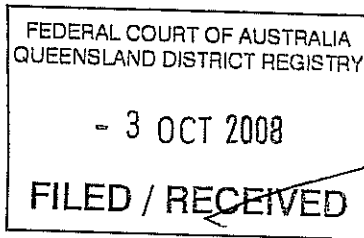


QUD - 3 17 / 08



WARATAH COAL INC.

Applicant

MINISTER FOR THE ENVIRONMENT HERITAGE AND THE
ARTS

Respondent

**APPLICATION FOR ORDER FOR REVIEW AND APPLICATION UNDER S.39B OF THE
JUDICIARY ACT 1903**

Application to review the decision of the Respondent made on 5 September 2008 ("the Purported Decision") purportedly pursuant to s.74B of the *Environmental Protection and Biodiversity Conservation Act 1999* ("the EPBC Act") in respect of the Applicant's referral No EPBC 2008/4366 dated 30 July 2008 ("the Referral").

Application to review the failure of the Respondent to decide pursuant to s.75 of the EPBC Act:

- (a) whether the proposed action the subject of the Referral is a controlled action; and
- (b) which provisions of Part 3 (if any) of the EPBC Act are controlling provisions for the proposed action the subject of the Referral.

The grounds of the Application are:

1. On 18 July 2003, the Applicant provided the Referral to the Respondent pursuant to s.68(a) of the EPBC Act for the Respondent's decision whether or not the proposed action the subject of the Referral is a controlled action under the EPBC Act.
2. Pursuant to s.75(1) of the EPBC Act, the Respondent has and had a duty to decide:
 - (a) whether the proposed action the subject of the Referral is a controlled action; and
 - (b) which provisions of Part 3 (if any) of the EPBC Act are controlling provisions for the proposed action the subject of the Referral.
3. Pursuant to s.75(5) of the EPBC Act, the Respondent had a duty to make the decisions referred to in paragraph 2 within 20 business days of receiving the Referral.

Filed on behalf of the Applicant

HopgoodGanim Lawyers
Level 8, Waterfront Place
1 Eagle Street
Brisbane Qld 4000

Phone: 3024 0000
Facsimile: 3024 0300
Ref: 0838379



4. Pursuant to ss.74B and 75(1AA) of the EPBC Act, the Respondent would not have or have had the duty referred to in paragraph 2 if, within 20 business days after the Respondent received the Referral, the Respondent:
 - (a) considered, on the basis of the information in the Referral, that it is clear that the proposed action the subject of the Referral would have unacceptable impacts on a matter protected by a provision of Part 3 of the EPBC Act; and
 - (b) decided that Division 1A of Part 7 of the EPBC Act should apply to the Referral.
5. On 5 September 2008, the Respondent made the Purported Decision.
6. The Respondent notified the Applicant of the Purported Decision by an undated letter from the Respondent to the Applicant which enclosed a statement of reasons for the Purported Decision.
7. By the Purported Decision, the Respondent purported to decide pursuant to s.74B of the EPBC Act that the proposed action the subject of the Referral will have clearly unacceptable impacts on the environment due to that part of the proposed action involving Commonwealth land (protected under ss.26 and 27A of the EPBC Act) and wetlands of international importance (protected under ss.16 and 17B of the EPBC Act).
8. The Purported Decision was not made by the Respondent within 20 business days of receiving the Referral.
9. In the premises:
 - (a) the Respondent did not have jurisdiction to make the Purported Decision;
 - (b) the Purported Decision was not authorised by the EPBC Act;
 - (c) the Purported Decision involved an error of law; and
 - (d) the Purported Decision was contrary to law.
10. In the premises, the Purported Decision:
 - (a) is invalid and is of no force or effect; and
 - (b) does not affect the duty of the Respondent referred to in paragraph 2.
11. As a consequence of the Purported Decision, the Respondent has failed to make the decisions referred to in paragraph 2.
12. In the premises, the Respondent's failure to make the decisions referred to in paragraph 2:
 - (b) involves an error of law; and
 - (b) is contrary to law.
13. The Applicant is aggrieved by the Purported Decision and by the failure of the Respondent to make the decisions referred to in paragraph 2.

