

case notes

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Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors [2006] FCA 736

By Larissa Waters

The first climate change case against the Federal Government was brought by Wildlife Whitsunday with legal representation by the Environmental Defenders Offices of Northern Qld and barristers Stephen Keim SC and Chris McGrath was dismissed by the Federal Court on 15 July 2006. The case involved two large mines in the Bowen basin that were scheduled to produce 48 million tonnes of coal over 15 years, equivalent to about 25% of Australia’s greenhouse gas emissions in a total year and worth \$3.5 billion to the economy.

His Honour Justice Dowsett of the Federal Court found the Minister’s delegate acted lawfully in considering greenhouse emissions, but in finding no link between the emissions and any specific damage to Australia’s environment. The delegate’s decision that the mines did not require approval under the federal *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) was therefore correct.

The case highlights the need for law reform in this area to ensure that the EPBC Act does regulate greenhouse gas emissions in the future.

Nonetheless, proponents of coal mines and their lawyers are well advised to address the greenhouse gas emissions of their projects because, as this case shows, the Department treats them as relevant impacts when assessing whether the project triggers the EPBC Act.

The decision is available from www.austlii.edu.au/au/cases/cth/federal_ct/2006/736.html.

A more detailed case note by Chris McGrath is set out below.

The Federal Court challenge to greenhouse gas emissions from coal mines

By Chris McGrath, Barrister-at-Law¹

A recent case in the Federal Court shows the need for a specific greenhouse trigger in the Environment Protection and Biodiversity Conservation Act 1999 (Cth). The case involved two coal mines in Queensland with greenhouse gas emissions roughly equivalent to 25% of Australia’s national greenhouse emissions in a single year. Despite the huge scale of their emissions, the mines were found not to trigger the EPBC Act and no conditions were imposed upon them to reduce or off-set their emissions. While the outcome of the case indicates that there is no effective mechanism in the EPBC Act for regulating even large emissions of greenhouse gases at the present time, this is an issue that is likely to see further litigation and legislative action in the future.

Greenhouse litigation

On 15 June 2006 the Federal Court dismissed a case concerning greenhouse gas emissions from two large coal mines.² In the case a North Queensland conservation group, Wildlife Whitsunday, sought judicial review of two decisions by a delegate of the Federal Environment Minister over the consideration of greenhouse gas emissions from the mining, transport and use of the coal from two large coal mines in Queensland. The mines are expected to produce 48 million tonnes (Mt) of black coal for export over the next 15 years.

1

Junior counsel for Wildlife Whitsunday in the case discussed in this article. The law and facts in this article are stated as at 18 June 2006.

2

Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors [2006] FCA 736 (Dowsett J).

The decisions challenged in this case were made under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).³ The trigger for assessment under the EPBC Act is whether an action has, will have or is likely to have a significant impact on a matter protected by the Act, such as the world heritage values of a declared World Heritage property.

The case built upon the principles from the Nathan Dam Case, in which the Federal Court ruled the Minister is required to consider direct and indirect impacts of actions, including downstream impacts of a dam due to farmers using water from the dam.⁴ Applying this principle in *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029; (2004) LGERA 100, the Victorian Civil and Administrative Tribunal found that a planning scheme amendment to allow an expansion of a coal mine was required to consider the indirect impacts of greenhouse gas emissions resulting from the burning of the coal at a power station.

The case began on the basis that the Minister's delegate simply failed to consider the greenhouse gas emissions from the mines. This would have been a straightforward error under the principles in the Nathan Dam Case. The proponents had not addressed this issue in their referrals⁵ but Wildlife Whitsunday raised it in public submissions to the Minister regarding the mines. The delegate made no mention of this issue in his statement of reasons for decisions under s 75 of the EPBC Act that the mines did not require assessment and approval under the EPBC Act. Ordinarily, if a statement of reasons does not set out a finding on some question of fact it indicates that the decision-maker made no finding on that matter and that, in turn, may indicate that he or she did not consider the matter to be material.⁶

However, the case changed fundamentally, two weeks prior to the trial, when the Minister filed an affidavit in which his delegate claimed he had given detailed consideration to greenhouse emissions from the mines. The delegate said he concluded that, when judged against the scale of past, present and future global emissions, the greenhouse emissions from the mines would not be measurable or identifiable and, therefore, would not be likely to cause a significant impact to matters of national environmental significance protected under the EPBC Act.

Wildlife Whitsunday responded to the delegate's claim that he considered the greenhouse gas emissions from the mines by attacking his reasoning process as "atomistic". It argued that global warming is an international problem but the EPBC Act can only regulate actions at a national level. The question of significance should, therefore, be addressed by asking whether the contribution to global warming of the likely emissions from these mines are significant at a national level in comparison with other actions in Australia contributing to global warming.

