

BETWEEN: **WILDLIFE PRESERVATION SOCIETY OF QUEENSLAND
PROSERPINE/WHITSUNDAY BRANCH INC** Applicant

AND: **MINISTER FOR THE ENVIRONMENT AND HERITAGE** First Respondent

AND: **BOWEN CENTRAL COAL MANAGEMENT PTY LTD** Second Respondent

AND: **QCOAL PTY LTD** Third Respondent

**APPLICANT'S OUTLINE OF SUBMISSIONS AND
SUMMARY OF RELEVANT FACTS**

INTRODUCTION

1. The applicant applies for review of two decisions of a delegate of the respondent (“**the delegate**”) under s 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“**EPBC Act**”). The decisions are:
 - (a) On 6 May 2005, that the proposal by Bowen Central Coal Management Pty Ltd (“**BCCM**”) to construct and operate an open cut coal mine, the Isaac Plains Coal Project, northeast of Moranbah, Queensland (EPBC referral No. 2005/2070), is not a controlled action; and
 - (b) On 10 May 2005, that the proposal by QCoal Pty Ltd (“**QCoal**”) to construct and operate an open cut coal mine, the Sonoma Coal Project near Collinsville, central Queensland (EPBC referral No. 2005/2080), is not a controlled action.
2. There is no dispute that the applicant has standing under s 487 of the EPBC Act to seek judicial review of the decisions.¹ Nor is there any doubt that the decisions are, to the extent required, “under an enactment”.
3. The two grounds of review as pleaded concern a failure to consider the likely impacts of greenhouse gas emissions from the mining, transport and use of the coal from the Isaac Plains Coal Project and the Sonoma Coal Project when assessing “all

¹ The requirements of s 487(3) of the EPBC Act are satisfied by paragraphs 2-5 of and exhibits ITL-1, ITL-2 and ITL-3 to the affidavit of Ian Thomas Lee filed 22 July 2005.

APPLICANT'S OUTLINE OF
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SUMMARY OF RELEVANT
FACTS

Filed on behalf of the applicant

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adverse impacts” the mines are likely to have on the matters protected by Part 3 of the EPBC Act under s 75(2) of the Act. The grounds are based on the reasons for decision provided by the decision maker pursuant to the s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (“**ADJR Act**”) and are as follows:

Ground 1: Under ss 5(1)(e) and 5(2)(b) of the ADJR Act, that the making of the decisions were an improper exercise of the power conferred by s 75 of the EPBC Act because the delegate failed to take a relevant consideration into account in the exercise of the power, namely, the adverse impacts the Isaac Plains Coal Project and the Sonoma Coal Project are likely to have on the matters protected by Part 3 of the EPBC Act due to the mining, transport and use of the coal from the mines emitting a large amount of greenhouse gases contributing to global warming (“**the greenhouse impacts**”)².

Ground 2: Under s 5(1)(f) of the ADJR Act, that the decisions involved an error of law, namely, the delegate misconstrued the meaning of “all adverse impacts the action is likely to have on the matter protected by each provision of Part 3”, in s 75(2) of the EPBC Act, as not including the greenhouse impacts.

4. On Wednesday, 5 October 2005, the first respondent purported to supplement the statement of reasons with a thirteen page affidavit. The thirteen pages purport to provide background information; findings on material questions of fact not found in the statement of reasons; closely argued reasoning and further reasons for the decision, none of which is contained in the statement of reasons.
5. The applicant will, at the hearing, seek to cross-examine the deponent and will argue that, because of the discrepancies between the contents of the affidavit and the respective submissions, the affidavit should be given no weight.
6. The reason why the delegate’s affidavit should be given little weight is that it is incredible to the point of being unbelievable, if the delegate in fact undertook such a detailed analysis as he now claims, that none of this was contained in the statement of reasons. On its face and in the context of these proceedings, the delegate’s affidavit reads like a document prepared in response to the litigation and not as an accurate recounting of the true reasoning process that in fact occurred.
7. Contrary to the general assertion in the affidavit that the delegate gave detailed consideration to the greenhouse impacts, the statement of reasons prepared by the delegate failed completely to mention the greenhouse impacts. The purpose and necessary content of a statement of reasons prepared under s 13 of the ADJR Act is well known and has recently been the subject of protracted litigation against the first respondent for decisions under the EPBC Act.³
8. If a statement of reasons does not set out a finding on some question of fact, that will indicate that it made no finding on that matter; and that, in turn, may indicate

² This abbreviation is an addition to the ground as pleaded.

³ Culminating in the decision in *Mees v Kemp* [2005] FCAFC 5. Note the purpose and necessary content of a statement of reasons set out at [54]-[55].

that the decision-maker did not consider the matter to be material.⁴ Similarly, a statement in the reasons that the decision-maker “took account of comments received from the public” is consistent with the view that, if he did not mention them specifically in his reasons, he regarded them as irrelevant or had failed to consider them.⁵ The decision in *Mees v Kemp* [2005] FCAFC 5 was delivered on 11 February 2005 and it can be presumed that the first respondent and his delegates under the EPBC Act are fully aware of these matters.

9. If the court does accept the relevant contents of the affidavit, the applicant relies, in the alternative, on the following additional and alternative grounds⁶:

Ground 3: Under s 5(1)(f) of the ADJR Act, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he failed to adopt a commonsense approach to causation of the greenhouse impacts appreciating that the purpose of the inquiry is to attribute legal responsibility for impacts to matters protected by Part 3 of the EPBC Act in light of the subject, scope and objects of the Act.

Ground 4: Under s 5(1)(f) of the ADJR Act, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he failed to treat the issue of causation, generally, and failed to construe references to “a significant impact”, in particular, in the context of the objects and purpose of the EPBC Act, including the function of Part 3 and s 75 thereof in the statutory environmental impact assessment process established by the EPBC Act.

Ground 5: Under s 5(1)(f) of the ADJR Act, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he failed to consider the greenhouse impacts operating cumulatively with other contributors to global warming.

Ground 6: Under s 5(1)(f) of the ADJR Act, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he equated a finding that such an impact was extremely small, taken on its own, with its being insignificant.

⁴ *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; 346 [69] per McHugh, Gummow and Hayne JJ; and 392 [216] per Callinan J.

⁵ *Mees v Kemp* [2005] FCAFC 5 at [58].

⁶ And will seek leave of the court on the morning of the trial to amend the application, accordingly.

Ground 7: Under s 5(1)(f) of the ADJR Act, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he treated it as a pre-requisite for such a conclusion that the greenhouse impacts “set in train climate change processes that may have impacts on matters protected by Part 3” when such processes are already in train and capable of being contributed to by the greenhouse impacts of the projects.

Ground 8: Under s 5(1)(f) of the ADJR Act, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that, having found that the greenhouse impacts would be likely to increase the concentration of greenhouse gases in the atmosphere, he ignored that finding to conclude that there was no possibility, in reality, that any impact on climate in the vicinity of matters protected by Part 3 could ensue.

Ground 9: Under s 5(1)(f) of the ADJR Act, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he treated it as a pre-requisite for such a finding that the particular impact on matters protected by Part 3 of the EPBC Act be measurable, specifically identifiable; and demonstrable.

Ground 10: Under ss 5(1)(e) and 5(2)(b) of the ADJR Act, that the making of the decisions was an improper exercise of the power conferred by s 75 of the EPBC Act because the delegate failed to take a relevant consideration into account in the exercise of the power, namely, the delegate failed to consider that global warming is included as a key threatening process on the list established under s 183 of the EPBC Act and, thereby, the delegate failed consider the serious threat that global warming poses to the matters protected by Part 3 of the EPBC Act when assessing whether the greenhouse impacts from the mines are likely to have a significant impact on the matters protected by Part 3.

Ground 11: Under ss 5(1)(e) and 5(2)(a) of the ADJR Act, that the making of the decisions were improper exercises of the power conferred by s 75 of the EPBC Act because the delegate took into account an irrelevant consideration in the exercise of the power, namely, uncertainties as to the details of the manner in which the coal would be put to use in circumstances where:

- (a) the delegate was obliged to consider exercising a power to seek specified information under section 76 of the EPBC Act;
- (b) the likely greenhouse impacts could properly be the subject of assessment under Part 8 of the EPBC Act; and
- (c) the Minister may attach conditions to an approval of a controlled action pursuant to section 134 of the EPBC Act including conditions requiring safeguards as to end users of exported coal using technologies that produce smaller amounts of greenhouse gases.

Ground 12: Under ss 5(1)(h) and 5(3)(a) of the ADJR Act, there was no evidence or other material to justify making the decision, or upon which the delegate could be reasonably satisfied, that the greenhouse impacts were not likely to have a significant impact on the matters protected by Part 3 of the EPBC Act.

10. The grounds will be addressed in two parts as shown in the following index.

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PART 1 – GROUNDS 1 & 2 ON THE ASSUMPTION THAT THE DELEGATE’S AFFIDAVIT IS GIVEN NO WEIGHT

THE RELEVANT FACTS

Isaac Plains Coal Project

The referral

11. On 7 April 2005, on behalf of BCCM, Matrix+ Consulting referred a proposal to construct and operate an open cut coal mine, known as the Isaac Plains Coal Project, northeast of Moranbah, Queensland, under s 68 of the EPBC Act. The reference number for the referral was EPBC 2005/2070.⁷
12. The referral described the action as follows:⁸

“The Isaac Plains Project is a proposed open cut coal mine located in the central Queensland coal fields ... approximately 7 km north east of Moranbah ... Mining of coal will be undertaken at a rate of approximately 1.9 million tonnes per annum, run-of-mine, with a lifespan of approximately 9 years, based on resource estimates of 18 million tonnes ... The coal will be crushed, sized and washed on site in a coal handling and preparation plant, before being railed to Dalrymple Bay Coal Terminal for export.”
13. A supporting document provided with the referral, the Environmental Management Overview Strategy (EMOS), stated in section 3.2, page 10, that, “the coal is suitable for coking and thermal coal.”⁹ Coking coal is used as a raw material in the production of steel while thermal coal is burnt to generate heat for power generation.
14. The referral of the Isaac Plains Coal Project, and the documents supplied in support of it, considered the on-site impacts of the mine but did not consider or provide any evidence regarding the impacts that the mining, transport and use of the coal from the mine is likely to have on global warming through the emission of greenhouse gases and the consequential impacts of this on matters protected by Part 3 of the EPBC Act.
15. The only reference to greenhouse gas emissions from the mining, transport or use of the coal from the mine that was contained in the supporting documents for the referral was the following statement on page 18 of the Environmental Management Overview Strategy (EMOS), dated March 2005.¹⁰

“5.2.3 Greenhouse Gas

Greenhouse gas emissions from the operation of the mine are predominantly from electricity and diesel use. Some methane emissions may occur from the coal seam at very low concentrations given the shallow depth of coal. Greenhouse gas emission as estimated at approximately 40,000-45,000 tones of CO₂ equivalent gas per year. Oxides of carbon, nitrogen and sulphur would also be emitted in vehicular emissions however these emissions are minor in comparison. The concentration of methane is not likely to exceed 1%, and consequently is not considered to have an adverse effect on air quality.”

