

FEDERAL COURT OF AUSTRALIA

Northern Inland Council for the Environment Inc v Minister for the Environment [2013] FCA 1418

Citation: Northern Inland Council for the Environment Inc v Minister for the Environment [2013] FCA 1418

Parties: **NORTHERN INLAND COUNCIL FOR THE ENVIRONMENT INC v MINISTER FOR THE ENVIRONMENT and BOGGABRI COAL PTY LTD (ACN 001 787 711)**

File number: NSD 1403 of 2013

Judge: **COWDROY J**

Date of judgment: 20 December 2013

Catchwords: **ADMINISTRATIVE LAW** – application for judicial review of decision of Minister for the Environment to approve a project to construct and operate an extension to a mine – whether the Minister took into account an alleged disclosure of sensitive information by the New South Wales Government in making his decision

Legislation: *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 13
Environmental Protection and Biodiversity Conservation Act 1999 (Cth) ss 18, 20, 67, 68, 87, 130, 133, 134, 136
Judiciary Act 1903 (Cth) s 39B
Environment Planning and Assessment Act 1979 (NSW) ss 23D, 75H, 75J

Cases cited: *Northern Inland Council for the Environment Inc v Minister for the Environment* [2013] FCA 1419
Phosphate Resources Ltd v Minister for the Environment, Heritage and Arts (No 2) (2008) 162 LGERA 154
Wilderness Society Inc v Turnbull (2007) 166 FCR 154

Date of hearing: 16, 17, 18, 19 September 2013

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs:	51
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**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1403 of 2013

BETWEEN: **NORTHERN INLAND COUNCIL FOR THE ENVIRONMENT
INC
Applicant**

AND: **MINISTER FOR THE ENVIRONMENT
First Respondent**

**BOGGABRI COAL PTY LTD (ACN 001 787 711)
Second Respondent**

JUDGE: **COWDROY J**

DATE OF ORDER: **20 DECEMBER 2013**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The originating application filed 18 July 2013 be dismissed.
2. Costs be reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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Second Respondent**

JUDGE: **COWDROY J**

DATE: **20 DECEMBER 2013**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 On 11 February 2013 two separate decisions were made by the first respondent ('the Minister'), each made pursuant to ss 130 and 133 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ('the EPBC Act'). The decision the subject of this judgment ('the Boggabri decision') approved an application by the second respondent Boggabri Coal Pty Ltd ('Boggabri Coal') to construct and operate an extension to the Boggabri Open Cut Mine located 15 km north east of the township Boggabri in New South Wales. The other decision ('the Maules Creek decision'), which is the subject of a separate judgment ('the Maules Creek judgment'), approved an application by Aston Coal 2 Pty Limited ('Aston Coal') to construct and operate a new open cut coal mine and associated infrastructure approximately 18 km north-east of the township of Boggabri in New South Wales.

2 Both decisions are subject to applications for judicial review by the applicant ('NICE') pursuant to s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the ADJR Act') and s 39B of the *Judiciary Act 1903* (Cth). Those applications were heard concurrently by the Court. The Maules Creek judgment may be found at *Northern Inland Council for the Environment Inc v Minister for the Environment* [2013] FCA 1419.

3 NICE claims to be a person 'aggrieved' by the Boggabri decision within the meaning
of s 5(1) of the ADJR Act due to its incorporation in Australia, its involvement in activities in
Australia for the protection and conservation of the environment, and its objects including the
protection of the environment. Neither the Minister nor Boggabri Coal challenge NICE's
standing to bring the application.

4 Upon commencing the proceeding, NICE challenged the Boggabri decision on five
grounds. One such ground was abandoned prior to the hearing, whilst a further three grounds
were abandoned during the hearing. Accordingly, the only ground now relied upon by NICE
is that in making the Boggabri decision, the Minister took into account an irrelevant
consideration, namely the alleged disclosure or 'leaking' to the public by the New South
Wales Government of commercially sensitive information relating to the proposed
development prior to the Minister making his final decision.

BACKGROUND

5 The EPBC Act ensures that proposals for certain activities and developments are
subjected to a rigorous and consultative assessment and approval process. Those proposals
are generally those that are likely to have significant impacts on the environment. The
application by Boggabri Coal ('the project') is such a proposal.

