No. QUD1017 of 2015

Federal Court of Australia

District Registry: Queensland

Division: General

AUSTRALIAN CONSERVATION FOUNDATION INCORPORATED
Applicant

MINISTER FOR THE ENVIRONMENT AND ANOTHER
Respondents

SUBMISSIONS FOR THE SECOND RESPONDENT (ADANI MINING PTY LTD)

Overview

1. On 14 October 2015 the First Respondent (the **Minister**), decided to grant approval under ss 130(1) and 133 of the *Environmental Conservation and Biodiversity Conservation Act* 1999 (**EPBC Act**) in respect of a controlled action proposed by the Second Respondent (**Adani**) which includes the development and operation of a coal mine, rail link and associated infrastructure (the **project**)[1].

2. The Applicant (**ACF**) applies under s 5 of *Administrative Decisions (Judicial Review) Act* 1977 (**ADJR Act**) and s 39B of the *Judiciary Act* 1903 for the review of the Minister's decision on grounds that it involved legal error.

3. The Minister's reasons for his decision (**Reasons**) run to 193 paragraphs, were based on a consideration of a very substantial amount of material arising from and following an extensive assessment process, and dealt with a large number of diverse environmental matters. However, following the abandonment of Ground 4 of the application by the

[1] The project is described in the Coordinator General's report at pp 2 – 14, which report was at Attachment A to the proposed approval decision brief before the Minister: see affidavit of Dean Knudsen at DK-1 (Document 4 in the table at DK-2).

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ACF[2], the issues on this application are narrow and concern only the Minister's consideration of greenhouse gas emissions.

4. Specifically, the ACF contends that the Minister fell into reviewable legal error in approving the project because of the *"manner in which"*[3] he considered greenhouse gas emissions which may result from the transport and combustion overseas by third parties of coal from the mine[4] (described by the ACF as combustion emissions[5]) and the potential indirect impacts of these emissions on the Great Barrier Reef.

5. The challenge is particularly narrow because it is uncontroversial that:

   a. the Minister had a broad discretion in making his decision[6];

   b. the Minister was not required to be satisfied of any particular matter under the EPBC Act as a prerequisite to making his decision[7];

   c. in deciding to approve the project the Minister in fact considered combustion emissions and the potential for indirect impacts on the Great Barrier Reef[8].

6. Notwithstanding this, the ACF contends that the Minister, in considering combustion emissions erred because he:

   a. Asked himself the *"wrong question"* or *"failed to ask himself"* the correct question or *"misdirected"* himself under the EPBC Act[9]. This is the primary ground of review. It involves a contention that the Minister was required by the EBPC Act ask himself whether combustion emissions involve relevant impacts

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2 ACF's submissions at [117].
3 ACF's submissions at [10].
4 See the Reasons at [136] – [138].
5 ACF's submissions at [7.2].
6 ACF's submissions at [16.1]. The width of the discretion is demonstrated by the fact the Minister may take into account non-environmental factors, such as economic and social matters, in making a decision: s 136(1)(b).
7 ACF's submissions at [23]. ACF's submissions about how *"in practice"* or *"ordinarily"* the Minister might come to make a decision are irrelevant to this proceeding: ACF's submissions at [18], [19.2]. As the opening sentence of [18] recognises, there is no requirement for the Minister to make a finding of *"no unacceptable impacts"* before granting an approval.
8 Reasons at [131] – [141].
9 ACF's submissions at [11], [48], [56], heading before paragraph [48].

on the Great Barrier Reef and failed to do this or failed to apply the provisions of the EPBC Act in doing this. It is apparent from the Reasons and other material that the Minister in fact addressed this issue in accordance with the provisions of the EPBC Act.

b. Failed to take into account the precautionary principle in connection with combustion emissions[10]. This contention involves a strained reading of the Minister's reasons and is made without reference to the direct evidence on the point. It is apparent from the Reasons and other material that the Minister took the principle into account.

c. Erred in various ways in complying with s 137 of the EPBC Act (which provides that in making his decision the Minster must not act inconsistently with the World Heritage Convention) in relation to combustion emissions[11]. The Minister concluded that his decision is not inconsistent with s 137 and his conclusion did not involve legal error.

7. The Minister expressly considered combustion emissions and their potential indirect impacts on the Great Barrier Reef in paragraphs [40], [48] and [131] to [141] of the Reasons in the following way:

a. ***First***, the Minister turned his mind to the fact that the project would result in combustion emissions, and in particular took into account specific estimates of the level of those emissions[12].

b. ***Secondly***, the Minister turned his mind to the damage which climate change in general may cause to the Great Barrier Reef and concluded that climate change is a significant threat to the Great Barrier Reef[13]. He concluded that it is a significant threat because it causes a rise in sea temperatures and ocean acidification, which leads to other adverse effects such as coral bleaching. The Minister further concluded that the extent of the potential impacts of climate

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10 ACF's submissions at [12].
11 ACF's submissions at [13].
12 Reasons at [129].
13 Reasons at [131].

change on the Great Barrier Reef was dependant *"to a large degree on how effectively the issue of rising levels of greenhouse gases is addressed worldwide"*[14]. The Minister therefore concluded that the future extent of climate change and its potential impacts on the Great Barrier Reef is itself uncertain. There is no contention that this conclusion of fact involved legal error.

