

The Bowen Basin Coal Mines caseⁱ

Kirsty Ruddock, Principal Solicitor, Environmental Defender's Office NSWⁱⁱ

In June 2005, the Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch (known as Wildlife Whitsunday), represented by the Environmental Defender's Office of Northern Queensland, started a 'David and Goliath' battle in the Federal Court against both the Federal Government and two proposed new coal mines in the Bowen Basin. The 'Bowen Basin case', as it has come to be known, was the first to challenge a decision of the delegate of the Minister for Environment and Heritage for failing to consider the greenhouse gas emissions from the mines in deciding whether they should be assessed and approved under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

While the case did not succeed, it did produce some positive results in highlighting the Federal Government's reluctance to assess the climate change impacts of large new coal mines and the need for reform of the EPBC Act. The case was also an important step in developing the jurisprudence on climate change law in Australia. This paper will seek to explore in detail the background to the case, the lessons learned from the litigation, including the difficulties in bringing public interest environmental litigation, and the law reform issues highlighted by it.

Use of litigation to address impacts of climate change:

The risks associated with greenhouse gas emissions to the Australian environment are now well documented.ⁱⁱⁱ The question has become what are various levels of Government going to do to address the issue and can litigation be used to encourage future action.

As the United Nations Environment Program has indicated there are over 500 international and regional agreements as well as national environmental laws dealing with everything from protection of the environment to conservation of oceans and seas. Yet ‘unless these are complied with, unless they are enforced, then they are little more than symbols, tokens, paper tigers’.^{iv}

The Bowen Basin case is one of several cases both in Australia and internationally that has sought to use litigation to develop strategies to combat climate change. Australian cases have mainly focused on using existing planning and judicial review mechanisms to do this.^v Internationally, climate change litigation has ranged from the use of similar judicial review mechanisms, to bringing public nuisance and human rights cases.^{vi}

The Federal Government did not welcome the opportunity for the Court to examine climate change impacts of these mines under the EPBC Act. The Minister’s response was that he would ‘prefer that taxpayer’s resources were used to reduce the impact of climate change, rather than on lawyers’ fees’.^{vii}

Background to the case

Coal in the Bowen Basin:

Coal is Queensland's most valuable export earner, 58% of the total recoverable black coal in Australia lying within its borders (NSW has 39%).^{viii} In 2003-2004, exports from Queensland were valued at \$7.2 billion.^{ix} Around 75% of black coal is exported. In 2005, Australia produced 398 million tonnes of raw black coal yielding 307 million tonnes of saleable black coal.^x Two thirds of the coal being exported is used in steel making with the other third being used for thermal coal used in power stations.^{xi} Around 85% of Queensland's coal comes from the Bowen basin.^{xii} The majority of mines in the Bowen Basin are open cut and directly employ around 13,000 people. Most of them are owned by the four dominant global mining companies, BHP Billiton, Rio Tinto, Xstrata and Anglo American. The National Greenhouse Gas Inventory 2004 identified that coal mining contributed to 21.3 million tonnes of CO₂ in 2004 or 4% of net national emissions. Those emissions associated with the combustion of coal contributed 185 million tonnes of CO₂ or 33% of emissions. The emission calculations do not include emissions that result from exported coal.^{xiii}

Coal mines at issue:

There were two new mines in issue in the Bowen basin case: the Sonoma Coal project ('Sonoma') and Isaac Plains Coal project ('Isaac Plains').

The Sonoma Coal project proposed by Qcoal Pty Ltd is for a new open cut mining project near Collinsville. The mine is expected to produce approximately 30 million tonnes of product coal, primarily export coking coal, with lesser amounts of thermal coal for both the export and domestic markets. The annual output is expected to be 2 million tonnes per annum, with an anticipated mine life of 15 years.^{xiv}

The Isaac Plains Coal project proposed by Bowen Central Coal Management Pty Ltd is for an open cut coal mine located approximately 7 km north east of Moranbah. Mining of coal will be undertaken at a rate of approximately 1.9 million tonnes per annum with a lifespan of approximately 9 years, based on resource estimates of 18 million tonnes for a strip ratio up to 15:1 (bank cubic metres per tonne). The coal will be crushed, sized and washed on site in a coal handling and preparation plant, before being railed to Dalrymple Bay Coal Terminal for export.^{xv}

Both proponents referred the mines to the Department of Environment and Heritage for assessment under the EPBC Act. Both argued that the mines did not impact on matters of national environmental significance and therefore were not controlled actions under s.75 of the EPBC Act.

The (third version) referral document lodged in respect to Isaac Plains discussed greenhouse gas emissions. It stated that the greenhouse gas emissions would be predominantly from electricity and diesel use from the operation of the mine and estimated to be 40,000-45,000 tonnes of CO₂ equivalent gas per year.^{xvi} Sonoma's referral contained no such details.

Who are Wildlife Whitsunday?

Wildlife Whitsunday was a small conservation group located at Bowen in North Queensland that were until recently a branch of Wildlife Preservation Society of Queensland.^{xvii} It received no Government funding and was run totally by volunteers. The driving force behind this group is the husband and wife team of Ian and Dympna

Lee. Ian and Dympna have written countless submissions about matters concerning the EPBC Act. They continue to campaign tirelessly for sustainable development in their region. Ian and Dympna's contribution to the region was recognised with their being awarded the Queensland Pride of Australia Medal for Environment in 2005.

Wildlife Whitsunday's submissions:

In April 2005, Wildlife Whitsunday wrote detailed submissions in response to the Isaac Plains and Sonoma referrals. No other group or individual lodged submission in response to the public notification of these referrals. Wildlife Whitsunday's submission highlighted the impacts of the mines on climate change as a matter of national environmental significance. The submission noted that: 'Global warming is already impacting on matters of national environmental significance and unless major changes are made in current greenhouse gas emissions, will severely impact on matters of national environmental significance in the future'.^{xviii} It went on to outline the strong scientific evidence of impacts on the Great Barrier Reef World Heritage area, referring to a study by Dr Ove Hoegh-Guldberg.^{xix} That study indicated that global temperature increases of the worst case scenario would lead to the collapse of coral populations by 2100. The submission also discussed evidence about the impacts of climate change on the Wet Tropics that suggested even moderate levels of warming would pose serious threats to its biodiversity.^{xx} For example, it stated the endangered Bellenden Ker Nursery frog is predicted to disappear entirely with a 1 degree average increase in annual warming.

