FEDERAL COURT OF AUSTRALIA

Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities [2013] FCAFC 111

Citation:	Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities [2013] FCAFC 111
Appeal from:	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 97 of 2012
Judges:	**GILMOUR, FOSTER AND BARKER JJ**
Date of judgment:	8 October 2013
Catchwords:	**ADMINISTRATIVE LAW** – appeal – whether the requirement in s 134(4)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act) that, in deciding whether to attach a condition to an approval, the Minister may consider "any relevant conditions that have been imposed … under the law of the State … on the taking of the action" extends to conditions under existing licences or approvals where the proposed action involves reliance on those licences or approvals; and if so, whether there was a failure by the Minister to consider those conditions; and if there was such a failure, whether that failure rendered the approval invalid **ADMINISTRATIVE LAW** – appeal – whether the totality of the conditions attached by the Minister to the approval of the action under s 134 of the EPBC Act rendered the approval of the action uncertain within the meaning of s 5(2)(h) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), or otherwise unauthorised by or in excess of the jurisdiction conferred by the EPBC Act
Legislation:	*Acts Interpretation Act 1901* (Cth) s 15AA *Administrative Decisions (Judicial Review) Act 1977* (Cth)

ss 5, 5(1)(c), 5(1)(d), 5(1)(e), 5(2)(h)
Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 3(1), 3(2), 3A, 21, 22(1), 22A, 25AA, 28AB, 43A, 67, 67A, 68, 72, 74, 75, 87, 102(3), 104, 105, 130, 131, 133, 134, 156A, 156B, 391, 475, 523, 527E, Ch 2, Pt 3, Div 1, Ch 2, Pt 3, Div 1, Subdiv E, Pt 4, Pt 7, Pt 8, Pt 9, Pt 10, Pt 11, Pt 17, Pt 18
Environment Protection (Impact of Proposals) Act 1974 (Cth)
Judiciary Act 1903 (Cth) s 39B
Native Title Act 1993 (Cth)

Environment Protection and Biodiversity Conservation Bill 1998 (Cth)

Development Act 1993 (SA) s 46, s 48(2)
Environmental Planning and Assessment Act 1979 (NSW) ss 75J, 91
Roxby Downs (Indenture Ratification) (Amendment of Indenture) Amendment Act 2011 (SA)
Roxby Downs (Indenture Ratification) Act 1982 (SA) s 7(4)
Town Planning and Development Act 1928 (WA) s 20(1)(a)
Water Management Act 2000 (NSW)

Roxby Downs (Indenture Ratification) (Amendment of Indenture) Amendment Bill 2011 (SA)

Cases cited:

Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council (1970) 123 CLR 490
Blue Wedges Inc v Minister for the Environment, Heritage and the Arts (2008) 167 FCR 463
Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2) [2012] FCA 403
Kent County Council v Kingsway Investments (Kent) Ltd [1971] AC 72
Kindimindi Investments Pty Ltd v Lane Cove Council (2006) 143 LGERA 277
King Gee Clothing Co Pty Ltd v Commonwealth (1945) 71 CLR 184
Krajniw v Brisbane City Council (No 2) [2011] FCA 563
Lansen v Minister for Environment and Heritage (2008) 174 FCR 14
Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts (2009) 178 FCR 385
Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts (2009) 165 LGERA 203
Lloyd v Robinson (1962) 107 CLR 142
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986)

	162 CLR 24 *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 *Parramatta City Council v Kriticos* [1971] 1 NSWLR 140 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 *R v Purdey* (1993) 31 NSWLR 668 *R v Toohey; Ex parte Meneling Station Proprietary Limited* (1982) 158 CLR 327 *Randwick City Council v Minister for the Environment* (1998) 54 ALD 682 *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 176 FCR 153 *Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 *Transport Action Group against Motorways Inc v Roads and Traffic Authority* (1999) 46 NSWLR 598 *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 *Ulan Coal Mines Limited v Minister for Planning* (2008) 160 LGERA 20 *Warren v Coombes* (1979) 142 CLR 531 *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508
Date of hearing:	21 June 2012
Place:	SYDNEY (HEARD IN ADELAIDE)
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	271
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Counsel for the First Respondent:	Dr SE Pritchard

Solicitor for the First Respondent:	Clayton Utz
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Solicitor for the Second Respondent:	Ashurst Australia
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 SA)

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **SAD 97 of 2012**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**KEVIN BUZZACOTT** **Appellant**
AND:	**MINISTER FOR SUSTAINABILITY, ENVIRONMENT, WATER, POPULATION AND COMMUNITIES** **First Respondent**
	BHP BILLITON OLYMPIC DAM CORPORATION PTY LTD **Second Respondent**
	STATE OF SOUTH AUSTRALIA **Third Respondent**
JUDGES:	**GILMOUR, FOSTER AND BARKER JJ**
DATE OF ORDER:	**8 OCTOBER 2013**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the costs of each respondent.

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

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	STATE OF SOUTH AUSTRALIA **Third Respondent**
JUDGES:	**GILMOUR, FOSTER AND BARKER JJ**
DATE:	**8 OCTOBER 2013**
PLACE:	**SYDNEY (HEARD IN ADELAIDE)**

REASONS FOR JUDGMENT

GILMOUR, FOSTER AND BARKER JJ:

1 This is an appeal from the judgment of a judge of this Court in *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 403 (the Reasons) which dismissed applications under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) and s 39B of the *Judiciary Act 1903* (Cth) (the *Judiciary Act*) to quash the decision of the first respondent (the Minister) approving the taking of a controlled action under ss 130(1) and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act) (the Decision).

2 The Decision approved, with conditions, an "action" namely, 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 Action). The

second respondent, BHP Billiton Olympic Dam Corporation Pty Ltd (BHPB) is the proponent of the action.

3 The third respondent is the State of South Australia (the State) which confined its submissions to ground 1 and to the Notice of Contention (Contentions).

4 The appeal raises four questions concerning the construction and application of the EPBC Act. The first three arise under the first ground of appeal and the last is under the second ground. The questions are:

(1) Whether the requirement in s 134(4)(a) of the EPBC Act that, in deciding whether to attach a condition to an approval, the Minister must consider "any relevant conditions that have been imposed … under a law of a State … on the taking of the action" extends to conditions under existing licences or approvals where the proposed action involves reliance on those licences or approvals (relevantly, the *Roxby Downs (Indenture Ratification) Act 1982* (SA) (*Indenture Act*) and South Australian Special Water Licences A and B (Water Licences) issued under cl 13(8)(B)(ii) of the Schedule in 1986 and 1995 respectively, to that Act);

(2) If so, whether there was a failure by the Minister to consider such conditions;

(3) If there was such a failure, whether the result is invalidity of the approval; and

(4) Whether the totality of the conditions attached by the Minister to the approval of the action under s 134 of the EPBC Act rendered the approval uncertain within the meaning of s 5(2)(h) of the ADJR Act, or otherwise unauthorised by or in excess of the jurisdiction conferred by the EPBC Act.

5 In the Contentions filed by BHPB which were adopted by both the Minister and the State, BHPB contends first that, in any event, the Minister in fact considered the conditions applicable to certain licences to draw water from the Great Artesian Basin (GAB); and second, that if the Minister did not do so and thereby erred, his decision was nevertheless valid because the matter was inconsequential.

Decision chronology

6 The mining operations to which the Minister's approval relates have their genesis in the *Indenture Act* which was assented to on 21 June 1982. This Act ratified and

approved the Indenture contained as a Schedule to it (the Indenture). By s 5 of the *Indenture Act* it is provided that the *Indenture Act* and the Indenture bind the Crown. We will, in these reasons, unless it is necessary to do otherwise, generally refer to the Indenture which provides comprehensively between the State and the Joint Ventures for the proposed and future mining developments in the Olympic Dam Area.

7 The Roxby Downs project was the subject of environmental assessment not only under South Australian legislation but also under the then relevant Commonwealth legislation, the *Environment Protection (Impact of Proposals) Act 1974* (Cth) (*Impact of Proposals Act*).

8 In 1988, following environmental approval under the *Impact of Proposals Act*, mining commenced at Olympic Dam pursuant to the Indenture.

9 In 1997, an expansion of mining operations under the Indenture was again assessed under the *Impact of Proposals Act*.

10 On 16 August 2005, Western Mining Corporation (WMC) referred a proposed action to the Minister under s 68 of the EPBC Act, the successor legislation to the *Impact of Proposals Act*. From that point on a number of steps required both for the Minister's approval under the EPBC Act, and for the purposes of South Australian law, were undertaken.

11 On 2 September 2005, the Minister determined that the proposed action was a "controlled action" under s 75 of the EPBC Act.

12 On 15 September 2005, the State Minister, under s 46 of the *Development Act 1993* (SA) (the *Development Act*) issued a declaration which had the effect of facilitating the proposed action under State law.

13 On 8 November 2005, a delegate of the Minister decided that the proposal identified as a controlled action should be assessed by means of an environmental impact statement (EIS) under the EPBC Act.

14 Subsequently, on 24 October 2008, the Minister accepted a variation to the controlled action.

15 On 1 May 2009, a draft EIS was made available for public comment by BHPB, which by that time had become the proponent of the controlled action as varied.

16 Soon after, on 9 June 2010, the Minister accepted a further variation of the varied proposal.

17 On 2 December 2010, BHPB lodged a supplementary EIS under the EPBC Act.

18 On 21 April 2011, the draft EIS and supplementary EIS were accepted as the final EIS under the EPBC Act.

19 On 12 July 2011, BHPB requested the State Minister to approve the proposal in its varied form under cl 7 of the Indenture (cl 7 request).

20 On 5 September 2011, an assessment report (the South Australian Assessment Report or SAAR) made for the purposes of the cl 7 request was completed and the State informed the Minister that the State Minister intended to approve the proposal as varied, subject to conditions set out in Ch 14 of the SAAR.

21 On 7 September 2011, the State provided the SAAR to the Minister.

22 On 8 September 2011, a brief was provided to the Minister by his department (the Department) recommending approval of the proposed action for the purposes of the EPBC Act.

23 On 13 September 2011, the Minister considered the brief and sought comments from other Commonwealth Ministers and the State Minister.

24 On 23 September 2011, comments were provided to the Minister by the Northern Territory.

25 On 27 September 2011, comments were provided to the Minister by the South Australian Olympic Dam Taskforce.

26 On 28 September 2011, comments were provided to the Minister by the State Minister.

27 Between 26 September and 4 October 2011, comments were provided to the Minister by other Commonwealth Ministers.

28 On 7 October 2011, the Minister received a brief on the final approval decision containing, amongst other things, Attachment C (Att C) which included the comments of the South Australian Olympic Dam Taskforce on the Minister's proposed conditions and the letter from the State Minister dated 28 September 2011.

29 On 10 October 2011, the Minister was provided with a final recommendation on changes to proposed final conditions. The Minister then provided his approval under the EPBC Act of the controlled action as it had been varied, but subject to conditions, and the State Minister also provided an approval to the proposed action.

30 Soon after, on 18 October 2011, to facilitate the State Minister's approval, the *Roxby Downs (Indenture Ratification) (Amendment of Indenture) Amendment Bill 2011* (SA) (*Amendment of Indenture Bill*) was introduced into the South Australian Parliament. It subsequently passed the Parliament and, on 8 December 2011, received assent.

31 On 15 December 2011, the *Roxby Downs (Indenture Ratification) (Amendment of Indenture) Amendment Act 2011* (SA) (save for Pt 2) commenced.

32 On 13 January 2012, the Minister signed a statement of reasons for his decision under the EPBC Act.

Regulatory process under EPBC Act

33 As may be seen from the chronology, the Minister's decision to grant the approval was made in circumstances where the proposed action was affected by both the law of South Australia and the law of the Commonwealth. State law principally governs mining

activity, including environmental and heritage impacts. However, the EPBC Act, when applicable, affects mining activities by causing a consideration of environmental and heritage impacts. Thus, both State and Commonwealth laws have the potential to overlap in relation to environmental impact assessment of a mining proposal. The constitutionality of the Commonwealth system of environmental regulation sitting alongside State land use, resource and environmental controls has not been in question since the landmark decision of *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.

34 At all material times the provisions of the EPBC Act relevant to the expansion proposal were as follows.

35 The objects of the EPBC Act set out in s 3(1) relevantly were:

· To provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance (s 3(1)(a)).

· To promote a co-operative approach to the protection and management of the environment involving governments, the community, landholders and indigenous peoples (s 3(1)(d)).

· To assist in co-operative implementation of Australia's international environmental responsibilities (s 3(1)(e)).

· To recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity (s 3(1)(f)).

36 Further, s 3(2) relevantly stated that, in order to achieve its objects, the EPBC Act:

· Recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas (s 3(2)(a)).

· Strengthens intergovernmental co-operation and minimises duplication, through bilateral agreements (s 3(2)(b)).

· Provides for the intergovernmental accreditation of environmental assessment and approval processes (s 3(2)(c)).

· Adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed (s 3(2)(d)).

· Promotes a partnership approach to environmental protection and biodiversity conservation through:

(i) bilateral agreements with States and Territories;

(ii) conservation agreements with landholders;

(iii) recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity; and

(iv) the involvement of the community in management planning (s 3(2)(g)).

37 The concept of "ecologically sustainable development" mentioned in the objects clause was elaborated in s 3A, where the following principles of ecologically sustainable development were identified:

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(c) the principle of inter-generational equity - that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

(e) improved valuation, pricing and incentive mechanisms should be promoted.

38 The overall structure of the EPBC Act was as follows:

• Chapter 1 – preliminary.

• Chapter 2 – protecting the environment, which by Pt 3 specified requirements for environmental approvals, and by Pt 4 specified those cases in which environmental approval are not needed.

• Chapter 3 – bilateral agreements.

- Chapter 4 – environmental assessments and approvals; which by Pt 7 dealt with deciding whether approval of actions is needed, by Pt 8 dealt with assessing impacts of controlled actions, by Pt 9 dealt with approval of actions, by Pt 10 dealt with strategic assessments and by Pt 11 dealt with miscellaneous rules.
- Chapter 5 – conservation of biodiversity and heritage.
- Chapter 5A – the list of overseas places of historic significance to Australia.
- Chapter 5B – declared commercial fishing activities.
- Chapter 6 – administration, including: Pt 16 which stated the "precautionary principle" at s 391(2) in terms that reflect the principles of ecologically sustainable development mentioned in s 3A(b); Pt 17 which dealt with enforcement; and Pt 18 which dealt with remedying of environmental damage.
- Chapter 7 – miscellaneous.
- Chapter 8 – definitions.

39 The regulatory mechanisms adopted by the EPBC Act to control activities likely to have significant impacts on the environment and to ensure the proper assessment of such activities were complex. First, by Ch 2, Pt 3, Div 1, there were provisions requiring approval of activities with a significant impact on world heritage property (Subdiv A), national heritage (Subdiv AA), wetlands of international importance (Subdiv B), listed threatened species and communities (Subdiv C) and listed migratory species (Subdiv D), as well as provisions requiring approval of nuclear actions (Subdiv E), activities involving the marine environment (Subdiv F), activities in the Great Barrier Reef Marine Park (Subdiv FA), additional matters of national environmental significance (Subdiv G) and actions that are taken to be covered by Div 1 (Subdiv H). Section 25AA (which appeared in Subdiv HA) and s 28AB (which appeared in Div 2, Subdiv D) provided a limitation on liability for the actions of third parties at material times. Secondly, Div 2 dealt with protection of the environment from proposals involving the Commonwealth.

40 Because the proposed expansion of Olympic Dam involved the mining of uranium, it attracted the operation of Ch 2, Pt 3, Div 1, Subdiv E – protection of the environment from nuclear actions. Section 21 adopted the regulatory mechanism evident in

the preceding subdivisions of Div 1, by prohibiting a prescribed action under threat of a civil penalty in the following terms:

> (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).

41 Section 22A(1)-(6) further provided for offences relating to nuclear actions. However, s 22A(8) provided:

> (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*.

42 The expression "nuclear action" was relevantly defined by s 22(1) to mean:

(d) mining or milling uranium ore;

…

(f) de-commissioning or rehabilitating any facility or area in which an activity described in paragraph …(d)…has been undertaken;

43 Thus, the proposed activity of the expansion of Olympic Dam for, amongst other things, uranium mining fell within the definition of nuclear action.

44 Section 21(4)(a) had the effect, therefore, that the prohibition on taking a nuclear action that has, will have or is likely to have a significant impact on the environment under s 21(1), would not apply if an approval to the taking of the action was in operation under Pt 9 for the purposes of s 21. Similarly, the offence created by s 22A(1) of taking a nuclear action that results or will result in a significant impact on the environment, would not apply by virtue of s 22A(8) if an approval to the taking of the action was in operation under Pt 9 for the purposes of s 22A. Accordingly, a proponent of an activity, such as one that involves taking a nuclear action that results or will result in a significant environmental impact on the environment, was required to obtain an approval to the taking of the action under Pt 9 in order to avoid the prohibition and offence provisions of Pt 3.

45 While Pt 9 of Ch 4 provided for the granting of approvals to actions, thus relieving a person proposing to take a relevant action from any liability under Pt 3 of the EPBC Act, Pt 7, Div 1, s 67A specified that a person must not take a "controlled action" unless an approval of the taking of the action by the person is in operation under Pt 9 for the purposes of the relevant provision of Pt 3.

46 Thus, an approval under Pt 9 for the purposes of a relevant provision of Pt 3 served both to relieve a person against the prohibition or offence provisions in Pt 3 and to relieve the person from the prohibition in s 67A – and from the prospect of being the subject of an injunction under s 475, to which the Note to s 67A refers.

47 The expression "controlled action" was defined by s 67:

> 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 section 25AA or 28AB, be) prohibited by the provision. The provision is a ***controlling provision*** for the action.
> (Original emphasis.)

48 A person proposing to take an action that the person thinks may be or is a controlled action, was obliged to refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action, as provided for by s 68(1). In this case, the proposed expansion of Olympic Dam for, amongst other things, uranium mining, was referred by the then proponent (WMC) to the Minister on 16 August 2005 under this provision.

49 The form and content of a referral made by a person was dealt with by s 72, and by s 72(3) could include alternative proposals relating to the location where the action is to be taken or the time frames within which the action is to be taken or the activities that are to be carried out in taking the action.

50 By s 74(1), the Minister, as the Environment Minister, was required to inform other Commonwealth Ministers with administrative responsibilities relating to the proposal about the referral and invite them to give the Minister, as Environment Minister, information that relates to the proposed action and is relevant in deciding whether or not the proposed action is a controlled action.

51 By s 74, the Minister was also obliged to, or could, as the case may be, invite comment from a number of other sources:

- From the Australian Heritage Council, because of national heritage values of a national heritage place or heritage values of a place (s 74(1A) and (1B)).

• From the appropriate State or Territory Minister, if the Minister thought the action may have an impact on a matter protected by a provision of Pt 3, Div 1 (about matters of national environmental significance) (s 74(2)).

• In effect, from the public by causing the referral to be published on the internet and inviting anyone to give the Minister comments within 10 business days on whether the action is a controlled action (s 74(3)).

52 By Pt 7, Div 2, s 75(1), the Minister was required to decide whether the action that is the subject of the proposal is a controlled action and which provisions of Pt 3, if any, are controlling provisions for the action.