c. ***Thirdly***, on the material before him, which he took into account, the Minister concluded that the connection between combustion emissions and any actual adverse impact on the Great Barrier, was *"speculative"*[15]. This is a critical point in the case. Specifically, the Minister:

i. concluded that the level of combustion emissions and their contribution to overall global emissions was subject to a range of variables (including whether the coal from this mine will be burned in *addition to* or in *substitution for* other coal and the efficiency of the coal burning power plants);[16]

ii. concluded that, as a result, determining the *"actual net emissions"* representing combustion emissions resulting from the project was *"speculative"*[17];

iii. concluded that for that reason, and having earlier concluded that the future extent of climate change was itself uncertain, it was not possible to draw a robust conclusion (that is a conclusion that was not merely speculative) that combustion emissions will contribute to any particular increase in global temperature[18];

iv. accordingly, concluded that it is difficult to identify a (real) relationship between the project on the one hand, and impacts on matters of

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14 Reasons at [131].
15 Reasons at [140].
16 Reasons at [138].
17 Reasons at [138], [140].
18 Reasons at [140].

environmental significant (in Queensland) *arising from an increase in global temperatures* on the other hand[19].

d. ***Fourthly***, despite these conclusions, the Minister did not then disregard combustion emissions, but considered how – given any uncertainties – they might be addressed. He was satisfied that combustion emissions (and, indeed, other emissions resulting from the project) will be managed and mitigated through existing national and international emissions control frameworks operating within Australia and within countries that are the import market for coal from the project[20]. This conclusion reflected his consideration and application of the precautionary principle.

e. ***Fifthly***, in light of the above conclusions, he found that the project will not have an unacceptable impact on the Great Barrier Reef[21].

8. In the result, the Minister did not ask himself the wrong question, his consideration of the appropriateness of existing national and international frameworks reflected his consideration and application of the precautionary principle, and his decision is not inconsistent with Australia's obligations under the World Heritage Convention.

9. The application should therefore be dismissed.

The legislative framework and relevant legal principles

The EPBC Act

10. The EPBC Act regulates, among other things, the taking of *"controlled actions"*. These are activities which would, but for approval, contravene provisions of the Act protecting various matters of national environmental significance (such as listed threatened species and certain wetlands): s 67[22].

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19 Reasons at [140].

20 Reasons at [141]. His conclusion rationally reflected what is common ground, namely that climate change is a global issue.

21 Reasons at [48], [53], [56].

22 See *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 at [3] (***Tarkine***).

11. The development of the project was decided by a delegate of the Minister to be a controlled action and so required Ministerial approval. Relevantly, the matters of national environmental significance in respect of which it was decided to be a controlled action included World Heritage Properties (including the Great Barrier Reef), Listed Migratory Species and the Great Barrier Reef Marine Park[23]. The decision that the project was a controlled action in respect of these matters did not, however, involve any conclusion that combustion emissions give rise to relevant impacts.

12. Approval is dealt with in Part 9 of the EPBC Act. The Minister is empowered to make his decision under s 133(1) of the Act, which provides (emphasis added)[24]:

> After receiving the assessment documentation relating to a controlled action, or the report of a commission that has conducted an inquiry relating to a controlled action, the Minister may approve for the purposes of a controlling provision the taking of the action by a person.

13. Sections 136 – 140A, which appear in Subdivision B of Part 9, then detail considerations which are to be taken into account. Relevantly, there are a list of mandatory general considerations and factors under s 136, and an additional mandatory requirement for World Heritage Convention matters under s 137.

14. Section 136 relevantly provides:

> *Subdivision B- Considerations for approvals and conditions*
>
> **General considerations**
>
> Mandatory considerations
>
> (1) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must consider the following, so far as they are not inconsistent with any other requirement of this Subdivision:
>
> (a) matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action;
>
> (b) economic and social matters.
>
> Factors to be taken into account
>
> (2) In considering those matters, the Minister must take into account:

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23 Reasons at [8].

24 See also *Tarkine* at [5].

(a) the principles of ecologically sustainable development; and

(b) the assessment report (if any) relating to the action; and

…

(e) any other information the Minister has on the relevant impacts of the action (including information in a report on the impacts of actions taken under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under Part 10 (about strategic assessments)); and

(f) any relevant comments given to the Minister in accordance with an invitation under section 131 or 131A; and

(fa) any relevant advice obtained by the Minister from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development in accordance with section 131AB; and

(g) if a notice relating to the action was given to the Minister under subsection 132A(3)--the information in the notice.

….

Minister not to consider other matters

(5) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must not consider any matters that the Minister is not required or permitted by this Division to consider.

15. The reference to *"relevant impacts"* in s 136(2)(e) is to be understood by reference to ss 82 and 527E of the EPBC Act, which respectively provide:

Section 82

If the Minister has decided under Division 2 of Part 7 that an action is a controlled action, the relevant impacts of the action are the impacts that the action:

(a) has or will have; or

(b) is likely to have;

on the matter protected by each provision of Part 3 that the Minister has decided under that Division is a controlling provision for the action.

Section 527E

(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.

16. Section 137 deals with specific requirements for approving actions with potential impacts on environmental matters covered by the World Heritage Convention. It provides:

> In deciding whether or not to approve, for the purposes of section 12 or 15A, the taking of an action and what conditions to attach to such an approval, the Minister must not act inconsistently with:
>
> (a) Australia's obligations under the World Heritage Convention; or
>
> (b) the Australian World Heritage management principles; or
>
> (c) a plan that has been prepared for the management of a declared World Heritage property under section 316 or as described in section 321.

17. Section 391 deals with the precautionary principle. It provides:

Taking account of precautionary principle

> (1) The Minister must take account of the precautionary principle in making a decision listed in the table in subsection (3), to the extent he or she can do so consistently with the other provisions of this Act.
>
> *Precautionary principle*
>
> (2) The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

18. The Minister specifically makes reference to this provision and states that he took it into account, in paragraph [163] of the Reasons. This is restated in paragraph [191] of the Reasons.

