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Lansen v Minister for Environment and Heritage [2008] FCA 903 (13 June 2008)

Last Updated: 13 June 2008

LANSEN v MINISTER FOR ENVIRONMENT AND HERITAGE

NTD 4 of 2007

SUMMARY

In accordance with the practice of the Federal Court in certain cases of public interest, the Court has prepared a Summary to accompany the judgment that is to be delivered today. However, it must be emphasised that the Summary forms no part of the judgment. The only authoritative statement of the Court's reasons is the judgment itself.

This Summary is intended to assist in understanding the principal conclusions reached by the Court, but is necessarily incomplete. The published Reasons for Judgment and this Summary will be available on the internet www.fedcourt.gov.au.

Lansen v Minister for Environment and Heritage [2008] FCA 903

The applicants are seven native title claim groups with native title claims under the *Native Title Act 1993* (Cth) over land in the vicinity of the McArthur River Mine near Borroloola in the Gulf Region of the Northern Territory.The operator of that mine, McArthur River Mines (MRM) proposes to alter its operations from an underground mine to an open pit mine. That will require a significant diversion of the McArthur River.On 4 March 2003, the Minister for the Environment and Heritage found that proposal to be a "controlled action" under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Hence it required his approval. The Minister's concerns particularly related to the impact of the proposal upon migratory bird species by its effect upon the flow and delta of the McArthur River, and upon the endangered species called the freshwater sawfish by affecting its habitats and its capacity to migrate up and down the river.Before the approval, the potential environmental impacts of the proposal were to be assessed and the results of the assessment reported to the Minister. The assessment process was undertaken through the Northern Territory Minister for the Environment and Heritage, in accordance with a Bilateral Agreement between the Commonwealth and the Northern Territory which came into force on 19 March 2003. The assessment process involved the preparation of an environmental impact statement, its exposure to public comments, and MRM's response to the public comments. The results of that process were conveyed to the Commonwealth Minister by the NT Minister on 25 February 2006 by an Assessment Report. The Minister then asked for further information from MRM concerning the potential impacts of the proposal upon the freshwater sawfish and migratory bird species and how those impacts might be better minimised and monitored.After receiving the response, the Minister decided to approve the proposed action subject to a number of conditions.The applicants have challenged the validity of that decision on four main grounds:

(1) the assessment of the environmental impacts of the proposal should have been made, but was not made, under Part 8 of the EPBC Act rather than under the Bilateral Agreement because the Agreement did not come into operation until after the Minister decided that the proposal was a "controlled action" under the EPBC Act;

(2) the Assessment Report was not a valid assessment report to empower the Minister to make a decision whether or not to approve the proposal because it did not contain sufficient information to enable the Minister to decide whether or not to approve the proposal;

(3) the Minister was required to, but did not, take into account the conditions imposed by the Northern Territory on the proposal, relating generally to the mine development but including its environmental impacts; and

(4) the Minister was required to, but did not, give effect to the principles of ecologically sustainable development, in particular the precautionary principle, as he was required to do by the EPBC Act, in granting his approval to the proposal.The Court has concluded that:

(1) the assessment process of the proposal under the Bilateral Agreement was the correct one, as that agreement came into operation before the Minister had selected an assessment process under Part 8 of the EPBC Act;

(2) the Assessment Report was a valid assessment report because it contained an adequate description of the material in the environmental impact statement, of the public comments, and of MRM's response to the public comments, even though the Report itself said that its contents were not themselves sufficient to decide that the environmental impacts of the proposal on the freshwater sawfish and migratory bird species would not be, or only marginally be, affected;

(3) the Minister had not taken into account the conditions imposed by the Northern Territory upon its approval to the mine redevelopment, but in the circumstances that failure did not make the Minister's decision invalid because consideration of the NT conditions could not have made a material difference to the Minister's decision, including on the conditions he imposed;

(4) the Minister had not failed to take into account the precautionary principle in making his decision.As the contentions of the applicants failed to show that the Minister's decision is invalid, the application is dismissed.

FEDERAL COURT OF AUSTRALIA

Lansen v Minister for Environment and Heritage

[2008] FCA 903

ADMINISTRATIVE LAW – application for approval of "controlled action" under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) – whether assessment of proposal was properly made under a Bilateral Agreement between Commonwealth and Northern Territory when Bilateral Agreement came into force after decision of Minister for Environment and Heritage that proposal was controlled action – whether assessment of proposal should have been made under Pt 8 of EPBC Act – **held:** assessment of proposal properly made under Bilateral Agreement**ADMINISTRATIVE LAW** – assessment of proposal to redevelop mine which required approval of Minister for Environment and Heritage under EPBC Act – proposal assessed under Bilateral Agreement between Commonwealth and Northern Territory – assessment report to Minister expressed concerns about environmental impacts of proposal upon freshwater sawfish and migratory bird species – whether report "assessment report" under EPBC Act – whether it did not contain sufficient information for Minister to decide whether or not to approve proposal – where report adequately presented material in environmental impact statement, public comments, and proponent's response to public comments – whether Minister sought further information from proponent – **held:** report was a valid assessment report for Minister's