Dowsett J accepted the delegate's evidence, found that his approach was lawful, and dismissed the application for judicial review. His Honour concluded by doubting that the principle in the Nathan Dam Case was correctly applied to greenhouse emissions of actions such as coal mines.⁷ Whether that is correct is a matter that will no doubt be litigated in the future.

For the present time, proponents of coal mines and their lawyers are well advised to address the greenhouse gas emissions of their projects for two very pragmatic reasons. The first reason is that, as this case shows, the Minister treats them as relevant impacts. The second reason is to avoid the delay and expense of becoming entangled in litigation with third parties. Conservation groups are certainly alive to the issue of greenhouse gas emissions and willing to litigate if a suitable case presents itself.

Need for a greenhouse trigger

This case highlights the need for reform of the consideration given to greenhouse gas emissions of large projects such as coal mines. Global warming is likely to have severe, long-term impacts on the environment, including matters protected by the EPBC Act such as the world heritage values of the Great Barrier Reef World Heritage

3 See the EPBC Act homepage at <http://www.deh.gov.au/epbc> (viewed 16 June 2006) and McGrath C, "Key concepts of the EPBC Act" (2005) 22 EPLJ 20.

4 *Minister for the Environment & Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.

5 One referral included some information on the greenhouse emissions during the mining process

6 See *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5], [37], [69] and [216], and *Mees v Kemp* (2005) 141 FCR 385 at [58]

7 *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors* [2006] FCA 736 at [72].

Area.⁸ It is now accepted by the Australian, State and Territory Governments that global warming poses a serious threat to the Australian environment. On 10 February 2006 the Council of Australian Governments (COAG) announced its *Plan For Collaborative Action on Climate Change*. COAG recognised:⁹

“The case for significant reductions in global greenhouse gas emissions to reduce the risk of dangerous climate change is clear. Early action by all nations is needed to make the task of stabilising and then reducing the level of greenhouse gas emissions in the atmosphere easier and less costly to achieve. For the sake of our future economy, as well as our future environment, Australia needs to significantly accelerate our conversion to the low emissions practices and technologies of the future. ...

All jurisdictions remain committed to the over-riding goal of the UNFCCC, to prevent ‘dangerous’ human interference with the climate system. Australia is on track to meet its Kyoto emissions targets by 2012. It will be necessary to achieve significant reductions in emissions beyond that as part of the international effort to avoid dangerous climate change. Early action will be of great value in extending the time for reacting to the threat. ...

COAG has agreed that:

- all jurisdictions are committed to working collaboratively as well as individually to reduce Australia’s emissions of greenhouse gases, adapt to unavoidable climate change and meet our international commitments, making Australia a leader in the global effort to stabilise greenhouse gas levels in the atmosphere;
- responses will enable economic development to proceed in a sustainable way, recognising that implementation of climate change policies should be consistent with equity, cost effectiveness, and multiple benefits;
- responses to climate change will promote business certainty within the limits created by the uncertainties of climate change;
- action on climate change requires a comprehensive policy framework which includes action to promote changed patterns of investment, technology innovation and take up, adaptation, demand management and improved energy efficiency. Within that framework, jurisdictions will pursue policies which respond to their individual needs and which are within their constitutional responsibilities;
- all jurisdictions will work collaboratively as well as individually to promote the development and take up of renewable and other low-emission technologies;
- action will respond to and foster relevant scientific, technological and socio-economic research;
- all governments recognise the importance of adaptation and agree to work together on Australia’s ability to develop and implement sound adaptation strategies; and
- jurisdictions will continue to communicate with each other, with industry and the broader community to foster a common understanding of greenhouse issues and the importance of addressing the impacts of climate change and to promote consistent and informed policy. ...”

Despite the fact that Australia’s greenhouse emissions are expected to allow Australia to meet its Kyoto¹⁰ target by 2012,¹¹ this case shows that Australia lacks a general legal framework for regulating large

8 See generally, Pittock B (ed), *Climate Change: An Australian Guide to the Science and Potential Impacts* (Australian Greenhouse Office, Canberra, 2003); Pittock B, *Climate Change: Turning Up the Heat* (CSIRO Publishing, Melbourne, 2005); and Allen Consulting Group, *Climate Change Risk and Vulnerability: Promoting an Efficient Adaptation Response in Australia* (Australian Greenhouse Office, Canberra, 2005).

9 See the Council of Australian Governments (COAG), *COAG Communiqué – 10 February 2006, Attachment C – Plan For Collaborative Action on Climate Change* (COAG, Canberra, 2006), p 1. Available at http://coag.gov.au/meetings/100206/attachment_c_climate_change.pdf (viewed 18 June 2006).

