FEDERAL COURT OF AUSTRALIA

Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2) [2012] FCA 403

Citation:	Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2) [2012] FCA 403
Parties:	**KEVIN BUZZACOTT v MINISTER FOR SUSTAINABILITY, ENVIRONMENT, WATER, POPULATION AND COMMUNITIES, BHP BILLITON OLYMPIC DAM CORPORATION PTY LTD and STATE OF SOUTH AUSTRALIA**
File number:	SAD 39 of 2012
Judge:	**BESANKO J**
Date of judgment:	20 April 2012
Catchwords:	**ADMINISTRATIVE LAW** – Judicial review – s 5 of *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("ADJR Act") and s 39B of *Judiciary Act 1903* (Cth) – decision by first respondent to approve with conditions the Olympic Dam Expansion under ss 130(1) and 133 of *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act") – where conditions imposed said to leave much of proposed action to be defined by plans and studies not yet undertaken – whether result of approval uncertain and exercise of power improper, pursuant to s 5 of ADJR Act. **ADMINISTRATIVE LAW** – whether failure to take into account relevant consideration – whether failure to consider impact on environment due to aboveground storage of radioactive mine tailings – where environmental impact statement indicated material radioactive for hundreds of thousands of years – where reasons of first respondent referred to a period of ten thousand years – whether first respondent failed to consider radioactive period after ten thousand years – s 5 ADJR Act, ss 130(1), 133, 136(1)(a) of EPBC Act. **ADMINISTRATIVE LAW** – whether failure to take into account relevant consideration – whether impact on environment outside Australia due to export of uranium a relevant consideration for purposes of s 136(1)(a) of EPBC

Act – whether term "environment" includes the environment outside Australia for purposes of s 21 of EPBC Act.

ADMINISTRATIVE LAW – whether failure to take into account relevant consideration – extraction of water from Great Artesian Basin and conditions relating thereto – whether failure to take into account conditions imposed or likely to be imposed under a law of a State, as required by s 134(4)(a) of EPBC Act – where existing State conditions concerned original Olympic Dam development – whether existing State conditions a relevant consideration for purposes of approval of proposed action – where existing State conditions amended by statute nine days after decision of first respondent – whether phrase "likely to be imposed under a law of the State" refers to an existing law of the State at time of the decision, for purposes of 134(4)(a).

Held: The application must be dismissed.

Legislation:

Acts Interpretation Act 1901 (Cth) ss 2(2), 21(1)
Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 5(1), 5(2), 12
Customs (Prohibited Exports) Regulations 1958 (Cth)
Development Act 1993 (SA)
Environment and Heritage Legislation Amendment Act (No 1) 2006 (Cth)
Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 3(1), 3A, 5(2), 16, 17B, 18, 18A, 20, 20A, 21, 22, 22A, 26, 27A, 37J, 43A, 67, 67A, 68, 72(3), 75, 105, 130, 131, 133, 134, 136, 140A, 146M, 156, 156A, 156B, 305(1), 487, 527E, 523, 528
Environment Protection and Biodiversity Conservation Regulations 2000 regs 2.01, 2.02
Environment Protection (Impact Proposals) Act 1974 (Cth)
Environmental Reform (Consequential Provisions) Act 1999 (Cth)
Nuclear Non-Proliferation (Safeguards) Act 1987 (Cth)
Judiciary Act 1903 (Cth) s 39B
Roxby Downs (Indenture Ratification) Act 1982 (SA)
Roxby Downs (Indenture Ratification) (Amendment of Indenture) Amendment Act 2001 (SA)

Cases cited:

Beckwith v The Queen (1976) 135 CLR 569, cited
Blue Wedges Inc v Minister for Environment, Heritage and the Arts (2008) 167 FCR 463, cited
Craig v The State of South Australia (1995) 184 CLR 163, cited
Chu Kheng Lim v Minister for Immigration, Local

Government and Ethnic Affairs (1992) 176 CLR 1, cited
Drake-Brockman v Minister of Planning (2007) 158 LGERA 349, cited
Foster v Minister for Customs and Justice (2000) 200 CLR 442, cited
Lansen v Minister for Environment and Heritage (2008) 174 FCR 14, cited
Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts & anor (2009) 165 LGERA 203, cited
Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts & anor (2009) 178 FCR 385, cited
Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24, cited
Minister for Environment and Heritage v Queensland Conservation Council Inc (2004) 139 FCR 24, cited
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323, cited
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, cited
Pyneboard Pty Ltd & ors v Trade Practices Commission & anor (1982) 39 ALR 565, cited
Queensland Conservation Council Inc v Minister for Environment and Heritage [2003] FCA 1463, cited
Ranwick City Council v Minister for Environment (1998) 54 ALD 682, cited
Re: Coldham; ex parte Brideson (1989) 166 CLR 338, cited

Date of hearing:	3, 4 April 2012
Place:	Adelaide
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	137
Counsel for the Applicant:	Mr G Kennett SC with Mr A Stafford
Solicitor for the Applicant:	Environmental Defenders Office
Counsel for the First Respondent:	Ms S Pritchard
Solicitor for the First Respondent:	Clayton Utz

Counsel for the Second Respondent:	Mr N Williams SC with Mr S Free
Solicitor for the Second Respondent:	Ashurst
Counsel for the Third Respondent:	Mr M Hinton QC, Solicitor-General for South Australia, with Mr D O'Leary
Solicitor for the Third Respondent:	Crown Solicitor's Office (State of South Australia)

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **SAD 39 of 2012**

BETWEEN:	**KEVIN BUZZACOTT** **Applicant**
AND:	**MINISTER FOR SUSTAINABILITY, ENVIRONMENT, WATER, POPULATION AND COMMUNITIES** **First Respondent**
	BHP BILLITON OLYMPIC DAM CORPORATION PTY LTD (ACN 007 835 761) **Second Respondent**
	STATE OF SOUTH AUSTRALIA **Third Respondent**

JUDGE: **BESANKO J**

DATE OF ORDER: **20 APRIL 2012**

WHERE MADE: **ADELAIDE**

THE COURT ORDERS THAT:

1. The application be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **SAD 39 of 2012**

BETWEEN:	**KEVIN BUZZACOTT** **Applicant**
AND:	**MINISTER FOR SUSTAINABILITY, ENVIRONMENT, WATER, POPULATION AND COMMUNITIES** **First Respondent**
	BHP BILLITON OLYMPIC DAM CORPORATION PTY LTD (ACN 007 835 761) **Second Respondent**
	STATE OF SOUTH AUSTRALIA **Third Respondent**
JUDGE:	**BESANKO J**
DATE:	**20 APRIL 2012**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

INTRODUCTION

1 On 10 October 2011, the first respondent to this proceeding, the Minister for Sustainability, Environment, Water, Population and Communities ("the Minister") made a decision under sections 130(1) and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act") to approve with conditions the expansion of the Olympic Dam copper, uranium, gold and silver mine and processing plant, including all associated infrastructure in South Australia and the Northern Territory. The approval was granted to BHP Billiton Olympic Dam Corporation Pty Ltd and that company is the second respondent to the proceeding. It is a person interested in the decision and on 1 March 2012, I made an order under s 12 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("ADJR Act") that it be a party to the proceeding. The State of South Australia is the third respondent and it also is a person interested in the decision as far as the matters referred to in grounds 4 and 6 (to the extent ground 6 is made out by reference to ground 4) of the applicant's application are concerned. I made an order that it be a party to the proceeding on

13 March 2012. The applicant claimed standing to bring this proceeding by reason of s 487 of the EPBC Act. None of the respondents challenged the applicant's standing.

2 The proceeding is an application for review of the first respondent's decision under s 5 of the ADJR Act and an application for constitutional writs with respect to his decision under s 39B of the *Judiciary Act 1903* (Cth). The grounds of the application are as follows:

> 1. The Decision leaves so much of the proposal comprising the Approved Action (including the assessment of the environmental impacts of the Approved Action and the proposed measures to protect or mitigate the impact of the Approved Action on the environment) to be defined by proposed studies and plans, yet to be prepared or undertaken, that:
>
> a. pursuant to sections 5(1)(e) and 5(2)(h) of the *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**), the making of the Decision was an improper exercise of the power conferred by sections 133 and 134 of the EPBC Act because the First Respondent exercised the power in such a way that the result of the exercise of the power is uncertain; and
>
> b. the First Respondent failed to exercise the power conferred under sections 134(1), (3)(e) and (3)(f), and the task required by sections 130(1), 133 and 136 of the EPBC Act consistently with that enactment so that:
>
> i. pursuant to section 5(1)(d) of the ADJR Act, the making of the Decision was not authorised by the enactment in pursuance of which it was purported to be made; or
>
> ii. pursuant to section 5(1)(c) of the ADJR Act, there was not jurisdiction to make the Decision as purportedly made at all in that the First Respondent so misconceived or misunderstood the nature of the jurisdiction which he was to exercise that there was a constructive failure to exercise that jurisdiction.
>
> 2. Pursuant to sections 5(1)(e) and 5(2)(b) of the ADJR Act, the making of the Decision was an improper exercise of the power conferred by sections 130(1) and 133 of the EPBC Act because the First Respondent failed to take into account a consideration required to be taken into account by section 136(1)(a) of the EPBC Act, being the impact that the Approved Action would have on the environment due to the above ground storage of mine tailings.
>
> 3. Pursuant to sections 5(1)(e) and 5(2)(b) of the ADJR Act, the making of the Decision was an improper exercise of the power conferred by sections 130(1) and 133 of the EPBC Act because the First Respondent failed to take into account a consideration required to be taken into account by section 136(1)(a) of the EPBC Act, being the impact that the Approved Action would have on the environment due to the export of uranium.
>
> 4. Pursuant to sections 5(1)(e) and 5(2)(b) of the ADJR Act, the making of the Decision was an improper exercise of the power conferred by sections 130(1)

and 133 of the EPBC Act because:

a. the First Respondent failed to take into account a consideration required to be taken into account by section 134(4)(a) of the EPBC Act, being conditions that were imposed, or were likely to be imposed, under South Australian law for the taking of additional ground water from the Great Artesian Basin; and

b. as a consequence of (a), the First Respondent also failed to consider as required by section 136(1)(a) of the EPBC Act the impact that the action would have on the environment due to the continued and increased extraction of ground water from the Great Artesian Basin.

5. Pursuant to section 5(1)(f) of the ADJR Act, the Decision involved an error of law in that the First Respondent assessed the Approved Action on the basis that continued water extraction from the Great Artesian Basin for the purpose of the Approved Action was not within the scope of the action and did not require EPBC Act approval.

6. Further or in the alternative, that each of the grounds in paragraphs 1 to 5 constitutes a jurisdictional error.

3 The approved action under the EPBC Act involves a substantial development and investment by the second respondent. For reasons which appear in an affidavit of an employee of the second respondent sworn on 23 February 2012 I granted an application by the second respondent for an expedited trial.

4 There was no dispute about the evidence. In fact, all of the evidence in this case was tendered by the respondents. The first respondent tendered four exhibits which comprised the material before him at the time he made his decision, save and except for a Referral Form dated 15 August 2005 which was not before him at that time. The second respondent tendered a bundle of documents and the third respondent tendered the South Australian Government Gazette of 10 October 2011.

5 There have been a number of amendments to the EPBC Act and the provisions of the Act which were relevant to the determination of the second respondent's application were agreed between the parties. By reason of the operation of the application, saving and transitional provisions in Schedule 2 to the *Environment and Heritage Legislation Amendment Act (No 1) 2006* (Cth) (Act No 165 of 2006) ("Amendment Act"), Parts 7 and 8 and Division 1 of Part 9 of the EPBC Act, in their form prior to the commencement of the Amendment Act, apply in relation to the action subject to the amendments in Schedule 2, Part 2, Item 3 of the Amendment Act, and Part 9 (other than Division 1) and Part 11, as amended by the Amendment Act, apply in relation to the action.

THE APPLICATION UNDER THE EPBC ACT

6 The second respondent's application under the EPBC Act has a long and detailed history. That history is set out in the first respondent's written submissions. However, in view of the grounds of the application and the submissions made to me it is not necessary for me to set out all of the details of the history. It is sufficient if I identify the major steps in the process. The legislative regime is the appropriate starting point.

7 Chapter 2, Part 3 of the EPBC Act contains a number of provisions which prohibit the taking of action which has certain effects with respect to particular matters. Of importance in this case are sections 21, 22 and 22A and it is convenient to set those sections out at this point.