Wildlife Whitsunday's submission then linked these impacts with the large amount of coal to be mined in the two projects. They also referred to the relevant International

Conventions of which Australia is a signatory, including the World Heritage and Biodiversity Conventions. The submission discussed the Nathan Dam case^{xxi} and the Hazelwood decision^{xxii}. Although the impact of the production of greenhouse gases on matters of national environmental significance will be difficult to determine, the Nathan Dam case and Hazelwood decision indicate that emissions must nevertheless be considered when assessing the likely impacts of the action under s.75 of the EPBC Act.^{xxiii}

Twists and turns in the conduct of the case

The Minister's delegate decided in May 2005 that these mines were not controlled actions - that is, they would not or would not be likely to have a significant impact on matters of national environmental significance, such as World Heritage values.

Wildlife Whitsunday requested a statement of reasons from the Minister's delegate.

The statement of reasons indicated that only impacts immediately associated with the mining of coal from the Isaac Plains Coal Project were considered, and that no consideration was given to the impacts of greenhouse gas emissions on matters protected by Part 3 of the Act that were likely to result from the burning of the coal.

Wildlife Whitsunday commenced proceedings in the Federal Court on the basis of the lack of discussion of greenhouse gas emissions in the statement of reasons.

In *Mees v Kemp*^{xxiv} at [54]-[55], the Full Court of the Federal Court

(French, Merkel and Finkelstein JJ) dealt with an appeal from a judicial review application against a decision under s.75 of the EPBC Act, and observed:

The section does not require that the reasons are set out with the degree of precision or detail which might be appropriate to a judicial decision:

‘But it demands a statement of the real findings and the real reasons. It is an incident of the obligation that the statement should not omit findings or reasons for the decision which may, in the light of a pending review application, appear to be irrelevant or reflective of some false assumption or pre-judgment.’ – *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 179 (French J)

The Full Court in *Mees v Kemp* also provided at [58]:

The statement in the reasons that the Minister ‘took account of comments received from the public’ is consistent with the view that if he did not mention them specifically in his reasons he regarded them as irrelevant or had failed to consider them. In either event, if the matters raised were relevant and required to be considered as an adverse impact the failure to do so would arguably give rise to a ground for review.

The delegate’s reasons stated that he, ‘took into account ... the public comments received on the referral from the Proserpine/Whitsunday Branch of the Wildlife Preservation Society of Queensland’. There was no reference in the reasons to the submissions on climate change. The reasoning in *Mees v Kemp* suggested that the delegate’s failure to mention the impacts of greenhouse gases from the burning of the coal indicates the delegate regarded them as irrelevant or had failed to consider them.^{xxv}

The decision of the Full Federal Court in Nathan Dam case also suggested that greenhouse gas emissions caused by the mines were matters that should be considered by the delegate. The Full Court indicated that for the purposes of s.75 of the EPBC Act:

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.

Evidence of the decision-maker

When the documents before the delegate were produced by the Minister's lawyers there was a briefing note that said: 'The nature of induced climate change from the referred coal mining operation, and impacts on world heritage values, are speculative'. The delegate had also handwritten a note in relation to the briefing for the Isaac Plains mine that stated: 'I regard the likelihood of significant impacts on NES arising from the marginal addition of greenhouse gases to be extremely small, in addition to speculative'.^{xxvi} A similar comment was made in relation to the Sonoma mine.

In October 2005, two weeks before the case was to be heard, the Minister's lawyers filed additional evidence to support the decisions, a 13 page affidavit from the delegate Mark Flanigan.^{xxvii} The affidavit sought to explain at length the reasoning behind his decision. In particular it sought to explain his thinking on greenhouse gas issues in a detailed fashion. It starkly contrasted with the statement of reasons which

contained no references to greenhouse gas emissions. Curiously it also considered issues that were not raised in Wildlife Whitsunday's submission such as the emissions from the mining, transport and use of coal that were only raised in the pleadings, not just the burning of coal mentioned in the submissions on the referral.^{xxviii}

The delegate concluded that because the contribution of the respective coal mines was small compared to, and not measurable or identifiable separately from, the collective contribution of all other contributors to the same climate change^{xxix}, the mines did not have a significant impact on World Heritage values.

Calling the decision-maker is not a normal approach to defending administrative decisions. Usually it does not occur because the decision-maker is the Minister and it would be inappropriate to subject a Minister to potential cross-examination before a Court. The fact that the delegate sought to put on additional evidence to explain his reasoning changed significantly the way the arguments proceeded in the Bowen basin case. It was more difficult for Wildlife Whitsunday to submit that the statement of reasons should be relied on when it was contradicted by the affidavit of the delegate, to show that greenhouse gas emissions had not been considered.

The approach taken by the Minister in defending this decision raises issues about the role of administrative law and accountability of decision-makers. If this step was taken by all decision-makers in response to judicial proceedings, it would be very difficult for applicants to argue the ground that a decision maker failed to consider a relevant matter.

Wildlife Whitsunday sought to cross-examine the decision-maker on the affidavit. It argued that the affidavit should be given little weight because none of it was contained in the statement of reasons and had been prepared after the litigation was commenced. Dowsett J allowed only limited cross-examination of the decision maker about his process of reasoning and whether it was true.^{xxx} He would also not allow cross-examination of Mr Flanigan to determine whether he understood his obligations under the EPBC Act and administrative law generally because he regarded this questioning as argumentative and unfair to the witness.^{xxxii} It was not surprising therefore that it was difficult to undermine the content of the delegate's affidavit.^{xxxiii}

Arguments before the Court

As a result of the additional evidence lodged by the Minister, Wildlife Whitsunday amended its application to challenge the reasoning of the delegate.^{xxxiiii} In particular, the Applicant's amendments sought to argue that the delegate had made several errors of law in considering this matter. They argued the significance of the emissions should be addressed by examining the emissions in the context of significance at a national level in comparison with other actions in Australia contributing to global warming.^{xxxv} Wildlife Whitsunday also argued that the question of significant impact should be considered cumulatively with other contributors to global warming.^{xxxvi} Wildlife Whitsunday also argued that the Minister had failed to consider that global warming is included as a key threatening process under section 183 of the EPBC Act.^{xxxvii} The Applicant also argued that there was no evidence or other material to justify making the decision, or upon which the delegate could be reasonably satisfied, that the greenhouse impacts were not likely to have a significant impact on the matters protected by Part 3 of the EPBC Act.^{xxxviii}