6 On 12 October 2009 Boggabri Coal sought approval under the now repealed Part 3A
of the *Environment Planning and Assessment Act 1979* (NSW) ('EP&A Act') to extend its
mining operations at the Boggabri Open Cut Mine ('the mine') for a further 21 years from
November 2011, and to increase its production rate to 7 million tonnes per annum of run-of-
mine coal. Part of the project included the upgrade and improvement of existing facilities and
infrastructure; construction and operation of a coal handling and preparation plant;
construction of a rail spur and loop, including a rail bridge; and closure of part of the Leard
Forest Road.

7 It was anticipated that, if approved, the expansion of the mining operations would
increase the total workforce at the mine by 355 workers to 500 workers at peak capacity. The
project also included the clearance of extensive areas of vegetation, being: 650 hectares of
potential habitat for listed endangered and migratory species, including the swift parrot,
regent honeyeater, and greater long-eared bat; and 82 hectares of a critically endangered

ecological community, being the 'White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland' ('the White-Box EEC'). Accordingly the project involved major infrastructure development, and potentially, a significant environmental impact.

8 On 15 December 2009 the project was referred to the Commonwealth Minister for the Environment, Heritage, Water and the Arts (as the Minister was then known, hereafter referred to as 'the Minister') pursuant to s 68 of the EPBC Act. Such section requires in part that 'a person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action'. A 'controlled action' is one which, if taken by a person without the approval of the Minister, would be prohibited pursuant to Part 3 of the EPBC Act: s 67 of the EPBC Act.

9 Relevantly, actions that will have or are likely to have a significant impact on the following categories are prohibited under Part 3 if taken without the approval of the Minister:

- Listed threatened species included in the 'extinct in the wild', 'critically endangered', 'endangered', or 'vulnerable' categories: ss 18(1)–18(4);
- Listed threatened ecological communities included in the 'critically endangered' or 'endangered' categories: ss 18(5) and 18(6); and
- Listed migratory species: s 20.

10 On 5 February 2010, a delegate of the Minister determined that the project was a controlled action due to the likely significant impacts on listed threatened species and ecological communities and listed migratory species. The delegate also determined that pursuant to ss 87(1)(a) and 87(4) of the EPBC Act the project should be assessed by accreditation by the NSW Minister for Planning and Infrastructure ('the NSW Minister') under Part 3A of the EP&A Act.

11 As part of the New South Wales approval process, Boggabri Coal submitted its Environmental Assessment for submission to the Director-General of Planning and Infrastructure in December 2010 as directed by s 75H of the EP&A Act. It was placed on public exhibition. On 2 March 2011 the Commonwealth Department of Sustainability,

Environment, Water, Population and Communities (as it was then known) made a submission in respect of the Environmental Assessment. In response a supplementary report was prepared on behalf of Boggabri Coal on 7 April 2011.

12 On 14 September 2011 the NSW Minister requested the NSW Planning Assessment Commission ('PAC') to undertake a merits review of the project. By virtue of the extant s 23D of the EP&A Act, the PAC had the function of determining applications for approval of projects under Part 3A of the EP&A Act.

13 Following the completion of its review, the PAC prepared a report in February 2012 which recommended the approval of the project subject to certain conditions. The NSW Director-General's Environmental Assessment Report, published in April 2012, also recommended the approval of the project subject to conditions. On 18 July 2012, the PAC approved the project subject to conditions pursuant to s 75J of the EP&A Act. The Commonwealth Department was informed of the approval on 23 July 2012.

14 Pursuant to ss 130(1A) and 130(1B)(a) of the EPBC Act, the Minister was required to decide whether to approve the project either within 30 business days of receiving the assessment report or within such period as the Minister specified in writing. On 25 October 2012, the Minister extended the date by which he was to make his decision until 31 January 2013. He further extended the decision date twice, first to 7 February 2013 and second to 30 April 2013.

15 On 20 December 2012, the Minister was provided with a 'proposed decision brief' by his Department. Included within the proposed decision brief were:

- a recommended decision that the Minister approve the project;
- proposed conditions for the approval of the project; and
- draft letters attaching the Minister's proposed decision to be sent to relevant parties, including the NSW Minister.

16 On 21 December 2012 the Minister indicated his agreement with the recommended decision and proposed conditions, and signed, and presumably sent, the draft letters.