> **21 Requirement for approval of nuclear actions**
>
> (1) A constitutional corporation, the Commonwealth or Commonwealth agency must not take a nuclear action that has, will have or is likely to have a significant impact on the environment.
>
> Civil penalty:
>
> (a) for an individual – 5,000 penalty units;
>
> (b) for a body corporate – 50,000 penalty units.
>
> (2) A person must not, for the purposes of trade or commerce:
>
> (a) between Australia and another country; or
>
> (b) between 2 States; or
>
> (c) between a State and a Territory; or
>
> (d) between 2 Territories.
>
> take a nuclear action that has, will have or is likely to have a significant impact on the environment.
>
> Civil penalty:
>
> (a) for an individual – 5,000 penalty units;
>
> (b) for a body corporate – 50,000 penalty units.
>
> (3) A person must not take in a Territory a nuclear action that has, will have or is likely to have a significant impact on the environment.
>
> Civil penalty:
>
> (a) for an individual – 5,000 penalty units;
>
> (b) for a body corporate – 50,000 penalty units.
>
> (4) Subsections (1), (2) and (3) do not apply to an action if:

(a) an approval of the taking of the action by the constitutional corporation, Commonwealth agency, Commonwealth or person is in operation under Part 9 for the purposes of this section; or

(b) Part 4 lets the constitutional corporation, Commonwealth agency, Commonwealth or person take the action without an approval under Part 9 for the purposes of this section; or

(c) there is in force a decision of the Minister under Division 2 of Part 7 that this section is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner; or

(d) the action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).

22 What is a *nuclear action?*

(1) In this Act:

nuclear action means any of the following:

(a) establishing or significantly modifying a nuclear installation;

(b) transporting spent nuclear fuel or radioactive waste products arising from reprocessing;

(c) establishing or significantly modifying a facility for storing radioactive waste products arising from reprocessing;

(d) mining or milling uranium ore;

(e) establishing or significantly modifying a large-scale disposal facility for radioactive waste;

(f) de-commissioning or rehabilitating any facility or area in which an activity described in paragraph (a), (b), (c), (d) or (e) has been undertaken;

(g) any other action prescribed by the regulations.

nuclear installation means any of the following:

(a) a nuclear reactor for research or production of nuclear materials for industrial or medical use (including critical and sub-critical assemblies);

(b) a plant for preparing or storing fuel for use in a nuclear reactor as described in paragraph (a);

(c) a nuclear waste storage or disposal facility with an activity that is greater than the activity level prescribed by regulations made for the purposes of this section;

(d) a facility for production of radioisotopes with an activity that is greater than the activity level prescribed by regulations mad for the purposes of this section.

Note: A nuclear waste storage of disposal facility could include a facility for storing spent nuclear fuel, depending on the regulations.

radioactive waste means radioactive material for which no further use is foreseen.

reprocessing means a process or operation to extract radioactive isotopes from spent nuclear fuel for further use.

spent nuclear fuel means nuclear fuel that has been irradiated in a nuclear reactor core and permanently removed from the core.

(2) In this Act:

large-scale disposal facility for radioactive waste means, if regulations are made for the purposes of this definition, a facility prescribed by the regulations.

22A Offences relating to nuclear actions

(1) A constitutional corporation, or a Commonwealth agency that does not enjoy the immunities of the Commonwealth, is guilty of an offence if:

(a) the corporation or agency takes a nuclear action; and

(b) the nuclear action results or will result in a significant impact on the environment.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) A constitutional corporation, or a Commonwealth agency that does not enjoy the immunities of the Commonwealth, is guilty of an offence if:

(a) the corporation or agency takes a nuclear action; and

(b) the nuclear action is likely to have a significant impact on the environment and the corporation or agency is reckless as to that fact.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(3) A person is guilty of an offence if:

(a) the person takes a nuclear action; and

(b) the nuclear action is taken for the purposes of trade or commerce:

(i) between Australia and another country; or
(ii) between 2 States; or
(iii) between a State and a Territory; or
(iv) between 2 Territories; and

(c) the nuclear action results or will result in a significant impact on the environment.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(4) A person is guilty of an offence if:

(a) the person takes a nuclear action; and

(b) the nuclear action is taken for the purposes of trade or commerce;

(i) between Australia and another country; or
a. between 2 States; or
b. between a State and a Territory; or
c. between 2 Territories; and

(c) the nuclear action is likely to have a significant impact on the environment and the person is reckless as to that fact.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(5) A person is guilty of an offence if:

(a) the person takes a nuclear action; and

(b) the nuclear action is taken in a Territory; and

(c) the nuclear action results or will result in a significant impact on the environment.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(6) A person is guilty of an offence if:

(a) the person takes a nuclear action; and

(b) the nuclear action is taken in a Territory; and

(c) the nuclear action results or will result in a significant impact on the environment and the person is reckless as to that fact.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(7) An offence against subsection (1), (2), (3), (4), (5) or (6) is punishable on conviction of by imprisonment for a term not more than 7 years, a fine not more than 420 penalty units, or both.

Note 1: Subsection 4B(3) of the *Crimes Act 1914* lets a court fine a body corporate up to 5 times the maximum amount the court could fine a person under this subsection.

Note 2: An executive officer of a body corporate convicted of an offence against this section may also be guilty of an offence against section 495.

Note 3: If a person takes an action on land that contravenes this section, a landholder may be guilty of an offence against section 496C.

(8) Subsections (1), (2), (3), (4), (5) and (6) do not apply to an action if:

(a) an approval of the taking of the action by the person is in operation under Part 9 for the purposes of this section; or

(b) Part 4 lets the person take the action without an approval under Part 9 for the purposes of this section; or

(c) There is in force a decision of the Minister under Division 2 of Part 7 that this section is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be

taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner; or

(d) The action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).

Note: The defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the Criminal Code.

8 Other relevant sections in this case are sections 16 and 17B (activities with a significant impact on wetlands of international importance), sections 18 and 18A (actions with a significant impact on listed threatened species and communities), sections 20 and 20A (activities with a significant impact on listed migratory species) and sections 26 and 27A (action taken on Commonwealth land having a significant impact on the environment).

9 The prohibitions in these sections do not apply if an approval of the taking of the action is in operation under Chapter 4, Part 9 of the Act.

10 Sections 67 and 67A are in the following terms:

67 What is a *controlled action*?

An action that a person proposes to take is a ***controlled action*** if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be (or would, but for s 25AA or 28AB, be) prohibited by the provision. The provision is a ***controlling provision*** for the action.

67A Prohibition on taking controlled action without approval

A person must not take a controlled action unless an approval of the taking of the action by the person is in operation under Part 9 for the purposes of the relevant provision of Part 3.

Note: A person can be restrained from contravening this section by an injunction under section 475.

11 Section 68 provides that a person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister for the Minister's determination of whether or not the action is a controlled action.

12 On 16 August 2005, the second respondent referred a proposal to the first respondent under s 68 of the EPBC Act. The second respondent summarised the proposed action in the following terms:

> The action is the expansion of the existing Olympic Dam copper, uranium, gold and silver mine and processing plant, including all associated infrastructure. The project is in the planning phase and therefore the details of the action are not yet finalised, with several options for major infrastructure being examined. The principal components of the action currently under investigation include, but are not limited to, the mining and processing of copper, uranium, gold and silver; sourcing and supplying additional water; sourcing and supplying additional energy; construction, relocation or upgrades to transport infrastructure (including rail, road, airport and port); and additional infrastructure and services associated with expanded accommodation needs.

13 There are a number of statements in the Referral Form which make it clear that the proposed action was for a very substantial development and that there were a number of aspects of the proposed action which had not at that point been finalised and that that was particularly so with respect to infrastructure. The Referral Form contained information as to the mining and production rates, the predicted size of the open pit and the initial design of a feature called a waste rock dump. It also contained details of the investigations being carried out with respect to the storage of tailings. It contained details about water supply and the current water licences for the taking of water from the Great Artesian Basin. The second respondent's Referral Form also contained a statement that the existing mining operation was regulated by the *Roxby Downs (Indenture Ratification) Act 1982* (SA) ("Indenture Act") and subsequent amendments in 1996. It is stated that the existing operation had approvals with conditions from both the Commonwealth Government and the South Australian Government, "to produce up to 350,000 tpa of copper and associated products". The second respondent said that it proposed to undertake the environmental assessment of the expanded project under a joint process between the Commonwealth and State Governments. It was proposed that an environmental impact statement be prepared to meet the requirements of both the Commonwealth and State Governments. The second respondent said in the Referral Form that the proposed action involved the mining of uranium ore and therefore was considered a controlled action under sections 21 and 22 of the EPBC Act.

14 On 2 September 2005, the Minister decided that the proposed action was a controlled action and that the relevant controlling provisions in the EPBC Act were sections 16 and 17B, sections 18 and 18A, sections 20 and 20A, sections 21 and 22A and sections 26 and 27A.

15 On 8 November 2005, a delegate of the Minister decided that the proposed action must be assessed by an environmental impact statement. Guidelines for the

environmental impact statement were published for comment on 18 November 2005 and finalised on 10 February 2006.

16 By letter dated 26 September 2008, the second respondent made a request of the first respondent to accept a variation of the original proposal. That was done pursuant to sections 156A and 156B of EPBC Act.

17 In its request for a variation, the second respondent said that it had engaged a team of expert consultants who had undertaken extensive studies and analysis of the various alternatives to the development of the Olympic Dam resources. It had done that to determine the ultimate design for the project. Drilling campaigns had been carried out since August 2005 and they had better defined the ore body. In August 2005 when the referral was lodged, the proposed open pit mining rate was to be at least 30 to 35Mtpa of ore and this equated to around 500,000 tpa refined copper plus associated products. The second respondent said that the enhanced definition of the ore body and related studies had resulted in a revision of the optimal open pit mining rate to around 60Mtpa with a total operational mining rate of around 70M tpa. This equated to about 750,000 tpa refined copper plus associated products. The second respondent said that the optimisation studies which have been carried out since August 2005 had also resulted in clarification of the plan for processing the minerals recovered from the mine. The second respondent stated that rather than construct a two stage smelter at the project site, it proposed to upgrade the existing smelter so that it had capacity to process the higher copper grade from the southern ore body, and the lower grade copper would be exported from the project site in the form of a multimetal concentrate. The second respondent stated that this change to the processing plan would result in some, rather than all, of the product being transported from Olympic Dam as refined metal, with the balance of product being transported as copper concentrate containing uranium, gold and silver.

18 The proposed action as varied involved substantially increased production rates for refined copper equivalent, uranium oxide, gold and silver. The tailings storage facility area was to be substantially increased. In relation to that facility, the second respondent's request for a variation stated as follows:

> The referral anticipated that an additional 1,100 ha footprint would be required for the expanded tailings storage facility (TSF) at the Olympic Dam site (assuming that the existing height restriction of 30m remains in place. ODC now expects the expanded TSF to cover up to an additional 4,010 ha area (with a maximum height of

> up to 80m). The increased size of the TSF is necessary to accommodate the increased volume of tailings produced from the expanded operation of the mine, but the proposed TSF will be essentially the same structure as that anticipated in the referral.

19 The second respondent said that the rock storage surface area was to be substantially increased. The second respondent also said that the proposed action as varied would require additional water and that the requirement for the volume of water identified would be met by the construction of a desalination plant with a capacity of up to 280 ML. The second respondent, in addressing the processing method and export, said the following:

> As noted in s 1 of this document, the Minister has already determined by his instrument dated 2 September 2005 that sections 21 and 21A (protection of the environment from nuclear actions) are controlling provisions for the project. However, it should be noted that despite the low concentration of uranium in the copper concentrate, the quantum of the concentrate which could be stored at the proposed dedicated port of Darwin storage facility would result in the dedicated storage facility also qualifying as a 'nuclear action' by reason of the operation of s 21(1)(g) of the EPBC Act and regulations 2.01 and 2.02 of the *Environment Protection and Biodiversity Conservation Regulations 2000*.

20 The second respondent made the submission to the first respondent that although the increased scale of the project may incrementally increase the degree of some impacts, the significance of impacts on any matters protected by the EPBC Act would not change.

21 On 24 October 2008, a delegate of the Minister accepted the variation to the proposed action, pursuant to s 156B of the EPBC Act.

22 A draft environmental impact statement ("Draft EIS") was open to public comment from 1 May 2009 to 24 October 2009 and 4,197 submissions were received.

