Mining and the Environment

Adani Proceedings - Full Court Appeal
Australian Conservation Foundation Inc v Minister for the Environment and Energy and Anor [2017] FCAFC 134

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Timeline of proceedings to set aside Adani Mining Pty Ltd approval under *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)

- 4 August 2015 – Katzmann J set aside 24 July 2015 approval by consent: ***Mackay Conservation Group v Commonwealth of Australia and Ors***
- 29 August 2016 - First instance Federal Court Judgment of Griffiths J dismissing application re 14 October 2015 approval: ***Australian Conservation Foundation Incorporated v Minister for the Environment and Anor*** [2016] FCA 1042
- 8 September 2016 – First instance costs Judgment: ***Australian Conservation Foundation Incorporated v Minister for the Environment (No 2)***
  - Applicant Ordered to pay 70 per cent of the Minister's costs and 40 per cent of Adani's costs.
- 25 August 2017 - Full Court Judgment dismissing appeal re 14 October 2015 approval: ***Australian Conservation Foundation Inc v Minister for the Environment and Energy and Anor*** [2017] FCAFC 134
- 15 December 2017 – Full Court costs Judgment: ***Australian Conservation Foundation Incorporated v Minister for the Environment and Energy and Anor (No 2)*** [2017] FCAFC 216
  - Appellant Ordered to pay costs of each respondent – "*As we have observed, the appeal was, in a number of respects, based on misconceptions concerning the legislation, the Minister's decision and the primary Judge's reasons*"
- Focus of this presentation is the Full Court appeal

Background to Adani *Environment Protection and Biodiversity Conservation Act 1999* approval

- Adani Mining Pty Ltd proponent of open cut and underground coal mine, 189 km rail link and associated infrastructure approximately 160 km north west of Clermont in Central Queensland
- Proposal had attracted submissions that combustion emissions from coal produced by mine would amount to 1/183 of the total global emissions if warming to be kept to 2 degrees
- November 2010 - referral to Minister to determine whether proposal was a “controlled action” under the EPBC Act
- 6 January 2011 - decision under s 75 of the EPBC Act by Minister’s delegate that the proposal was a “controlled action” for the purpose of section 75 of the EPBC Act and that various controlling provisions under Part 3 of the Act applied – proposal likely to have significant impact on a number of matters protected by Part 3
- Additional controlling provision for “water resources” added on 24 October 2013 (after those controlling provisions added to EPBC Act)

Background to Adani *Environment Protection and Biodiversity Conservation Act 1999* approval

- Section 47 assessment process applied to the proposal, rather than Part 8 assessment, in that proposal was to be assessed under bilateral agreement between Queensland and the Commonwealth. The Queensland assessment process required the proponent to prepare an EIS and that process culminated in a Report of the Queensland Coordinator General dated 7 May 2014
- 24 July 2014 – Minister purported to approve the proposal under sections 130(1) and 133 of the EPBC Act
- 4 August 2015 – Federal Court set aside the 24 July 2014 decision by consent
- 14 October 2015 – Minister again approved the proposal under section 130(1) and 133 of the EPBC Act
- Section 136 specifies matters that the Minister was required to take into account or that the Minister was precluded from taking into account. Subclause (5) precludes the Minister from taking into account matters not required or permitted to be considered by Division 1 of Part 9

Australian Conservation Foundation grounds of challenge to the 14 October 2015 approval before Griffiths J

- His Honour rejected all three grounds. Only original **Ground 2** was pursued on appeal to Full Court
- **Ground 1:** Minister made error of law in failing to comply with prohibition in section 137 of EPBC Act in that Minister's decision was alleged to be inconsistent with with the World Heritage Convention and the World Heritage Management Principles
  - Section 137 prohibition on acting inconsistently with the Convention was justiciable ([205]), but it was a matter for the Minister to form a view (lawfully) whether giving approval would create inconsistency with Australia's obligations under the convention and not a jurisdictional fact that the Court could determine for itself ([201]). The Minister did so by concluding the combustion emissions would not have an unacceptable impact on the world heritage values of the reef ([204]).
- **Ground 3:** Minister made an error of law in failing to apply the precautionary principle under ss 136(2)(a) and 391 of the EPBC Act having found that it was difficult to identify a relationship between the action and any possible impacts on relevant matters of national environmental significance (in respect of combustion emissions)
  - If there is no threat of serious or irreversible environmental damage, the precautionary principle is not triggered ([182]) and this was the case here in respect of combustion emissions because the Minister made no finding of any threat of serious or irreversible damage to the reef caused by combustion emissions: [184]

