

The Bowen Basin coal mines case: Climate law in the Federal Court

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In June 2005, the Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch usually known as Wildlife Whitsunday started a ‘David and Goliath’ battle in the Federal Court against both the Commonwealth Government and two proposed new coal mines in the far north of Queensland. *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* or the ‘Bowen Basin case’, as it has come to be known,¹ 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). The Commonwealth Government did not welcome the litigation. 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’.²

While the case did not succeed, it did highlight the Commonwealth 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 chapter explores the background to the case, the lessons learned from it, including the difficulties in bringing public interest environmental litigation, and the law reform issues highlighted by it.

Background to the case

Coal in the Bowen Basin

Coal is Queensland’s most valuable export earner, 58 per cent of the total recoverable black coal in Australia lying within its borders (New South Wales has 39 per cent).³ In 2003-2004, exports from Queensland were valued

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Minister's and two mining companies' costs which amounted to over \$300,000.⁷² 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 have 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 demise of Wildlife Whitsunday, the region has been left without an organisation 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 Environment Protection Agency.⁷³

Conclusion

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.

Notes

- 1 *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736, (2006) 232 ALR 510.
- 2 Quoted in Amanda Hodge, 'Canberra in Denial over Greenhouse', *The Australian*, 11 August 2005, p 7.
- 3 L Fairhead, R Curtotti, C Rumley and J Mélanie, *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, <www.abareconomics.com/publications_html/minerals/minerals_06/coal_exports.pdf>.
- 4 Department of Natural Resources and Water, 'Mining, Exploration and Petroleum: Coal Industry Overview, Coal Facts 2003-04', State of Queensland, 2007, <www.nrw.qld.gov.au/mines/coal/overview.html>.
- 5 Geoscience Australia, *Australia's Identified Mineral Resources 2006*, Commonwealth of Australia, Canberra, 2006, <www.ga.gov.au/image_cache/GA8870.pdf>.
- 6 Department of Natural Resources and Water, 'Mining, Exploration and Petroleum: Queensland Coal Production', State of Queensland, 2007, <www.nrw.qld.gov.au/mines/coal/production.html>.

- 7 Department of Natural Resources and Water, 'Mining, Exploration and Petroleum: Mining Operations and Developments', State of Queensland, 2007, <www.nrw.qld.gov.au/mines/coal/operations.html>.
- 8 Australian Greenhouse Office (AGO), National Greenhouse Gas Inventory 2004: Accounting for the 108% Target, Canberra, 2006, <www.greenhouse.gov.au/inventory/2004/pubs/inventory2004.pdf>
- 9 QCoal Pty Ltd, Sonoma Coal Project Commonwealth EPBC Act 1999 Referral, p 2, 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, <www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=2080>.
- 10 Isaac Plains Coal Project Commonwealth EPBC Referral, p 2, 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, <www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=2070>.
- 11 Above, pp 37-8.
- 12 It has since ceased to exist as a result of the costs orders in this case as discussed below.
- 13 Wildlife Whitsunday submission p 6.
- 14 Ove Hoegh-Guldberg, Implications of Climate Change for Australia's Great Barrier Reef, WWF Australia and Queensland Tourism Industry, Brisbane, 2004.
- 15 AK Krockenberger, RL Kitching and SM Turton, *Environmental Crisis: Climate Change and Terrestrial Biodiversity in Queensland*, Rainforest CRC, Cairns, 2003.
- 16 *Minister for Environment and Heritage v Queensland Conservation Council* [2004] FCAFC 190, 139 FCR 24.
- 17 *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029.
- 18 Wildlife Whitsunday, 'Comments on QCoal Pty Ltd-Mining near Collinsville Queensland, Sonoma Coal Project, 14 April 2005, p 7.
- 19 *Mees v Kemp* [2005] FCAFC 5, [54]-[55], 141 FCR 385.
- 20 Above, [58].
- 21 Above. Also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, at [5], [37], [69] and [216].
- 22 These documents were annexed to affidavit of Mark Flanigan (see n 23 below).
- 23 Affidavit of Mark Flanigan can be found at <www.envlaw.com.au/greenhouse2.pdf> (without attachments).
- 24 Above, paras 17, 22, 26, 29(a) and 29(d).
- 25 Above, paras 17-25, 29 (b) & (e), 41.
- 26 *Bowen Basin* case, see n 1, at [32].
- 27 Above at [37].
- 28 Above at [37]-[38].
- 29 Amended Application for Order of Review (version 3), amended October 2005 pursuant leave under O 13, r 2 of the Rules, granted by Justice Dowsett, (in respect of *Bowen Basin* case), <www.envlaw.com.au/greenhouse1.pdf>.
- 30 Above, [6].
- 31 Above, [5].
- 32 Above, [10].
- 33 Above, [12].
- 34 *Project Blue Sky v ABA* (1998) 194 CLR 357; *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402, 417 per Cripps J; *Tasmanian Conservation Trust Inc v Minister for Resources & Gunns Ltd* (1995) 55 FCR 516, 541 per Sackville J; *Environmental Defence Society Inc v South Pacific Aluminium Ltd* (No 4) [1981] 1 NZLR 531, 534.