23 On 19 March 2010, the second respondent made a second request for a variation to the proposed action. The second respondent sought the removal of an Aboriginal heritage salvage programme from the controlled action so that the programme could be commenced before the first respondent's decision. That variation was accepted on 9 June 2010.

24 A supplementary environmental impact statement ("Supplementary EIS") was prepared. The final environmental impact statement was accepted on 21 April 2011 and published on 13 May 2011.

25 Under s 105 of the EPBC Act, the Secretary must prepare and give to the Minister a report relating to the action within 30 business days after the day on which the Minister accepted from the designated proponent the finalised statement. The Olympic Dam expansion assessment report is dated September 2011. I will refer to the report as the Commonwealth Assessment Report.

26 The first respondent considered the application on 13 September 2011. The information before him on that day consisted of a briefing note and a number of appendices. He considered the recommendations made in the briefing note and, among other things, he indicated that he agreed to the recommended proposed action and recommended conditions. Having done that, the first respondent agreed that the information in the brief, including the Commonwealth Assessment Report, reflected the reasons for his decision. Recommendations 6 and 7 related to the process first respondent was obliged to follow under s 131 of the EPBC Act. After that consultation process, there was a further briefing note to the first respondent and recommendations in that briefing note. On 10 October 2011, the first respondent indicated that he approved the action. However, he did not sign the approval notice until after he had discussed two changes to the conditions of approval.

27 The approval was signed by the first respondent on 10 October 2011. The proposed action was described in the approval as follows:

> Expansion of the Olympic Dam copper, uranium, gold and silver mine and processing plant, including all associated infrastructure, South Australia and Northern Territory (see EPBC Act referral 2005/2270 as varied on 24 October 2008 and 9 June 2010).

28 The controlling provisions were identified. The approval was subject to 109 conditions and was expressed to have effect until 30 October 2061.

29 On 13 January 2012, the first respondent signed a Statement of Reasons for the decision to approve an action under sections 130 and 133 of the EPBC Act.

GROUND 1

30 It is convenient to summarise the first ground of the application in the following way. It is that the first respondent's decision leaves so much of the proposal comprising the approved action to be defined by proposed plans and studies, yet to be prepared or undertaken that:

1. The making of the decision was an improper exercise of the power conferred by sections 133 and 134 of the EPBC Act because the first respondent exercised the power in such a way that the result of the exercise of the power is uncertain within sections 5(1)(e) and 5(2)(h) of the ADJR Act; and

2. The first respondent failed to exercise the power conferred under sections 134(1)(3)(e) and (3)(f) of the EPBC Act, and perform the task required by sections 130(1), 133 and 136 consistently with that enactment so that the making of the decision was not authorised by the enactment in pursuance of which it was purported to be made within s 5(1)(d) of the ADJR Act; or

3. There was no jurisdiction to make the decision the first respondent purported to make in that he so misconceived or misunderstood the nature of the jurisdiction which he was to exercise that there was a constructive failure to exercise jurisdiction and in this connection, the appellant relies on s 5(1)(c) of the ADJR Act.

31 Sections 133 and 134 of the EPBC Act relevantly provide as follows:

> **133 Grant of approval**
>
> *Approval*
>
> (1) After receiving an assessment report 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.
>
> (1A) If the referral of the proposal to take the action included alternative proposals relating to any of the matters referred to in subsection 72(3), the Minister may approve, for the purposes of subsection (1), one or more of the alternative proposals in relation to the taking of the action.
>
> *Content of approval*
>
> (2) An approval must:
>
> (a) be in writing; and
>
> (b) specify the action (including any alternative proposals approved

under subsection (1A)) that may be taken; and

(c) name the person to whom the approval is granted; and

(d) specify each provision of Part 3 for which the approval has effect; and

(e) specify the period for which the approval has effect; and

(f) set out the conditions attached to the approval.

134 Conditions of approval

Condition to inform persons taking action of conditions attached to approval

(1A) An approval of the taking of an action by a person (the ***first person***) is subject to the condition that, if the first person authorises, permits or requests another person to undertake any part of the action, the first person must take all reasonable steps to ensure:

(a) that the other person is informed of any condition attached to the approval that restricts or regulates the way in which that part of the action may be taken; and

(b) that the other person complies with any such condition.

For the purposes of this Chapter, the condition imposed by this subsection is attached to the approval.

Generally

(1) The Minister may attach a condition to the approval of the action if he or she is satisfied that the condition is necessary or convenient for:

(a) protecting a matter protected by a provision of Part 3 for which the approval has effect (whether or not the protection is protection from the action); or

(b) repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage has been, will be or is likely to be caused by the action).

Conditions to protect matters from the approved action

(2) The Minister may attach a condition to the approval of the action if he or she is satisfied that the condition is necessary or convenient for:

(a) protecting from the action any matter protected by a provision of Part 3 for which the approval has effect; or

(b) repairing or mitigating damage that may or will be, or has been, caused by the action to any matter protected by a provision of Part 3 for which the approval has effect.

This subsection does not limit subsection (1).

Examples of kinds of conditions that may be attached

(3) The conditions that may be attached to an approval include:

(aa) conditions requiring specified activities to be undertaken for:

(i) protecting a matter protected by a provision of Part 3 for which the approval has effect (whether or not the protection is protection from the action); or

(ii) repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage may or will be, or has been, caused by the action); and

(ab) conditions requiring a specified financial contribution to be made to a person for the purpose of supporting activities of a kind mentioned in paragraph (aa); and

(a) conditions relating to any security to be given by the holder of the approval by bond, guarantee or cash deposit:

(i) to comply with this Act and the regulations; and

(ii) not to contravene a condition attached to the approval; and

(iii) to meet any liability of a person whose taking of the action is approved to the Commonwealth for measures taken by the Commonwealth under section 499 (which lets the Commonwealth repair and mitigate damage caused by a contravention of this Act) in relation to the action; and

(b) conditions requiring the holder of the approval to insure against any specified liability of the holder to the Commonwealth for measures taken by the Commonwealth under section 499 in relation to the approved action; and

(c) conditions requiring a person taking the action to comply with conditions specified in an instrument (including any kind of authorisation) made or granted under a law of a State or self governing Territory or another law of the Commonwealth; and

(d) conditions requiring an environmental audit of the action to be carried out periodically by a person who can be regarded as being independent from any person whose taking of the action is approved; and

(e) conditions requiring the preparation, submission for approval by the Minister, and implementation of a plan for managing the impacts of the approved action on a matter protected by a provision of Part 3 for which the approval has effect such as a plan for conserving habitat of a species or ecological community; and

(f) conditions requiring specified environmental monitoring or testing to be carried out; and

(g) conditions requiring compliance with a specified industry standard or code of practice; and

(h) conditions relating to any alternative proposals in relation to the taking of the action covered by the approval (as permitted by subsection 133(1A)).

This subsection does not limit the kinds of conditions that may be attached to an approval.

Considerations in deciding on condition

Certain conditions require consent of holder of approval

(3A) The following kinds of condition cannot be attached to the approval of an action unless the holder of the approval has consented to the attachment of the condition:

(a) a condition referred to in paragraph (3)(aa), if the activities specified in the condition are not reasonably related to the action;

(b) a condition referred to in paragraph (3)(ab).

(3B) If the holder of the approval has given consent, for the purposes of subsection (3A), to the attachment of a condition:

(a) the holder cannot withdraw that consent after the condition has been attached to the approval; and

(b) any person to whom the approval is later transferred under section 145B is taken to have consented to the attachment of the condition, and cannot withdraw that consent.

Conditions attached under paragraph (3)(c)

(3C) A condition attached to an approval under paragraph (3)(c) may require a person taking the action to comply with conditions specified in an instrument of a kind referred to in that paragraph:

(a) as in force at a particular time; or

(b) as is in force or existing from time to time;

even if the instrument does not yet exist at the time the approval takes effect.

(4) In deciding whether to attach a condition to an approval, the Minister must consider:

(a) any relevant conditions that have been imposed, or the Minister considers are likely to be imposed, under a law of a State or self governing Territory or another law of the Commonwealth on the taking of the action; and

(aa) information provided by the person proposing to take the action or by the designated proponent of the action; and

(b) the desirability of ensuring as far as practicable that the condition is a cost effective means for the Commonwealth and a person taking the action to achieve the object of the condition.

Effect of conditions requiring compliance with conditions specified in another instrument

(4A) If:

(a) a condition (the ***principal condition***) attached to an approval under paragraph (3)(c) requires a person taking the action to comply with conditions (the ***other conditions***) specified in an instrument of a kind referred to in that paragraph; and

(b) the other conditions are in excess of the power conferred by subsection (1);

the principal condition is taken to require the person to comply with

> the other conditions only to the extent that they are not in excess of that power.
>
> *Validity of decision*
>
> (5) A failure to consider information as required by paragraph (4)(aa) does not invalidate a decision about attaching a condition to the approval.

32 It is not necessary for me to set out s 130 of the EPBC Act. It deals with the periods within which the Minister must decide whether or not to approve the taking of a controlled action.

33 In considering these and the other sections of the Act referred to later in these reasons, I must bear in mind the objects of the Act which are set out in s 3.

34 The applicant submits that the conditions attached to the approval suffer from two vices which are closely related. First, there are conditions whose content and effect depend on a determination to be made in the future either by the second respondent (a private corporation) or by the first respondent or by both of them. In the case of these conditions, the effect of the conditions could not be seen until further processes are undertaken. It was submitted that there were so many conditions which dealt with proposed plans or studies that the result of the exercise of the power was uncertain.

35 Secondly, the applicant submits that there are conditions which envisage significant aspects of the proposed action being designed or determined at some later stage, generally by the second respondent, albeit at least generally with ministerial approval, and that that feature of the conditions meant that the first respondent had granted an approval which was not the type of approval envisaged by the Act. It was a "preliminary" or "provisional" approval and had the undesirable consequence of excluding public participation in important aspects of the proposal.

36 In his oral submissions the applicant gave examples of conditions which fell within his two submissions. It is not necessary to go beyond those examples. A full list of the conditions he challenges is set out in his written submissions.

37 As to the applicant's first submission, he relied squarely on the uncertainty ground in the ADJR Act. No party submitted that Finn J did not state the matter correctly in

Ranwick City Council v Minister for the Environment (1998) 54 ALD 682 at 730 when he said:

> At least for the purposes of the ADJR Act, I am not here concerned with the common law but with a matter of statutory construction. Section 5(2)(h) deems an exercise of power to be improper if it has been:
>
> exercise[d] … in such a way that the result of the exercise of the power is uncertain.

38 In relation to his first submission, the applicant gave as examples the following conditions:

> 4. The Approval Holder must develop, and submit to the Minister for approval, an environmental protection management program in relation to Mining and Processing.
>
> 5. The program must specify:
>
> a. the proposed operations covered by the program
>
> b. measures to mitigate or avoid:
>
> i. radiation exposure of Members of the Public and Non-human Biota
>
> ii. site contamination
>
> iii. mortality or injury to Listed Species of birds from exposure to the tailings storage facility
>
> iv. local and regional groundwater impacts
>
> c. the environmental outcomes to be achieved, as specified in conditions 13 (radiation), 16 (site contamination), 18 (fauna), 22 (groundwater), 26 (impacts of groundwater on vegetation) and 27 (extraction of water from the Great Artesian Basin)
>
> d. Compliance Criteria, to demonstrate compliance with conditions 13 (radiation), 16 (site contamination), 24 (groundwater), 26 (impacts of groundwater on vegetation) and 28 (extraction of water from the Great Artesian Basin). A failure to meet Compliance Criteria represents non-compliance with these conditions
>
> e. Leading Indicator Criteria as specified in conditions 17 (site contamination) and 25 (groundwater). Leading Indicator Criteria must provide an early warning that the Compliance Criteria identified in (d) may not be met. A failure to meet a Leading Indicator Criterion does not represent non-compliance with these conditions but remedial action must be taken in response. The program must specify the remedial action which will be taken in relation to an exceedance of a Leading Indicator Criterion
>
> f. Target Criteria, as specified in conditions 14 (radiation) and 20 (fauna). Target Criteria must reflect a level of impact that is as low as reasonably achievable for radiation exposure to humans, and must be minimised to the lowest reasonable levels for Non-human Biota. A failure to meet a Target Criterion does not represent non-compliance

with these conditions but the Approval Holder must review practices if criteria are exceeded and endeavour to meet the Target Criteria

g. the specific parameters to be measured and monitored

h. the locations at which monitoring will take place, or how these locations will be determined

i. the frequency and timing of monitoring or how it will be determined

j. the baseline or control data to be used or how it will be acquired

k. information about the strategies and other measures the Approval Holder will implement to achieve the Compliance Criteria and to investigate and respond to any non-compliance with the Compliance Criteria, Leading Indicator Criteria, or Target Criteria (without limiting the measures that may be implemented to those specified in the program)

7. The approved program must be implemented.

17. The program required under condition 4 must include Leading Indicator Criteria that specify, for each class of contaminants, investigation and response levels, as defined in the *National Environment Protection (Assessment of site contamination) Measure 1999* in the event that spills or leaks occur.