Wildlife Whitsunday filed extensive submissions in this matter. Those submissions addressed the statement of reasons and lack of reference to greenhouse gas as outlined above. Wildlife Whitsunday's submissions also provided detailed background on the EPBC Act and its purpose. They also explored the need for environmental impact assessments and their role in environmental law, in order to provide the necessary context for the EPBC Act.^{xxxviii} The Applicant referred to the context of international legal obligations such as United Nations Framework Convention on Climate Change and associated obligations to control greenhouse gas emissions and take climate change into consideration.^{xxxix}

Wildlife Whitsunday's submissions also made detailed references to the role of causation in the context of environmental law, suggesting it was a matter of common sense and need not be the only cause when considering the context and purpose of the EPBC Act.^{xl} Wildlife Whitsunday argued that the interpretation of the delegate meant that no matter how substantial an action's contribution to climate change; it would be excluded from assessment under the EPBC Act. Instead it was argued, the fact that there were multiple causes of damage to world heritage values does not mean the mines are insignificant as one of those causes. Wildlife Whitsunday posited that the relevant test should be the contribution of the proposal to impacts which climate change will bring to the matters of national environmental significance in the context of other Australian contributors to those impacts.

The Applicant also argued that there was no evidence or other material to support a finding that the greenhouse gas emissions would not be likely to cause a significant

impact on the matters protected by Part 3 of the EPBC Act. There was no material except the small reference in one of the referrals to the greenhouse gas omissions from mining, to base any finding.

This was particularly important because had such material been before the decision-maker it would have shown that the impacts of the mines were significant. Using the methodology of the Australian Greenhouse Office, the greenhouse gas emissions from the full fuel cycle of 48 million tonnes of coal for electricity production (thermal or steaming coal) or steel production (coking coal) is 121-161 million tonnes of carbon dioxide equivalent.^{xli} This is roughly equivalent to 25% of Australia's annual greenhouse gas emissions over time and annually around 2% of emissions each year.^{xlii}

In response, the Respondents' argued that the question of 'significance' was a question of fact and the delegate had discretion in determining the appropriate weight of the various factors required to be taken into account. They also argued that there was evidence in the affidavit that the delegate had taken into account the greenhouse gas emissions of the mine.^{xliii} The Respondents also argued that the delegate had applied the right test and could consider whether the impact was measurable or identifiable. The Respondents submitted the delegate had considered the listing of greenhouse gas emissions as a key threatening process by considering those matters in general rather than specifically referring to s.183.^{xliv}

Judgment

Some commentators have suggested that the case shows the problems with climate change litigation in relying on the judiciary to bring about environmental change.^{xlv}

This is not surprising given the concluding remarks of Dowsett J in the Bowen Basin case. His Honour indicated that while he proceeded on the basis it was relevant to consider greenhouse gas emissions (as the decision-maker argued he had done) he maintained skepticism about the impacts of climate change, saying:

However I am far from satisfied that the burning of coal at some unidentified place in the world, the production of greenhouse gases from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter can be so described ...There has been no suggestion that the mining, transportation or burning of coal from either proposed mine would directly affect any such protected matter, nor was there any attempt to identify the extent (if any) to which emissions from such mining, transportation and burning might aggravate the greenhouse gas problem. The applicant's case is really based upon the assertion that greenhouse gas emission is bad, and that the Australian Government should do whatever it can to stop it including, one assumes, banning new coal mines in Australia. This case is far removed from the factual situation in *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.^{xlvi}

Clearly, His Honour was not convinced about the need to consider greenhouse gas emissions or indeed the risks that they pose to the future of the Australian environment. This was despite the fact that there was little evidence about the extent

of the emissions that would result from the mines before him. He also failed to engage with any of the case law in detail from other jurisdictions that had considered climate change, such as the Hazelwood decision. Nor did he consider case law on environmental law generally under the EPBC Act.^{xlvii} This was in contrast to the detailed analysis of such decisions set out in the Nathan Dam case.^{xlviii}

His Honour Justice Dowsett construed the EPBC Act in a way that benefited the decision-maker. His approach contrasted with more specialist environmental courts, and paid little attention to the purpose of environmental assessment legislation nor key concepts contained in it such as ecologically sustainable development. For example, he indicated that despite the fact that Wildlife Whitsunday had raised concerns about the impacts of 18 million tonnes of coal (from the Isaac Plains mine) on greenhouse gases, this should not lead to a full scientific investigation and definitive determination of the matter.^{xlix}

In fact Dowsett J suggested that Wildlife Whitsunday in its submission should have identified in detail the protected matters that would be significantly impacted by the emissions from these mines and the increase in the amount of coal burned as a result of these mines.¹ In doing so, His Honour clearly misunderstood the role of submissions during the referral process under the EPBC Act, in contrast to the obligations on the proponent to provide detailed information about the impacts of their proposal.

His Honour saw no difficulty with the decision-maker using his own experience gained through his undergraduate science studies to assess the possible effects of

rising sea levels and accumulation of greenhouse gases in the atmosphere.^{li} Mr Flanigan had formed views on these matters through assessing other mines under the EPBC Act, as well as in lieu of the general significance of greenhouse gases to his work, and the Court found it was reasonable for him to do so.^{lii} His Honour accepted that the mention of ‘indirect impacts’ on World Heritage values was enough to indicate that the delegate had considered that greenhouse gas emissions might cause climate change and impact on these values.^{liii}

His Honour also found that the international conventions relevant to the EPBC Act, including the World Heritage Convention, the Biodiversity Convention and the Framework Convention on Climate Change, offered little assistance in construing the EPBC Act.^{liv}

Dowsett J found that the principle of ecologically sustainable development did not assist stating:

it is not clear that this ‘principle’ can be applied to the decision-making process prescribed by s.75. In any event it has not been established that either project will cause serious or irreversible environmental damage.^{lv}