19. The Full Federal Court recently considered the legal constraints on the Minister in approving a controlled action under the EPBC Act in some detail in *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254. Jessup J wrote the primary judgment, which was concurred in by Kenny and Middleton JJ.

20. Jessup J explained the general operation of s 136 as follows: (emphasis added):

> [25] …I would make four observations about the structure and content of [section 136 of the EPBC Act]. First, subss (1) and (2) made a distinction between the matters that the Minister "must consider" (subs (1)) and the things that the Minister "must take into account" in considering those matters (subs (2)). The purpose of subs (1), as it seems to me, was to mark out the broad categories of consideration to which the Minister was required to turn his mind, and specifically to require consideration not only of the matters protected by Pt 3 of the EPBC Act but also of matters that, otherwise, appear to be of no concern under that Act, namely, "economic and social matters". Neither para (a) nor para (b) of s 136(1) dealt, at the level of detail, with particular matters that required consideration. For example, what, if any, particular "social matter" might have required consideration in a proposal that came before the Minister was, it seems, a matter for the Minister.
>
> [26] Secondly, the expression "matters relevant" in s 136(1) was not defined in the EPBC Act. By contrast, the expression "relevant impacts", used in s 136(2)(e), was defined and gave content, at the level of detail, to the Minister's obligation to take things into account. I shall return to this definition below.
>
> [27] Thirdly, while the range of things that the Minister was to take into account under subs (2) was extensive, with the exception of those referred to in paras (a) and (e), each was a concrete document or some similar existing artefact. In effect, what the Minister had to take into account were the contents of those documents or artefacts. This approach to regulation is to be contrasted with a situation in which the things to be taken into account were identified by description, or generically, such as, for example, where a decision-maker was required to take account of the condition of the habitat of a particular species. Subject to the exceptions

> mentioned, the scheme of s 136 was one in which it was assumed that specific subjects of this and similar kinds were already dealt with in the documents or artefacts referred to. The role of the Minister was to take into account the things that were before him in this way, rather than being either obliged or entitled to undertake additional research or investigations.
>
> [28] Fourthly, the terms of s 136(5) should be noted. While they require no further explanation, they confirm the impression that Subdiv B established a closed system of the matters that the Minister was to consider in making his decision, and the things that should be taken into account.

21. His Honour then drew attention to the fact that s 136(2)(e) required consideration of *"any other information which the Minister has on relevant impacts"* and noted that the term *"relevant impacts"* was defined in s 82, and the term *"impact"* was defined in s 527E, his Honour then said:

> Reading ss 82(1) and 527E into s 136(2)(e), the Minister was required to take into account any other information that he had on the consequences that the proposal would have, or was likely to have, on the matter protected by each provision which was a controlling provision in relation to the proposal, being consequences that were either direct in relation to that matter or, if indirect, were substantially causative in relation thereto.

22. His Honour later concluded, in relation to the operation of this section as follows at [53] (emphasis added):

> …For reasons I have given earlier, under s 136(2)(e), the question would be whether the Minister was possessed of information that showed that the [particular matters] would contribute, or were likely to contribute, to the consequences that the proposal would have, or was likely to have, on the matter protected by each provision which was a controlling provision in relation to the proposal. In the present case, the Minister did, it seems, have a copy of the DPEMP, but whether that contained information which answered the statutory description was, in my view, a question for the Minister to decide. Only if that question were answered in the affirmative would the Minister have then come under an obligation to take account of the consequences referred to.

23. Finally, in relation to the *"mandatory considerations"* in s 136(1), Jessup J went on to say at [45] (emphasis added):

> With respect to s 136(1)(a), the primary judge referred to, and adopted, what had been said by North J in *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* (2008) 167 FCR 463 at [115]:
>
> > Section 136(1)(a) left it to the Minister to decide what were the matters relevant to the protected matters which he should take into account. The section does not suggest that

> there was a defined set of specific matters to be taken into account such as might be intended if the section had referred to "all matters relevant" or "the matters relevant".
>
> While I would not dissent from anything here said by North J (although, with respect, I would not tie myself to the proposition that some difference might have been made by the use of the definite article), it will be apparent that I would, for my own part, take a more direct, and less contestable, route to the conclusion that s 136(1)(a) could not be used as a means to make the Minister's choice of subject matter justiciable in a court. I do not regard this provision as the source of any obligation to take particular matters into account, in point of detail. So long as the Minister, in making his or her approval decision, proceeded by reference to the categories in s 136(1), the decision could not be assailed on the ground that some particular matter, falling within either para (a) or para (b), had not been considered. The particular matters that had to be taken into account were the concern of subs (2).

The Reasons

24. The Minister's reasons for his decision under s 133 of the EPBC Act appear at exhibit KO-2 to the affidavit of Ms O'Shannassy. They run to 37 pages and cover a wide variety of topics. Relevantly, the Reasons:

a. At paragraph [21] note that except where discussed in the Reasons, the Minister has accepted the Coordinator-General's Report in relation to relevant impacts.

b. At paragraph [31], identify that the Minister's decision is based on consideration of a final approval decision brief (referred to below).

c. At paragraphs [33] – [56], record that the Minister considered impacts on the Great Barrier Reef. At paragraph [40] the Minister indicated that his detailed consideration of greenhouse gas issues relating to the Great Barrier Reef appears later in the Reasons at paragraphs [131] – [141].

d. At paragraphs [31] – [32], [47] – [48], identify that in making his decision the Minister considered the full range of information before him, considered the greenhouse gas emissions (including those from burning the coal overseas), and was satisfied that the project would not have an unacceptable impact on the world heritage values of the Great Barrier Reef. Similar conclusions by the Minister in relation to the Great Barrier Reef National Heritage Place and the Great Barrier Reef Marine Park appear at paragraphs [53] and [56].

e. At paragraphs [131] – [141], considered the potential effects of greenhouse gas emissions in detail, the effect of which has been summarised in the Overview section above.

