

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 15/06/2015 12:30:27 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application for Judicial Review - Form 66 - Rule 31.01(1)
File Number:	NSD33/2015
File Title:	Mackay Conservation Group Incorporation Number: IA03355 (Incorporated pursuant to the Associations Incorporation Act 1981 (Qld)) v The Commonwealth of Australia & Ors
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 15/06/2015 1:56:58 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Further Amended Originating application for judicial review and for relief under section 39B Judiciary Act 1903

No. NSD33 of 2015

Federal Court of Australia
District Registry: New South Wales
Division: General Division

Mackay Conservation Group Incorporation Number: IA03355 (Incorporated pursuant to the Associations Incorporation Act 1981 (Qld))

Applicant

The Commonwealth of Australia

First Respondent

Minister for the Environment

Second Respondent

Adani Mining Pty Ltd ABN 27 145 455 205

Third Respondent

To the Respondents

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place:

The Court ordered that the time for serving this application be abridged to _____.

Filed on behalf of (name & role of party) Mackay Conservation Group Inc (Applicant)
Prepared by (name of person/lawyer) Sarah Reebuck Susan Higginson
Law firm (if applicable) Environmental Defenders Office (NSW) Inc
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Email sarah.reebuck@edonsw.org.ausue.higginson@edonsw.org.au
Address for service Level 5, 263 Clarence St, SYDNEY NSW 2000



Date:

Signed by an officer acting with the authority
of the District Registrar



The Applicant applies to the Court under section 5(1) of the *Administrative Decision (Judicial Review) Act 1977* (Cth) (**ADJR Act**) and/or and section 39B(1) and (1A) of the *Judiciary Act 1903* (Cth) for an order of review of the purported decision of the Second Respondent (the **Minister**) made on 24 July 2014 (the **Decision**) pursuant to sections 130(1) and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) to approve a proposed action to develop an open cut and underground coal mine, 189 km rail link and associated infrastructure approximately 160 km north west of Clermont in central Queensland (the **Project**) (being a "controlled action" within the meaning of section 67 of the EPBC Act), subject to certain conditions imposed pursuant to section 134 of the EPBC Act (the **Conditions**).

Details of claim

The Applicant is taken to be a person aggrieved by the whole of the Decision by section 487(3) of the EPBC Act because:

1. The Applicant is incorporated in, or otherwise established in, Australia;
2. In the two years immediately before the Decision was made, the Applicant had engaged in a series of activities in Australia for protection or conservation of, or research into, the environment, and it still does today; and
3. At the time of the Decision, the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment; and
4. ~~The Applicant is aggrieved by the Decision because it is wrong in that it was unlawfully made.~~

Grounds of application

1. The Decision involved an error of law within the meaning of section 5(1)(f) of the ADJR Act and/or a jurisdictional error in that the Minister, in considering under section 136(1) of the EPBC Act greenhouse gas emissions in relation to effects on the Great Barrier Reef World Heritage Area (which considerations were also applied to national heritage values of the Great Barrier Reef National Heritage Place and the environment in the Great Barrier Reef Marine Park), wrongly considered that he was:
 - a. limited to taking into account those greenhouse gas emissions on which the Third Respondent was required to report under the *National Greenhouse and Energy Reporting Act 2007* (Cth) (**NGER Act**); and/or
 - b. precluded from taking into account greenhouse gas emissions from the burning of coal that was to be mined from the Project (**Scope 3 Emissions**) because the



consideration of Scope 3 Emissions is not a requirement of either Australian or state legislation or policy.

2. Further or in the alternative to Ground 1, the making of the Decision was an improper exercise of the power conferred by sections 130(1) and 133 of the EPBC Act within the meaning of sections 5(1)(e) and 5(2)(a) of the ADJR Act and/or was affected by a jurisdictional error because the Minister took an irrelevant consideration into account, being:
- a. the requirements for reporting of greenhouse gas emissions to which the Third Respondent was subject under the NGER Act; and/or
 - b. advice that the consideration of Scope 3 Emissions was not a requirement of either Australian or state legislation or policy.
3. The making of the Decision was an improper exercise of the power conferred by sections 130(1) and 133 of the EPBC Act, within the meaning of sections 5(1)(e) and 5(2)(a) and/or (b) of the ADJR Act, and/or was affected by a jurisdictional error because, in his consideration of whether the Third Respondent was a suitable person to be granted an approval under section 136(4) of the EPBC Act, the Minister:
- a. failed to take into account a consideration required to be taken into account, in that his consideration of this question was required to be based on the most recent and accurate information that the Minister had at hand (or of which he had actual or constructive knowledge), being submissions made to him; and/or
 - b. took an irrelevant consideration into account, in that his consideration of this question proceeded on the basis of earlier material that was corrected, updated or elucidated by subsequent submissions made to him.

Particulars

- i. In his statement of reasons at [105] the Minister accepted a statement in the proponent's referral (which was dated November 2010) that "*the Adani Group has a history of responsible environmental and community management applied to similar projects in other countries*".
- ii. In accepting and relying on that statement the Minister did not have regard to evidence before him concerning breaches or alleged breaches of environmental laws by entities associated with the proponent's parent company or the Adani Group after the date of the referral, contained in submissions from Greenpeace dated 8 February 2013, Sonya Duus dated 11 February 2013 and Lock the Gate Alliance Inc dated 11 January



2013, as well as in a series of emailed submissions from various senders facilitated by "GetUp!".