Ground 2: alleged failure to apply / comply with sections 527E and 136(2)(e) – ”impacts”

- **Ground 2:** Minister made error of law in characterising combustion emissions as not being a direct consequence of the proposed action, allegedly not applying the test for “impacts” in section 527E of the EPBC Act and allegedly failing to comply with the requirement to consider information about those emissions and their “impacts” under section 136(2)(e)
- Section 527E specifies when an event or circumstance is considered to be an “impact” of an action.
- Relevantly, an event or circumstance that is an indirect consequence of an action will be an “impact”, subject to s 527E(2) [which was not the subject of detailed analysis], only if the action is “*a substantial cause of that event or circumstance*” (s 527E(1)(b)): [29].
- Section 136(2)(e) provided that the Minister must take into account (emphasis added) “*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)*”
- Section 528 defines “relevant impacts” to have the meaning in section 82
- Under section 82 “relevant impacts” of a controlled action are the impacts that an action has or will have or is likely to have on the matter protected by each provision of Part 3 that is a controlling provision

Griffiths J Judgment on original Ground 2: alleged failure to apply / comply with sections 527E and 136(2)(e) –"impacts"

- Minister found that he could not determine the action would be a "substantial cause" of the relevant event or circumstances ([160]) - being, in respect of combustion emissions, the physical effects associated with climate change ([158]). Difficult for Minister to identify necessary relationship between taking of the action and impact on environmental matters, including the reef: 161.
- Reasons not to be reviewed with a fine toothcomb and an eye for error, nor with undue concern for loose language or unfortunate phrasing from a decision maker: ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** (1996) 185 CLR 259
- Minister was addressing section 527E, even if he did not refer to it – and implicitly applied both that section and s 82: [162] and [174].
- No error in construction of "substantial cause" apparent in reasons: [163].
- The Minister considered in any event that consequential greenhouse gas emissions would be managed and mitigated by emissions control frameworks in Australia and internationally, and there was no error in taking this into account to conclude that there was no impact on the reef: [165].
- The Minister *was* obliged to give effect to the meaning of "relevant impacts" in section 82 (a conclusion that is not obvious given that the Part 8 assessment process – in which s82 appears - does not apply here) so as to take into account information on "relevant impacts" under section 136(2)(e) – as well as giving effect to section 527E: [172]
- The Minister did in fact consider combustions emissions information and it was a matter for the Minister (not the Court as jurisdictional fact) to make relevant findings of fact including whether combustion emissions would have an "impact" on the reef: [173]-[174]

Appeal to Full Court in respect of original Ground 2

- **Appeal Ground 1:** Error to find that Statement of Reasons included determination by Minister as to whether physical effects of climate change on the Great Barrier Reef were an "impact" of the action within the meaning of section 527E of EPBC Act (should have found the Minister failed to apply section 527E).
- **Appeal Ground 2:** If contrary to Appeal Ground 1 the Minister did purport to apply section 527E, it was an error to:
  - Fail to find the Minister misdirected himself as to the correct question under subsections 82(1), 136(2)(e) and 527E of the EPBC Act; or
  - Fail to hold that it was not open to the Minister (given the facts the Minister had accepted in his Statement of Reasons) to determine that the physical effects of climate change on the Great Barrier Reef were not an "impact", within the meaning of ss 82(1) and 527E.

- Joint Judgment of Dowsett, McKerracher and Robertson JJ dismissed the grounds in one sentence:

  "[ACF] asserts that the Minister did not have regard to the definition of the term "impact" in s 527E, and so did not identify the effects of the overseas emissions as being impacts. ACF submits that the primary judge adopted an unduly generous approach to the adequacy and/or effect of the Minister's reasons. His Honour gave close consideration to decisions concerning the proper judicial approach to reasons for administrative decisions. We have previously set out his Honour's understanding of the effect of the Minister's reasons. We see no reason to conclude that his Honour in any way misconstrued them. It follows that we consider ACF's submission to be without merit." ([49])

Reasoning of Full Court

- Purpose of section 130 decision is to allow, or not to allow, an action which will, or is likely to, have a significant impact on the protected matter(s) ([50])
  - It is not to the point that there will be, or likely be, such an impact → the Court considered this appeared to be the Appellant's main concern
  - Notwithstanding that the matters relevant to the decision are prescribed, there is no particular matter of which the Minister must be satisfied (discussed further below)

