IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY   No. NSD870 of 2007

BETWEEN: **ANVIL HILL PROJECT WATCH ASSOCIATION INC**

Applicant

AND: **MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES**

First Respondent

AND: **CENTENNIAL HUNTER PTY LIMITED**
ACN 101 509 111

Second Respondent

APPLICANT'S OUTLINE OF ARGUMENT

CONTENTS

INTRODUCTION 2
BACKGROUND 3
STATUTORY CONTEXT 4
GROUND 7: JURISDICTIONAL FACT 7
- General principles 7
- The statutory procedure for the decision 8
- Curial processes determine liability under Part 3 10
- Statutory exemptions from liability under Part 3 11
- No reference to the Minister's mental state 12
- Resolving inconsistency between provisions 13
- Constitutional considerations 14
- Administrative inconvenience 14
- Promoting the objects of the EPBC Act 15

GROUNDS 1-4: GREENHOUSE IMPACTS 15
- The delegate's reasons on greenhouse impacts 15
- Grounds 1 and 2: Requirement for a measurable or identifiable impact 16
- Grounds 3 and 4: Failure to consider key threatening process 23

GROUNDS 5-6: BOX-GUM GRASSY WOODLAND 25
- Statutory framework for threatened ecological communities 25
- The delegate's reasons on the threatened ecological community 26
- Reference to a policy document and not the legislative instrument 27
- Reference to non-listed ecological communities 29
- Guidance for decision-makers 30

CONCLUSION 31

APPLICANT'S OUTLINE OF ARGUMENT
Filed on behalf of the applicant

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INTRODUCTION

1. The applicant moves on the Amended Application for an Order of Review filed 10 July 2007.

2. The evidence relied upon by the applicant is:

   (a) the affidavit of Christine May Phelps, sworn 16 May and filed 17 May 2007, except the words in paragraph 9, "today, 16 May 2007, which is", which the applicant does not read;

   (b) the decision and the statement of reasons filed on 27 June 2007, tendered as exhibits by consent;

   (c) the bundle of documents before the decision-maker filed on behalf of the first respondent on 31 July 2007 (referred to in these submissions as **B1**); and

   (d) the bundle of further documents before the decision-maker filed on behalf of the applicant on 3 August 2007 (referred to in these submissions as **B2**).

3. The applicant applies under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) for an order of review in respect of the decision by a delegate of the first respondent made under s 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) on 19 February 2007 that the proposed action of the second respondent to construct and operate an open cut coal mine and ancillary facilities, known as the Anvil Hill Project (EPBC Referral No. 2007/3228), is not a controlled action.

4. The applicant is an association incorporated in Australia[1] that has, since its incorporation on 21 June 2000, engaged in a series of activities in Australia for protection of the environment[2] and whose objects at the time of the decision under review included protection of the environment[3]. It is accordingly a person aggrieved within the meaning of the ADJR Act by reason of the extended standing conferred by s 487 of the EPBC Act.

5. The grounds of the Amended Application fall into three categories that will be addressed in this outline and in oral submissions in the following order:

   (a) Ground 7 raises the question whether, on the proper construction of the EPBC Act, the factual references in Part 3 to "an action that has or will have a significant impact on [matters protected by a provision of Part 3]" and "an action that is likely to have a significant impact on [matters protected by a provision of Part 3]" are jurisdictional facts in the exercise of the Minister's power under s 75 of the Act. If so, the Minister's decision that the referred action is not a controlled action does not conclusively determine those factual issues and they are liable to be determined by the Court;

   (b) Grounds 1 to 4 raise the question whether the delegate applied the wrong test (grounds 1 and 2) or failed to take relevant considerations into account (grounds

[1] See paragraph 2 and annexure CMP-1 to the affidavit of Christine May Phelps sworn 16 May 2007.
[2] See paragraphs 5 and 6 of the affidavit of Christine May Phelps sworn 16 May 2007.
[3] See paragraph 3 and annexure CMP-2 to the affidavit of Christine May Phelps sworn 16 May 2007.

3 and 4) when considering the contribution that the greenhouse gas emissions from the mine would make to climate change (the greenhouse gas issues);

(c) Grounds 5 and 6 raise the question whether the delegate applied the wrong test or took an irrelevant consideration into account when deciding whether or not a listed threatened ecological community was present on the site of the proposed mine (the Box-Gum Grassy Woodland issues).

6. As to grounds 1 to 6, the applicant accepts that, to succeed, it must establish that the delegate erred in a manner that could have materially affected the decision.[4]

7. The applicant accepts that the reasons of the 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.[5]

BACKGROUND

8. The Anvil Hill Project is a major project for the purposes of the *Environment Planning and Assessment Act 1979* (NSW) (EPA Act)[6] and therefore required planning approval by the NSW Minister for Planning under Part 3A of the EPA Act. That approval process was the subject of litigation in the NSW Land and Environment Court in *Gray v the Minister for Planning and Ors* [2006] NSWLEC 720 (Pain J), considered further below.

9. The Project also requires approval under Part 9 of the EPBC Act if it is a “controlled action” within the meaning of s 67 of the EPBC Act. Section 68 of the Act makes provision for the referral of a proposal to the first respondent for his decision whether or not the action is a controlled action. A consequence of a decision that the action is a “controlled action” is the requirement for further assessment of the relevant impacts. The Minister must then decide whether to grant or refuse approval for the taking of the action.

10. The second respondent referred the Anvil Hill Project to the Minister on 11 January 2007: see B1 page 11. The referral described the action in the following terms (at B1 page 12):

> Centennial Hunter Pty Limited (Centennial) proposes to establish an open cut coal mine and ancillary facilities including a coal preparation plant (CPP) and rail loop. The proposal, known as the Anvil Hill Project (the Project), is based on a large, undeveloped coal reserve of approximately 150 million tonnes (Mt) that is suitable for production of thermal coal for both domestic and export markets. It is proposed to mine up to 10.5 million tonnes of run of mine (ROM) coal per annum using truck and shovel methods. …

11. As to the proposed timeframe for the action, the referral stated (at B1 page 16):

> Approval will be sought for a 21 year mine life, concurrent with the duration of a mining lease to be sought for the operation. If approved, Centennial is targeting commercial production by early 2008.

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[4] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J); *Hyundai Automotive Distributors Australia Pty Ltd v Australian Customs Service* (1998) 81 FCR 590 at 599 E-F (Hill, Sackville and Madgwick JJ).

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

[6] B1 at page 17.

12. The referral identified the existence of matters protected by the EPBC Act within the project area, including threatened species[7] and endangered ecological communities.[8] It also made specific reference to greenhouse gas emissions that would be generated by the Project, including the emissions that would be generated by third parties who may burn the coal from the mine.[9]

13. Section 74(3) of the Act requires the Minister to publish a referral on the internet and to invite public comment. The applicant made written submissions about the project and invited the Minister to "call in" the proposal as a controlled action for a number of reasons, including its impact on threatened species and threatened ecological communities, and due to greenhouse gas emissions from the mining and use of the coal.[10]

14. On 19 February, a delegate of the Minister, Ms Alex Rankin, decided under s 75 of the EPBC Act that the proposal was not a controlled action. The applicant made a request under s 13 of the ADJR Act and a statement of reasons dated 18 April 2007 was furnished to the applicant on 19 April 2007.

15. These proceedings were commenced on 17 May 2007.

STATUTORY CONTEXT

16. The objects of the EPBC Act and the statutory context of decisions under s 75 of the EPBC Act are summarized in the decision of 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].

17. As noted by Kiefel J in the trial decision in the Nathan Dam Case,[11] 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".[12]

18. The *Environment Protection and Biodiversity Conservation Bill 1998 Explanatory Memorandum* explained at pages 5-6 the deficiencies in the previous legislation that the new Act was intended to remedy to achieve those objectives.[13] The explanatory memorandum explained that there was a market failure for environmental protection and that previous legislation had developed in an ad hoc and piecemeal

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[7] B1 pages 18 and 22 and 36-38.
[8] B1 pages 22-23.
[9] B1 page 41.
[10] The applicant made two submissions included at B1 pages 95-148.
[11] *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463, para 40 citing *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 515, 528, 537.
[12] 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. See also the construction of the EPBC Act to accord with international obligations favoured by Marshall J in *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 42-44 (noting this decision is currently subject to appeal).
[13] Consideration may be given to the Explanatory Memorandum as extrinsic material in the interpretation of the EPBC Act in accordance with s 15AB of the *Acts Interpretation Act 1901*. However it is acknowledged that the words of the statute, not non-statutory words seeking to explain them, have paramount importance: *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11; (2006) 225 ALR 643 at [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

fashion. The previous legislation failed to recognise and implement the principles of ecologically sustainable development which are now universally accepted as the basis upon which environmental, economic and social goals should be integrated in the development process. The previous legislation did "not adequately equip the Commonwealth to address current and emerging environmental issues" and had "not been amended to reflect best practice." The new Act was intended to remedy those deficiencies to improve environmental protection and its administration by the Commonwealth.

19. As noted by the Full Court in the Nathan Dam case at [3], a central element of the Act is Part 3 which prohibits the taking of an action that has, will have or is likely to have a significant impact on a matter of national environmental significance. Each of subdivisions A to F of Division 1 in Part 3 contains a series of provisions in similar terms, protecting different matters of national environmental significance.