53 In deciding whether an action is a controlled action, by s 75(1A) the Minister was required to consider any public comment he had received pursuant to the invitation issued under s 74(3).

54 In this case, the Minister decided on 2 September 2005 that the proposed action referred by WMC was a controlled action under s 75.

55 Section 156A enabled a person who has referred an action to the Minister to request the Minister to accept a variation of the action, which the Minister might do under s 156B. This occurred in this case.

56 Where the proposal or the varied proposal was identified as a controlled action, the Minister was required to choose an assessment method (s 87). In this particular case, assessment by an EIS under Div 6, the option mentioned in s 87(1)(d), was chosen.

57 The EIS process enabled comments to be made. Section 104 provided for the proponent to finalise the draft statement taking account of comments received and then to give the finalised statement to the Minister.

58 Under s 105, the secretary of the Department was required to prepare and give to the Minister a report relating to the action (assessment report) within 30 business days after the day on which the Minister accepted the finalised statement from the designated proponent. That assessment report could be published.

59 Under Pt 9, s 130 the Minister was required to decide for the purposes of each controlling provision whether or not to approve the taking of a controlled action. This decision had to be made within 30 business days (or such longer period as the Minister specified in writing) where, as in the present case, the action was the subject of an assessment report.

60 However, under s 130(1B), if the action was to be taken in more than one State or self governing Territory, as it was in this case, the relevant period did not start until after the first business day after the day on which the Minister received from one of those States or Territories a notice as described in para (1B)(b) of s 130.

61 At that point a number of things were required to be done. By s 131 the Minister, as Environment Minister, before deciding whether or not to approve the taking of an action and what conditions, if any, to attach to it, was required to inform all other Commonwealth Ministers whom the Minister believed had responsibilities and invite them to give comments that relate to economic and social matters and may be considered by the Minister consistently with the principles of ecologically sustainable development. The Minister could also request further information for the approval decision if the Minister believed on reasonable grounds he or she did not have enough information to make an informed decision.

62 Ultimately, under s 133 the Minister could approve, for the purposes of a controlling provision, the taking of the action by a person.

63 Under s 134 the Minister was relevantly empowered to attach conditions to an approval. Section 134(1) empowered the Minister to attach a condition to the approval of the action if considered necessary or convenient for protecting a matter protected by a provision of Pt 3 for which the approval has effect, or repairing or mitigating damage to a matter protected by a provision of Pt 3 for which the approval has effect.

64 Section 134(2) provided that the Minister may attach a condition to the approval of the action if he was satisfied that the condition was 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.

65 While s 134(2) was in almost identical terms to s 134(1), s 134(1) made it clear that the circumstance mentioned in (a) exists "whether or not the protection is protection from the action" and in relation to (b) "whether or not the damage has been, will be or is likely to be caused by the action".

66 Section 134(3) stated that the conditions that "may be attached to an approval include" those set out in subpars (aa)-(h). It was stated in subs (3), however, that the subsection does not limit the kinds of conditions that may be attached to an approval.

67 Section 134(3A) specified conditions that could not be attached to an approval and s 134(3B) specified conditions which could be attached if the holder of the approval consents.

68 Section 134(4) provided that in deciding whether to attach a condition to an approval, a 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.

69 Section 134(5), however, provided that a failure to consider information as required by subs (4)(aa) does not invalidate a decision about attaching a condition to the approval.

70 On 10 October 2011, the Minister made the Decision and granted the approval.

Summary of Decision and challenge

71 In summary, the process leading to the Decision under challenge began in August 2005 when, in accordance with s 68 of the EPBC Act, a proposed action was referred to the Minister to take action in the form of an expansion of the existing Olympic Dam copper, uranium, gold and silver mine and processing plant, including all associated infrastructure in South Australia and Northern Territory. The existing underground mining operation at Olympic Dam was regulated by the Indenture and existing Commonwealth and South Australian environmental approvals to produce up to 350,000 tpa of copper and associated products. The proposed action involved a change to open pit mining, a significant increase in the scale of production and extensive infrastructure associated with the expanded mining operations.

72 The State conditions at issue in this appeal are those relating to water in the Indenture and the Water Licences. The Water Licences apply to wellfields A and B, the locations of which are shown relative to the GAB in the draft EIS. The *Indenture Act* and the Indenture, made in 1982 and amended most recently in 2011, did not impose conditions on the proposed action, which first arose as a proposal in 2005. The material before the Minister indicated that the Action would involve drawing additional water from the GAB via these wells, for the purpose of the mine expansion, up to 42 ML/day. This would have involved an increase, relative to current use, but would be within BHPB's entitlement under the Water Licences. Neither the conditions in the Water Licences themselves nor the conditions in the Indenture were set out in the materials before the Minister.

73 The primary judge found that the Minister "did not know sufficient details of the conditions for it to be said that he considered the conditions". However, his Honour held that the Minister was not required to consider conditions in the Indenture and Water Licences because they were not conditions imposed "on the taking of the action"; rather, they were conditions imposed on the existing Olympic Dam development. Both of these conclusions are challenged on this appeal.

74 The appellant contends that the Indenture and two Water Licences contained conditions that the Minister was bound to consider.

75 The appellant also challenges the legal efficacy of the totality of the conditions imposed by the Decision, contending they go beyond the Minister's power under the EPBC Act.

Ground 1: Minister required to consider conditions in Indenture and Water Licences

76 The principal issue with respect to ground 1 of the appeal concerns the scope of the words "conditions that have been imposed … on the taking of the action" in s 134(4)(a) of the EPBC Act. Relevantly, do the words "on the taking of the action" qualify the matters which "the Minister must consider" so as to limit the inquiry to conditions imposed under the laws of a State on the proposed action, or alternatively, as the appellant contends, is the Minister required to consider both the pre-existing conditions imposed under laws of a State on an existing project as well as those conditions that have been, or are likely to be, imposed on the proposed action?

77 The primary judge at [131] concluded that the words "on the taking of the action" qualified the scope of the conditions the Minister must consider such that there was no statutory requirement to consider conditions imposed on pre-existing projects or developments. The consequence of that finding was that the Minister was not required, by s 134(4)(a), to consider the Water Licences granted under the Indenture.

78 Section 134(1) of the EPBC Act authorises the Minister to attach conditions to an approval given under s 133. A condition may be attached if it is considered "necessary or convenient" for protecting a matter protected by a relevant provision of Pt 3, or repairing or mitigating damage to such a matter. There is an additional and more specific power in s 134(2) to attach conditions that are "necessary or convenient" for protecting relevant matters from the action that is being approved, or repairing or mitigating the effects of the action. Section 134(3) contains examples of kinds of conditions that may be attached.

79 Section 134(4)(a), as relevantly in force, provides:

> (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; …

80 The purpose of s 134(4)(a) was identified by the majority (Moore and Lander JJ) in *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 where a failure to consider relevant State conditions rendered the Minister's Decision invalid:

> [25] Section 134(4) is couched in imperative language. The Minister, in considering whether to attach any condition to an approval, whether of the kind in s 134(3) or for the purposes in s 134(1) or s 134(2), must consider the three matters in s 134(4). In particular, the Minister is obliged to consider "any relevant conditions that have been imposed under a law of ... a self-governing Territory". A relevant condition would be a condition that is relevant for the purposes of s 134(1) or s 134(2).
>
> . . .
>
> [63] It seems to us that the Minister must have considered at least the matters in s 134(4)(a) and (b) prior to the Minister complying with his or her statutory obligation in s 131 if the Minister is proposing to approve the taking of an action. *The Minister must know what conditions he or she is proposing to attach to the approval and can only know that if the Minister has first considered the relevant conditions referred to in s 134(4)(a)*. Moreover, the Minister must have considered the conditions which the Minister may attach to an approval under s 134 generally. ... (Emphasis added.)

81 Tamberlin J, while dissenting on whether a failure to consider such a condition would invalidate the consent, identified the purpose of s 134(4)(a) in these terms:

> [288] Section 134(4)(a) is not directed to limit or control the terms or content of any condition which should be attached, but rather provides a collateral checking point or reference guide to be looked at in deciding whether to attach a condition, and if so, the extent of the condition and its terms. The consideration of other relevant conditions imposed under other laws on or related to the taking of the action can be seen as directed to avoidance of inessential duplication and/or inconsistency. Those conditions do not serve to lessen or expand the independent duty of the Minister under the EPBC Act of ensuring that all appropriate conditions on the application under consideration are imposed. …

82 The appellant submits that s 134(4)(a) requires the Minister to take into account conditions imposed by a State, as a step in determining what conditions he should attach to an approval in order to avoid duplication, inconsistency or omission which purpose is not achieved if the Minister's consideration is limited to conditions that the State has freshly formulated and applied specifically to the aspect of a proposed development that is presently before the Minister for approval under the EPBC Act. He contends that the purpose of avoiding duplication, inconsistency or omission can only be achieved if the Minister makes him or herself aware of all relevant restrictions or requirements under State law that apply to the proposed development; that the Minister can only protect relevant matters from the action that is being approved, or repair or mitigate the effects of the action, if

consideration is given to what State controls apply. He further submits that conditions applicable to "existing" approvals that are to apply to, or be relied on, for an expanded or amended development are just as susceptible to duplication or inconsistency with EPBC Act conditions as those (if any) which State authorities attach to such additional approvals as are required.

83 The appellant submits that consideration of some of the potential broader consequences of the construction preferred by the primary judge makes the point clear:

(1) The Minister would not be required to take into account any condition applying to a proposal, or part of a proposal, under a State planning instrument such as a local or State-wide plan, or a master plan applying to a broader development precinct or project, because such conditions would comprise existing controls not imposed specifically on the proposed action. The Minister would thus be freed from considering under the EPBC Act omission in the planning instrument's conditions, or the extent to which any conditions which he or she proposed to attach might duplicate, or be inconsistent with, those conditions.

(2) The Minister would not be required to consider any relevant conditions in State approvals that, rather than applying specifically to the proposed action before the Minister, instead attached to a person, site or class of activities. Given the diversity across States in the form of environment protection licences or other relevant environmental approvals (such as waste management agreements, approvals to clear land or harm threatened species), that result is at odds with the evident purpose of s 134(4)(a).

(3) No condition of a water access licence under the *Water Management Act 2000* (NSW), for example, would need to be taken into account by the Minister under the EPBC Act because such licences are not project-specific (an incident of water trading).

84 The appellant contends, taking into account s 15AA of the *Acts Interpretation Act 1901* (Cth), that the better construction of s 134(4)(a) is, therefore, one which treats "conditions that have been imposed … on the taking of the action" as referring to conditions which *apply* to the taking of the action, rather than conditions expressly directed at that action. Such a construction, he contends, is open, and indeed preferable, as a matter of

ordinary language: conditions imposed under law on a class of activities would ordinarily be understood to be "imposed" on each activity within the class.

85 The appellant further submits that the conditions in the Water Licences and Indenture were clearly relevant to the proposed approval in this sense for the following reasons. The Minister himself saw fit to take into account the environmental impacts of the extraction of water from the GAB notwithstanding that it was to occur under existing licences (reasoning which was only permissible on the footing that it was a "matter relevant" to the controlling provisions under s 136(1)(a) of the EPBC Act), and imposed conditions relating to such extraction. The conditions are set out in the Reasons at [121]. The Decision itself states that it applies to water extraction from wellfields A and B and to all activities on the "Special Mining Lease", which is specifically defined by reference to the Indenture. If aspects of an existing development, subject to existing approvals, are relevant to the approval of an expansion of that development, as the appellant contends, s 134(4)(a) should be given a corresponding application requiring the Minister to consider the conditions applicable to those existing approvals.

86 The conditions in s 134(4)(a), which the Minister was required to consider, are identified in temporal terms, namely, conditions that:

(i) have been imposed; or

(ii) are likely to be imposed

under the laws of the State on the taking of the Action. The appeal is confined to the scope of the duty imposed on the Minister in relation to conditions that have been imposed on the taking of the Action.

87 The Minister was required to identify the "action" to which the conditions speak in order to discern the relevant conditions that "have been imposed" under the law of the State.

88 The Action, as previously identified, is the proposed expansion of the Olympic Dam mine. As is evident from the statutory context in which s 134(4)(a) is found, it is only the "alteration" of the existing mining operation that forms the "action" for the purposes of s 134(4)(a).

89 The Minister's duty, described in s 130(1), is the requirement to consider whether to "approve" the "taking of the action", a phrase found variously throughout Pt 9, including in s 134(4)(a). The nature and content of the Minister's duty under Pt 9 is informed by the "action" in respect of which the Minister's approval is sought.

90 Actions are defined in s 523(1) of the EPBC Act as follows:

> (1) Subject to this Subdivision, ***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).
>
> (Original emphasis.)

91 Conduct that amounts to an "action", which is a "controlled action" is prohibited under the EPBC Act unless expressly authorised. Here, the relevant sanctions are identified in ss 21 and 22A which apply to the taking of a "nuclear action" as defined in s 22(1)(d). Those sanctions do not apply to an action that is, amongst other things, subject to prior authorisation under s 43A or an operative "approval" under s 133. Appreciating the extent of the conduct proscribed by ss 21 and 22A requires identification of what is the "action" regulated by the provisions of Pt 3 of the EPBC Act.

92 A project or development or undertaking in relation to "nuclear actions" are "actions" for the purposes of s 523. The applications for approval sought by BHPB from both the Minister and the State concerned the taking of "actions" of the kind provided for in s 523(1)(e) namely, an "alteration" to an existing project. This, it seems, is common ground. The mining activities then being undertaken at Olympic Dam were the subject of prior authorisation by the Commonwealth.

93 We accept the submission that the scope of the approval required on the taking of an action at each stage or increment of a project does not extend to actions already subject to an approval. Otherwise, the word "alteration" in s 523(e) would serve no purpose and s 43A would be rendered redundant. Moreover, it would also mean that activities undertaken in relation to an existing project the subject of prior approvals would be rendered unlawful from the point at which the Minister refused to approve an "alteration". That consequence militates against acceptance of such a construction.

94 Section 134(4)(a) required the Minister to consider three matters: the conditions imposed; under the approval granted under State law; on the alteration to the existing mining operation at Olympic Dam.

95 As to the first, it is not disputed that the conditions imposed under the laws of the State were imposed on the same day as the conditions imposed by the Commonwealth. As to the second, the relevant conditions were imposed under cl 7(2)(b) of the Indenture and deemed by s 7(4) of the *Indenture Act* to have been imposed under s 48(2)(b)(i) of the *Development Act*. The Minister's consideration of those conditions had in fact occurred in fulfilment of the duty under the separate limb of s 134(4)(a), namely, the duty to consider the conditions "likely to be imposed" on the taking of the action, which had been identified in the SAAR and which was before the Minister and subject to his consideration. As to the third, the precise scope of the alteration – the scope of the "action" – had been identified in the substantial body of materials placed before the Minister, including the SAAR, the draft EIS and the supplementary EIS.

96 As BHPB submitted, the appellant seeks to characterise the conditions contained within the Indenture and/or the Water Licences as being conditions "imposed on … the taking of the action" because they relate to activities which are to be undertaken as part of the proposed action, namely the extraction of water from wellfields in the GAB. We agree that this characterisation does not conform to the text of s 134(4)(a) which is specific and restrictive, and deliberately so. A condition can only be "imposed … under a law of a State … on the taking of the action" if the taking of "the action" is the subject of the condition imposed under a State law. The language of s 134(4)(a) is to be contrasted with the wider language employed in s 134(3)(c), which refers to conditions "specified in an instrument … made or granted under a law of a State".

97 Nothing in the Indenture, as in force at the time of the Minister's decision, or the Water Licences can be described as constituting a condition "imposed on" the action of expanding the Olympic Dam as per the proposed action.

98 The construction of s 134(4)(a) by the primary judge is consistent with the broader statutory scheme and the purpose underlying s 134(4). The EPBC Act contemplates that assessment processes may operate concurrently and collaboratively at State, Territory

and Commonwealth levels in respect of a single development proposal. So much is evident from those objects of the Act set out in ss 3(1)(d) and 3(2) as well as provisions such as s 102(3). This concurrent approach informs the process of determining conditions under s 134. Section 134 contemplates the coordination of approvals being granted in respect of the same developments, including by an "accreditation" at Commonwealth level of conditions imposed or soon to be imposed under a State approval. Section 134(4)(a) is directed towards conditions that have been imposed, or are likely to be "imposed", under State law specifically "on" the taking of the action the subject of the approval.

99 The appellant's contention was that the statutory construction he advances is one which avoids "duplication, inconsistency or omission". This evidently was within the contemplation of the Parliament when enacting s 134(4)(a). The Explanatory Memorandum in relation to cl 134 of the *Environment Protection and Biodiversity Conservation Bill 1998* (Cth) provided as follows at 56:

> The ability to impose a condition requiring compliance with conditions identified in another instrument is intended to facilitate the 'accreditation' of agreed conditions implemented primarily through approvals granted under State legislation. The requirement to consider any relevant conditions imposed by State or Territory laws or other Commonwealth laws is also intended to facilitate reliance on other regulatory regimes, where this is appropriate to avoid duplication.

100 As a matter of fact, in this case, the avoidance of duplication and inconsistency was manifest in a number of respects. The action was the subject of joint assessment by the Commonwealth, the State and the Northern Territory governments. The referral of the proposed action on 16 August 2005 to the Minister under s 68 advised that it was proposed to undertake the environmental assessment of the expanded project under a joint process between the Commonwealth and State governments. It was proposed that the proponent produce an EIS to meet the requirements of both governments, and that the expanded project continue to operate under the *Indenture Act*, recognising that an amendment would be required for works beyond the approved production rate. The EIS was to identify all "Commonwealth and State legislative Acts and Regulations relevant to the project, and permits and licences for the project [would] be obtained as required". On 13 June 2008, BHPB submitted a Notice of Intent for a Northern Territory transport option as a component of the Olympic Dam expansion. Subsequently, the Northern Territory Government agreed to work collaboratively with the Commonwealth and the State Governments in assessing the project. The proposed State conditions were before the Minister, the State provided comment

on proposed Commonwealth conditions, and the Commonwealth conditions were amended following receipt of the State's comments.

101 We regard the appellant's construction as inconsistent with the text and one which overstates the statutory purpose. The introduction of the concept of a State law which "applies to" a proposed action is unwarranted textually. Relevantly, it is materially different from the statutory text which requires consideration of any relevant conditions that "have been imposed on" under State law the taking of the action. The purpose of the legislature is to be derived primarily from the language adopted by the legislature in the statute: *R v Purdey* (1993) 31 NSWLR 668 at 672 per Mahoney JA.

102 The appellant's submissions that, "potential broader consequences" of the construction preferred by the primary judge strain against its acceptance, are without force. The language of s 134(4)(a) cannot, in its ordinary meaning, be construed so as to require the Minister to consider the details of any prior environmental protection licence that somehow "applies" to the subject matter of the proposed action. Such a construction would, we agree, impose an intolerable burden on the Minister. As the majority pointed out in *Lansen*, a "relevant condition" under s 134(4) would be a condition that is relevant for the purposes of s 134(1) or s 134(2). The appellant's approach is one which deprives the statutory expression "the action" of any determinate meaning or limits.