Reasoning of Full Court

- The Minister is not required to make intermediate decisions concerning "impacts" or the causes of impacts ([50]).
  - When making a decision based on the considerations in section 136, the Minister is not required to decide, at that stage, whether or not a particular event or circumstance is an "impact" or "relevant impact", **save for the purpose of deciding whether s 136(2)(e) has been engaged** ([53])
  - The Minister is intended to decide whether there is material identified by section 136(2)(e) and, if so, *he must consider that material* (Id.)
  - The identification of controlling provisions and relevant impacts are primarily steps designed to provide a structure within which the *assessment* of the relevant action may be conducted. **Those concepts will generally be irrelevant to the Minister's decision pursuant to s 130.** Of course, the likely consequences of the overseas emissions *had to be* considered, but that exercise did not necessarily involve applying either s 82 or s 527E (Id.).
- The Minister in fact assumed overseas emissions were an impact ([56] and [58]), considered that national and international arrangements would manage and mitigate emissions in Australia and the overseas emissions ([51]), and considered "new" material concerning overseas emissions ([58]-[59])

"Impact" identification presumed to occur earlier than section 130 decision

- The Full Court reasoning raises a number of questions that, with respect, were not problematic in the straightforward reasoning of Griffiths J:
  - The Full Court reasoning insofar as it concerns "impact" identification appears based on the earlier reasoning (at [53]) that "*In each case, the assessment report must address the relevant impacts which are, as we have observed, impacts on the protected matters identified by the Minister pursuant to s 75*"
  - Anyone who has seen a "controlled action" decision will know that while the Minister identifies the protected matters under section 75, the Minister does not identify the "*impacts on the protected matters*" at this early stage of the process
  - Consequently, the person or entity responsible for preparing the assessment report is largely left to their own devices to determine what impacts on the protected matters will be addressed in the assessment report
  - There had been single Judge authority that the Minister is not bound by the assessment process or report when making a section 130 decision (***Tarkine National Coalition Incorporated v Minister for the Environment*** [2014] FCA 468 at [105] per Tracey J) – which, with respect, must be correct or the Minister's decision function would be subservient to the assessment function
  - If the "relevant impacts" are intended to be determined during the controlled action determination and assessment phase, as the Full Court appears to suggest, the Minister's obligation to consider "matters relevant to any protected matter" is arguably affected by the earlier impact identification process, largely carried out not by the Minister but by the person preparing the assessment

Minister's reasons identified overseas emissions as relevant but Full Court found he only had to consider whether new information was 'on the relevant impacts'

- In fact, the Report of the Queensland Coordinator General (the report arising from the assessment process in this case) did not identify scope 3 emissions as a relevant impact (it disavowed the relevance of such emissions) – it was only the Minister's reasons for the section 130 decision that did so – also apparently contradicting the reasoning that "impacts" are not usually to be identified at the section 130 decision stage
- This might be explained on the basis that the Court reasoned "impacts" could be identified at the section 130 stage for the purpose of deciding whether s 136(2)(e) has been engaged → yet at [58] the Court considered "*it was not necessary that the Minister decide whether the overseas emissions were relevant impacts. He rather had to consider whether the new information was 'on the relevant impacts' of the Proposal.*"
- Further, if "impacts" should have already been identified and the task for the Minister is to "*decide whether there is material identified by section 136(2)(e) and, if so, he must consider that material*", it is not apparent from the language in subsection 136(2)(e) why the Minister can engage in "impact identification" for the purpose of subsection 136(2)(e) but not otherwise

  → If the Minister is otherwise constrained to the impacts that have already been identified in the earlier processes, it is not apparent why section 136(2)(e) is any different, given that it would be a simple task to determine whether material the Minister has is "on the relevant impacts" or not

"Those concepts will generally be irrelevant to the Minister's decision pursuant to s 130"

- I do not expect that by finding "*Those concepts will generally be irrelevant to the Minister's decision pursuant to s 130*" ([53]) the Full Court was suggesting that the "controlling provisions and relevant impacts" are irrelevant to the Minister's section 130 decision (which the Court acknowledged would allow an action having significant impacts)
  - This finding would be, with respect, so clearly wrong that the Full Court would in future arguably not be compelled to follow it. It is the Minister's task under section 130 to decide whether the action should be permitted in the face of those controlling provisions and relevant impacts
  - If this were the intention of the Judgment, then a Minister's decision could in fact be impugned by taking account of the "controlling provisions and relevant impacts" → an irrelevant consideration
- One is left to presume that by finding "*Those concepts will generally be irrelevant to the Minister's decision pursuant to s 130*" that the Full Court meant "the identification of controlling provisions and relevant impacts" will be irrelevant at the section 130 stage
- The implications of "identification of…relevant impacts" being irrelevant at the section 130 decision stage are still extraordinary: could a Minister who purports to identify a relevant impact while granting or refusing an approval (at least for purposes other than section 136(2)(e)) that was not already identified earlier in the process be considered to have acted outside of the task required of him or her when considering an approval?
- This did not arise in the reasoning of Griffiths J at first instance