20. In each case the structure is to prohibit the action, providing civil and criminal penalties, but the prohibition does not apply in nominated circumstances. The exemptions include where there is an approval in operation under Part 9 and, importantly, where there is in force a decision of the Minister under Division 2 of Part 7 that the relevant section is not a controlling provision for the action. The factual references "has or will have a significant impact on [the protected matter]" and "is likely to have a significant impact on [the protected matter]" are common to all the prohibition provisions.

21. Part 7, to which s 75 is central, provides a procedure for a proposed action to be referred to the Minister for assessment and 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".

22. Part 8, to which s 87 is central, provides six 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.[14]

23. 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.

24. Other parts of the Act, such as the provisions for listing threatened species and threatened ecological communities in Part 13, are intricately and inherently linked through the statutory framework of the Act to the offence, assessment and approval system in Parts 3 and 7-9.

25. The Act also provides for the integration of its processes with State and Territory assessment and approval processes through a system of bilateral agreements in Chapter 3, Part 5. Bilateral agreements may provide for State and Territory processes to be substituted for assessment under Part 8 of the EPBC Act

[14] An assessment bilateral agreement is currently in force for the State of New South Wales under the EPBC Act but was not used in relation to the Anvil Hill Project.

("assessment bilaterals")[15] or for the Minister's approval under Part 9 of the Act ("approval bilaterals").[16] An assessment bilateral agreement is in force for the State of NSW but was not used in relation to the Anvil Hill Project. No approval bilateral agreement is in force for the State of NSW or any other State or Territory.

26. 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. Subsection 75(1) 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
> (b) which provisions of Part 3 (if any) are controlling provisions for the action.

27. Subsection 75(2) requires the Minister to consider "all adverse impacts (if any) the action has or will have or is likely to have on a matter protected by each provision of Part 3."

28. As originally enacted the EPBC Act did not define the term "impact"; however, in response to the decision in the Nathan Dam Case, a new s 527E was introduced into the Act to define the term.[17] These amendments commenced on 19 February 2007, the same day as the delegate's decision in relation to the Anvil Hill Project. The delegate's decision should therefore be understood in terms of the legislation subsequent to these amendments. The definition of "impact" in s 527E of the Act is as follows:

> **527E Meaning of *impact***
> (1) For the purposes of this Act, an event or circumstance is an ***impact*** of an action taken by a person if:
> (a) the event or circumstance is a direct consequence of the action; or
> (b) for an event or circumstance that is an indirect consequence of the action—subject to subsection (2), the action is a substantial cause of that event or circumstance.
> (2) For the purposes of paragraph (1)(b), if:
> (a) a person (the ***primary person***) takes an action (the ***primary action***); and
> (b) as a ***consequence*** of the primary action, another person (the ***secondary person***) takes another action (the ***secondary action***); and
> (c) the secondary action is not taken at the direction or request of the primary person; and
> (d) an event or circumstance is a consequence of the secondary action;
> then that event or circumstance is an ***impact*** of the primary action only if:
> (e) the primary action facilitates, to a major extent, the secondary action; and
> (f) the secondary action is:
> (i) within the contemplation of the primary person; or
> (ii) a reasonably foreseeable consequence of the primary action; and
> (g) the event or circumstance is:
> (i) within the contemplation of the primary person; or
> (ii) a reasonably foreseeable consequence of the secondary action.

29. While ss 25AA and 28AB exclude civil and criminal liability for third party actions for the provisions of Part 3 of the EPBC Act, s 67 specifically includes the impact

[15] Made under ss 45 and 47 of the EPBC Act.
[16] Made under ss 45 and 46 of the EPBC Act.
[17] By the *Environment and Heritage Legislation Amendment Act (No. 1) 2006*, commencing 19 February 2007.

of third party actions for the purpose of the definition of "controlled action" in Part 7, including for decisions under s 75. Section 67 states:

> **67 What is a *controlled action*?**
> 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 for the purposes of a provision of Part 3 would be (or would, but for section 25AA or 28AB, be) prohibited by the provision. The provision is a ***controlling provision*** for the action.

GROUND 7: JURISDICTIONAL FACT

General principles

30. The term "jurisdictional fact" is used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion.[18] If the fact in issue is a jurisdictional fact, the Court may determine whether or not the fact exists and evidence of its existence or non-existence is admissible.[19]

31. As Spigelman CJ stated in *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 63-64, the issue of jurisdictional fact turns, and turns only, on the proper construction of the statute. Previous decisions in respect of different legislation may therefore be unhelpful except to establish the relevant principles to be applied.[20] Spigelman CJ stated the broad principles to be applied in *Timbarra* at 64:[21]

> … The parliament can make any fact a jurisdictional fact, in the relevant sense: that it must exist in fact (objectivity) and that the legislature intends that the absence or presence of the fact will invalidate action under the statute (essentiality): *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 72 ALJR 841 at 859-861; 153 ALR 490 at 515-517.
>
> "Objectivity" and "essentiality" are two inter-related elements in the determination of whether a factual reference in a statutory formulation is a jurisdictional fact in the relevant sense. They are inter-related because indicators of "essentiality" will often suggest "objectivity".
>
> Any statutory formulation which contains a factual reference must be construed so as to determine the meaning of the words chosen by parliament, having regard to the context of that statutory formulation and the purpose or object underlying the legislation. …

32. In the present case, the Minister's decision that the coal mine is not a controlled action was based on the supposed fact that the mine will not have a significant impact on matter protected under Part 3.

33. The question raised by ground 7 turns on whether the parliament intended that the absence of that fact would invalidate the decision. The applicant contends that, in the case of a decision under s 75 that an action is not a controlled action, the definition of "controlled action" in section 67 can only be satisfied by the actual non-existence of the facts referred to in the prohibition sections. The following matters militate in favour of that conclusion:

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[18] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28] per Gleeson CJ, Gummow, Kirby and Hayne JJ.
[19] See generally, *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 63 and the cases cited at [36] per Spigelman CJ.
[20] Weinberg J provides helpful guidance on the relevant principles in *Cabal v Attorney-General of the Commonwealth* (2001) 113 FCR 154 at 166-173, especially at 173 [74].
[21] His Honour's reference to *Project Blue Sky* is now reported as (1998) 194 CLR 355 at 388-391.

(a) that is the construction that will promote the objects of the Act;

(b) the language of the prohibition provisions, which require the Court to decide the same factual issue for the purpose of applying the civil offence provisions or deciding whether to grant an injunction under s 475 and State and Territory courts to decide the same factual issue for the purpose of applying the criminal offence provisions. To construe the Act so as to mean that the Minister can conclusively determine that issue when he makes a decision under s 75 is at odds with the separation of the factual issues identified in each prohibition section (whether the action will have a significant impact on protected matter and whether there is in force a decision of the Minister under Division 2 of Part 7 (which includes s 75));

(c) the absence of any reference in s 75 to the state of mind of the Minister and the references to the Minister's state of mind in closely related provisions of the Act;

(d) the references in ss 67 and 82 to "controlled action" without reference to any decision of the Minister.

The statutory procedure for the decision

34. The Minister's decision under s 75 is part of a procedure set out in ss 68-77A of the EPBC Act that involves the giving of public notices and receipt of consideration of objections. Reading these sections in context, the purpose of the giving of public notices appears to be to improve the factual decision-making process by allowing the Minister to be better informed of relevant facts as to whether a proposed action is likely to have a significant impact on a matter protected by Part 3. That is a consideration against the applicant's argument.[22] However, unlike the situation in *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297, the Minister's decision under s 75 does not involve weighing up values for listing of a property on a heritage or other list for protection. The "weighing up" exercise, if it occurs at all,[23] is carried out under the procedures elsewhere in the Act and under corresponding international treaties for listing many of the properties, species and ecological communities protected under Part 3 of the EPBC Act. For instance:

(a) Whether a property has world heritage values that are protected by ss 12 and 15A of the Act depends upon the property being included in the World Heritage List under the World Heritage Convention or a Ministerial declaration in accordance with ss 13 and 14 of the Act.

(b) Whether a place has National Heritage values protected under ss 15B and 15C depends upon the listing process in Part 15, ss 324A-324ZC of the Act.

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[22] In *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297, at 306, Dawson, Gaudron, McHugh, Gummow and Kirby JJ held the provisions of the *Australian Heritage Commission Act* 1975 (Cth) requiring the giving of public notices and the receipt of consideration of objections suggested that the Australian Heritage Commission was given the power conclusively to determine whether or not a place should be recorded as part of the national estate and its determination of that question was not subject to review as a jurisdictional fact.

[23] Some matters protected under Part 3, such as the environment for nuclear actions (ss 21 and 22A) and Commonwealth marine areas (ss 23 and 24A), do not depend on value judgments. What is a Commonwealth marine area depends on a decision on territorial limits (s 24).

(c) Wetlands are only protected by ss 16 and 17B if the wetland is listed under the Ramsar Convention or declared by the Minister in accordance with ss 17 and 17A and the process for designation in ss 326 and 327 of the Act.

(d) Species and ecological communities are only protected under ss 18 and 18A if they are included in the lists established under ss 178 and 181 in accordance with the procedures set out in Part 13, ss 178-194T of the EPBC Act and the criteria specified in the *Environment Protection and Biodiversity Conservation Regulations 2000* (the Regulations).