25. The ACF makes a submission that the Minister's reasons are to be interpreted by comparing them with an earlier statement of reasons the Minister had given for a previous decision which was set aside by consent[25]. No authority is cited for this proposition and it is submitted that it should be rejected. Adani objects to the admission of the earlier reasons as irrelevant. The earlier reasons relate to a different decision, made on the basis of different information[26], at a different time. The Reasons for the Minister's decision the subject of this application are to be construed by reading them as a whole[27], not by extracting paragraphs and attempting a comparison with an earlier document.

26. It is also submitted by the ACF that the Reasons should be construed with *"considerable care, and without significant hesitation about the degree of scrutiny to be applied to them"*.[28] It may be accepted that greater leeway is accorded to the reasons of a delegate in a routine manner than those provided by a Minister in an important case. But that does not mean that the Reasons should be read as a statute, or *"with an eye keenly attuned to the perception of error"*.[29] Nor does it provide any basis to depart from the fundamental proposition that the Reasons should be read as a whole. Regardless of the precise degree of latitude to be given to the particular phrasing adopted in the reasons, the Court must *"beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the*

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25 ACF's submissions at [46] – [47].

26 For example, ACF's submissions at [8] state that the Minister *"accepted and applied"* the approach in the Coordinator General's Report of expressly not considering combustion emissions. In fact, the Minister correctly limited his consideration to the material before him at the time.

27 Compare *McAuliffe v Secretary Department of Social Security* (1992) 28 ALD 609 at 616, cited with approval by the High Court in *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at [272] (footnote 38).

28 ACF's submissions at [28].

29 Per Sackville J in *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 69 FCR 28 at 57G – 58D – a case which involved reasons provided by a Minister in comparable circumstances.

merits of the decision": *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at 272[30].

27. The Reasons must of course also be read together with materials the Minister evidently relied on.

28. ***First,*** the Minister relied on and took into account a list of legislative extracts which appears at Annexure A to the reasons[31]. This extract included ss 133 (grant of approval), 136 (general consideration), 137 (requirements for decisions about World Heritage), 391 (precautionary principle) and 527E (meaning of impact) of the EPBC Act.

29. ***Secondly,*** the Minister relied on the final decision brief which appears at document-002 to exhibit DK-1 to the affidavit of Mr Knudsen affirmed 10 December 2015. This brief is signed by the Minister and confirms that he had considered various information and matters before reaching his decision. In particular, he had considered the *"proposed decision brief"* at Attachment A[32], including:

    a. The information in the legal considerations report (which was Attachment B to that proposed decision brief)[33]. The legal considerations report (**LCR**):

        i. set out the mandatory considerations the Minister had to take into account under s 136(1) of the EPBC Act (LCR, p 1 of 28);

        ii. identified information relating to potential impacts of combustion emissions on the Great Barrier Reef (LCR, pp 3, 7 and 11-13 of 28);

        iii. set out the other factors the Minister had to take into account under s 136(2) of the EPBC Act (LCR, p 13 of 28);

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30 See also *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [8]
31 Exhibit KO-2 at pp 71 – 142, Reasons at [31] – [32], Annexure A.
32 Exhibit DK-1, this is the document identified in Row 2 of exhibit DK-2.
33 Exhibit DK-1, this is the document identified in Row 5 of exhibit DK-2.

iv. specifically identified the precautionary principle and the need to take it into account (LCR, p 14 of 28);

v. identified that under s 137 of the EPBC Act, the Minister was required not to act inconsistently with the relation to World Heritage Convention in his decision about whether to approve the project (Attachment B, p 16 – 17 of 28);

vi. identified that in deciding whether or not to approve the project, the Minister was not permitted to consider any matters outside of Subdivision B of Part 9 of the EPBC Act (LCR, p 26 of 28);

b. the information in Attachment M to the proposed decision brief[34], which itself contained a series of detailed documents relating to climate change including a joint expert report placed before the Land Court of Queensland[35], which is referred to in paragraph [136] of the Reasons[36]. At paragraph [12] the Joint Expert Report stated[37]:

> When carrying out an assessment of the extent that the Mine causes additional cumulative emissions, the Mine cannot be viewed in isolation, but should be seen in terms of the change in global net emissions. The fundamental question that must be answered is to what extent a project or policy will result in a change in global emissions. There is a net change to global emissions to the extent emissions associated with the Mine are not offset by a reduction in emissions elsewhere, or to the extent that they would otherwise occur even if the Mine were not approved. All Emissions from the burning of product coal from this Mine will have a climate impact in the physical cause-effect sense. If those climate impacts are additional to what would have occurred in the absence of the Mine's approval depends on the extent the Mine increases global coal consumption…

30. It is not suggested that there is a proper basis to go behind the Minister's statement that he took these matters into account.

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34 Exhibit DK-1, these are the document identified in Rows 93 – 266 of exhibit DK-2.
35 See exhibit DK-2 at rows 164 – 171.
36 See exhibit DK-2 at row 164.
37 There was a real issue in the Land Court about whether even if the mine were approved it would make any net contribution to global greenhouse gas levels: see expert report of Jon Stanford at pp 3 – 6, which was before the Minister: see exhibit DK-2 at row 194 (Attachment M1 to proposal approval decision brief).