103 Accordingly, the conditions to which s 134(4)(a) refers are the conditions "imposed … on" the "action" for which approval is sought, such action in this case being the "alteration" of an existing project which alteration was the subject of referral, assessment and approval under the EPBC Act. The primary judge correctly held, at [131], that any conditions contained in the Indenture or the Water Licences were not conditions that had been "imposed [under South Australian law] on the taking of the action". Ground 1 fails.

Notice of contention: consideration of conditions

104 If ground 1 of the appeal were made good and the Minister was obliged to consider such conditions within the Indenture and the Water Licences as being "relevant conditions" for the purposes of s 134(4)(a), the first contention is that the Minister fulfilled that obligation. The obligation attaches only to "relevant conditions" that have been imposed, which, as we have mentioned, is one that would be relevant for the purposes of

s 134(1) or s 134(2), in the sense that it may assist the Minister in determining whether it is necessary or convenient to attach a condition to the Commonwealth approval: *Lansen* at [25]. Consistently with the obligation in s 136, as considered in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463 at [115], it is a matter for the Minister to determine what conditions imposed under State law are "relevant" to the process of determining conditions under s 134.

105 The issue is one of fact, albeit one based on documents: *Lansen* at [30]. His Honour's finding is to be given appropriate "respect and weight": *Warren v Coombes* (1979) 142 CLR 531 at 551 per Gibbs ACJ, Jacobs and Murphy JJ.

106 The appellant submits that his Honour's finding at [127] was correct in that it was not enough for the Minister to know something about the Indenture and the Water Licences if he had not in fact considered whether the conditions imposed in those documents might affect the conditions the Minister would impose. This demonstrates, the appellant contends, the unlikelihood that the Minister did so, given that the materials before him did not include the conditions contained in the Indenture or the Water Licences, or any explanation of the substance of those conditions.

107 It is common ground that this factual issue must be determined objectively in the light of the evidence as to what was actually brought to the Minister's attention.

108 The respondents contend that the appellant has not identified a single "relevant condition" in the Indenture or State Water Licences which he says the Minister was required and failed to consider. This is disputed by the appellant. It is presently unnecessary to resolve this issue. The only potentially relevant conditions under State law are those relating to GAB water extraction.

109 We are satisfied, on the evidence, that the Minister had regard to the possibility of there being "relevant conditions" imposed under State law. In relation to the extraction of water, the Minister was advised that the proposed action did not involve the taking of additional groundwater from the GAB, except to the extent that there was anticipated to be an increased take-up of the existing allocation under the Water Licences. The Minister was advised, and may be taken to have considered, that the existing licences

under State law meant that such extraction was permissible, subject to conditions relating to the monitoring and management of the extraction. This advice was contained in a number of sources including, most significantly, the advice provided by the State. The SAAR also contained a detailed set of conditions that were recommended to be imposed as part of the approval under State law. The Minister had also provided the State Minister, among others, with a draft approval decision, including the proposed Commonwealth conditions. The State Government provided the Minister with a comprehensive response which addressed, *inter alia*, the current and proposed conditions under State law which bore upon the approval proposed to be granted by the Minister. BHPB also provided a comprehensive response. The Department prepared a detailed analysis of the comments that had been received on the proposed decision and conditions.

110 The evidence that the Minister did consider existing conditions under South Australian law relating to GAB water extraction can be found in, *inter alia*:

(1) section 2.6 of the draft EIS in relation to "Great Artesian Basin" setting out the amount of water extracted, and Table 5.24 in relation to "Great Artesian Basin" setting out current licence permits drawdown in relation to "Water Supply from Wellfields A and B" extrapolated to about 42 ML/d;

(2) section 4.3.4 of the supplementary EIS referring to the "stringent licensing and reporting requirements" of the South Australian Government, information on current extraction rates, drawdown pressures and spring flows being presented annually in the Olympic Dam Wellfields Annual Reports, and the Indenture requiring on an annual basis 10 year forecasts of GAB water extraction;

(3) the Commonwealth Assessment Report discussing environmental requirements on the existing operation in relation to the monitoring of spring flows and drawdown rates;

(4) the SAAR setting out current use averages of 37 ML/d with a current approved maximum limit of 42 ML/d which would be used to supply potable requirements; and

(5) the Statement of Reasons provided by the Minister on 13 January 2012 for his decision of 10 October 2011, in which the Minister at [8.1] confirmed that in accordance with s 134(4)(a), he had "considered relevant conditions that have

been imposed under a law of a State", and that the conditions of approval were "consistent with the South Australian Government conditions of approval".

111 The content of the SAAR is of significance. Relevantly, the SAAR noted a potential impact on the GAB and assessed the potential impact of the expansion of the project on the GAB accordingly. The two relevant findings in the SAAR with respect to the GAB and GAB Springs are at 277-278 (Mine water supply) and 286 (Great Artesian Basin (GAB) Springs) respectively. With respect to mine water supply, the only extraction of water from the GAB is via wellfields "A" and "B", which was assessed in the SAAR. Relevantly, under the heading, "Mine water supply", BHPB assessed that no additional water beyond sustainable yields and "existing State approvals" would be drawn from the GAB. Because there was to be no impact on existing water extraction entitlements relevant to the GAB by the proposed expansion, no condition under a law of the State was attached to the extraction of water from the GAB for the proposed expansion. It is not to the point, therefore, that neither the Indenture nor the Water Licences were before the Minister. The SAAR with respect to the impact of the expansion on the GAB was before the Minister and he had regard to it.

112 With respect to the impact of the expansion on the GAB Springs, the SAAR noted "a low probability exists for hydraulic effects on the Great Artesian Basin springs … as a result of Olympic Dam Expansion activities", which gave rise to condition 28 of the State approval. Again, the relevant finding in the SAAR and the resulting recommendation foreshadowing condition 28 were before the Minister.

113 It is accordingly apparent that the matters relevant to the extraction of water from the GAB in relation to the proposed expansion were identified in the SAAR which gave rise to the conditions imposed under the laws of the State and which were considered by the Minister. Nothing more could have been achieved by attaching the Water Licences or the Indenture to the SAAR as these would simply have, relevantly, replicated what was in the SAAR.

114 The appellant did not point to any condition imposed by the Minister which was inconsistent with or duplicative of any condition in the Indenture or the Water Licences, such as may suggest that there was a condition contained therein which was relevant to the

Minister's task. It cannot be, as the appellant seems to submit, that the Minister should have had regard to the absence of a condition in the Water Licences about drawdown limits. Section 134(4)(a) is concerned with relevant conditions that have been imposed, not conditions which have not been imposed.

115 In the circumstances, the proper factual inference to be drawn is that the Minister did consider such conditions imposed under State law as were "relevant conditions" for the purposes of s 134(4)(a). No significance attaches to the fact that the Indenture and the Water Licences were not before the Minister. Even if those documents had been before the Minister they would not have disclosed any "relevant conditions" going beyond what had been reported to the Minister.

Notice of contention: immateriality

116 The alternative of the Contentions is that even if the Minister failed to consider existing conditions under South Australian law, any such failure could, in the circumstances, not have materially affected his decision, and was not such as to invalidate the decision to approve the taking of the action: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J; *Lansen* at [121]. The substance of this contention is that any such failure could not have materially affected the decision to grant approval flows from the finding (unchallenged) that the Minister did consider the impact of the action on the environment due to the continued and increased extraction of groundwater from the GAB for the purpose of the mine expansion, but within BHPB's entitlements under the State Water Licences.

117 The appellant submits that this contention cannot succeed because:

(1) The primary judge correctly recognised that the holding of the majority in *Lansen* (at [72]-[74]) stood in the way of its acceptance. There is no basis upon which it could be properly said that *Lansen* was clearly erroneous, and this Court would therefore follow it as a matter of comity: see for example, *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at [27]-[31]. In any event, the detailed reasoning of the majority leading to that conclusion is clearly correct.

(2) The suggestion by Mason J in *Peko-Wallsend* at 40 that error might not be established where an otherwise mandatory relevant consideration was so insignificant that it could not have materially affected the decision should be understood as qualifying the implied requirement to consider matters made relevant by the subject-matter, scope and purpose of the legislation. It can have no operation in the face of an express statutory command to take into account an identified matter. Such a command creates a distinct statutory obligation which means that the identified matter must be taken into account by the decision-maker "as a fundamental element in making his determination": *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 per Mason J (Gibbs J agreeing); *R v Toohey; Ex parte Meneling Station Proprietary Limited* (1982) 158 CLR 327 at 333 per Gibbs CJ; *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 176 FCR 153 at [103]-[105], [110] (approved in *Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 at [267]). The discussion of *Peko-Wallsend* in *Lansen*, which included consideration of the question of materiality at [121]-[127] was dealing with an alternative argument: see *Lansen* at [32] and [79].

(3) Even if, despite s 134(4)(a), the Minister was not obliged to have regard to existing conditions under State law if that consideration was so insignificant that it could not have materially affected the decision, it is for the respondents to establish that the conditions would have the requisite level of insignificance: *Lansen* at [135]. That could not be demonstrated in *Lansen*, and the same conclusion follows in this matter:

(a) If the Minister had considered the Water Licences or the general water controls in the Indenture, there is no way of knowing what modified, or further or other, conditions might have been imposed on the Decision, given that the drawing of water from the GAB and from wells A and B under the existing approvals was a matter of sufficient significance for the Minister to take it into account in making the Decision (see Reasons at [125] and [116]), and for the Minister to impose conditions 27, 28 and 24a in connection with the drawing of water from the GAB

and wells A and B (purportedly in the same form as requirements from the existing approval under the *Impact of Proposals Act*).

(b) Had the Minister considered the Indenture and the Water Licences it would have been apparent that they do not place any total cap on the additional water that can be drawn from the GAB generally (only the drawdown area from wells A and B as indicated on Special Water Licence B – which is not the same as a cap on the total volume of water that can be drawn from the GAB from other locations). To the contrary, the Indenture purported to provide that South Australia would grant a Special Water Licence on request by the proponent, subject to certain conditions including agreement on area and location. Given that the Minister's reasons for the conditions imposed appear to be predicated on an understanding of the "existing" extraction levels from the GAB, it can readily be imagined that a consideration of this aspect of the licensing regime might have led the Minister to impose some further condition.

(c) The potential for duplication, inconsistency or omission between the State and Federal conditions was real in that the Indenture has its own system for monitoring and compliance and there had been some concern outlined in the materials before the Minister as to potential conflicts between Federal and State regulation.

118 Accordingly, the appellant submits that the consequence of the Minister failing to consider the Indenture and the Water Licences, applying *Lansen* and taking account of the considerations above, was that the Decision ought be set aside as invalid.

119 In our opinion, contrary to the appellant's submissions, the holding of the majority in *Lansen* at [36]-[74] does not stand in the way of acceptance of the respondents' argument in relation to immateriality. *Lansen* is not authority for the proposition that every failure to comply with the obligation under s 134(4)(a) to consider relevant State conditions results in the invalidity of the approval. It is apparent from [33]-[35], that their Honours are there dealing with the *Project Blue Sky* question, namely whether as a matter of statutory construction it was the purpose of the legislation that an act done in breach of a condition regulating the exercise of a statutory power should be invalid: *Project Blue Sky Inc v*

Australian Broadcasting Authority (1998) 194 CLR 355 at 390. Applying that test, their Honours concluded at [74] that the Minister was obliged to have regard to the matters in s 134(4)(a) and (b), and, if the Minister failed to do so, the Minister's decision was invalid. However, their Honours continued, noting that there were, as Mason J said in *Peko-Wallsend*, two questions:

> [90] ... The first question is in two parts: first, did the Minister fail to have regard to a consideration he was bound to take into account; and secondly, was the consideration which the Minister failed to take into account so insignificant that the failure to take that consideration into account could not have materially affected his decision.

120 Earlier in their reasons at [80] their Honours observed the remarks of Mason J in *Peko-Wallsend* at 39:

> [80] The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of ultra vires administrative action. That ground now appears in s. 5(2)(b) of the A.D.(J.R.) Act which, in this regard, is substantially declaratory of the common law. Together with the related ground of taking into account irrelevant considerations, it has been discussed in a number of decided cases, which have established the following propositions …

121 The relevant proposition of Mason J in *Peko-Wallsend* for current purposes is proposition (c), namely:

> Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision: see, e.g., the various expressions in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*; *Hanks v. Minister of Housing and Local Government*; *Reg. v. Chief Registrar of Friendly Societies*; *Ex parte New Cross Building Society*. A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decision: *Reg. v. Bishop of London*; *Reg. v. Rochdale Metropolitan Borough Council; Ex parte Cromer Ring Mill Ltd.* (Footnotes omitted.)

122 The dicta of Mason J in *Peko-Wallsend* applies equally to s 134(4)(a), which was accepted for the purposes of the argument by the majority in *Lansen*. The appellant seeks to avoid the issue of materiality by suggesting that the express requirement to consider "conditions" means that the failure to consider any condition, no matter how insignificant, produces invalidity. Such a proposition is too broad and assumes what must be established;

namely, that the duty to consider "conditions" refers to every and any matter that may be characterised as a "condition". It is precisely because the statutory duty is expressed in such general terms that the issue of materiality compels consideration. This explains the majority's consideration of Mason J's dicta in *Lansen*, culminating in the following statement:

> [125] It follows, therefore, that the question of materiality as explained by Mason J in *Peko-Wallsend* … is relevant in a consideration as to whether or not error has been demonstrated on the part of the decision-maker rather than on the exercise by the Court of its discretion in relation to the relief which might be granted under s 16(1) of the ADJR Act or the issue of the constitutional writs under s 39B of the *Judiciary Act*.

123 At [122] their Honours concluded that where it is concluded that "the consideration was so insignificant that the failure to take it into account could not have materially affected the decision", then the application for review must fail.

124 The Minister submits that the reasoning of Moore and Lander JJ in *Lansen* should be so understood. If, however, it be necessary, the Minister submits that the majority in *Lansen* at [74] were wrong, and the reasoning of Tamberlin J at [288]-[289] should be preferred. That is, s 134(4)(a) operates so as to "*guide* the manner in which the Minister considers the question of conditions". Compliance with s 134(4)(a) "does not … affect the outcome or the extent of the Minister's duty". Indeed this submission was put to the primary judge by the State.

125 The proposition that the reasoning of Mason J in *Peko-Wallsend* should be read as being limited to implied and not express mandatory considerations ought not be accepted. There is nothing in the reasoning of his Honour to support such a distinction. In *Lansen*, Moore and Lander JJ proceeded on the basis that the observations of Mason J applied equally to considerations expressed in an Act and those which are implied.

126 It is apparent that the Minister understood the significance of the drawing of water from the GAB within BHPB's entitlements under the Water Licences, but for the purpose of the mine expansion, and considered the impact on the environment. Notwithstanding material before him indicating that the risk to the GAB mound springs was "low", the Minister nonetheless imposed "precautionary conditions" recommended by the Department:

(1) to ensure that "the extraction of water from wellfields A and B in the [GAB], as assessed under the [*Impact of Proposals Act*], does not have a significant adverse impact on groundwater dependent listed threatened species or Ecological Communities" (condition 27);

(2) to require the environmental protection management program required by condition 4 to include (condition 28):

(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 draw down 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 draw down or flow rates at mound springs occurring as a result of water extraction by the approval holder; and

(d) collection of a long term data set to achieve a better understanding of fluctuations in these systems.

127 Applying that reasoning to the present case produces the result that materiality remains a central and critical consideration as to whether error has been demonstrated on the part of the decision-maker. In the present case, the alleged failure is that the Water Licences and the Indenture were not before the Minister at the time of the approval under the EPBC Act. In light of the fact that the material the Minister did consider indicated that there was to be no additional extraction of water from the GAB and only a low probability of impact on GAB springs, there could be no practical impact on the Minister's decision approving the expansion had the Minister considered specifically the Water Licences or the Indenture. The Water Licences and the Indenture were immaterial to the Decision.

128 The appellant raised the spectre of the South Australian Government granting a special water licence for drawdown from other areas of the GAB than wells A and B. Such speculation ignores the fact that water for the expanded operation (200 ML/d) is to be sourced from a coastal desalination plant, with an additional 80 ML/d from the desalination

plant to be available for the Government of South Australia. We have already dealt with the potential for "duplication, inconsistency or omission".

129 If indeed the Minister was obliged by s 134(4)(a) to consider the conditions imposed in the Indenture and/or the Water Licences, then the failure was inconsequential. The appellant has not identified any condition contained in the Indenture or the Water Licences which could realistically have affected the Decision bearing in mind the conditions that were imposed. In the circumstances, the failure to comply with s 134(4)(a) is of an immaterial kind that the legislature would not have intended to result in invalidity.

Ground 2: Uncertainty

130 *Ground of appeal*: The appellant's second ground of appeal is that the primary judge erred in law in holding that the result of the exercise of the Minister's power, the approval granted on 10 October 2011, was sufficiently certain having regard to the statutory context of the EPBC Act, and therefore that the Decision was not uncertain within the meaning of s 5(2)(h) of the ADJR Act or otherwise unauthorised by or in excess of the jurisdiction conferred by the EPBC Act (under s 5(1)(c) and (d) of the ADJR Act or under the common law), in that:

(1) the question posed in ground 1 of the application in the Court below and identified at [34] and [35] of the Reasons was whether the totality of the conditions attached to the Decision rendered the Decision uncertain in the relevant sense or otherwise beyond power; and

(2) this is the effect of the Decision, read with the totality of conditions as properly construed, insofar as it leaves so much of the design of the proposal (including the assessment and mitigation of environmental impacts) to be defined by proposed plans and studies, yet to be prepared or undertaken.

131 *Primary judge's decision*: The primary judge dismissed the appellant's application on the uncertainty ground, first noting the decisions in *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts* (2009) 165 LGERA 203 (Tracey J) (*Lawyers for Forests*) and *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts* (2009) 178 FCR 385 (Sundberg, Dowsett and Jacobson JJ) (*Lawyers for Forests FC*), where the proponent had obtained an approval subject to conditions 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 Strait.

132 The primary judge noted that the Minister's approval in that case was subject to 48 conditions, many of them referring to an environmental impact management plan that the applicant was required to develop in order to manage, monitor and respond to environmental impacts occasioned by the operation of the pulp mill. One condition required the applicant to sample the effluent discharged from the operation of the mill to determine if it fell within parameters set out in a table in the condition. The mill was not to operate if the monthly average effluent exceeded the maximum amounts set out in the table. The limits in the table 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.

133 His Honour noted that, at first instance, Tracey J considered the challenged conditions were of a kind comprehended by s 134(3)(f) of the EPBC Act or contemplated by that subsection and that on appeal the Full Court rejected the submission that the Minister had, in effect, purported to create more than one approval. His Honour noted that the Full Court had rejected a 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; and that it had stated that even if certain conditions could not be regarded as actually *managing* impacts, they were part of a plan for managing residual risks which had been identified.