(e) Migratory species are only protected under ss 20 and 20A of the Act if the species is included in the list established under s 209 of the Act, which is itself dependent on listing of the species under specified international conventions.

35. The fact that the Minister's decision under s 75 is not a "weighing up" exercise is emphasised by subs (2)(b) which prohibits the Minister from considering any beneficial impacts the action has, will have or is likely to have on the matters protected by Part 3 of the Act.

36. As part of the procedures under ss 68-77A, the Minister's decision under s 75(1) as to whether an action is a controlled action and what controlling provisions apply is inter-related to several decisions that occur either consecutively or concurrently. These are as follows:

(a) Upon receipt of a referral, s 74A allows the Minister to request referral of a larger action if the Minister is satisfied the action that is the subject of the referral is a component of a larger action.[24]

(b) Upon receipt of a referral and after giving notice in accordance with ss 74B-74D, if the Minister "considers" on the basis of the information in the referral that it is clear that the action would have "unacceptable impacts" on a matter protected by Part 3 the Minister's may reject a proposal without further assessment under s 74D(4). In such a situation the Minister does not need to proceed to a decision under s 75.

(c) When making a decision under s 75, the Minister must designate a person as a proponent of the action under subs 75(5).

(d) Instead of making a decision under s 75(1), the Minister may adopt an intermediate course and decide under s 77A that an action is not a controlled action and that particular provisions of Part 3 are not controlling provisions if the Minister believes the action will be taken in a particular manner.

37. The language used in s 75 is, of course, an important consideration in determining whether the Minister's decision is a subjective one or depends, as a matter of jurisdictional fact, on whether an action has, will have or is likely to have a significant impact on a matter protected by Part 3. Section 75 states that "the

[24] This allows the Minister to prevent proponents "splitting" referrals in a piecemeal way in an attempt to gain a favourable decision from the Minister that an action is not a controlled action as a defence to the civil and criminal liability provisions in Part 3. This allows the Minister to prevent what are commonly called "piecemeal applications" following the terminology of Stephen J in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485 at 500 and 506.

Minister must decide whether the action that is the subject of a proposal referred to the Minister is a controlled action and which provisions of Part 3 (if any) are controlling provisions". The wording of s 75 indicates that the decision is vested in the Minister, although it is unclear from the section alone whether this is a subjective decision personal to the Minister (and hence not a jurisdictional fact) or a requirement for the Minister to recognise whether or not approval is required by Part 3 of the Act as a matter of objective fact (and hence a jurisdictional fact).

38. Read in context, the language of s 75 and the framework of the EPBC Act suggest that the Minister's decision in s 75 of the EPBC Act is based on a jurisdictional fact as to whether there is an action that has, will have or is likely to have a significant impact on a matter protected by Part 3 of the Act.

39. The Minister's s 75 decision in Part 7 is predicated on the action triggering Part 3 leading to a requirement that it be assessed and approved (or refused) under s 133. The statutory framework indicates the Minister's decision under s 75 is preliminary or ancillary to his or her decision under s 133. That proposition may be tested by asking whether, irrespective of his or her decision under s 75, the Minister would have power to approve or refuse an action under s 133 if the action did not in fact trigger a requirement for approval under Part 3. The answer to that question must be no.

40. A Ministerial decision favourable to an action under four provisions of the EPBC Act, namely ss 75, 77A, 133 or 158, provides a licence or permit that operates as an exemption from civil and criminal liability under Part 3 of the Act but whether the action has, will have or is likely to have a significant impact on a matter protected by Part 3 of the Act does not depend upon those decisions. The issuance of a licence or permit is clearly an *administrative decision* rather than a *curial decision,* adopting the dichotomy identified by Brennan J in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634 at 643.[25] Were this not so, then civil and criminal liability under the Act would turn on Ministerial discretion rather than matters that can be determined by a curial process.

Curial processes determine liability under Part 3

41. There is no doubt that whether an action has, will have or is likely to have a significant impact on a matter protected by Part 3 of the Act is a fact that can be determined by a curial civil or criminal process without a decision from the Minister. That is, it is an objective fact. It is precisely the question the Court is asked to determine in any application for an injunction under s 475 of the EPBC Act to restrain an offence against Part 3 of the Act. Three decisions of the Court involving applications for injunctions under s 475 of the Act have attributed liability for civil offences against Part 3 of the Act. These decisions were made, respectively, without Ministerial intervention, at the suit of the Minister, and in opposition to the Minister's views:

(a) In *Booth v Bosworth* (2001) 114 FCR 39, Branson J granted an injunction under s 475 of the EPBC Act restraining fruit farmers from electrocuting spectacled

[25] Brennan J discussed the important differences between administrative decisions and curial decisions in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634 at 643, stating "Generally speaking, a discretionary administrative decision creates a right in or imposes a liability on an individual; a curial decision declares and enforces a right or liability antecedently created or imposed."

flying-foxes in contravention of s 12 of the Act. The Minister was not a party to the litigation but her Honour granted the injunction subject to the farmers' obtaining approval from the Minister under the Act.

(b) In *Minister for the Environment & Heritage v Greentree (No 2)* (2004) 138 FCR 198 the Minister sought an injunction restraining a breach of s 16 of the EPBC Act. Sackville J found that the respondent farmers had contravened the Act by clearing a Ramsar wetland and granted an injunction restraining their action. That decision was not disturbed on appeal.[26]

(c) In *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 (a decision currently under appeal), Marshall J found that, pursuant to s 18(3) of the EPBC Act, the respondent's forestry operations constitute an action that will have a significant impact on three endangered species in Tasmania. His Honour considered an impact may be significant because of its cumulative impacts and because it is in the context of legislation that is designed to protect native species. The Minister intervened in that case opposed to the grant of the injunction.

42. As the *Booth v Bosworth*, *Greentree* and *Brown v Forestry Commission* cases show, legal liability under Part 3 of the EPBC Act can depend on complex facts and the formation of opinions on a potentially wide range of matters of factual dispute, but that does not prevent the Court from deciding such disputes. While the nature of the task committed to the Minister under s 75 involves the assessment of complex facts and the formation of opinions on a potentially wide range of matters,[27] the determination of these issues is not dependent on the subjective views of the Minister and can be decided based on evidence in the Court. Further, the fact that those issues are committed for determination by the Court in some instances defeats any suggestion that a determination of those issues by the Minister for the purpose of a decision under s 75 should be construed as being conclusive by reason of their complexity.

Statutory exemptions from liability under Part 3

43. In determining whether the Minister's decision under s 75 involves a jurisdictional fact it is significant that the Act provides statutory exemptions from liability under Part 3. These exemptions themselves must form a jurisdictional fact for the Minister's decision under s 75 because it cannot be the case that the Minister has jurisdiction to regulate an activity if it is exempt under the statute. The Act provides the following statutory exemptions from liability under Part 3:

(a) Sections 29-31 exempt actions in a class of actions declared by a bilateral agreement between the Commonwealth and a State or Territory not to require approval under Part 9 because they are managed through a bilaterally accredited management arrangement.

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[26] *Greentree v Minister for the Environment and Heritage* (2005) 144 FCR 388 (Kiefel J with whom Wienberg and Edmonds JJ agreed).

[27] A matter that Weinberg J suggested is indicative of an intention that the decision-maker have the power to make a conclusive determination rather than its being a jurisdictional fact in *Cabal v Attorney-General of the Commonwealth* (2001) 113 FCR 154 at 173 [74].

(b) Sections 32 and 37 exempt actions in a class of actions declared by the Minister not to require approval under Part 9 because they are managed through an accredited management arrangement or bioregional plan respectively.

(c) Section 38 exempts forestry operations taken in accordance with a regional forest agreement under the *Regional Forest Agreements Act 2002*,[28] other than in the circumstances stated in s 42.

(d) Section 43 exempts actions in the Great Barrier Reef Marine Park that are authorised under the *Great Barrier Reef Marine Park Act 1975*.

(e) Sections 43A and 43B exempt actions with prior authorization or which are lawful continuations of a use of land. These provisions were unsuccessfully relied upon by the respondent farmers in *Minister for the Environment & Heritage v Greentree (No 2)* (2004) 138 FCR 198.[29]

(f) Section 523 defines an "action" but ss 524 and 524A exclude government decisions and grants of funding from this concept.[30]

44. An example of the operation of the statutory exemptions in the Act limiting the Minister's jurisdiction to regulate activities potentially impacting on matters protected by Part 3 can be drawn from the facts in *Save the Ridge Inc v National Capital Authority* (2004) 143 FCR 152 (Stone J); (2004) 143 FCR 156 (Full Ct). In that case an injunction was sought to restrain proposed amendments to the National Capital Plan of the ACT. The application was dismissed summarily on the ground that the proposed amendment did not constitute "an action" for the purposes of ss 523-524A of the EPBC Act. In such circumstances, the Minister would commit a jurisdictional error if he or she purported to decide under s 75 that such a proposal was a controlled action.