10 Australia has a target of limiting its greenhouse gas emissions between 2008-2012 to 108% of its 1990 emissions levels under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. Done at Kyoto on 11 December 1997. Signed for Australia at New York, 24 April 1998. Entry into force generally on 16 February 2005. Not yet in force for Australia. Reported in [2005] ATNIF 1.

11 See the *Australian Greenhouse Office, National Greenhouse Gas Inventory 2004* (AGO, Canberra, 2006). Available at <http://www.greenhouse.gov.au/inventory/2004/index.html> (viewed 16 June 2006).

emissions of greenhouse gases from projects such as coal mines. The lack of any general regulatory system for major new emitters of greenhouse gases is a serious deficiency in the response to climate change if it is genuinely regarded as requiring a comprehensive and effective policy response.¹²

Wildlife Whitsunday was not allowed to present further evidence to the Federal Court of the likely greenhouse gas emissions from the Isaac Plains Coal Project and the Sonoma Coal Project,¹³ but calculation of these matters explains their significance on a national and international scale.¹⁴ Using the methodology of the Australian Greenhouse Office,¹⁵ the greenhouse gas emissions from the full fuel cycle¹⁶ of 48 Mt of coal for electricity production (thermal or steaming coal) or steel production (coking coal) is 121-161 Mt of carbon dioxide equivalent (Mt CO₂-e).¹⁷ This is roughly equivalent to 25% of Australia's greenhouse gas emissions¹⁸ and 0.6% of global emissions from fossil fuels¹⁹ in 2003. The Sonoma Project alone, involving 30 Mt of coal, is roughly equivalent to 16% of Australia's greenhouse gas emissions and 0.4% of global emissions from fossil fuels in 2003.²⁰

The economic value of the coal from these mines gives another indication of their scale as well as the potential resources that might be available to reduce or off-set greenhouse gas emissions. The 48 Mt of coal from the Isaac Plains Coal Project and the Sonoma Coal Project is worth between AUS\$2,858,400,000 to AUS\$4,124,640,000, or roughly AUS\$3.5 billion, gross value based on the average export unit value of steaming and coking coal in 2004-2005.²¹

Despite the massive emissions of greenhouse gases involved, both the Isaac Plains Coal Mine and the Sonoma Coal Project were determined not to be controlled actions and **no conditions were imposed upon them to reduce or off-set their greenhouse gas emissions**. The decision in this case shows that the emissions from the use of the coal from the mines are effectively not regulated under the EPBC Act, which indicates an important gap in the ability of that Act to genuinely protect the matters of national environmental significance it recognises as warranting protection.

Were projects such as the Isaac Plains and Sonoma Coal Project regulated under the EPBC Act, the greenhouse gas emissions both within Australia and overseas could be regulated by conditions requiring the use of low emissions technology. Such an approach would complement the other greenhouse emission reduction programs currently being undertaken by the Australian Government. Use of the EPBC Act in this way would also be consistent with the objective of promoting low emissions technology in the recent Asia-Pacific Partnership on Clean Development and Climate²² and the COAG Plan For Collaborative Action on Climate Change. On the basis of these considerations, a greenhouse trigger should be included in Part 3 of the EPBC Act or in the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth).

The need for a greenhouse trigger in the EPBC Act has been debated previously. The Australian Government investigated a greenhouse trigger in 1999-2001. It released a consultation paper and draft regulations on the greenhouse trigger but failed to implement it.²³ Under the draft regulation

12 In relation to effective environmental policy generally, see Dovers S, *Environment & Sustainability Policy Creation, Implementation, Evaluation* (The Federation Press, Sydney, 2005) and Gunningham N and Grabosky P, *Smart Regulation Designing Environmental Policy* (Oxford University Press, Melbourne, 1998), Ch 6

13 For this reason these facts do not appear in Dowsett J's judgment

14 The majority of the greenhouse emissions from these projects will occur overseas when the coal is used. The bulk of emissions would, therefore, not be accounted for as part of Australia's greenhouse emissions, however, as indirect impacts of the mines the emissions can still be regulated under the EPBC Act in accordance with the principle in the Nathan Dam Case

15 AGO, *Australian Greenhouse Office Factors and Methods Workbook*, (AGO, Canberra, August 2004) Available at <http://www.greenhouse.gov.au/workbook/pubs/workbook.pdf> (viewed 30 October 2005)

16 Total emissions resulting from the use of a fuel including those emissions associated with the production and transport of the fuel

17 Based on the formula, Greenhouse Gas Emissions (GHG) (t CO₂-e) = Q x EC x EF/1000, where Q = the quantity of fuel burnt in tonnes, EC = the energy content of fuel in GJ/tonne or GJ/kL, EF = the relevant emissions factor. According to Table 1, p 6 of the AGO workbook, the energy content of washed black coal for Queensland electricity generation is 27.0 GJ/t and the full fuel cycle emissions factor is 93.9 kg CO₂-e/GJ. The energy content of coal used in the steel industry is 30.0 GJ/t and the full fuel cycle emissions factor is 112.8 kg CO₂-e/GJ