134 His Honour then said, at [58], that it could not be doubted that the power to impose conditions under the EPBC Act is a "very wide one". His Honour noted 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 subss 134(1) and (2). He considered the breadth of the power could be seen from the terms of subs 134(3), and that para (e) authorised a condition for the preparation, approval and implementation of a plan for managing the impacts of the approved action. His Honour noted that the concept of management "is a very wide one and includes

matters such as monitoring and testing, reporting, preventative measures and remedial action". His Honour considered that one thing was clear and that was that the power is broad enough to encompass significant additions or variations to the approved action. He noted that para (f) of s 134(3) authorises conditions requiring specified environmental monitoring or testing to be carried out, a power which recognised 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. His Honour noted that para (g) of s 134(3) authorised conditions which require compliance with a specified industry standard or code of practice. His Honour finally noted that the list of matters about which conditions may be made under s 134(3) is not exhaustive of the kinds of conditions which may be attached to an approval.

135 As to the requirements of the certainty ground in s 5(2)(h) of the ADJR Act, his Honour said, at [59], that they must be formulated having regard to the particular statutory context to which it is to be applied. His Honour considered that, in the context of s 134, there is a "degree of latitude" in terms of the certainty ground. He considered, largely for reasons advanced by the respondents, that the conditions were sufficiently certain. Put another way, his Honour said the conditions made it "reasonably clear to the second respondent what it is required to do".

136 In relation to the appellant's submission that relied on s 5(1)(c) and s 5(1)(d) of the ADJR Act and the general law, his Honour considered, at [60], that 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, was a matter he need not consider. That was because the appellant's submission failed whichever ground was relied upon. In that regard, his Honour gave close consideration to two conditions, conditions 32 and 71. As to condition 32, his Honour said that, on the face of it, it left a major matter – "mine closure" – to be determined. He rejected the appellant's submission, however, that BHPB was left to formulate the assessment criteria. He said the Minister had the power to withhold approval to the mine closure plan. The reference to the assessment criteria being "clear, unambiguous and specific" was to assist the Minister to understand the metes and bounds of the mine closure plan. His Honour stated, at [64], that he was not satisfied that the imposition of condition 32 meant that there had been a

failure to exercise the power in s 130 and s 133 of the EPBC Act. He considered the approach to conditions adopted in the *Lawyers for Forests* decisions supported that conclusion. His Honour added that there was another important matter which supported that conclusion, which was that this was not a case where a major topic was not addressed before approval was granted. Rather, mine closure had been considered before the approval was granted.

137 As to condition 71 concerning infrastructure alignment, his Honour noted it must be read with condition 70. He said that it was not argued that condition 71 was invalid. Rather, the argument was that condition 71 establishes that the Minister did not exercise the power he was authorised to exercise by the provisions of Pt 9 of the EPBC Act. His Honour considered, at [65], that the answer to that submission was that by condition 70 it was clear that the rail line, water pipe line and electricity transmission lines must be constructed on the alignments shown in figures in the draft EIS, unless otherwise approved by the Minister. The possibility of a gas pipeline was referred to in BHPB's referral form and three possible options for the location of a gas pipeline were shown in the draft EIS. His Honour said the reference to the gas pipeline may well fall within the concept of "alternative proposals" within s 72(3), s 133(1A) and s 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".

138 *Appellant's contentions*: The appellant seeks to advance two broad propositions on this ground of appeal, as he did before the primary judge, based on the extent to which conditions attached to the approval by the Minister left aspects of the proposed action to be later defined, assessed or its impacts mitigated, and contends that:

(1) where the content and effect of conditions depend on later determinations, their effect cannot be known until those processes occur. The result is that the decision involves an exercise of power which is uncertain, either in the general law sense or in the sense identified in s 5(2)(h) of the ADJR Act;

(2) where conditions envisage significant aspects of the proposed action being designed, determined or assessed at a later stage, the result is that an approval of the kind envisaged by s 133 of the EPBC Act has not been given. Rather, the Minister has purported to give a provisional or preliminary approval to a

proposed action whose exact content is not yet clear. This is a constructive failure to exercise jurisdiction.

139 The appellant contends that if either proposition is correct, the consequence is that the Minister's decision to approve the proposed action is bad and should be set aside. Alternatively, the power in s 134, while undoubtedly broad, does not extend to attaching a set of conditions which undermine the Decision in the way complained of and, for the reasons given in *Lansen* at [28], the approval decision would be liable to be set aside.

140 As to the first proposition, the appellant says that the primary judge held that the conditions of the approval were sufficiently certain so as not to found relief under the uncertainty ground in s 5(2)(h) of the ADJR Act, and that his Honour also rejected the second proposition but in terms which suggests that it was treated as a variation on the uncertainty theme rather than as going to the nature of the approval purportedly granted.

141 The appellant contends that the primary judge's approval decision is largely based on the breadth of the power to impose conditions and the Minister's retention of control of subsequent approvals under the conditions and there is throughout the judgment a focus on specific conditions and how they are to be construed. While the appellant accepts that the primary judge recognised that the appellant's main argument related to the effect of the *totality* of the conditions, he submits that little consideration was given to the collective effect of the approval and its conditions.

142 The appellant contends that when one considers the approval and a number of relevant conditions to which it is subject collectively, the result of the exercise of the approval power is uncertain and the Decision is *ultra vires* the EPBC Act, in that it is made in error of jurisdiction owing to a level of uncertainty and is not authorised on the proper construction of the EPBC Act.

143 The appellant contends that the focus of the inquiry, whether under the ADJR Act or under the general law, is on the result of the exercise of power sought to be impugned, here the approval, and not on the reasons or process leading to it.

144 As to his first proposition, the appellant draws attention to what he says are proposed plans or studies relating to particular matters in the following conditions: 4-12

(environment protection management program); 14-15 (radiation); 17 (site contamination); 18 and 20-21 (fauna); 23-25 (groundwater); 28 (extraction of water from the GAB); 30-31 (best practicable technology); 32 (mine closure); 42 (desalination plant); 45 (Minister can agree to higher salinity level); 47 and 50 (giant cuttlefish); 55-57 (operational dilution factor); 58 (review of program); 62 (management plan for barge landing facility); 66 (transport to Darwin and export); 71-72 (infrastructure plan); 77 and 79 (future consultation with indigenous representatives and measures to protect indigenous cultural heritage); 82 (environmental offsets plan); and 83-91 (general provisions concerning plans). The appellant also draws attention to the proposed Greenhouse Gas and Energy Management Plan in this context. The appellant complains that these constitute an extensive purported use of s 134(1) and s 134(3)(e) and (f) of the EPBC Act to define, assess and mitigate impacts of the proposal later.

145 The appellant says these conditions provide numerous examples of the approval leaving the definition of the proposal, its assessment or mitigation of its impacts to be dealt with later. He contends that some conditions requiring plans to be prepared in the future purport to have the plan "pull itself up by its own bootstraps", in that the plan is to specify the operations which are to be covered by the plan – referring to conditions 5(a) and 43(a) which it is said apply respectively to the environmental protection management plan and the desalination plant environmental management plan.

146 The appellant says there is a series of targets, yet to be set, which targets are to be the subject of as yet unascertained requirements in plans and those targets are required to be set according to unclear criteria (for example, targets for spills in condition 17, targets to avoid significant impacts on threatened species in condition 20, targets to limit impacts from the desalination plant in condition 43, and the size of any exclusion zone for the barge landing facility in condition 62). The appellant says the primary judge did not address these "vague" target examples.

147 The appellant says the limits or standards by which the plans or monitoring are to be judged are in many cases vague and unspecific, depending on diffuse obligations (such as a requirement to "further update, enhance and validate", "improved understanding" and "confirm the conceptual understanding", in condition 23) and objectives (for example, to decrease attractiveness of the tailings storage facilities to Listed Species of birds, in

condition 21). The appellant says the approval requires the establishment of compliance criteria to determine whether standards such as "no significant adverse impact" are met (as in condition 24 in respect of the standard in condition 22; and condition 28 in respect of the standard in condition 27), but the bases for determining such criteria in turn comprise criteria such as "no significant adverse impact" (as in condition 22) or leave the compliance criteria to be determined (as in condition 28(a)). The appellant says there are also a number of objectives to achieve "best practicable technology" without any real guidance as to what this term might constitute at any particular time; and that some target criteria will require further investigation or testing (as for example, in condition 55).

148 As to his second proposition, the appellant places particular reliance on conditions 32, 66 and 71.

149 The appellant submits these conditions establish that the purported approval does not have the quality required by s 131 and s 133 of the EPBC Act. The appellant says his Honour considered condition 71, but not condition 66, the latter being put in issue by the appellant for the same reason as condition 71.

150 The appellant says his Honour considered that condition 71 did not have the effect contended for by the appellant because condition 70 required relevant infrastructure (except any gas pipeline) to be constructed in approved corridors unless otherwise approved under condition 71. The appellant contends that the fact that there was a "default" pathway for the infrastructure (other than the gas pipeline) in condition 70 does not overcome the "real problem" in condition 71, namely, that the Minister was purporting to give BHPB a right to propose, and to give himself the power to approve as yet undescribed alternative proposals pursuant to a condition and not pursuant to the mechanisms in the EPBC Act for consideration of proposed actions. Consultation with indigenous groups in connection with infrastructure corridors that are to be part of the action was also something which, by the condition, was to be undertaken later.

151 The appellant makes the same complaint about condition 66 that deals with construction of the Port of Darwin handling facility, submitting that by the condition the Minister has purported to give himself the power to approve an as yet undescribed proposal.

152 The appellant, in a similar vein, draws attention to condition 32(a) that deals with mine closure. The appellant says the relevant requirements are not specified in the approval but are left to be the subject of a further plan. BHPB is left to formulate the criteria; and a requirement for Ministerial approval of the basis on which the mine is to be closed, after the event, does not overcome the fact that the approval leaves the major matter of mine closure to be determined later without providing any clear criteria that such a closure is to meet.

153 The appellant submits that by conditions such as 32, 66 and 71, it may be seen that the Minister has purported to give himself the power to decide later what ought be done to address substantial impacts on the environment which should have been considered at the time of making the Decision and granting the approval.

154 *Consideration*: Under the general law, the power of a public official to do a particular act, such as grant an approval or impose conditions on an approval, is ordinarily dictated by a statute under which the public official acts. If the validity of an approval or conditions attached to it is challenged the question then is whether the approval granted or the conditions challenged are authorised by the statute.

155 In *Lloyd v Robinson* (1962) 107 CLR 142 the power of the planning agency under s 20(1)(a) of the *Town Planning and Development Act 1928* (WA) to "give its approval … subject to conditions which shall be carried out before the approval becomes effective" to the subdivision of part of a lot was held to be sufficient to support the validity of a condition requiring the giving up of an area of an adjacent portion of the lot land for purposes relevant to the subdivision, in circumstances where the statute at its commencement took away the proprietary right to subdivide without approval and gave no compensation for the loss.

156 The Court (Kitto, Menzies and Owen JJ) stated, at 154:

> If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second. For the giving up of the second a *quid pro quo* is received, namely the restored right to subdivide the first. It may be that the *quid pro quo* is inadequate, and that the landowner, though under no legal compulsion to give up the second area of land if he chooses to forego the idea of subdividing the first, is nevertheless under some real compulsion, in a practical sense, to submit to the loss of it because of the importance to him of obtaining the approval. But there is no room

> for reading the [Town Planning and Development] Act down in some fashion by appealing to a principle of construction that has to do with confiscation.

The Court then immediately added:

> *If the Board has performed its statutory duty by giving approval to the subdivision subject only to conditions imposed in good faith and not with a view of achieving ends or objects extraneous to the purposes for which the discretion exists, the inescapable effect of the Act is that the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions.*
>
> (Emphasis added.)

157 In *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30, a majority of the Court upheld the approach taken in *Lloyd v Robinson* and supported the validity of a condition imposed pursuant to a similar conditional approval power to that considered in *Lloyd v Robinson*, to the effect that upon subdivision the developer cede a portion of a foreshore reserve to the Crown free of costs to and without payment of compensation by the Crown.

158 The majority (McHugh J, in a separate judgment, and Gummow and Hayne JJ, in a joint judgment) confirmed a number of principles concerning the imposition of conditions under such a conditional approval power. It was generally accepted that the planning agency's power to attach conditions to development consents under such a provision was limited to those conditions that are reasonably capable of being regarded as related to a legitimate planning purpose, and that purpose is to be ascertained from a consideration of the applicable legislation and town planning instruments to which the agency is subject, and not to be ascertained from some preconceived general notion of what constitutes planning: see McHugh J at [56]; Gummow and Hayne JJ at [93]. In this regard, the majority had regard not only to what was held in *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 123 CLR 490, but also to the decision of the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 at 618-619.

159 In *Newbury*, as McHugh J stated at [57], it was held that a condition attached to a grant of planning permission will not be valid unless:

> 1. The condition is for a planning purpose and not for any ulterior purpose. A planning purpose is one that that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the authority, not by reference to some preconceived general notion of that

constitutes planning.
2. The condition reasonably and fairly relates to the development permitted.
3. The condition is not so unreasonable that no reasonable planning authority could have imposed it.

160 These criteria for validity of a condition attached to an approval may be taken to inform, at a general law level, an analysis of the validity of conditions, sometimes called "ambulatory conditions", designed to govern the process by which an approved activity is implemented. Such conditions may be imposed to require such things as the monitoring of aspects of the approved activity or further assessment and approval of aspects of the approved activity.

161 However, the validity of ambulatory conditions may also raise questions as to whether the approval power has truly been exercised at all, either because the activity defined by the conditions or the application of the conditions is different from the activity for which approval was sought, or because a condition is ambiguous or uncertain.

162 In this regard, a decision such as *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 is instructive in relation to the power to impose ambulatory conditions under the general law. In *Mison*, the New South Wales Court of Appeal (Priestley, Clarke and Meagher JJA) considered the validity of a conditional consent to permit development of residential land granted under s 91(1)(a) of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) which required that the overall height of a dwelling house be "reduced to the satisfaction of the Council's Chief Town Planner". Section 91(1)(a) of the EPA Act provided that a development application shall be determined by "the granting of consent to that application, either unconditionally or subject to conditions". No provision of the EPA Act specified what conditions or types of conditions might be imposed under s 91(1)(a). The Court of Appeal considered that, generally speaking, having regard to the terms of a particular regulatory regime, the retention of some flexibility or the delegation of authority through conditions in relation to the implementation of a land or resource use proposal will not necessarily spell the invalidity of the approval granted (whether because it could be argued that the approval power had not been exercised at all or because of some ambiguity in the conditions).

163 Priestley JA, at 737, expressed the view that a purported consent will not be a consent to the application under s 91(1)(a):

> (1) if a condition imposed has the effect of significantly altering the development in respect of which the application was made; or
>
> (2) if the fulfilment of a condition imposed upon a consent would significantly alter the development in respect of which the application was made; or
>
> (3) if the effect of an imposed condition is to leave open the *possibility* that development carried out in accordance with the consent and the condition will be significantly different from the development for which the application was made.

164 His Honour acknowledged that the introduction of the word "significantly" into the test imports into the decision-making process of the consent authority a judgmental factor incapable of precise statement. By reference to this test, his Honour considered the impugned condition was invalid as there was no clear answer to the question of the extent to which the Council's planner might require reduction of the overall height of the house.

165 Clarke JA, in coming to the same conclusion as to the invalidity of the impugned condition, considered, at 739-740, that where a consent has been granted in terms which leave open for later decision a particular aspect of the planned development, the question may arise whether the consent is *final*. But, his Honour added, this will not necessarily be the case. Where the question does arise there may be cases in which the answer is clear. In other instances "questions of degree" may be involved. His Honour considered it neither possible nor desirable to attempt to lay down a criterion to be applied in every case in determining whether a consent is final. His Honour added, however, that where a consent leaves for later decision an important aspect of the development and the decision on that aspect could alter the proposed development in a fundamental respect, it is difficult to see how that consent could be regarded as final.

166 His Honour considered that in light of the importance of the height factor in the immediate case before the Court, the relative lack of restriction upon the planner's discretion led to the view that the Council had not finally disposed of the application.

167 Meagher JA agreed with both Priestley JA and Clarke JA. His Honour, at 741, applied both a "significantly different" test and a "was the consent final or certain?" test and noted that there were ambiguities that arose from the use of the word "height" in the condition imposed. He considered it was not possible to say what "overall height" meant in those circumstances. His Honour questioned, how, unless such ambiguities were resolved, one could consider that the resulting structure is not "significantly different" from that applied for, and how could one reach the result that the condition is certain?

168 In *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 the New South Wales Court of Appeal (Spigelman CJ, Powell and Stein JJA) again considered the s 91 EPA Act conditional consent power. All three members of the Court applied *Mison*. Spigelman CJ (who otherwise generally agreed with the reasons of Stein JA and with whom Powell JA agreed in part) noted, at [12], that the common law has not developed a general principle that the exercise of a statutory power must be "certain", referring to what was said in *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184 at 194-195 and other authorities. The Chief Justice emphasised that the issue is one of construction of the particular statute under consideration and the application of the statute to the circumstances of the particular case. The Chief Justice further noted that, as in *Mison*, a purported exercise of the s 91 of the EPA Act power would not be valid unless the decision constituted a "consent", and that a purported exercise of the power would not be valid unless it constituted a "consent to that application". Consequently, the power to impose conditions cannot be exercised in such a manner as to have the consequence that the exercise of the power fails to answer the description of a "consent" or a "consent to that application". The Chief Justice noted that the process of statutory construction has sometimes been expressed in the terms of a "principle of finality" but, at [15], counselled that such terminology must be approached with care, as the issue always turns on the construction of the particular statute.

169 The Chief Justice, at [17], by reference to *Transport Action Group against Motorways Inc v Roads and Traffic Authority* (1999) 46 NSWLR 598 at [117], accepted that *Mison* does not stand for the proposition that *any* retention of flexibility or *any* delegation to a third party of the function of supervising a later stage of a development is prohibited. He accepted, at [18], that such provisions are inevitable since it cannot be supposed that a development application can contain ultimate detail or that a consent can finally resolve all aspects of a proposal with absolute precision.

170 Stein JA, at [206]-[211], also acknowledged the *Mison* principles. At [207], his Honour said that, in essence, the principle is that where a condition has the effect of significantly altering the development or to leave open the possibility that the development carried out in accordance with the condition will be significantly different from that applied for, then it is not a consent to the development. At [210], his Honour considered one underlying rationale for the principle was the diminishing of participation rights of objectors provided for by the EPA Act.

171 On the face of it, the approaches suggested by Priestley JA and Clarke JA in *Mison* disclose subtle but important differences. Under the tests suggested by Priestley JA, invalidity may follow if there is a "possibility" that the development carried out will be significantly different from that for which consent was sought. By contrast, Clarke JA emphasised the question of finality. In *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277, Basten JA (with whom Handley JA and Hunt AJA agreed) noted the different explanations provided by Priestley JA and Clarke JA for the finding that the relevant condition was invalid and stated, at [28], that although "different language" was used in relation to the separate categories of invalidity:

> it would seem that the test of uncertainty or lack of finality, being determined by reference to an important aspect of the development, requires that what is left uncertain must be the possibility that the development as approved may be significantly different from the development the subject of the application. Thus, the result should not be different depending upon which approach is adopted: a consent will only fail for uncertainty where it leaves open the possibility of a significantly different development. On the other hand, a consent may fail, within the first category (Priestley JA), where a condition of great precision and certainty of operation results in a significantly different development. Whichever category is preferred in the case of a consent which lacks certainty or finality, it is helpful to bear in mind the relationship between the two tests.