45. Similarly, if a person referred an activity that had prior authorisation or was an existing lawful use under ss 43A or 43B, the Minister would commit a jurisdictional error if he or she purported to decide under s 75 that the proposal was a controlled action. This would be the case even if the decision were based on a mere factual error such as the date on which a prior authorisation was granted (rather than an error of law). The existence or non-existence of an action that has, will have, or is likely to have a significant impact on a matter protected under Part 3 of the Act is essential for the Minister's ability to assess and approve the action under Parts 7-9.

No reference to the Minister's mental state

46. Read in the context of the statutory framework, including the statutory exemptions to liability, the language of s 75, "the Minister must decide …", requires the Minister to recognise his or her jurisdiction, not to determine the issue subjectively. Section 75 of the EPBC Act contains no reference to the Minister's mental state through the use of the words "opinion", "belief" or "satisfaction", which often,

[28] This exemption is repeated in s 6(4) of the *Regional Forest Agreements Act 2002*. The Minister is also prohibited from considering such impacts when making a decision under subs 75(1) by subs 75(2B) of the EPBC Act.

[29] Note, however, that the provisions were slightly amended following the decision in that case.

[30] For example, see *Save the Ridge Inc v National Capital Authority* (2004) 143 FCR 152 (Stone J); *Save the Ridge Inc v National Capital Authority* (2004) 143 FCR 156 (Wilcox, Moore and Gyles JJ).

although not necessarily, goes against a conclusion of jurisdictional fact.[31] The language of s 75 can be contrasted with the language in closely related provisions of the EPBC Act:

(a) Unlike s 75, the Minister's powers in ss 33 and 37A to exempt actions in a class of actions from requiring approval under Part 3 depends on the Minister being "satisfied" of matters involving value judgments in accordance with ss 34A-34F and 37B-37J of the Act.

(b) Unlike s 75, the Minister's decision under s 74A depends on whether the Minister "is satisfied" the action that is the subject of a referral is a component of a larger action.

(c) Unlike s 75, under ss 74B(1)(a), 74C(2)(a), and 74D(4)(a), if the Minister "considers" on the basis of the information in the referral that it is clear that the action would have "unacceptable impacts" on a matter protected by Part 3 the Minister's may reject a proposal without further assessment.

(d) Unlike s 75, the Minister's decision under s 77A depends on whether the Minister "believes" an action will be taken in a particular manner.

(e) Unlike s 75, the Minister's decision under s 78(1)(a)-(c) to vary or substitute a decision under s 75 depends on the Minister being "satisfied" that particular circumstances exist.[32]

(f) Also unlike s 75, the Minister's decision under s 158 depends upon the Minister being "satisfied that it is in the national interest" that a provision of Part 3 of the Act not apply to an action.

These differences in language are important matters to be considered but not determinative of whether the decision of the Minister under s 75 depends upon a jurisdictional fact.

Resolving inconsistency between provisions

47. Another issue that militates in favour of finding that the question whether an action will have a significant impact on a protected matter is a jurisdictional fact in the exercise of the Minister's power under s 75 is the interaction of ss 67, 75 and 82.[33] The language of s 67 suggests that the issue whether an action is a controlled action (which necessarily includes the issue whether the action has, will have or is likely to have a significant impact on a matter protected by Part 3 of the Act) is determined objectively without any reference to the Minister. The language of s 82, which defines "relevant impacts" for assessment under Part 8, is much less clear but also appears to assume the objective existence of "controlled action". Subsection 82(2) appears to assume an objective determination as to what is a controlled action

[31] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 64 per Spigelman CJ.
[32] Discussed by the Full Court in *Mees v Kemp* (2005) 141 FCR 385 at 405-407.
[33] In *Timbarra*, Spigelman CJ discussed the unusual feature of the EP&A Act was that the same factual formulation appeared in two sections. He drew the distinction between a factual reference that is preliminary or ancillary to the exercise of power (probably a jurisdictional fact) and a factual reference that necessarily arises in the course of consideration of the exercise of a power by the decision-maker (probably not a jurisdictional fact) and noted that the EP&A Act had the same formulation in both kinds of provisions.

without regard to any consideration by the Minister. If the existence of a controlled action does not involve a jurisdictional fact, it produces the unlikely result that the same factual question is committed to the Minister for final determination for some purposes but not for others. That anomaly is resolved if the factual question is a jurisdictional fact.[34]

Constitutional considerations

48. There are sound constitutional reasons for construing the Minister's power to assess and approve an action under Parts 7-9 of the Act, to which the decision in s 75 is preliminary or ancillary, as dependent upon the factual existence of an action that has, will have or is likely to have a significant impact on a matter protected by Part 3.[35] The constitutional power to make laws with respect to the majority of matters protected by Part 3 of the Act is based upon the external affairs power in s 51(xxix) of the Constitution and Australia's international legal obligations to protect the environment and conserve biodiversity.[36] For matters (or "affairs") which are physically internal to Australia, the Commonwealth has constitutional power under s 51(xxix) to enact legislation that is reasonably capable of being considered appropriate and adapted to implementing those obligations.[37] It may be inferred that for the provisions in Part 3 that are dependent on international legal obligations for constitutional validity[38], in imposing the requirement for an action to have a significant impact on a matter protected by Part 3, the legislature intended to limit the operation of the EPBC Act to actions having a sufficient nexus to impacts on a matter over which Australia has international legal obligations to warrant the action being controlled by the Commonwealth. This is not to suggest that actions with an *insignificant impact* on matters for which Australia has international legal obligations would necessarily be beyond the constitutional power of the Commonwealth to regulate based on the external affairs power, but the nexus requiring a *significant impact* has clearly been adopted by the Parliament for those provisions in Part 3 that are dependent on international legal obligations.

Administrative inconvenience

49. There is, no doubt, some administrative inconvenience in construing s 75 so as to permit the Minister's decision to be challenged on the basis of the absence of a jurisdictional fact. That inconvenience weighs against the construction contended for by the applicant,[39] however, as noted by Weinberg J in *Cabal v Attorney-*

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[34] Noting that, "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute": *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-384 [69]-[71] and [78] (McHugh, Gummow, Kirby and Hayne JJ); *Peldan v Anderson* [2006] HCA 48; (2006) 229 ALR 432 at [40] and [47] (Gummow ACJ, Kirby, Hayne, Callinan and Crennan JJ).

[35] Section 15A of the *Acts Interpretation Act 1901* provides that every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth.

[36] Sections 12 and 15A are based on Australia's obligations under the World Heritage Convention; ss 15B(5), 15B(6), 15C(9) and 15C(10) are based on Australia's obligations under the Biodiversity Convention; ss 16 and 17B are based on Australia's obligations under the Ramsar Convention; ss 18 and 18A are based generally on Australia's obligations under the Biodiversity Convention; ss 20 and 20A are based on Australia's obligations under the Bonn Convention, JAMBA and CAMBA.

[37] *Victoria v Commonwealth* (1996) 187 CLR 416 (the Industrial Relations Act Case) at 487-488 and the cases cited there.

[38] See n 36 above.

[39] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 64 per Spigelman CJ; *Brock v USA* (2007) 157 FCR 121 at [30] per Black CJ.

General of the Commonwealth (2001) 113 FCR 154 at 173 [74], it is also necessary to consider whether "transcendent" or "important" values are at stake. Plainly, they are. As Branson J said in *Booth v Bosworth* (2001) 114 FCR 39 at 67-68 [115] in analogous circumstances regarding the financial detriment to the respondents from the grant of an injunction under the EPBC Act to protect world heritage values:[40]

> In weighing the factors which support an exercise of the Court's discretion in favour of the grant of an injunction under subs 475(2) of the Act against those factors which tell against the grant of such an injunction, it seems to me that it would be a rare case in which a Court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance.

Promoting the objects of the EPBC Act

50. Consistent with what Branson J stated in *Booth v Bosworth*, any administrative inconvenience must be balanced against improvements in decision-making promoting the objects of the Act to protect the matters recognised in Part 3 as matters of national environmental significance. A principal purpose of the EPBC Act, stated in ss 3(1) and 3(2)(d) of the Act, is to protect matters of national environmental significance and, given the central role of the Minister's decision under s 75 as the gateway to further assessment and control under the Act and as a defence to civil and criminal liability under Part 3, it will promote the objects of the Act to require objective correctness of the factual predicate to the Minister's decisions under s 75.

GROUNDS 1-4: GREENHOUSE IMPACTS

The delegate's reasons on greenhouse impacts

51. The delegate's findings in relation to greenhouse gas emissions are set out in paragraphs 27-33 of the statement of reasons. Those reasons must be read in full, but it is sufficient to set out paragraphs 28 and 32 here:

> 28. I found that the proposed action will extract a maximum of 10.5 million tonnes per annum of run of mine coal (eg before washing). I found that this will result in approximately 7.98 million tonnes of product coal per year. Assuming that all product coal from the project is consumed by end users, the combustion of product coal from the project will have a full fuel cycle maximum annual average greenhouse gas emissions of 12,414,387 tonnes of CO_2-equivalent per annum. I found that this amount is equivalent to approximately 0.04% of the current global greenhouse gas emissions. I also found that such emissions are a small proportion of the total possible emissions from all other sources.
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> ….
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> 32. I found that, while it is clear that, at a global level, there is a relationship between the amount of carbon dioxide in the atmosphere and warming of the atmosphere, the climate system is complex and the processes linking <u>specific additional greenhouse gas emissions</u> to <u>potential impacts on matters protected by Part 3 of the EPBC Act</u> are uncertain and conjectural. In light of this, and in light of the relatively small contribution of the proposed action to the amount and concentration of greenhouse gases in the atmosphere, I found that a possible link between the additional greenhouse gases arising from the proposed action and a measurable or identifiable increase in global atmospheric temperature or other greenhouse impacts is not likely to be identifiable. [emphasis added]

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[40] See also *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 17 and 42-44 (Marshall J).