His Honour rejected that the threats posed by emission of greenhouse gases are cumulative and rejected an argument that the assessment should be undertaken by comparing those projects with the mines or other proposals that would lead to emissions.^{lvi}

The Bowen basin case and other recent judgments

In the recent decision in *Gray v Minister for Planning & Ors* [2006] NSWLEC 720 (Gray case), Justice Pain explored and distinguished the judgment of Dowsett J in the Bowen Basin case from the decision in the Nathan Dam case. The respondents in the Gray case sought to rely on the Bowen Basin case to suggest that a finding of causation in relation to the impacts of climate change could not be made.^{lvii} Pain J found that the case was not persuasive if it is relied on to suggest the impacts of Greenhouse gas emissions produced from coal mined in NSW are beyond the scope of environmental assessment procedures in NSW. Likewise, the recent Supreme Court of the United States decision in *Massachusetts v EPA* 549 US (2007) accepted that incremental small steps from greenhouse gas emissions should still be regulated despite not being the only cause of these emissions in the global context.^{lviii} Pain J also accepted that the principle of ecologically sustainable development required the Court to consider greenhouse gas emissions, in contrast to Dowsett J's finding that the principle of ecologically sustainable development did not assist him.

Chief Justice Preston provided a useful judgment in *Taralga Landscape Guardians Inc v Minister for Planning & Ors* [2007] NSWLEC 59 (Taralga case) about climate change issues in the context of considering objections to a wind farm. He stated:

Addressing the implications of climate change involves a complex intersection of political, economic and social considerations. It is widely recognised that the state of the global environment is in rapid decline, requiring an urgent response if the current quality of life enjoyed by most Australians is to

continue and future generations are to have access to the resources of the present.^{lix}

He went onto find that the wind farm should proceed notwithstanding private and environmental concerns about the impacts on some species. He justified this on the basis of intergenerational equity as a key part of the concept of ecologically sustainable development, and the fact that the use of renewable energy sources would significantly benefit the community by reducing greenhouse gas emissions. The judgment of Preston CJ again emphasised ecologically sustainable development and the need for environmental laws to be interpreted at a local level in order to respond to the global challenge of climate change. This contrasted with the reasoning of Dowsett J in the Bowen basin case, where he found ecologically sustainable development and the context of global warming to be of little assistance in interpreting the EPBC Act.

The judgment in *Brown v Forestry Tasmania (No. 4)* [2006] FCA 1729 (Wielangta case) adopted an interpretation of the EPBC Act that sought to give effect to the objects of the Act and of the International Conventions to which it seeks to give effect. This contrasts with the approach taken by Dowsett J in the Bowen Basin case which rejected such an interpretation.^{lx}

In the Wielangta case, Marshall J adopted an expansive interpretation of ‘significant impact’, referring at length to the judgment of the Full Court in the Nathan Dam case. He found that while the impact of forestry operations was relatively insignificant in the context of other factors causing loss to such habitat for one of the species

(Tasmanian wedge tailed eagle), that loss is still significant in the context of legislation

designed to protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species). Loss of habitat caused by forestry operations, while small compared to other causes, has a significant impact on a threatened species where 'to protect' is seen as a duty not just to maintain population levels of threatened species but to restore the species.^{lxi}

Marshall J made extensive comments about the construction of the EPBC Act. He stated, in contrast to Dowsett J, that the EPBC Act is informed by International Conventions which it implements in compliance with Australia's international obligations.^{lxii} Australia has signed the United Nations Framework Convention on Climate change and the Biodiversity and World Heritage Conventions. The threats from climate change to World Heritage and to particular threatened species are now well documented. Further research is reaffirming these threats.^{lxiii}

Dowsett J did not consider these conventions useful as he could not see the significance or link between greenhouse gas emissions, these particular mines and the impacts on World Heritage. This was despite the fact that the link was more direct than the actions in the Nathan Dam case, which stemmed from the actions of third parties.

Lessons learned from the case

One of the key benefits of the case was that it received national attention and highlighted the Government's failure to use its own laws to address climate change, at

a time when climate change was obtaining less coverage than it currently receives. When the litigation commenced ABC's 'Lateline' ran a story about the case, including an interview with the Minister for Environment. Similarly, the Australian ran two articles about the case, one criticising the Government's hypocrisy in denying that climate change was occurring in the context of the litigation.^{lxiv} The position of the Government in denying that climate change was occurring in response to a notice to admit facts early in the case also became the subject of a heated debate in the Senate.^{lxv}

Several major law firms have produced newsletters or commentary about the case.^{lxvi} They have sought to highlight to their mining clients the fact that environmentalists are using the law to challenge coal mining projects. Much of this has been to encourage their clients to obtain expert advice on climate change issues. Some companies such as BHP Billiton have now decided to change their approach and are being more careful about how they word and provide information about greenhouse gas emissions to the Department of Environment and Water Resources in referring new mining operations to them.^{lxvii}

Need for law reform through amendments to the EPBC Act

Litigation can be a useful mechanism for highlighting problems with the law and the need for law reform even if a case is not successful. Thus despite the Bowen Basin case proving ultimately unsuccessful, it was beneficial in terms of the publicity it generated, which led to increased awareness of the need to consider climate change in assessing matters under the EPBC Act. On the other hand, the outcome also

highlighted the difficulties in relying on Courts to respond in a timely fashion to climate change, particularly in Queensland.^{lxviii}

The Bowen Basin case showed, that until the Courts find otherwise, it will be possible for the Minister to consider greenhouse gas emissions of large mining and infrastructure projects - but find that their contribution to climate change is not enough to justify their assessment under the EPBC Act. The only way to conclusively deal with this problem is to amend the EPBC Act to include a specific greenhouse trigger.

