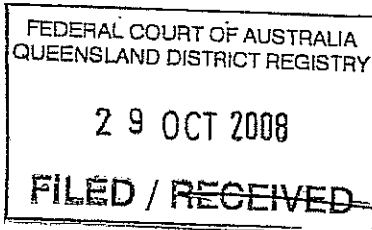


THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

No. QUD317 of 2008



WARATAH COAL INC.

Applicant

MINISTER FOR THE ENVIRONMENT HERITAGE AND
THE ARTS

Respondent

SUBMISSIONS ON BEHALF OF THE APPLICANT

Summary

1. These proceedings concern the application of the *Environmental Protection and Biodiversity Act 1999* ("the EPBC Act") to a referral by the Applicant ("Waratah") to the Respondent ("the Minister") under s.68 of the EPBC Act of action proposed to be taken by Waratah. The proposed action consists of coal mining and associated activities.
2. On 5 September 2005, the Minister purported to decide pursuant to s.74B(1) of the EPBC Act that the proposed action will have "unacceptable impacts" on matters protected by provisions in Part 3 of the EPBC Act and that Division 1 of Part 7 of the EPBC Act applies to the referral. If the Minister's decision is valid and effective, by reason of s.74B(2) of the EPBC Act, the proposed action cannot be assessed and approved under the EPBC Act. In short, in that event, it will be unlawful to take the proposed action.
3. However, the Minister's decision is not valid and effective. Division 1A of Part 7 of the EPBC Act only applies to the referral if the Minister made a decision under s.74B(1) within 20 business days of receipt of the referral. The Minister did not do that. There is no issue here that the decision was valid and effective notwithstanding that it was out of time. The necessary condition precedent to the

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impacts" on the environment due to that part of the proposed action involving Commonwealth land (protected under ss.26 and 27A of the EPBC Act) and wetlands of international importance (protected under ss.16 and 17B of the EPBC Act). The Minister decided that Division 1A of Part 7 of the EPBC Act applies to the Referral.

10. If it is valid and effective, the Minister's decision has the effect of preventing the Project from proceeding. Clearly, Waratah is aggrieved by the Minister's decision and has standing to challenge the validity and effectiveness of it.

The EPBC Act

11. As s.3 of the EPBC Act indicates, the Act has a number of objects. They include:
- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance;
 - (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources.
12. One particular means by which the EPBC Act achieves its objects is by prohibiting action which has, will have or is likely to have a significant impact on certain environmental matters, without the Minister's approval². These are referred to as controlled actions³. The protected environmental matters are set out in Part 3 of Chapter 2 of the EPBC Act and include Commonwealth land⁴ and declared wetlands⁵.
13. The EPBC Act contains provisions which enable the Minister's approval to be obtained in respect of controlled actions. These are contained in Chapter 4 of the EPBC Act.
14. Pursuant to s.68 of the EPBC Act, a person proposing to take an action which they think may be or is a controlled action must, and a person proposing to take

² Chapter 2, Parts 2 & 3 & s 67A
³ Section 67.
⁴ Sections 26-27A.
⁵ Sections 16-17B.

16. Section 77 of the EPBC provides time limits within which the Minister must notify and provide reasons with respect to a decision whether a proposed action is a controlled action.
17. Section 87 of the EPBC provides that the Minister must decide which of a number of stated assessment approaches must be used for the assessment of the relevant impacts of an action the Minister has decided is a controlled action.
18. Section 88 of the EPBC Act provides (in part):

"Timing of decision on assessment approach

Initial decision

- (1) *The Minister must decide on the approach to be used for assessment of the relevant impacts of the action within 20 business days after the Minister receives the referral of the proposal to take the action.*

Note: Section 156 sets out rules about time limits.

When initial decision must be made

- (2) *The Minister must make the decision under subsection (1) on the same day as the Minister has decided, under subsection 75(1), that the action is a controlled action, unless the Minister has requested more information under subsection 76(3) or section 89 for the purposes of deciding on the approach to be used for assessment of the relevant impacts of the action.*

19. Pursuant to s.130 of the EPBC Act the Minister must decide whether or not to approve, for the purposes of each controlling provision for a controlled action, the taking of the action. The provision establishes time limits in which the Minister must make his decision.
20. Section 156(3) of the EPBC Act provides:

"General rules about time limits

- (3) *Failure to comply with a time limit set in this Chapter does not affect the validity of:*

23. Division 1A of Part 7 of the EPBC (ss.74B-74D) was inserted by the *Environmental and Heritage Legislation Amendment Act (No.1) 2006* ("the Amending Act"). It was inserted after the enactment of ss.156(3) and 518(1).

24. The substantive provision of that Division is s.74B which provides:

"Application of this Division

- (1) *This Division applies to the referral of a proposal to take an action if, within 20 business days after the Minister receives the referral:*
- (a) *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 a provision of Part 3; and*
 - (b) *the Minister decides that this Division should apply to the referral.*
- (2) *If this Division applies to a referral, any other provisions of this Chapter that would, apart from this subsection, have applied to the referral cease to apply to the referral.*
- (3) *Subsection (2) has effect subject to paragraph 74D(6)(a)."*

25. According to s.74C, the Minister must notify his decision under s.74B(1)(b) "as soon as practicable" after making it. Amongst other things, the notice must set out the reasons for the Minister's decision.