Grounds 1 and 2: Requirement for a measurable or identifiable impact

52. The applicant submits that an error of law is demonstrated in the delegate's reasoning. The delegate approached her task by considering the link between "specific additional greenhouse gas emissions" and "potential impacts on matters protected by Part 3 of the EPBC Act" and looked for a "measurable or identifiable increase in global atmospheric temperature or other greenhouse impacts" from the specific greenhouse gas emissions from the action.

53. The delegate's reasoning displays a misunderstanding of the principles for attributing legal liability and, compounding this error, the delegate applies the wrong test as to what constitutes a "significant impact" for the purposes of Part 3 of the EPBC Act.[41] The inquiry into the link between "specific additional greenhouse gas emissions" from the mine and "potential impacts on matters protected by Part 3" and "a measurable or identifiable increase in global atmospheric temperature or other greenhouse gas impacts" demonstrates a scientific or philosophical approach requiring a direct and identifiable relationship between conditions and occurrences. That is the wrong approach. What the law requires to ascertain or apportion legal responsibility for a given occurrence is a common sense approach.[42] The issue of causation must be addressed and applied taking into account the legal context in which it arises[43] and it is well established that an action need not be the sole, direct or immediate cause for it to be legally causative.[44] In the context of water pollution, Lord Hoffmann said in *Environment Agency v Empress Car Co (Arbertillery) Ltd* [1999] 2 AC 22 at 29B, 29F, 31E, 31H and 32B:[45]

> 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. [emphasis added]

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[41] 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] per Branson J. 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) 144 FCR 388 at 399 [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. Cf. *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 17 (Marshall J).

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

[43] *Barnes v Hay* (1988) 12 NSWLR 337, 353 per Mahoney JA; *Environment Agency v Empress Car Co (Arbertillery) Ltd* [1999] 2 AC 22, 29-32 per Lord Hoffmann; *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) 221 CLR 568 at [41]-[42] and at [96]-[99] per McHugh J and Gummow, Hayne and Heydon JJ.

[44] As McHugh J stated in *Henville v Walker* (2001) 206 CLR 459, 493 [106]: "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." (citation omitted).

[45] Cf. *Henville v Walker* (2001) 206 CLR 459, 489-491 [96]-[99] per McHugh J.

54. The importance of the context and purpose for which the inquiry into the causal relationship is undertaken was emphasised in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568, where 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 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.

55. 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.

56. The applicant submits that the delegate should have approached the question of whether this mine has, will have or is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, not as a scientific or philosophical exercise attempting to attribute a specific, identifiable and measurable rise in global temperatures or other greenhouse impacts from the mine, but by applying common sense and appreciating that the task is to attribute legal responsibility for the impacts of climate change generally on the matters protected by Part 3. The proper approach required the delegate to ask whether 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 is important, notable or of consequence having regard to its context not only in the total Australian and global emissions of greenhouse gases but in comparison to other actions that might reasonably be assessed under the EPBC Act.[46]

57. In this case the proponent has provided a detailed analysis of the greenhouse gas emissions that are likely to result from the mining and use of the coal from the project.[47] That detailed analysis calculates that the mining operations and associated electricity production will produce an average 219,094 tonnes per annum of greenhouse gases (measured in "carbon dioxide equivalents") for 20 years, which

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[46] 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] per Branson J. See also *Minister for Environment & Heritage v Greentree (No 2)* (2004) 138 FCR 198 at 244, [191]-[201] (Sackville J); *Greentree v Minister for the Environment and Heritage* (2005) 144 FCR 388 at 399 [45]-[50] (Kiefel J with whom Weinberg and Edmonds JJ agreed); *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 17 (Marshall J).

[47] Umwelt Environmental Consultants, *Anvil Hill Project Environmental Assessment – Response to Submissions Part A* (October 2006). See B2 pages 455-533.

represents in total about 0.039% of Australia's direct annual greenhouse gas emissions.[48] It also calculates that the burning of coal from the mine will produce on average approximately 12,414,387 tonnes per annum of greenhouse gases, which is equivalent to 2.198% of Australia's national greenhouse gas emissions in 2004, approximately 0.031% of annual global greenhouse gas emissions, and approximately 0.095% of total greenhouse gas emissions from global annual coal combustion.[49]

58. If, as the analysis prepared by the proponent suggests, the greenhouse gas emissions from the mining operations and use of the coal from this project will be equivalent to approximately 2% of Australia's current national annual emissions and these emissions will continue for 20 years then it can be inferred that if these emissions do not trigger assessment under the EPBC Act for their contribution to climate change, no project that might reasonably be assessed under the Act will require assessment because of its contribution to climate change. Such an outcome would mean that the Act does not, in effect, regulate any actions contributing to a process that is recognised as a key threatening process under the Act.

59. Such an interpretation cannot be said to promote the objects, stated in s 3 of the Act, to protect the environment, to conserve biodiversity, or to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources. Such an interpretation would be contrary to four of the principles of ecologically sustainable development stated in s 3A of the Act, namely:

    (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

    (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

    (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations; and

    (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making.

60. Consequently, the applicant submits that an interpretation should be given to the EPBC Act as set out in paragraph 56 above.

61. The applicant notes that its submissions on this issue are inconsistent with the decision of Dowsett J in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736; (2006) 232 ALR 510 (WPSQ Case). In that case, Dowsett J dismissed an application for an order for review against two decisions of a delegate of the Minister concerning the greenhouse gas emissions from two large coal mines. Dowsett J found that the delegate considered these impacts and that his reasoning contained no legal errors.

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[48] B2 page 487.

[49] B2 page 487 and 491.

62. Unlike the present case, in the WPSQ Case no evidence was before the Court "to identify the extent (if any) to which emissions from such mining, transportation and burning might aggravate the greenhouse gas problem."[50] As set out above at paragraph 57, in this case the proponent has provided a detailed analysis of the greenhouse gas emissions that are likely to result from the mining and use of the coal from the project.[51]

63. Also unlike the WPSQ Case, in the present case the proponent has expressly acknowledged that greenhouse gas emissions will result from the mining and use of the coal and contribute to climate change.[52]

64. While there was no evidence before the Dowsett J of the extent of greenhouse gas emissions from the mines in the WPSQ Case, his Honour suggested that the impacts of emissions from the burning of the coal were not relevant to consider under s 75 of the EPBC Act when assessing the impacts of a coal mine.[53] His Honour stated in *obiter dicta* at [72] that he was "far from satisfied that the burning of coal at some unidentified place in the world, the production of greenhouse gases from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter" might arguably cause an impact upon a protected matter that needed to be assessed under the EPBC Act. His Honour stated, "This case is far removed from the factual situation in *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24."

65. It is submitted, with respect, that the application by Dowsett J of the principles stated in the Nathan Dam Case is clearly wrong. In the Nathan Dam Case at [53] and [57] the Full Court indicated that for the purposes of s 75 of the EPBC Act:

> [53] … "Impact" in the relevant sense means the influence or effect of an action: *Oxford English Dictionary,* 2nd ed, vol VII, 694-695. As the respondents submitted, the word 'impact' is often used with regard to ideas, concepts and ideologies: "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. Expressions such as "the impact of science on society" or "the impact of drought on the economy" serve to illustrate the point. 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 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. …
>
> [57] … It is sufficient in this case to indicate that "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."

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[50] [2006] FCA 736; (2006) 232 ALR 510 at [72].
[51] See B2 pages 455-533.
[52] B1 page 41, referring to the detailed analysis in Umwelt Environmental Consultants, n 47, where acknowledgment is made of climate change particularly at B2 pages 491-495.
[53] [2006] FCA 736; (2006) 232 ALR 510 at [72].

66. As noted above, in the present case the proponent has expressly acknowledged that greenhouse gas emissions will result from the mining and use of the coal and contribute to climate change,[54] which means such impacts "can reasonably be imputed as within the contemplation of the proponent of the action" in accordance with the Full Court's reasoning at [57].

67. Apart from being within the contemplation of the proponent, the impacts of the contribution of greenhouse gas emissions to climate change also clearly fall within the reasoning of the Full Court at [53]. In the Nathan Dam Case, the "action" being considered was a dam intended to allow, *inter alia*, the growing of cotton in areas not previously able to be used for agriculture through using water stored by the dam. The impacts which the Minister had ruled out of his consideration were potential impacts of the run off from cotton farms on the Great Barrier Reef some further hundreds of kilometres downstream. The effect of the decision, at first instance and confirmed on appeal, was that those indirect, downstream impacts on the Reef were impacts of the action for the purpose of the EPBC Act.