consideration**ADMINISTRATIVE LAW –** decision of Minister for Environment and Heritage to approve proposal constituted a controlled action under EPBC Act – Minister failed to take into account conditions imposed by Northern Territory upon its approval to mine redevelopment comprising proposal – Minister imposed conditions upon approval consistent with conditions imposed by Northern Territory in respect of potential environmental impacts – whether Minister's decision invalid – **held:** Minister's decision valid as consideration of Northern Territory conditions could not have made a material difference to Minister's decision, and EPBC Act requiring Minister to take into account conditions imposed by Northern Territory did not provide that the failure to do so necessarily led to invalidity of decision**ENVIRONMENTAL LAW** – processes for approval of proposal which was a controlled action under the EPBC Act – consideration of whether assessment of proposal under Bilateral Agreement correct, rather than under Pt 8 of EPBC Act, where decision of Minister that proposal was a controlled action was made before Bilateral Agreement came into force – consideration of necessary contents of an assessment report required under EPBC Act – consideration of whether failure of Minister to take into account conditions imposed by Northern Territory upon its approval to mine redevelopment constituting proposal resulted in invalidity of Minister's decision – consideration of principles of ecologically sustainable development and the precautionary principle and whether Minister had regard to them*Administrative Decisions (Judicial Review) Act 1977* (Cth)*Judiciary Act 1903* (Cth) *Environment Protection and Biodiversity Conservation Act 1999* (Cth)*Native Title Act 1993* (Cth) *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)*Environmental Assessment Act 1982* (NT)*Inquiries Act* (NT)*Mining Management Act 2001* (NT) *Environmental Assessment Act 1982* (NT)*Administrative Decisions (Judicial Review Act) 1977* (Cth)*Mining Management Act 2001* (NT)*Environment Protection and Biodiversity Conservation Bill 1998* (Cth)*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 *Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 29; (1998) 194 CLR 355 *Minister for Environment v Queensland Conservation Council* [2004] FCAFC 190; (2004) 139 FCR 24*Scurr v Brisbane City Council* [1973] HCA 39; (1973) 133 CLR 242*Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1986) 145 CLR 485*Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986]

HCA 40; (1986) 162 CLR 24*Lu v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 340; (2004) 141 FCR 346*Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24 *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; (2005) 215 ALR 162 *Hatton v Beaumont* [1977] 2 NSWLR 211 *Smith v Wyong Shire Council* [2003] NSWCA 322; (2003) 132 LGERA 148*Woods v Bate* (1986) 7 NSWLR 560 *Turner v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388**HARRY LANSEN, PETER ELLIS, JERRY ANDERSON, DEREK ANDERSON, GORDON LANSEN, RONNY RAGGETT, NANCY KUNOTH, BILL DODD, ROGER WILSON, SWEENY SWANSON, BRUCE JOY AND BILLY COOLIBAH ON BEHALF OF THE KURDANJI PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS NTD 6020/98), LES HOGAN ON BEHALF OF THE GARAWA AND GURDANJI PEOPLE (IN HIS CAPACITY AS REGISTERED NATIVE TITLE CLAIMANT IN FEDERAL COURT PROCEEDINGS NTD 6020/00), ANNIE ISAAC AND DINAH NORMAN ON BEHALF OF THE RRUMBURRIYA PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS NTD 6014/00), WENDY ROPER, GORDON LANSEN, PHILLIP TIMOTHY, GRAHAM FRIDAY, MAVIS TIMOTHY ON BEHALF OF THE RRUMBURRIYA BORROLOOLA GROUP (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS NTD 6003/03), ANNIE ISAAC ON BEHALF OF THE RRUMBURRIYA PEOPLE (IN HER CAPACITY AS REGISTERED NATIVE TITLE CLAIMANT IN FEDERAL COURT PROCEEDINGS NTD 6047/01), LEONARD NORMAN, WAILO MCKINNON, ELIZABETH MCCRACKEN, PHILLIP TIMOTHY, NORMA TIMOTHY, ROY HAMMER, GRAHAM FRIDAY, MAVIS TIMOTHY ON BEHALF OF THE ANTHAWIRRIYARRA PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS NTD 6024/98 AND BILLY COOLIBAH, GORDON LANSEN AND ROY DIXON ON BEHALF OF GURDANJI AND GARAWA PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL**

COURT PROCEEDINGS NTD 6031/00) v COMMONWEALTH MINISTER FOR ENVIRONMENT AND HERITAGE AND MCARTHUR RIVER MINING PTY LTDNTD 4 OF 2007MANSFIELD J13 JUNE 2008DARWIN

IN THE FEDERAL COURT OF AUSTRALIA
NORTHERN TERRITORY DISTRICT REGISTRY **NTD 4 OF 2007**

BETWEEN:

HARRY LANSEN, PETER ELLIS, JERRY ANDERSON, DEREK ANDERSON, GORDON LANSEN, RONNY RAGGETT, NANCY KUNOTH, BILL DODD, ROGER WILSON, SWEENY SWANSON, BRUCE JOY AND BILLY COOLIBAH ON BEHALF OF THE KURDANJI PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS
NTD 6020/98)
First Applicant

LES HOGAN ON BEHALF OF THE GARAWA AND GURDANJI PEOPLE (IN HIS CAPACITY AS REGISTERED NATIVE TITLE CLAIMANT IN FEDERAL COURT PROCEEDINGS NTD 6020/00)
Second Applicant

ANNIE ISAAC AND DINAH NORMAN ON BEHALF OF THE RRUMBURRIYA PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS NTD 6014/00)
Third Applicant

WENDY ROPER, GORDON LANSEN, PHILLIP TIMOTHY, GRAHAM FRIDAY, MAVIS TIMOTHY ON BEHALF OF THE RRUMBURRIYA BORROLOOLA GROUP (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS NTD 6003/03)
Fourth Applicant

ANNIE ISAAC ON BEHALF OF THE RRUMBURRIYA PEOPLE (IN HER CAPACITY AS REGISTERED NATIVE TITLE CLAIMANT IN FEDERAL COURT PROCEEDINGS NTD 6047/01)
Fifth Applicant

LEONARD NORMAN, WAILO MCKINNON, ELIZABETH MCCRACKEN, PHILLIP TIMOTHY, NORMA TIMOTHY, ROY HAMMER, GRAHAM FRIDAY, MAVIS TIMOTHY ON BEHALF OF THE ANTHAWIRRIYARRA PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS
NTD 6024/98
Sixth Applicant

