

BETWEEN: **WILDLIFE PRESERVATION SOCIETY OF QUEENSLAND
PROSERPINE/WHITSUNDAY BRANCH INC**
Applicant

AND: **MINISTER FOR THE ENVIRONMENT AND HERITAGE**
First Respondent

AND: **BOWEN CENTRAL COAL MANAGEMENT PTY LTD**
Second Respondent

AND: **QCOAL PTY LTD**
Third Respondent

~~AMENDED~~ APPLICATION FOR AN ORDER OF REVIEW (VERSION 3)

Application for an order of review of two decisions made under section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (“EPBC Act”) by a delegate of the respondent:

1. On 6 May 2005, that the proposal by Bowen Central Coal Management Pty Ltd to construct and operate an open cut coal mine, the Isaac Plains Coal Project, northeast of Moranbah, Queensland (EPBC Referral No. 2005/2070), is not a controlled action; and
2. On 10 May 2005, that the proposal by QCoal Pty Ltd to construct and operate an open cut coal mine, the Sonoma Coal Project near Collinsville, central Queensland (EPBC Referral No. 2005/2080), is not a controlled action.

The applicant is a person who is aggrieved by the decisions, pursuant to the widened standing provided by section 487 of the EPBC Act, because –

1. The applicant is incorporated in Australia.
2. During the 2 years immediately before the decisions the applicant has engaged in a series of activities in Australia for protection or conservation of, or research into, the environment.
3. At the time of the decisions the objects or purposes of the applicant included the protection or conservation of, or research into, the environment.

~~AMENDED~~ APPLICATION FOR
AN ORDER OF REVIEW
(VERSION 3)
Filed on behalf of the applicant
Form 56, Order 54

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The grounds of the application are –

1. Under sections 5(1)(e) and 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977*, that the making of the decisions were an improper exercise of the power conferred by section 75 of the EPBC Act because the delegate failed to take a relevant consideration into account in the exercise of the power, namely, the adverse impacts the Isaac Plains Coal Project and the Sonoma Coal Project are likely to have on the matters protected by Part 3 of the EPBC Act due to the mining, transport and use of the coal from the mines emitting a large amount of greenhouse gases contributing to global warming.
2. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decisions involved an error of law, namely, the delegate misconstrued the meaning of “all adverse impacts the action is likely to have on the matter protected by each provision of Part 3”, in section 75(2) of the EPBC Act, as not including the adverse impacts the Isaac Plains Coal Project and the Sonoma Coal Project are likely to have on the matters protected by Part 3 of the EPBC Act due to the mining, transport and use of the coal from the mines emitting a large amount of greenhouse gases contributing to global warming (“**the greenhouse impacts**”).

In the alternative to grounds 1 and 2 -

3. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he failed to adopt a commonsense approach to causation of the greenhouse impacts appreciating that the purpose of the inquiry is to attribute legal responsibility for impacts to matters protected by Part 3 of the EPBC Act in light of the subject, scope and objects of the Act.
4. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he failed to treat the issue of causation, generally, and failed to construe references to “a significant impact”, in particular, in the context of the objects and purpose of the EPBC Act, including the function of Part 3 and s 75 thereof in the statutory environmental impact assessment process established by the EPBC Act.
5. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he failed to consider the greenhouse impacts operating cumulatively with other contributors to global warming.

6. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he equated a finding that such an impact was extremely small, taken on its own, with its being insignificant.
7. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he treated it as a pre-requisite for such a conclusion that the greenhouse impacts “set in train climate change processes that may have impacts on matters protected by Part 3” when such processes are already in train and capable of being contributed to by the greenhouse impacts of the projects.
8. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that, having found that the greenhouse impacts would be likely to increase the concentration of greenhouse gases in the atmosphere, he ignored that finding to conclude that there was no possibility, in reality, that any impact on climate in the vicinity of matters protected by Part 3 could ensue.
9. Under section 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977*, that the decisions involved an error of law, namely, the delegate misdirected himself in considering whether, as a result of the greenhouse impacts, either the Isaac Plains Coal Project or the Sonoma Coal Project, is likely to have a significant impact on a matter protected by Part 3 of the EPBC Act, in that he treated it as a pre-requisite for such a finding that the particular impact on matters protected by Part 3 of the EPBC Act be measurable, specifically identifiable; and demonstrable.
10. Under sections 5(1)(e) and 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977*, that the making of the decisions were an improper exercise of the power conferred by section 75 of the EPBC Act because the delegate failed to take a relevant consideration into account in the exercise of the power, namely, the delegate failed to consider that global warming is included as a key threatening process on the list established under section 183 of the EPBC Act and, thereby, the delegate failed consider the serious threat that global warming poses to the matters protected by Part 3 of the EPBC Act when assessing whether the greenhouse impacts from the mines are likely to have a significant impact on the matters protected by Part 3.
11. Under sections 5(1)(e) and 5(2)(a) of the *Administrative Decisions (Judicial Review) Act 1977*, that the making of the decisions were improper exercises of the power conferred by section 75 of the EPBC Act because the delegate took into

account an irrelevant consideration in the exercise of the power, namely, uncertainties as to the details of the manner in which the coal would be put to use in circumstances where:

- (a) the delegate was obliged to consider exercising a power to seek specified information under section 76 of the EPBC Act;
 - (b) the likely greenhouse impacts could properly be the subject of assessment under Part 8 of the EPBC Act; and
 - (c) the Minister may attach conditions to an approval of a controlled action pursuant to section 134 of the EPBC Act, including conditions requiring safeguards as to end users of exported coal using technologies that produce smaller amounts of greenhouse gases.
12. Under sections 5(1)(h) and 5(3)(a) of the *Administrative Decisions (Judicial Review) Act 1977*, there was no evidence or other material to justify making the decision, or upon which the delegate could be reasonably satisfied, that the greenhouse impacts were not likely to have a significant impact on the matters protected by Part 3 of the EPBC Act.

The applicant claims –

1. An order setting aside the decision of the delegate of the respondent, on 6 May 2005, that the proposal by Bowen Central Coal Management Pty Ltd to construct and operate an open cut coal mine, the Isaac Plains Coal Project, northeast of Moranbah, Queensland (EPBC Referral No. 2005/2070), is not a controlled action.
2. An order setting aside the decision of the delegate of the respondent, on 10 May 2005, that the proposal by QCoal Pty Ltd to construct and operate an open cut coal mine, the Sonoma Coal Project near Collinsville, central Queensland (EPBC Referral No. 2005/2080), is not a controlled action.
3. An order remitting the decisions referred to in orders 1 and 2 to the respondent (or a duly appointed delegate of the respondent) for further consideration and decision.
4. An order that the respondent pay the applicant's costs of the application.

This application was prepared by Stephen Keim SC and Chris McGrath of counsel.

Date: October 2005

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Kirsty Ruddock
Solicitor for the applicant

NOTICE OF AMENDMENT

This application was amended on October 2005 pursuant leave under O 13, r 2 of the Rules, granted on October 2005 by His Honour Justice Dowsett.