68. The insertion since the Nathan Dam Case of the definition of "impact" into s 527E of the EPBC Act has no material effect on the consideration of the indirect impacts in the circumstances of this case. Clearly, the mine (the primary action) facilitates, to a major extent, the burning of the coal (the secondary action) because without the mine the coal would remain in the ground and not be able to be burnt resulting in greenhouse gas emissions contributing to climate change. The emission of greenhouse gases contributing to climate change from both the mining operation and from the burning of the coal is expressly within the contemplation of the proponent (the primary person) and a reasonably foreseeable consequence of the mine and the secondary action.

69. It is submitted that the *obiter dicta* of Dowsett J in the WPSQ Case at [72] is not correct and that the principles in Nathan Dam Case indicate that the impacts of greenhouse gas emissions from the use of coal are relevant to consider when assessing the impacts of a coal mine under s 75 of the EPBC Act. The construction of a dam is, essentially, a physical activity whose direct impacts on the environment are localised and, relatively, restricted. The dam, like a coal mine, produces product intended for use elsewhere. That product, by being available for use, makes possible activities for which it would not, otherwise, be used. These activities are, in each case, contemplated by the proponent of the action. These subsequent activities have, potentially, broader and more far-reaching effects. That is, if the coal stays in the ground (the operations do not occur), it cannot be burnt for power generation resulting in, on average, the emission of 12,633,481 tonnes of greenhouse gas emissions per annum over 20 years.[55] Similarly, if the water is not stored, it cannot be used for cotton growing. In both cases, the subsequent (facilitated) activities involve the actions of other people but without breaking, as a matter of ordinary usage, the causal relationship between the original physical activities and the effects of the subsequent activities.

70. In *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029 at [42]-[47], Morris J applied the reasoning in the Nathan Dam Case and held that a

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[54] B1 page 41, referring to the detailed analysis in Umwelt Environmental Consultants, n 47, where acknowledgment is made of climate change particularly at B2 pages 491-495.

[55] Combining the average annual emissions from the mining operation (219,094 tpa CO_2-e) with the average annual emissions from the use of the coal (12,414,387 tpa CO_2-e).

planning scheme amendment to facilitate an expansion of a coal mine must consider the indirect impacts of greenhouse gas emissions resulting from the burning of the coal at the nearby Hazelwood Power Station in Victoria.

71. Pain J applied the decision in the Nathan Dam Case in considering the causal relationship between emissions from the use of coal in power stations and the effects of climate change and global warming in *Gray v Minister for Planning* [2006] NSWLEC 720, particularly at [98]-[100] (the Gray Case). Her Honour did not accept the *obiter dicta* comments of Dowsett J in the WPSQ Case, stating in relation to it:

> [93] That case was reviewing a decision of the relevant Commonwealth Minister of the Environment not to declare a particular action to be a controlled action. I do not find it persuasive if it is relied on by the Respondents as suggesting that the impacts of GHG emissions produced from coal mined in NSW are beyond the scope of environmental impact assessment procedures in NSW. I do not know what evidence was before Dowsett J as to what measurement of GHG emissions is feasible, for example. This case concerns different circumstances, namely what is required by a detailed GHG assessment in the context of an environmental assessment of a large coal mine under the EP&A Act.

72. Pain J went on to consider the principles in the Nathan Dam Case and found:

> [97] Given the quite appropriate recognition by the Director-General that burning the thermal coal from the Anvil Hill Project will cause the release of substantial GHG in the environment which will contribute to climate change/global warming which, I surmise, is having and/or will have impacts on the Australian and consequently NSW environment it would appear that Bignold J's test of causation based on a real and sufficient link is met. While the Director-General argued that the use of the coal as fuel occurred only through voluntary, independent human action, that alone does not break the necessary link to impacts arising from this activity given that the impact is climate change/global warming to which this contributes. In submissions the parties provided various scenarios where this approach would lead to unsatisfactory outcomes such as, in the Director-General's submissions, the need to assess the GHG emissions from the use of ships built in a shipyard which use fossil fuels. Ultimately, it is an issue of fact and degree to be considered in each case, which has been recognised in cases such as *Minister for Environment and Heritage v Queensland Conservation Council Inc and Another* (2004) 139 FCR 24, by the Full Court at [53].
>
> [98] The Director-General's test that the effect is significant, is not unlikely to occur and is proximate also raises issues of judgment. Climate change/global warming is widely recognised as a significant environmental impact to which there are many contributors worldwide but the extent of the change is not yet certain and is a matter of dispute. The fact there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored in the environmental assessment process. The coal intended to be mined is clearly a potential major single contributor to GHG emissions deriving from NSW given the large size of the proposed mine. That the impact from burning the coal will be experienced globally as well as in NSW, but in a way that is currently not able to be accurately measured, does not suggest that the link to causation of an environmental impact is insufficient. The "not likely to occur" test is clearly met as is the proximate test for the reasons already stated.
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> [99] While cases concerning the issue of causation in different statutory contexts have to be applied with care, they are nevertheless instructive, particularly where it is the ordinary meaning of words such as "impact" and "effect" on the "environment" which are being considered. While the EPBC Act has different provisions, as the Respondents emphasised, the cases under that Act referred to above recognise that the meaning of "impact" and "effects" clearly has broad application. These meanings inform the consideration of what environmental impacts are to be assessed under the EP&A Act

> and Pt 3A in particular given the broad definition of "environment" in s 4 and the broad objects set out in s 5 of the EP&A Act.
>
> [100] I consider there is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Pt 3A.

73. The reasoning of Pain J indicates that the WPSQ Case is distinguishable, particularly given the fact that in this case, unlike the WPSQ Case, there is a detailed analysis of greenhouse gas emissions from which their significance in the context of Australia's and global greenhouse gas emissions can be assessed.

74. The reasoning of the majority of the United States Supreme Court in *Massachusetts v Environmental Protection Agency* 549 US __ (2007) provides a helpful analysis of liability for climate change in a common sense way appreciating that the task is to attribute legal responsibility. The litigation concerned whether the US EPA could regulate greenhouse gas emissions from automobiles under the US *Clean Air Act*. In relation to the causal link between emissions of greenhouse gases from automobiles in the United States and global warming, the majority reasoned:[56]

> *Causation*
>
> EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions "contributes" to Massachusetts' injuries.
>
> EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the agency cannot be haled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.
>
> But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. …
>
> And reducing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere [it] accounts for more than 6% of worldwide carbon dioxide emissions. … Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.
>
> *The Remedy*
>
> While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. … Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

75. In the case of the present decision, the delegate's search for a measurable or identifiable increase in global temperature or other greenhouse gas effects as a direct result of the emissions from this particular mine demonstrates a misconception of the causal relationship required to establish legal responsibility and led the delegate into error. The correct test, consistent with the approach

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[56] *Massachusetts v Environmental Protection Agency* 549 US __ (2007) at pp 20-22 of the majority judgment (per Stevens, Kennedy, Souter, Ginsburg, and Breyer JJ).

adopted by Branson J in *Booth v Bosworth*, is whether 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 is "important, notable or of consequence" having regard to its context not only in the total Australian and global emissions of greenhouse gases but in comparison to other actions that might reasonably be assessed under the EPBC Act.

Grounds 3 and 4: Failure to consider key threatening process

76. "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.[57]

77. There is no recognition in the delegate's statement of reasons of the fact that "loss of climatic habitat caused by anthropogenic emissions of greenhouse gases" is a key threatening process or that the greenhouse gas emissions from the mining operations and use of the coal from the mine will contribute to a key threatening process. Consequently, the applicant submits it should be inferred that the delegate failed to consider these matters.[58]

78. The real issue is not whether the delegate considered this matter – on the face of her reasons she clearly did not – but whether she was required to consider it. As Mason J stated *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39:

> the ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account in making that decision … 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.

79. There is no express requirement to consider key threatening processes in making a decision under s 75 and, therefore, the requirement (if it exists) must be determined by implication from the subject matter, scope and purpose of the Act. In this regard, the applicant submits that the critical questions are whether the contribution an action will make to a key threatening process:

    (a) is "an impact" that must be considered under s 75(2) of the Act; or

    (b) is relevant to the context of an action when assessing whether it will cause a "significant impact" to a listed threatened species or listed threatened ecological community for the purposes of determining whether ss 18 and 18A are controlling provisions under s 75(1) of the EPBC Act.

80. Section 183 provides for the establishment of the list of key threatening processes. Section 184 allows the list to be amended. Section 188 provides the criteria for

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

[58] See *Mees v Kemp* (2005) 141 FCR 385 at [58]; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 per Gleeson CJ at 330-331 [5]; Gaudron J at 338 [37]; McHugh, Gummow and Hayne JJ at 346 [69], and Callinan J at 392 [216].

amending the list. Subsections 188(3) and (4) define "threatening process" and "key threatening process" as follows:

> **188 Amending list of key threatening processes**
> ...
> (3) A process is a ***threatening process*** if it threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community.
> (4) A threatening process is eligible to be treated as a key threatening process if:
> (a) it could cause a native species or an ecological community to become eligible for listing in any category, other than conservation dependent; or
> (b) it could cause a listed threatened species or a listed threatened ecological community to become eligible to be listed in another category representing a higher degree of endangerment; or
> (c) it adversely affects 2 or more listed threatened species (other than conservation dependent species) or 2 or more listed threatened ecological communities.