20. The program required under condition 4 must specify Target Criteria for impacts on Listed Species of Birds. Target Criteria must be specified for each of the Listed Species of birds that are likely to be affected. The Target Criteria must be at a level to avoid significant impacts on those species, based on the significant impact criteria for threatened and migratory species in *EPBC Act Policy Statement 1.1, Significant Impact Guidelines – Matters of National Environmental Significance* (Department of the Environment, Water, Heritage and the Arts 2009, or as amended) and Draft EPBC Act Policy Statement 321 – Significant Impact Guidelines for 36 migratory shorebird species (Department of the Environment, Water, Heritage and the Arts 1009, or as finalised or amended).

23. The program required under condition 4 must include a regional groundwater monitoring and management program. The program must provide for the Approval Holder to:

a. further update, enhance and validate the Groundwater Simulation Model included in the Supplementary EIS by reviewing the model at least every three years from the date of this approval taking account of the results of the work required under this condition and monitoring data collected under the plan required under condition 4. Sensitivity analysis and predictions from modelling must comply with the Murray Darling Basin Commission groundwater flow modelling guidance (2000, or as amended), or alternative guidelines specified in writing by the Minister.

b. improve understanding of the hydrogeology and ecology of the Yarra Wurta Springs by undertaking a work program to:

i. determine the significance that declines in groundwater levels in the Andamooka Limestone may have on the Springs

ii. develop a well substantiated understanding of the hydrogeology and groundwater processes supporting the Yarra Wurta Springs

iii. develop a well substantiated understanding of the structural controls that exist between Yarra Wurta Springs and the open pit

iv. develop a well substantiated understanding of the storage buffering of Lake Torrens to the drawdown of groundwater levels within the Andamooka Limestone.

c. confirm the conceptual understanding of the hydrogeology of the Torrens Hinge Zone by undertaking a work program to:

i. develop a well substantiated understanding of the hydrogeology of the Torrens Hinge Zone, based on a combination of hydro chemical, hydrogeological and geophysical information, and confirm the existence and magnitude of the groundwater divide

ii. determine aquifer parameters for the Torrens Hinge Zone to be used in modelling upgrades.

d. confirm the conceptual understanding of the hydrogeology of the Stuart Shelf by undertaking a work program to:

i. develop a well substantiated understanding of the recharge mechanisms to the Stuart Shelf, including recharge from rainfall and inflow from the Archaringa Basin

ii. develop a well substantiated understanding of impacts to the regional groundwater system resulting from the open pit void.

61. The construction and operation of the barge landing facility, as described in the EIS, must not have a significant adverse impact on cetaceans as a result of noise or vibration, as demonstrated by:

a. maintenance of an exclusion zone for cetaceans; and

b. a maximum sound exposure level for any blasting or pile driving.

62. The Approval Holder must specify an exclusion zone for the purpose of condition 61(a) and a maximum sound exposure for the purpose of condition 61(b) in an environmental management plan relating to construction of the barge landing facility. A plan satisfying State requirements and addressing the matters set out in this condition will be deemed to have been submitted and approved by the Minister.

77. Subject to condition 78, the Approval Holder must provide, to the satisfaction of the Minister, evidence of consultation with Indigenous persons or groups with rights, claims or interests in an area where land disturbance for the activities covered by this schedule would occur in relation to:

a. the adequacy of surveys to identify sites of Indigenous heritage value and the need for additional surveys

b. protocols for handling archaeological material that may be found during construction including measures for funding any costs that may result from the preservation or storage of this material

c. any processes and protocols related to:

i. the assessment of known Indigenous heritage values prior to construction

ii. any newly identified Indigenous heritage values during construction

iii. any relevant existing consents to disturb Indigenous heritage values from a relevant Indigenous group/s; and

d. obtaining future possible consent to disturb Indigenous heritage values from the relevant Indigenous group/s.

78. Where material is culturally sensitive and cannot be disclosed, the Approval Holder must advise the Department of the extent to which it cannot comply with condition 77 for that reason.

39 The applicant's submission is that these conditions mean that the approval is uncertain because the results of the approval cannot be known or cannot be known in detail.

40 In relation to his second submission, the applicant gave as examples conditions 32, 70 and 71. These conditions are in the following terms:

32 Within two years of the date of this approval, or prior to construction of the tailings storage facility, whichever date is the earliest, the program required under condition 4 must be revised to include a mine closure plan. The mine closure plan must:

a. include a set of environmental outcomes that will be achieved indefinitely post mine closure;

b. include assessment criteria that are clear, unambiguous and are specific to the achievement of the specified environmental outcomes and which include:

i. parameters to be measured and monitored

ii. the locations where monitoring will take place, or how these locations will be determined

iii. the measures for demonstrating achievement of the outcome, with consideration of any inherent errors of measurement

iv. the frequency and timing of monitoring, or how this will be determined

v. identification of the background or control data to be used or how these will be acquired.

c. contain a comprehensive safety assessment to determine the long-term (from closure to in the order of 10,000 years) risk to the public and the environment from the tailings storage facility and rock storage facility. The safety assessment must include:

i. a systematic approach that includes international best practice methodology such as a features, events, processes study (as defined by the International Atomic Energy Agency). The

Approval Holder must consult the Department and the South Australian Government in developing the methodology for the study

ii. modelling of alternative covers for the tailings storage facility to develop a preferred cover using industry best practice models, including models that assess the long term erosion of the final proposed landforms.

d. describe the measures the Approval Holder will implement to:

i. achieve the Compliance Criteria, and

ii. investigate and respond to any potential or actual non-compliance with the assessment criteria.

e. describe the Approval Holder's management systems that will be used to demonstrate compliance with the assessment criteria and reduce the risk of non-compliance

f. address the potential for and impacts resulting from early, unplanned closure

g. demonstrate that all practical options for progressive rehabilitation have been addressed

h. propose on-ground trials during operations that demonstrate the feasibility and improve the viability of the proposed remediation strategies, including site trials of the preferred covers

i. include a requirement that rehabilitation and closure commence, at the latest, 10 years before the expiry date of this approval.

70. The rail line, water pipeline and electricity transmission lines must be constructed on the alignments shown in Figures N1.4 (a) – (f) of the Olympic Dam expansion, Draft environmental impact statement 2009, Appendix N – Terrestrial ecology, unless otherwise approved by the Minister under condition 71.

71. If the Approval Holder proposes to construct the rail line, water pipeline or electricity transmission lines on a different alignment to that specified above, or if the Approval Holder proposes to construct the gas pipeline, the Approval Holder must prepare an infrastructure plan detailing the proposed alignment and submit the plan to the Minister for approval. The plan must demonstrate how the alignment has been selected to:

a. minimise the impact on the values of places on the National Heritage List, the World Heritage List and/or the Register of the National Estate

b. avoid and/or minimise impacts on nationally Listed Species and Ecological Communities, and migratory species, and other areas of environmental significance

c. avoid impacts on groundwater dependent listed threatened species or Ecological Communities, and migratory species, in the Great Artesian Basin

d. avoid and/or minimise, to the extent practicable, impacts on significant Indigenous heritage values.

41 The submission was that the nature of these conditions was such that two consequences followed. First, the Court should infer as a matter of fact that the first respondent had not satisfied himself that the proposed action should be approved. At best, he had satisfied himself that the proposed action ought to be approved in a provisional way. Secondly, and this is related to the first point, the Minister had dealt with the application in a way which the Act did not permit. The applicant submits that if those propositions are accepted then the approval is bad in law. Alternatively, I should follow *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 at 26 [28] per Moore and Lander JJ and hold that an erroneous decision to attach a condition also meant an erroneous decision to approve.

42 In response to the submissions, the first and second respondents relied heavily on the decision of Tracey J in *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts & anor* (2009) 165 LGERA 203 ("*Lawyers for Forests Inc*"). That case went on appeal but the appeal was dismissed: *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts & anor* (2009) 178 FCR 385. Before turning to consider that decision, I will mention a number of general points made by either the first or second respondent or both of them.

43 First, the second respondent submits, correctly in my view, that the extent or degree of certainty required in conditions for a lawful exercise of power depends very much on the statutory context. The statutory context here has two important features. First, the Act may apply to very substantial developments which may be carried out over a very long period of time. The proposed action by the second respondent is an example. The first respondent's approval is expressed to have effect until 30 October 2061.

44 Secondly, and almost certainly reflecting the first factor, the Act contains a wide power to impose conditions. The Minister may attach a condition to an approval if he or she is satisfied that the condition is "necessary or convenient" to achieve the purposes identified in subsections 134(1) and (2). The conditions in subsection 134(3) are examples of the type of conditions that may be attached to an approval. They include conditions requiring the preparation, submission for approval by the Minister, and implementation of a plan for managing the impacts of the approved action on a matter protected by a provision of Part 3 for which the approval has effect, conditions requiring specified environmental monitoring or testing to be carried out, conditions requiring compliance with a specified industry standard

or code of practice or conditions relating to any alternative proposals in relation to the taking of action covered by the approval. Enhanced or improved scientific knowledge may require the imposition of conditions with sufficient flexibility to embrace the best scientific practice at the relevant time.

45 Thirdly, the first and second respondents submit that there is no reason to read into the EPBC Act a limit on the number of conditions of the type which fall within s 134(3). They submitted that that, in truth, was what the applicant was asking the Court to do. I think the first and second respondent's submission is correct as a general proposition, although I do not need to decide whether there might not be an exception in rare circumstances.

46 Fourthly, the first respondent submits, correctly in my view, that insofar as the applicant complained of ambiguity in the wording of the conditions, the Court ought not to read the conditions in a precious or hypercritical fashion: *Pyneboard Pty Ltd & ors v Trade Practices Commission & anor* (1982) 39 ALR 565 at 570-1.

47 Fifthly, the first respondent submits, again correctly in my view, that insofar as the applicant claims that the first respondent had in effect handed over the power to determine the scope of the approved action to the second respondent, that proposition must be rejected in light of the conditions which indicate that the first respondent maintained control of the project. Two examples will suffice. By reason of condition 10, the environmental protection management program had to be reviewed every three years and a report on the review provided to the Minister addressing certain matters. Any revision to the program had to be approved by the Minister. By reason of clause 30, the second respondent had to review the activities covered by the first schedule which dealt with mining and processing every ten years to confirm that the best practicable technology was being used to minimise environmental impacts and risks. A report had to be provided to the Minister.

48 Finally, the first and second respondents made a number of points about specific conditions. First, they submit that the consequences of the environmental protection management program not being approved are clear. Condition 8 provides that the program must be submitted to and approved by the Minister before substantial commencement and substantial commencement is defined as meaning "the stripping of top soil from the open pit site and commencement of removal of overburden". Secondly, they submit that properly read

the effect of condition 5a is not to enable the second respondent to determine for itself what the proposed operations are to involve. Condition 5a links back to the proposed action defined in the approval and for which approval was given. Thirdly, they submit that it is necessary to link subjects of the program referred to in condition 5 to subsequent conditions. For example, clause 5c refers to radiation. Radiation is dealt with in conditions 13, 14 and 15. Those conditions provide as follows:

> 13. The Approval Holder must ensure that, in undertaking the activities covered by this schedule, exposure of Members of the Public to radioactive releases does not exceed relevant dose limits as described in the *Code of Practice for Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing* and is as low as reasonably achievable.
>
> 14. The program required under condition 4 must include Target Criteria for radiation exposure in the form of a radiation Dose Constraint for Members of the Public and a Reference Level for impacts on Non-human Biota. The Dose Constraint must be no more than 300 micro-Sieverts in a year unless otherwise agreed by the Minister. The Reference Level must be consistent with any guidance provided in the *Code of Practice for Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing*.
>
> 15. The program required under condition 4 must demonstrate that the Approval Holder uses Best Practicable Technology to ensure exposure of the public to radioactive releases is as low as reasonably achievable and exposure of Non-human Biota is also minimised to the lowest reasonable levels.