17 On 30 January 2013, a submission and report prepared by Northwest Ecological Services on behalf of NICE and the Maules Creek Community Council (another community group), was made available to the Minister. Relevantly, such documents alleged that the offsets proposed to ameliorate the likely impact on the swift parrot, the regent honeyeater, the greater long-eared bat, and the White-Box EEC were inadequate for both the project and the Maules Creek development proposed by Aston Coal.

18 Between 1 and 11 February 2013 the Minister held discussions with departmental staff regarding amendments to the conditions contained in the proposed decision brief.

19 On 6 February 2013 the Minister, as referred to above, extended the time in which to give his decision until 30 April 2013. On 7 February 2013 the then NSW Minister for Resources and Energy, Chris Hartcher, criticised the Minister in an ABC interview for opting to delay the decision, stating:

It has been signed off by New South Wales. The Federal Government promised it would announce a decision on Thursday. Now it has deferred it and is playing politics with the coal seam gas and coal mining industries in NSW...

20 On 9 February 2013 an article was published in the Sydney Morning Herald newspaper entitled '*Burke intended to approve Maules Creek before hoax*'. The article referred to the fact that the Minister (then Mr Tony Burke) sent to the NSW Government a confidential letter that raised '*further questions about the minister's [sic] sudden announcement this week to delay a decision on the mine for three months*'. The article referred to the fact that the Minister had proposed to approve the '*controversial Maules Creek Coal Mine before Christmas, only weeks before it was the subject of a hoax media release claiming funding for the project from ANZ Bank had been withdrawn*'. The article continued:

Mr Burke was widely anticipated to announce his decision on the \$776 million project on Thursday, but the environment department instead announced it would be deferred until April 30.

The department said the delay was because it was seeking "clarification on potential impacts to matters of national environmental significance."

However, in a letter to the NSW Planning Minister, Brad Hazzard on December 21, Mr Burke said: "I am proposing to approve this proposal. My proposed decision is attached for your information."

21 The article went on to state:

The New South Wales Resources Minister, Chris Hartcher, said Mr Burke's letter showed that the decision to defer was driven by the timing of the federal election.

22 On 11 February 2013 a final decision brief was submitted to the Minister. Such brief incorporated the voluminous reports, statements and material which were contained in the proposed decision brief. On the same day, the Minister determined to approve the project subject to conditions pursuant to s 134 of the EPBC Act ('the approval').

23 Some conditions incorporated in the approval were either amended from those recommended in the proposed decision brief, or new. Relevantly, conditions 7, 9 and 10, as contained in the approval, refer to the process by which offset areas would be established to ameliorate the likely impact on the swift parrot, the regent honeyeater, the greater long-eared bat, and the White-Box EEC. As explained by notes included in the final decision brief from departmental officers, condition 7 was amended for clarity and to rectify an error in the size of the offset areas. Condition 9 was inserted to 'bring [it] in line' with the proposed conditions for the eventual Maules Creek decision, to address community concerns, and to remove doubt about the quality of the offsets being offered. Condition 10 was also said to have been included to remove doubt about the quality of the offsets being offered.

24 The Minister issued a press release on 11 February 2013. Such press release stated that the NSW Government had 'leaked' commercially sensitive information concerning the project and that in consequence the Minister had considered it necessary to bring forward the decision even though further work was to be done in relation to the approvals. It is not clear on the evidence what constituted the commercially sensitive information, but at a minimum it appears to have included the Minister's proposed approval of the project. Relevantly, the Minister said:

"In each of these there additional approvals there is more work to be concluded before the project can actually proceed," Mr Burke said.

"As the conditions make clear where more work, new plans or further modelling needs to take place, then this must be carried out to my satisfaction.

"It has always been my preference to minimise the number of planning and modelling processes which have to continue after a decision has been made because I want companies to be able to determine whether or not a project will go ahead on the basis of the conditions they see in my decision.

"Unfortunately the decision of the New South Wales Government to leak commercially sensitive information has caused me to have to bring these decisions forward today with the remaining work to be resolved directly between the company

and myself.

"The development of these further conditions will be conducted without reference to the NSW Government, which is unfortunate but a decision that they have effectively made for themselves."

25 On the following day, the Minister was interviewed by Sabra Lane in an ABC AM radio program. An introduction to the transcript to the interview refers to the Minister's decision to approve '*two coal mine projects near Narrabri*', being the project and the Maules Creek proposal, as well as a separate coal seam gas development near Gloucester. The transcript relevantly states:

TONY BURKE: I don't think there's ever been a set of three approvals that I've given with so little knowledge as to whether or not the projects will end up going ahead.

