IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY No. QUD 216 of 2005

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

SUPPLEMENTARY OUTLINE OF SUBMISSIONS OF THE APPLICANT

1. These submissions supplement the Applicant's Outline of Submissions and Summary of Relevant Facts (10 October 2005) ("**the applicant's outline**") to clarify several matters arising from the first day of the hearing of the application on 20 October 2005. The following matters are either remarks that were not reached on the last occasion or minor supplementation to the remarks that were made. The applicant has reduced them to writing to save using further court time. The following issues are addressed:

   (a) Criteria for the delegate to use in making s 75 decisions in this case;

   (b) Construing the EPBC Act in context;

   (c) UN Framework Convention on Climate Change;

   (d) Causation;

   (e) Irrelevant considerations – The delegate's uncertainty;

   (f) No evidence ground.

Criteria for the delegate to use in making s 75 decisions in this case

2. The Court requested counsel for the applicant to consider further what criteria the delegate (or another decision-maker) should use in making the decisions under s 75 of the EPBC Act in this case.

3. As stated at paragraph 103 of the applicant's outline, 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

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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.

4. Put in a slightly different way, it is fundamental to the context of resolving s75 decisions in relation to the Isaac Plains and Sonoma Coal Projects to recognise that global warming is an international problem but the EPBC Act only purports to regulate actions at a national level. The question of significance should, therefore, ask whether the contribution to global warming of the likely emissions from these mines is significant at a national level in comparison with other actions in Australia contributing to global warming?

Construing the EPBC Act in context

5. The emphasis on context, both within the statute and more broadly, in construing provisions has been emphasized by McHugh, Gummow, Kirby and Hayne in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 69-70 and 78. On the same matter we would add references to the reasons of Gleeson CJ in *Singh v The Commonwealth* (2004) 209 ALR 355; 78 ALJR 1383; [2004] HCA 43 at paragraphs 12 and 19 as follows:

> "Meaning is always influenced, and sometimes controlled, by context. The context might include time, place, and any other circumstance that could rationally assist understanding of meaning. I referred above to the meaning of 'aliens' in s 51(xix). That is a brief description of the immediate context in which 'aliens' appears, but the context is much wider than that. It includes the whole of the instrument, its nature and purpose, the time when it was written and came into legal effect, other facts and circumstances, including the state of the law, within the knowledge or contemplation of the framers and legislators who prepared the Constitution or secured its enactment, and developments, over time, in the national and international context in which the instrument is to be applied. Reference was made earlier to what was said in *Chu Kheng Lim* about such developments affecting s51(xix). Another example is *Sue v Hill*." (Citation deleted; emphasis added.)

> "Acknowledging that '[i]ntention of the Legislature' is a 'very slippery phrase', courts, and Parliament itself, refer to 'intention' or 'intent' in stating rules and principles of statutory interpretation. For example, a principle of interpretation, referred to by this Court in several recent judgments, is that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. The *Acts Interpretation Act 1901* (Cth) sets out various rules of interpretation of statutes which apply 'unless the contrary intention appears'. Questions of statutory interpretation are commonly formulated, and answered, by reference to legislative intention. For example, where a statute imposes a duty, the question whether a breach of the duty will give rise to an action for damages at the suit of an injured victim 'depends upon the intention to be extracted from the statute when read as a whole, having regard to its general scope and purview as well as to its particular provisions'. In *Sovar v Henry Lane Pty Ltd*, Kitto J warned that the intention that such a private right shall exist is not conjured up by judges to give effect to their own ideas of policy, and then imputed to Parliament. 'The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation ... . It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the light of all its surrounding circumstances.' In *Wilson v Anderson*, I sought to explain the objectivity of the concept

> of intention, comparing the position with respect to construction of a contract, and stressing that the exercise is not formal or literalistic but demands consideration of background, purpose and object, surrounding circumstances, and other matters which throw light on the meaning of unclear language. The danger to be avoided in references to legislative intention is that they might suggest an exercise in psychoanalysis of individuals involved in the legislative process; the value of references to legislative intention is that they express the constitutional relationship between courts and the legislature. As Kitto J said, references to intention must not divert attention from the text, for it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intention, and it is from the text, read in that light, that intention is inferred. The words 'intention', 'contemplation', 'purpose', and 'design' are used routinely by courts in relation to the meaning of legislation. They are orthodox and legitimate terms of legal analysis, provided their objectivity is not overlooked." (Citations deleted; emphasis added.)