BILLY COOLIBAH, GORDON LANSEN AND ROY DIXON ON BEHALF OF GURDANJI AND GARAWA PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS
NTD 6031/00)
Seventh Applicant

AND: **COMMONWEALTH MINISTER FOR ENVIRONMENT AND HERITAGE**

First Respondent

MCARTHUR RIVER MINING PTY LTD
Second Respondent

JUDGE: **MANSFIELD J**
DATE OF ORDER: **13 JUNE 2008**
WHERE MADE: **DARWIN**
THE COURT ORDERS THAT:

1. The applicants have leave to amend their Further Amended Application in terms of the document entitled "Second Further Amended Application for an Order of Review" dated 18 February 2008 and attached to the document entitled "Submission on Additional Issue" filed by the applicants on that date.

2. The application be dismissed.Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
NORTHERN TERRITORY DISTRICT REGISTRY **NTD 4 OF 2007**

BETWEEN: **HARRY LANSEN, PETER ELLIS, JERRY ANDERSON, DEREK ANDERSON, GORDON LANSEN, RONNY RAGGETT, NANCY KUNOTH, BILL DODD, ROGER WILSON, SWEENY SWANSON, BRUCE JOY AND BILLY COOLIBAH ON BEHALF OF THE KURDANJI PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS NTD 6020/98)**
First Applicant

LES HOGAN ON BEHALF OF THE GARAWA AND GURDANJI PEOPLE (IN HIS CAPACITY AS REGISTERED NATIVE TITLE CLAIMANT IN FEDERAL COURT PROCEEDINGS NTD 6020/00)
Second Applicant

ANNIE ISAAC AND DINAH NORMAN ON BEHALF OF THE RRUMBURRIYA PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS NTD 6014/00)
Third Applicant

WENDY ROPER, GORDON LANSEN, PHILLIP TIMOTHY, GRAHAM FRIDAY, MAVIS TIMOTHY ON BEHALF OF THE RRUMBURRIYA BORROLOOLA GROUP (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS NTD 6003/03)
Fourth Applicant

ANNIE ISAAC ON BEHALF OF THE RRUMBURRIYA PEOPLE (IN HER CAPACITY AS REGISTERED NATIVE TITLE CLAIMANT IN FEDERAL COURT PROCEEDINGS NTD 6047/01)
Fifth Applicant

LEONARD NORMAN, WAILO MCKINNON, ELIZABETH MCCRACKEN, PHILLIP TIMOTHY, NORMA TIMOTHY, ROY HAMMER, GRAHAM FRIDAY, MAVIS TIMOTHY ON BEHALF OF THE ANTHAWIRRIYARRA PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT

	PROCEEDINGS **NTD 6024/98** **Sixth Applicant**
	BILLY COOLIBAH, GORDON LANSEN AND ROY DIXON ON BEHALF OF GURDANJI AND GARAWA PEOPLE (IN THEIR CAPACITY AS REGISTERED NATIVE TITLE CLAIMANTS IN FEDERAL COURT PROCEEDINGS **NTD 6031/00)** **Seventh Applicant**
AND:	**COMMONWEALTH MINISTER FOR ENVIRONMENT AND HERITAGE** **First Respondent**
	MCARTHUR RIVER MINING PTY LTD **Second Respondent**

JUDGE:	**MANSFIELD J**
DATE:	**13 JUNE 2008**
PLACE:	**DARWIN**

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INTRODUCTION

1 This application is made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth) to challenge the validity of a decision of the Commonwealth Minister for the Environment and Heritage (the Minister or the Commonwealth Minister) under s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the Act). The decision was made on 20 October 2006. By the decision, the Minister approved a proposed action of the second respondent, McArthur River Mining Pty Ltd (MRM) to convert an

underground lead and zinc mine to an open cut mine and associated works, including the diversion of the McArthur River (the decision).

2 The underground mine as operated prior to the decision was adjacent to the McArthur River, some 740km south-east of Darwin, in the Gulf Region of the Northern Territory. It is upstream of the town of Borroloola. It is approximately 100km inland from the mouth of Bing Bong Creek on the Gulf of Carpentaria, and ore concentrate recovered from the mine is shipped from a port at the mouth of that creek. The McArthur River flows across the site of the proposed open cut mine. The proposed conversion and expansion of the mine by MRM approved by the decision includes a proposal to divert the course of the river for 5 km around the site of the open cut mine.

3 The applicants in this matter are seven native title claim groups with native title determination applications under the *Native Title Act 1993* (Cth) over land in the vicinity of the mine and over land through which the McArthur River flows. The claims include a claim over the McArthur River Project Area and areas upstream and downstream of it. The town of Borroloola is surrounded by Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), including land which abuts the north eastern boundary of the McArthur River pastoral lease and which abuts the western boundary of that lease. In addition, the islands in the Gulf of Carpentaria at the mouths of the McArthur River and the Bing Bong Creek are also Aboriginal land and the beds and banks of the McArthur River from its mouth to the land grant around Borroloola and the intertidal zone of the Bing Bong Creek have been recommended for grant by the Aboriginal Land Commissioner. The applicants share significant concerns over the potential environmental impacts of the proposed action, in particular by the diversion of the McArthur River, which relevantly include the potential impact on certain fish and migratory bird species in the region.

4 In those circumstances, both the Minister and MRM have accepted that at least one member of each applicant group has standing in this matter. It is not necessary to further consider that matter.