- 35 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.
- 36 The *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, 387; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 215 ALR 385; *Henville v Walker* (2001) 206 CLR 459, 489-491.
- 37 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; Australian Greenhouse Office, Australian Greenhouse Office Factors and Methods Workbook, Canberra, August 2004, <www.greenhouse.gov.au/workbook/pubs/workbook.pdf>. For more information about these calculations see McGrath, Chris, 'Federal Court Case Challenges Greenhouse Gas Emissions from Coal Mines', 2006, <www.envlaw.com.au/greenhouse3.pdf>
- 38 Based on total greenhouse gas emissions being 550Mt CO₂ (as they were in 2003 according to AGEIS).
- 39 *Bowen Basin* case, see n 1, [70].
- 40 *Foster v Minister for Customs and Justice* (2000) 200 CLR 442.
- 41 Jacqueline Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming', *Environmental Planning Law Journal*, vol 24, 2007, p 101.
- 42 *Bowen Basin* case, (see n 1), [72].
- 43 *Booth v Bosworth* [2001] FCA 1453, (2001) 114 FCR 39; *Mees v Kemp*, see n 19.
- 44 *Nathan Dam* case, (see n 16), [29], [32]-[35].
- 45 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.
- 46 *Bowen Basin* case, (see n 1), [40].
- 47 Above, [23].
- 48 Above, [25].
- 49 Above, [42].
- 50 Above, [46]-[47].
- 51 Above, [53]-[54].
- 52 Above, [55].
- 53 *Gray v Minister for Planning* [2006] NSWLEC 720.
- 54 Above, [92]-[93].
- 55 *Massachusetts v EPA* 549 US __ (2007).
- 56 See p 20 of the *Massachusetts* judgment.
- 57 *Taralga Landscape Guardians Inc v Minister for Planning* [2007] NSWLEC 59, [67].
- 58 *Brown v Forestry Tasmania (No 4)*, [2006] FCA 1729, (2006) 157 FCR 1 (*Wielangta* case). Note this case is on appeal currently to the Full Federal Court.
- 59 Above,[94].
- 60 Above, [295]-[296]. See also *Nathan Dam* case (n 16) and *Booth v Bosworth* (n 43).
- 61 See IPCC, Fourth Assessment Report; Mary Wood, 'Nature's Trust: Reclaiming an Environmental Discourse', Keynote Address to the 2006 Bioneers Conference, Oregon, 20 October 2006, <www.law.uoregon.edu/faculty/mwood/docs/bioneers.pdf>; Krockenberger et al, 'Environmental Crisis'; Hoegh-Guldberg, Implications of Climate Change for Australia's Great Barrier Reef; and material associated with QCC case, <www.envlaw.com.au/newlands.html>.
- 62 Hodge, above n 2.
- 63 See speech of Senator Bob Brown, 11 August 2005, *Hansard*, <http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2237741&table=HANSARDS>.

- 64 Allens Arthur Robinson, 'Greenhouse Gas Challenge to Coal Mines Rejected by Federal Court', by Phillip Murray, and Simon Batten, Focus: Environment and Planning, June 2006, <<http://www.aar.com.au/pubs/env/foenvjun06.html>>; Corrs Chambers Westgarth, 'Isaac Plains/Sonoma Coal Mines Greenhouse Gas Case', Energy & Resources Issues, 29 June 2006, <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 Melanie Simmonds, Environment and Planning Articles, June 2006, <www.deacons.com.au/NewsUpdates/Newsroom/EPQLDArticles.cfm?objid=5559>; Mallesons Stephen Jaques, 'Greenhouse Gas Emissions: Recent Development', Renewable Energy Alert, 5 August 2005, <www.mallesons.com.au/publications/alerts/Renewable_Energy_Alerts/8033341W>.
- 65 Letter from Ian Lee to Prime Minister dated 15 February 2007.
- 66 See judgment of Koppenol P in *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33.
- 67 Council of Australian Governments, 'Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment', November 1997, <www.environment.gov.au/epbc/about/agreement/index.html> Attachment 1-Pt II.
- 68 Australian Network of Environmental Defender's Offices (ANEDO), Submission: 'Possible New Matters of National Environmental Significance under the *Environment Planning and Biodiversity Conservation Act 1999*', 2 May 2005. See also Australian Network of Environmental Defender's Offices (ANEDO), Submission on the Environment and Heritage Legislation Amendment Bill (No 1), 27 October 2006, p 42, <www.edo.org.au/policy/epbc_amendment_bill061027.pdf>, <www.edo.org.au/edonsw/site/policy/mnes_review060502.php> and Donald Anton on behalf of the ANEDO, 'Submission on the Consultation Paper for the possible Greenhouse Trigger under the EPBC Act 1999', 18 February 2000, <www.edo.org.au/policy/ghousetr.html>.
- 69 See decisions such as *Margarula v Minister for Environment* [1999] FCA 730 where costs order made was for two-thirds of the costs.
- 70 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] FCA 942; (1997) 93 LGERA 249; (1997) 95 LGERA 229; (1998) 99 LGERA 140.
- 71 *Wildlife Preservation Society of Queensland v Minister for Environment & Heritage* [2005] FCA 1219, [2].
- 72 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.
- 73 *Alliance to Save Hinchinbrook Inc v Cook* [2005] QSC 355.