172 Basten JA, at [52], further noted that the *Mison* test was not expressed in terms of "fundamental difference", but of a consent having "the effect of significantly altering the development", and that, as was expressly recognised by Priestley JA at 737, was a different and lesser test than that of compliance with a condition which would make the application an "entirely different development". Basten JA noted that in *Winn*, Powell JA spoke of "fundamentally altering the nature of the development" but, because the discussion followed immediately upon lengthy extracts from the judgments in *Mison*, without any suggestion that a different test was being applied to that espoused in *Mison*, he did not understand his Honour

to have adopted the "harder to establish test" eschewed by Priestley JA in that case. Basten JA further noted that, on the other hand, the discussion in the judgment of Stein JA in *Winn*, at [209]-[216], "adopts a variety of terminology, and the precise implications of the variations may need to be explored in another case".

173 Basten JA further noted, at [55], that a challenge to a condition may be based on the second category identified in *Mison*. Thus, a condition may be uncertain but final, in the sense that it does not foreshadow a further judgment, either by the planning agency or a delegate or a third party. However, Basten JA considered that mere uncertainty may not give rise to invalidity and whether or not it does depends upon the question whether the condition complies with the statutory limits imposed upon the power of the agency. His Honour considered mere flexibility or imprecision may not necessarily contravene any statutory limit on the particular power being exercised.

174 In *Ulan Coal Mines Limited v Minister for Planning* (2008) 160 LGERA 20, Preston J, Chief Judge of the New South Wales Land and Environment Court applied *Winn* in the course of considering the validity of condition 29 to a coal mining project approval granted under s 75J of the EPA Act. By subs (4) a project could be approved "with such modifications of the project or on such conditions as the Minister may determine". By subs (5) the conditions of approval for the carrying out of a project "may require the proponent to comply with any obligations in a statement of commitments made by the proponent…". Condition 29 provided:

> The Proponent must ensure that it has sufficient water for all stages of the project, and if necessary, adjust the scale of mining operations to match its water supply.

175 The applicant proponent, relying on *Mison*, unsuccessfully challenged the validity of this condition. The Chief Judge, at [53]-[63], first rejected a contention that condition 29 was neither logical nor responsive to the issue of water supply availability once it was recognised that the condition did not require the mine to operate at the maximum scale permitted and that the condition did not mandate that the only means by which the mine can balance water supply and demand is to adjust the scale of operations.

176 The Chief Judge rejected a second contention that there was a lack of certainty as to what might be required to adjust the scale of mining operations to match its water

supply and that the words "scale of mining operations" were either ambiguous or uncertain. In that regard his Honour noted, at [66], that mere ambiguity or uncertainty of the meaning of words does not necessarily lead to invalidity if courts endeavour to avoid uncertainty by adopting a construction which gives statutory instruments and decisions practical effect. He considered that on their proper construction the words had a clear meaning.

177 In a related way the Chief Judge rejected an argument that condition 29 was uncertain because it did not specify the precise way in which the mine must adjust its mining operations, that is to say, specify the parameters governing any adjustment. His Honour noted, at [74], that the power to grant approval on conditions in s 75J neither expressly nor impliedly required, in order for a condition to be valid, that a condition set the parameters for adjustment of a project to achieve an outcome or an objective specified in the conditions. As to a further related argument that without such specification of parameters there would be a legally unacceptable uncertainty, his Honour considered that questions of degree are always involved in determining whether a condition is sufficiently uncertain as to be outside power. His Honour further noted, at [78], that retention of practical flexibility, leaving matters of detail for later determination and delegation of supervision of some stage or aspect of the development may all be desirable and be in accordance with the statutory scheme. The Chief Judge considered, at [79], that the condition fitted within the statutory scheme of the EPA Act Pt 3A there under consideration.

178 As to a third contention, that the project was significantly different from that for which approval had been sought, the Chief Judge considered there were two responses, one factual and the other legal. As to the legal response, the Chief Judge, at [88], considered that the argument that condition 29 may result in a significantly different project was that this would only be legally relevant if to do so would take condition 29 outside power. At [90], his Honour commented that if condition 29 could result in the proponent carrying out different mining operations under the project at a lesser scale, such as by not proceeding with one mine (a construction he had rejected), this could still be said to be a modification of the project and therefore it would be within power.

179 Decisions such as *Mison*, *Winn*, *Kindimindi* and *Ulan Coal Mines* go to confirm the observation that, under the general law, the question whether a conditional approval or a condition attached to the approval of some activity is valid, is an exercise in

statutory construction. They also confirm that, as a general principle, the approval or a condition will not necessarily be considered invalid because a condition retains in the decision-maker some ongoing flexibility in relation to the implementation of an approved activity or because it delegates some authority in relation to the implementation of the decision to some other person or agency.

180 The appellant's challenge to the validity of the Decision here relies to an extent on these general law considerations, but also on a particular uncertainty argument that is derived from the ADJR Act.

181 In relation to the first proposition he advances, the appellant relies on s 5(1)(e) of the ADJR Act in combination with s 5(2)(h). Subsection (1)(e) enables a person who is aggrieved by a decision to which the ADJR Act applies (which includes the approval here), to apply for an order of review in respect of the decision on the ground that "the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made". Subsection (2)(h) provides that the reference in subs (1)(e) to an improper exercise of a power shall be construed as including a reference to "*an exercise of a power in such a way that the result of the exercise of the power is uncertain*".

182 In relation to the second proposition he advances, the appellant relies on s 5(1)(c) and s 5(1)(d) of the ADJR Act. Subsection (1)(c) enables a person who is aggrieved by a decision to which the ADJR Act applies to apply for an order of review on the ground that "*the person who purported to make the decision did not have jurisdiction to make the decision*" and (1)(d) enables the application for review to be made on the ground that "*the decision was not authorized by the enactment in pursuance of which it was purported to be made*". In advancing the second proposition the appellant also relies on s 39B of the *Judiciary Act* and the general law.

183 It is to be understood that each of the grounds for judicial review specified in s 5 of the ADJR Act constitutes a separate statutory ground of review and, while perhaps reflective of the general law grounds by which judicial review of administrative action could be sought at the time of its enactment in 1977, or now, is not confined or prescribed by the general law as it was then, or is now. Thus, as Finn J noted in *Randwick City Council v*

Minister for the Environment (1998) 54 ALD 682 at 730 (in a passage noted by the primary judge at [37] of the Reasons), where provisions such as s 5(1)(c), (d) or (2)(h) provide the ground of review, the Court is not concerned with the common law but with a matter of statutory construction. For example, so far as the first proposition is concerned that relies on s 5(2)(h), the question of construction is whether there has been "an exercise of power in such a way that the result of the exercise of the power is uncertain".

184 In the present case, it is common ground that "*the result of the exercise of the power*" in question for the purpose of s 5(2)(h) and the "*decision*" referred to in s 5(1)(c) and (1)(d), is the approval granted with conditions. The appellant's first proposition poses the question whether the conditions attached to the approval make it "uncertain". The appellant's second proposition involves the contention that, under the ADJR Act s 5(1)(c) and (d) and the general law the same conditions that are impugned and which are said to make the approval uncertain under s 5(2)(h), as well as others, result in the decision being one the Minister did not have jurisdiction to make or which was not authorised by s 133 and s 134 of the EPBC Act.

185 The starting point, therefore, whether considering the question of uncertainty under the ADJR Act grounds or validity under the ADJR Act and the general law grounds, is the EPBC Act that authorises the Minister to grant an approval under s 133 and to impose conditions on the approval under s 134. Section 133 relevantly provided:

> *Approval*
>
> (1) After receiving the assessment documentation 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.

186 Section 134 relevantly provided:

> (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).

…

(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

…

(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.

187 What is immediately obvious about s 134, is that care has been taken not to empower the Minister to impose conditions generally (as did the approval powers the subject of consideration in *Mison*) but to structure the circumstances in which the Minister may attach a condition to an approval under s 133 and to identify the nature or types of conditions that may be attached. The effect of s 134(1) is two-fold. First, no condition, including those that may be imposed under subs (3), can be attached unless the Minister is satisfied that the condition is "necessary or convenient" for protecting a matter or repairing or mitigating damage to a matter protected as described by subs (1)(a) or (b). Secondly, subs (1) is also a source of the power of the Minister to attach a condition where the Minister is satisfied that that condition is necessary or convenient in terms of subs (1)(a) or (b). This is clear from the statement in subs (3), that subs (3) does not limit the kinds of conditions that may be attached to an approval. This non-limitation provision necessarily means that by subs (1) the Minister is authorised to attach a condition which meets the description provided in subs (1)(a) or (b). In a case such as the present, therefore, an impugned condition may possibly be authorised by s 134(1)(a) or (b) alone, or in combination with one of the subparagraphs of subs (3).

188 It may be seen that by s 134(3)(e) conditions of the type that involve some retention of flexibility in relation to continuing decision-making in relation to the implementation of an activity, are expressly authorised. But, as noted, any condition relying on subs (3)(e) must meet the character of 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 Pt 3 for which the approval has effect such as a plan for conserving habitat of a species or ecological community. However, the final phrase in subs (3)(e), "such as a plan for conserving habitat of a species or ecological community", should be understood as providing merely an example of and not limiting the type of conditions that may be imposed under subs (3)(e), if they otherwise meet the primary requirements of such conditions. Attention should also be directed to subs (3)(f) which enables conditions requiring specified environmental monitoring or testing to be carried out, and to subs 3(g) which enables conditions requiring compliance with a specified industry standard or code of practice.

189 In *Lawyers for Forests*, Tracey J, at [22], noted the applicant (LFF) asserted that the Minister was seeking, by the imposition of conditions, to obtain knowledge of the impact of the discharge of effluent and that, without this knowledge, it was not possible for him to impose the conditions in the first place. His Honour considered there were a number of difficulties with that assertion. First, that LFF was unable to adduce any direct evidence that the Minister considered that he laboured under the disability attributed to him. Second, that it failed to take into account the range of information which was before the Minister when he made the decision. Third, that LFF had failed to define with precision the level of knowledge which it said the Minister must have in order to come to a degree of certainty which it said he must have before he can impose conditions under s 134(1). His Honour noted that LFF's argument did, however, assume that the results of the studies and the monitoring which the conditions require be undertaken form an essential part of that body of knowledge.

190 At [26], Tracey J found there was nothing in the material before the Minister which would have enabled him to have been satisfied to a level of scientific certainty, that the proposed marine outfall would have a particular impact on the Commonwealth marine environment. There was, however, sufficient information to enable him to conclude, as he did, that the *likely* impact of the discharge of effluent could be prevented or mitigated by

imposing conditions which imposed limits, based on overseas experience, on the concentration and volume of toxic materials being discharged. That, in his Honour's view, provided a sufficient foundation to determine that it was necessary and/or convenient to impose conditions of the kind adopted by him.

191 Tracey J added, at [27], that the Minister could so act even though he was unable to determine with certainty what the environmental impact of the proposed discharge would be. His Honour noted the "precautionary principle", which is stated and defined in s 391 of the EPBC Act and which by s 391(3) must be regarded in the exercising of s 133. However, by s 391(1), the precautionary principle must be regarded only "to the extent [the Minister] can do so consistently with the other provisions of this Act".

192 The point about both the precautionary principle and the principle of ecologically sustainable development, both described above, is that in each case it is intended to authorise "measures" to prevent environmental degradation where there are "threats" of serious or irreversible environmental damage even if that decision-maker lacks full scientific certainty.

193 On appeal in *Lawyers for Forests FC*, the Full Court noted the Minister's findings and observations, noted the precautionary principle which the Minister is required to take into account in making a decision under s 133 to the extent he or she can do consistently with the other provisions of the Act, and found, at [47], that it was apparent from the Minister's reasons that the impugned conditions were not imposed so as to enable him to assess the environmental impact of the proposed action or for the purpose of predicting that impact. Although on the evidence no significant impacts were likely, the conditions were designed to deal with a 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. The Full Court, at [54], said it was also apparent from the Minister's reasons that the impugned conditions did not constitute a separate approval process. The approval was accompanied by the conditions attached to it. They were not subordinate to the approval.

194 The Full Court recorded its agreement, at [56], with what the primary judge said about the claim that the Minister lacked the required degree of certainty he was required

to have as a precondition to the exercise of his powers under s 134, and with his conclusion that the Minister in fact had sufficient information to enable him to conclude that the likely impact of the discharge of effluent could be prevented or mitigated by imposing conditions which imposed limits, based on overseas experience, on the concentration and volume of toxic materials being discharged.

195 On this appeal both the appellant, in pressing his contention that the primary judge did not give adequate regard to the totality of the conditions imposed on the approval when considering the grounds of review, and the respondents, in contending that the impugned conditions must be construed by reference to a range of relevant conditions touching on the particular subject matter, emphasise the importance of the Court not approaching the questions of construction in a narrow, artificial or segmented way. To this end, it is appropriate to attach the conditions imposed on the approval as an appendix to these reasons. It will be noticed that the conditions are located in seven "schedules" dealing with particular aspects or components of the proposal and include three definition conditions.

196 While the appellant's main attack on the uncertainty grounds here is by reference to what he says was the failure of the primary judge to consider adequately the *totality* of the impugned conditions, which indicate an uncertain approval or that the approval so issued was beyond jurisdiction, it remains necessary to have regard to particular impugned conditions and their context in relation to other conditions in order to deal with the propositions put. To attempt to regard the *totality* of the impugned conditions in any other way would be impermissibly impressionistic and fail to regard what the conditions actually require or do in relation to the approved activity either taken alone or together with other conditions or the conditions as a whole.

197 It should also be said in relation to the appellant's totality contention, however, that the appellant does not seek to rely upon the *number* of conditions that he says leave a range of issues for approval by the Minister during the course of the implementation of the project in order to sustain the propositions put. Nor would one expect such an argument to be put. The question ultimately is one of construction, as to both whether particular conditions answer the description of conditions that may be imposed on an approval and/or make the approval uncertain; and/or whether the approval with the

challenged conditions is beyond the Minister's jurisdiction under the EPBC Act or not authorised by the EPBC Act.

198 As noted above, the appellant draws attention to a range of conditions that are said to support the first proposition advanced on behalf of the appellant. The primary judge dealt with particular conditions that were the subject of argument before him, although it would appear that his Honour was not thereby intending to deal with every condition raised in argument. It is appropriate to take a broadly similar approach here. Consideration will in particular be given to those conditions to which his Honour appears primarily to have been directed, as well as to those pressed in submissions on behalf of the appellant on the appeal.

199 Conditions 4, 5 and 7 are the first grouping of conditions to be considered. They fall within Sch 1: Mining and processing. They require the preparation, subject to the Minister's approval, of an environmental protection management program in relation to mining and processing that has particular nominated specifications and which, when approved, must be implemented. The program is not at large, but must meet the specifications identified in condition 5. The specifications include "target criteria".

200 There is no relevant lack of certainty or ambiguity in condition 5(f). The expression "target criteria" is not vague. These 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", as is stated in 5(f). The expression is defined to similar effect in condition 107.

201 It may also be noted in passing, at this point, that other expressions used in condition 5 (and also in a number of other conditions), namely "compliance criteria", "leading indicator criteria" and "non-human Biota" are also defined in condition 107.

202 It is for the Minister ultimately to approve what is appropriate by reference to various specifications in condition 5 and no doubt some degree of negotiation or exchange may be completed before approval is given by the Minister to the various criteria and other terms of the program.

203 To similar effect the primary judge, at [49], reasonably said of the expression "target criteria", that it was broad but not so broad as to be meaningless. His Honour noted the same could be said of the definition of "leading indicator criteria" in condition 5(e) (also relevant to condition 17). In his discussion at [49], his Honour also reasonably accepted the respondents' submissions that condition 20 (dealing with listed species of birds) must be read as a whole so that the definitions provided in the EPBC Act for words or expressions such as "impact" and "significant impact" supplied criteria by which compliance may be determined.

204 In general terms, the environmental protection management program envisaged and required by conditions 4, 5 and 7 fall within the statutory language of s 134(3)(e) 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*". The fact that there is an apparent lack of specificity about what must be done when the condition is imposed does not make the approval uncertain, especially in the circumstances where s 134(3)(e) authorises such a condition. The program will, when approved, manage the potential impacts identified.

205 It is also appropriate to note, as the respondents do and the primary judge accepted at [48], 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". This term is defined by condition 107 to mean "the stripping of top soil from the open pit site and commencement of removal of overburden". The Minister thus exercises close control over the program formulation process.

206 Additionally, as the Minister submitted and the primary judge accepted at [47], by condition 10 the environmental protection management program must be reviewed every three years with a report provided to the Minister addressing certain matters. Any revision to the program must be approved by the Minister.

207 Further, by condition 30, BHPB must review the activities covered by Sch 1 every 10 years to confirm that the "best practicable technology" (another expression defined by condition 107) is being used to minimise environmental impacts and risks, and provide a report to the Minister.

208 Conditions 4, 5 and 7, particularly when read in context and with these other conditions, are of the kind contemplated by s 134 of the EPBC Act. They have to do with managing impacts of the approved activity. The approval with those conditions imposed is not uncertain.

209 Condition 16, also within Sch 1, deals with site contamination. Condition 16 requires that the approval holder ensure assessment and remediation of any contamination from spills or leaks, including from radioactive process materials, in accordance with an identified Measure and an identified Code of Practice.

210 In this context condition 17 requires that the program required under condition 4 include "leading indicator criteria" that specify, for each class of contaminants, investigation and response levels as defined in the Measure in the event that spills or leaks occur.

211 For the same reasons that conditions 5 and 7 do not make the approval uncertain, nor do conditions 16 and 17. The expression "leading indicator criteria" used by condition 17, as noted above, is defined and, as his Honour said at [49], is not meaningless. Condition 17, related as it is to condition 4, reasonably provides for the submission of a program, to be approved by the Minister, that deals with the management of an environmental contamination risk from spills or leaks. It is a condition that is essentially preventative in nature in respect of an identified risk and may reasonably be said to reflect an application of the precautionary principle.

212 Condition 20 deals with target criteria for impacts on listed species of birds. Condition 20 falls within a number of conditions in Sch 1 that deal with fauna. Conditions 18 and 19 respectively deal with a concern that evaporation ponds do not impact on listed species of birds and require that the program mandated by condition 4 demonstrates best practicable technology to that end. In that context, the requirement of condition 20 that the program specifies target criteria for impacts on listed species of birds cannot be considered objectionable. The expression "target criteria" is defined, as noted above. As to exactly what the target criteria will be will become clear in the approved program. Again, the purpose of the condition is to manage impacts in respect of listed vulnerable species of birds. The target criteria must be at a level to avoid "significant impacts" on those species. This requirement

may raise questions of judgment and degree, but it does not thereby make the requirement objectionable. The condition reasonably is one that provides for managing identified potential impacts.

213 Condition 23, also within Sch 1, deals with groundwater monitoring. Condition 23 along with conditions 22 and 24-26 deal with groundwater. Each condition has a particular objective. For example, condition 22 is concerned to ensure no significant adverse impacts on groundwater dependent listed species or ecological communities, or on environmental values as described in the EIS or as revised under condition 23(b) of the Yarra Wurta Springs, or to compromise the environmental values of groundwater outside the special mining lease as a result of seepage from the tailings storage facility. Condition 23 requires the program under condition 4 to include a regional groundwater monitoring and managing program that provides for the approval holder to:

(a) update, enhance and validate a simulation model included in the supplementary EIS by reviewing the model at least every three years, together with other requirements;

(b) improve understanding of the hydrogeology and ecology of the Yarra Wurta Springs by undertaking a specified work program;

(c) confirm the conceptual understanding of the hydrogeology of the Torrens Hinge Zone by undertaking a specified work program; and

(d) confirm the conceptual understanding of the hydrogeology of the Stuart Shelf by undertaking a specified work program.

