

RECENT DEVELOPMENTS

COMMONWEALTH

MATTERS HOTTING UP ON GREENHOUSE IMPACTS UNDER THE EPBC ACT*

At present, federal decision makers do not take into account potential greenhouse impacts of a project when assessing actions under the Commonwealth environmental assessment legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). However, two recent developments have put the issue of whether greenhouse impacts should be included in Commonwealth environmental impact assessment squarely on the agenda. The outcomes of these developments, together with similar developments at the State level, could have significant impacts on the environmental impact assessment processes for greenhouse gas generating projects, and particularly for fossil fuel-based mines and power stations.

Proposed open cut coal mines: The greenhouse impact

On 22 July 2005, the Wildlife Preservation Society of Queensland (WPS) launched a Federal Court action against the federal Minister for the Environment & Heritage (Minister) in relation to two decisions of the Minister's delegate under s 75 of the EPBC Act that:

- a proposal by Bowen Central Coal Management Pty Ltd to construct and operate an open cut coal mine, known as the Isaac Plains Coal Project, northeast of Moranbah, Queensland; and
- a proposal by QCoal Pty Ltd to construct and operate an open cut coal mine, known as the Sonoma Coal Project near Collinsville, central Queensland,
- were not "controlled actions" under the EPBC Act and therefore did not require further environmental assessment.
- Under the EPBC Act, assessment and approval is required for any action (including a project, development, undertaking, activity, or series of activities) that are likely to have a significant impact on the following "matters of national environmental significance":
 - World Heritage properties;
 - national heritage places (from 1 January 2004);
 - Ramsar wetlands of international significance;
 - threatened species and ecological communities;
 - migratory species;
 - Commonwealth marine area; and
 - nuclear actions (including uranium mining).

When a person proposes to take an action that they believe may need approval under the EPBC Act, they must refer the proposal to the Minister. The Minister then must decide if the action is

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likely to have a significant impact on a matter of national environmental significance (that is, if it is a **controlled action**). If the Minister decides that an action is a controlled action, the action requires environmental assessment under the EPBC Act, whilst if the Minister decides that the action is not a controlled action, no further assessment under the EPBC Act is required.

The WPS has brought proceedings in relation to the decisions of the Minister's delegate that the Isaacs Plains Coal Project and the Sonoma Coal Project are not controlled actions on the following administrative law grounds:

- **failure to take into account a relevant consideration:** under ss 5(1)(e) and 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977*(Cth) ("ADJR Act"), that the making of the decisions were an improper exercise of the power conferred by s 75 of the EPBC Act because the delegate failed to take into account a relevant consideration in the exercise of the power, namely, the adverse impacts that the Isaac Plains Coal Project and Sonoma Coal Project are likely to have on matters of national environmental significance due to the burning of the coal from the mines in coal-fired power station emitting a large amount of greenhouses gases, thereby contributing to global warming; and
- **error of law:** under s 5(1)(f) of the ADJR Act, that the decisions involved an error of law, namely, the delegate misconstrued the meaning of "all adverse impacts that action is likely to have" on a matter of national environmental significance in s 75(2) of the EPBC Act, as not including the adverse impacts that the Isaac Plains Coal Project and Sonoma Coal Project are likely to have on matters of national environmental significance due to the burning of the coal from the mines in coal-fired power stations emitting a large amount of greenhouse gases contributing to global warming.

Section 75(2) of the EPBC Act requires the Minister, when deciding whether or not an action is a controlled action, to consider "all adverse impacts ... the action ...has or will have, or ... is likely to have" on relevant matters of national environmental significance. The WPS's second ground of appeal is clearly based upon the recent decision in the *Nathan Dam* case¹, where the full Federal Court held that s 75(2) of EPBC Act requires the Minister to consider each way in which a proposed action will, or is likely to, adversely influence or effect a matter of national environmental significance, including both direct and indirect impacts.

In the *Nathan Dam* case, the Minister's decision was overturned by the full Federal Court because the Minister only took into account the direct impacts of the construction and operation of the Nathan Dam, but did not take into account the fact that downstream pollution by irrigators was a likely consequence of construction and operation of the dam. The full Federal Court held that:

"all adverse impacts" includes each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not.

The current WPS action is clearly designed to test the limits of the *Nathan Dam* decision, and in particular whether potential greenhouse impacts fall within the ambit of "indirect" impacts under s 75 of the EPBC Act. The matter is currently set down for hearing in October 2005 before Justice Dowsett and a decision in the case is not expected before early 2006.

¹ *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190).

Political pressure for insertion of a greenhouse trigger into the EPBC

On 18 August 2005, Anthony Albanese, the federal ALP Shadow Minister for Environment & Heritage, announced that he would introduce a Private Members Bill – the *Avoiding Dangerous Climate Change (Climate Change Trigger) Bill* – into the Commonwealth Parliament, which would make climate change a matter of national environmental significance under the EPBC Act, and therefore ensure that projects were assessed for their climate change impact as part of the EPBC Act environmental assessment process.

Whilst this announcement is purely political in nature, given the Coalition's majority in both houses of Federal Parliament, it is another indication that mainstream support for greenhouse mitigation strategies, and in particular for consideration of greenhouse impacts in the EPBC Act assessment process, are gathering considerable steam.

Impact potential of these developments on fossil fuel industries

The consequences of greenhouse impacts being taken into account under the existing EPBC Act framework, or the introduction of a greenhouse trigger into the EPBC Act could be very significant for fossil fuel industries, potentially including:

- substantially longer, more complex and more costly environmental assessment processes for fossil fuel extraction facilities and power stations;
- conditions may be imposed on approvals to protect a matter of national environmental significance. For example, a condition may be imposed that a fossil fuel extraction facility and/or power station must offset the impact of the greenhouse gases that it produces by purchasing carbon credits; and
- ultimately, certain fossil fuel-based projects could be refused approval entirely under the EPBC, and therefore could not proceed.

These Commonwealth developments are accompanied by increasingly onerous state environmental assessment regimes in relation to greenhouse gas emissions. For example, the draft *Guidelines for Assessment Environmental Effects under the Environmental Effects Act 1978* released by the Victorian Department of Sustainability and Environmental in August 2005, includes “potential greenhouse gas emissions exceeding 200,000 tonnes of carbon dioxide equivalent per annum, directly attributable to the operation of the facility” as a trigger for referral to the relevant Victorian Minister under the *Environment Effects Act 1978* (Vic).

Therefore, proponents of fossil fuel-based projects should be aware that it is increasingly likely that greenhouse gas emissions will be taken into account in both State and Commonwealth environmental impact assessment processes for these projects.