31. In summary then, the Minister, in relation to the topic of combustion emissions:

a. took into account the relevant statutory provisions and the constraints they imposed on his decision making;

b. considered the factual information before him which was relevant to his decision;

c. analysed the factual information to come to conclusions about the potential impacts of combustion emissions on the Great Barrier Reef;

d. concluded on the material before him that any potential impacts were indirect[38] and speculative[39], such that there was real difficulty in identifying an actual relationship between the project and an impact on the Great Barrier Reef;

e. concluded (even though no relevant impacts were found) that direct and indirect greenhouse gas emissions resulting from the project will be managed and mitigated through National and international emissions control frameworks operating in Australia and in countries where the coal will be burned[40];

f. concluded on that basis that the project would not have an unacceptable impact on the Great Barrier Reef[41].

32. This was a thorough and unremarkable decision-making process which reveals no error of law.

ACF's submissions

The preamble

33. In paragraphs [29] to [47] of its submissions, the ACF deals at some length with processes which occurred before and separately to the Minister's decision, including the terms of reference for the EIS, the Coordinator-General's Report and the Land Court's approach.

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38 Reasons at [138].
39 Reasons at [140].
40 Reasons at [141].
41 Reasons at [48], [53], [56].

34. It is common ground that the EIS and Coordinator-General's Report did not consider combustion emissions and that decisions of the Land Court have considered the extent to which these emissions are relevant to its task under the applicable Queensland legislation.

35. It also seems to be common ground that none of that background particularly affects the issue before this Court, which turns on the provisions of the EPBC Act, the Minister's decision and the reasons for it – not on what other bodies have done or are required to do under different regimes. However, for the sake of completeness, there is no occasion for this Court to speculate or reach conclusions about the Coordinator-General as is done in paragraphs [39] and [45] of ACF's submissions. Nor is there any occasion for the Court to consider the decisions of the Land Court. There is no ground of review based upon the assessment process leading to the Coordinator-General's report or based upon the Land Court decisions.

Ground 2

36. Ground 2 of the amended originating application is in the following terms:

> The Minister made an error of law by:
>
> a. characterising emissions from transport by rail, shipping and combustion of the product coal overseas as "not a direct consequence of the proposed action", without applying the test in section 527E of the EPBC Act.
>
> b. failing to comply with the requirement in s 136(2)(e) of the EPBC Act in respect of the information about these emissions.

37. Ground 2(a) involves a contention that the Minister erred in law in characterising combustion emissions as an indirect consequence of the project. Ground 2(b) is a failure to consider ground.

38. In Adani's submission, the ACF's submissions on this ground:

    a. misunderstand the conclusion which the Minister reached in his Reasons;

b. ultimately descend into an attempt to review the merits of the conclusions the Minister reached in relation to combustion emissions.

39. The ACF submits that the Minister failed to ask himself whether the consequences of the combustion emissions on the Great Barrier Reef were *"relevant impacts"* within the meaning of ss 82 and 527E of the EPBC Act or *"impacts"* at all: see ACF's submissions at [10] – [11], [48]. It submits that the Minister applied a range of criteria not sourced in the EPBC Act and *"effectively dismissed from further consideration the consequences of the action ... and information about those consequences"*[42].

40. In fact, the matters the subject of ss 82 and 527E of the EPBC Act are precisely the matters the Minister addressed in paragraphs [138] – [140] of his reasons and the Minister's analysis is in accordance with those provisions.

41. In summary, the Minister concluded that combustion emissions are *"not a direct consequence of"* the project, that the future extent of climate change is itself uncertain, that determining actual (as opposed to possible) net emissions was *"speculative at this stage"* and that it was therefore *"not possible to draw robust conclusions on the likely contribution of the project to a specific increase in global temperature"*. These are conclusions of fact about the directness or indirectness of any potential impacts and about the actual likelihood of any potential impacts. They are conclusions to the effect that any potential impacts are indirect and that it is speculative and not possible to conclude there will in fact be any relevant impacts, or to identify the extent of any relevant impacts. Therefore, unlike aspects of the ACF submissions which assume that combustion emissions will have relevant impacts and that the extent of those impacts can be assessed[43], the Minister correctly addressed those anterior questions.

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42 ACF's submissions at [11], [53]. The contention in [53] – [54] of ACF's submissions that some inference is to be drawn from the *"differential treatment"* of combustion emissions and other matters cannot be sustained. The imposition of mitigation measures in respect of scope 2 emissions reflects the conclusion that combustion emissions are a matter to be mitigated and managed through other measures. It is similarly wrong to say that the Minister concluded that *"he did not need to quantify"* the impacts of combustion emissions. He made no finding to that effect. The Reasons reflect an attempt to find whether there will be relevant impacts rather than any view that there is *"no need"* to quantify found impacts.

43 ACF's submissions at [2], [9] – [11], [48], [57] – [62], [69].

Section 527E

42. Section 527E identifies that impacts may be either direct or indirect. Section 527E(2) provides some guidance as to what may be considered an indirect impact in contemplating that a secondary action by a secondary person may be indirect if not directed or requested by the primary person.

43. In paragraphs [131], [138] and [140] the Minister concluded that:

    a. the potential impacts on the Great Barrier Reef are rises in sea temperatures and ocean acidification;

    b. these potential impacts result from climate change;

    c. the extent of climate change (and the impacts of it) depend on how greenhouse gas emissions are dealt with globally;

    d. the potential impacts of the project are through any contributions to climate change (and the impacts of it) resulting from combustion emissions, which are themselves *"not a direct consequence of the proposed action"*.

44. The Minister's conclusion that combustion emissions are not a direct consequence of the project was a conclusion about the mechanism for potential impacts, being any contribution combustion emissions might make to climate change and its impacts on the Great Barrier Reef. The conclusion that combustion emissions were themselves not a direct consequence of the project necessarily logically leads to the conclusion that any contribution combustion emissions might make to climate change and its impacts on the Great Barrier Reef are themselves not a direct consequence of the project. A conclusion to the effect that any potential impacts will be indirect does not involve any misapplication of s 527E[44]. A conclusion to the effect that combustion emissions and any potential impacts of them are (at most) indirect consequences of the project is

[44] Indeed, ACF accepts that any impacts from combustion emissions are indirect: ACF's submissions at [58].

consistent with the distinction drawn in that provision. No error of law is demonstrated by the Minister's conclusion about these matters.