214 The management program required in each case is no doubt complex and extensive. In relation to a project such as that put forward by BHPB and the subject of the Decision, this may not be considered surprising. The Minister's statement of reasons for decision at [6.17] to [6.31] shows the Minister gave close consideration to the groundwater issue and this condition is designed to enable further detailed management of impacts to be put in place, with the approval of the Minister. Condition 23 would therefore appear to be supported by s 134(3)(e). Additionally, it would also appear to be supported by subs (3)(f), as it requires specified environmental monitoring or testing to be carried out. It would also appear to be supported by s 134(1)(a) in that it is designed to protect groundwater resources. It serves to manage nominated environmental risks arising from the approved activity.

215 Condition 61 concerns a barge landing facility. It falls under Sch 3: Barge landing facility and pre-assembly yard together with condition 62. Condition 61 would appear to be directly within the power to impose a condition created by s 134(1)(a), in that the condition is designed to ensure that the construction and operation of a barge landing facility, "as described in the EIS", must not have a "significant adverse impact" on cetaceans in the manner described. The proscription is clear. As to the meaning of "significant adverse impact" that is an expression that is capable of being given content, including under the EPBC Act. Condition 108 states that any terms used in these conditions, that are not otherwise defined, will have the meaning given to them under the EPBC Act. The word "impact" is defined in the EPBC Act in s 527E. While the expression "significant impact" is not separately defined in the EPBC Act there are a number of authorities that bear upon the meaning of the provision. In short, these authorities suggest that a "significant" impact is one that is "important, notable, or of consequence having regard to its context or intensity": see for example, *Krajniw v Brisbane City Council (No 2)* [2011] FCA 563 at [10] and authorities there cited. There is no relevant uncertainty in the Decision created by the imposition of that condition.

216 By condition 61, the construction and operation of the barge landing facility must not have a significant adverse impact on cetaceans as a result of noise or vibrations, as demonstrated by maintenance of an exclusion zone and a maximum sound exposure level for any blasting or pile driving. Condition 62 provides that the approval holder must specify an exclusion zone and a maximum sound exposure in an environmental management plan relating to the construction of the barge landing facility. Thus, the environmental management plan will operate to give effect to condition 61.

217 Condition 62 further provides that 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". While this, at one level, might suggest a degree of abdication of satisfaction of the condition to the approval holder or the State, properly construed the provision merely requires the environmental management plan to satisfy State requirements and address the matters set out in the condition. If that occurs then the Minister by this condition has indicated in advance that he will treat the plan as one approved by him following submission. If the plan does not meet those requirements then it may be taken that the Minister would consider conditions 61 and 62 not to have been satisfied. The

specification of "State requirements" (which should be construed as a reference to relevant State laws and not executive, ministerial or administrative directions) provides a certain external source of regulation and does not make the Decision uncertain. It does not delegate any decision-making authority to the State.

218 While condition 61 and condition 62 when read together appear to leave a degree of flexibility in the hands of the approval holder, the practical position is that the Minister retains a supervisory and approval role in relation to the content of the environmental management plan referred in condition 62. Conditions 61 and 62 individually and collectively do not introduce that degree of ambiguity or uncertainty that would suggest the Decision is uncertain.

219 Conditions 77 and 78 fall within Sch 6: Infrastructure corridors (rail, electricity, gas, water) and relate to consultation with indigenous people. In this context, condition 77, subject to condition 78, requires the approval holder to 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 would occur in relation to the activities covered by Sch 6. Condition 78 provides that 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.

220 Condition 77 therefore applies generally in respect of the consultation with indigenous persons in relation to the matters specified in paras (a)-(d). The purpose of the consultation condition is evident. If, in the carrying out of an approved activity, land is to be disturbed and it has the potential to affect indigenous values or archaeological material, then:

· the adequacy of surveys that identify sites of indigenous heritage value;

· the need to establish protocols in relation to archaeological material;

· the need to establish protocols in relation to the assessment of known indigenous heritage values, prior to construction, as well as any newly identified indigenous heritage values during construction; and

· the obtaining of future possible "consents" to disturb indigenous heritage values from the relevant indigenous groups;

must be taken account of.

221 It may be assumed that the consents referred to will be those that are available under existing law, such as the *Native Title Act 1993* (Cth), where individuals or groups have pre-existing native title rights or interests or a right to negotiate.

222 Conditions 77 and 78 in those circumstances relate to practical management issues in relation to identified environmental and heritage issues. The conditions may be considered authorised by s 134(1)(a). They do not on their face appear to depend upon s 134(3). They do, however, reflect the relevant objects of the EPBC Act expressed in s 3(1)(f) and (g) of the EPBC Act in relation to the interests of indigenous persons.

223 Nothing in the various conditions considered above, either individually or collectively, suggests that the conditions are beyond the power of the Minister under s 134 to impose conditions on an approval granted under s 133. Nor when taken collectively does the range of conditions suggest that the approval granted is invalid for lack of certainty.

224 What the conditions reflect is that the approved activity is a large and complex one. It raises many environmental and heritage issues. It is not surprising that there should be a number of conditions designed both to manage impacts or otherwise to protect environmental and heritage values that have been identified during the EIS and assessment report processes which informed the Minister's Decision.

225 In these circumstances the first proposition advanced by the appellant fails.

226 As to the appellant's second proposition, the appellant offers as examples of conditions that he contends should lead the Court to infer that the Minister has not satisfied himself that the proposed action should be approved – that is to say, has not actually exercised the approval power – conditions 32, 66 and 71. They may conveniently be dealt with in the following order: conditions 32, 71 and 66, as the appellant contends condition 66 infects the approval with invalidity for the same reasons as does condition 71.

227 Condition 32, which is within Sch 1: Mining and processing, along with a number of the other conditions discussed above, deals with mine closure. Condition 32

requires the condition 4 program to include a "mine closure plan" which answers the specifications of condition 32(a)-(i).

228 The primary judge accepted, at [62], that condition 32 would appear to leave the "major matter" of mine closure to be determined, but noted the Minister's reasoning set out in his statement of reasons for decision as follows:

> 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.

229 His Honour rejected the appellant's contentions that BHPB was left to formulate the "assessment criteria" mentioned in condition 32(a). He noted that the Minister has the power to withhold approval to the mine closure plan. His Honour considered the reference in condition 32(b) to the assessment criteria being "clear, unambiguous and specific" is to assist that process.

230 The primary judge's analysis should be accepted. While condition 32 demands "assessment criteria" that are "clear, unambiguous and are specific to the achievement of the specified environmental outcomes" and which are to include certain parameters and the like, what is required of BHPB is clear, as are the comprehensive safety assessment requirements and other requirements of the subparagraphs of condition 32. To the extent that there is any present lack of specificity about exactly what will need to be done by the approval holder to meet the terms of this condition, there might be some negotiation or exchange with the Minister that will lead to the Minister ultimately approving the plan in which these requirements are resolved. Thus, in the circumstances, there is no relevant uncertainty in the approval by reason of condition 32. The condition does not reveal that the Minister has failed to consider the environmental effects of an important issue and has left it

until later. Indeed, the passage quoted by the primary judge from the Minister's statement of reasons indicates proper consideration. The approval power does not remain to be exercised by reason of the condition; it does not fail to consider the impact of an important impact or issue. Rather, the issue has been recognised and regulated by the condition.

231 The appellant also draws attention to condition 71 within Sch 6. It deals with rail line, water pipeline and electricity transmission lines infrastructure proposals not provided for by condition 70, as well as a gas pipeline, "if the approval holder proposes to construct [it]". The appellant says condition 71 also demonstrates that the Minister did not satisfy himself that the proposed action should be approved, on account of these substantive potential environmental issues being left for later determination.

232 Condition 71 should be regarded in the context of all conditions contained in Sch 6, but particularly conditions 69-76, which are as follows:

> 69. The conditions in this schedule apply to the construction of the rail line and infrastructure for electricity, water and gas, as described in the EIS.
>
> 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.
>
> 72. If the proposed alignment for the gas pipeline passes between Lake Blanche and Lake Callabonna, the plan must include a review of the section from the 395 to 405 kilometre point from Olympic Dam by an appropriately qualified megafauna palaeontologist. The plan must include details as to how the

> Approval Holder will address any recommendations from that review to minimise impacts on fossils. The financial cost of the review will be borne by the Approval Holder.
>
> 73. The construction of the gas pipeline must not have a significant adverse impact on groundwater dependent listed threatened species or Ecological Communities, or migratory species, in the Great Artesian Basin.
>
> 74. Where construction will impact on the Cultana Training Area or the proposed expansion, or the Woomera Prohibited Area, the Approval Holder must consult with the Department of Defence before commencing that element of construction.
>
> 75. The Approval Holder must comply with any requirements by the Department of Defence to limit access to the Woomera Prohibited Area, in accordance with the Defence Force Regulations, as necessary for the protection of persons, property and official secrets.
>
> 76. Where a plan is required under this schedule, construction must not commence until the relevant plan is approved by the Minister. The approved plan must be implemented.

233 These conditions reflect recommendations made to the Minister in the assessment report provided by his Department. The question of rail line, water pipeline, electricity transmission lines and a gas pipeline infrastructure were there assessed. Condition 70 is unambiguous about the alignment on which the relevant rail line, water pipeline and electricity transmission lines (but not a gas pipeline) must be constructed. It is, however, the proviso – "unless otherwise approved by the Minister under condition 71" – and condition 71 itself that are the focus of the appellant's challenge.

234 Condition 71 has two purposes. First, it purportedly applies to facilitate the Minister's approval of alternative alignments of the condition 70 infrastructure. Secondly, it purportedly applies to facilitate the construction of the gas pipeline, *if* BHPB proposes to construct it.

235 The primary judge, at [65], noted that conditions 70 and 71 must be read together. He rejected an argument that condition 71 establishes that the Minister did not exercise the power he was authorised to exercise. He said the answer to that submission was that it is clear that the rail line, water pipeline and electricity transmission lines must be constructed as stated in condition 70 unless otherwise approved. His Honour added that the possibility of a gas pipeline was referred to in the BHPB's referral form given under the EPBC Act, and three possible options for the location of a gas pipeline were shown in the

draft EIS. His Honour considered (without deciding) that the reference to the gas pipeline may well fall within the concept of "alternative proposals" under s 72(3), s 133(1A) and s 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".

236 The appellant contends that the fact that there was a "default" pathway for the infrastructure other than the gas pipeline in condition 70, does not overcome the real problem in condition 71, which is that the Minister was purporting to give BHPB a right to propose, and to give to himself the power to approve, an as-yet-undescribed alternative proposal for that infrastructure pursuant to a condition and not pursuant to the mechanisms of the EPBC Act. The appellant further submits that consultation with indigenous groups in connection with infrastructure corridors that are to be part of that action, (under condition 71(d) and under conditions 77 and 78 discussed above) is also something that is to be undertaken later, rather than under the mechanisms of the EPBC Act.

237 BHPB submits that condition 71 cannot be properly construed without also reading conditions 69 and 70. BHPB submits that, to the extent the complaint is made by the appellant that the matters that follow in conditions 70 and 71 permit the approval holder and the Minister at large to do things that have not been assessed, the complaint is misconceived, because the scope of Sch 6 is restricted expressly by condition 69 to matters "described in the EIS".

238 BHPB notes that condition 70 approves a specific route for the nominated infrastructure other than the gas pipeline. It also notes that in the departmental assessment report the service corridors, as they were called, were discussed in section 5.6. It was there indicated that the proposed Olympic Dam expansion would require additional gas, water and electricity infrastructure and that, where practicable, the mains and transmission lines would align with existing infrastructure corridors to minimise environmental impacts and fragmentation. A 320 km water pipeline was identified. Additional high capacity transmission lines were also identified. So too was a gas pipeline, running underground for the majority of its length, which would connect Olympic Dam with natural gas supplies. It was noted that BHPB had identified three alternative configurations which were described as options 1, 2 and 3. Four key values were identified as "potentially impacted" by these proposed service corridors, which included Department of Defence facilities, natural heritage

sites listed on the Register of the National Estate, historic heritage sites listed on the Register of the National Estate and indigenous cultural sites listed on the Register of the National Estate. The assessment report noted the South Australian assessment that identified risks with different options and, in particular, that proposed option 2 occurs within 1 km of a lake reserve that may potentially contain megafauna fossils; and also noted that the gas pipeline would create a new corridor through a nominated site and that BHPB would need to apply for a pipeline licence under South Australian legislation, which would require detailed information on the design, construction, operation and maintenance of the pipeline.

239 BHPB submits that the conditions in Sch 6, including the terms of condition 71, reflect proposals that have been identified, assessed and set out in the Department's assessment, which had already been commented upon following public exhibition of the draft EIS and assessed by the Department, pursuant to the mechanisms of the EPBC Act. BHPB submits that what the appellant now requires is a further and better assessment than that which has already occurred under the EPBC Act. BHPB says that in the assessment report the recommendations were made to ensure that environmental degradation in a number of respects is avoided.

240 BHPB submits that far from it being at liberty to choose its own path free of the gaze of assessment, exhibition and the like under the EPBC Act, the proposal and the conditions have been developed in detail, in an assessment that was publicly exhibited, considered, assessed and with conditions designed to minimise environmental impacts. Thus, BHPB submits that the complaint the appellant makes about a lack of public participation is, once condition 69 is taken into account, without substance.

241 It is undoubtedly necessary to first have regard to condition 69. Condition 69 is in terms that reflect the drafting style used in some earlier conditions that proceed from a reference to a component activity "as described in the EIS". For example, condition 61, considered above relative to the barge landing facility, provides that:

> 61. The construction and operation of the barge landing facility, as described in the EIS, must not have a significant adverse impact…

Condition 69 in a similar way provides:

> 69. The conditions in this schedule [Sch 6] apply to the construction of the rail

line and infrastructure for electricity, water and gas, as described in the EIS.

242 This form of condition may be apt to indicate, when read with the approval itself, that the component activity described in the EIS is approved, subject of course to any statement or indication to the contrary in the conditions. However, the expression "as described in the EIS" may not take one very far where there are options expressed in the EIS. It may be that such a condition constitutes recognition that the component of the proposal referred to, as an activity, is accepted, but the details are subject to the requirements of the conditions. This should be accepted as the proposed construction of condition 69.

243 Thus, when it comes to the rail line, water pipeline and electricity transmission lines, condition 70 prescribes the particular alignments such infrastructure is to follow – "unless otherwise approved by the Minister under condition 71". Condition 70 crystallises the alignment the accepted infrastructure is to follow.

244 However, as to the gas pipeline described in the EIS, given the discussion of the three corridor options in the assessment report and the condition 70 prescription of the infrastructure alignment for infrastructure other than the gas pipeline, and the particular terms of condition 71 that include reference to the possible construction of the gas pipeline, it cannot be said that condition 69 approves a gas pipeline component on any particular alignment. Instead, alignment of any gas pipeline remains to be approved and approval to a proposed alignment must be sought if BHPB proposes to construct the gas pipeline.

245 This is confirmed by condition 72, in that, "[i]f the proposed alignment for the gas pipeline passes between Lake Blanche and Lake Callabonna" then the plan must include a certain review by an appropriately qualified megafauna palaeontologist and address recommendations from that review to minimise impacts on fossils. Until a proposed alignment is put forward under condition 71, it cannot be known whether condition 72 will apply. But if the alignment proposed passes between the two nominated lakes, then condition 72 will apply. While condition 72 obviously has regard to questions of environmental damage to megafauna discussed in the assessment report, this fact does not thereby imply that the gas pipeline must be restricted to an alignment option discussed in the assessment report.

246 Condition 73 will apply to the gas pipeline in any event, in that it provides that the construction must not have a "significant adverse impact on groundwater dependent listed threatened species or Ecological Communities or migratory species in the Great Artesian Basin". This condition would also appear to owe itself to the EIS and discussion in the assessment report.

247 Conditions 74 and 75 would appear to be referable to construction of any approved infrastructure affected by Sch 6, including the gas pipeline.

248 Condition 76 makes it clear that, where a plan is required, no construction can be commenced until a relevant plan is approved by the Minister. In other words, if condition 71 applies, then a plan must be approved and implemented. Condition 76 thereby gives the Minister final control over any gas pipeline construction, as well as any alternative rail line, water pipeline or electricity transmission lines infrastructure proposed under condition 71.

249 Condition 70 is certain. It does not depend for its operation on condition 71.

250 On one view, all that condition 71 does in respect of the approved infrastructure identified by condition 70, is provide for its *variation*, so long as the environmental values or considerations identified in condition 71 paras (a)-(d) are met, these values or considerations having been outlined in the assessment report and having informed the Minister's decision to impose condition 70. This view could be accepted if all that condition 71 does is permit BHPB to propose an alternative alignment to that prescribed by condition 70 on the basis that the alternative alignment will be one of those already assessed in the assessment report. This is because it will already have been assessed under the EPBC Act. As the primary judge said, the alternative may well be an "alternative proposal" under the Act.

251 The difficulty with this view, however, is that nothing in the Sch 6 conditions and particularly in conditions 70 and 71 limits the Minister's power to approve an alternative alignment of condition 70 infrastructure to options 1, 2 and 3 the subject of the assessment report. There is nothing in the terms of conditions 70 and 71 to prevent the Minister approving an alignment of such infrastructure not previously discussed in the EIS or the assessment report. The result is that by condition 71 the Minister has created, in himself, an

infrastructure approval power, albeit one to be exercised by reference to the four values or considerations specified in condition 71(a)-(d), to approve the identified infrastructure but on a new alignment without any reference to the particular requirements and mechanisms specified in the EPBC Act that would otherwise apply in relation to such a fresh infrastructure proposal. Consequently, it may reasonably be said the approval containing condition 71 does not answer the description of an approval granted under s 133 in respect of the condition 70 infrastructure activity referred under the EPBC Act and the subject of the draft EIS. Or put another way, condition 71 is not authorised by s 134, as it does not involve the protection of the environment or the management of environmental impacts identified by the *proposed activity*, but provides for the assessment and approval of some other potential infrastructure proposal.

252 This analysis applies with equal, if not greater force, in relation to any proposal that may be advanced for approval under condition 71 of the alignment of the gas pipeline. There is nothing in the Sch 6 conditions that limits any proposed alignment or the power of the Minister to approve any proposed alignment in respect of the gas pipeline to an alignment reflected in the EIS or to options 1, 2 or 3 discussed in the assessment report. As a result, a fresh alignment of the gas pipeline described in the EIS might be proposed for approval under condition 71. Consequently, the approval containing condition 71 does not answer the description of an approval granted under s 133 in respect of the gas pipeline referred under the EPBC Act and the subject of the EIS. Or put another way, condition 71 in respect of the gas pipeline alignment is not authorised by s 134 as it does not involve the protection of the environment or the management of environmental impacts identified by the *proposed activity*, but provides for the assessment and approval of some other potentially fresh gas pipeline alignment proposal.

