activity (**agricultural ERA**)[58] in certain circumstances in the catchment of the Great Barrier Reef has obligations to hold and comply with an accredited ERMP.[59]

127. Section 94 of the EPA provides general content requirements for an ERMP, including matters such as "any matter that is reasonably necessary to reduce the impact of the agricultural ERA on the quality of water entering the reef".

128. Section 99 provides for the decision to accredit an ERMP. Section 99(2) provides:

> The administering authority may decide to accredit the ERMP only if the authority is satisfied it complies with the ERMP content requirements.

129. Again, the obligation in s 5 has a logical and practical role to play in the administering authority making a decision under s 99. For instance, it directs the administering authority to what is necessary for it to be "satisfied" the ERMP complies with the ERMP requirements such as "any matter that is reasonably necessary to reduce the impact of the agricultural ERA …". Questions of what are "reasonably necessary" in these circumstances logically are informed by the question in s 5.

130. Section 195 of the EPA provides a third example of the way the obligation in s 5 operates for the variety of functions and powers conferred under the Act.

131. Section 195 provides for the issue of an environmental authority after a decision to approve an application under s 194(2), relevantly, as follows:

> If the administering authority decides to approve an application … it must issue an environmental authority to the applicant—
>
> (a) if the application for the authority is referred to the Land Court under section 185—within 5 business days after a final decision is made under section 194(2); …

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[56] The term is defined in s 77 of the EPA.
[57] The objects of Ch 4A are stated in s 74 of the EPA.
[58] Agricultural ERA is defined in s 75 of the EPA.
[59] See EPA, s 88.

132. In contrast to the function and power conferred by s 194, the power and function conferred by s 195 is a relatively minor, administrative one with little discretion.

133. Section 5 still applies to the function and power under s 195 but the nature of what s 5 requires changes to correspond to the nature of the function and power conferred under s 195.

134. To fulfill the obligation under s 5 in performing the function and exercising the power under s 195 the administering authority could perform the function or exercise the power in the way that best achieves the object of the Act by administering the Act in a timely and efficient way and issuing the environmental authority in accordance with the timeframes specified in s 195. Delaying the issue of the environmental authority in contravention of the timeframes in s 195 would not be consistent either with ss 5 or 195 in these circumstances. Efficient and timely administration of the Act is consistent with the obligation in s 5 where a largely administrative function and power is conferred with little discretion and little scope of addressing environmental harm.[60]

135. The Applicant submits that these three examples, ss 49, 99 and 195, illustrate how s 5 has a logical and practical role to play in the decision-making process for the variety of functions and powers conferred under the EPA.

Presumption of regularity is rebutted

136. As a final matter for reply, the Second Respondent refers[61] to *Hill v Woollahra Municipal Council* (2003) 127 LGERA 7 at [51] for the presumption of regularity. The passage needs to be read in the context of the preceding passage in the judgment at [50]:

> [50] … where a body such as a local council is required by a statute to address a question posed by that statute or by an instrument referred to by the statute, it must address that very question. If it does not do so, it will be in breach of the statute, even though it may have adverted to the topic of the question.
>
> [51] However, when a court comes to consider whether or not such a breach has occurred, 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; 62 LGRA 409 at 418 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; (1971) 28 LGRA 191 at 196-197.
>
> [52] … 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 Bros & Rigg Ltd v Grice* (1906) 4 CLR 835 at 849-855 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.

[60] Efficient and timely administration of the EPA are also relevant where a wider discretion is involved but then wider considerations apply consistent with the nature of the function or power conferred by the EPA.
[61] Second Respondent's Outline of Submissions at [65].

137. Each case no doubt turns in large part on its own facts[62] and the presumption of regularity operates alongside other normal considerations that may rebut the presumption of regularity in the circumstances of an individual case. For instance, 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.[63]

138. Even where an administrative decision-maker correctly sets out the relevant legislative provisions, their reasons and the surrounding circumstances may establish that they none-the-less misconceived their duty under the legislation. This was the case in *Sinclair* where the mining warden correctly stated the relevant obligation before going on to state reasons which showed he had misunderstood the nature of the obligation. The presumption of regularity did not save the decision in that case.

139. The presumption of regularity is akin to the normal approach of the courts "that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act."[64]

140. The presumption of regularity and the normal reluctance of the courts to find an act done in breach of a statutory provision is invalid if public inconvenience would result are rebutted 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 by judicial review.[65]

141. This is the case at least where it is impossible to state that this failure or flaw in the reasoning could not have materially affected the decision.[66]

142. The Applicant submits that in this case the delegate's errors clearly fall into the category that it cannot be said they could not have materially affected the decision and, therefore, the decision should be set aside.

CONCLUSION

143. For the reasons set out in the Applicant's Outline of Argument and in this Reply, 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.

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

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29 July 2016

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[62] As noted in *Hill v Woollahra Municipal Council* (2003) 127 LGERA 7 at [52].
[63] *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.
[64] *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 392 [97] per McHugh, Gummow, Kirby and Hayne JJ (footnote omitted).
[65] See the cases cited at footnote 34.
[66] *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26 at [97] per Crennan and Bell JJ.