4. The Decision involved an error of law within the meaning of section 5(1)(f) of the ADJR Act and/or a jurisdictional error in that, in the course of considering under section 136(4) of the EPBC Act whether the Third Respondent was a suitable person to be granted an approval, the Minister misconceived and/or misconstrued the question he was addressing under section 136(4) as an enquiry as to whether the Third Respondent was willing or able to undertake the Project in accordance with the conditions of approval.
5. The making of the Decision was an improper exercise of the power conferred by sections 130(1) and 133 of the EPBC Act, within the meaning of sections 5(1)(e) and 5(2)(b) of the ADJR Act, and/or was affected by a jurisdictional error because the Minister failed to have regard to a mandatory consideration in s 139(2) of the EPBC Act, being the approved conservation advices in respect of the Yakka Skink and Ornamental Snake each dated 29 April 2014.

Particulars

- i. In his statement of reasons at [49] and [52] the Minister determined that the Yakka Skink and Ornamental Snake were likely to be significantly impacted by the proposed action.
 - ii. On 29 April 2014, the Minister approved a conservation advice for the *Egernia rugosa* (Yakka Skink) under s 266B of the EPBC Act.
 - iii. On 29 April 2014, the Minister approved a conservation advice for the *Denisonia maculata* (Ornamental Snake) under s 266B of the EPBC Act.
 - iv. The Minister did not have regard to the approved conservation advices for the Yakka Skink and Ornamental Snake, and those advices were not otherwise in the materials before the Minister.
1. The Decision involved an improper exercise of power (within the meaning of sections 5(1)(e) and 5(2)(b) of the ADJR Act) conferred by sections 130(1), 133 and 134 of the EPBC Act or, alternatively, the Minister fell into jurisdictional error, because he failed to take into account mandatory relevant considerations in the making of his decision that were required to be taken into account by sections 136 and 527E of the EPBC Act, namely:
- a. Matters relevant to the following matters protected by a provision of Part 3 of the EPBC Act, being the impact of the Project on:
 - i. the world heritage values of the Great Barrier Reef World Heritage Area (GBHRWA) (being a declared World Heritage property);



~~ii.— the National Heritage values of the Great Barrier Reef National Heritage Place (being a National Heritage place); and~~

~~iii.— the environment in the Great Barrier Reef Marine Park;~~

~~in that, in making the Decision, the Minister was obliged to consider and he failed to consider or take into account the emission of greenhouse gases contributing to climate change from the burning of the coal that was to be mined from the Project;~~

~~b.— The Minister was obliged to consider and he failed to consider “*economic and social matters*” as was provided for in section 136(1)(b) of the EPBC Act in that he failed to consider or take into account the emission of greenhouse gases contributing to climate change from the burning of the coal that was to be mined from the Project;~~

~~(together, “**Relevant Considerations**”).~~

~~c.— The Minister was obliged to consider and he failed to consider factors to be taken into account when considering the matters in section 136(1), being:~~

~~iv.— the principles of ecologically sustainable development as required by section 136(2)(a) in that he failed to consider or take into account the emission of greenhouse gases contributing to climate change from the burning of the coal that was to be mined from the Project;~~

~~v.— information he had on the relevant impacts of the action within the meaning of sections 136(2)(e) and 527E of the EPBC Act in that he failed to consider or take into account the submissions concerning climate change that were before him and, in particular, the Applicant’s submission concerning the emission of greenhouse gases contributing to climate change from the burning of the coal that was to be mined from the Project;~~

~~(together, the “**Relevant Factors**”).~~

2.— The Decision is thereby invalid.

3.— Alternatively, the Minister failed to give proper, genuine and realistic consideration to the matters he was obliged to consider, namely, the Relevant Considerations and the Relevant Factors, and the Decision is thereby invalid.

4.— The Decision involved an error of law, within the meaning of section 5(1)(f) of the ADJR Act and/or a jurisdictional error in that the Minister failed to lawfully or properly construe



the nature of the Project's "impact", as that word is defined in section 527E of the ~~EPBC Act~~. The Minister was required to consider and apply this when exercising his power to approve the Project pursuant to sections 130(1) and 133. The First Respondent wrongly construed the ~~EPBC Act~~ as only requiring him to consider matters concerning:

- d. ~~the direct greenhouse gas emissions of the Project itself; and~~
- e. ~~the direct greenhouse gas emissions resulting from energy required to undertake the Project;~~

and as not requiring him to consider the emission of greenhouse gases contributing to climate change from the burning of the coal mined from the Project. The Minister accordingly, failed to consider these emissions in making his Decision.

~~5. Accordingly, the Decision is invalid.~~

Orders sought

1. An order or writ quashing or setting aside the Decision.
2. Alternatively, a declaration to effect that the Decision is void and of no effect and/or was made unlawfully.
3. If necessary, a writ or order in the nature of prohibition and/or an injunction prohibiting or restraining the Third Respondent from undertaking the Controlled Action or otherwise doing any act or thing pursuant to the Decision, ~~until the final determination of these proceedings.~~
4. Costs.
5. Such further or other orders as this Court thinks just.

Applicant's address

The Applicant's address for service is:

Place: ~~Sarah Roebuck~~ Sue Higginson, Environmental Defender's Office (NSW) Inc, Level 5, 263 Clarence Street, Sydney NSW 2000

Email: ~~sarah.roebuck@edonsw.org.au~~ sue.higginson@edonsw.org.au

The Applicant's address is Environment Centre, 156 Wood St, Mackay QLD 4740.



Service on the Respondents

It is intended to serve this application on all Respondents.

Date: 15 June 2015

A handwritten signature in black ink, which appears to be "S. Higginson", is written over a horizontal line.

Signed by ~~Sarah Reebuck~~ Susan Higginson
Lawyer for the Applicant