⁷ Affidavit of Mark Flanigan (5 October 2005), annexure MF-1, pp 1-26.

⁸ Ibid, annexure MF-1, p 3.

⁹ Ibid, annexure MF-3, p 87.

¹⁰ Ibid, annexure MF-3, p 95.

The applicant's public submission on the referral

16. On 18 April 2005, the applicant made a public submission to the respondent regarding whether the action was a controlled action, including that:¹¹

“2.1.4 World Heritage Areas

A) IMPACTS OF CLIMATE CHANGE ON MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE

Global warming is already impacting on matters of national environmental significance and, unless major changes are made in current greenhouse gas emissions, will severely impact on matters of national environmental significance in the future.

There is strong scientific evidence of severe impacts on the Great Barrier Reef World Heritage Area (**GBRWHA**) in coming decades due to global warming. A comprehensive study by Hoegh-Guldberg and Hoegh-Guldberg, *Implications of Climate Change for Australia's Great Barrier Reef*, indicated the best case scenario for the GBRWHA is recoverable loss if global temperature increases remain below 2 degrees. Under the worst case scenario, coral populations will collapse by 2100 and the re-establishment of coral reefs will be highly unlikely over the following 200-500 years.

There is similar strong scientific evidence of severe impacts on the Wet Tropics World Heritage Area (**Wet Tropics WHA**) in coming decades due to global warming. The Rainforest Cooperative Research Centre, *Environmental Crisis: Climate Change and Terrestrial Biodiversity in Queensland*, concluded that the likely impacts of climate change on terrestrial biodiversity within the Wet Tropics WHA would be very serious and could be catastrophic under some scenarios. Even moderate levels of warming, well within the envelope defined by the IPCC, have the potential to pose serious threats to biodiversity. The predicted impacts will be particularly acute for regions with many local endemic species (such as the Wet Tropics) because the current climatic ranges of local endemics are generally restricted. Modeling shows that high elevation species (i.e. species that live at or near the tops of mountain ranges) especially may become progressively restricted as their already limited habitat shrinks or even disappears due to climate change affecting rainfall and temperature. For example, the climatic habitat of the Bellenden Ker Nursury frog, *Cophixalus neglectus*, is predicted to disappear entirely with 1°C average annual warming. As these endemic species have been important in the listing of the Wet Tropics WHA on the World Heritage List, the loss or decline of these species has important ramifications for the ongoing heritage values of the area.

B) LIKELY IMPACTS OF THE ACTION MUST CONSIDER IMPACTS ON GLOBAL WARMING

... The burning of 18 million tonnes of coal will have an impact on global warming, how much of an impact the production of this amount of greenhouse gases will have on global warming and, consequently, on matters of national environmental significance is more difficult to determine but must, at the very least, be considered when assessing the likely impacts of the action.

Consideration of the impacts of the action under section 75 of the EPBC Act must consider the potential impacts of greenhouse gas emissions from the burning of the coal on global warming and the consequential impacts on matters of national environmental significance.

We contend that when the ultimate greenhouse gas emissions are considered the proposed action is likely to have a significant impact on matters of national environmental significance, including the World Heritage Areas. ...

¹¹ Ibid, annexure MF-4, pp 164-166.

2.3 GREENHOUSE GAS EMISSIONS

Our geographical and environmental circumstances mean that Australia is vulnerable to the potential impacts of climate change. Potentially significant impacts include those of our agricultural productivity, coastal communities, threats to human health, and the imposition of further survival pressures on a range of native plants and animals.

Loss of terrestrial climatic habitat caused by anthropogenic emissions of greenhouse gases is listed as a *key threatening process* under the *EPBC Act*. Previously we discussed the affects of climate change on World Heritage Areas (s 2.1.4), however, it must be recognised that coal mining both during the extraction process and the burning of the end product is a major contributor to the greenhouse effect. ...

Consideration of the impacts of the action under section 75 of the *EPBC Act* must consider the potential impacts of greenhouse gas emissions from the extraction process and the eventual burning of the coal on global warming and the consequential impacts on matters of national environmental significance and international significance.”

The Departmental minute

17. A Departmental minute was approved on 6 May 2005 by the delegate recommending the referral is not a controlled action under the *EPBC Act*. The Departmental minute considered the on-site impacts of the mine before referring to the comments of the applicant as follows:¹²

“Secondary or consequent impacts

The comments from the Wildlife Preservation Society of Queensland suggest that the impacts of climate change, as a consequence of the burning of coal produced from the mine, on the world heritage values of the Great Barrier Reef World Heritage Area should be considered. The nature of induced climate change from the referred coal mining operation, and impacts on world heritage values, are speculative.”

18. A handwritten note on page 4 of the Departmental minute above the signature of the delegate stated:¹³

“I regard the likelihood of significant impacts on NES [matters of national environmental significance] arising from the marginal addition of greenhouse gases to be extremely small, in addition to speculative.”

The delegate’s decision

19. On 6 May 2005, the delegate determined that the Isaac Plains Coal Project is not a controlled action for the purposes of s 75 of the *Act*.¹⁴

The statement of reasons

20. On 12 May 2005, the applicant requested a statement of reasons, under s 13 of the *ADJR Act*, for the decision that the Isaac Plains Coal Project was not a controlled action.¹⁵

21. On 21 June 2005, the delegate prepared a statement of reasons for the decision that that Isaac Plains Coal Project is not a controlled action.¹⁶

¹² Ibid, annexure MF-5, p 182.

¹³ Ibid, annexure MF-5, p 183.

¹⁴ Ibid, annexure MF-7, p 198.

¹⁵ Ibid, annexure MF-10, pp 204-205.

22. The delegated stated at paragraph 7 of the statement of reasons:¹⁷

“One public submissions was received from the Proserpine/Whitsunday Branch of the Wildlife Preservation Society of Queensland. This submission raised concerns regarding the loss of habitat for threatened and migratory species and impacts upon the Shoalwater and Corio Bays Ramsar site, and considered that the proposal should be a controlled action.”

23. The delegate stated at paragraph 10 of the statement of reasons:¹⁸

“The evidence or other material upon which my findings were based [included] a brief from the Department, dated 4 May 2005, including ... advice from the Department relating to the potential impacts of the proposed action on matters protected under the EPBC Act.”

24. The delegate made findings on material questions of fact and reasons for his decision dealing with the site-specific and downstream impacts of the mine at paragraphs 11-17 of his statement of reasons before concluding, at paragraph 18, with the statement that:¹⁹

“In making my decision on whether the proposed action is a controlled action, I took account of the precautionary principle and public comments received on the referral from the Proserpine/Whitsunday Branch of the Wildlife Preservation Society of Queensland.”

25. In relation to the impacts of the mine, the delegate’s reasons refer only to impacts immediately associated with the mining of coal and do not refer to the impacts of greenhouse gas emissions on matters protected by Part 3 of the EPBC Act that are likely to result from the burning or other uses of the coal.

Sonoma Coal Project

The referral

26. On 14 April 2005, on behalf of QCoal, McCollum Environmental Management Services Pty Ltd referred a proposal to construct and operate an open cut coal mine, known as the Sonoma Coal Project near Collinsville, central Queensland, under s 68 of the EPBC Act (EPBC referral No. 2005/2080).²⁰

27. The referral described the action as follows:²¹

“The action is the construction and operation of the Sonoma Coal Project which is proposed to be an open cut coal mine. The mine is expected to produce approximately 30 million tonnes of product coal, primarily export coking coal, with lesser amounts of thermal coal for both the export and domestic markets. The annual output is expected to be 2 million tonnes per annum, with an anticipated mine life of 15 years.”

28. As for the Isaac Plains Coal Project, the analysis of the impacts of the Sonoma Coal Project provided in the referral was limited to the site-specific impacts of the mining operation. The referral of the Sonoma Coal Project did not consider or

¹⁶ Ibid, annexure MF-11, pp 207-210.

¹⁷ Ibid, annexure MF-11, p 208.

¹⁸ Ibid, annexure MF-11, p 209.

¹⁹ Ibid, annexure MF-11, p 210.

²⁰ Ibid, annexure MF-13.

²¹ Ibid, annexure MF-13, p 215.

provide any evidence regarding the impacts that the mining and ultimate burning of the coal is likely to have on global warming and the consequential impacts of this on matters protected by Part 3 of the EPBC Act.

The applicant's public submission on the referral

29. On 27 April 2005, the applicant made a public submission regarding the referral of the Sonoma Coal Project in similar, though more extensive, terms to the submission concerning the Isaac Plains Coal Project set out above.²²

The Departmental minute

30. A Departmental minute was approved on 10 May 2005 by the delegate recommending the referral is not a controlled action under the EPBC Act. The Departmental minute considered the on-site impacts of the mine before referring to the comments of the applicant as follows:²³

“Secondary or consequent impacts

The comments from the Wildlife Preservation Society of Queensland suggest that the impacts of climate change, as a consequence of the burning of coal produced from the mine, on the world heritage values of the Great Barrier Reef World Heritage Area should be considered. The nature of induced climate change from the referred coal mining operation, and impacts on world heritage values, are speculative. The quantum contribution to induced climate change directly attributable to the referred action is minute and not likely to be measurable against the context of existing and reasonably foreseen contributors.”

The delegate's decision

31. On 10 May 2005, the delegate determined that the Sonoma Coal Project was not a controlled action for the purposes of s 75 of the EPBC Act.²⁴

The statement of reasons

32. On 12 May 2005, the applicant requested a statement of reasons, under section 13 of the ADJR Act, for the decision that the Sonoma Coal Project was not a controlled action.²⁵

33. On 21 June 2005, the delegate prepared a statement of reasons for the decision that that Sonoma Coal Project was not a controlled action.²⁶

34. The delegate stated at paragraph 9 of his statement of reasons:²⁷

“Public comment was received from the Proserpine/Whitsunday Branch of the Wildlife Preservation Society of Queensland. The Society considered that the proposal should be a controlled action because of the potential significant impacts on the Squatter Pigeon (Southern) (*Geophaps scripta scripta*) and Black Ironbox (*Eucalyptus raveretiana*), listed threatened species in the vulnerable category under the EPBC Act, and on the listed ecological community *Brigalow* (*Acacia harpophylla* dominant and co-dominant). The submission also considered that significant impacts will occur on

²² Ibid, annexure MF-15, noting the submissions on greenhouse impacts at pp 310-317.

²³ Ibid, annexure MF-16, p 337.

²⁴ Ibid, annexure MF-18, p 349.

²⁵ Ibid, annexure MF-21, pp 355-356.

²⁶ Ibid, annexure MF-22, pp 358-361.

²⁷ Ibid, annexure MF-22, p 359.

listed migratory species occurring in, or dependent upon, the nearby Bowen River and on the world heritage values of the Great Barrier Reef World Heritage Area (GBRWhA).”

35. The delegate stated at paragraph 11 of his statement of reasons:²⁸

“The evidence or other material upon which my findings were based [included] a brief from the Department, dated 6 May 2005, including ... advice from the Department relating to the potential impacts of the proposed action on matters protected under the EPBC Act.”