Climate change requires federal leadership and action, as acknowledged in the 1997 Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment, which states:

The Commonwealth has a responsibility and an interest in relation to meeting the obligations under the United Nations Framework Convention on Climate Change, in co-operation with the States, through specific programmes and the development and implementation of national strategies to reduce emissions of greenhouse gases, and to protect and enhance greenhouse sinks.^{lxix}

The Australian Network of Environmental Defender's Offices (ANEDO) has consistently appealed for the introduction of a greenhouse gas emission trigger. ANEDO has submitted that the greenhouse gas emission trigger should recognise any development that produces over 100,000 tonnes of CO₂ equivalent per year as a

matter of national environmental significance. ANEDO also argued that the trigger could be supplemented by provision for all projects on a designated development list (including expansion of existing projects and significant land use change, including significant land clearing and motorway projects) to trigger the approval provisions. This would ensure the trigger is able to capture diffuse emissions.^{lxx} While such a trigger would not necessarily stop the development of new coal mines such as those at issue in the Bowen basin case, the trigger would ensure the Minister has significant scope under the EPBC Act to impose extensive conditions on developments that contribute to greenhouse gas emissions. These conditions for example could ensure that new coal mines and other developments were responsible for offsetting all or most of their contributions to greenhouse gas emissions. Breaching conditions of an approval under the EPBC Act is an offence, and those responsible for such breaches can be the subject of enforcement action taken either by third parties (ie conservation groups) or the Department of Environment and Water.

Difficulties in bringing climate change litigation

There were a number of barriers to the Bowen Basin case. Federal Court litigation is expensive. The filing fee alone is around \$1700. The costs risks are considerable, as the Court has been reluctant to exercise its discretion to not award costs in favour of public interest litigants. The courts have only on some occasions discounted the costs amount.^{lxxi} This means that most major conservation groups are unwilling to take the risk of litigation unless they are sure that the case is certain to succeed.

The Bowen Basin case occurred because the client was prepared to risk their organization to run the litigation. As an organisation run by volunteers with no paid

staff or recurrent funding they were able to take this risk. It also was possible because they obtained a fee waiver for the Federal Court fees, the legal assistance of the EDO free of charge, and pro bono assistance from the barristers Stephen Keim SC and Chris McGrath. Without this assistance they would not have been able to run the case.

The problems with litigation have been highlighted by the outcome. Costs were awarded against Wildlife Whitsunday as a result of them losing the case. Each of the coal mines concerned sought to join the proceedings and be heard, which significantly added to the legal costs incurred by the mines (around \$200,000).

Wildlife Whitsunday did not object to the joinder but sought for the order to be conditional upon not being exposed to an order to pay the mines' costs in the event that the case was unsuccessful.^{lxxii} Dowsett J rejected these arguments. He said 'In my view the question of costs is best addressed after the case has been determined. Costs are discretionary. At this stage it would be quite inappropriate to limit either the entitlement or the liability for costs.'^{lxxiii}

As a result of the adverse costs order that resulted from the unsuccessful litigation, Wildlife Whitsunday voluntarily agreed to wind up their organization. Unsurprisingly they were unable to meet the estimate of the Minister's and two mining companies' costs which amounted to over \$300,000.^{lxxiv} Unexpectedly at this stage, despite no apparent powers to do so, the Department of Fair Trading has refused to accept the winding up of Wildlife Whitsunday. They've indicated that Wildlife Whitsunday should write to their creditors about their debts before they will accept their winding up application.

As a result of the winding up of Wildlife Whitsunday, the region has been left without an organization to battle on their behalf. The case highlights the need for the EPBC Act to contain mechanisms to promote public interest litigation. For example, a similar provision could be included to that of s.49 of the *Judicial Review Act 1991* (Qld) which enables public interest litigants to seek up front an order that each party pay their own costs. Environmental groups such as the Alliance to Save Hinchinbrook have successfully used this provision. They were not required to pay costs as a result of losing a recent case against the EPA.^{lxxv}

Conclusions

Litigation in the Federal sphere still has a significant way to progress in dealing with climate change. There are however some useful decisions both in relation to interpreting the EPBC Act, and climate change litigation in other jurisdictions, that will assist in future arguments before the Federal Court. There is significant scope for regulation under the EPBC Act to ensure mining is better regulated to address the overall impacts on emissions and the Australian environment through conditions on the approvals. The Bowen Basin case while unsuccessful has assisted in starting the debates about the climate law and the EPBC Act. It has also highlighted the need for clear statutory reform to address greenhouse gas emissions.

Bibliography

Legislation:

Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005

Environment & Heritage Legislation Amendment Bill (No. 1) 2006

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Judicial Review Act 1991 (Qld)

Cases

Alliance to Save Hinchinbrook Inc v Cook & Ors [2005] QSC 355

Allianz Australia Insurance Ltd v GSF Australia Pty Ltd (2005) 215 ALR 385.

Australian Conservation Foundation & Ors v Minister for Planning [2004] VCAT 2029. ('Hazelwood decision').

BGP Properties v Lake Macquarie CC [2004] NSWLEC 399

Booth v Bosworth [2001] FCA 1453.

Brown v Forestry Tasmania (No. 4) [2006] FCA 1729.

Chu Kheng Lim v Minister Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1.

Environmental Defence Society Inc v South Pacific Aluminium Ltd (No.4) [1981] 1 NZLR 531.

Foster v Minister for Customs and Justice (2000) 200 CLR 442.

Friends of Hinchinbrook v Minister and Cardwell Properties Pty Ltd [1996] 942 FCA 1 (1 November 1996); (1997) 93 LGERA 249; (1997) 95 LGERA 229; (1998) 99 LGERA 140

Gray v Minister for Planning & Centennial Hunter Pty Ltd [2006] NSWLEC 720. ('Gray case').

Greenpeace Australia Ltd v Redbank Power Co Pty Ltd (1994) 86 LGERA 143

Henville v Walker (2001) 206 CLR 459.

March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506.

Margarula v Minister for Environment [1999] FCA 730.

Massachusetts v EPA 549 US (2007)

Mees v Kemp [2005] FCAFC 5.

Minister Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273.

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323.

Minister for Environment and Heritage v Queensland Conservation Council [2004] FCAFC 190; (2004) 139 FCR 24. ('Nathan Dam case').

Prineas v Forestry Commission of NSW (1983) 49 LGRA 402.

Project Blue Sky v ABA (1998) 194 CLR 357.

Royall v R (1991) 172 CLR 378.

Taralga Landscape Guardians Inc v Minister for Planning & Ors [2007] NSWLEC 59. ('Taralga case').

Tasmanian Conservation Trust Inc v Minister for Resources & Gunns Ltd (1995) 55 FCR 516.

