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EDO Alert! Climate Change Case

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Wildlife Whitsunday v The Minister for Environment & Heritage

A case concerning greenhouse gas emissions from coal mining was heard by Justice Dowsett of the Federal Court in Brisbane on 20 and 28 October 2005 ("the Greenhouse Emissions Case"). The Wildlife Preservation Society of Queensland Proserpine / Whitsunday Branch Inc ("Wildlife Whitsunday") represented by EDO-NQ is challenging decisions by a delegate of the Federal Environment Minister over the consideration of greenhouse gas emissions contributing to global warming from the mining, transport and use of the coal from two proposed coal mines.

The decisions under challenge were made under the *Environment Protection and Biodiversity Conservation Act* 1999 ("EPBC Act"), which provides an overarching framework for environmental protection in Australia.[1] 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 World Heritage properties and listed threatened species).

The case builds upon the principles from last year's 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.[2] The Greenhouse Emissions Case follows the same principle (the mines being assessed for the burning of the coal by others) but now with a twist.

The Greenhouse Emissions Case began on the basis that the Minister's delegate simply failed to consider the greenhouse gas emissions from the mines (a straightforward error under the Nathan Dam Case principle). The delegate made no mention of greenhouse gas emissions in his statement of reasons for the decisions that the mines did not require assessment and approval under the EPBC Act.

However, the case changed fundamentally when the delegate gave evidence to the Court that in fact he gave 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?

[1] See www.deh.gov.au/epbc and McGrath C, "Key concepts of the EPBC Act" (2005) 22 EPLJ 20.
[2] *Minister for the Environment & Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.

By raising this argument the Greenhouse Emissions Case moves beyond the principles in the Nathan Dam Case and attacks the heart of the Federal Government's current approach of, in effect, not regulating large projects with major greenhouse emissions (when judged on a national scale).

Justice Dowsett reserved his decision and indicated that he is unlikely to give a judgment until early next year.

Chris McGrath[3]

APPENDIX – GREENHOUSE GAS EMISSIONS

Wildlife Whitsunday were not allowed to present further evidence of the likely greenhouse gas emissions from the Isaac Plains Coal Project and the Sonoma Coal Project, but calculation of these matters illustrates their significance on a national and international scale. The mines are expected to produce 48 million tonnes ("**Mt**") of coal over the next 15 years.[4] Using the methodology of the Australian Greenhouse Office,[5] the greenhouse gas emissions from the full fuel cycle[6] of this amount of coal for electricity production (thermal or steaming coal) or steel production (coking coal) is 121-161 Mt of carbon dioxide equivalent ("**Mt CO_2–e**").[7] This is roughly equivalent to 25% of Australia's greenhouse gas emissions[8] and 0.6% of global emissions from fossil fuels[9] in 2003. The Sonoma Project alone (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.[10]

For more information, contact Kirsty Ruddock at EDO-NQ on (07) 4031 4766. Why not join or donate to EDO so we can continue to run test cases like this? See our memberships-donations form on our website www.edo.org.au/edonq.

[3] Barrister-at-Law. Junior counsel for Wildlife Whitsunday in the Greenhouse Emissions Case.

[4] 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.

[5] 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).

[6] Total emissions resulting from the use of a fuel including those emissions associated with the production and transport of the fuel.

[7] Based on the formula, Greenhouse Gas Emissions (GHG) (t CO_2–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 CO_2-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 CO_2-e/GJ.

[8] Total greenhouse gas emissions, including landuse change, in Australia in 2003 were 550 Mt CO_2–e. Source: Australian Greenhouse Emissions Information System (AEGIS). Available at http://www.greenhouse.gov.au (viewed 30 October 2005).

[9] Total global greenhouse gas emissions from burning of fossil fuels in 2003 were 24,983 Mt CO_2–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).

[10] See the previous three footnotes for the background data for these figures.