49 The definition of "Target Criteria" is broad but not so broad as to be meaningless. The same may be said of the definition of "Leading Indicator Criteria". Fourthly, the first and second respondents submit that condition 20 must be read as a whole. Not only does the Act define "impact" and use the expression "significant impact", but the condition itself contains a criterion by which compliance may be determined. Fifthly, the respondents submit that insofar as the applicant criticises the language used in paragraph 23, such criticism is misguided. The condition is plainly dealing with a matter concerning the science of hydrology and the language used reflects that fact. Sixthly, the respondents submit that condition 71 is clearly authorised by the terms of s 134(3)(h) of the EPBC Act.

50 In *Lawyers for Forests Inc*, the applicant sought approval to build and operate a pulp mill at Bell Bay in Tasmania. When operating, the mill would discharge effluent from the production process into Bass Straight. It was possible that such discharge may have an adverse effect on an area of Bass Straight which formed part of the Commonwealth marine environment. The applicant needed the approval of the Minister under the EPBC Act. It

obtained that approval and Lawyers for Forests Inc sought judicial review under the ADJR Act and s 39B of the *Judiciary Act 1903* (Cth).

51 The Minister's approval was subject to 48 conditions. Many of the conditions referred to an environmental impact management plan which the applicant was required by some of the other conditions to develop in order to manage, monitor and respond to the environmental impacts occasioned by the operation of the pulp mill. One of the conditions required the applicant to sample the effluent discharged from the operation of the pulp mill to determine if it fell within the parameters set out in a table in the condition. The pulp mill was not to operate if the monthly average effluent exceeded the maximum amounts set out in the tables. Significantly, the limits in the tables could be revised if the revision was agreed to by a group called the Independent Expert Group and approved by the Minister as a result of further studies. Other conditions required the applicant to obtain samples, conduct chemical analysis, conduct laboratory studies, surveys and the like. The applicant was also required to carry out additional modelling in relation to the fate of the effluent as part of the environmental impact management plan prior to the commencement of the commissioning of the mill.

52 The approval was challenged on a number of grounds. In dealing with the argument that the decision was not authorised by the Act because some of the conditions were outside the object and purpose for which the power to compose conditions, provided for in s 134, was granted, Tracey J said that at the heart of the applicant's case was the assertion that the Minister was seeking by the imposition of conditions to obtain knowledge of the impact of the discharge of effluent and that, without that knowledge, it was not possible for him to impose the conditions in the first place. Tracey J noted a number of difficulties with the argument. His Honour said at 217 [27]:

> The Minister could so act even though he was unable to determine, with certainty, what the environmental impact of the proposed discharge into the marine environment would be. The precautionary principle, to which the Minister was bound to have regard (and which will be considered in greater detail when dealing with ground 2), specifically contemplates that decisions of the kind presently under consideration can be made notwithstanding the single 'lack of full scientific certainty'. The Minister acknowledged a risk and fixed on conditions which he considered to be appropriate to deal with that risk. Conditions 34, 35, 36, 38 and 40 are each linked to the EIMP. The duties which they impose on Gunns are to be performed either in accordance with the EIMP or as part of the EIMP. They are, therefore, conditions which govern the implementation, by Gunns, of the EIMP. They are conditions of the kind contemplated by s 134(3)(e). Each of these

> conditions also requires Gunns, before commissioning the pulp mill, to undertake varying forms of environmental monitoring and testing. They are, thus, conditions of the kind comprehended by s 134(3)(f). Even if a particular condition were, contrary to my view, to be held not to fall within one of the paragraphs of s 134(3), this would not matter because the subsection does not contain an exhaustive list of the type of conditions which may be imposed.

53 Tracey J at 223-4 [56]-[57] made the point that the Minister is not bound to refrain from making a decision under Part 9 of the EPBC Act by a lack of information determined by an objective standard. In rejecting the uncertainty ground under sections 5(1)(e) and 2(h) of the ADJR Act, his Honour said (at 228 [79]):

> It may be doubted that the construction of this ground requires resort to the body of case law which has dealt with the requirement that delegated legislation may be invalid by reason of uncertainty: see *Ranwick City Council v Minister for Environment* (1998) 54 ALD 682 at 730.
>
> The common law approach is, nonetheless, available to LFF under s 39B of the *Judiciary Act* on which it also relied. It is not necessary to pursue this issue further because the parties are agreed that the ground will be made out if the impugned conditions do not convey to Gunns, with reasonable clarity, what it is required to do: see *Seven Network Ltd v Australian Competition and Consumer Commission* (2000) 140 FCR 170 at [49]. Put another way: the conditions must, on a fair reading, make it reasonably clear to Gunns what action is required of it: see *Pineboard Pty Ltd v Trading Practices Commission* (1982) FLR 368 at 375.

54 On the appeal, the Full Court (at 393-4 [25]-[29]) summarised the appellant's submissions and that summary shows the similarity between the submissions in this case and the submissions made in *Lawyers for Forests Inc*. The Full Court referred to a number of submissions put by the appellant. It seems to me that, in substance, there was but one submission put in a variety of ways. The appellant in *Lawyers for Forests Inc* submitted that there could only be one operative approval and a condition which contained a discretion to approve or not approve, or erected a discretionary regime which had that effect, was not permissible. The appellant submitted that the conditions required an assessment of the environmental impacts to be undertaken. That had to be done at the approval stage and could not be left to conditions. The Full Court said that the appellant had argued that what the Minister had done had the result that his ascertainment of the impact of the discharge of effluent was only able to be ascertained by reference to the conditions themselves.

55 The Full Court rejected the submission that the Minister had purported to grant more than one approval. The Court rejected the submission that the impugned conditions

were imposed so as to enable the Minister to assess the environmental impact of the proposed action or for the purpose of predicting that impact. The Court said at 397 [47]:

> Although on the evidence no significant impacts were likely, the conditions were designed to deal with the residual risk from unexpected trends or events, and were imposed in accordance with the precautionary principle for the purpose of guarding against them by resort to monitoring and management.

56 The Court made the point that even if certain conditions could not be regarded as actually *managing* impacts (presumably a reference to s 134(3)(e) of the EPBC Act), they were part of a plan for managing residual risks which had been identified. The Court said at 398 [51]:

> Condition 34 can thus be seen to be part of a management process directed at ascertaining more information about analogous situations so as to become better informed about unlikely but possible risks.

57 The Full Court said that consideration of what, if any, conditions are to be imposed is an integral part of the decision to approve.

58 It cannot be doubted that the power to impose conditions under the EPBC Act is a very wide one. The Minister may attach a condition to an approval if he or she is satisfied that it is "necessary or convenient" to do so within subsections 134(1) and (2). The breadth of the power can be seen from the terms of subsection 134(3) which sets out examples of the types of conditions which may be imposed. Paragraph (e) authorises a condition for the preparation, approval and implementation of a plan for managing the impacts of the approved action. The concept of management is a very wide one and includes matters such as monitoring and testing, reporting, preventative measures and remedial action. One thing seems to me to be clear and that is that the power is broad enough to encompass significant additions or variations to the approved action. Paragraph (f) authorises conditions requiring specified environmental monitoring or testing to be carried out. This power recognises that there are always risks to the environment, particularly with major developments, and that conditions or circumstances change and the operation of an approved action needs to recognise the risks and changing conditions and circumstances and adapt to them. Paragraph (g) authorises conditions which require compliance with a specified industry standard or code of practice. I do not think it exceeds the bounds of matters of which I can take judicial notice to note that industry standards and codes of practice often include requirements expressed in

terms of results to be achieved rather than closely defined criteria. Finally, it is to be noted that the list of matters about which conditions may be made in subsection 134(3) is not exhaustive of the kinds of conditions which may be attached to an approval.

59 As I have said, the requirements of the certainty ground in s 5(2)(h) of the ADJR Act must be formulated having regard to the particular statutory context to which it is to be applied. In the context of s 134, there is a degree of latitude in terms of the certainty ground. I think, largely for the reasons advanced by the respondents (see paragraphs [43]-[49] above), that the conditions are sufficiently certain. Put another way, I think the conditions make it reasonably clear to the second respondent what it is required to do: *Lawyers for Forests Inc* at 228 [79] per Tracey J.

60 The applicant's second submission relies on sections 5(1)(c) and (d) of the ADJR Act. Whether the certainty ground might also be invoked on the basis that the exercise of the power in respect of which the result must be certain is not only the power to impose conditions, but also the power to approve (see the Full Court decision in *Lawyers for Forests Inc* at 399 [54]) is not a matter I need to consider. The applicant's submission fails whichever ground is relied upon.

61 I will deal with conditions 32 and 71 separately.

62 On the face of it, condition 32 leaves a major matter – mine closure – to be determined. The first respondent's reasoning is set out in his Statement of Reasons:

> 6.36 The EIS demonstrates conceptually that the expanded mine can be closed and rehabilitated to a standard that would ensure long-term protection of the environment. Best practice mining standards require a comprehensive closure plan to be in place before mining commences. In particular, given that the tailings storage facility and, to a lesser extent, the rock storage facility, would retain above background radiation levels, a long term safety assessment is essential to support the detailed design of closure strategies and structures in the closure plan.
>
> 6.37 I therefore decided to impose conditions requiring a mine closure plan, including a safety assessment to determine the long-term risk to the public and the environment from the tailings storage facility and rock storage facility. I was satisfied that these requirements will ensure that appropriate environmental protection measures are in place after the closure of operations on site.

63 The applicant made a number of points about, and in connection with, condition 32. He refers to the fact that the second respondent was left to formulate the assessment criteria. I do not think that this point has any force. The first respondent has the power to withhold approval to the mine closure plan. The reference to the assessment criteria being clear, unambiguous and specific is to assist the first respondent to understand the metes and bounds of the mine closure plan. The applicant submits that the decision in *Lawyers for Forests Inc* was quite a different case. It is correct to say that there were a number of grounds put in that case that are not advanced in this case (Tracey J at 212-3 [14]) but, as I have said, there were also similar arguments put as can be seen from the Full Court summary of the various ways in which the applicant put its key submission on the appeal. It is also true, as the applicant submits, that there are significant differences between the conditions in that case (Tracey J at 209-212 [13]) and the condition in this case. That said, condition 32 in *Lawyers for Forests Inc* was very broad in that it allowed a change in the limits of the various chemical compounds in the effluent to be discharged.

64 I am not satisfied that the imposition of condition 32 means that there has been a failure to exercise the power in sections 130 and 133 of the EPBC Act. The wide power to impose conditions and the approach to conditions adopted in *Lawyers for Forests Inc* support that conclusion. There is one other important matter which supports the conclusion. This is not a case where a major topic was not addressed before approval was granted. Mine closure was considered before the approval was granted. I refer to the first respondent's Statement of Reasons and, in addition, it may be noted that Chapter 23 in the draft EIS deals with rehabilitation and closure.

65 Condition 71 must be read with condition 70. It is important to appreciate that it is not argued that condition 71 is invalid and might be struck from the approval. The argument is that the condition establishes that the first respondent did not exercise the power he was authorised to exercise by the provisions of Part 9 of the EPBC Act. The answer to that submission is that it is clear that the rail line, water pipe line and electricity transmission lines must be constructed on the alignments shown in figures N1.4(a-f) of the Draft EIS, unless otherwise approved by the first respondent. The possibility of a gas pipeline was referred to in the second respondent's Referral Form and three possible options for the location of a gas pipeline were shown in the draft EIS. The reference to the gas pipeline may well fall within the concept of "alternative proposals" within sections 72(3), 133(1A) and 134(3)(h) of the

EPBC Act but, in any event, the reference to a gas pipeline in condition 71 would not be sufficient to bring down the approval.

66 I reject ground 1 of the applicant's application.

GROUND 2

67 The applicant submits that the first respondent failed to take into account a consideration he was required to take into account by s 136(1)(a) of the EPBC Act, being the impact that the approved action would have on the environment due to the above ground storage of mine tailings.