LEGISLATION AND APPROVAL PROCESS

Objects of the Act

5 At the outset it is useful to state the relevant objects of the Act. They are found in s 3(1):

The objects of this Act are:

(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
(c) to promote the conservation of biodiversity; and
...
(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
...
(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and

(g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

6 Section 3A sets of the principles of ecologically sustainable development, including what is referred to as the precautionary principle at s 3A(b):

... if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

Decision that Action is a Controlled Action

7 Section 67 of the Act defines a 'controlled action' as any action that is prohibited under a provision of Part 3 of the Act without approval under Part 9. The relevant Part 3 provision is the 'controlling provision' for an

action. The process of seeking approval for an action that a person thinks might be a controlled action begins with s 68. That section states that if a person thinks that an action may be a controlled action, that person must refer it to the Minister for a decision as to whether or not that is the case.

8 Pursuant to s 68, a referral of the proposed development by changing from an underground mine to open pit mining and the diversion of the McArthur River and Barney Creek was made by MIM Holdings Limited (MIM) to the Minister on 6 February 2003. (The relationship between that company, now Xstrata Queensland Limited, and MRM is unclear, but nothing apparently turns on that. It appears from the material before the Court that MRM took ownership of the proposed action from MIM sometime between 4 March 2003 and 3 August 2005.) The referral by MIM noted that the proposed action may impact members of listed threatened species and members of listed migratory species, but it argued that its proposed action was not considered to be a controlled action for the purposes of the Act so that it required approval under that Act.

9 Section 18 of the Act prohibits an action that has, will have or is likely to have a significant impact on a listed threatened species. Section 18A of the Act makes it an offence to take an action that results or will result in a significant impact on a listed threatened species of a listed threatened ecological community: s 18A(1). It also makes it an offence if an action is likely to have a significant impact on a listed threatened species or listed threatened ecological community if the person taking the action is reckless as to that fact: s 18A(2). Under s 19 of the Act, ss 18 and 18A do not apply if the Minister has approved the action under Part 9 (including an approval under s 133) of the Act.

10 Section 20(1) of the Act prohibits an action that has, will have, or is likely to have a significant impact on a listed migratory species. That sub-section also does not apply if approval of the action under Pt 9 is given by the Minister: s 20(2). Sub-section 20A makes it an offence to take an action that results or will result in a significant impact on a listed migratory species: s 20A(1). It also makes it an offence if an action is likely to have a significant impact on a listed migratory species if the person taking the action is reckless as to that fact: s 20A(2). Actions of those types are also not offences if the Minister has approved the action under Part 9: s 20A(4).

11 Pursuant to s 75 of the Act, a delegate of the Minister decided on 4 March 2003 that the proposed action was a controlled action and, as such, required the approval of the Minister. He found that ss 18, 18A, 20 and 20A, were the controlling provisions. The Minister's reasons for decision outline why those controlling provisions were enlivened. He found that thirty one listed migratory bird species were likely to be in the vicinity of the site at various times, including some that utilise permanent pools along the river. He also found that six listed threatened species were likely to be in the vicinity of the site, including an 'important population' of freshwater sawfish (*pristis microdon*).

12 The delegate also designated MIM as the proponent of the action, as required by s 75(3). Section 78(5) states that if the Minister believes the person designated as the proponent of the action under s 75 is no longer the appropriate person, the Minister may designate a different person as the proponent. There is no evidence that a designation for MRM has been made, but again nothing has been made of that. I shall proceed, as the parties proceeded, on the basis that MRM is so identified with MIM that MRM can be treated as the entity giving notice under s 68 and as the designated entity under s 75(3).

The bilateral agreement

13 The consequence of the proposed action by MRM being designated as a controlled action was potentially to enliven Ch 4 Pt 8 of the Act. It provides a structure for the assessment of the impacts of the controlled action, so as to provide information for a decision whether or not to approve the taking of the proposed action. However, s 83 provides:

(1) This Part does not apply in relation to an action if:

(a) The action is to be taken in a State or self-governing Territory; and

(b) A bilateral agreement between the Commonwealth and the State or Territory declares that actions in a class that includes the action need not be assessed under this Part; and

(c) The provision of the bilateral agreement making the declaration is in operation in relation to the action.

...

Note 2A: An action will be in a class of actions declared not to need assessment under this Part only if the action has been assessed in a manner specified in the bilateral agreement.

14 The cooperative nature of the Act, especially in relation to cooperation between the States, Territories and the Commonwealth is reflected in Ch 3 Pt 5 of the Act. The object of that Part is expressed in s 44 as follows:
The object of this Part is to provide for agreements between the Commonwealth and A State or self-governing Territory that:

(a) protect the environment; and

(b) promote the conservation and ecologically sustainable use of natural resources; and

(c) ensure an efficient, timely and effective process for environmental assessment and approval of actions; and

(d) minimise duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (and vice versa).

Section 45(1) of the Act then gives the Commonwealth Minister the power to enter into bilateral agreements, which are defined in ss 45(2) in similar terms to the objects in s 44.

15 There is a relevant bilateral agreement between the Commonwealth and the Northern Territory (the Agreement). The Agreement was entered into on 31 May 2002. At cl 10.1, the Agreement declares that any action assessed in the manner specified in the Agreement does not require assessment under Part 8 of the Act.

16 It is not straightforward that Pt 8 of Ch 4 of the Act did not apply to the process of assessing the relevant impacts of the controlled action by MRM. The Agreement was entered into on 31 May 2002, well prior to the decision of the Minister of 4 March 2003 that the proposed development

of the mine was a controlled action.

17 However, cl 5 of the Agreement provides that:

This agreement will enter into force on the date specified in a notice given by the Northern Territory as being the date on which the amendments to the Administrative Procedures (referred to in clause 4) commence.