36. The delegate made findings on material questions of fact and reasons for his decision dealing with the site-specific and downstream impacts of the mine at paragraphs 12-17 of the statement of reasons. The statement of reasons concluded, at paragraph 21, with the statement that:²⁹

“I took account of the precautionary principle and public comments made by the Proserpine/Whitsunday Branch of the Wildlife Preservation Society of Queensland in making my decision on whether the proposed action is a controlled action.”

37. In relation to the impacts of the mine, the delegate’s reasons refer only to impacts immediately associated with the mining of coal and downstream impacts.³⁰ The delegate’s reasons do not refer to the impacts of greenhouse gas emissions on matters protected by Part 3 of the EPBC Act that are likely to result from the mining, transport and use of the coal from the mine.

Global warming

38. Global warming has received statutory recognition under the EPBC Act and is a matter upon which the Court may properly take judicial notice for the purposes of these proceedings.³¹ As the paragraphs of these submissions which follow indicate, the terms have acquired ordinary meanings reflected by their appearing in modern dictionaries. The first respondent, as the relevant minister, has set out the nature of the problems associated with global warming, including on matters protected by Part 3 of the EPBC Act. Relevant statements from such documentation are set out below.

39. “Loss of climatic habitat caused by anthropogenic emissions of greenhouse gases” was listed as a key threatening process under the EPBC Act on 4 April 2001.³² The advice from the Threatened Species Committee to the First Respondent described this key threatening process as follows:³³

“The ‘Loss of climatic habitat caused by anthropogenic emissions of greenhouse gases’ consists of reductions in the bioclimatic range within which a given species or ecological community exists due to emissions induced by human activities of

²⁸ Ibid, annexure MF-22, pp 359-360.

²⁹ Ibid, annexure MF-22, p 361.

³⁰ The delegate’s reasons state at paragraph 13 that, “I considered that the nature of any indirect impacts on world heritage values associated with the referred action are speculative”, but this was in the context of considering downstream impacts as the mine is located in the catchment of the Great Barrier Reef. In this context, the reasons do not indicate the delegate was referring to indirect impacts from greenhouse emissions.

³¹ In accordance with s 144 of the *Evidence Act 1995*.

³² Notified in the *Commonwealth of Australia Gazette* (No. GN 13, 4 April 2001), p 906. The relevant extract will be included in the book of authorities provided to the Court.

³³ This document will be included in the book of authorities provided to the Court.

greenhouse gases. Human activities are described in the National Greenhouse Gas Inventory. The categories of human-induced activities are: energy; industrial processes; solvent and other product use; agriculture; land use change and forestry; and waste. ...

The distribution of the nominated process is continental. Ecosystems in which the process occurs include: alpine habitats; coral reefs; wetlands and coastal ecosystems; polar communities; tropical forests; temperate forests; and arid and semi-arid environments.”

40. “Global warming” (which is often used synonymously with “climate change”), “the greenhouse effect”, “greenhouse gases”, and “fossil fuels” are terms now in common usage that are defined in *The Australian Oxford Dictionary* as follows:³⁴

“**global warming** *n.* the increase in average temperatures on the earth caused by the greenhouse effect. While there is broad scientific agreement that an increase is occurring, there is no consensus regarding its likely extent. An average rise of up to 5°C by the year 2100 has been predicted, which would cause a significant raising of sea level, due to melting of polar ice, and unpredictable climatic changes, probably with far-reaching consequences. Remedial measures would include reducing the world’s production of carbon dioxide and other greenhouse gases, and reversing the trend of deforestation.”³⁵

“**greenhouse effect** *n.* the trapping of solar heat in a planet’s lower atmosphere due to the greater transparency of the atmosphere to visible radiation from the sun than to infrared radiation from the planet’s surface. Such an effect is responsible for the surprisingly high surface temperature (460°C) of the planet Venus, whose dense carbon dioxide (CO₂) atmosphere is opaque to infrared radiation. On earth, small amounts of CO₂ and water vapour naturally present in air act in a similar but limited way. However, the increasing quantity of atmospheric CO₂ from the burning of fossil fuels, together with the release of other greenhouse gases (notably chlorofluorocarbons) and the effects of deforestation, are expected to cause a significant rise in world temperatures with unforeseen climatic and environmental effects.”³⁶

“**greenhouse gas** any of various gases, esp. carbon dioxide, that contribute to the greenhouse effect.”³⁷

“**fossil fuel** a natural fuel such as coal or gas formed in the geological past from the remains of living organisms.”³⁸

41. The first respondent’s acceptance of the existence of global warming / climate change, its cause and its likely impacts on matters protected by Part 3 of the EPBC Act, and the need to address greenhouse gas emissions associated with fossil fuels such as coal, are evident from his public statements:³⁹

“The Australian Government recognises climate change as a very serious problem and ... is strongly committed to the development of an effective global response to climate change that involves all major emitters.” (Media release 9 July 2005).

“It’s becoming obvious that climate change is occurring, that there is human-induced climate change through greenhouse gas emissions. ... It is an incredibly important issue and there are incredibly strong reasons for taking comprehensive, effective global action to reduce carbon and other greenhouse gas emissions.” (ABC AM Programme 26 July 2005).

³⁴ The relevant extracts will be included in the book of authorities provided to the Court.

³⁵ *The Australian Oxford Dictionary* (1999), p 553.

³⁶ *The Australian Oxford Dictionary* (1999), p 574.

³⁷ *The Australian Oxford Dictionary* (1999), p 574.

³⁸ *The Australian Oxford Dictionary* (1999), p 508.

³⁹ Affidavit of Kirsty May Ferguson Ruddock (18 August 2005), annexure KMFR-1.

“Being able to use traditional energy sources such as coal, oil and gas through cleaner and more efficient methods is undoubtedly the biggest challenge facing governments and industry.” (Media release 16 March 2005).

“In 2003, Australia’s net greenhouse gas emissions were estimated to be 550 million tonnes of carbon dioxide equivalent (Mt CO₂-e).” (Media release 24 May 2005).

“Australia’s abundant reserves of fossil fuels and increasing energy use makes it imperative for Australia to investigate and implement technological solutions that reduce emissions from the energy sector.” (Media release 3 June 2005).

“The [*Climate Change Risk and Vulnerability – Promoting an efficient adaptation response in Australia*] report tells us that some degree of climate change is inevitable because of the greenhouse gases already emitted to the atmosphere and the strong growth of global emissions.” (Media release 26 July 2005).

“[The Asia-Pacific Partnership on Clean Development and Climate] ... will collaborate to promote and create an enabling environment for the development, diffusion, deployment and transfer of existing and emerging cost-effective, cleaner technologies and practices, through concrete and substantial cooperation so as to achieve practical results. Areas for collaboration may include, but not be limited to: energy efficiency, clean coal, integrated gasification combined cycle, liquefied natural gas, carbon capture and storage, combined heat and power, methane capture and use ...” (Media release 28 July 2005).

42. A recent report of the Australian Government Department of the Environment and Heritage Australian Greenhouse Office, *Climate Change Risk and Vulnerability – Promoting an efficient adaptation response in Australia* (March 2005), summarised the likely impacts of global warming on the Australian environment as follows:⁴⁰

“Greenhouse gas emissions since the industrial revolution make some climate change inevitable, but adaptation is likely to be a progressively imperfect substitute for reducing global greenhouse gas emissions because the more greenhouse gas concentrations in the atmosphere rise, the greater the risk of ‘dangerous’ anthropogenic interference with the world’s climate system that cannot be readily absorbed or prepared for.”⁴¹

“There is little doubt that Australia will face some degree of climate change over the next 30 to 50 years irrespective of global or local efforts to reduce greenhouse emissions. The scale of that change, and the way it will be manifested in different regions is less certain, but climate models can illustrate possible effects.”⁴²

“The Allen Consulting Group has identified the following priority vulnerable systems and associated regions. These reflect considerations of climate vulnerability, the significance of the systems at risk and the likely need for government intervention to encourage a timely and efficient adaptation response.

Ecosystems and biodiversity

- alpine regions;
- reef systems (such as Ningaloo and the Great Barrier Reef);
- tropical rainforest areas;
- heathland systems in southwest Western Australia;
- coastal mangrove and wetland systems (such as Kakadu); and
- rangelands.

Within this group, particular priority should be given to World Heritage listed systems. Such systems and areas have properties of uniqueness and ecological importance that have been confirmed against an international yardstick. However, there is a need to

⁴⁰ Affidavit of Kirsty May Ferguson Ruddock (18 August 2005), annexure KMFR-2.

⁴¹ Ibid, annexure KMFR-2, p 25.

⁴² Ibid, annexure KMFR-2, p 29.

face the prospect that, in some cases, the [sic] may be little that can be done. Climate change might overwhelm some fragile species and remnant habitats (such as those in alpine regions) that literally have nowhere else to go, or for which effective options for supplementing their natural adaptive and coping capacities – through actions such as relocation, developing migratory corridors or relieving other environmental pressures – are extremely limited.

*Biological systems are likely to come under significant pressure from climate change, which is likely to proceed at a rate that will exceed their natural adaptive capacities. In some cases there may be scope to assist the adaptation of vulnerable systems and species, and work should proceed on identifying the most effective options. The threat from climate change should be explicitly factored into planning and actions undertaken under a range of existing initiatives such as the ... preparation of recovery and threat abatement plans under the Environment Protection and Biodiversity Conservation Act 1999.*⁴³

43. This is the factual context of the decisions the subject of these proceedings (excluding the delegate’s affidavit, which will be addressed in Part 2 of these submissions). Relevant aspects of the legal context are set out in the paragraphs of these submissions which follow.

THE RELEVANT LAW

The statutory context of the decisions

44. The objects of the EPBC Act and the statutory context of decisions under s 75 of the Act were explained by the Full Court in *Minister for the Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24 (“**the Nathan Dam Case**”) at [2]-[16] and will only be touched upon in these submissions.

45. As noted by Kiefel J in the trial decision in the Nathan Dam Case,⁴⁴ a broad approach should be taken to interpreting the EPBC Act as its objects are matters of “high public policy in remedial and protective legislation”.⁴⁵

46. The objects of the EPBC Act are stated in s 3 of the Act, *inter alia*, as follows:

“3. Objects of Act

- (1) The objects of this Act are:
 - (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
 - (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
 - (c) to promote the conservation of biodiversity; and ...
- (2) In order to achieve its objects, the Act:
 - (a) recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas; and ...

⁴³ Affidavit of Kirsty May Ferguson (18 August 2005), annexure KMFR-3, pp 32-33.

⁴⁴ *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463, para 40.

⁴⁵ As to the remedial intention and high public policy of the EPBC Act generally, see the *Environment Protection and Biodiversity Conservation Bill 1999 Explanatory Memorandum*, pp.2-18. Consequently, “No narrow construction of the Act should be adopted. But neither should the words of the Act be stretched beyond their limit”: *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 515 per McHugh, Hayne and Callinan JJ, at 528 per Gummow J and 537 per Kirby J.

- (d) adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; and
- (e) enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions to:
 - (i) protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species) and ensure the conservation of migratory species; and ...
 - (iv) identify processes that threaten all levels of biodiversity and implement plans to address these processes; and
- (f) includes provisions to enhance the protection, conservation and presentation of world heritage properties ...”