Section 82

45. Section 82 identifies that *"relevant impacts"* (to which s 136(2)(e) of the EPBC Act refers) are impacts (under s 527E) which meet a threshold of probability. That is, they are impacts that the action *"will have"* or *"is likely to have"*. The Minister addresses the question of probability of impacts in paragraph [140] of his Reasons and concludes that:

    a. the actual net combustion emissions from the project are *"speculative"*;

    b. it is not therefore possible to reach a robust conclusion about the likely contribution of the project to a specific increase in global temperature;

    c. it is difficult to identify the necessary relationship between the taking of the action and the impacts which may result from increased global temperatures.

46. The Minister did not conclude on the material before him that the project will have or is likely to have an (indirect) impact on the Great Barrier Reef because of the many variables and uncertainties inherent in such a conclusion. That is a reasoning process consistent with the observations by Dowsett J in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 210 at [57] and [72]. Contrary to the submission by the ACF that the Minister's approach was based on the use of *"a range of criteria from outside the EBPC Act"*, it was in fact based on the very concepts provided for under ss 82 and 527E[45].

Other submissions by the ACF in support of Ground 2

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[45] ACF's submissions at [63] – [64] state that the Minister's conclusion was *"seemingly informed by questions of responsibility for global emissions"*. The Minister referred to how emissions were being addressed nationally and internationally leading to his conclusion that *"greenhouse gas emissions associated with the project will be managed and mitigated through national and international emission control frameworks"*: Reasons at [137] – [138], [141]. Nowhere does he conflate questions of impact and legal responsibility.

47. The ACF makes submissions in paragraphs [61] to [63] which, in Adani's submission, amount to an invitation to this Court to review merits of the Minister's decision on the likelihood of the project having indirect impacts on the Great Barrier Reef. For example, the ACF wishes to say the Minister should have put more weight on a particular passage from the joint expert report in the Land Court[46]. This is not a proper basis for this Court to set aside the decision on a judicial review application.

48. The ACF also criticises the Minister for maintaining the distinction between *"mining emissions (scope 1 and 2 emissions)"* and combustion emissions[47]. But the use of this distinction involved no error of law. It was a reasonable analytical approach to a consideration of the directness of potential impacts based on the way in which the information before the Minister was presented.

49. At paragraph [68] of its submissions, the ACF makes a general submission to the effect that the Minister took into account a range of factors which he should only have considered after other information was taken into account, with the result that the Minister did not attach any conditions to mitigate or offset impacts. No particular error of law is identified here, but in any case:

    a. the submissions seems to presuppose that the Minister made or should have made a finding that there will be or is likely to be an impact – but the Minister did not make such a finding, and the merits of that conclusion are not subject to review;

    b. the submissions seems to presuppose that the Minister is required to adopt a staged approach involving (amongst other things) the assessment of relevant impacts followed by a consideration of other relevant matters followed by a consideration of conditions[48] – but nothing in the EPBC Act dictates that;

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46 ACF's Submissions at [61]. At various points the ACF's submissions make reference to material in relation to combustion emissions before the Minister as though it clearly demonstrated relevant impacts (or threats of relevant impacts) to the Great Barrier Reef: see, for example, ACF's submissions at [9], [43], [75], [81.1], [110]. In fact there was a significant contest in the issue of impacts: expert report of Jon Stanford at pp 3 – 6, which was before the Minister: see exhibit DK-2 at row 194 (Attachment M1 to proposal approval decision brief); *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48 at [420]-[457]. But that is irrelevant, as the weight to be given to the material was a matter for the Minister to decide.

47 ACF's submissions at [65] – [66].

48 See ACF's submissions at [17.6] – [17.7], [69].

c. as discussed below in relation to the precautionary principle, the Minister in fact considered what response was appropriate in light of the uncertainties which he had identified, and considered that certain measures were appropriate to address that uncertainty.

50. At paragraph [69] of its submissions, the ACF fails to grapple with the Minister's conclusion. There was no *"failure"* to treat the effect on the Great Barrier Reef as a *"relevant impact"*. The Minister concluded that no robust conclusion could be reached as to the likely existence or extent of impacts on the Great Barrier Reef in consequence of combustion emissions. The submission assumes a conclusion that there will be a *"relevant impact"* when that was not the Minister's conclusion.

51. Finally, there is no legal error arising simply because of the structure of the Reasons[49]. It is true that the impacts generally on the Great Barrier Reef are dealt with earlier in the Reasons, and the specific topic of emissions are dealt with later. But this is clearly stated by the Minister: see Reasons at [40]. The Reasons must be read as a whole[50]. When this is done, the Minister's ultimate conclusions at paragraphs [48], [53] and [56] are plainly informed by the discussion of emissions which appears in paragraphs [131] – [141]. It is unpersuasive to take specific paragraphs of the Reasons from their context, and read them in isolation as evidencing a failure to consider a matter which is in fact considered in the Reasons.

Ground 3

52. Ground 3 of the amended originating application is in the following terms:

> Having found in relation to climate change that "it is difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant matters of national environmental significance" the Respondent made an error of law in failing to consider or apply the precautionary principle to that conclusion as he was required to do by section 136(2)(a) and section 391 of the EPBC Act.

53. It is uncontroversial that the Minister was required to take into account the *"precautionary principle"* as a consideration in approving the project under s 133 of

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49 See ACF's submissions at [70].