Telstra v Hornsby Shire Council [2006] NSWLEC 133.

Tickner v Chapman (1995) 57 FCR 451 at 461-462.

Wildlife Preservation Society of Queensland Proserpine/ Whitsunday Branch Inc v Minister for the Environment and Heritage & Ors [2006] FCA 736. ('Bowen Basin case').- *Wildlife Preservation Society of Queensland v Minister for Environment & Heritage* [2005] FCA 1219.

Re Xstrata Coal Queensland Pty Ltd & Ors [2007] QLRT 33.

International Conventions

1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage

1992 UNEP Convention on Biological Diversity.

1992 UN Framework Convention on Climate Change.

Court documents

Affidavit of Mark Flannigan filed in Bowen basin case found at <http://www.envlaw.com.au/greenhouse2.pdf>

Amended Application for Order of Review (version 3), amended October 2005 pursuant leave under O 13, r 2 of the Rules, granted by Dowsett J, (in respect of Bowen Basin case)
<http://www.envlaw.com.au/greenhouse1.pdf>

Referral documents

(initial Isaac Plains Referral)

Isaac Plains Coal Project Commonwealth EPBC Referral, title: 'Bowen Central Coal Management Pty Ltd /Mining/Moranbah/QLD/Open cut coal mine 7km NE of Moranbah (Isaac Plains)', reference no. 2005/2070, April 2005,
http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=2070

(final Isaac Plains Referral)

Isaac Plains Coal Management Pty Ltd, Integrated Isaac Plains Project Commonwealth EPBC Act 1999 Referral, title: 'IP Coal Pty Ltd, AMCI (IP) Pty Ltd and Isaac Plains Coal Management Pty Ltd/Mining/Bowen Central/QLD/Integrated Isaac Plains Project', reference no. 2006/3043, August 2006,

http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=3043

QCoal Pty Ltd, Sonoma Coal Project Commonwealth EPBC Act 1999 Referral, title: 'QCoal Pty Ltd/Mining/near Collinsville/QLD/Sonoma Coal Project, comprising Sonoma-1, Sonoma-2, and Belmore-1', reference no. 2005/2080, April 2005,
http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=2080

Reports / publications

Australian Conservation Foundation (ACF), 'Submission to the Parliamentary Inquiry into the Environment & Heritage Legislation Amendment Bill (No. 1) 2006', 27 October 2006,
http://www.acfonline.org.au/uploads/res_epbcsub.pdf

Australian Greenhouse Emissions Information System (AEGIS),
<http://www.greenhouse.gov.au>

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

Australian Greenhouse Office (AGO), *National Greenhouse Gas Inventory 2004: Accounting for the 108% Target*, Canberra, 2006,
<http://www.greenhouse.gov.au/inventory/2004/pubs/inventory2004.pdf>

Australian Network of Environmental Defender's Offices (ANEDO), Submission on the *Environment and Heritage Legislation Amendment Bill (No. 1)*, 27 October 2006,
http://www.edo.org.au/policy/epbc_amendment_bill061027.pdf

Australian Network of Environmental Defender's Offices (ANEDO), Submission: 'Possible new matters of National Environmental Significance under the *EPBC Act 1999*', 2 May 2005, p. 23,
http://www.edo.org.au/edonsw/site/policy/mnes_review060502.php

Australian Petroleum Production and Exploration Association (APPEA), 'Submission to Environment Australia on Possible Application of a Greenhouse trigger under the *EPBC Act*',
www.appea.com.au/Download.asp?Filename=EPBCTrigger.Sub.PDF&ID=88

Anton, Donald, on behalf of the ANEDO, 'Submission on the Consultation Paper for the possible Greenhouse Trigger under the *EPBC Act 1999*', 18 February 2000,
<http://www.edo.org.au/policy/ghousetr.html>

Bateman, Brendan, 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): A Progress Report', Clayton Utz, July 2001.

Brown, Bob, Senate Speech, 11 August 2005, Hansard,
http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2237741&table=HANSARDS

Council of Australian Governments, 'Heads of Agreement on Commonwealth/ State Roles and Responsibilities for the Environment', November 1997,
<http://www.environment.gov.au/epbc/about/agreement/index.html>

Environmental Defenders Office (EDO), 'Climate Litigation First: Californian Attorney General Sues "Big Six" Automakers for Global Warming Damages', *Impact*, vol. 83, September 2006, p. 13.

Geoscience Australia, *Australia's Identified Mineral Resources 2006*, Commonwealth of Australia, Canberra, 2006,
http://www.ga.gov.au/image_cache/GA8870.pdf

Fairhead, L., Curtotti, R., Rumley, C. and Mélanie, J., *Australian Coal Exports: Outlook to 2025 and the Role of Infrastructure*, Australian Bureau of Agricultural and Resource Economics (ABARE) Research Report 06.15, Canberra, October 2006,
http://www.abareconomics.com/publications_html/minerals/minerals_06/coal_exports.pdf

Hodge, Amanda, 'Canberra in denial over greenhouse', *The Weekend Australian*, 11 August 2005, p. 7.

Hoegh-Guldberg, Ove, *Implications of Climate Change for Australia's Great Barrier Reef*, WWF Australia and Queensland Tourism Industry, Brisbane, 2004.

IPCC Working Group II, 'Climate Change 2007: Impacts, Adaptation and Vulnerability', *Intergovernmental Panel on Climate Change Fourth Assessment Report*, April 2007,
<http://www.ipcc.ch/activity/ar.htm#ar4>

Krockenberger, AK, Kitching, RL, and Turton, SM, *Environmental Crisis: Climate Change and Terrestrial Biodiversity in Queensland*, Rainforest CRC, Cairns, 2003.

McGrath, Chris, 'Federal court case challenges greenhouse gas emissions from coal mines', 2006, <http://www.envlaw.com.au/greenhouse3.pdf>

Peel, J, 'The role of climate change litigation in Australia's response to global warming', *Environmental Planning Law Journal*, vol. 24, 2007, p.90.