47. An assessment and approval system for actions impacting upon matters of national environmental significance is provided by Part 3 and Parts 7-9 of the EPBC Act. This system may be summarised as follows:

- (a) Part 3, Division 1 (ss 12-25) provides requirements for environmental approvals relating to matters of national environmental significance. An action that has, will have or is likely to have a significant impact on a matter of national environmental significance is prohibited by civil⁴⁶ and criminal liability.⁴⁷ However, the prohibition does not apply to an action that is approved or exempt under the EPBC Act.
- (b) Part 7, to which s 75 is central, provides a procedure for a proposed action to be referred to the Minister for approval. Section 67 defines “controlled action” by stating that an action that a person proposes to take is a controlled action if the taking of the action by the person without approval under Part 9 would be prohibited by a provision of Part 3. The prohibiting provision is defined as “a controlling provision”.
- (c) Part 8, to which s 87 is central, provides five methods for assessment of a proposed action that the Minister has decided is a controlled action. An assessment bilateral agreement with a State or Territory government under Part 5 can be substituted for the Commonwealth's procedures under Part 8.⁴⁸
- (d) Part 9, to which s 133 is central, provides for the Minister to approve or refuse a proposed action. The Minister's approval or otherwise (pursuant to s 133) follows the Minister's receipt of a report from the chosen assessment process under Part 8 or a bilateral agreement.

Section 75 of the EPBC Act

48. Section 75 is the “gateway” to the assessment and approval system under the EPBC Act for actions referred to the Minister under ss 68 and 69. It provides as follows:

“75 Does the proposed action need approval?

Is the action a controlled action?

(1) The Minister must decide:

- (a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and

⁴⁶ For example, s 12 relating to impact on world heritage values. Note also ss 481-486D (Civil penalties).

⁴⁷ For example, s 15A also relating to impact on world heritage values.

⁴⁸ An assessment bilateral agreement is currently in force for Queensland under the EPBC Act but is not material to these proceedings.

(b) which provisions of Part 3 (if any) are controlling provisions for the action.

...

Minister must consider public comment

(1A) In making a decision under subsection (1) about the action, the Minister must consider the comments (if any) received:

- (a) in response to the invitation (if any) under subsection 74(3) for anyone to give the Minister comments on whether the action is a controlled action; and
- (b) within the period specified in the invitation.

Considerations in decision

(2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:

(a) the Minister must consider all adverse impacts (if any) the action:

- (i) has or will have; or
 - (ii) is likely to have;
- on the matter protected by each provision of Part 3; and

(b) must not consider any beneficial impacts the action:

- (i) has or will have; or
- (ii) is likely to have;

on the matter protected by each provision of Part 3.

Designating a proponent of the action

(3) If the Minister decides that the action is a controlled action, the Minister must designate a person as proponent of the action. ...”

49. A decision pursuant to s 75 determines whether some form of environmental impact assessment under the EPBC Act is necessary⁴⁹ and whether a subsequent approval is required⁵⁰. It does not determine whether or not the proposal which is the subject of the referral receives approval under the EPBC Act. If the delegate decides that the action is a controlled action, the decision whether to grant approval or not is made after the impact assessment process has been carried out. If the decision is that the proposal is not a controlled action, the proponent receives a statutory exemption from the civil restrictions and criminal penalties that might otherwise ensue pursuant to the controlling provisions.⁵¹ The gatekeeper nature of the provision is reflected in the requirement to ignore all beneficial impacts.⁵²

50. The construction to be given to s 75 concerning its treatment of “all adverse impacts” was the issue addressed by the Full Federal Court in the Nathan Dam Case, discussed below.

The purpose and function of environmental impact assessment

51. Section 75 of the EPBC Act is a gatekeeper provision to a process of environmental impact assessment and, consequently, it is useful to understand the established purpose and function of this procedure.

52. “Environmental impact assessment” is the general term used for the assessment of the impact of a proposed development on the environment, such as provided for in Parts 7 and 8 of the EPBC Act. Environmental impact assessment is a widely used, practical tool whereby decision-makers and members of the public are informed about the certain and likely impacts of a proposal on the environment, possible alternatives and ways of mitigating those impacts.

⁴⁹ The assessment processes are provided for in Part 8, ss 80-129.

⁵⁰ The approval of actions (or otherwise) is provided for by Part 9, ss 130-145B.

⁵¹ This can be seen from the controlling provisions, themselves. For example, see s 12(2)(c) of the EPBC Act (impact on a declared World Heritage property).

⁵² Section 75(2)(b) of the EPBC Act.

53. As a practical tool for decision-making, environmental impact assessment need not be perfect or cover every topic but it is well recognised that it must at least attempt to broadly alert the decision-maker and members of the public to the true effect of the activity and the consequences to the community inherent in the carrying out or not carrying out of the activity.

“I do not think the [statute] ... imposes on a determining authority when preparing an environmental impact statement a standard of absolute perfection or a standard of compliance measured by no consideration other than whether it is possible in fact to carry out the investigation. I do not think the legislature directed determining authorities to ignore such matters as money, time, manpower etc. In my opinion, there must be imported into the statutory obligation a concept of reasonableness ... provided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public ... to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations. The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations.”⁵³ (emphasis added)

54. This practical approach to identifying the true effects of a proposal was adopted by the Court in relation to s 5 of the *Environment Protection (Impact of Proposals) Act 1974* (one of the predecessor Acts to the EPBC Act), as shown in the following passage:

“In considering whether the proposed action would have a significant effect on the environment, it is appropriate, in my view, in the words of Cripps J in *Kivi v Forestry Commission* [(1982) 47 LGRA 38] (at 47) to ‘look to the whole undertaking of which the relevant activity forms a part to understand the cumulative and continuing effect of the activity on the environment’. However, this does not mean that the significance of a particular activity can only be assessed by reference to its impact upon the whole area in which some aspect of the activity is to take place. Despite the broad definition of ‘environment’ in the [*Environment Protection (Impact of Proposals) Act 1974*] (which corresponds to that in s.4 of the *Environmental Planning and Assessment Act [1979 (NSW)]*), site specific impacts can be significant, depending on the circumstances. The impact of logging in particular forests can have a significant impact on the environment, even though there may be other forests nearby which remain untouched: compare *Jararius v Forestry Commission (NSW) (No. 1)* (1988) 71 LGRA 79 at 90-93.”⁵⁴

55. A similar, practical approach to identifying the true effects of a proposal is adopted in other jurisdictions. For example, in elucidating a remarkably undefined “environmental impact report” in s 5 of the *National Development Act 1979* (NZ), the New Zealand Court of Appeal stated:

“Obviously there must be a real and sufficient link between the less direct effects likely to flow from projected works if they are to be regarded as relevant. But it could not be Parliament’s intention that in every context a discussion limited to site-specific environmental implications will satisfy an applicant’s responsibility to provide a realistic impact report. If that were the case the ‘green light’ could well be given to some major industrial project which involved insignificant environmental implications considered by reference only to the site itself, but manifold and adverse effects when assessed against the further construction of another undertaking which alone could give

⁵³ *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402, 417 per Cripps J.

⁵⁴ *Tasmanian Conservation Trust Inc v Minister for Resources & Gunns Ltd* (1995) 55 FCR 516, 541 per Sackville J.

it industrial meaning and with which it clearly would be inextricably involved.⁵⁵
(emphasis added)

56. These general principles are consistent with the approaches taken by Kiefel J and the Full Court in the Nathan Dam Case, which will be discussed below.

Failure to take into account a relevant consideration

57. Turning to the first ground of review, the requirement to consider (in this case, impacts) was the subject of discussion in *Tickner v Chapman* (1995) 57 FCR 451. The following passage from the reasons of Black CJ at 461-462 is indicative of the approach taken from the court to such a requirement at both first instance and on appeal:

“Section 10 (1)(c) of the Act requires the Minister to consider both the report under s.10(4) in relation to the area received from a person nominated by him, and any representations attached to the report. In the context of the Act, given the policy of public involvement in the process and the potential gravity of the consequences of granting or withholding a declaration, it is clear that the Minister's duty to consider under s 10(1)(c) is a provision compliance with which is a necessary step in the exercise of power under s 10: cf. *Hunter Resources Ltd v Melville* (1988) 62 ALJR 88 at 94-5 per Dawson J. There is no distinction made by the Act between the report and the representations for this purpose. ...

The Minister must personally consider the report and any representations attached to it. This is because the powers and functions of the Minister under s 10 (and under ss 9, 12, 13(2), Part IIA and s 26) are specifically excluded from the power of delegation conferred by s.31(1). The exclusion is, in terms, quite general and it was not suggested that the exclusion from the power of delegation of the Minister's powers and functions under s 10 was confined to the making of a declaration and that the Minister could nevertheless delegate the consideration of the report and any attached representations to anyone else.

The meaning of ‘consider’ used as a transitive verb referring to the consideration of some thing is given in the *Oxford English Dictionary*, 2nd ed. as ‘to contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of.’ Consideration of a document such as a representation or a submission (there is little, if any, difference between the two for these purposes) involves an active intellectual process directed at that representation or submission.” (emphasis added)

58. In relation to the impacts of the mine, the delegate's reasons refer only to impacts immediately associated with the mining of coal. The delegate's reasons do not refer to the impacts of greenhouse gas emissions on matters protected by Part 3 of the EPBC Act that are likely to result from the mining, transport and use of the coal from the mine. This, as the authorities discussed in the paragraphs that follow suggest, is a very strong indication that the impacts of those greenhouse emissions on matters protected by Part 3 of the EPBC Act were not considered.
59. The applicant, of course, accepts that the reasons of an administrative decision-maker are meant to inform, and not to be scrutinised upon overzealous review by seeking to discern whether some inadequacy might be gleaned from the way in which the reasons are expressed.⁵⁶

⁵⁵ *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 4)* [1981] 1 NZLR 531, 534 per the Court (Woodhouse P, Cooke, Richardson and McMullen JJ).

⁵⁶ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

60. In *Mees v Kemp* [2005] FCAFC 5 at [54]-[55], the Full Court (French, Merkel and Finkelstein JJ) observed (in the context of an appeal from a judicial review application against a decision under section 75 of the EPBC Act), that:

“Sections 13(1) and (2) [of the ADJR Act], read together, require a decision-maker who has been requested to give reasons for a decision to provide:

1. A statement in writing.
2. Setting out the findings on material questions of fact.
3. Referring to the evidence or other material on which those findings were based.
4. Giving the reasons for the decision.

The section requires that reasons be furnished ‘which make intelligible the true basis of the decision’ – *ARM Constructions Pty Ltd v Commissioner of Taxation* (1986) 10 FCR 197 at 204 (Burchett J). It is remedial and supplies the deficiency of the common law – *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 130 (Gummow J). It is designed to provide persons affected by a decision with sufficient information to decide whether to accept it or to pursue the matter further with the administrative process or through the Court – *Ansett Transport Industries (Operations) Ltd v Secretary, Department of Aviation* (1987) 73 ALR 193 at 197 (Lockhart J).

