

GREENHOUSE EMISSIONS CASE UPDATE

21 October 2005

A case concerning greenhouse gas emissions from coal mining commenced before Justice Dowsett in the Federal Court in Brisbane on 20 October 2005 (“the Greenhouse Emissions Case”). The Wildlife Preservation Society of Queensland Proserpine / Whitsunday Branch Inc (“Wildlife Whitsunday”) 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?

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).

Following lengthy legal argument centering on these issues, the matter was adjourned until 28 October 2005. Justice Dowsett has already indicated that he is unlikely to give a judgment until early next year.

Chris McGrath³

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.

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