Section 82 defined "relevant impact" for section 136(2)(e), but section 82 did not need to be applied

- "*Although s 83 suggests that Pt 3 did not apply to the Proposal, the primary judge concluded that the combined effect of ss 528, 81 and 82 was that s 82 defined the term "relevant impact" for all purposes under the Conservation Act. That term is used in provisions of the Conservation Act which are presently relevant, particularly s 136(2)(e). We agree with his Honour's reasons concerning this question of construction. We do not understand that conclusion to be challenged on appeal*" ([20])
- That is, accepted that section 82 definition of "relevant impact" applied to section 136(2)(e)
- But considered that application of section 136(2)(e) "did not necessarily involve applying either s 82 or s 527E" ([53])
- Meant because relevant impacts had already been identified at earlier stage, so was a mechanical question of considering whether material held was "on" the relevant impacts

Full Court appeared to consider or assume that earlier approval was set aside by the Federal Court by consent because of failure to consider scope 3 emissions

- "*On 24 July 2014, the Minister approved the Proposal, subject to conditions. It seems that in the assessment and decision-making process, there had been no consideration of greenhouse gas emissions from the transportation and combustion, in other countries, of the coal to be produced (the overseas emissions). At some stage, the possible relevance of such matters (the new information) was drawn to the attention of the Minister. As a result, on 4 August 2015, the decision was, by consent, set aside.*" ([29])
- "*In those reasons [supporting the new decision of 14 October 2015], the Minister set out the circumstances which had led to the setting aside of the earlier decision. The primary judge summarised those circumstances as follows: [circumstances relating to 'new' information on scope 3 emissions set out]"* ([Id.])
- Nowhere did the Commonwealth publicly state in respect of the ***Mackay Conservation Group*** proceedings that scope 3 emissions played a role in it consenting to the decision being set aside (but the reasons certainly took account of these emissions in the further approval) – justification was always the failure to provide conservation advices to the Minister (see e.g. https://www.smh.com.au/business/companies/federal-court-overturns-approval-of-adani-carmichael-coal-mine-in-queensland-20150805-girtz9.html)
- Did the Federal Court simply assume this because the Minister's reasons changed to address overseas emissions? Did the Minister accept in the course of the ACF proceedings that there were additional reasons for setting aside the earlier approval?

The nature of EPBC Act section 130 approvals

- "*Curiously, ACF does not assert, as a ground of appeal, that the Minister failed to take account of relevant matters, or took into account irrelevant matters*" ([49]) → would have been misconceived for ACF to raise this as an issue, given the construction applied to section 136 by the Federal Court to date
- The Full Court's decision recognizes, however, the very reason why litigants are very unlikely to challenge whether a particular consideration was a relevant consideration: "*There are no criteria as to which the Minister must be satisfied in order to grant approval. By definition, the approval is of an action which has, will have or is likely to have a significant impact upon the protected matters identified by the controlling provisions*". This statement is, however, not necessarily correct for all s 130 approvals.
- The drafting of sections 130 and 136 of the EPBC Act means that all of the power for an approval is concentrated in the hands of the Minister and it is only in the rare cases where there is a specific consideration in a relevant provision (for example, s 139) that the Minister's power can potentially be constrained by particular considerations.
- By contrast there are a number of successful "controlled action" appeals because considerations are more specific → but can be avoided by determining that everything potentially relevant is a controlling provision → effectively renders it very difficult for successful judicial review proceedings to be brought challenging an approval

The nature of EPBC Act section 130 approvals

- Why does this arise?
  - The Minister is directed by s 136 to consider, "matters relevant to any protected matter".
  - Section 136(1)(a) is not "*a provision from which the Minister's obligation to take particular matters into account, at the level of detail, may be discerned*", with the consequence that it cannot be the "*the source of any obligation to take particular matters into account, in point of detail*": ***Tarkine National Coalition Inc v Minister for the Environment and Others*** (2015) 233 FCR 254 at [44]-[45] per Jessup J (Kenny J and Middleton J agreeing)
  - It is left to the Minister to decide "*what were the matters relevant to the protected matters which he should take into account*" ***Blue Wedges Inc v Minister for the Environment, Heritage and the Arts*** (2008) 167 FCR 463 at 490 [115] per North J
  - The Minister is also not bound to take such matters (that the Minister decides are relevant) into account "*in a particular manner and to a particular extent*": ***Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)*** [2012] FCA 403 at [83]-[84] per Besanko J

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