Pidot, Justin, *Global Warming in the Courts: An Overview of Current Litigation and Common Legal Issues*, Georgetown Environmental Law and Policy Institute, 2006,
http://www.law.georgetown.edu/gelpi/current_research/documents/GWL_Report.pdf

Senate Environment, Communications, Information Technology and the Arts Committee, *Inquiry into the provisions of the Environment & Heritage Legislation Amendment Bill (No. 1) 2006 Report*, 21 November 2006,
http://www.aph.gov.au/senate/committee/ecita_ctte/environment_heritage/report/index.htm

Topfer, K, Speech on adoption of Judges Johannesburg Principles on the Role of Law and Sustainable Development, August 2002, located at www.climatelaw.org.

Wildlife Whitsunday, 'Comments on QCoal Pty Ltd-Mining near Collinsville Queensland, Sonoma Coal Project, 14th April 2005.

Wood, Mary, 'Nature's Trust: Reclaiming an Environmental Discourse', Keynote Address to the 2006 Bioneers Conference, Oregon, October 20 2006,
<http://www.law.uoregon.edu/faculty/mwood/docs/bioneers.pdf>

Websites

Allens Arthur Robinson, 'Greenhouse gas challenge to coal mines rejected by Federal Court', by Murray, Philip, and Batten, Simon, *Focus: Environment and Planning*, June 2006,

<http://www.aar.com.au/pubs/env/foenvjun06.htm>

Corrs Chambers Westgarth, 'Isaac Plains/Sonoma Coal Mines Greenhouse Gas Case', *Energy & Resources Issues*, 29 June 2006,

http://www.corrs.com.au/corrs/website/web.nsf/Content/Pub_ER_Newsletter_280606_Isaac_Plains_Sonoma_Coal_Mines

Deacons, 'Wildlife Preservation Society of Queensland Proserpine /Whitsunday Branch Inc v Minister for Environment and Heritage & Ors [2006] FCA 736', by Simmonds, Melanie, *Environment and Planning Articles*, June 2006,

<http://www.deacons.com.au/NewsUpdates/Newsroom/EPQLDArticles.cfm?objid=5559>

Department of Natural Resources and Water, 'Mining, Exploration and Petroleum: Coal Industry Overview, Coal Facts 2003-04', State of Queensland, 2007.

<http://www.nrw.qld.gov.au/mines/coal/overview.html>.

-- Department of Natural Resources and Water, 'Mining, Exploration and Petroleum: Queensland Coal Production', State of Queensland, 2007,

<http://www.nrw.qld.gov.au/mines/coal/production.html>

-- Department of Natural Resources and Water, 'Mining, Exploration and Petroleum: Mining Operations and Developments', State of Queensland, 2007,

<http://www.nrw.qld.gov.au/mines/coal/operations.html>

Friends of Earth, 'Community sue Shell to stop Nigerian Gas Flaring', press release, 20 June 2005,

<http://www.climatelaw.org/media/Nigeria.shell.april06>

Haag, Amanda, 'Going to court over climate change', *Bioed Online*, 8 September 2006,

<http://www.bioedonline.org/news/news.cfm?art=2783>

Mallesons Stephen Jaques, 'Greenhouse Gas Emissions: Recent Development', *Renewable Energy Alert*, 5 August 2005,

http://www.mallesons.com.au/publications/alerts/Renewable_Energy_Alerts/8033341W

-
- ⁱ *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage & Ors* [2006] FCA 736.
- ⁱⁱ Formerly Principal Solicitor at the Environmental Defender's Office of Northern Queensland, who conducted the case in 2005/2006.
- ⁱⁱⁱ IPCC Working Group II 'Climate Change 2007: Impacts, Adaptation and Vulnerability'. Also see the extensive evidential sources cited by Wood, 'Nature's Trust: Reclaiming an Environmental Discourse', pp. 434-436
- ^{iv} Topfer, 'on the adoption of the Judges' Johannesburg Principles on the Role of Law and Sustainable Development'.
- ^v The first case to raise such issues was *Greenpeace v Redbank Power*, where the Court imposed conditions upon a coal fired power station in NSW requiring it to mitigate the effects of greenhouse gas emissions by the planting of sinks, the limitation of fuel sources for the station to tailings from particular mines, and the monitoring and reporting on stack emissions. Also see: *ACF v Minister for Planning* [2004] VCAT 2029; *Gray v Minister for Planning* [2006] NSWLEC 720.
- ^{vi} In the United States there are more than a dozen lawsuits involving climate change issues before the Courts. See: Pidot, 'Global Warming in the Courts', p.1. EDO, 'Climate Litigation First: Californian Attorney General Sues 'Big Six' Automakers for Global Warming Damages', p.13. Friends of Earth, 'Community sue Shell to stop Nigerian Gas Flaring'. Haag, 'Going to court over climate change'.
- ^{vii} Quoted in: Hodge, 'Canberra in denial over greenhouse', p. 7.
- ^{viii} Fairhead et al, *Australia Coal Exports*.
- ^{ix} Department of Natural Resources and Water, 'Coal Industry Overview'.
- ^x Geoscience Australia, *Australia's Identified Mineral Resources 2006*.
- ^{xi} Department of Natural Resources and Water, 'Queensland Coal Production'.
- ^{xii} Department of Natural Resources and Water, 'Mining Operations and Developments'.
- ^{xiii} AGO, *National Greenhouse Gas Inventory 2004*.
- ^{xiv} QCoal, *Sonoma Coal Project EPBC Referral*, p. 2.
- ^{xv} Bowen Central Coal Management, *Isaac Plains Integrated Project EPBC Referral*, p. 2.
- ^{xvi} *Ibid.*, pp. 37-8.
- ^{xvii} It has since ceased to exist as a result of the costs orders in this case as discussed below.
- ^{xviii} Wildlife Whitsunday submission p. 6.
- ^{xix} Hoegh-Guldberg, *Implications of Climate Change for Australia's Great Barrier Reef*.
- ^{xx} Krockenberger et al, *Environmental Crisis: Climate Change and Terrestrial Biodiversity in Queensland*.
- ^{xxi} *Minister for Environment and Heritage v Queensland Conservation Council* [2004] FCAFC 190.
- ^{xxii} *Australian Conservation Foundation & Ors v Minister for Planning* [2004] VCAT 2029.
- ^{xxiii} Wildlife Whitsunday submission, p. 7.
- ^{xxiv} *Mees v Kemp* [2005] FCAFC 5.
- ^{xxv} At [58]. Also: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5], [37], [69] and [216].
- ^{xxvi} These documents were annexed to affidavit of Mark Flanigan (see below).
- ^{xxvii} Affidavit of Mark Flanigan can be found at <http://www.envlaw.com.au/greenhouse2.pdf> (without attachments).
- ^{xxviii} Affidavit of Mark Flanigan, paragraphs 17, 22, 26, 29(a) and 29(d).
- ^{xxix} Affidavit of Mark Flanigan, paragraphs 17-25, 29 (b) & (e), 41.
- ^{xxx} Bowen Basin case at [32]
- ^{xxxi} Bowen Basin case at [37].
- ^{xxxii} *Ibid* at [37]-[38].
- ^{xxxiii} Amended Application for Order of Review (in respect of Bowen Basin case).
- ^{xxxiv} *Ibid*, paragraph [6].
- ^{xxxv} *Ibid*, paragraph [5].
- ^{xxxvi} *Ibid*, paragraph [10].
- ^{xxxvii} *Ibid*, paragraph [12].
- ^{xxxviii} *Project Blue Sky v ABA* (1998) 194 CLR 357; *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402 at 417 per Cripps J; *Tasmanian Conservation Trust Inc v Minister for Resources & Gunns*