26. The evident purpose of s.74B is to enable the Minister, in a clear case, to summarily refuse to approve a proposed action without the need for a full assessment and approval process to be undertaken. This is confirmed by the explanatory memorandum to the Amending Act which states:

"78. *This item inserts new Division 1A of Part 7 of the Act. Division 1A establishes a new process that allows the Minister to make a prompt refusal for an action that would have unacceptable impacts on a matter protected by Part 3 of the Act. This avoids the expense and time involved in conducting the full assessment and approval process under Chapter 4 for actions that would be unlikely to receive approval under Part 9 of the Act. The scope and process for making a prompt refusal is established in three new sections of the Act 74B, 74C, and 74D."*

enacted before Division 1A of Part 7, are manifestly concerned with the essential validity of decisions which there is an obligation to make; not with the timely satisfaction of conditions precedent to the operation of particular provisions.

30. Section 156(3) operates with respect to a "*failure to comply with a time limit set*" in Chapter 4 of the EPBC. The provision requires that there be a time limit set in Chapter 4 of the EPBC Act which must be complied with – otherwise there could be no relevant "*failure*"⁷. The provision is therefore apt to deal with the familiar situation in which a provision establishes both an obligation to make a decision and sets a time limit within which the decision must be made. In such a case, questions will often arise as to whether a decision made outside the relevant time limit is invalidated by the failure to comply with the time limit. Section 156(3) expressly addresses that issue by providing that the mere failure to comply with the time limit does not invalidate the decision.
31. However, s.74B(1) stands outside the operation of s.156(3) for the reasons given above. It imposes no obligation on the Minister to make a decision under that provision and it imposes no time limit on the making of that decision. For those reasons a purported decision by the Minister under s.74B(1) which is made outside the 20 business days referred to in that provision cannot be characterised as one in respect of which there has been a "*failure to comply with a time limit set*".
32. All that s.74B does is make the application of Division 1A of Part 7 of the EPBS Act (and hence the lack of operation of other provisions of Chapter 4) conditional upon a particular event. The relevant event is a decision of the Minister which satisfies s.74B(1), being a decision of a particular description which is made within 20 business days after the Minister receives the referral. If the event does not occur, Division 1A of Part 7 of the EPBC Act can never operate with respect to the referral. There is no question in those circumstances of a decision being valid or invalid if made after the 20 business days. Such a decision simply cannot operate to satisfy the condition contained in s.74B(1).

⁷

R v. Skurray (1967) 2 NSW 611 at 615-616; *Victoria v. The Commonwealth* (1975) 134 CLR 81 at 122-123, 177; *CBS Productions Pty Ltd v. O'Neill* (1985) 1 NSWLR 601 at 609

s.74B(1). The effect of such a construction is that there is no necessary requirement for the Minister to make a "*prompt*" decision under s.74B(1) and that the Minister's obligations under ss.75 and 87 would at any time be defeasible at his discretion by a decision made under s.74B(1). That could not have been intended.

36. Section 518(1) is similarly inapplicable to a decision made under s.74B(1) of the EPBC Act. That provision speaks in terms of the essential validity of an act of the Minister. It contemplates that the act is not done within the "*period required*" under the EPBA Act. It too posits a situation in which an action which is required to be done under the EPBC Act is not done within the period required by that Act. Sections 518(2) and (3) are consistent with this. The provision has no application to s.74B(1) because the latter is not concerned to require the Minister to do anything within any imposed period of time.
37. Moreover, s.518(1) only operates if the act would otherwise be invalid "*merely*" because it was not done within a "*period required*" by the EPBC Act. That is not the case in respect of a decision purportedly made under s.74B(1) more than 20 business days after the receipt of a referral. As stated above, if a decision is not made within that period the Minister has an obligation to make decisions under s.75 and 87 of the EPBC. In that event, an alternative and inconsistent procedure under the EPBC Act is automatically invoked. A continuing right to make a decision under s.74B(1) cannot co-exist with that alternative and inconsistent procedure. It therefore cannot be said that any invalidity attaching to a decision purportedly made under s.74B(1) more than 20 business days after the receipt of a referral results "*merely*" from the fact that a time limit was not complied with.
38. For these reasons, on their proper construction ss.156(3) and 518(1) have no application with respect to a decision purportedly made by the Minister under s.74B(1) more than 20 business days after the receipt of a referral. However, if it is found that ss.156(3) and 518(1) are capable of applying to such a decision, it should be concluded that s.74B(1) evinces an intention to exclude the prima facie operation of those provisions.

within the same time frame. The EPBC Act therefore mandates a further and necessarily inconsistent regime if no decision is made under s.74B(1) within 20 business days of receipt of the referral. A construction of s.74B which enables an effective decision to be made outside that time period is inconsistent with that structure and makes the regime contained in provisions such as ss.75, 87, 88 and 130 unworkable. If the Minister could reserve to himself the right to make a decision under s.74B(1) outside the 20 business days a referring party could never know with certainty what the Minister was required to do, even outside the 20 business day period.

43. Manifestly, therefore, Division 1A of Part 7 of the EPBC Act was intended to operate strictly in accordance with its terms as an anterior and alternative mechanism to the procedures and processes otherwise established by Chapter 4 of the EPBC Act. It is inconsistent with that, and with the clear terms of s.74B(1) itself, to apply ss.156(3) and 518(1) to that provision.

Relevant Consequences

44. It follows that the Minister's decision is invalid and ineffective to invoke the operation of s.74B(2) with respect to Waratah's referral. The Minister's decision, purportedly pursuant to s.74B(1), was not authorised by that provision or otherwise was the product of an error of law.
45. The necessary consequence of that is that the Minister is and was under a duty to make the decisions required by ss.75 and 87 of the EPBC Act. In failing to make those decisions the Minister has failed to comply with his statutory duties and has based himself on the erroneous legal proposition that his purported decision under s.74B(1) was valid and effective to render the other provisions of Chapter 4 of the EPBC Act inapplicable to the Referral.
46. Waratah is therefore entitled to the relief claimed in the Application.