253 For these reasons, condition 71 should not be considered to be authorised by the EPBC Act and to be invalid both under the ADJR Act and the general law.

254 This then leads to the question whether the invalidity of condition 71 means that the whole of the Decision – the approval with all the conditions – must fall with condition 71. As noted above, the primary judge considered that even if condition 71 in relation to the gas pipeline were invalid, it would not "bring down the approval". With

respect, this must be considered correct, both in respect of the gas pipeline infrastructure alignment as well as any alternative condition 70 infrastructure alignments.

255 It is well established that an invalid condition may be severable where it is not fundamental to the whole of the approval, but where it is it cannot be severed and the whole of the approval is invalid: *Kent County Council v Kingsway Investments (Kent) Ltd* [1971] AC 72 at 90 per Lord Reid and 102-103 per Lord Morris; *Parramatta City Council v Kriticos* [1971] 1 NSWLR 140; *Winn* at [212]-[216] per Stein JA, with whose reasons for judgment Spigelman CJ at [1] agreed); *Kindimindi* at [56] per Basten JA.

256 Condition 71 is not fundamental to the approval. Nor, as noted above, is it fundamental to the operation of condition 70. Condition 71 may be and should be severed from the approval.

257 The consequence of the severance of condition 71 is that BHPB remains able to propose an alignment to any gas pipeline infrastructure it proposes to construct, as well as new alignments of condition 70 infrastructure. However, should it wish to do so, its proposal will be affected by the operation of the EPBC Act.

258 The appellant also contends that condition 66, relating to the Port of Darwin handling facility, is objectionable for the same reasons that condition 71 is objectionable. Condition 66 is within Sch 5: Transport of copper and uranium oxide concentrate and Port of Darwin handling facility.

259 Conditions 64 to 67 should first be noted in order to appreciate the function of condition 66:

> 64. The transport of uranium oxide concentrate, the construction and operation of the Port of Darwin handling facility and rail transport of copper concentrate, as described in the EIS:
>
> a. must not have a significant adverse impact on the Ecological Values of the Port Darwin wetlands
>
> b. must not expose Members of the Public or Non-human Biota to radioactive releases above the dose limits recommended in the *Code of Practice for Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing*
>
> c. must ensure exposure of Members of the Public to radioactive releases is as low as reasonably achievable and exposure of Non-human Biota is minimised to the lowest reasonable levels..

65. The Approval Holder must ensure that the transport and loading of copper concentrate uses a no release containment system and that transport of both copper concentrate and uranium oxide concentrate is consistent with the *Code of Practice for the Safe Transport of Radioactive Material* (ARPANSA 2008, or as amended).

66. Before commencing construction of the Port of Darwin handling facility, the Approval Holder must prepare an environment management plan for the facility, which includes:
    a. design plans showing the type and extent of works proposed
    b. a construction schedule and methodology, including plans and maps showing discharge points and emission controls for all construction stages
    c. any potential impacts or effects of the proposed works on the environment during the construction and operational phases and the means by which adverse impacts will be avoided or mitigated.

67. A plan satisfying Northern Territory Government requirements and addressing the matters set out in condition 66 will be deemed to have been submitted and approved by the Minister.

260 The consequence of these four conditions is that: condition 64 deals with construction and operation of the handling facility; condition 65 deals with transport and loading; condition 66 deals with potential impacts or effects during the construction and operational phases; and condition 67 requires the relevant plan design to achieve the specifications of condition 66 according to "Northern Territory Government requirements".

261 Condition 64 applies to the transportation, construction and operation of the port, "as described in the EIS".

262 It is clear from condition 64 that, during the transportation phase and in the construction and operation of the port, members of the public and non-human biota must not be exposed to radioactive releases above the dose limits recommended in the Code of Practice for Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing (condition 64(b)).

263 By condition 65, transport and loading must use a "no release containment system" according to the nominated Code of Practice.

264 In this context, it cannot be said that condition 66 lacks any certainty or makes the approval uncertain or leaves for later assessment an as-yet-undescribed activity. Rather, construction must be according to a plan consistent with the laws of the Territory and the

relevant code of practice, and which has been approved by the Minister. The condition in effect regulates construction of the approved activity which has been identified as carrying with it environmental risk.

265 The fact that the Minister can require revisions to the plan under condition 87, for example, would also appear to ensure Ministerial oversight of the entire plan approval process in any event and enable any adjustments as may be necessary from a continuing management perspective.

266 Contrary to the appellant's submission, condition 66 is not like condition 71. Condition 71 proposes an approval regime in respect of an activity generally which, while described, is potentially not in respect of any particular alignment or location. Condition 66 lacks this feature. The Port of Darwin area to which the construction and operation conditions apply, is clearly described in the EIS.

267 It should also be said in passing that the loose language in condition 67 in relation to the "Northern Territory Government requirements" may be contrasted with condition 62 which relevantly refers to "State requirements" without any reference to "Government". "State requirements", as noted above, plainly are limited to those imposed by State law. The expression "Northern Territory Government requirements" should be similarly construed.

268 Finally, as noted above, by this appeal ground the appellant presses for a finding of invalidity of the approval having regard to the *totality* of the conditions. In circumstances, however, where the individual conditions impugned do not disclose that the approval is uncertain or that it was beyond the power of the Minister to impose the relevant conditions (with the exception of condition 71), it is difficult to draw a conclusion from a suggested separate overall or "totality" analysis, that the conditions when read together make the approval uncertain, or that the conditions collectively are beyond the Minister's power to impose conditions, or that the approval power remains unexercised or may possibly result in the approval of an activity not referred under the EPBC Act, or that the approval lacks finality when the conditions are collectively considered.

269 In the result, save for condition 71 which should be severed from the approval granted, the second proposition also fails.

Conclusion

270 The appellant has failed to make out his grounds of appeal. Moreover, to the extent that it were necessary, we are of the opinion that the judgment of the primary judge which was the subject of ground 1 of the appeal should be affirmed on the grounds set out in the Contentions.

271 The appeal will be dismissed. The appellant should pay the costs of each respondent.

I certify that the preceding two hundred and seventy-one (271) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Gilmour, Foster and Barker.

Associate:

Dated: 8 October 2013

SCHEDULE 1: MINING AND PROCESSING

Scope

1. The conditions in this schedule apply to all activities undertaken by the Approval Holder on the Special Mining Lease and to water extraction by the Approval Holder from Wellfields A and B in the Great Artesian Basin.

Commencement and completion

2. Within 10 business days of the date of Substantial Commencement of the activities covered by this schedule, the Approval Holder must advise the Department in writing of the actual date of commencement.

3. If, at any time after five years from the date of this approval, the Approval Holder has not substantially commenced the activities covered by this schedule, then the Approval Holder must not commence those activities without the written agreement of the Minister.

   Note: The 50 year duration of this approval allows for a period of 10 years for rehabilitation and closure after the end of 40 years of Mining and Processing.

Environmental protection management program (Mining and Processing)

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).

6. Where the South Australian Government has required standards to be met that relate to the Compliance Criteria, Leading Indicator Criteria or Target Criteria specified in the program, the Approval Holder must revise the program so that the criteria under condition 5(d) do not set a lower environmental standard. Any such revisions are taken to be a part of the program approved by the Minister.

7. The approved program must be implemented.

Timing for approval of environmental protection management program

8. The environmental protection management program must be submitted to, and approved by, the Minister before Substantial Commencement.

9. The environmental protection management program must be revised by the Approval Holder and the revised program must be submitted to the Minister for approval:

a. prior to construction of the tailings storage facility. The program submitted to the Minister must address the recommendations from the report on exposure of Listed Species of birds to tailings prepared under condition 21

b. prior to commencement of mining of ore (after Overburden Removal).

Review of program

10. The environmental protection management program required under condition 4 must be reviewed at least every three years from the date of its first approval, or as otherwise specified in writing by the Minister. A report on the review must be provided to the Minister addressing:
    a. the effectiveness of the program over the preceding period
    b. the monitoring results over the preceding three years and the extent to which Compliance Criteria, Leading Indicator Criteria and Target Criteria have been met
    c. whether the Compliance Criteria should be revised to improve measurement of the achievement of the outcomes referred to in condition 5(c), taking into account the latest scientific information
    d. whether the Leading Indicator Criteria can be revised to provide a better early warning of potential non-compliance
    e. whether Target Criteria should be changed to reflect a level of impact for Members of the Public that is as low as reasonably achievable and for non-human biota that risks are minimised to the lowest reasonable levels
    f. opportunities for improved monitoring methods
    g. the outcome of risk assessments undertaken over the preceding three years
    h. the Approval Holder's response to the review, including any revisions to the program the Approval Holder proposes to make
    i. the information on which the review was based
    j. the expertise used in undertaking the review
    k. any other findings and recommendations from the review

11. The Minister may require the Approval Holder to ensure that the report is independently reviewed and the results provided to the Minister. The financial cost of the review will be borne by the Approval Holder.

12. If the Approval Holder proposes to revise the program in response to the review, the revised program must be submitted to the Minister for approval. If the Minister approves revisions to the program, those changes must be implemented.

Radiation

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.

Site contamination

16. In undertaking the activities covered by this schedule, the Approval Holder must ensure assessment and remediation of any contamination from spills or leaks, including from radioactive process materials, is undertaken in accordance with the *National Environment Protection (Assessment of site contamination) Measure 1999* (or as amended) and the *Code of Practice for Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing*.

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.

Fauna

18. The program required under condition 4 must demonstrate that the Approval Holder uses Best Practicable Technology to ensure that impacts on Listed Species of birds from exposure to the tailings storage facility or Evaporation Ponds are minimised to the lowest reasonable levels. This must include:
    a. measures to prevent Listed Species of birds from accessing the Central Decant Pond of each new cell in the tailings storage facility, such as barrier netting;
    b. measures to prevent Listed Species of birds from accessing the Balancing Ponds, such as barrier netting.

19. The Approval Holder must not construct Evaporation Ponds (for the purpose of the expanded mine).

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 3.21 - Significant Impact Guidelines for 36 migratory shorebird species (Department of the Environment, Water, Heritage and the Arts 2009, or as finalised or amended).

21. The Approval Holder must undertake a review to identify further opportunities to decrease the attractiveness of tailings storage facilities (in place at the date of this approval) and Evaporation Ponds to Listed Species of birds, prevent and deter visits by large flocks of Listed Species of birds, improve monitoring methods, phase out the use of Evaporation Ponds as soon as practicable, and ensure continuous improvement in reducing the number of Listed Species of bird mortalities each year. A report on the outcome of this review must be provided

to the Minister prior to commencement of construction of the tailings storage facility. The report must make recommendations for reviewing Target Criteria for impacts on Listed Species of birds and for a staged reduction in this criteria, and state how the Approval Holder will address these recommendations in the environmental protection management program.

Groundwater

22. The Approval Holder must ensure that the activities undertaken by the Approval Holder on the Special Mining Lease do not result in any:
    a. significant adverse impact on groundwater dependent Listed Species or Ecological Communities
    b. significant adverse impact on the Environmental Values (as described in the Environmental Impact Statement or as revised under condition 23b) of the Yarra Wurta springs
    c. compromise of the environmental values of groundwater outside the Special Mining Lease as a result of seepage from the tailings storage facility.

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 guideline* (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 hydrochemical, 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 Arckaringa Basin

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

24. The program required under condition 4 must include Compliance Criteria to determine whether the requirements of condition 22 are being achieved. Compliance criteria must be adequate to confirm that:

a. in relation to 22(a), that groundwater drawdown from mining operations will have no significant adverse impact on groundwater pressure in the Great Artesian Basin

b. in relation to 22(b), that groundwater drawdown from mining operations will not have a significant adverse impact on groundwater flow and pressure of the Yarra Wurta Springs

c. in relation to 22(c), that seepage from the tailings storage facility will flow towards the open pit.

25. The program required under condition 4 must include Leading Indicator Criteria to address condition 22(c) based on measured attenuation rates of seepage from the tailings storage facility, and monitoring of lateral movement of seepage.

26. To ensure the activities covered by this schedule do not result in any significant adverse impact on vegetation from seepage from the tailings storage facility, the groundwater level at the perimeter of the tailings storage facility must not be higher than 80 metres Australian Height Datum, unless otherwise agreed in writing by the Minister.

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 of Proposals) Act 1974*, does not have a significant adverse impact on groundwater 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 draw down 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 draw down or flow rates at mound springs occurring as a result of water extraction by the Approval Holder

d. collection of a long term data set to achieve a better understanding of fluctuations in these systems.

Other outcomes

29. In undertaking activities covered by this schedule, the Approval Holder must ensure that:
    a. there is no significant adverse impact on the abundance and diversity of Listed Species outside the Special Mining Lease as demonstrated by baseline and ongoing flora and fauna surveys
    b. there is no increase in abundance or area of infestation of declared weeds, plant pathogens and pest animal populations (as declared under the *Natural Resources Management Act 2004* (SA)) as demonstrated by baseline and ongoing flora and fauna surveys
    c. management of radioactive substances and waste is consistent with the *Code of Practice for Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing*.

Best practicable technology

30. The Approval Holder must review the activities covered by this schedule at least once every ten years from the date of this approval to confirm that Best Practicable Technology is being used to minimise environmental impacts and risks. The Approval Holder must provide a report to the Minister on the outcomes of the review within three months of completing the review. The report must specify:
    a. the terms of reference for the review
    b. the information on which the review was based
    c. the recommendations from the review
    d. the Approval Holder's response to the review.

31. The experts to be used in the review must be approved by the Minister before the review commences. The financial cost of the review will be borne by the Approval Holder.

    Note: Condition 87 provides that, if the Minister believes that it is necessary or desirable for the better protection of the environment, the Minister may require the Approval Holder to make, within a period specified by the Minister, revisions to a plan approved under these conditions.

Mine closure

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.

Rehabilitation bond

33. On request by the Minister, the Approval Holder must provide details of the financial arrangements that may be required by the South Australian Government in relation to ensuring adequate rehabilitation for the action. The Approval Holder must comply with the request within 20 business days.

34. If at any time the Minister determines in writing that s/he is not satisfied that adequate financial arrangements, as may be required by the South Australian Government, are in place to ensure that the mine closure plan (required under condition 32) will be implemented, the Minister may require the Approval Holder to provide an arrangement (in the form of a bond,

financial guarantee or similar arrangement (in these conditions 'a bond')), as directed by the Minister.

35. The maximum value of a bond that may be required by the Minister under condition 34, is the difference between the value of the arrangements the Approval Holder has provided to meet South Australian requirements, and the amount determined by the Minister as the full cost of implementation of the mine closure plan.

36. The Minister may decrease the bond amount required where the Approval Holder has decreased the liability through undertaking rehabilitation.

37. In providing for or varying a bond amount in accordance with these conditions, the Minister may request the Approval Holder to obtain written quotes for the cost of the rehabilitation liability under the mine closure plan from a third party approved by the Minister.

38. The Approval Holder must meet all the charges and costs in obtaining and maintaining the bond.

SCHEDULE 2: DESALINATION PLANT

Scope

39. The conditions in this schedule apply to the construction and operation of the desalination plant at Point Lowly, as described in the EIS.

Timing of commencement

40. Within 10 business days of the date of commencement of the activities covered by this schedule, the Approval Holder must advise the Department in writing of the actual date of commencement.

41. If, at any time after twelve years from the date of this approval, the Approval Holder has not substantially commenced construction of the desalination plant, then the Approval Holder must not commence this component without the written agreement of the Minister.

Environmental protection management program (Desalination Plant)

42. The Approval Holder must develop, and submit to the Minister for approval, an environmental protection management program in relation to the desalination plant.

43. The program must specify:
    a. the proposed operations covered by the program
    b. measures to mitigate or avoid:
        i. significant salinity changes in the Upper Spencer Gulf
        ii. impacts on the Australian Giant Cuttlefish

iii. impacts on other marine species and communities.

c. the environmental outcomes to be achieved, as specified in conditions 46 (Australian Giant Cuttlefish) and 51 (other marine species and communities)

d. Compliance Criteria, to demonstrate compliance with conditions 45 (salinity changes in Upper Spencer Gulf), 47 (Australian Giant Cuttlefish) and 52 (other marine species and communities). A failure to meet Compliance Criteria represents non-compliance with these conditions

e. Leading Indicator Criteria as specified in conditions 47 (Australian Giant Cuttlefish) and 52 (other marine species and communities). 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 does not represent non-compliance with these conditions but means that remedial action must be taken in response. The program must specify the remedial action which will be taken in relation to an exceedance of Leading Indicator Criteria

f. the specific parameters to be measured and monitored

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

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

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

j. 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 or Leading Indicator Criteria (without limiting the measures that may be implemented to those specified in the program).

44. The program must be approved by the Minister before commencement of the activities covered by this schedule. The program must be implemented.

Salinity changes in Upper Spencer Gulf

45. The activities covered by this schedule must not result in an increase in salinity in the Upper Spencer Gulf of more than 0.15 g/L at any time, unless otherwise agreed in writing by the Minister.

Australian Giant Cuttlefish

46. The activities covered by this schedule must not result in any significant adverse impacts on the abundance and distribution of the Australian Giant Cuttlefish.

47. The program required under condition 42 must include Compliance and Leading Indicator Criteria addressing condition 46.

48. The return water outfall diffuser must be designed to achieve a dilution factor greater than 1:85 at all cuttlefish breeding areas during all tidal conditions (including dodge tides) and discharge flow rates (including under low discharge flow rates).

49. Trenching and blasting for construction of the intake pipe must not occur in the breeding season for the Australian Giant Cuttlefish between 1 May and 31 October each year (or such other dates which may be specified by the Minister in writing).

50. The program required under condition 42 must include a program for baseline surveys and annual monitoring of breeding populations of Australian Giant Cuttlefish abundance and distribution in the Upper Spencer Gulf to improve the understanding of natural population variability and provide a stronger knowledge base for management of the Australian Giant Cuttlefish.

Other marine species and communities

51. The activities covered by this schedule must not result in any significant adverse impact on the condition and extent of native marine species or their associated Ecological Communities beyond 100m of the diffuser.

52. The program required under condition 42 must include Compliance Criteria and Leading Indicator Criteria addressing condition 51.

53. The return water outfall diffuser must be designed to achieve a dilution factor greater than 1:70 beyond 100 metres of the diffuser as demonstrated by near-field modelling.

54. The outfall pipe from the desalination plant must be installed by tunnelling.

Operational dilution factor

55. Prior to construction of the desalination plant, the Approval Holder must undertake further ecotoxicology testing in relation to the dilution factor required to protect native marine species (including the Australian Giant Cuttlefish).

56. The Approval Holder must establish an expert panel, consisting of at least three independent ecotoxicology experts approved by the Minister, to:
    a. review the proposed scope for the ecotoxicology testing required under condition 55
    b. provide recommendations on the appropriateness of the species selected, the appropriateness of the experimental design, and acceptable criteria for quality assurance/control for those species tests that do not have existing standards
    c. where an existing standard test is being used, confirm that the accompanying quality assurance/control criteria are adequate
    d. review the interpretation of the results from the tests.