68 Section 136 of the EPBC Act is in the following terms:

> **136 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:
>
> (a) the principles of ecologically sustainable development; and
>
> (b) the assessment report relating to the action; and
>
> (c) if the action was assessed under Division 5 or 6 of Part 8 (which deal with public environment reports and environmental impact statements) – the report or statement about the action finalised by the designated proponent; and
>
> (d) if an inquiry was conducted under Division 7 of Part 8 in relation to the action – the report of the commissioners; and
>
> (e) any other information the Minister had 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 by another Minister in accordance with an invitation under section 131.

Person's environmental history

(4) In deciding whether or not to approve the taking of an action by a person, and what conditions to attach to an approval, the Minister may consider whether the person is a suitable person to be granted an approval, having regard to:

(a) the person's history in relation to environmental matters; and

(b) if the person is a body corporate – the history of its executive officers in relation to environmental matters; and

(c) if the person is a body corporate that is a subsidiary of another body or company (the ***parent body***) – the history in relation to environmental matters of the parent body and its executive officers.

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 Subdivision to consider.

69 The applicant submits that for the purposes of s 136(1)(a) the matter protected is the environment and it is protected from any action which will have, or is likely to have, a significant impact on it. The applicant submits that the evidence before the first respondent was to the effect that the tailings would contain radioactive material and that material would remain radioactive for hundreds of thousands of years. The applicant submits that the first respondent restricted his consideration of the effects of the radioactive material in the tailings to a period in the order of 10,000 years. That approach by the first respondent, the applicant contends, involved a failure to take into account a relevant consideration in the exercise of the power under sections 130(1) and 133 of the EPBC Act within s 5(2)(b) of the ADJR Act, and was therefore an improper exercise of power within s 5(1)(e) of the ADJR Act. Further, the applicant submits that the first respondent's approach involved jurisdictional error at common law: *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39 per Mason J (as his Honour then was); *Craig v The State of South Australia* (1995) 184 CLR 163 at 177.

70 There was material before the first respondent in the form of Appendix S to the Draft EIS to the effect that uranium and its decay remain radioactive for a very long period of time. For example, uranium-238 which is said to be the most common form of uranium and one which is contained in uranium ore, is said to have a half-life of 4.5 multiplied by 10^9 years, that is to say, 4.5 billion years. Furthermore, the Draft EIS contains the following statement:

> Uranium is extracted from ore by physical and chemical processes. The processes aim to remove only the uradium isotopes, leaving all other radio isotopes in the waste (tailings). As some of these radioisotopes have very long half lives (^{230}Th half-life is 77,000 years), the tailings will remain radioactive for hundreds of thousands of years, decreasing over time.

71 The applicant submits that the first respondent restricted his consideration of the period over which the proposed action may have a significant impact on the environment to a period in the order of 10,000 years. To support that submission he relies on the following evidence.

72 First, the applicant points to paragraphs 6.9, 6.10 and 6.11 in the first respondent's Statement of Reasons. These paragraphs are in the following terms:

> 6.9 The EIS included calculations of expected radiation emissions following closure and rehabilitation of the mine and the risk assessment, based on a conceptual closure plan. BHPB proposes in the EIS to cap the tailings storage facility with waste rock to ensure long-term isolation of the tailings from the environment. There is adequate waste rock for this purpose. Reactive material and low grade mineralised rock in the rock storage facility would be encapsulated within an outer layer of benign rock.
>
> 6.10 Based on this approach, the EIS calculates that post-closure radiation exposure for the nearest residents at Roxby Downs from the rehabilitated mine would be an additional 0.02 milliSieverts per year (mSv/y) above the background radiation level of 2 mSv/y.
>
> 6.11 Based on this information, I am satisfied that post-closure radiation risks can be acceptably managed and represent low risks to people and the environment. However, as a precaution, I have required conditions for a detailed and comprehensive closure plan to address the long-term (in the order of 10,000 years) residual risks from radiation. This must include a monitoring program and on-ground trials to test remediation strategies.

73 Secondly, the applicant relies on condition 32 and, in particular, paragraph c (see paragraph [40] above).

74 Thirdly, the applicant relies on the briefing paper which contained the recommendations which the first respondent considered on 13 September 2011 and in particular, the following passage (at page 8):

> The Department concludes that post-closure radiation risks can be acceptably managed and represent low risk to people and the environment. However, as a precaution, the Department recommends conditions for a detailed and comprehensive closure plan to address the long-term (10,000+ years) residual risks from radiation. This must include a monitoring program and on-ground trials to test remediation

strategies.

75 The applicant submits that the first respondent erred in not considering the effects of the radioactive material in the tailings between the period from 10,000 years to hundreds of thousands of years. He points to the broad definition of "environment" in the EPBC Act. Section 528 defines environment as including:

> (a) Ecosystems and their constituent parts, including people and communities; and
>
> (b) Natural and physical resources; and
>
> (c) The qualities and characteristics of locations, places and areas; and
>
> (d) Heritage values of places; and
>
> (e) The social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).

76 The applicant also points to the fact that in terms of impacts on the environment there is no temporal limitation in the EPBC Act and in fact one of the principles of ecologically sustainable development is the principle of intergenerational equity (s 3A(c)).

77 The applicant submits that it can be inferred from the terms of condition 32 that the first respondent excluded from his consideration a consideration of the period from 10,000 years to hundreds of thousands of years. The applicant also submits that the fact that the longer period is referred to in the Draft EIS does not mean that the first respondent relied on it or used it. He did not refer to it in his Statement or Reasons. The applicant also sought to meet an argument that he anticipated would be put against him. He submits that insofar as North J in *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* (2008) 167 FCR 463 at 490 [115] ("*Blue Wedges*") said that it is open to the Minister under s 136(1)(a) of the EPBC Act to decide what matters he will consider then his Honour's decision is wrong. He sought to gain support for his submissions from the decision of Keifel J sitting as a Judge of this Court in *Queensland Conservation Council Inc v Minister for Environment and Heritage* [2003] FCA 1463 ("*Queensland Conservation Council Inc*"). He also referred to *Re: Coldham; ex parte Brideson* (1989) 166 CLR 338 at 347.

78 I do not think the resolution of this ground in the application depends on what North J said in *Blue Wedges* at 490 [115]. I make the observation that one needs to consider what his Honour said after that passage and, in particular, how he dealt with the three matters

the applicant in that case asserted the Minister was bound to take into account. His Honour said (at 490 [117]) that the impact of maintenance dredging was not something that the EPBC Act indicated had to be taken into account. It was not the subject of the approval decision and it would be subject to separate referral and assessment in the future. There was no certainty that it would be necessary and the purpose of the EPBC Act was met by the requirement that there be a further approval. In relation to the impact of oil or chemicals, the material before the Minister had rated the risk of a major oil spill as almost impossible. His Honour said (at 491 [119]) that in these circumstances it could not be said that the EPBC Act implicitly required that the matter be taken into account by the Minister. In relation to the impact of the removal and disposal of toxic sediment in the north of Port Phillip, his Honour said (at 491 [120]) that the Minister expressly referred to the impacts from contaminated sediments in relation to the wetlands of international importance. His Honour said that such information as there was before the Minister indicated that there was no significant environmental impact from the proposed process for dealing with toxic sediments. He said (at 492 [122]) that the subject matter, scope or purpose of the EPBC Act therefore did not require the Minister to consider this as a relevant matter. He was free to do so if he chose, as he did in the case of the wetlands where he indicated in the statement of reasons that they were not likely to be effected. I do not think his Honour was saying that the Minister had an unfettered discretion under s 136(1) to decide what was relevant and therefore what he considered. In my respectful opinion, such an approach would be erroneous.

79 *Queensland Conservation Council Inc* dealt with a challenge to a Minister's decision at a different stage of the process (i.e., s 75 of the EPBC Act). Nevertheless, there are observations by her Honour to the effect that, having regard to the high public policy revealed by the objects of the EPBC Act, a narrow approach to its interpretation should not be taken (at [40]). Her Honour's decision went on appeal, but the appeal was dismissed: *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.

80 The first respondent accepted that he was bound to take into account the long-term effects and impacts on the environment of the above-ground storage of tailings. He contended that he had done that. He submitted that he was not bound to consider the matter in the specific way advanced by the applicant. In my opinion, these submissions are correct. It seems to me that the relevant matter was the long-term effects of the storage of tailings. Both

the periods referred to are very long periods of time and to draw any distinction between them for the purpose of determining the relevant consideration would be artificial.

81 It is obvious that in determining whether a decision maker has failed to have regard to a particular matter, it is necessary to identify the matter. There is a danger in defining the matter with the level of particularity identified by the evidence. I refer to *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 452, [22] and [23] per Gleeson CJ and McHugh JJ and 457 [38] per Gaudron and Hayne JJ.

82 In *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at 347-8 [73] and [74] , McHugh, Gummow and Hayne JJ said:

> … On analysis, however, the asserted duty to make findings may be simply another way of expressing the well-known duty to take account of all relevant considerations. The considerations that are, or are not, relevant to the Tribunal's task are to be identified primarily, perhaps even entirely, by reference to the Act rather than the particular facts of the case that the Tribunal is called on to consider (72) …
>
> This does not deny that considerations advanced by the parties can have some importance in deciding what is or is not a relevant consideration. It may be, for example, that a particular statute makes the matters which are advanced in the course of a process of decision-making relevant considerations of the decision-maker. What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with whether the decision-maker has properly applied the law. They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision-make acts.

83 In *Drake-Brockman v Minister of Planning* (2007) 158 LGERA 349 at 385 [126] Jagot J said:

> To succeed, the applicant must establish that the EPA Act, by necessary implication, bound the Minister to consider one aspect of the complex of matters that might inform the concept of ecological sustainable development (greenhouse gas emissions) *in a particular manner and to a particular extent.*
>
> (my emphasis)

84 It seems to me that the applicant's submission in this case is really along similar lines in that he is submitting that the first respondent was bound to consider the long-term effects and impacts on the environment of the storage of tailings in a particular manner and to a particular extent. I do not think that the first respondent was bound to proceed in that way.

85 The first respondent did consider the long-term effects and impacts on the environment of the storage of tailings. There are many references in the material, of which the following are examples:

1. Draft Environmental Impact Statement 2009, Olympic Dam Expansion, at paragraph 23.8.4, page 699.

2. Draft Environmental Impact Statement, Appendix F1, Tailings Storage Facility Design Report, Olympic Dam Expansion Project at pages 527, 544, 612 and 613.

3. Supplementary Environmental Impact Statement, page 129, 719, 747 and 749.

4. South Australian Assessment Report, Environmental Impact Statement, Olympic Dam Expansion, pages 314-315 and 330; and

5. Commonwealth Assessment Report, Olympic Dam Expansion, paragraph 5.1.8.

86 In 6.4 of his Statement of Reasons, the first respondent said:

> The Department's advice identified a number of key issues which required careful consideration in order to ensure the level of risk could be effectively managed. Overall, based on the EIS, the South Australian Assessment Report, expert advice and the Department's assessment, I conclude that provided the recommended conditions were applied, the residual risks of the proposed action on the environment were acceptable.

87 There is no reason to think that the Minister did not consider the long-term environmental effects and impacts of the above ground storage of tailings.

88 I reject ground 2 of the applicant's application.

GROUND 3

89 The applicant contends that the first respondent failed to take into account a consideration he was required to take into account by s 136(1)(a) of the EPBC Act, being the impact that the action would have on the environment due to the export of uranium.

90 The applicant's submission started with the proposition that the environment is not confined by national boundaries. He referred to the definition of environment which is set out in paragraph 37 above. He also referred to the broad meaning of "impact". Section 527E provides as follows:

527E Meaning of impact

(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.

91 The applicant submits that the word, "environment" in s 21 should be read as including the environment outside Australia. He noted two provisions which appeared to confine the operation of the EPBC Act to matters or things within Australia. Section 5(2) of the EPBC Act is in the following terms:

Limited exterritorial application

(2) This Act applies to acts, omissions, matters and things in the Australian jurisdiction, and does not apply to acts, omissions, matters and things outside the Australian jurisdiction except so far as the contrary intention appears.

92 Section 21(1)(b) of the *Acts Interpretation Act 1901* (Cth) ("Acts Interpretation Act") provides as follows:

> 21(1) In any Act:
>
> (a) …
>
> (b) references to localities, jurisdictions and other matters and things shall be construed as references to such localities, jurisdictions and other matters and things in and of the Commonwealth.

93 Section 2 of the Acts Interpretation Act provides as follows:

> 2 (1) This Act applies to all Acts, (including this Act)
>
> (2) However, the application of this Act or a provision of this Act to an Act or a provision of an Act is subject to a contrary intention.