81. Listing of a key threatening process may lead to a threat abatement plan being prepared under ss 270A–271 of Part 13. Key threatening processes are particularly relevant for listed threatened species and listed threatened ecological communities, for which the controlling provisions are ss 18 and 18A of the EPBC Act.

82. There is no express reference to key threatening processes in s 75 of the EPBC Act or Parts 7 or 8. In Part 9, s 139 requires that in deciding whether or not to approve for the purposes of a subsection of section 18 or section 18A the taking of an action, and what conditions to attach to such an approval, the Minister must not act inconsistently with a recovery plan or threat abatement plan.

83. However, the contribution that an action makes to a key threatening process is logically an "adverse impact" of the Act within the meaning ascribed by the Full Court in the Nathan Dam Case set out above.[59] In this case the contribution of greenhouse gases to climate change was reasonably within the contemplation of the proponent and was expressly recognised by the proponent in its referral to the Minister.

84. In addition the contribution that an action makes to a key threatening process is part of the context of the impact that must be considered to determine its significance.[60] This is particularly the case for ss 18 and 18A as key threatening processes are defined, and the Minister's power to include a threatening process in the list of key threatening processes, in s 188 of the Act by reference to its impacts on listed threatened species and listed threatened ecological communities.

85. Dowsett J did not accept that the failure to consider this key threatening process invalidated the delegate's reasoning in the WPSQ Case at [67]-[68]; however, that conclusion was expressed by reference to his reasoning at [48]-[51] where it appears he concluded that the fact climate change is listed as a key threatening process "offers no justification for construing s 12 as prohibiting conduct which is not likely to have significant impact on a protected matter." [sic] With respect, his Honour's reasoning is unclear but it appears to be made in relation to a construction of s 12 alone rather than the purpose, scope and structure of the EPBC Act.

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[59] *Minister for the Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24 at 38-38 per Black CJ, Ryan and Finn JJ.
[60] *Booth v Bosworth* (2001) 114 FCR 39 at 64-65 (Branson J).

86. 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 Act, be a relevant consideration for decisions under s 75 concerning actions that contribute to that process.

87. 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. For the purposes of the EPBC Act, and the decision under s 75, this places the seriousness of the threat posed by climate change to matters protected by Part 3 of the EPBC Act beyond doubt.

88. The failure of the delegate to refer to the fact that climate change is listed as a key threatening process indicates that she did not consider the matter to be material.[61]

89. 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.

90. In addition, requiring the contribution an action will make to a key threatening process to be considered when assessing the action under s 75 will promote the objects of the Act, stated in s 3, by improving the protection of the environment and promoting the conservation of biodiversity. Consequently, the applicant submits that the contribution an action will make to a key threatening process is required to be considered when assessing the action under s 75 by implication from the subject matter, scope and purpose of the Act.

GROUNDS 5-6: BOX-GUM GRASSY WOODLAND

Statutory framework for threatened ecological communities

91. Listed threatened ecological communities are included as a matter of national environmental significance protected under ss 18 and 18A of Part 3 of the EPBC Act. Section 181 of Part 13 of the Act established the original list of threatened ecological communities, which may be amended by the Minister under s 184.

92. The key issue for grounds 5 and 6 is what is "a listed threatened ecological community" for the purpose of interpreting the civil and criminal offence provisions in ss 18 and 18A of Part 3 of the EPBC Act, which the delegate was required to consider in making her decision under s 75?

93. "Ecological community" and "listed threatened ecological community" are defined in s 528 of the Act as follows:[62]

> ***ecological community*** means the extent in nature in the Australian jurisdiction of an assemblage of native species that:
> (a) inhabits a particular area in nature; and
> (b) meets the additional criteria specified in the regulations (if any) made for the purposes of this definition.

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[61] *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) 141 FCR 385 at [58].

[62] Note that "native species" is also defined in s 528 but nothing turns on that definition in this case.

> ***listed threatened ecological community*** means an ecological community included in the list referred to in section 181.

94. The White Box-Yellow Box-Blakely's Red Gum Grassy Woodlands and Derived Native Grasslands (Box-Gum Grassy Woodland) was included on the list of threatened ecological communities established under s 181 of the EPBC Act as a critically endangered ecological community on 18 May 2006. In accordance with s 184 of the Act, the amendment to the list of threatened ecological communities was effected by registering a legislative instrument on the Federal Register of Legislative Instruments maintained under the *Legislative Instruments Act 2003*. The title of the legislative instrument was, "Inclusion of ecological communities in the list of threatened ecological communities under section 181 of the *Environment Protection and Biodiversity Conservation Act 1999*"[63] (the legislative instrument).

95. The legislative instrument stated that the list of threatened ecological communities referred to in s 181 of the EPBC Act was amended (emphasis added):

> … by including in the list in the critically endangered category:
>
> - White Box–Yellow Box–Blakely's Red Gum Grassy Woodlands and Derived Native Grasslands, as described in the Schedule to this instrument.

96. The Schedule is two pages in length and the first paragraph reads as follows:

> White Box–Yellow Box–Blakely's Red Gum Grassy Woodland and Derived Native Grassland (Box–Gum Grassy Woodlands and Derived Grasslands) are characterised by a species-rich understorey of native tussock grasses, herbs and scattered shrubs, and the dominance, or prior dominance, of White Box, Yellow Box or Blakely's Red Gum trees. In the Nandewar Bioregion, Grey Box (*Eucalyptus microcarpa* or *E. moluccana*) may also be dominant or co-dominant. The tree-cover is generally discontinuous and consists of widely-spaced trees of medium height in which the canopies are clearly separated.

97. An explanatory statement was published for the legislative instrument. It does not form part of the instrument[64] but can be used to assist in interpreting the instrument.[65]

The delegate's reasons on the threatened ecological community

98. The delegate's statement of reasons note, at paragraph 10, that she considered a departmental policy statement on the Box-Gum Grassy Woodland entitled, "*White Box – Yellow Box – Blakely's Red Gum grassy woodlands and derived native grasslands* (EPBC Act Policy Statements, Department of the Environment and Heritage, May 2006)."[66] The delegate also refers to this policy statement at paragraph 36 of the reasons. On the face of the reasons, the delegate did not consider the relevant legislative instrument itself.

99. The delegate's statement of reasons contained the following in relation to the Box-Gum Grassy Woodland at paragraphs 14, 16, 17 and 34-36:

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[63] Dated 20th day of December 2005 and registered on the Federal Register of Legislative Instruments on 17 May 2006. Pursuant to s 12(1)(d) of the *Legislative Instruments Act 2003*, the listing took effect on 18 May 2006.
[64] Section 4 of the *Statutory Instruments Act 2003* defines "instrument" to "not include an explanatory statement or a compilation."
[65] Section 13 of the *Statutory Instruments Act 2003* and s 15AB of the *Acts Interpretation Act 1901*.
[66] See B1 pages 300-307.

Listed ecological communities

14. I found that the listed ecological communities *White Box-Yellow Box-Blakely's Red Gum grassy woodlands and derived native grasslands* and *Weeping Myall – Coobah – Scrub Wilga Shrubland of the Hunter Valley* may occur in the region of the proposed action.

…

16. I found that a community type similar to the listed *White Box-Yellow Box-Blakely's Red Gum grassy woodlands and derived native grasslands* occurs in the project area (known as Upper Hunter White Box – Ironbark Grassy Woodland). I also found that there are two other vegetation communities occurring in the project area that could potentially conform to the listed community under the EPBC Act, namely Forest Red Gum Riparian Woodland and the Ironbark Woodland Complex. I found that the Ironbark Woodland Complex occurs extensively across the project area and that the Forest Red Gum Riparian Woodland occurs in riparian areas in the proposed disturbance area.

17. I found, however, that the above communities do not constitute the listed ecological community under the EPBC Act based on vegetative diagnostic plots. In particular, I found that key diagnostic species, such as White Box, Yellow Box or Blakely's Red Gum, were absent or not present as the dominant canopy species sufficient to form the listed community. I therefore found that a significant impact on listed ecological communities is not likely.

…

34. In making my decision I took account of the precautionary principle and public comments made on the referral. In particular, I noted issues raised about the potential presence of the listed *White Box-Yellow Box- Blakely's Red Gum grassy woodlands and derived native grasslands* ecological community and listed species within the disturbance area.

35. I noted that flora and fauna surveys, using appropriate experts and techniques, had been conducted for a minimum of two years and considered that the site of the proposed action had been adequately characterised in terms of the likely presence of listed ecological communities and species under the EPBC Act. …

36. I also considered information and advice provided by the Anvil Hill Project Watch Association in regard to the potential presence of *White Box- Yellow Box- Blakely's Red Gum grassy woodlands and derived native grasslands*. I noted that similar vegetative types occur in the project area, but concluded that adequate ecological assessments had been undertaken to conclude that the specific community listed under the EPBC Act, and as described in Department's *Policy Statement on White Box-Yellow Box- Blakely's Red Gum grassy woodlands and derived native grasslands ecological community*, is not present.

100. The applicant's submission referred to by the delegate at paragraph 36 appears at B1 pages 95-148. Special note can be made of the applicant's submissions at B1 pages 136-137.