On this occasion, all three of them, there were significant outstanding issues and in the ordinary course, I would have worked through those before making a decision.

What I've done in this case is, for the areas that are not yet resolved, instead of giving a normal approval and say these are the conditions, I've said these further issues need to be worked through to my satisfaction before we know whether the project can actually go ahead.

So it's quite... even though it's just being reported as approvals, it's actually quite a different set of conditions to what would normally occur.

SABRA LANE: How stringent are these conditions?

TONY BURKE: As I say, some of them are on issues that are not resolved. So with Gloucester, the hydrological modelling still has to be done. And if the impact on ground water comes back as unacceptable then the project won't be able to go ahead.

SABRA LANE: Why give approval then? It sort of sounds like a Claytons approval kind of thing.

TONY BURKE: That's not an unreasonable description of this one.

Quite simply, the New South Wales Government had stated to strategically leak parts of where we were up to with bits of it being reported, not all of it being reported, and effectively had a situation where market-sensitive information was starting to drip feed into the market.

Pretty irresponsible pathway to choose, and something that no other state government's ever done before.

So I took the view that should make the decision on all the conditions that we were certain of and do all of that publicly. And then for the issues that were still yet to be resolved, put rules around them where unless they're resolved to my satisfaction, the project can't go ahead, but to cut New South Wales out of the remainder of the process.

...

TONY BURKE: I can't have a situation where market-sensitive information gets

strategically leaked for political purposes. You need to have a situation where anyone who you're bringing into the advanced detail before things are finalised is able to act in a responsible way.

26 On 20 June 2013, the Minister issued a statement of reasons pursuant to s 13 of the ADJR Act for the decision to approve the project. The reasons record that on 21 December 2012, the Minister proposed to approve the proposed action with conditions.

27 Paragraph [33] of the reasons relevantly states:

I also determined that the proposal decision should not be released for public comment under s 131A of the **EPBC Act**, on the basis that, given the extensive nature of the New South Wales assessment process, including opportunities for public consultation, further public comment was not likely to raise an issues that had not already been considered in the assessment process.'

[Emphasis in original]

28 The statement of reasons continues at [34] as follows:

On 21 December 2012, I wrote to the **proponent** under section 131AA(1) of the **EPBC Act**, the Minister for Resources and Energy, and the Minister for Climate Change and Energy Efficiency seeking comments on the proposed decision. I also wrote to the NSW Minister for Planning and Infrastructure to notify him of my proposed decision. No comments were received from the Commonwealth Ministers. Despite publicity around the proposed decision, no written comments were received from the **NSW Minister**.

[Emphasis in original]

LEGISLATIVE FRAMEWORK

29 Section 136 of the EPBC Act defines the powers of the Minister to decide whether to approve a controlled action under ss 130 and 133, and to decide which, if any, conditions are to apply to an approval under s 134. Section 136(1) provides that the Minister must take into account the following considerations insofar as they are not inconsistent with any other requirement of the subdivision:

- (a) matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action; and
- (b) economic and social matters.

30 Factors the Minister must take into account when considering the matters in s 136(1), and factors the Minister may take into account, are contained within ss 136(2) and 136(4)

respectively. The Minister is also prevented from taking into account otherwise extraneous considerations pursuant to s 136(5). Such section provides:

- (5) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must not consider any matters that the Minister is not required or permitted by this Division to consider.

ISSUES

31 As noted above, the central tenets of NICE's application are that the disclosure constituted an irrelevant consideration and that the Minister took the disclosure into account in making his decision to approve the project.

32 It is readily acknowledged by NICE that the Minister's statement of reasons does not refer to the disclosure nor to market sensitive information generally. NICE submits however that, in view of the contemporaneous statements of the Minister at the time the decision was made, the statement does not represent the complete reasons for the decision. In determining whether the Minister took into account the disclosure in the course of deciding to approve the project, it is plain that the Court may consider all material before the Minister at the time the decision was made, the context in which it was made, and the matter to which his attention was drawn or not drawn: *Phosphate Resources Ltd v Minister for the Environment, Heritage and Arts (No 2)* (2008) 162 LGERA 154 at [172]. The press release of the Minister on 11 February 2013, and the media reports and interview immediately prior to and after the decision, plainly form part of the context in which the Minister's decision to approve the project was made.