A. DETAILS OF CLAIM

On the grounds stated in the accompanying affidavit, the Applicant claims



1. A declaration pursuant to s.16(1)(c) of the *Administrative Decisions (Judicial Review) Act 1977* and/or s.21 of the *Federal Court of Australia Act 1976* that the Purported Decision is invalid and is of no force and effect.
2. An order pursuant to s.16(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* quashing or setting aside the Purported Decision in its entirety.
3. An order pursuant to s.23 of the *Federal Court of Australia Act 1976* for the issue of a writ of certiorari quashing the Purported Decision.
4. A declaration pursuant to s.16(3)(b) of the *Administrative Decisions (Judicial Review) Act 1977* and/or s.21 of the *Federal Court of Australia Act 1976* that Respondent must decide pursuant to s.75 of the EPBC Act:
 - (a) whether the proposed action the subject of the Referral is a controlled action; and
 - (b) which provisions of Part 3 (if any) of the EPBC Act are controlling provisions for the proposed action the subject of the Referral.
5. An order pursuant to s.16(3)(a) of the *Administrative Decisions (Judicial Review) Act 1977* directing that the Respondent decide pursuant to s.75 of the EPBC Act:
 - (a) whether the proposed action the subject of the Referral is a controlled action; and
 - (b) which provisions of Part 3 (if any) of the EPBC Act are controlling provisions for the proposed action the subject of the Referral.
6. An order pursuant to s.39B of the *Judiciary Act 1903* for the issue of a writ of mandamus directing that the Respondent decide pursuant to s.75 of the EPBC Act:
 - (a) whether the proposed action the subject of the Referral is a controlled action; and
 - (b) which provisions of Part 3 (if any) of the EPBC Act are controlling provisions for the proposed action the subject of the Referral.
7. An order that the Respondent pay the Applicant's costs of and incidental to the proceeding, to be assessed if not agreed.
8. Such further or other orders as the Court considers appropriate.

Date: 3 October 2008



Haggood Ganim
Solicitors for the Applicant

B. NOTICE TO THE RESPONDENT

TO the Respondent of:

The Department of the Environment, Water, Heritage and the Arts,
John Gorton Building,
Environment entrance,
King Edward Terrace,
Parkes, ACT
Australia, 2600

This application has been set down for the time and place stated below. If you or a legal practitioner representing you do not attend the Court at that time, the application may be dealt with and judgment may be given, or an order made, in your absence. As soon after the time mentioned as the business of the Court will allow, any of the following may happen:

FOR DIRECTIONS ONLY

- (a) the application may be heard;
- (b) directions may be given for the further conduct of the proceeding;
- (c) any application for interlocutory relief may be heard.

Before any attendance at Court, you must file an appearance in the Registry.

Time and date for hearing: *9-30am* **WEDNESDAY 15 OCT 2008**

Place: Brisbane Registry *level 7*
Harry Gibbs Commonwealth Law Courts Building
119 North Quay
Brisbane QLD 4000

Date: **03 OCT 2008**



C. FILING AND SERVICE

This application is filed by HopgoodGanim Lawyers, for Waratah Coal Inc, whose address for service is Level 8, Waterfront Place, 1 Eagle Street, Brisbane, Queensland 4000.

The Applicant's address is Level 10, Santos House, 60 Edward Street, Brisbane, Queensland 4000.

It is intended to serve this application on each person listed below:

**THE MINISTER FOR THE ENVIRONMENT
HERITAGE AND THE ARTS**

c/- The Australian Government Solicitor
Level 12
340 Adelaide Street
Brisbane, QLD 4000
Attention: Richard Silver