Reference to a policy document and not the legislative instrument

101. While Ministerial and department policy is irrelevant to a court in interpreting a statute,[67] subject to several important limitations, there is no question that Ministers and departments can lawfully state policies by which they will exercise statutory discretions. These limitations include that a policy must: be consistent with the statute in respect of which it offers guidance; allow the decision-maker to take account of relevant circumstances; and not preclude the decision-maker from

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[67] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634 at 643 (Brennan J); *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419-421 (Bowen CJ and Deane J).

considering the circumstances of a particular case and all relevant arguments which may run counter to the policy.[68]

102. Section 13 of the *Legislative Instruments Act 2003* sets out the principles for construction of legislative instruments. Sections 15AA and 15AB of the *Acts Interpretation Act 1901* apply in relation to the interpretation of a legislative instrument requiring the Court to adopt a construction which would promote the purpose or object underlying the Act.[69]

103. In this case the delegate failed to consider the legislative instrument and relied upon the departmental policy statement. The acute difficulty with that approach is that the two documents appear on their face to be materially different. There appears to be a difference in substance, not merely in form, between the two documents. For example, the legislative instrument states in its initial paragraph that:

> The tree-cover is generally discontinuous and consists of widely-spaced trees of medium height in which the canopies are clearly separated.

104. The departmental policy document does not contain a similar statement, which is significant in this case as the delegate only referred to the policy document and based the finding that the Box-Gum Grassy Woodland was not present on the site on the fact that:

> … key diagnostic species, such as White Box, Yellow Box or Blakely's Red Gum, were absent or not present as the dominant canopy species sufficient to form the listed community.

105. As the departmental policy document did not refer to the fact that "tree-cover is generally discontinuous and consists of widely-spaced trees of medium height in which the canopies are clearly separated" the delegate could not, on the face of the documents she referred to, have known of this fact. Given the critical emphasis given to the assessment of the "dominant canopy species" this absence of knowledge regarding how the canopy is formed could have materially affected the decision.[70]

106. A further example of a potentially material inconsistency between the legislative instrument and the departmental policy document is the difference in wording of the minimum requirements for the ecological community in the legislative instrument and the flowchart provided on page 5 of the policy.[71] The legislative instrument lists, on page 1 of the schedule, four criteria for an understorey patch in the absence of overstorey trees. It then states "areas with both an overstorey and understorey present are also considered of sufficiently good condition to be part of the listed ecological community if the understorey meets any of the conditions above, or …" (emphasis added). While the legislative instrument appears to allow fulfilment of any of the criteria to be sufficient (i.e. a disjunctive

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[68] *Green v Daniels* (1977) 13 ALR 1 at 9 (Stephen J); *Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640-641 (Brennan J); *Humane Society International v Minister for Environment and Heritage* (2003) 126 FCR 205 at 216 [51] (Kiefel J).

[69] See *South Coast X-Ray Pty Ltd v Chief Executive Officer of Medicare Australia* (2007) 158 FCR 173 at 178 [25] (Cowdroy J).

[70] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J); *Hyundai Automotive Distributors Australia Pty Ltd v Australian Customs Service* (1998) 81 FCR 590 at 599 E-F.

[71] B1 page 304.

meaning is given to the criteria), the flowchart in the department policy statement implies that all of the criteria must be met for areas in which the overstorey and understorey are present (i.e. a conjunctive meaning is given to the criteria). The flowchart appears to be inconsistent with the plain meaning of the text of the legislative instrument in this regard.

Reference to non-listed ecological communities

107. In addition to failing to refer to the description of the Box-Gum Grassy Woodland ecological community contained in the legislative instrument it appears, from paragraphs 16, 17, 34, and 36 of the statement of reasons, that the delegate classified the ecological community on the site by reference to non-listed ecological communities. The delegate referred to these ecological communities as the "Upper Hunter White Box – Ironbark Grassy Woodland", "Forest Red Gum Riparian Woodland" and the "Ironbark Woodland Complex". These ecological communities are not referred to in the legislative instrument and are not listed threatened ecological communities under the EPBC Act. The delegate appears to have adopted a classification system used by the proponent.[72] Prima facie, it is completely wrong to consider whether the site contains a listed ecological community by comparing the species on it to a separate definition of an unlisted community and not simply asking, "does the ecological community meet the definition of the listed ecological community?"

108. From paragraphs 16, 17, 34, and 36 of the statement of reasons the delegate appears to have interpreted the description of the Box – Gum Grassy Woodland ecological community by reference to three non-listed ecological communities, known as "Upper Hunter White Box – Ironbark Grassy Woodland", "Forest Red Gum Riparian Woodland", and "Ironbark Woodland Complex". The first of these ecological communities was defined in a report cited in the referral as (Peake 2006),[73] which formed the basis of the part of the second respondent's consideration of the presence or absence of any endangered ecological communities in its referral.[74] The Peake (2006) report developed its own (and quite different) classification system not based on EPBC Act listed threatened ecological communities. The report stated that an ecological community used in its classification system, referred to as Upper Hunter White Box – Ironbark Grassy Woodland and coded by it as Mapping Unit (MU) 11:[75]

> is … at least partially equivalent to the White Box – Yellow Box – Blakely's Red Gum Grassy Woodlands and Derived Native Grasslands [endangered ecological community] listing under the EPBC Act 1999 (Cth).

109. Based particularly on paragraph 16 and the references to "diagnostic plots" and "diagnostic species"[76] in paragraph 17 of the delegate's statement of reasons, she appears to have interpreted the description of the Box-Gum Grassy Woodland by

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[72] B1 pages 22-23 and supplemented at pages 75-79.
[73] The full citation is provided in referral at B1 page 50 as "Peake, T.C. (2006) The Vegetation of the Central Hunter Valley, New South Wales. A report on the Findings of the Hunter Remnant Vegetation Project. Final Draft Hunter – Central Rivers Catchment Management Authority, Paterson." Relevant extracts from this document will be provided to the Court.
[74] B1 pages 22-23. See also B1 pages 75-79.
[75] Peake (2006), volume 1, page 157. A copy of this part of the report will be provided to the Court.
[76] These terms are not used in the legislative instrument but the latter term and the term "vegetation plots" were used by the proponent with reference to Peake (2006) at B1 pages 23, 76 and 77.

reference to the classification system used in Peake (2006). This was completely wrong. The listed threatened ecological community should have been interpreted strictly by reference to the description used in the listing in the legislative instrument. The description used in the legislative instrument does not refer to Peake (2006) and there is no other reference to this author in the list of references at the end of the listing document.

110. The approach taken by the delegate to interpreting the description of the Box-Gum Grassy Woodland by reference to the classification system used in Peake (2006) took into account an irrelevant consideration and erred of law in construing the meaning of "listed threatened ecological community" for the purposes of ss 18(5) and 18A(2) of Part 3 of the EPBC Act. What should have been critical to the decision is that the ecological community *included in the list* is what is protected by the EPBC Act. As there are potentially infinite variations in the way ecological communities may be described, the description that is listed must be regarded as paramount for the purposes of interpreting and applying the civil and criminal offence provisions in ss 18 and 18A of the Act. The delegate failed to understand this point and in doing so her decision fell into error.

Guidance for decision-makers

111. The delegate's errors in assessing the Box-Gum Grassy Woodland ecological community require the decision to be set aside and the matter to be remitted to the Minister for further consideration according to law. It will assist this reconsideration if the Court provides general guidance on the correct approach to be taken to interpreting listed threatened ecological communities. The applicant submits that the following guidance can be given to the Minister for that assessment:

    (a) The primary reference document for the assessment of a listed threatened ecological community should be the legislative instrument listing the ecological community as a threatened ecological community under the Act;

    (b) The legislative instrument should be interpreted according to its plain meaning read in context of the whole document but any technical terms, such as species names, should be given their technical meaning;

    (c) The legislative instrument should not be interpreted with the strictness of a statute and its interpretation should be consistent with the objects of the Act to protect listed threatened ecological communities;

    (d) A policy document explaining the identification of a listed threatened ecological community should generally state the legislative instrument verbatim but may also provide maps, pictures, flowcharts and other aids to assist in the application and communication of the nature and extent of the ecological community by members of the public, provided that these aids are consistent with the description in the legislative instrument; and

    (e) It is impermissible to refer to non-listed ecological communities to determine whether a listed threatened ecological community is present at a site.

CONCLUSION

112. Read in context, the language of s 75 and the framework of the EPBC Act suggest that the Minister's decision in s 75 of the EPBC Act is based on a jurisdictional fact as to whether there is an action that has, will have or is likely to have a significant impact on a matter protected by Part 3 of the Act. Consequently, the Court must determine the existence or otherwise of these facts and the applicant should be permitted an opportunity to present evidence in relation to these matters in a further hearing.

113. Separate to the jurisdictional fact question, the delegate's reasoning involved material errors that require the decision to be set aside and remitted to the Minister for consideration according to law. The delegate erred in relation to the consideration of greenhouse gas emissions by not asking the right question and failing to consider the inclusion of climate change in the list of key threatening processes established under s 183 of the Act. The delegate also erred in her consideration of the Box-Gum Grassy Woodland.

114. Finally, the applicant requests that the Court decide the jurisdictional fact issue regardless of how the other issues are decided. Such a course will avoid this issue potentially needing to be re-litigated were the applicant to succeed on another ground and the matter be remitted to the Minister for reconsideration.

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Counsel for the applicant
8 August 2007