According to the Notes in the Environmental Assessment Administrative Procedures (NT) (the Administrative Procedures), the relevant variation was made on 28 February 2003, and commenced on 19 March 2003.
18 Consequently, it appears that the date on which the Agreement entered into force is 19 March 2003. That commencement date is confirmed in the undated letter from the Northern Territory Minister for Environment and Heritage (the Territory Minister) to the Commonwealth Minister that confirmed the Northern Territory Government's intention to conduct the assessment pursuant to the Agreement.
19 That date is after the Minister's decision of 4 March 2003 under s 75, following MRM's referral of the proposed action under s 68 of the Act on 6 February 2003.
20 Thus, unless s 83 operated so as to exclude Pt 8 from applying, s 82 required MRM to give the Minister in the prescribed way the prescribed information in relation to the controlled action and s 83 required the Minister to choose one of five alternative assessment approaches specified within it. The Minister's decision was required within 20 business days of the later of the decision under s 75 or the provision of the information under s 82, subject to some exceptions which are not presently relevant: s 88. The Minister must then give written notice of the decision about the assessment approach within a further 10 business days: s 91.
21 It is common ground that the Minister made no decision under s 87 of the Act selecting one of the assessment approaches listed in s 87(1) and that the controlled action was not assessed under Pt 8 of the Act. The evidence also shows that the Territory Minister on 2 April 2003 wrote to the Commonwealth Minister, in response to the notification under s 77 of the Act of the decision that the proposed action was a controlled action. The Territory Minister at that time notified the Commonwealth Minister that, pursuant to cl 5 of the Agreement, it commenced on 19 March 2003 when the amendments to the Administrative Procedures commenced so

that the assessment of the proposed action would be under the Agreement. The Commonwealth Minister accepted that position on 27 May 2003.

22 Upon the issue being raised, the applicants put the contention that there has been no valid assessment of the controlled action because, in the circumstances, the assessment should have taken place under Pt 8 of the Act. In fact, it took place under the Agreement. The consequence, they contended, is that the Minister has failed to exercise the power and to perform the functions required by Pt 8 of Ch 4 of the Act. They sought leave to amend their application to make such a claim, as it had not otherwise been expressed in their application, and to make consequential amendments to their application. There was no objection to that application. I shall give leave to further amend the application in the terms proposed by the applicants.

23 Both the Commonwealth Minister and MRM contended that s 83 operated to remove the consideration of the controlled action from Pt 8 of the Act in the circumstances because each of the three conditions prescribed by s 83 were met on 19 March 2003 when the Agreement came into effect, and that the obligation of the Minister under s 87 to select an assessment approach in relation to the controlled action did not arise because, at the earliest, the 20 business days time limit prescribed by s 88 occurred after 19 March 2003. Indeed, they contended, the Minister after that date had no power to make a decision under s 87. In essence, they contended that Pt 8 applied between 4 and 18 March 2003 but that it then ceased to apply, and as the Minister had made no decision under s 87 by that time, s 83 then operated in respect of the earlier decision under s 75 so as to enliven the assessment process under the Agreement.

24 The starting point to consider the respective contentions is s 81 of the Act. It provides:

(1) This Part applies to the assessment of the relevant impacts of an action that the Minister has decided under Division 2 of Part 7 is a controlled action.

(2) This section has effect subject to sections 83 and 84.

(3) This section does not limit section 82.

Of itself, it does not appear to address the particular circumstances. Section 83(1)(c) is expressed in the present tense. But it is not clear

whether it is directed to a state of affairs which exists at the time of the decision under s 75 or at the time of the Agreement coming into force.

25 The Minister and MRM pointed out that s 83 could have been drafted to indicate that it applied at the time of the decision under s 75, and at no later time. So it could. On the other hand, to give s 83 "an ambulatory operation" as contended would or could mean that after an assessment approach selected under s 87 had been decided (and perhaps that the assessment procedures under Pt 8 extensively followed) the fact of a bilateral agreement then coming into force might frustrate that process. Of course, in those circumstances, one might expect the parties to a bilateral agreement to expressly cover that situation by ensuring it did not frustrate the ongoing assessment processes. Indeed, the contention of the applicants that s 83 does not permit a bilateral agreement coming into effect only after the decision under s 75 from having impact upon the applicability of Pt 8, because it would or could render nugatory the Pt 8 assessment process so far as it has gone, is readily met. The Commonwealth Minister would be well alert to that risk. That prospect would inform the decision whether to enter into a bilateral agreement, and upon its terms and its applicability to the decision under s 75, and the extent to which any assessment processes already undertaken under Pt 8 should be taken into account as part of the assessment procedure under the bilateral agreement. It might also be that, once the assessment process was selected under s 87, s 83 would be construed so as not to operate to bring to an end the application of Pt 8 to the assessment of the relevant impacts of the controlled action. That would require reading s 83(1) as providing that Pt 8 does not apply in relation to an action if the Minister had made a decision under s 87(1). That is not a matter which directly arises for consideration, although it is desirable to construe s 83 in a way which would provide a harmonious operation in relation to events which may arise.

26 I have come to the conclusion that s 83 operated in the particular circumstances to exclude the assessment processes which Pt 8 provides for, so that the assessment of the relevant impacts of the controlled action was to be made in accordance with the Agreement. In other words, although Pt 8 applied when the Minister’s decision was made under s 75 that the proposed action of MRM was a controlled action, it ceased to apply to the assessment of the relevant impacts of that controlled action

from 19 March 2003. I do not think s 83(1) should be read to exclude the application of a bilateral agreement which comes into force before the Commonwealth Minister makes a decision under s 87 as to the assessment approach. I do not intend to express any view about the application of Pt 8, after both a decision under s 75 and a decision under s 87, save to note that it is not clear even then that a bilateral agreement entered into in such a circumstance would not displace the ongoing operation of Pt 8.