33 To be successful in its application, NICE must make good three propositions:

- a) That the Minister brought forward the decision on the project due to the disclosure;
- b) That such consideration affected the substance of the decision to approve the project;
and
- c) That it was improper to take such consideration into account.

34 The first proposition is not challenged by the respondents. It is clear from the Minister's press release that he expedited the decision due to the disclosure from the following statement:

Unfortunately the decision of the New South Wales Government to leak commercially sensitive information has caused me to have to bring these decisions forward today...

35 The second proposition is challenged by the respondents. They submit that the final decision to approve the project, including the conditions, was substantially the same as the decision contained within the proposed decision brief on 20 December 2012. In this way, s 136(5) is not engaged because the disclosure was not taken into account '*in deciding whether or not to approve the taking of an action, and what conditions to attach to an approval* (emphasis added)': ss 136(1), 136(4) and 136(5). Instead, the disclosure is said to have affected no more than the timing of the decision.

36 The third proposition is also challenged by the respondents. They submit that even if the disclosure affected the substance of the decision, the Minister was allowed to take it into account as it was an 'economic and social' matter as envisaged by s 136(1)(b) of the EPBC Act: see [29] above.

37 Further and in the alternative, Boggabri Coal submits that even if the disclosure affected the substance of the Minister's decision, and the disclosure is not an economic or social matter for the purposes of the EPBC Act, the taking into account of the disclosure was totally immaterial. It is submitted that the Court should not quash the Minister's decision on that basis.

38 For the reasons set out below, NICE has failed to make out the second proposition. As such, it is not necessary for the Court to consider whether the disclosure is an 'economic and social' matter. Further, Boggabri Coal's alternative submission, that the effect of taking into account the disclosure was immaterial, does not arise.

SUBMISSIONS

39 NICE does not contend that the disclosure affected the outcome of the Minister's decision itself. This is presumably due to the fact that the Minister expressed his agreement with the proposed approval of the project at least as early as 21 December 2012. Rather, NICE submits that the conditions attached to the approval were affected, resulting from the haste by the Minister to give his decision. Reliance is placed on *Wilderness Society Inc v*

Turnbull (2007) 166 FCR 154 at [84] in which the Full Court of the Federal Court of Australia observed that the decision before it was '*one of studied haste*', stating:

This can create some tension between the conduct of assessment processes (including community participation therein) and securing expeditious finalisation of the approval process itself. Efficient decision making should be well informed.

[Reference removed]

40 In oral submissions counsel for NICE clarified its contention of the effect of the Minister's consideration of the disclosure. Counsel expressly disavowed that the disclosure '*operated somehow retrospectively to affect the conditions which were provided after the meeting of the Minister on 1 February which is referred to... in the final decision brief*'. Counsel for NICE emphasised that '*the process [of addressing community concerns about the project] was an ongoing one, but we do not suggest for a moment that intervention of the... New South Wales Government retrospectively shaped these conditions*'. Rather it was argued that the disclosure and the Minister's consideration thereof '*truncated the orderly completion of the issues raised by the community and in the community submissions...*'.

41 NICE equates the community concerns with the Minister's reference to '*significant outstanding issues*' in his interview with Ms Lane on 12 February 2013. Relevant statements of the Minister from that interview are as follows:

On this occasion, all three of [the approvals], there were **significant outstanding issues** and in the ordinary course, I would have worked through those before making a decision.

What I've done in this case is, **for the areas that are not yet resolved**, instead of giving a normal approval and say these are the conditions, I've said these further issues need to be worked through to my satisfaction before we know whether the project[s] can actually go ahead.

So it's quite... even though it's just being reported as approvals, it's actually **quite a different set of conditions to what would normally occur**.

[Emphasis added]

42 NICE submits that the outstanding issues in relation to the project were the adequacy of the offset conditions, reproduced above at [23]. It is alleged that the proper resolution of those issues was truncated in view of the fact that on 6 February 2013 the Minister extended the time in which to make his decision until 30 April 2013, but due to the disclosure, made the decision to approve the project a mere five days after extending the period in which to make the decision.

43 The respondents submit that the difficulty for NICE is to show how any consideration of the disclosure affected the substance of the Minister's decision, thereby occurring 'in deciding' whether or not to approve the project: s 136(5) of the EPBC Act. Boggabri Coal asserts that the unresolved issues referred to in the Minister's interview with Ms Lane did not refer to the project as the conditions attached to the approval did not change in substance from the consideration included in the proposed decision brief. It is argued that the decision was brought forward to prevent the further release of market sensitive information and for other political purposes, and that these are mere issues of timing.