18 Total greenhouse gas emissions, including land use change, in Australia in 2003 were 550 Mt CO₂-e. Source: Australian Greenhouse Emissions Information System (AGEIS) Available at <http://www.greenhouse.gov.au> (viewed 30 October 2005)

19 Total global greenhouse gas emissions from burning of fossil fuels in 2003 were 24,983 Mt CO₂-e. Source: International Energy Agency, *Key World Energy Statistics 2005* (IEA, 2005), pp 44-45. Available at <http://www.iea.org> (viewed 30 October 2005)

20 See the previous three footnotes for the background data for these figures

21 Australian Bureau of Agricultural and Resource Economics, *Australian Mineral Statistics – June Quarter 2005* (ABARE, Canberra, 7 September 2005), p 8. Available at <http://www.abareconomics.com> (viewed 20 October 2005)

22 See <http://www.asiapacificpartnership.org/> (viewed 1 June 2006)

23 See <http://www.deh.gov.au/epbc/about/amendments/greenhouse.html> (viewed 23 November 2005)

the trigger proposed was more than 500,000 t CO₂-e in any 12 month period. The Australian Network of Environmental Defenders Office (ANEDO) has also recommended such a trigger based on 100,000 t CO₂-e per annum for all greenhouse emissions (that is, including existing emitters and not merely new emitters).²⁴ Similarly, the Shadow Environment Minister, Anthony Albanese MP, proposed a greenhouse trigger for the EPBC Act in a private members bill, *Avoiding Dangerous Climate Change (Climate Change Trigger) Bill* 2005. The Bill proposed a new s 25AA of the Act to provide a trigger based on emissions of 500,000 t CO₂-e and an additional threshold of establishing a “significant impact” on the environment.

The need for a greenhouse trigger in the EPBC Act and how it might be framed is an important topic deserving further consideration both by the Australian Government and in the professional literature. Further analysis in the professional literature might attempt to calculate the greenhouse emissions from projects that have been approved under the EPBC Act since its commencement.²⁵ A cursory glance at the list of referrals under the Act²⁶ indicates that many coal mines and petroleum projects have been approved. Few appear to have been assessed for greenhouse emissions.

Conclusion

This case shows the need for a specific greenhouse trigger in the EPBC Act. While the outcome indicates that there is no effective mechanism in the EPBC Act for regulating even large emissions of greenhouse gases at the present time, this is an issue that is likely to see further litigation and legislative action in the future. The Australian, State and Territory Governments accept that climate change is a pressing policy issue that requires a comprehensive and effective response. The current legal regime does not provide for effective regulation of even enormous emissions from projects such as coal mines. Clear gaps and deficiencies in regulatory systems tend to be filled over time and this gap is unlikely to be an exception.

Booth v Frippery Pty Ltd and Ors - successful appeal in fruitbat case

Readers may recall from the Spring 2005 Queensland NELR Update the case of *Booth v Frippery Pty Ltd and Ors*, the first public enforcement action under state wildlife protection laws, to stop electrocution of protected native bats by a lychee farmer. Despite the farmer's admissions of thousands of illegal bat killings, Judge Pack DCJ found that the defence in section 88(3) of the *Nature Conservation Act* 1992 had been made out.

Dr Carol Booth sought leave to appeal from that decision on 25 grounds, and the State environment department, the Environmental Protection Agency, joined as a party to the appeal in support of Dr Booth. On 17 March 2006 the Court of Appeal upheld Dr Booth's appeal and ordered a retrial of the case in the Planning and Environment Court. If the appeal had failed the *Nature Conservation Act* would have been rendered ineffective to protect wildlife.

TASMANIA

Gunns Ltd v Marr (No. 2) [2006] VSC 329 (28 August 2006) - Gunns' statement of claim Version 3 struck out: “... too much has been sought to be alleged against too many ...”

In *Gunns Ltd v Marr (No. 2)* [2006] VSC 329 (28 August 2006), Bongiorno J of the Supreme Court of Victoria rejected the Tasmanian timber company's third statement of claim against the Gunns 20 defendants. His Honour gave Gunns Ltd until 19 October 2006 to apply for leave to proceed, stating “... However, whatever they do they will need to radically alter the way they have pleaded this case to date.”

24 ANEDO, “Possible new matters of national environmental significance under the EPBC Act” (ANEDO, Sydney, 2 May 2005), pp 22-28.

25 Building on the work of Fallding M, “Predicted Impacts on Energy and Greenhouse Gases in Hunter Valley Coal Mining Environmental Impact Statements” (1999) 6 AJEM 219.

26 See the public notice website at <http://www.deh.gov.au/epbc/index.html> (viewed 15 June 2006).