27 That conclusion reflects the object of the Act specified in subs 3(1)(d) of promoting a cooperative approach to the protection and management of the environment between governments. That object is explained in subs 3(2)(b) by reference to strengthening intergovernmental cooperation through bilateral agreements and in subs 3(2)(g) by reference to promoting a partnership approach to environmental protection and biodiversity conservation through bilateral agreements with States and Territories. Reference may also be made in that regard to s 44(d) of the Act.

28 It is consistent with those purposes that a bilateral agreement might displace the operation of Pt 8 of Ch 4, at least up to the time that the Commonwealth Minister under s 87 makes a decision about one or other of the assessment approaches it provides for. There is no apparent reason why the opportunity for cooperative agreement about a State or Territory based assessment method should be available only up to the time the Commonwealth Minister decides under s 75 that a proposed action is a controlled action. The Minister retains the quality control on the means of assessment by deciding whether or not to enter into a bilateral agreement.

29 Chapter 3 Pt 5 deals generally with bilateral agreements. Section 45(2) defines a bilateral agreement as one which, inter alia, provides for an efficient and timely and effective process for environment assessment and approval of actions, and for minimising duplication in the environment assessment and approval process through Commonwealth accreditation of the processes of the State or Territory. Part 5 contains extensive provisions to ensure that a bilateral agreement is consistent with and reflects the expectations of the Commonwealth Minister, including s 53 dealing specifically with its terms concerning listed threatened species and ecological communities and s 54 dealing with migratory species. As the applicants' submission described it, there is an "up-front" accreditation of State and Territory assessment and approval processes of classes of action.

30 There is no apparent reason why, given the requirements for a bilateral agreement, and the cooperative objectives of the Act, the opportunity for a bilateral agreement to apply to the assessment of a controlled action should be confined. It is also, in my view, consistent with the context of s 83 that that opportunity should be available at least until the making of a decision by the Commonwealth Minister about some other assessment approach under s 87. Part 8 applies by reason of the making of a decision under s 75 that a proposed action is a controlled action: s 81(1). But Pt 8 does not apply only at or immediately after that point in time. Section 81(2) provides that s 81(1) has effect subject to ss 83 and 84. That contemplates Pt 8 having the state of being operative from, and not merely at, a particular point in time. It connotes a continuous temporal operation. That is consistent with the procedural steps which the balance of Pt 8 prescribes. Sections 83 and 84 then prescribe circumstances, at least until a decision is made under s 87, in which the continued applicability of Pt 8 will come to an end.

31 In that contextual setting, s 83 would apply during the period of assessment of relevant impacts of a controlled action. When its conditions were satisfied, it would cause s 81(1) to cease to have effect and Pt 8 would no longer apply to the assessment of those impacts.

32 The terms of s 83 also readily accommodate that view. It provides that Pt 8 is not to apply if certain facts are in existence. It does not confine its operation to the existence of those facts at the time of the Minister's decision under s 75 that proposed action is a controlled action. Unlike s 81(1), expressed by reference to a past fact (the decision of the Minister), s 83(1)(c) refers to a present fact: the current operation of the declaratory provision of the bilateral agreement; and generally s 83(1) is activated by reference to the existence of three current facts or conditions.

33 In my view, other provisions of the Act to which the applicants drew attention do not suggest the alternative construction of s 83 for which they contended.

34

Section 47 permits a bilateral agreement to declare classes of actions do not need assessment under Pt 8, if they have been assessed in a specified

manner. That must contemplate prospective assessment in the specified manner (approved by the Commonwealth Minister: s 47(2)), otherwise it would only operate after the specified assessment and in the meantime the assessment procedure under Pt 8 would have to be followed: see eg *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 320-321. In my view, s 47 does not inform the proper construction of ss 81 and 83. I also note that ss 87(1)(a), 87(4) and 91(2) provide for the Minister to select an assessment approach by an "accredited assessment process". That contemplates what the applicants called a "one-off" accreditation process. But I do not think that the power of the Minister to select an accredited assessment process under s 87 and in furtherance of the assessment of the impacts of a controlled action under Pt 8 supports the view that a bilateral agreement, coming into force at least before the Minister's decision under s 87, cannot operate to exclude the application of Pt 8 to the assessment process. The two processes simply are different.

35 Section 46 permits a bilateral agreement to declare that actions in a class specified in the bilateral agreement do not need approval under Pt 9 if they are approved under a bilaterally accredited management plan. It is one of the class of actions which s 29 recognises may be declared by agreement not to need approval under Pt 9. It is not suggested that the bilateral agreement under consideration attracted the application of s 46. The process of achieving a bilaterally accredited management plan under s 46 is obviously a prolonged and complex one. Section 46 operates in a different context to s 47. Section 46 contemplates that no approval at all by the Minister under Pt 9 would be required. It is common ground that the Minister's approval under Pt 9 in respect of this controlled action was necessary. I do not therefore regard s 46 as throwing light upon the proper construction of ss 81 and 83 in the present circumstances.

36 For those reasons in my judgment, the assessment procedure in relation to the controlled action undertaken under the Agreement was not of itself unauthorised or invalid.

Preparation of Assessment Report 51

37 Pursuant to cl 1 of Sch 1 of the Agreement, the assessment must be carried out under the *Environmental Assessment Act 1982* (NT). Section 7

of that Act allows for administrative procedures to be determined, for the purpose of achieving the objects of that Act. Under that section, the Administrative Procedures were established. As noted above, apparently because the Administrative Procedures were not initially suitable for assessment of actions under the Agreement, cl 4 and cl 5 of the Agreement provided that the Agreement did not enter into force until certain amendments were made to the Administrative Procedures. Those amendments commenced on 19 March 2003. They are referred to in the Administrative Procedures as 'modified procedures'.