UN Framework Convention on Climate Change

6. An important part of the context for construing the EPBC Act is the global nature of climate change and Australia's international legal obligations. The applicant's outline does not refer specifically to the Australia's international commitments under the *United Nations Framework Convention on Climate Change 1992* ("**the Climate Change Convention**"),[1] but the following summary reflects the oral submissions made by counsel for the applicant.

7. Australia has signed and ratified the Climate Change Convention, and has signed but not ratified a protocol done under the convention, the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* ("**the Kyoto Protocol**").[2] Non-ratification of the Kyoto Protocol does not remove Australia's obligations under the Climate Change Convention.

8. Article 1 of the Climate Change Convention contains the following definitions:

> **"Climate change**" means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.
>
> **"Greenhouse gases**" means those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.

9. Article 4 of the Climate Change Convention states the commitments of the parties, including the following:

> 1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: ...
>
> (c) Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors; ...

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[1] Done at New York on 9 May 1992, entry into force for Australia and generally 21 March 1994. See tab 33 of the Combined book of authorities for a copy of the convention in [1994] ATS No. 2.

[2] Done at Kyoto on 11 December 1997. Signed for Australia at New York, 24 April 1998. Entry into force generally on 16 February 2005. Not yet in force for Australia. Reported in [2005] ATNIF 1.

> (f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change; ...

10. The Climate Change Convention is incorporated into Australian law. It is annexed, in whole, in Schedule 3E of the *Ozone Protection and Synthetic Greenhouse Gas Management Act* 1989 (Cth). That Act, however, focuses on ozone depleting substances and synthetic greenhouse gases, so it is not directly relevant to activities such as coal mines.

11. Section 520(3)(k) of the EPBC Act allows the Governor-General to make regulations to give effect to the Climate Change Convention (but no regulations have been made for that purpose).

12. Section 3(1)(e) of the EPBC Act states that one of the objects of the Act is "to assist in the co-operative implementation of Australia's international environmental responsibilities" which must include implementing Australia's commitments under the Climate Change Convention.

13. The meaning of "significant impact" and "all adverse impacts" in Part 3 and s 75 of the EPBC Act should be interpreted to promote the objective of implementing Australia's responsibilities under the Climate Change Convention.[3] As a treaty referred to in the EPBC Act, the Climate Change Convention is also extrinsic material that may be referred to resolve ambiguity in the EPBC Act.[4]

14. Where a statute is ambiguous the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, the relevant international instrument: *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 38; and *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.[5] In interpreting the terms and obligations imposed by a treaty, the courts should look at the ordinary meaning together with the context, objects and purpose of the treaty: *Applicant 'A' v MIEA* (1997) 190 CLR 225 at 252-256.

Causation

15. In oral submissions to the Court, counsel for the applicant indicated that the concept of causation was found in the term "impact" in the provisions in Part 3 and s 75(2) of the EPBC Act.

16. Upon further consideration of this issue, this submission should be expanded. The concept of causation is inherent in the provisions of Part 3 and s 75(2); however, the causal link in more appropriately understood as contained in the whole phrase: "has, will have or is likely to have a significant impact [on a matter protected by

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[3] Section 15AA of the *Acts Interpretation Act 1901*.
[4] Section 15AB(2)(d) of the *Acts Interpretation Act 1901*.
[5] While decision in *Teoh* has criticised, this part of the decision has not been doubted, although caution is expressed over its application: see *Coleman v Power* (2004) 209 ALR 182; (2004) 78 ALJR 1166; [2004] HCA 39 at [19] per Gleeson CJ and [240] per Kirby J.