Ltd (1995) 55 FCR 516 at 541 per Sackville J; *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No.4)* [1981] 1 NZLR 531 at 534.

^{xxxix} Article 4, United Nations Framework Convention on Climate Change 1992; *Chu Kheng Lim v Minister Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Minister Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

^{xl} Nathan Dam case mentioned decisions on causation: *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506; *Royall v R* (1991) 172 CLR 378 at 387; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 215 ALR 385; *Henville v Walker* (2001) 206 CLR 459 at 489-491.

^{xli} These calculations were based on formula: Greenhouse Gas Emissions (GHG) (t CO₂-e) = Q x EC x EF/1000, where: Q= quantity of fuel burnt in tonnes, EC=the energy content of fuel in GJ/tonne or GJ/kL, EF= the relevant emissions factor: *AGO Factors and Methods Workbook*. For more information about these calculations see the article by Chris McGrath, 'Federal court case challenges greenhouse gas emissions from coal mines'.

^{xlii} Based on total greenhouse gas emissions being 550Mt CO₂ (as they were in 2003 according to AGEIS).

^{xliii} Bowen Basin case, paragraph [70].

^{xliv} *Foster v Minister for Customs and Justice* (2000) 200 CLR 442.

^{xlv} Peel, 'The role of climate change litigation in Australia's response to global warming', at 101.

^{xlvi} Bowen Basin case, paragraph [72].

^{xlvii} *Booth v Bosworth* [2001] FCA 1453; *Mees v Kemp* [2005] FCAFC 5.

^{xlviii} Nathan Dam case, paragraphs [29], [32]-[35].

^{xlix} Contrast this approach with the detailed consideration of the NSW Land and Environment Court of the need to consider the precautionary principle as set out by Preston CJ in *Telstra v Hornsby Shire Council* [2006] NSWLEC 133, and *BGP Properties v Lake Macquarie CC* [2004] NSWLEC 399.

^l Bowen Basin case, paragraph [40]

^{li} *Ibid*, paragraph [23].

^{lii} *Ibid*, paragraph [25].

^{liii} *Ibid*, paragraph [42].

^{liv} *Ibid*, paragraphs [46]-[47].

^{lv} *Ibid*, paragraphs [53]-[54].

^{lvi} *Ibid*, paragraph [55].

^{lvii} Gray case, paragraphs [92]-[93].

^{lviii} See p. 20 of the *Massachusetts* judgment.

^{lix} Taralga case, paragraph [67].

^{lx} Note this case is on appeal currently to the Full Federal Court.

^{lxi} *Wielangta* case, paragraph [94].

^{lxii} *Wielangta*, paragraph [295]-[296]. See also: Nathan Dam case and *Booth v Bosworth*.

^{lxiii} See IPCC, *Fourth Assessment Report*; Wood, 'Nature's Trust'; Krockenberger et al, 'Environmental Crisis'; Hoegh-Guldberg, *Implications of Climate Change for Australia's Great Barrier Reef*; and material associated with QCC case at www.envlaw.com.au/newlands.html

^{lxiv} Hodge, 'Canberra in denial over Greenhouse'.

^{lxv} See speech of Senator Bob Brown, 11 August 2005.

^{lxvi} Deacons, 'Wildlife Preservation Society of Queensland'; Malleons Stephen Jaques, 'Greenhouse Gas Emissions'; Allens Arthur Robinson, 'Greenhouse gas challenge to coal mines rejected by Federal Court'; Corrs Chambers Westgarth, 'Isaac Plains/Sonoma Coal Mines Greenhouse Gas Case'.

^{lxvii} Letter from Ian Lee to Prime Minister dated 15th February 2007

^{lxviii} See judgment of Koppenol P in *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33.

^{lxix} Council of Australian Governments, Attachment 1- Part II.

^{lxx} ANEDO submission, 'Possible new matters of National Environmental Significance under the *EPBC Act 1999*'. Also see: ANEDO, Submission on the *Environment and Heritage Legislation Amendment Bill (No. 1)*, p. 42; and Anton on behalf of ANEDO, 'Submission on the Consultation Paper for the possible Greenhouse Trigger under the *EPBC Act 1999*'.

^{lxxi} See decisions such as *Margarula v Minister for Environment* [1999] FCA 730 where costs order made was for 2/3 of costs.

^{lxxii} A similar order had been made in relation to the State of Queensland in *Friends of Hinchinbrook v Minister and Cardwell Properties Pty Ltd* [1996] 942 FCA 1 (1 Nov 1996); (1997) 93 LGERA 249; (1997) 95 LGERA 229; (1998) 99 LGERA 140.

^{lxxiii} *Wildlife Preservation Society of Queensland v Minister for Environment & Heritage* [2005] FCA 1219 at [2].

^{lxxiv} These were the costs estimates provided by the three Respondents on a party/party basis as opposed to taxed costs. The actual legal costs were higher.

^{lxxv} *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355.