The section does not require that the reasons are set out with the degree of precision or detail which might be appropriate to a judicial decision:

‘But it demands a statement of the real findings and the real reasons. It is an incident of the obligation that the statement should not omit findings or reasons for the decision which may, in the light of a pending review application, appear to be irrelevant or reflective of some false assumption or pre-judgment.’ – *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 179 (French J).”

61. The Full Court observed in *Mees v Kemp* [2005] FCAFC 5 at [58]:

“The statement in the reasons that the Minister ‘took account of comments received from the public’ is consistent with the view that if he did not mention them specifically in his reasons he regarded them as irrelevant or had failed to consider them. In either event, if the matters raised were relevant and required to be considered as an adverse impact the failure to do so would arguably give rise to a ground for review.”

62. The approach of the Full Court in *Mees v Kemp* in this regard is consistent with the decision in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323. That case concerned an appeal from a decision of the Refugee Review Tribunal under the *Migration Act 1958*. Gleeson CJ stated at 330-331 [5]:

“When the Tribunal prepares a written statement of its reasons for decision in a given case, that statement will have been prepared by the Tribunal, and will be understood by a reader, including a judge reviewing the Tribunal’s decision, in the light of the statutory requirements contained in s 430. The Tribunal is required, in setting out its reasons for decision, to set out ‘the findings on any material questions of fact’. If it does not set out a finding on some question of fact, that will indicate that it made no finding on that matter; and that, in turn, may indicate that the Tribunal did not consider the matter to be material. It was not suggested, in either of the present cases, that the Tribunal made some finding of fact which it failed to set out. The substance of the complaint was that the Tribunal failed to make a finding upon a particular question.”

63. Gaudron J stated in *Yusuf* at 338 [37]:

“As already indicated, if in its written statement setting out its decision, the Tribunal fails to refer to or fails to make findings with respect to a relevant matter, it is to be assumed, consistently with the clear directive in s 430 of the Act, that the Tribunal has not regarded that question as material. And depending on the matter in issue and the

context in which it arises, that may or may not disclose reviewable error. For example, the failure to make a finding on a particular matter raised by the applicant may, in some cases, reveal an error of law for the purposes of s 476(1)(e) of the Act.”

64. Similar reasoning was adopted in *Yusuf* by McHugh, Gummow and Hayne JJ at 346 [69], and Callinan J at 392 [216].
65. The delegate’s statements of reasons in relation to the Isaac Plains Coal Project and the Sonoma Coal Project state that:
- (a) “the evidence or other material upon which my findings were based [included] ... advice from the Department relating to the potential impacts of the proposed action on matters protected under the EPBC Act”;⁵⁷ and
 - (b) “I took account of ... the public comments received on the referral from the Proserpine/Whitsunday Branch of the Wildlife Preservation Society of Queensland”.⁵⁸
66. Both the Departmental minutes and the submissions of the applicant refer to the potential greenhouse impacts from the mines, but the reasoning set out above in *Yusuf* and *Mees v Kemp* suggests that these statements are consistent with the view that the delegate failed to consider them as relevant to the decisions. The failure of the delegate to mention the impacts of greenhouse gases from the mining, transport and use of the coal (even though they were properly placed before the decision maker by way of the applicant’s submission)⁵⁹ in his statements of reasons indicates the delegate regarded those impacts as irrelevant (and, thereby, failed to bestow attentive thought upon them) or had failed to consider them at all.
67. On the basis of the principles in *Yusuf* and *Mees v Kemp*, the applicant submits that the Court should find that the delegate’s reasons indicate that he regarded the impacts of greenhouse gas emissions that are likely to result to matters protected by Part 3 of the Act from the mining, transport or use of the coal mined in the Isaac Plains Coal Project or the Sonoma Coal Project as irrelevant or had failed to consider them at all.

The greenhouse impacts are adverse impacts of the mines

68. The scope of relevant impacts of an action was the subject of the Nathan Dam Case.

⁵⁷ Paragraph 10 of the statement of reasons for the Isaac Plains Coal Project (p 209 of the affidavit of Mark Flanigan, 5 October 2005) and paragraph 11 of the statement of reasons for the Sonoma Coal project (p 359-360 of the affidavit of Mark Flanigan, 5 October 2005).

⁵⁸ Paragraph 18 of the statement of reasons for the Isaac Plains Coal Project (p 210 of the affidavit of Mark Flanigan, 5 October 2005) and paragraph 21 of the statement of reasons for the Sonoma Coal project (p 361 of the affidavit of Mark Flanigan, 5 October 2005).

⁵⁹ Thereby satisfying part of the criteria of relevance spelled out by Deane J in *Sean Investments v Mackellar* (1981) 38 ALR 363, at 375: “In a case such as the present where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide.” (emphasis added)

69. In the first instance decision in the Nathan Dam Case, Kiefel J focused on the wide scope of the Minister's decision under s 75 itself in the context of the objects of the Act and held that:⁶⁰
- (a) When assessing the impacts of a proposal under the s 75 of the EPBC Act, the inquiry of the Minister is a wide one and might extend properly to the whole, cumulated and continuing effect of the activity, including the impacts of activities of third parties.
 - (b) When assessing the impacts of a proposal under the s 75 of the EPBC Act, the Minister is first to consider "all adverse impacts" the action is likely to have. The widest possible consideration is to be given in the first place, limited only by considerations of the likelihood of it happening. By that means the Minister should exclude from further consideration those possible impacts which lie in the realms of speculation.
70. In setting down those criteria, Kiefel J can be seen to be applying to the specific context of the EPBC Act, the general guidance provided as to the appropriate approach to determining what are relevant considerations as set out in the classic passage from the reasons of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, at 39 as follows:

"What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider - are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard ... By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act."

71. In the appeal in the Nathan Dam Case, the Full Court stated that, for the purposes of s 75 of the EPBC Act:⁶¹

"'Impact' in the relevant sense means the influence or effect of an action: *Oxford English Dictionary*, 2nd ed, vol VII, 694-695. ... 'impact' in its ordinary meaning can readily include the 'indirect' consequences of an action and may include the results of acts done by persons other than the principal actor. ... Accordingly, we take s 75(2) to require the Minister to consider each way in which a proposed action will, or is likely to, adversely influence or effect the world heritage values of a declared World Heritage property or listed migratory species. As a matter of ordinary usage that influence or effect may be direct or indirect. 'Impact' in this sense is not confined to direct physical

⁶⁰ *Queensland Conservation Council Inc v Minister for Environment & Heritage* [2003] FCA 1463 at [38] and [39].

⁶¹ *Minister for the Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24 at [53] and [57].

effects of the action on the matter protected by the relevant provision of Pt 3 of Ch 2 of the EPBC Act. It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter. Provided that the concept is understood and applied correctly in this way, it is a question of fact for the Environment Minister whether a particular adverse effect is an ‘impact’ of a proposed action.

... all adverse impacts’ includes each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not.”

72. Applying these principles in *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029, the Victorian Civil and Administrative Tribunal found that a planning scheme amendment to allow an expansion of a coal mine was required to consider the indirect impacts of greenhouse gas emissions resulting from the burning of the coal at a power station.
73. Applying the principles in *Nathan Dam to the Isaac Plains Coal Project and the Sonoma Coal Project*:
- (a) the impacts on matters protected by Part 3 of the Act of greenhouse gas emissions resulting from the mining, transport and use of the coal are indirect impacts of the mines;
 - (b) the impacts of the mining, transport and use of the coal on global warming are sufficiently close to the mining projects to allow it to be said, without straining the language of s 75 of the Act, that they are, or would be, the consequences of the actions on matters protected by Part 3 of the Act; and
 - (c) the impacts of greenhouse gas emissions and global warming resulting from the mining, transport and use of the coal from the mines can reasonably be imputed as within the contemplation of the BCCM and QCoal, whether those consequences are within the control of the BCCM and QCoal or not.⁶²
74. Consequently, the applicant submits that the Court should find that the greenhouse gas emissions from the mining, transport and use of the coal (whether inside Australia or overseas) from the Isaac Plains Coal Project and the Sonoma Coal Project are adverse impacts of the mines that must be considered under s 75(2) of the EPBC Act.
75. In the light of the established principles, the impacts upon matters protected by Part 3 of the EPBC Act of greenhouse gas emissions that are likely to result from the mining, transport and use of the coal from the Isaac Plains Coal Project or the Sonoma Coal Project satisfy both the legal and practical requirements of relevance. That is, they were matters that were relevant and the delegate was required to consider them.
76. The evidence from the statements of reasons that these matters were not given such degree of attention as to satisfy the requirement of consideration suggests that the

⁶² It is submitted that, within the contemplation is probably a requirement particularly associated with the facts in *Nathan Dam*. There, the Minister had regarded himself as unable, in law, to consider the impacts of cotton growing on the Great Barrier Reef despite the fact that providing water to grow cotton was the prime purpose of building the Dam. It is submitted that impacts may be impacts even though a proponent has failed to have them in contemplation.

ground of failure to take into account a relevant consideration has been made out. In circumstances where no satisfactory basis has been shown for the failure to consider, it may be inferred that the failure was caused by an error of law on the part of the delegate in that he did not understand that those impacts were indeed required to be considered.

The decisions may have been materially affected by the errors

77. The mining, transport and use of the coal from the Isaac Plains Coal Project and the Sonoma Coal Projects are expected to produce 18 million tonnes and 30 million tonnes of coal respectively.⁶³ These are objectively large amounts of coal from which it is logically inferred that there will be large amounts of greenhouse gases contributing to global warming emitted by the mining, transport and use of this coal (although there is no evidence of the actual quantity of greenhouse emissions that are likely to result from the mining, transport and use of the coal).
78. The failure to consider the impacts of the mining, transport and use of the coal contributing to global warming is not “so insignificant that the failure to take it into account could not have materially affected the decision”: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40. Given the objectively large amounts of coal involved, the mining, transport and use of the coal from the mines may significantly or materially contribute to global warming and resultant impacts on the matters protected by Part 3 of the EPBC Act and, therefore, the failure to consider the greenhouse gas emissions could have materially affected the decision.
79. These submissions will now turn to consider the facts if weight is given to the alleged process of reasoning set out in the delegate’s affidavit to the extent that it is contradicted by the delegate’s statements of reasons. As will be seen, even accepting the alleged reasoning process in the affidavit, the delegate has erred in his analysis of the relevant law and evidence.

PART 2 – GROUNDS 3-12 ON THE ASSUMPTION THAT THE AFFIDAVIT OF THE DELEGATE IS GIVEN WEIGHT

THE RELEVANT FACTS⁶⁴

80. The delegate’s affidavit, filed on 5 October 2005, purports to provide background information; findings on material questions of fact not found in the statement of reasons; closely argued reasoning and further reasons for the decision in terms of the greenhouse impacts of the mines. As noted previously, it is incredible to the point of being unbelievable, if the delegate in fact undertook such a detailed analysis as he now claims, that none of this was contained in the statement of reasons. On its face and in the context of these proceedings, the delegate’s affidavit reads like a document prepared in response to the litigation and not as an account of the true reasoning process that in fact occurred.

