Climate change and mining

Overview of *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042

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Australian Conservation Foundation Incorporated v Minister for the Environment [2016] FCA 1042

- First instance Federal Court Judgment of Griffiths J - 29 August 2016
- Appeal listed before Full Court on 3 March 2017
- This presentation confined to overview of reasons of Griffiths J without commentary on ACF decision

Background to Adani *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) 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 has 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: [51]
- 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 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* (EPBC Act) 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

- 3 grounds pursued at hearing
- **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
- **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)
- **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)

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

- His Honour rejected all 3 grounds
- Considered the approach to all 3 grounds, given the reliance of the applicant on the Minister's reasons, had to be approached having regard to principles in ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** (1996) 185 CLR 259
- Effectively, 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
- Reiterated the distinction between merits review and judicial review more than once

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

- 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

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.
- 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]

Ground 3: alleged failure to apply the precautionary principle under ss 136(2)(a) and 391 of the EPBC Act in respect of combustion emissions

- Subsection 391(1) required the Minister to take account of the precautionary principle in making listed decisions (including decisions under section 133). Subsection 391(2) defines the precautionary principle in familiar terms similar to section 3A(b).
- Subsection 136(2)(a) provided that the Minister must take into account the principles of ecologically sustainable development (defined in section 3A so as to include the precautionary principle).
- If there is no threat of serious or irreversible environmental damage, the precautionary principle is not triggered ([182]), adopting ***Telstra Corporation Ltd v Hornsby Shire Council*** (2006) 67 NSWLR 256 at [137]-[138] per Preston CJ
- A necessary precondition to the operation of the precautionary principle (in respect of combustion emissions) did not arise in this case because the Minister made no finding of any threat of serious or irreversible damage to the reef caused by combustion emissions: [184].
- Section 391(1) only required the principle to be applied to the extent it could be complied consistently with the other provisions of the Act – but in the circumstances the Minister found combustion emissions were not an "impact" for the purposes of s 527E.

Ground 1: section 137 and alleged inconsistency with World Heritage Convention

- Real issue here was with protection of the Great Barrier Reef.
- Section 137 provided:

> ***137 Requirements for decisions about World Heritage***
>
> *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.*

Ground 1: section 137 and alleged inconsistency with World Heritage Convention

- Articles 4 and 5 of the World Heritage Convention provided:

Article 4

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Article 5

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

…

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage

Ground 1: section 137 and alleged inconsistency with World Heritage Convention

- Articles 4 and 5 of the World Heritage Convention imposed real obligations on Australia, but these were not absolute obligations – those articles give considerable latitude to States to decide what actions are appropriate to implement the obligations and contemplate a level of protection for world heritage that takes account of other objectives: [188] and [199]-[200].
- 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 failure to reference combustion emissions in the context of the convention did not mean those emissions were not considered in the context of inconsistency with the convention – to the contrary the Minister concluded the combustion emissions would not have an unacceptable impact on the world heritage values of the reef: [204].
- However, section 137 does create a justiciable prohibition – but there was no breach of the prohibition in this case: [205].

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