50 Compare *McAuliffe v Secretary Department of Social Security* (1992) 28 ALD 609 at 616, cited with approval by the High Court in *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at 272 (footnote 38).

the EPBC Act. Under s 136(2)(a) of the EPBC Act the Minister must take into account the *"principles of ecologically sustainable development"* which are set out in s 3A of the Act and which include, at s 3A(b), that:

> 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.

54. The Minister was required to take account of same principle by virtue of s 391 of the EPBC Act set out above.

55. There are two preconditions to the application of the precautionary principle:

    a. ***First***, the existence of a threat of serious or irreversible environmental damage: *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510 at 521.

    b. ***Secondly***, the existence of scientific uncertainty.

56. Where engaged, the principle:

    a. suggests that the lack of certainty should not be used as a reason for postponing measures to prevent environmental degradation;

    b. does not operate to require automatically that all necessary, or any particular, measures be taken to avert the anticipated threat.

57. The approach to the application of the principle must be balanced, recognising that the anticipated threat is just one matter to be weighed in the balance and may be outweighed by other matters: see, e.g., *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd* (1994) 86 LGERA 143 at 154.

58. Further, any particular measure imposed in response to the anticipated threat must embrace the concept of proportionality and take into account considerations of practicality: *Telstra v Hornsby Shire Council* (2006) 67 NSWLR 256 at [166]-[171].

59. In this case the Minister:

a. specifically stated that he considered the precautionary principle[51] and general stated he took into consideration the material referred to above which identified the need for him to take into account the precautionary principle[52];

b. in fact considered and applied the precautionary principle in relation to emissions in paragraph [141] of the Reasons, where he said:

> I found that direct and consequential greenhouse gas emissions associated with the project will be managed and mitigated through national and international emissions control frameworks operating in Australia and within countries that are the import market for coal from the project.

60. That is, having been unable to reach a conclusion that combustion emissions will give rise to relevant impacts, but that this was potentially an area of scientific uncertainty, the Minister considered that uncertainty and was addressed by national and international emissions control frameworks. There is no reviewable error of law in that reasoning process or conclusion.

61. The ACF's submissions do not have regard to paragraphs [141] and [191] of the Reasons but focus instead on paragraph [164]. The Minister does consider the precautionary principle generally in paragraphs [163] – [165], but the Reasons note at paragraph [40] that the specific discussion in relation to greenhouse gas emissions is contained in paragraphs [131] – [141]. It is therefore incorrect to conclude, as ACF contends, that paragraph [164] indicates that the Minister confined his consideration of the precautionary principle to the Coordinator-General's Report. A fair reading of paragraph [164] is that the Minister was there adopting the conclusions of the Coordinator-General's Report in relation to the matters which it addressed. As paragraph [141] of the Reasons makes plain, that adopting did not involve a limitation to his consideration of the precautionary principle.

Ground 1

62. Ground 1 of the amended originating application is in the following terms:

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51 Reasons at [163], [191].
52 Reasons at [31], [47], Annexure A.

The Respondent made an error of law in failing to apply the statutory command in section 137 of the EPBC Act to his consideration of the effect of emissions from transport by rail, shipping and combustion of the product coal overseas on the World Heritage Values of the Great Barrier Reef World Heritage Area, that is the command to not act inconsistently with:

a. Australia's obligations under the World Heritage Convention, in particular Australia's obligation in Article 4 to do "all it can to the utmost of its resources" to identify, protect, conserve, present, and transmit to future generations the outstanding universal value of the Great Barrier Reef World Heritage Area; and

b. The World Heritage Management Principles, in particular that the identification, protection, conservation, presentation and transmission to future generations must be the "primary purpose" of the management of the Great Barrier Reef World Heritage Area.

63. The Minister, on the face of the Reasons:

a. identified the Great Barrier Reef World Heritage Area was inscribed on the World Heritage List: Reasons at [33];

b. noted in that context that concerns about the potential impacts on the Great Barrier Reef of greenhouse gas emissions were considered at paragraphs [131] – [141]: Reasons at [40];

c. in addressing combustion emissions did not conclude that there were any relevant impacts but nonetheless concluded that the direct and indirect greenhouse gas emissions associated with the project will be managed and mitigated through national and international emissions control frameworks[53], and that in those circumstances the project will not have an unacceptable impact on the world heritage values of the Great Barrier Reef: Reasons at [48], [53], [56] and [141].

d. later in his Reasons specifically identified the constraint imposed on him by s 137 of the EPBC Act – that he was not permitted to act inconsistently with Australia's obligations under the World Heritage Convention: Reasons at [168];

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[53] The Minister was not limited to taking account of protective arrangements under Commonwealth law only: *Friends of Hinchinbrook Society Inc v Minister for Environment (No 2)* (1997) 69 FCR 28 at 62.

e. ultimately concluded that the approval of the project (on conditions) was not inconsistent with the World Heritage Convention: Reasons at [171].

64. The obligations imposed by the World Heritage Convention are expressed in general terms and leave an element of discretion and value judgment for domestic decision makers: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 143 (Mason J) and 225 (Brennan J); *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289-290 (Mason CJ and Brennan J); *Friends of Hinchinbrook Society Inc v Minister for Environment (No 2)* (1997) 69 FCR 28 at 62.

65. That is, the Minister did that which the ACF submits, in paragraph [107] of its submissions, he was required to do – he determined whether approving the project was consistent with Australia's obligations under the World Heritage Convention.