⁶³ Some sense of the relative scale of this amount of coal may be gained from the statement by the First Respondent that, “In 2003, Australia’s net greenhouse gas emissions were estimated to be 550 million tonnes of carbon dioxide equivalent” (affidavit of Kirsty Ruddock, 18 August 2005, p 8).

⁶⁴ These facts are in addition to the facts summarised in Part 1 of these submissions.

81. The delegate says he has knowledge of greenhouse issues, and emphasises the many sources of emissions of greenhouse gases contributing to climate change.⁶⁵ For example, the delegate states:⁶⁶

“17. I considered how the Isaac Plains mine ... fits within the global context. In this regard, I considered the extent to which greenhouse gases produced from the mining, shipping and use of the Isaac Plains coal would be likely to add to the volume of greenhouse gases in the atmosphere and thereby increase the concentration of those gases in the atmosphere. I took that matter into account relative to the amount and concentration of greenhouse gases currently in the atmosphere and also relative to the total annual global contributions of greenhouse gases from all global sources that add to the volume and increase the concentration of greenhouse gases in the atmosphere. ...

19. In this context I formed the view that the Isaac Plains [and Sonoma] mine was likely to represent only a relatively small contribution to total greenhouse gas load.”

82. Curiously, the delegate says he considered the greenhouse emissions likely to arise from the “mining, shipping and use of the coal”⁶⁷ from the mines, despite the fact that the emissions of greenhouse emissions from transportation of the coal were not raised in the applicant’s submission and only became an issue in dispute after the proceedings in the Court commenced.

83. The delegate comments that the applicant’s submissions to the first respondent concerning the mines were:⁶⁸

“pitched at a general level of discussion rather than a rigorous examination of a series of demonstrated causal links from greenhouse gas emissions likely to be associated with this project to specific impacts on specific matters of national environmental significance.”

84. The delegate makes no reference to the climate change being listed as a key threatening process under the EPBC Act,⁶⁹ but, instead, stated that impacts of climate change were a mere possibility as follows:⁷⁰

“15. ... I formed the view that the ‘Greenhouse Effect’ is a genuine concern and in terms of global atmospheric conditions and weather pattern is having impacts, including possible impacts on matters protected under Part 3 of the EPBC Act. ...

22. I formed the view that ... the climate system is complex and the processes linking specific additional greenhouse gas emissions to potential impacts on matters protected by Part 3 of the EPBC Act are uncertain and conjectural. I concluded that a possible link between the additional greenhouse gases arising from the mining, shipping and use of the coal from the proposed Isaac Plains [and Sonoma] mine and a measurable or identifiable increase in global atmospheric temperature was speculative only and was unlikely to be demonstrable.”

85. The delegate stated he was unable to attribute a causal link between the greenhouse gas emissions from the mines and any impact, or any significant impact, on the matters protected by Part 3 of the EPBC Act:⁷¹

⁶⁵ Affidavit of Mark Flanigan (5 October 2005), paragraphs 11, 17, 18, 19, 29 and 41.

⁶⁶ Ibid, paragraphs 17 and 19.

⁶⁷ Ibid, paragraphs 17, 22, 26, 29(a), 29(d).

⁶⁸ Ibid, para 13.

⁶⁹ “Loss of climatic habitat caused by anthropogenic emissions of greenhouse gases”, was listed under s 184 of the EPBC Act on 4 April 2001: *Commonwealth of Australia Gazette* (No GN 13, 4 April 2001).

⁷⁰ Affidavit of Mark Flanigan (5 October 2005), para 15. Similarly, at paragraphs 21 and 43 of his reasons the delegate considered the “possible” impacts of greenhouse gas induced climate change.

“23. I also considered that, even if such a causal link was realistically feasible, it was also necessary to consider whether that increment to the global warming process would be likely to translate into any identifiable changes in sea level, water temperature or local (ie North Queensland) climate. On the basis of my knowledge and understanding of climate change as outlined above, I concluded that any such translations associated with this particular project were matters of conjecture and speculation only. Therefore, I was not satisfied they were likely to occur.

24. I considered the cumulative contribution of greenhouse gases from the Isaac Plains [and Sonoma] mine over its projected life and concluded that the accumulated additional load of such gases was also unlikely to result in a measurable increase in global atmospheric temperature and therefore was unlikely to result in a significant impact on matters of national environmental significance.

26. The key thing about considering whether mining, shipping and use of the Isaac Plains [and Sonoma] coal is likely to have an impact on matters protected by Part 3 of the EPBC Act is the long chain of possible causes and effects linking the emission of greenhouse gases to any impacts on matters protected, and whether the small contribution to this possible process that would be attributable to the Isaac Plains [and Sonoma] project is realistically likely to make any real difference at each or any point in the chain or in the chain as a whole.

29. ... I concluded that

- (a) The mining, shipping and use of coal from the proposed coal mine at Isaac Plains [and Sonoma] would be likely to make an additional contribution of greenhouse gases to the atmosphere and thus would be likely to increase the concentration of greenhouse gases in the atmosphere.
- (b) That additional contribution would be small relative to both
 - (i) the amount and concentration of greenhouse gases currently in the atmosphere; and
 - (ii) the additional amount of greenhouse gases that would make their way into the atmosphere from other sources during the period of operation of the proposed Isaac Plains coal mine and use of the coal from that mine and any resulting increase in the concentration of greenhouse gases in the atmosphere during and after that period.
- (c) In relation to each of the matters of national environmental significance protected by Part 3 of the EPBC Act, there may in theory be a remote possibility that that additional contribution and increased concentration of greenhouse gases in the atmosphere associated with this project could set in train climate change processes that may have impacts on them.
- (d) However, those possibilities are speculative only and there is no real possibility that those theoretically possible impacts will arise from the mining, shipping and use of coal from the proposed Isaac Plains [and Sonoma] coal mine.
- (e) Furthermore, if the additional contribution and increased concentration of greenhouse gases in the atmosphere arising from the mining, shipping and use of coal from the proposed Isaac Plains [and Sonoma] coal mine were to have an adverse impact on a matter of national environmental significance, any such impact is likely to be extremely small and is therefore unlikely to be significant.”

86. With one minor and immaterial exception,⁷² the referrals did not provide information on the greenhouse emissions likely to result from the mining, transport and use of the coal from the mines, nor did the referrals specify the destinations and markets for the coal from which the likely emissions from transport and use might have been calculated. In short, the referrals lacked sufficient information from

⁷¹ Ibid, paras 23, 24, 26 and 29.

⁷² The statement regarding the greenhouse gas emissions from the mining of coal from the Isaac Plains Coal Project contained on p 18 of its Environmental Management Overview Strategy, dated March 2005.

which the likely greenhouse gas emissions from the mining, transport or use of the coal could be estimated.

87. The delegate overlooked this failure to provide relevant information and, surprisingly, purported to rely, as part of his reasoning, upon the uncertainty of the likely greenhouse gas emissions from the mining, transport and use of the coal, notably, in the following statement:⁷³

“27. ... in my view, the additional uncertainty as to how the coal would be used at its export destinations: what processes, which power stations or other furnaces, what emissions technologies would be employed, all of which is uncertain and speculative.”

88. The next matter to consider is whether this additional reasoning process, if it in fact occurred, was itself in error.

THE RELEVANT LAW

Error of law in understanding the causal link

Causation as a matter of law

89. The delegate’s reasoning in discounting a causal link and lack of significance of the greenhouse impacts attributable to the mines displays a fundamental misunderstanding of the principles of causation in a legal context. The delegate, it is submitted, abandoned a commonsense approach to future impacts for an arbitrary cut-off point of what he considered “measurable”, specifically “identifiable”, and “demonstrable”, and other similar concepts.⁷⁴
90. The task to be taken by the delegate, pursuant to s 75(2) of the EPBC Act, is to consider a series of notional causal relationships between future events.⁷⁵ One end of each causal relationship is the proposed action. Each causal relationship is, otherwise, open ended and involves many events some of which may be almost certain to occur and others which, at the highest, may be only described as “likely”; some of which may be short term, some long term; some large, some small; some very direct; some more indirect and so on. Those events (impacts), however, are restricted in one sense in that they must involve detrimental (adverse) impact on a matter of protected by Part 3 of the EPBC Act. For simplicity here, this may be limited to impacts on the world heritage values of the Great Barrier Reef World Heritage Area and Wet Tropics World Heritage Area.⁷⁶ The controlling provisions, therefore, may be treated as being represented by s 12 of the EPBC Act.

⁷³ Affidavit of Mark Flanigan (5 October 2005), paragraph 27.

⁷⁴ The delegate lost himself in a philosophic and scientific examination of cause and effect, illustrating what Dixon CJ, Fullagar and Kitto JJ said in *Fitzgerald v Penn* (1954) 91 CLR 268 at 277: “If one is to enter on a philosophic examination of ‘cause and effect’, there is no telling where one ought to stop.”

⁷⁵ The issue of causation must be addressed and applied taking into account the legal context in which it arises. See *Barnes v Hay* (1988) 12 NSWLR 337, 353 per Mahoney JA; *Environment Agency v Empress Car Co (Arbortillery) Ltd* [1999] 2 AC 22, 29-32 per Lord Hoffmann; and *Henville v Walker* (2001) 206 CLR 459, 489-491 [96]-[99] per McHugh J; and *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 215 ALR 385; [2005] HCA 26 at [41]-[42] and at [96]-[99] per McHugh J and Gummow, Hayne and Heydon JJ.

⁷⁶ The process can be carried out, in the same way, for each of the matters of national environmental significance protected by Part 3. In fact, to reach his conclusion, the delegate may be deemed to reached the same conclusion in respect of all potentially relevant species of listed threatened species, migratory species, etc. This is in a context where the vulnerability of particular species to be adversely impacted

91. The decisions of Kiefel J and the Full Court in the Nathan Dam Case, discussed previously, inherently, reflect the well established principles of causation in the law including that causation is a matter of commonsense, appreciating that the task is to attribute legal responsibility, and also the importance of the statutory context of the particular task. These principles can be seen in the following passages extracted from cases from a number of different areas of the law:

“It has often been said that the legal concept of causation differs from philosophical and scientific notions of causation. That is because ‘questions of cause and consequence are not the same for law as for philosophy and science’ ... In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence.”⁷⁷

“The common law tradition is that what was the cause of a particular occurrence is a question of fact which ‘must be determined by applying common sense to the facts of each particular case.’”⁷⁸

“The issue of causation was left to the jury to decide as one of fact. In this respect ... it is ‘enough if juries [are] told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter’”⁷⁹

“The courts have repeatedly said that the notion of ‘causing’ is one of common sense. ... [However] The first point to emphasise is that common sense answers to questions of causation will differ according to the purpose for which the question is asked. ... one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule. ... Before answering questions about causation, it is therefore first necessary to identify the scope of the relevant rule. This is not a question of common sense fact; it is a question of law. ... [It] is a question of statutory construction, having regard to the policy of the Act.”⁸⁰ (emphasis added)

92. The importance of the context and purpose for which the causal relationship is being considered is developed at some length in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 215 ALR 385; [2005] HCA 26. For example, McHugh J stated at [41]-[42]:

“The language of the [*Motor Vehicle Accidents Act* 1995 (NSW)] reflects the concept of causation at common law. This suggests that the inquiry into the question of causation under the Act does not differ materially from the ‘common sense’ test for causation at common law. However, because the task before the court is one of statutory construction, the question of causation must be determined in light of the subject, scope and objects of the Act. The common law concept of causation is concerned with determining whether some breach of a legal norm was so significant that, as a matter of common sense, it should be regarded as a cause of damage. In the present case, however, common law conceptions of causation must be applied having

upon by climate change is infinitely varied with some species hanging on to very restricted ranges (that are particularly cold, particularly wet, particularly protected from storms, etc) and others which currently exist (survive) in more extended ranges and will be adversely affected later and to lesser degrees for a given amount of climate change.