57. Prior to construction of the desalination plant, a report must be submitted to the Minister which includes:
    a. the results of the ecotoxicology testing;
    b. a proposed operational dilution factor for the return water discharge
    c. the findings of the expert panel established under condition 56

d. the results of further near-field and mid-field modelling to demonstrate the ability of the proposed diffuser design to achieve compliance with the dilution factor under all possible conditions
e. recommended Compliance Criteria and Leading Indicator Criteria for inclusion in a revised environmental management and monitoring plan for the desalination plant.

Review of program

58. The environmental protection management program required under condition 42 must be reviewed at least every three years from the date of its first approval, or as otherwise agreed in writing by the Minister. A report on the review must be provided to the Minister addressing:
    a. the effectiveness of the program over the preceding period
    b. the monitoring results over the preceding three years and the extent to which Compliance Criteria and Leading Indicator Criteria have been met
    c. whether the Compliance Criteria should be revised to improve measurement of the achievement of the outcomes referred to in 43(c), taking into account the latest scientific information
    d. whether the Leading Indicator Criteria can be revised to provide a better early warning of potential non-compliance
    e. opportunities for improved monitoring methods
    f. the outcome of risk assessments undertaken over the preceding three years.
    g. the Approval Holder's response to the review, including any revisions to the program, if any, the Approval Holder proposes to make
    h. the information on which the review was based
    i. the expertise used in undertaking the review
    j. any other findings and recommendations from the review.

59. If the Approval Holder proposes to revise the program, the revised program must be submitted to the Minister for approval. If the Minister approves changes to the program, those changes must be implemented.

60. The Minister may require the Approval Holder to ensure the report is independently reviewed and the results provided to the Minister. The financial cost of the review will be borne by the Approval Holder.

SCHEDULE 3: BARGE LANDING FACILITY AND PRE-ASSEMBLY YARD

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.

Note: Condition 87 provides that, if the Minister believes that it is necessary or desirable for the better protection of the environment, the Minister may require the Approval Holder to make, within a period specified by the Minister, revisions to a plan approved under these conditions.

SCHEDULE 4: SULPHUR HANDLING FACILITY (OUTER HARBOR, PORT ADELAIDE)

63. The construction and operation of the sulphur handling facility on the Outer Harbor, Port Adelaide, as described in the EIS, must not have a significant adverse impact on the Ecological Values of the Barker Inlet and St Kilda wetlands, and Mutton Cove Conservation Reserve.

SCHEDULE 5: TRANSPORT OF COPPER AND URANIUM OXIDE CONCENTRATE AND PORT OF DARWIN HANDLING FACILITY

64. The transport of uranium oxide concentrate, the construction and operation of the Port of Darwin handling facility and rail transport of copper concentrate, as described in the EIS:
    a. must not have a significant adverse impact on the Ecological Values of the Port Darwin wetlands
    b. must not expose Members of the Public or Non-human Biota to radioactive releases above the dose limits recommended in the *Code of Practice for Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing*
    c. must ensure exposure of Members of the Public to radioactive releases is as low as reasonably achievable and exposure of Non-human Biota is minimised to the lowest reasonable levels..

65. The Approval Holder must ensure that transport and loading of copper concentrate uses a no release containment system and that transport of both copper concentrate and uranium oxide concentrate is consistent with the *Code of Practice for the Safe Transport of Radioactive Material* (ARPANSA 2008, or as amended).

66. Before commencing construction of the Port of Darwin handling facility, the Approval Holder must prepare an environment management plan for the facility, which includes:
    a. design plans showing the type and extent of works proposed
    b. a construction schedule and methodology, including plans and maps showing discharge points and emission controls for all construction stages
    c. any potential impacts or effects of the proposed works on the environment during the construction and operational phases and the means by which adverse impacts will be avoided or mitigated.

67. A plan satisfying Northern Territory Government requirements and addressing the matters set out in condition 66 will be deemed to have been submitted and approved by the Minister.

Note: Condition 87 provides that, if the Minister believes that it is necessary or desirable for the better protection of the environment, the Minister may require the Approval Holder to make, within a period specified by the Minister, revisions to a plan approved under these conditions.

68. The Approval Holder must provide the Department with notice of publication of the plan under condition 66. If requested, the Approval Holder must provide a copy of the plan to the Department, as specified by the Department.

SCHEDULE 6: INFRASTRUCTURE CORRIDORS (RAIL, ELECTRICITY, GAS, WATER)

Scope

69. The conditions in this schedule apply to the construction of the rail line and infrastructure for electricity, water and gas, as described in the EIS.

Infrastructure plan

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.

72. If the proposed alignment for the gas pipeline passes between Lake Blanche and Lake Callabonna, the plan must include a review of the section from the 395 to 405 kilometre point from Olympic Dam by an appropriately qualified megafauna palaeontologist. The plan must include details as to how the Approval Holder will address any recommendations from that review to minimise impacts on fossils. The financial cost of the review will be borne by the Approval Holder.

73. The construction of the gas pipeline must not have a significant adverse impact on groundwater dependent listed threatened species or Ecological Communities, or migratory species, in the Great Artesian Basin.

74. Where construction will impact on the Cultana Training Area or the proposed expansion, or the Woomera Prohibited Area, the Approval Holder must consult with the Department of Defence before commencing that element of construction.

75. The Approval Holder must comply with any requirements by the Department of Defence to limit access to the Woomera Prohibited Area, in accordance with the Defence Force Regulations, as necessary for the protection of persons, property and official secrets.

76. Where a plan is required under this schedule, construction must not commence until the relevant plan is approved by the Minister. The approved plan must be implemented.

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.

79. Construction to which this schedule relates must not commence until the Minister advises the Approval Holder in writing that s/he is satisfied with the consultation undertaken. The Minister may require, within a period specified in writing, the Approval Holder to undertake measures to ensure protection of Indigenous cultural heritage. The Approval Holder must comply with any such requirement.

80. Within 10 business days of the date of commencement of the activities covered by this schedule, the Approval Holder must advise the Department in writing of the actual date of commencement.

Schedule 7: Whole of project conditions

Scope

81. The conditions in this schedule apply to the entire action as referred under the Act and any activities relating to the Olympic Dam mine that were assessed under the *Environment Protection (Impact of Proposals) Act 1974* that will continue after the date of this approval.

Environmental offsets plan

82. The program required under condition 4 must include an environmental offsets plan to compensate for clearance of vegetation and other environmental impacts associated with the action. The offsets plan must:
    a. as a minimum, provide a vegetation offset of at least 8 hectares of vegetation for every hectare cleared.
    Note: At a ratio of 8:1, the required offset would correspond to approximately 140,000 hectares, based on projected figures for clearing in the environmental impact statement for the project.
    b. contribute to the biodiversity conservation priorities of the Australian and South Australian governments, in particular, having regard to:
        i. high priority additions to the National Reserve System. Additions must:
            · meet the eligibility requirements in *Minimum requirements for contributing to the comprehensiveness, adequacy and representativeness of the National Reserve System through Caring for our Country funding* (Department of Sustainability, Environment, Water, Population and Communities 2011, or as amended)
            · increase representation of the National Reserve System in bioregions with less than ten per cent protection and/or subregions with less than five per cent representation.
        ii. the *South Australian Arid Lands Regional Natural Resources Management Plan* (South Australian Arid Lands Natural Resources Management Board 2010, or as amended)
        iii. the *South Australian Arid Lands Biodiversity Strategy* (SA Department for Environment and Heritage and SA Arid Lands Natural Resources Management Board 2009, or as amended)
        iv. Wildlife Corridors Plan (Department of Sustainability, Environment, Water, Population and Communities, under development)
    c. contribute to landscape scale ecological linkages to increase resilience to climate change
    d. contribute to the protection and recovery of Listed Species and Ecological Communities, in particular, ‘the community of native species dependent on natural discharge of groundwater from the Great Artesian Basin’, and address key threatening processes

e. support improved identification, protection, management and interpretation of sites of natural, historic or Indigenous heritage significance, including on existing sites on the Register of the National Estate such as Finniss Springs Mission and Pastoral Station and the *Eriocaulon carsonii* sites
f. contribute to meeting the identified research objectives of the Arid Recovery initiative
g. support research to improve understanding and management of the marine environment in the Upper Spencer Gulf
h. contribute to capacity building in natural resource and cultural heritage management in Indigenous and other local communities
i. provide a high degree of certainty that conservation outcomes will be achieved in a timely and transparent way and will be long-lasting
j. deliver on-ground environmental outcomes that would not otherwise occur, noting that lessees have a general duty under the *Pastoral Land Management and Conservation Act 1989* (SA) to use good land management practices and prevent degradation of land
k. include timeframes for undertaking activities identified in the plan, funding arrangements, delivery mechanisms and criteria for measuring and evaluating the success of the plan
l. provide for provision of data in an appropriate format for inclusion in the Department's database, including Shapefiles for all offset areas.

Publication of plans

83. All plans approved by the Minister under these conditions, including any revised plans, must be published on the Approval Holder's website within 20 business days of approval by the Minister, unless the plans are published within this time on an appropriate South Australian or Northern Territory government website.

Request for variation of plans by proponent

84. If the Approval Holder wants to act other than in accordance with a plan approved by the Minister under these conditions, the Approval Holder must submit a revised plan for the Minister's approval.

85. If the Minister approves the revised plan, then that plan must be implemented instead of the plan originally approved.

86. Until the Minister has approved the revised plan, the Approval Holder must continue to implement the original plan.

Revisions to plans by the Minister

87. If the Minister believes that it is necessary or convenient for the better protection of the environment or to repair or mitigate any damage that may or will be, or has been, caused by the action to any matter protected by Part 3 of the EPBC Act for which the approval has effect, the Minister may require the Approval Holder to make, within a period specified by the

Minister, revisions to a plan approved under these conditions.

88. If the Minister requires a revision to a plan, the Approval Holder must:
    a. comply with that requirement; and
    b. submit the revised plan to the Minister for approval within the period specified in the requirement.

89. The Approval Holder must implement the revised plan on approval of the Minister.

90. Until the Minister has approved the revised plan, the Approval Holder must continue to implement the original plan.

Minimum timeframes for consideration of plans

91. For any plan required to be approved by the Minister under these conditions, the Approval Holder must ensure the Minister is provided at least 20 business days for review and consideration of the plan, unless otherwise agreed in writing between the Approval Holder and the Minister. This does not apply to urgent changes required to protect the environment or to repair or mitigate any damage that may or will be, or has been, caused by the action to any matter protected by Part 3 of the EPBC Act for which the approval has effect.

Timeframes

92. If these conditions require the Approval Holder to provide something by a specified time, a longer period may be specified in writing by the Department.

Auditing

93. At least every five years from the date of Commencement of the Action, or on the request of, and within a period specified by, the Department, the Approval Holder must ensure that:
    a. an independent audit of compliance with these conditions is conducted; and
    b. an audit report, which addresses the audit criteria to the satisfaction of the Department, is published on the Internet and submitted to the Department.

94. Before the audit begins, the following must be approved by the Department:
    a. the independent auditor; and
    b. the audit criteria.

95. The audit report must include:
    a. the components of the project being audited;
    b. the conditions that were activated during the period covered by the audit;
    c. a compliance/non-compliance table;
    d. a description of the evidence to support audit findings of compliance or non-compliance;
    e. recommendations on any non-compliance or other matter to improve compliance;

f. a response by the Approval Holder to the recommendations in the report (or, if the Approval Holder does not respond within 20 business days of a request to do so by the auditor, a statement by the auditor to that effect); and
g. certification by the independent auditor of the findings of the audit report.

96. The financial cost of the audit will be borne by the Approval Holder.

97. The Approval Holder must:
a. implement any recommendations in the audit report, as directed in writing by the Department;
b. investigate any non-compliance identified in the audit report; and
c. if non-compliance is identified in the audit report - take action as soon as practicable to ensure compliance with these conditions.

98. If the audit report identifies any non-compliance with the conditions, within 20 business days after the audit report is submitted to the Department, the Approval Holder must provide written advice to the Department setting out the:
a. actions taken by the Approval Holder to ensure compliance with these conditions; and
b. actions taken to prevent a recurrence of any non-compliance, or implement any other recommendation to improve compliance, identified in the audit report.

Note: To avoid doubt, independent third party auditing may include audit of the Approval Holder's performance against the requirements of any plan required under these conditions.

Reporting compliance

99. Within three months of every anniversary of the action commencing operation, or by a date otherwise agreed by the Minister, the Approval Holder must provide an annual compliance report to the Department addressing compliance with each of the conditions of this approval.

100. The Approval Holder must ensure that the report is publicly available on the internet within 20 business days of it being submitted to the Minister.

101. Reports must be provided until the Minister is satisfied that the closure outcomes in condition 32 (Mine closure) have been met.

102. Where the conditions of this approval require the Approval Holder to submit a plan for the Minister's approval, or undertake a review at regular intervals, the Approval Holder must maintain a register recording:
a. the date on which each plan was approved by the Minister
b. if a plan has not been approved, the date on which it was, or is expected to be, submitted to the Minister
c. the dates on which reports on the outcomes of reviews have been approved by the Minister
d. the dates on which the next subsequent reviews are due.

103. The register must be submitted with the annual compliance report, but does not form part of the report.

Reporting and remediating non-compliance

104. The Approval Holder must, when first becoming aware of a non-compliance:
   a. in relation to Compliance Criteria specified in an approved environmental management and monitoring plan, report the non-compliance to the Department within two business days;
   b. in relation to any other non-compliance with any of these conditions, report the non-compliance to the Department within 30 business days; and
   c. report the remedial action within such time as is reasonable in the circumstances, unless required to bring the matter into compliance within a time frame specified in writing by the Department.

105. If the Minister is not satisfied that the Approval Holder is complying with any of these conditions, the Minister may require the Approval Holder to undertake, within a period specified by the Minister, specific measures as determined by the Minister. The measures may include, but are not limited to, requiring further studies, mitigation strategies or offsets; or use of specified technologies. The Approval Holder must comply with any such requirement.

Record-keeping

106. The Approval Holder must:
   a. maintain accurate records substantiating all activities associated with or relevant to these conditions of approval, including measures taken to implement a plan approved under these conditions; and
   b. make those records available on request to the Department. Such records may be subject to audit by the Department or an independent auditor in accordance with section 458 of the EPBC Act, or used to verify compliance with these conditions.

   Note: Audits or summaries of audits carried out under these conditions, or under section 458 of the EPBC Act, may be posted on the Department's website. The results of such audits may also be publicised through the general media.

Definitions

107. In these conditions, unless otherwise indicated:

Approval Holder is the person named in the approval, in accordance with section 133(2)(c) of the *Environment Protection and Biodiversity Conservation Act 1999.*

ARPANSA is the Australian Radiation Protection and Nuclear Safety Agency.

As low as reasonably achievable has the meaning given in the *Code of Practice for Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing* (ARPANSA 2005, or as amended).

Balancing Pond has the meaning described in section 5.5.6 of the *Olympic Dam expansion draft environmental impact statement 2009*.

Best Practicable Technology is defined as the use of that technology which produces the maximum environmental benefit that can be reasonably achieved having regard to all matters including:

a. the environmental standards achieved by uranium operations elsewhere in the world and the extent to which environmental degradation is prevented
b. the level of environmental protection to be achieved by the application or adoption of the technology and the resources required to apply or adopt the technology so as to achieve the maximum environmental benefit from the available resources
c. the cost of the technology
d. evidence of detriment, or lack of detriment, to the environment
e. the physical location of the Olympic Dam mine
f. the age of equipment and facilities in use at Olympic Dam and their relative effectiveness in reducing environmental pollution and degradation
g. the extent to which the technology provides for continuous improvement
h. social factors including the views of the regional community and possible adverse effects of introducing alternative technology.

Central Decant Pond has the meaning described in section 5.5.6 of the *Olympic Dam expansion draft environmental impact statement 2009*.

Commencement of the Action is any preparatory works required to be undertaken including clearing vegetation, the erection of any onsite temporary structures and the use of heavy duty equipment for the purpose of breaking the ground for buildings or infrastructure.

Compliance Criteria are measurable standards or specification of parameters that demonstrate achievement of a required outcome and must be complied with at all times during the period of this approval.

Department is the Australian Government department administering the *Environment Protection and Biodiversity Conservation Act 1999*.

Dose Constraint has the meaning given in the *Code of Practice for Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing* (ARPANSA 2005, or as amended).

Ecological Values of a wetland are the values described in the *Directory of important wetlands in Australia*: http://www.environment.gov.au/water/topics/wetlands/database/diwa.html (or as amended).

Environmental Values means the physical characteristics and qualities of the environment that contribute to biodiversity conservation, and the social, spiritual and economic health of individuals and society.

EPBC Act means the *Environment Protection and Biodiversity Conservation Act 1999*.

Evaporation Pond has the meaning described in section 2.5.1 of the *Olympic Dam expansion draft environmental impact statement 2009*.

Final Environmental Impact Statement or EIS means the *Olympic Dam expansion draft environmental impact statement 2009* together with the *Olympic Dam expansion supplementary environmental impact statement 2011* including the appendices.

Groundwater Simulation Model means the Stuart Shelf regional groundwater flow model as described in Appendix K6 of the *Olympic Dam expansion draft environmental impact statement 2009* and updated in the *Olympic Dam expansion supplementary environmental impact statement 2011*, and as further updated under these conditions.

Leading Indicator Criteria are measurable standards or specification of parameters that give an early warning that a control measure is failing and a required outcome is potentially at risk of not being achieved. Remedial action must be taken in response.

Listed Species or Ecological Communities are those species or communities that are listed as threatened or migratory under Commonwealth and/or relevant State or Territory legislation.

Members of the Public has the meaning given in *IAEA Safety Glossary – Terminology used in nuclear safety and radiation protection* (International Atomic Energy Agency 2007, or as amended).

Mining and Processing means all mining, milling, refining, treatment and processing of minerals.

Minister means the minister responsible for administering the *Environment Protection and Biodiversity Conservation Act 1999* and includes an authorised delegate of the Minister.

Non-human Biota means plants and animals (other than humans).

Overburden Removal is removal of material located above the ore body following stripping of topsoil.

Reference Level has the meaning given in *IAEA Safety Glossary – Terminology used in nuclear safety and radiation protection* (International Atomic Energy Agency 2007, or as amended).

Shapefile – an ESRI Shapefile, containing '.shp', '.shx' and '.dbf' files and other files capturing attributes including at least the EPBC reference ID number and EPBC protected matters present at the relevant site. Attributes must also be captured in '.xls' format.

Special Mining Lease is the area of land which the Approval Holder is exclusively entitled to occupy and mine under the *Roxby Downs (indenture Ratification) Act 1982* (SA).

Substantial Commencement in relation to *Schedule 1 – Mining and processing* is defined as the stripping of topsoil from the open pit site and commencement of removal of overburden. In relation to *Schedule 2 – Desalination plant*, substantial commencement is defined as the commencement of tunnelling for the discharge pipe.

Target Criteria are measurable standards or specification of parameters that reflect a level of impact that is as low as reasonably achievable or minimised to the lowest reasonable levels for non-human biota. Practices must be reviewed if criteria are exceeded.

108. Any terms used in these conditions, that are not otherwise defined, will have the meaning given to them under the EPBC Act.
109. In these conditions, unless otherwise indicated, headings and notes are for convenient reference only, and do not affect the conditions to which they relate.