94 The applicant submits that a contrary intention may be discerned from two considerations. First, he relies on what he described as the "innate interconnectedness" of the environment. Secondly, he relies on a principle in what was referred to as the Stockholm Declaration made on 16 June 1972. That declaration is in the following terms (relevantly):

> **Declaration of the United Nations Conference on the Human Environment**
>
> The United Nations Conference on the Human Environment, having met at Stockholm from 5 to 16 June 1972, having considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment,
>
> Proclaims that:
>
> **Principle 21**
>
> States have in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

95 The applicant also refers to the fact that one of the objects of the EPBC Act is to assist in the co-operative implementation of Australia's international environmental responsibilities (s 3(1)(e)). As I understood the applicant's submission, it was that even though there may be no offence under s 22A of the EPBC Act unless the nuclear action is taken in the Australian jurisdiction, the effect on the environment outside Australia is a matter that the Minister must consider under s 136(1)(a). In other words, the Minister must consider impacts on the environment outside Australia even though the EPBC Act is limited to acts, omissions, matters or things within Australia.

96 The applicant submits that there can be no doubt that the export of uranium was an aspect of the project, and he relied on the fact that there is very little a person can do with uranium in Australia (see sections 37J, 140A and 146M of the EPBC Act). The first and second respondents did not dispute this proposition.

97 The applicant submits that the first respondent did not consider the impact that the action would have on the environment due to the export of uranium. The applicant points to a statement at page 7 of the Draft EIS which reads as follows:

> The geographic area studied for the draft EIS has been termed the EIS study area. It extends beyond the area of mining and minerals processing operations at Olympic Dam and the Roxby Downs township to take in the land and the wider region of South Australia and in Adelaide and Darwin on which it is proposed to establish infrastructure. The EIS study area provides a context for understanding and assessing local and regional impacts. The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) does not require impacts beyond Australia's jurisdiction to be assessed.

98 He next referred to the Commonwealth Assessment Report. In this Report three matters relevant to the present issue are discussed. First, there is a discussion about nuclear security which was said to relate to the physical protection of nuclear material and installations so that there was no unauthorised use of the material. Secondly, there is a discussion about nuclear safeguards which were applied to ensure and confirm that exports of uranium are only used for peaceful purposes. Thirdly, there is a discussion about issues of the safety of the nuclear power industry in terms of accidents such as the accident at Chernobyl and the accident following the Great East-Japan Earthquake and Tsunami.

99 In relation to the first two matters, the Report referred to the *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) and the obligations under that Act. It is said that in addition to inspections by the International Atomic Energy Agency, Australia's bilateral safeguard agreements apply specific conditions to "Australian Obligated Nuclear Material". Although there is not currently a bilateral safeguard agreement with China that covered the export of uranium contained within the copper concentrate, the Report noted that such an agreement would need to be finalised before any export of copper concentrate could take place. The Report stated that Australian Safeguards and Non-Proliferation Offices ("ASNO") will determine the accounting arrangements and security measures required and that an export permit would be required from the Minister of Resources, Energy and Tourism under

the *Customs (Prohibited Exports) Regulations 1958* (Cth) to ensure that all handling, transport and non-proliferation requirements were met. The Report noted that the transport and storage of the uranium in Australia would also require a permit from ASNO.

100 In relation to the third matter, nuclear safety, the Report noted that some public submissions had questioned the safety of the nuclear power industry. The Report referred to international instruments and regimes in place which address nuclear safety. The recommendation of the Report was that the export of uranium from Olympic Dam would be addressed by comprehensive international frameworks and legislative requirements covering nuclear safety and security. For that reason, the Department did not recommend conditions under the EPBC Act to address those matters.

101 The applicant submits that there was no assessment of the effectiveness of the international measures as at today, nor was there any assessment of the probability of nuclear accidents and their likely seriousness. The briefing note which contained the recommendations considered by the Minister on 13 September 2011 contained a summary of the Commonwealth Assessment Report.

102 The first respondent's Statement of Reasons simply repeated what was contained in the briefing note. In his Reasons, the first respondent said:

> **Nuclear Security**
>
> 6.70 A number of submissions raised nuclear security issues arising from the export of uranium. Comprehensive international frameworks and national legislative requirements address nuclear safety and security. The *Nuclear Non-Proliferation (Safeguards) Act 1987* applies to the export of nuclear material and export permits are required under the *Customs (Prohibited Exports) Regulations 1958*. Australia's safeguards arrangements include approvals from the Australian Safeguards and Non-Proliferation Office. Export of concentrate to China would require a new bilateral agreement. Given the existing legislative requirements at the international and national level, I do not consider it necessary or appropriate to recommend EPBC conditions to address nuclear security/safety in relation to export of uranium from the proposed expansion.

103 The applicant made a further submission to the effect that the above reasons indicate that nuclear security and safety was considered only in the context of the conditions of approval and not in the context of whether approval should be granted.

104 In my opinion, the applicant's submissions must be rejected. First, I do not think that the first respondent was required to take into account the impact the action would have on the environment due to the export of uranium. Secondly, even if I am wrong in reaching that conclusion, I think the first respondent did consider that matter.

105 It seems to me that the "matter protected" within s 136(1)(a) is the environment and, on the face of it, it is the Australian environment. The applicant is no doubt correct in submitting that it is difficult to define aspects of the environment by reference to national boundaries. However, that fact is of itself not sufficient intention to the contrary for the purposes of s 5(2) of the EPBC Act and s 2(2) of the Acts Interpretation Act. As to the second matter raised by the applicant, that is, the Stockholm Declaration, it is true that in a case of ambiguity the court should favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ. However, this is not a case of ambiguity. This is a case where the word "environment" in the EPBC Act is to be interpreted as the environment in the Australian jurisdiction, or in and of the Commonwealth unless a contrary intention appears. I do not think that a contrary intention appears from the provisions of the EPBC Act. I should mention that in his written submissions the applicant sought to gain support for his arguments from the fact of an amendment to s 305(1)(f), but I do not think that that provides a firm basis for accepting his contentions.

106 In any event, as I have said, I think that the first respondent gave consideration to the impact that the action would have on the environment due to the export of uranium.

107 The questions of nuclear security and safety were addressed in a report in Appendix E3 to the draft EIS. The report deals with the Olympic Dam Expansion in the Context of the International Nuclear Fuel Cycle. The purpose of the report is stated at the outset:

> 1. The Purpose
>
> The purpose of this Appendix is to:
>
> (a) explain the civil nuclear fuel cycle (NFC) and to show how copper concentrate containing uranium (concentrate) produced from the Olympic Dam expansion and the combined operations of Olympic

Dam would form part of the NFC.

(b) discuss the various controls and safeguards in place under international and domestic law which would cover the whole of the NFC from the mining and milling of uranium in Australia through export, transport, processing, storage and use in China, which is the current preferred export destination.

(c) describe the systems and controls that BHP Billiton proposes under its incorporated structure with end users of the concentrate in China, and the uranium stewardship program which would apply comprehensive product stewardship principles to the safe handling, transport and use of Australian uranium produced from copper concentrate from the Olympic Dam expansion.

Although this appendix assumes that China is the preferred export destination, there are a range of alternative destinations available in line with applicable law and policy described in this appendix, and final decisions are yet to be made and approvals obtained.

108 The report describes the stages of the NFC. It discusses Australian government policy and the concept of Australian Obligated Nuclear Material. It discusses safety, security and safeguards across the NFC. It discusses safety, security and safeguard controls on the export of concentrate including international treaties and conventions, Australian government uranium export policy and legislation and bilateral safeguards agreements. It discusses in detail safety and security controls on international nuclear transport. It discusses in detail safety, security and safeguard controls for Australian Obligated Nuclear Material in China. It refers to a whole series of matters under this major heading. The subheadings give an indication of the matters discussed. They are as follows:

7.1 Management of AONM in China

7.2 Bilateral Safeguards Agreements with China

7.3 Accounting and Control of AONM

7.4 Safety Systems at Nuclear Installations

7.5 Significant Incidents at Nuclear Facilities

7.6 Contractual Control

7.7 Waste Streams and Controls

7.8 ESD and Product Stewardship

7.9 No Waste to be Returned to Australia

109 The issues were the subject of the supplementary EIS. They are discussed in Chapter 7 of the supplementary EIS which starts with the following:

> A number of issues raised in submissions on the draft EIS were about nuclear non-proliferation, arms control and disarmament, international politics, treaties and conventions. These issues are, principally, the responsibility of government. However, the responses below outline BHP Billiton's general appreciation of such issues based on publically available information.

110 The passages in the Commonwealth Assessment Report and the briefing note and the first respondent's reasons at paragraph 6.70 are in effect summaries of a considerable quantity of material. They must be viewed in that light. They show that the Minister considered the impact that the action would have on the environment due to the export of uranium.

111 I reject ground 3 of the applicant's application.

GROUNDS 4 AND 5

112 The applicant made his submissions on the basis that grounds 4b. and 5 were in effect one argument and ground 4a. a second argument.

113 With respect to the applicant's first argument, he contends that the first respondent failed to consider a matter he was required to consider by s 136(1)(a) of the EPBC Act being the impact that the action would have on the environment due to the continued and increased extraction of ground water from the Great Artesian Basin. That was an improper exercise of the power conferred by sections 130 and 133 of the EPBC Act, within sections 5(1)(e) and 5(2)(b) of the ADJR Act. He failed to consider that matter because he decided that continued water extraction from the Great Artesian Basin for the purpose of the approved action was not within the scope of the action and did not require approval under the EPBC Act and that was an error of the law within s 5(1)(f) of the ADJR Act.

114 The starting point for the applicant's submissions is the first respondent's Statement of Reasons and, in particular, paragraphs 6.27 and 6.28.

> Water extraction from the Great Artesian Basin
>
> 6.27 I noted that a number of public submissions on the draft EIS argued that BHPB should be required to reduce its existing extraction of water from the

> Great Artesian Basin (currently around 33 million litres of water a day) and replace this with water from the desalination plant. Existing water extraction was assessed under the now repealed *Environment Protection (Impact of Proposals) Act 1974*. As such, existing water extraction is not within the scope of the proposed action referred to under the EPBC Act and does not require EPBC approval.
>
> 6.28 Water extraction from the Great Artesian Basin has been subject to strict ongoing monitoring requirements to ensure it does not impact on mound spring communities or other ground water uses. I considered that there was no evidence to indicate that there would be a significant environmental gain in replacing existing water extracted from the Great Artesian Basin with water from the proposed desalination plant. To ensure the proposed action and the existing Olympic Dam operation are regulated under a single approval decision, I decided to apply the existing requirements for water extraction from the Great Artesian Basin as conditions under the EPBC Act.

115 The applicant submits that the first respondent excluded from his consideration the impacts of water extraction from the Great Artesian Basin under existing approvals.

116 The respondents submit that the applicant has misread the first respondent's reasons and that the first respondent did consider the impacts of the extraction of water from the Great Artesian Basin under existing approvals. The second and third respondents submit, in the alternative, that by reason of certain transitional provisions the first respondent was not required to consider that matter as a matter of law. The third respondent put an argument based on s 43A(1) of the EPBC Act which was supported by the second respondent. The second respondent also put an argument based on the *Environmental Reform (Consequential Provisions) Act 1999* (Cth). The first respondent submits that both arguments raise considerable difficulties and that it is not necessary for me to address them. I will outline the substance of the arguments, although for reasons I will give, it is not necessary for me to decide whether they are correct.

117 The third respondent's argument which was supported by the second respondent contained the following steps:

1. Section 21 of the EPBC Act contained a prohibition punishable by a civil penalty and s 22A contained a prohibition punishable by a criminal penalty. In accordance with well established principle, any ambiguity in the terms of those provisions must be resolved in

favour of the subject: *Beckwith v The Queen* (1976) 135 CLR 569 at 576-577 per Gibbs J (as his Honour then was).

2. Section 523 of the EPBC Act contains a definition of "actions" which is in the following terms:

> **Actions**
>
> (1) Subject to this sub-division **action** includes:
>
> (a) a project; and
>
> (b) a development; and
>
> (c) an undertaking; and
>
> (d) an activity or series of activities; and
>
> (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).

The second respondent's proposal fell within s 523(1)(e). The third respondent took me to material that referred to the existing development and submitted that the proposed action is clearly an *action* because it is an alteration within s 523(1)(e).