⁷⁷ *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, 509 per Mason CJ.

⁷⁸ *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, 515 per Mason CJ citing Lord Reid in *Stapley v Gypsum Mines* [1953] AC 663, 681.

⁷⁹ *Royall v R* (1991) 172 CLR 378 per Mason CJ at 387. See also Brennan J at 398; Deane and Dawson JJ at 411; Toohey and Gaudron JJ at 423; and McHugh J at 441.

⁸⁰ *Environment Agency v Empress Car Co (Arbortillery) Ltd* [1999] 2 AC 22 at 29B, 29F, 31E, 31H and 32B per Lord Hoffmann. Cf. *Henville v Walker* (2001) 206 CLR 459, 489-491 [96]-[99] per McHugh J.

regard to the terms or objects of the Act. Those terms and objects of the Act operate to modify the common law's practical or common sense concept of causation. The inquiry into the question of causality is therefore not based simply on notions of 'common sense'.

... the purpose of the inquiry must be ascertained before the application of any notion of "common sense". The purpose of the causal inquiry is critical because it conditions the result. Once the purpose of the inquiry is ascertained, the question of causality must be determined in light of the subject, scope and objects of the Act.

93. Gummow, Hayne and Heydon JJ stated in *Allianz* at [96]-[99] that:

"the question of causality was not at large or to be answered by 'common sense' alone; rather, the starting point is to identify the purpose to which the question is directed. ... notions of 'cause' as involved in a particular statutory regime are to be understood by reference to the statutory subject, scope and purpose."

94. It is similarly well established that an action need not be the sole, direct or immediate cause for it to be legally causative:

"The law does not accept John Stuart Mill's definition of cause as the sum of the conditions which are jointly sufficient to produce it. Thus, at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage."⁸¹

"The basic proposition relating to causation in homicide is that an accused's conduct, whether by act or omission, must contribute significantly to the death of the victim. It need not be the sole, direct or immediate cause of the death. However, when death is not caused directly by the conduct of the accused but by something done by the victim or by a third person in response to the conduct of the accused, there is a question whether the chain of causation has been broken."⁸² (internal citation omitted)

"If the defendant's breach has 'materially contributed' to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage."⁸³ (internal citation omitted).

95. The causal relationship between the two mines in this case and the greenhouse impacts on matter protected by Part 3 of the EPBC Act may be compared with a complex commercial relationship. Attributing liability for damage in a complex commercial relationship can involve almost infinitely complex factual matters, such as fluctuations in global markets over many years, but the task of attributing a causal relationship remains one of commonsense.⁸⁴ Conceptually, at least, causation in the present case may be simpler than many such commercial matters.

The delegate's reasoning in discounting causation and lack of a significant impact

96. In the context of the affidavit of the delegate and the material on the record sourced from the first respondent (as set out above), the following matters may be treated as correct⁸⁵ and as being the relevant background to the reasoning processes of the delegate:

⁸¹ *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, 509 per Mason CJ (citations omitted).

⁸² *Royall v R* (1991) 172 CLR 378, 399 per Brennan J. See also Mason CJ at 388; Deane and Dawson JJ at 411; Toohey and Gaudron JJ at 423; and McHugh J at 441.

⁸³ *Henville v Walker* (2001) 206 CLR 459, 493 [106] per McHugh J.

⁸⁴ See, for example, *Henville v Walker* (2001) 206 CLR 459.

⁸⁵ Including the proposition that they could be established for the purpose of a civil penalty proceeding pursuant to s 12.

- (a) Anthropogenic production of greenhouse gases (especially, carbon dioxide) is producing global warming / climate change, including, across the Australian continent and including in those areas where the Great Barrier Reef and the Wet Tropics World Heritage properties are located.
- (b) The amount of greenhouse gases already in the atmosphere but also the strong growth of emissions of those gases are what make further climate change, and its associated ecological impacts, inevitable.
- (c) Climate change is listed as a key threatening process under the EPBC Act and is a serious ecological problem, that is, it has, will have and is likely to⁸⁶ have significant adverse impacts, *inter alia*, on the world heritage values of the Great Barrier Reef and the Wet Tropics World Heritage properties.
- (d) Australia contributes approximately 550 million tonnes of carbon dioxide equivalent per year to the world's carbon dioxide emissions.
- (e) The production and use of fossil fuels, including coal,⁸⁷ represent one of the seven major human-induced activities described in the National Greenhouse Gas Inventory as activities inducing climate change.
- (f) Each of the two proposals is for the opening of a new coal mine and represents a new contributor to the emission of greenhouse gases due to the mining, transport and use of the coal.
- (g) The relative size of the mines,⁸⁸ in terms of scale of production, may be described as typical of Australian coal mines, although the likely amount of greenhouse gas emissions from the mining, transport and use of the coal from the mines has not actually been quantified.
- (h) The opening of the coal mines will add to the amount of greenhouse gases in the atmosphere and will add to the annual emission of greenhouse gases by Australian energy production, at least for the life of the mines. The opening of the mines will add to the amount of greenhouse gases inducing climate change and will add to the processes producing adverse ecological impacts upon the two World Heritage properties.
- (i) The likely greenhouse gas emissions from the mining, transport and use of the coal from the mines are very small in the context of all of the greenhouse gases added to the atmosphere since the start of the industrial revolution and in the context of greenhouse gases emitted in a year or during the life of the mines.

⁸⁶ The phrase "is likely to", of its very nature eschews demonstrability of the causal relationship between proposal and "adverse impact". Something which "is likely to happen" may not happen. It requires a certain minimum probability of happening which will be derived or ascertained for the purpose of applying the section from a process of reasoning and inference. The delegate's purported demand for quantifiability and demonstrability ignores the presence of "is likely to" in s.12 EPBC Act.

⁸⁷ The relevant greenhouse gas emissions from the mines will include emissions from the mining, transport and use of the coal (whether by the domestic or export markets). The Nathan Dam Case allows the downstream impacts of use by a consumer of product to be treated as an impact of the production of that product or the operation of the mine which produces it.

⁸⁸ 18 millions tonnes of coal from the Isaac Plains Coal Project and 30 million tonnes of coal from the Sonoma Coal Project.

- (j) The addition of greenhouse gas emissions from the mines to the climate change processes producing adverse ecological changes in the World Heritage properties (and other matters protected by Part 3 of the EPBC Act) are unable to be measured, demonstrated or quantified.
- (k) Section 75 EPBC Act is a provision which determines whether actions should be subject to a form of environmental impact assessment. The assessment process (under Part 8 of the EPBC Act) leads to an approvals process (under Part 9 of the Act) which can prevent the action being taken (the mine going into production) but can also result in the attachment of conditions intended to ameliorate the impact of the mines' contribution to the processes producing adverse impacts ecological changes in the World Heritage properties. Without the environmental impact assessment process being triggered, no further Commonwealth involvement will occur requiring conditions of that kind.

97. This is, essentially, the context in which and the factual basis on which the delegate has reasoned his way to a conclusion that, considering all adverse impacts and ignoring any beneficial impacts on the world heritage values of the Great Barrier Reef and Wet Tropics World Heritage properties, the respective coal mines will not have and is not likely to have⁸⁹, even applying the civil onus of proof,⁹⁰ a significant impact⁹¹ on those world heritage values. He has reached that result because the contribution of each action is small compared to, and not measurable or identifiable, separately from the collective contribution of all other contributors to the same climate change (since the beginning of the industrial revolution). In doing so, the delegate abandoned a commonsense approach to future impacts for an arbitrary cut-off points of what he considered measurable, specifically identifiable, and demonstrable and, it would seem, took no account of the legal purpose for which the causal relationships were to be considered.

98. Not only is the reasoning wrong in terms of not adopting a commonsense approach to causation, it also does not accord with the legal principle that the question of causation must be considered in the relevant legal context (including, here, the objects of the EPBC Act) for the purpose of attributing legal responsibility.⁹²

99. The delegate's approach has the effect that no conceivable action of a single person (or commercial or government entity) can be attributed legal responsibility, and thereby regulated, under the EPBC Act for greenhouse gas emissions contributing to global warming. His reasoning, therefore, excludes from environmental impact assessment the contribution to greenhouse impacts each and every proposed action

⁸⁹ The applicant submits that, for the purposes of s 12 and the other controlling provisions of Part 3 of the EPBC Act, "likely to have" means "a real chance or possibility regardless of whether or not it is more or less than 50%". See the dicta of Branson J in *Booth v Bosworth* (2001) 114 FCR 39 at 64, [97]-[98] and the analysis in McGrath C, "Key concepts of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)" (2005) 22(1) EPLJ 20 at 31-32 and references cited therein.

⁹⁰ Section 12 of the EPBC Act provides for a civil penalty.

⁹¹ A "significant impact" means an impact that is important, notable or of consequence having regard to its context or intensity": *Booth v Bosworth* (2001) 114 FCR 39 at 65, [99]-[100]. In *Minister for Environment & Heritage v Greentree (No 2)* (2004) 138 FCR 198 at 244, [191]-[201], Sackville J followed the definition of significant impact used by Branson J but noted that, "in the end, however, it is a question of fact as to whether any particular action or actions has had or will have a significant impact." In *Greentree v Minister for the Environment and Heritage* [2005] FCAFC 128 at [45]-[50], the Full Court (Kiefel J with whom Weinberg and Edmonds JJ agreed) implicitly confirmed this approach and held that a significant impact can occur to a site that is already degraded and is not natural or pristine.

⁹² See the previous discussion of these issues.

that might possibly be engaged in. That is, no matter how big or how substantial, and no matter how reckless an action is in not taking advantage of available technologies to reduce the associated production of greenhouse gases, the delegate's reasoning process will exclude the action from assessment under the EPBC Act. It follows that the same result ensues no matter how much the project could be made to reduce its contribution by the imposition of conditions as part of the approvals process.