66. Despite this, the ACF attacks the Minister decision in three ways:

a. ***First***, the ACF contends that because of the specific wording used in the Reasons, it should be concluded that in applying s 137 of the EPBC Act, the Minister failed to *"turn his mind to the most serious threat the mine poses to the World Heritage value of the Reef"* (combustion emissions) and this involved legal error: ACF's submissions at [112] – [113].

b. ***Secondly***, the ACF says that the Minister's conclusion that the project was not inconsistent with Australia's obligations under the World Heritage Convention was logically irreconcilable with his conclusion about the potential impacts of combustion emissions associated with the project on the Great Barrier Reef: ACF submissions at [114] – [115]. This appears to involve a contention of irrationality or unreasonableness[54].

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[54] As to which see *Friends of Hinchinbrook Society Inc v Minister for Environment (No 2)* (1997) 69 FCR 28 at 59 – 65 and more recently the reasons of Allsop CJ in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [10] – [13], [21] – [22].

c. ***Thirdly***, the ACF says that the *"reasoning"* of the Minister (rather than the decision or the project) was contrary to Australia's obligations under the World Heritage Convention: ACF's submissions at [116].

The ACF's first argument

67. In making this submission the ACF does not to read the Reasons as whole.

68. In paragraph [171] the Minister concluded that:

> I was therefore satisfied that the granting of approval for the proposed action, and the conditions of that approval, are not inconsistent with Australia's obligations under the World Heritage Convention [or] the Australian World Heritage management principles…

69. The preceding paragraph of the Reasons, paragraph [170], refers to the EIS process and mitigation measures proposed in consequence of it, but does not explicitly refer back to the conclusions about combustion emissions at paragraphs [48], [53], [56] and [141]. This leads the ACF to submit (in effect) that the word *"therefore"* at the start of paragraph [171] must be read as indicating that in forming the conclusion expressed in paragraph [170]:

a. the Minister relied *"entirely"* on the matter set out in paragraph [170] (i.e. the EIS process which did not included a consideration of combustion emissions), and

b. had no regard to any of the other matters set out in his Reasons, including his conclusions about combustion emissions and their potential impact on the Great Barrier Reef[55].

70. This submission should not be accepted for two reasons.

71. ***First***, it imposes an artificial construct on the decision making process. The Minister's decision under review is a single decision made under s 133 of the EPBC Act for which he has given a single statement of Reasons. But the ACF's approach requires an assumption the Minister bifurcated his thinking process so that although, in making his overall decision under s 133, he evidently had regard to the matters set out in

[55] ACF's submissions at [112].

paragraphs [131] – [141] of the Reasons, he quarantined those matters and put them out of his mind for the purposes of reaching his conclusion in paragraph [171]. The Court would not ordinarily make that assumption about an administrative decision maker and even the ACF's further submission in paragraphs [114] – [115] presuppose that the Minister's earlier consideration of greenhouse gas issues informed the way in which he dealt with the requirements of s 137.

72. ***Secondly***, the submission depends on an overly narrow and unforgiving approach to reading the Reasons. It is ultimately a submission that the Minister's decision is invalided because of one word in Reasons running to 193 paragraphs[56]. To read paragraph [171] as the ACF contends is an extreme example of construing the Reasons *"with an eye keenly attuned to the perception of error"*[57].

73. When the Reasons are read as a whole, the conclusion about the World Heritage Convention in paragraph [171] is more naturally understood as being based not only on the matters specifically set out in paragraph [170], but on the Minister's earlier conclusions that:

    a. the direct and consequential greenhouse gas emissions associated with the project will be managed and mitigated through national and international emissions control frameworks operating in Australia and within countries that are the import market for coal from the project: Reasons at [141].

    b. after giving consideration to the greenhouse gas emissions from mining operations and from the burning of mined coal, the project will not have an unacceptable impact on the world heritage values of the Great Barrier Reef: Reasons at [48], [53] and [56].

74. Further, this is a sterile point because, even if it be assumed that the Minister did not consider combustion emissions when considering s 137 of the EPBC Act, it is unreal to suggest that his decision would have been different if did take them into account. The

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[56] If the word "therefore" did not appear in paragraph [171], the ACF's submission would not be open.

[57] Per Sackville J in *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 69 FCR 28 at 57G – 58D – a case which involved reasons provided by a Minister in comparable circumstances.

is because the Minister separately and explicitly concluded that even taking into account greenhouse gas emissions, the project would not have an unacceptable impact on the world heritage values of the Great Barrier Reef: Reasons at [48]. For this reason, any error was not material in the sense explained in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353 (Mason CJ), 384 (Toohey and Gaudron JJ); see also *Samad v District Court (NSW)* (2002) 209 CLR 140 at 155 (Gleeson CJ and McHugh J); *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 702.

The ACF's second argument

75. The ACF's submission at paragraphs [114] to [115] seems to involve a suggestion of irrationality or unreasonableness in the decision by the Minister, despite irrationality not having been identified as a ground of review[58].

76. In any case, the ACF's submission again isolates one aspect of the Reasons in paragraph [140] from the balance of the Minister's consideration.

77. The Minister's ultimate conclusions about combustion emissions are not in paragraph [140] of the Reasons, but are as summarised above. There is no demonstrated error of law in the Minister, having reached the above conclusions, reaching the expressed state of satisfaction under s 137 of the EPCA Act.

The ACF's third argument

78. This argument is based on a suggestion that the Minister's reasoning process was bad because he wrongly took into account that *"the refusal of the mine would not, in itself, ensure that the Great Barrier Reef is protected"*: ACF's submissions at [116].

79. The Reasons are not expressed in those terms. What the Minister relevantly concluded has already been set out above and involved no error of law.

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[58] The requirements for establishing irrationality as a ground of review were recently summarised succinctly by the Full Federal Court in *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28 at [54] – [65].

80. It was for the Minister to be satisfied under s 137 of the EPBC Act that he was not acting inconsistently with Australia's obligations. He was so satisfied.

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26 April 2016