3. Section 43A(1) of the EPBC Act provides as follows:

> (1) A person may take an action described in a provision of Part 3 without an approval under Part 9 for the purposes of the provision if:
>
> (a) the action consists of a use of land, sea or sea bed; and
>
> (b) before the commencement of this Act, the action was authorised by a specific environmental authorisation; and
>
> (c) immediately before the commencement of this Act, no further specific environmental authorisation was necessary to allow the action to be taken lawfully; and
>
> (d) at the time the action is taken, the specific environmental authorisation continues to be in force.

4. The third respondent submits that the prior authorisation remains in place, and that what is proposed in terms of the extraction of water from the Great Artesian Basin does not involve exceeding the limit under the prior authorisation. The limit under the prior authorisation is said to be 42ml/d of which approximately 32ml/d is currently used. The following appears in the draft EIS:

> 5.7 Water Supply
>
> 5.7.1 Overview
>
> … The most significant areas of increased demand are associated with a need for low-quality water for dust suppression within the new open pit mine, increased process and demineralised water use associated with the new metallurgical plant and increased potable water demand required from the expansion of Roxby Downs and

> the operation of Hiltaba …
>
> The demand for onsite construction water would be met through a combination of process of probably water from the existing GAB supply source if high-quality water is desired, or from Wellfields should low-quality water be required …
>
> The existing underground mine and metallurgical plant will continue to source process, potable and demineralised water from the GAB via the on-site desalination plant.

There are then various tables which indicate the following. First, the current licence limit for the extraction of water from the Great Artesian Basin is based on drawdown, "extrapolated to an extraction rate of about 42ML/d". Secondly, the current demand from the existing Great Artesian Basin Wellfields A and B averaged 37ML/d. The proposal was to use the unused amount under the current licences.

5. The proposed action being an alteration to an existing development did not involve the extraction of water under existing approvals.

6. It followed that the first respondent did not need to consider the extraction of water from the Great Artesian Basin as part of the alteration to an existing development.

118 The second respondent's further argument (referred to as its tertiary argument) involved the following steps:

1. The extraction of water from the Great Artesian Basin within the limits of the existing South Australian licences was part of an activity previously assessed under the *Environment Protection (Impact Proposals) Act 1974* (Cth) ("EPIP Act") and an EPIP activity within the *Environmental Reform (Consequential Provisions) Act 1999* (Cth) Schedule 1, clause 1. By reason of Schedule 1, clause 3(2), Part 3 of the EPBC Act does not apply to an action that is related to an EPIP activity.

2. The action of extracting water from the Great Artesian basin was an action that is related to an EPIP activity.

3. The EPIP activity was assessed under the EPIP Act.

4. All of the provisions of the Administrative Procedures relating to the mining and milling of uranium ore for export at Olympic Dam had been complied with.

119 I do not need to consider these arguments because I do not think the Minister failed to consider the extraction of water from the Great Artesian Basin.

120 It seems to me that the first respondent is addressing a number of issues in paragraphs 6.27 and 6.28 of his Statement of Reasons. One issue is a response to the public submissions to the effect that the existing extraction of water from the Great Artesian Basin should be reduced. The first respondent notes that he has no power to achieve that result. It is in that context that he states that existing water extraction is not within the scope of the proposed action referred to under the EPBC Act and does not require EPBC approval. The first respondent goes on to note that water extraction has been subject to strict ongoing monitoring requirements. He expresses the opinion that there is no evidence to indicate a significant environmental gain in replacing existing water extracted from the Great Artesian Basin with water from the proposed desalination plant. Significantly, he states that to ensure the proposed action and the existing operation are regulated under a single approval decision, he had decided to apply the existing requirements to the water extraction as conditions under the EPBC Act.

121 The conditions attached to the approval included the following:

> Extraction of water from the Great Artesian Basin.
>
> 27 The approval holder must ensure that the extraction of water from Wellfields A and B in the Great Artesian Basin, as assessed under the *Environment Protection (Impact Proposals) Act 1974*, does not have a significant adverse impact on ground water, dependent listed threatened species or ecological communities.
>
> 28. The program required in condition 4 must include:
>
> (a) Compliance criteria for condition 27.
>
> (b) A requirement for collection of spring flow data and bore pressure data, and details of how these will be used to refine aquifer parameters and re-estimate drawdown effects at spring groups at regular time intervals.
>
> (c) contingency measures and a response plan to address any significant adverse variation in monitored and/or predicted drawdown or flow rates at mound springs occurring as a result of water extraction by the approval holder.
>
> (d) collection of long term data set to achieve a better understanding of fluctuations in these systems.

There is also reference in condition 24a. to there being no significant adverse impact on ground water pressure in the Great Artesian Basin.

122 The following appears in the Supplementary EIS:

> The existing Olympic Dam operation currently extracts approximately 33ml/d from the GAB within the terms of its existing approved special water licence. This existing and continued extraction from the GAB is dependent on BHP Billiton meeting strict ground water pressure drawdown criteria designed to manage the impact of extraction on local ground water dependent springs. Information about current extraction rates, drawdown pressures and spring flows is presented annually in the BHP Billiton Olympic Dam Wellfield's annual reports. As outlined in sections 4.1.3 and 4.3.3 above, the efficient and sustainable use of GAB water has long been a priority of BHP Billiton, with significant improvements in water use efficiency achieved over the decades since the previous expansion at Olympic Dam.

123 The issue is also addressed in the South Australian Assessment Report at pages 47, 69, 79 and 88. For example, at page 79 the following appears:

> The DEIS indicated that no additional water would be sourced from the GAB beyond the current special water licensing arrangements under the Olympic Dam indenture. Current licensing arrangements provide for the management of extractions from the two Wellfields (Wellfield A and Wellfield B), with current extraction rates in the order of 35ml/d.

At page 88, the author addresses the effects on the springs in the Great Artesian Basin.

124 In the Commonwealth Assessment Report, the following appears:

> BHBP currently extracts 37ml of water per day from the GAB and this is monitored and has remained within agreed drawdown limits to protect the mound springs. As a comparison, BHPB estimates ground water inflows from the Stuart Shelf into the open pit would be about 3.5ml per day, or approximately one tenth of BHBP's current extraction from the GAB. As such inflows would occur approximately 90km from the GAB, it is likely that any impact on ground water pressure in the GAB would be minor. In addition, BHPB indicated in the EIS that no additional water for the expansion would be obtained from the GAB beyond that which is available under current approvals from South Australia for existing mine operations.

I also note the statements and information in sections 6.1 and 5.1.3.

125 The respondents referred me to the well known principle referred to in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 to the effect that a decision maker's reasons for decision should not be construed minutely and finely with an eye keenly attuned to the perception of error. The issue of the environmental impacts of the extraction of water from the Great Artesian Basin has not been dealt with in detail. However, it has been considered and I think that in his examination of the matter, the first respondent was entitled to take into account the fact that there was an existing approval. In those circumstances, the applicant has not made good grounds 4b. and 5 of his application.

126 The applicant commenced his submissions with respect to ground 4a by referring to the decision of Moore and Lander JJ in *Lansen v Minister for Environment and Heritage & anor* (2008) 174 FCR 14 at 32 [72]-[74]. The applicant submits that I am bound by that decision and therefore I am bound to conclude that if the first respondent failed to comply with s 134(4)(a) then his decision is invalid.

127 The applicant submits that the first respondent did not consider relevant conditions that had been imposed under a law of the State of South Australia. He had not considered existing conditions on water extraction under State water licences and in the Indenture Act. Although the first respondent knew something about the existing water licences (see paragraphs [117.4], [122], [123] and [124] above) he had not considered the conditions that had been imposed on those water licences. The applicant submits that it could not be said that the first respondent knew of the limit because the alleged limit was not a condition but an extrapolation from the drawdown. In any event, the applicant contends, the first respondent had not considered the conditions; general references to licences granted by the State of South Australia were not sufficient.

128 The applicant also submits that the first respondent failed to consider conditions that were likely to be imposed under the *Roxby Downs (Indenture Ratification) (Amendment of Indenture) Amendment Act 2011* (SA) ("Amendment Act"). The first respondent gave his approval under the EPBC Act on 10 October 2011. The Amendment Act was introduced into the South Australian Parliament on 18 October 2011 and enacted on 19 November 2011. It commenced in operation on 15 December 2011. It contains a number of conditions. The applicant pointed to material before the Minister which should have alerted him to the fact that there would be amendments to the indenture and to the Indenture Act. There are references to amendments to the indenture and that amendments to the indenture would require legislation.

129 The respondents contend that s 134(4)(a) referred to conditions imposed on the proposed development not on an existing development. Furthermore they contend that s 134(4)(a) refers to existing laws and not proposed laws. As far as existing laws are concerned, the first respondent had information before him in the form of the South Australian Assessment Report about likely conditions to be imposed by the South Australian Government under the *Development Act 1993* (SA) and in fact those conditions were

imposed as is evidenced by the South Australian Government Gazette of 10 October 2011. They were the only conditions likely to be imposed under an existing law of South Australia.

130 I think the respondents' arguments are correct.

131 I start with *existing conditions*. The applicant points to the existing water conditions in the Indenture Act as being existing conditions within s 134(4)(a). The respondents submit that the first respondent had considered the substance of such conditions. The first respondent appears to have known something of those conditions, but I agree with the applicant that he did not know sufficient details of the conditions for it to be said that he considered the conditions. The respondents' principal argument is that the first respondent was not required to consider the conditions. They submit that the conditions were not conditions imposed "on the taking of the action". I agree with that submission. The State of South Australia had not imposed the conditions on the taking of the action comprising the proposed development. They were conditions imposed on the existing development. This is not to accept the respondents' arguments based on the transitional provisions in another form, but merely to recognise that *existing* conditions within s 134(4)(a) are conditions which qualify or travel with the proposed development.

132 I turn now to *conditions likely to be imposed*. The first respondent did consider, or at least it has not been established that he did not consider, the conditions likely to be imposed under the *Development Act 1993* (SA) as modified by the Indenture Act. That is established by the South Australian Assessment Report which was before the first respondent and which contained details of proposed conditions. Those conditions were in fact imposed by the State Minister as can be seen from the South Australian Government Gazette of 10 October 2011. However, the applicant contends that the first respondent did not consider the alterations to the conditions embodied in the Amended Indenture which was executed on 12 October 2011 and which formed part of the Amendment Act. As I have said, the respondents' response to this submission was that conditions likely to be imposed under a law of South Australia means a law of South Australia in force at the time the Minister makes his decision. It seems to me that if one goes no further than the words in s 134(4)(a) then the respondents' submission is correct. The apparent purpose of the section is to avoid the duplication of conditions, or inconsistency between conditions. The conditions may be specified in an instrument (including an authorisation) made or granted under a law of

another body politic or another law of the Commonwealth (s 134(3)(c) of the EPBC Act). One would not ordinarily expect the Minister to be required to speculate about the passage of a law which contains conditions, or under which an instrument may be made or granted which contains conditions. There is nothing to displace that meaning. Section 134(3C) was added to the EPBC Act at the same time as the words "or the Minister considers are likely to be imposed" were added to s 134(4)(a). The Explanatory Memorandum for the amendments refers to the latter as being consequential upon the former. The Explanatory Memorandum contains the following statements:

> Further, to avoid potential duplication or inconsistency, the Minister may require a proponent to comply with conditions contained in an instrument which has not yet come into force. This avoids the need to repeat conditions for projects subject to multiple approvals.

133 I do not think that there is anything in the amendments to sections 134(3C) and 134(4)(a) which displaces the ordinary meaning to which I have referred.

134 Ground 4a must be rejected. The respondents put an alternative argument. It was that the changes to the conditions were so minor – the limitation in water quantity to be extracted from the Great Artesian Basin was made express (condition 13(8A)) and there was provision for the imposition of charges (condition 13(12)) – that a failure to consider them did not result in invalidity (*Minister for Aboriginal Affairs v Peko - Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J (as his Honour then was)). However, that submission must fail, at least before me, because of the decision of the Full Court of this Court in *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 at 32 [72]-[74] per Moore and Lander JJ.

135 I reject grounds 4 and 5 of the applicant's application.

GROUND 6

136 This ground must be rejected following my rejection of grounds 1-5 inclusive.

CONCLUSION

137 The application must be dismissed.

I certify that the preceding one

hundred and thirty seven (137) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 20 April 2012