100. The reason why no conceivable action of a single person (for example, a proposal to clear and burn an area in Australia equivalent to the Amazon rainforest)⁹³ would suffer the same fate (as these coal mine proposals) at the hands of the delegate's reasoning process is that it is impossible to establish a causal link applying that reasoning. That is, for any conceivable action, it is equally difficult to quantify or measure or specifically identify a particular contribution to a particular ecological result (separate from all other greenhouse gases since the beginning of the industrial revolution). This applies to actions many orders of magnitude greater than these proposed mines. That does not mean, however, that such actions do not have a significant impact on matters protected by Part 3 of the EPBC Act, such as the Great Barrier Reef and Wet Tropics World Heritage properties – merely that the causal link cannot be established using the delegate's reasoning process.⁹⁴
101. In summary, there are a number of matters, factual and statutory, to have regard to in approaching the issue of significance of the impact of an action through contribution to greenhouse emissions.⁹⁵
- (a) The objects of the EPBC Act.
 - (b) The listing of climate change as a key threatening process under the EPBC Act.
 - (c) The seriousness of the climate change problem including the potentially devastating impact of climate change on all matters protected by Part 3 of the EPBC Act.⁹⁶
 - (d) The strong reasons which exist for taking comprehensive, effective global action to reduce carbon and other greenhouse emissions.⁹⁷
 - (e) The abundant nature of Australia's reserves of fossil fuels and the increasing demand for energy use and the concomitant imperative to develop technological ways of reducing emissions from the use of those fuels.⁹⁸

⁹³ An amount of greenhouse gases that, to be significant according to the delegate's reasoning, must loom as large (and be quantifiable etc) compared to all the greenhouse gases that have accumulated since the start of the industrial revolution.

⁹⁴ Again, the variations in vulnerability make it extremely likely that variations in global warming, even very small, will result in more species being adversely affected and some species suffering more greatly.

⁹⁵ Noting again, Lord Hoffmann's important speech in *Environment Agency v Empress Car Co (Arbortillery) Ltd* [1999] 2 AC 22 at 29-32, "one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule. ... [Causation] is a question of statutory construction, having regard to the policy of the Act." Cf. *Henville v Walker* (2001) 206 CLR 459, 489-491 [96]-[99] per McHugh J.

⁹⁶ See the public statements of the first respondent set out in paragraph 41 of these submissions.

⁹⁷ *Ibid.*

102. As a matter of law and of commonsense, the existence of multiple causes does not prevent any of those multiple causes from being held to have a causal relationship with the phenomenon.⁹⁹ The impacts of the contributions to greenhouse gases and climate change on matters of national significance, including the Great Barrier Reef and the Wet Tropics, of the two projects are real although each impact is unable to be isolated from those of the host of other contributors.¹⁰⁰ The inability to isolate does not result in a finding of “insignificance” and the delegate was in error to draw that conclusion.
103. Rather, in the context of the objects of the EPBC Act and the environmental impact assessment purpose of both of ss 12 and 75, the question of significant impact requires a different process of comparison. The question to be addressed is whether, as a matter of commonsense and appreciating that the task is to attribute legal responsibility, the contribution of this proposal to those impacts which climate change is likely to bring to the matters protected by Part 3 of the EPBC Act, in the context of other Australia contributors to those impacts; in the context of finding an effective global solution to global warming; in the context of finding technological ways to reduce greenhouse emissions from energy use; is significant. In that context, the delegate may or may not come to a different answer. He, certainly, must address a different question. In failing to do so, he has made an error of law.
104. Examples of the application of the right test can be given. One action, the subject of a proposal may be the driving of a vehicle from one’s home to the local store. That also will contribute to greenhouse gas emissions and, ultimately, to impacts on matters of national environmental significance. The contribution, however, in the context that has been discussed, is clearly not significant and does not require referral to an environmental impact assessment process. On the other hand, a proposal to clear and burn an area of forest the size of Victoria would have significant impacts and would require an affirmative answer to the s 75(1) of the EPBC Act question. The delegate’s purported reasoning would, however, and it is submitted, wrongly, exclude both from requiring assessment under the EPBC Act for greenhouse emissions.

⁹⁸ Ibid.

⁹⁹ As set out previously, it is well established that, as a matter of law, there may be more than one cause of an impact or result and it is not necessary that a cause be the sole, direct or immediate cause to attribute legal responsibility. Where two or more causes combine to bring about the impact or result in question, an act is legally causative if it substantially, significantly or materially contributes to the impact or result. In the present case, these principles will have particular application in the light of the objects and the EIA function of the relevant sections of the EPBC Act.

¹⁰⁰ Again, the point needs to be made that impacts on particular species (which are listed as threatened or migratory or go to make up World Heritage values) will ensue at a variable rate in response to given amounts of climate change. Detailed after the fact research would be needed to document these changes and the variations. That does not mean that they are not significant. To argue that changes are not significant unless they are documented (after they have occurred) ignores the common sense approach to causation and smacks of shutting one’s eyes to the harshness of reality. Therefore, once one accepts that it is likely that the greenhouse gas contributions of the proposals (if approved) will make a difference, however small, to the speed of onset of or level of climate change, one can draw the logical conclusion that the same quantum of impact, albeit also small in quantum, will occur to the ecology that the EPBC Act seeks, as part of its objects, to protect. Such change is neither, necessarily, speculative nor insignificant.

Failure to consider climate change as a key threatening process

105. The fact that a process is recognised as a key threatening process under the list established under s 183 of the Act must, logically and consistently with the purpose, scope and structure of the Act¹⁰¹, be a relevant consideration for decisions under s 75 concerning actions that contribute to that process.
106. As noted previously, “loss of climatic habitat caused by anthropogenic emissions of greenhouse gases” was listed as a key threatening process under the EPBC Act on 4 April 2001.¹⁰² For the purposes of the EPBC Act, and the decision under s 75, this makes the seriousness of the threat posed by climate change to matters protected by Part 3 of the EPBC Act beyond doubt.
107. The delegate, however, purports to regard climate change as only “a genuine concern” that is having “possible impacts on matters protected under Part 3 of the EPBC Act.”¹⁰³
108. The failure of the delegate to refer to the fact that climate change is listed as a key threatening process¹⁰⁴ indicates that he did not consider the matter to be material.¹⁰⁵
109. The delegate’s failure to consider the fact that climate change is recognised as a key threatening process is a material error because it means that the delegate misunderstood, in a fundamental way, the legal and factual context of the decisions under s 75.

Uncertainty is an irrelevant consideration

110. In his affidavit, the delegate relies on his ignorance of the proposed method of using the coal (which he regards as “uncertain and speculative”) to assist his finding that the greenhouse impacts are not likely to be significant.¹⁰⁶ Such ignorance should not be used by a decision-maker in circumstances where:
- (a) there is a duty on the proponent to supply relevant information;¹⁰⁷
 - (b) there is a discretion to be exercised judicially by the first respondent to consider requesting further information and a power so to request it under s 76 of the EPBC Act;¹⁰⁸

¹⁰¹ See the classic statement of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, at 39, set out previously in these submissions.

¹⁰² Notified in the *Commonwealth of Australia Gazette* (No. GN 13, 4 April 2001), p 906.

¹⁰³ Paragraph 15 of the affidavit of Mark Flanigan (5 October 2005).

¹⁰⁴ Which was raised by the applicant in its public submissions regarding both mines.

¹⁰⁵ *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; 346 [69] per McHugh, Gummow and Hayne JJ; and 392 [216] per Callinan J; *Mees v Kemp* [2005] FCAFC 5 at [58].

¹⁰⁶ Paragraph 27 of the affidavit of Mark Flanigan (5 October 2005).

¹⁰⁷ Section 489 of the EPBC Act makes it an offence to recklessly or negligently supply false or misleading information to obtain approval under the Act. Regulation 4.03 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (“**EPBC Regulations**”) specifies the information that must be included in a referral by reference to Schedule 2 of the Regulations. Item 5.02 of Schedule 2 of the EPBC Regulations states that the nature and extent of likely impacts on matters of national environmental significance must be included in the referral and item 6.01 requires any uncertainties in the information given to be noted.

- (c) the decision concerns the gateway to an environmental impact assessment process (under Part 8) that can resolve uncertainty;
- (d) there is a power to impose conditions on any approval under ss 133 and 134 of the EPBC Act, which can restrict or control the use of the coal from the mines to reduce greenhouse emissions (for example, by limiting use of the coal to use in modern, low emissions technology).

111. To the extent that the decisions are not set aside on other grounds, this aspect of the process amounts to a failure to observe procedures required by law in the making of the decision.¹⁰⁹

No evidence of total greenhouse emissions and impacts

112. Complementing the delegate's reliance on his ignorance of the use of the coal as "uncertain and speculative", the final ground of review is that there was no evidence to support a finding as to the likely amount of greenhouse gas emissions from the mining, transport or use of the coal. With one minor and immaterial exception,¹¹⁰ no evidence or other material was provided by BCCM or QCoal in their referrals as to the likely greenhouse gas emissions from the mining, transport and use of the coal from the mines. The referrals do not even state with any specificity the markets for the coal or what proportion of coal will be used for coking coal or thermal coal. If the markets for the coal include China or other overseas markets, then the greenhouse gas emissions from the transportation of the coal to those markets will be considerable in accordance with the large amounts of coal involved. No finding could be made on this matter based on the information contained in the referrals.

113. With one minor and immaterial exception,¹¹¹ there is not a skerrick of evidence upon which a decision could have been made by the delegate as to the likely amount of greenhouse gas emissions that will result from the mining, transport and use of the coal from the mines. Consequently, there was no evidence or other material upon which a finding that the greenhouse gas emissions would not be likely to cause a significant impact on the matters protected by Part 3 of the EPBC Act could have been based nor was such an inference reasonably open.¹¹²

CONCLUSION

114. It is incredible to the point of being unbelievable, if the delegate in fact undertook such a detailed analysis as he now claims in his affidavit, that none of this was contained in the statement of reasons. On its face and in the context of these proceedings, the delegate's affidavit reads like a document prepared in response

¹⁰⁸ The reliance on this ignorance might also be contrasted with the delegate's willingness, according to the affidavit, to address detailed matters of comparative contributions to greenhouse gas emissions in circumstances where the proponents failed to provide relevant information on the topic and the delegate made no attempt to rectify these omissions by asking for further information.

¹⁰⁹ Section 5(1)(b) of the ADJR Act.

¹¹⁰ The statement regarding the greenhouse gas emissions from the mining of coal from the Isaac Plains Coal Project contained on p 18 of its Environmental Management Overview Strategy, dated March 2005 (see the affidavit of Mark Flanigan, 5 October 2005, p 95).

¹¹¹ *Ibid.*

¹¹² *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 per Mason CJ; *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222.

to the litigation and not as the true reasoning process that in fact occurred. The delegate's affidavit should be given no weight and, consequently, the failures to refer to the greenhouse impacts of the mines in his statements of reasons indicate either that he did not consider them or that he regarded them as immaterial. On either basis, the decision of the Full Court in the Nathan Dam Case indicates that the delegate erred in a material way.

115. If the delegate's affidavit is given weight, his reasoning process has still erred in a material way. In addition to the other grounds dealt with above, the delegate, it is submitted, abandoned a commonsense approach to future impacts for an arbitrary cut-off point of what he considered "measurable", specifically "identifiable", and "demonstrable", and other similar concepts. The question the delegate should have addressed was whether, as a matter of commonsense and appreciating that the task is to attribute legal responsibility, the contribution of this proposal to those impacts which climate change is likely to bring to the matters protected by Part 3 of the EPBC Act, in the context of other Australia contributors to those impacts; in the context of finding an effective global solution to global warming; in the context of finding technological ways to reduce greenhouse emissions from energy use; is significant.
116. The decisions should be set aside and remitted to the first respondent for further consideration according to law.

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10 October 2005