Part 3 of the EPBC Act]". A person's "action" is the (or a substantial) cause. An "impact" or a "significant impact" to a matter protected by Part 3 of the EPBC Act (if it occurs) is the outcome or effect of the action. The notion of a causal link between the "action" and an "impact" or a "significant impact"[6] on a matter protected by Part 3 of the EPBC Act is conveyed in the words "has, will have or is likely to have[7]".

17. As noted at paragraphs 89-95 of the applicant's outline, the question of causation must be determined as a matter of commonsense, appreciating that the task is to attribute legal responsibility, and in light of the subject, scope and objects of the Act.[8] The applicant's fundamental point on this issue is that the delegate failed to do this when making the decisions the subject of this application for review.

Irrelevant considerations – The delegate's uncertainty

18. The issue of taking an irrelevant consideration into account, namely the delegate's own uncertainty of the use of the coal, can be stated very simply. It is an abuse of the processes for an applicant to fail to supply relevant information and a decision-maker to fail to exercise powers to correct that, and for the decision-maker to then rely upon that as a ground for refusal. There is, no doubt, from a fair reading of paragraph 27 of the delegate's affidavit that the delegate relied on his ignorance of the matters stated therein as a ground for his decision. He says: "Added to this …"[9]

No evidence ground

19. The applicant's outline refers (at paragraph 112) to the statement (at page 95 of the delegate's affidavit in the EMOS for Isaac Plains) as to the carbon dioxide (CO_2) produced per year from mining of the coal and the applicant describes it as minor and immaterial. We are surprised to see the second respondent (at paragraph 45) refer to it in the context of "material upon which the delegate was entitled to decide that the proposed action was not a controlled action" and actually compare it to annual Australian production. This underlines the applicant's point. The EMOS only addresses the methane that seeps out of the coal when one rips through it and loads it on trucks. That is why it is thousands of tonnes, not millions of tonnes per year as from the burning of the coal, alone, which must be considered.

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[6] As noted in footnote 91 of the applicant's outline, 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].

[7] As noted in footnote 89 of the applicant's outline, 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%".

[8] *Barnes v Hay* (1988) 12 NSWLR 337 at 353; *Environment Agency v Empress Car Co (Arbertillery) Ltd* [1999] 2 AC 22, 29-32; *Henville v Walker* (2001) 206 CLR 459, 489-491; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 215 ALR 385; [2005] HCA 26 at [41]-[42] and at [96]-[99].

[9] Wilcox J treated a failure to make reasonable inquiries as a basis for an unreasonableness finding in *Prasadv Minister for Immigration* (1985) 6 FCR 155 where he said at 170: "The circumstances in which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision-maker to make the applicant's case for him. It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it." See also the Full Court's decision in *Luu v Renevier* (1989) 91 ALR 39 at 50, para [34].

20. In fact, the delegate had no evidence or material on the overall quantum of carbon dioxide equivalent from the transport or use of the coal, certainly, none that he provided in his statements of reasons or his affidavit.

21. Expertise, general knowledge and previous experience will take a decision-maker part of the way but it is no substitute for evidence on important aspects of the considerations he has to address.

22. On the no evidence ground, paragraph 49 of the outline of the first respondent raises an important technical point based on the interplay between ss 5(1)(h) and 5(3)(a) of the ADJR Act.

23. The first respondent's argument fails to take into account the effect of s 75(2) of the EPBC Act which places an obligation on the first respondent to consider all adverse impacts of the action. If the evidentiary record is inadequate as to a particular adverse impact on which there is no evidence, s 75(2) cannot be satisfied and the decision-maker may not proceed to make a decision that the action is not a controlled action.

24. Therefore, the requirement of s 5(3)(a) ADJR Act that the delegate was required by law to decide that the matter was not a controlled action only if a particular matter (each adverse impact as part of all adverse impacts of the proposal) was established is made out. On the requirement of the adverse impact caused by production of greenhouse gases, there was no (relevant) evidence on which that matter could be established (and so the delegate could not proceed to consider same). Instead, the delegate purported to consider a finding based on the absence of such evidence. Accordingly, the technical argument raised by the first respondent fails.

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27 October 2005