38 Clause 3A of the Administrative Procedures states that:

The modified procedures apply in relation to a proposed action when the proposed action is assessed by the Territory in accordance with a bilateral agreement between the Territory and The Commonwealth made under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 of the Commonwealth.

39 Clause 13.2 of the Agreement and s 77 of the Act require the Commonwealth Minister to give notice of the decision that the proposed action is a controlled action to the relevant Minister of the Northern Territory. Such notice was given by letter to the Territory Minister dated 4 March 2003.
40 Clause 14.2 of the Agreement required the Territory Minister to indicate by written notice to the Commonwealth Minister whether the proposed action would be assessed pursuant to the Agreement. On or about 2 April 2003, an undated letter from the Territory Minister was received by the Commonwealth Minister (the undated letter), which indicated that the assessment of the proposed action would be undertaken pursuant to the terms of the Agreement.
41 In many cases, the requirements of the Administrative Procedures simply mirror explicit requirements of the Agreement. Where such provisions are relevant in the following paragraphs, they are both identified. Clause 2.1 of sch 1 of the Agreement and cl 8 of the Administrative Procedures required the Territory Minister to decide which assessment approach will be used. The possible approaches include the preparation of an Environmental Impact Statement, the preparation of a Public Environment Report, and inquiry carried out under the *Inquiries Act*

(NT). The undated letter of the Territory Minister indicated that the assessment approach would be by the preparation of an Environmental Impact Statement (EIS).

42 The Agreement (at cl 3.1) and the Administrative Procedures (at cl 8(3)-(6)) also required the Territory Minister to produce guidelines relating to the matters that should be dealt with in the EIS, and set out certain requirements for those guidelines, including that a draft be made available for public comment for at least 14 days. The undated letter confirmed that such guidelines had been prepared and that they had been available for public review for a period of 28 days to 14 March 2003. The Territory Minister advised that public comments received would be taken into account in finalising the guidelines. Final guidelines were issued in the second half of March 2003.

43 On 15 August 2005, MRM wrote to the Commonwealth Minister's Department to advise that a draft EIS had been lodged with the Northern Territory. That letter also enclosed a copy of the draft EIS. Clause 4 of Sch 1 of the Agreement and cl 9 of the Administrative Procedures required that the draft EIS be made available for public comment for a period of at least 28 days. The letter of 15 August 2005 from MRM indicated that the draft EIS would be available for public comment for 10 weeks, ending 21 October 2005.

44 The draft EIS noted the presence of threatened terrestrial fauna species and migratory fauna species in and near the project area. It considered possible impacts upon fauna of the controlled action. It suggested that no migratory species were likely to be significantly affected by the controlled action.

45 The draft EIS also addressed aquatic ecology. It noted that the McArthur River ceases to flow during most dry seasons, and that most stretches of water – particularly those near the mine project area – dry to a series of larger isolated pools during most dry seasons. The major permanent refuge pools for aquatic ecology were said to be Eight Mile Waterhole, about 8 km upstream of the mine project area and Djirrinmini Waterhole, about 1 km upstream of the mine project area and of the proposed diversion of the McArthur River. It noted the recorded presence of the freshwater sawfish in the McArthur River system, and it identified the possible effect of the proposed diversion of the river on that species from river and creek re-alignments, downstream water degradation, drawdown effects on permanent refuge pools, and change in stream flow

volumes. It concluded that:
Due to the current lack of data on the endangered freshwater sawfish in the region of the mine, a specific survey for this species will be undertaken and, based on the survey findings, a management and monitoring plan for this species will be developed.

46 Among the comments received on the draft EIS was a letter from the Commonwealth Department of the Environment and Heritage (DEH) dated 31 October 2005. It expressed concerns about the impact of the controlled action on the freshwater sawfish and populations of migratory birds in the wetlands at the mouth of the McArthur River. As to the freshwater sawfish, the DEH commented upon the absence of an outline of a survey design and management plan; and upon the need for prescribed remedial measures for drawdown of dry season refuge pools. As to migratory bird populations, the DEH commented upon the increased sediment load carried in wet season flow to the mouth of the river; and upon the need to monitor sediment deposition to assist in determining if any significant impacts are occurring.
47 The Northern Land Council, who act for the applicants in this matter, also made comments on the draft EIS during that period including recommendations that the controlled action not be approved until issues relating to the freshwater sawfish, other aquatic fauna, and various bird species were more thoroughly considered.
48 Clause 5 of sch 1 of the Agreement and cl 12 of the Administrative Procedures required MRM to produce and lodge a supplement to the EIS that took into account any public comments received on the draft EIS. Despite the fact that cl 12 of the Administrative Procedures states that the proponent must ‘conduct a revision of the statement and produce a supplement to the statement’, the clause should be read as requiring a ‘revision of the statement *by the production of* a supplement to the statement’. That is consistent with the requirements of the Agreement, which only makes reference to the production of a supplement and is made clear by cl 12(2) of the Administrative Procedures which states:
A supplement referred to in subclause (1) shall, on its completion, become part of the statement it supplements and a reference to the statement then becomes a reference to the statement together with the supplement.

