

FEDERAL COURT

Waratah Coal Inc v Minister for the Environment Heritage and the Arts [2008] FCA 1870

This case involved a challenge to the Minister's decision to deny EPBC Act approval for a new coal project in central Queensland. The applicant is a coal exploration company incorporated in Canada. It has identified a resource of some 4.3 billion tonnes of coal in the Galilee Basin in Queensland approximately 38 kilometres north-west of Alpha. It intends to establish a new coal mine, railway and port to export high volatile, low sulphur, steaming coal to international markets. The project also includes the possible establishment of a water supply pipeline between the coal mine and Lake Dalrymple, and the provision of a high voltage distributor electricity transmission line between the closest high voltage distributor and the port. The Project required both State and Federal government approval.

The Referral was submitted by the applicant to the Commonwealth Minister for Environment Heritage and the Arts on 29 July 2008. On 5 September 2008 (more than the 20 days later) the Minister's department advised the applicant by telephone that it was in the process of making an announcement (pursuant to s 74B EPBC Act) pertaining to the Referral, namely that the Minister had declared the Project "Clearly Unacceptable" and had dismissed the application for referral. A copy of the decision was forwarded to the applicant on 7 September 2008.

The applicant sought judicial review under s 39B *Judiciary Act 1903* (Cth) based upon the wording of s 74B, which suggests that a Minister's decision must be made within 20 business days. The application was rejected by Collier J. in the Federal Court, who stated:

'... a plain reading of the EPBC Act demonstrates clearly that failure of the Minister to comply with a time limit prescribed by the EPBC Act does not affect the validity of a decision under the Act made outside a set time limit, including decisions made under s 74B.'

'The event upon which the operation of the section depends is the prompt making of a decision by the Minister that the proposed action will have unacceptable environmental impacts, not the passage of 20 business days. In other words the **making** of a decision of the Minister is critical – the time period of 20 business days, while relevant to the making of the decision, does not determine its validity (cf *Hatton v Beaumont* (1977) 2 NSWLR 211 at 224).'

NEW SOUTH WALES - Land and Environment Court

Scrap Realty Pty Limited v Botany Bay City Council [2008] NSWLEC 333

Author: Janet McKelvey, Henry Davis York Lawyers

Can you add a separate lot using Section 96?

Let's assume you wish to add a lot to your existing development. Do you need to lodge a new development application or can you amend your existing consent? Until the decision in *Scrap Realty Pty Limited v Botany Bay City Council*, there was no clear answer to that question.