CONSIDERATION

44 The conditions as at the time of the proposed decision brief as compared to the final conditions do not reflect that the Minister took into account the disclosure in framing the conditions. Most of the amendments to the conditions in between those times are only administrative in nature or were made for the purposes of consistency with the conditions in the Maules Creek approval. For instance, and using the numbers from the final conditions, condition 11 was simply moved from one section of the conditions to more properly reflect its subject matter, whilst scientific names for the regent honeyeater and the swift parrot were included in condition 2 for clarity.

45 The conditions that NICE submit were affected by the truncation of the orderly completion of the issues raised by the community are, again using the numbering from the final conditions, conditions 9 and 10. Both conditions were new conditions from those included in the proposed decision brief. Conditions 9 and 10 provide that:

9. The person taking the action must verify through an independent review by 30 December 2013, the quantity and quality of habitat or potential habitat for the regent honeyeater, swift parrot and greater long-eared bat of all proposed offset areas. The review will:
 - a. validate the quantity, quality and ecological characteristics of the offset areas in line with the requirements of the department's *Environment Protection and Biodiversity Conservation Act 1999* Environmental Offsets Policy October 2012
 - b. be undertaken by ecological experts who have been agreed in writing by the **department**

[Emphasis in original]
10. If the independent review finds that the minimum quantities of threatened species habitat and ecological community required under condition 7 do not

meet the 'equivalent or better' quality, or the criteria required under condition 9a, then additional areas must be protected until all relevant criteria under condition 9 are met.

...

46 The reasons for the inclusion of these conditions, as explained by the departmental staff to the Minister in the final decision brief, are as follows:

9. To bring in line with Maules Creek conditions and to address community concerns. Although asking for baseline surveys in offset this review is intended to remove doubt about the quality of offsets being offered.
10. [T]his review is intended to remove doubt about the quality of the offsets being offered.

47 The departmental comments make clear that the inclusion of the new conditions was to address concerns regarding the adequacy of the quantity of the offsets provided in relation to the impact that the project would have on the regent honeyeater, swift parrot, greater long-eared bat and the White-Box EEC. As noted above, it is this issue of offsets that NICE submits form at least part of the unresolved issues referred to by the Minister in his press release and in the interview with Ms Lane.

48 Even if such submission is accepted, it only goes so far as to say that had the Minister made his decision to approve the project at a later point in time, the conditions may have been framed differently. That may be so, but it does not establish error. As referred to above, on 6 February 2013 and pursuant to s 130(1A) of the EPBC Act, the Minister extended the time in which he could decide whether to approve the project until 30 April 2013. Having done so, it was open to the Minister to make his decision on any date within that period, or indeed further extend the time in which to make the decision. It is possible for any relevant project that the Minister, properly considering the matters that he or she must and may take into account under ss 136(1), 136(2) and 136(4), and properly ignoring any other matters in accordance with s 136(5), may frame different conditions for a project depending on when they decide to approve it. Indeed, the Minister should frame conditions on the basis of the information available and the prevailing circumstances at the time of making the decision.

49 What NICE was required to prove was that the conditions were in substance affected by the Minister's consideration of the disclosure. There is simply no suggestion in either the reasons of the Minister, the comments on the conditions by departmental staff, or in the conditions themselves that the amendments to the conditions or the inclusion of the new

conditions were due to any leaking of market sensitive information by the New South Wales Government. The disclosure, as is submitted by the respondents, merely influenced the Minister to bring his decision to approve the project forward as he was entitled to do.

50 NICE's reference to an 'orderly completion' of issues raised by the community imparts a requirement in the EPBC Act that does not exist. The fact that the final conditions were formulated well in advance of 30 April 2013 does not show that any further consideration of community concerns as to the provision of offsets would have been undertaken. Further, the Minister and his department were not obliged to have any further discussions with community groups concerning the proposed offsets, or indeed in connection with any other matter. Ultimately, NICE's argument amounts to no more than an expression of dissatisfaction with approval of the project by the Minister. It must be rejected.

51 It follows that the application of NICE should be dismissed. The costs of the application will be reserved in accordance with the request of counsel for both NICE and Boggabri Coal.

I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Cowdroy.

Associate:



Dated: 20 December 2013