49 In December 2005, MRM released a Supplement to the draft EIS. It

provided a copy to the DEH. The original was lodged with the Northern Territory Government.
50 The Supplement to the draft EIS addressed the public comments, including those of the DEH. MRM proposed the extension of its environmental monitoring of the McArthur River estuary to transect the delta of its mouth – apparently to respond to one of the concerns of the DEH about monitoring impacts on migratory birds. It proposed a survey of freshwater sawfish, and that a detailed management and monitoring plan for the freshwater sawfish would be formulated based on the results of the survey. The initial survey was to be conducted in the early part of the 2006 dry season and towards the end of the 2006 dry season. Each sampling trip was to include a leading authority on freshwater sawfish, who had proposed the methodology for the proposed survey.
51 Clause 6 of the Agreement required the Territory Minister to prepare an Assessment Report that takes into account the draft EIS, comments received on the draft EIS, the Supplement to the draft EIS and any other relevant information available. Pursuant to that clause, the Territory Minister provided the Commonwealth Minister with Assessment Report 51 (AR 51), with a letter of 23 February 2006. AR 51 was unable to conclude that the project could proceed without unacceptable environmental impacts.
52 AR 51 said that:
The outcome of the environmental impact assessment for this proposal is that the EPA (Environmental Protection Authority) is unable to conclude that the project can proceed without unacceptable environmental impacts. The EPA is not confident that mining at the site can be managed with minimal long-term risk to the environment adjacent and downstream of the mine site. The proponent has not been able to adequately demonstrate that there will be no significant environmental impacts as a result of the operation.

53 It identified the issues of most concern to include the potential impacts associated with river and creek re-alignments and the potential environmental risk of mining operations posed by their location within the primary channel of a major tropical river. It considered environmental impacts from the river and creek re-alignments, leaching of waste rock and tailings seepage, degradation in surface water quality, and increased groundwater drawdown. It considered impacts on biology by habitat loss

and fragmentation, and impacts on aquatic environments by isolation of upstream and downstream aquatic environments, downstream impacts of sedimentation and contamination, and alteration of river flows and drawdown effects, including impacts on the Djirrinmini Waterhole as an aquatic habitat.
54 AR 51 specifically commented on the potential impact of the controlled action on the freshwater sawfish. It concluded:
In the absence of baseline surveys, and proposed management, monitoring and mitigation strategies, adequate assessment of the potential impacts of the open cut project on the freshwater sawfish cannot be made at this point in time.

55 AR 51 also addressed impacts on migratory species. It concluded that monitoring of sediment deposition and contamination in the wetlands at the north of the McArthur River would assist in determining if any significant impacts were occurring. It observed that the commitment by MRM to expand its monitoring program should include consideration of migratory birds. It also noted the potential impact upon the white-browed Robin by habitat fragmentation in the McArthur River riparian corridor.
56 Also enclosed with the letter of 23 February 2006 was a notice under s 130(1B)(b) of the Act. That section refers to a notice:
(i) stating that the certain and likely impacts of the action on things other than matters protected by the controlling provision for the action have been assessed to the greatest extent practicable; and

(ii) explaining how they have been assessed.

The statements comprising the notice were expressed in terms to meet the requirements of s 130(1B)(b). The Territory Minister also concluded in the letter of 23 February 2006 that the controlled action described in the draft EIS should not proceed. It does not appear that, under the Act or the Agreement, that conclusion had any particular status or consequence for the Commonwealth Minister. Under s 130(1B) of the Act, the first day after the provision of that notice (being 24 February 2006) marked the start of the period within which the Commonwealth Minister had to make a decision whether or not to approve the taking of the controlled action. That period was 30 business days pursuant to s 130(1)(a) and (2)(a), subject to certain time extensions provided for.

Consideration of Assessment Report 51

57 Section 132 of the Act states:

If the Minister believes on reasonable grounds that he or she does not have enough information to make an informed decision whether or not to approve for the purposes of a controlling provision the taking of an action, the Minister may request any of the following to provide specified information relevant to making the decision:

(a) the person proposing to take the action;
(b) the designated proponent of the action;
...

58 By letter of 16 March 2006, a delegate of the Commonwealth Minister made such a request of MRM. The letter noted the conclusion of AR 51 that there was insufficient information in the EIS to enable an adequate assessment of the impacts on the freshwater sawfish. The delegate requested a revised description of the potential impacts associated with the realignment of the McArthur River and of Barney Creek and an assessment of the potential impacts of the controlled action on the freshwater sawfish, and details of how MRM proposed to manage, monitor and mitigate those potential impacts upon the freshwater sawfish. Under s 130(5) of the Act, that request caused the time period under s 130(1)(a) to pause. The letter noted that the statutory time period within which the Commonwealth Minister was required to make a decision would restart when that information was received. It is the submission of the respondents that a second assessment report – discussed below – was prepared as part of the response to that request for further information. However, there is an issue as to whether the second report had to be prepared pursuant to the Agreement. That question is dealt with later in these reasons.

Preparation of Assessment Report 54

59 According to the Commonwealth Minister's statement of reasons for decision, on 20 March 2006 the Northern Territory Minister for Mines and Energy asked MRM to lodge an amended proposal under cl 14A of the Administrative Procedures to address outstanding environmental issues. It is unclear on the material why the Northern Territory Minister for Mines

and Energy made that request, or whether it related at all to the assessment of the proposed controlled action under the Act. It may have been part of a separate approval process under the *Mining Management Act 2001* (NT) (the NT Mining approval process), which was being undertaken concurrently with the process under the Act and the Agreement.

60

In any case, on 12 April 2006, MRM notified the Northern Territory Environment Protection Agency (the EPA) of its intention to alter the proposed action under cl 14A of the Administrative Procedures. It was to do so to address the concerns raised in AR 51. It is apparent that the alteration was not such that the proposed action became a different action, but rather was directed toward additional information that was required to satisfy the Northern Territory and the Minister as to the impacts of the same action. The alterations are discussed below.

61 Pursuant to cl 14A, the Territory Minister is required to

... re-consider the environmental significance of the proposed action and by notice in writing to the proponent ... inform [it] that –

...
(b) he has decided that a report or a statement is necessary in respect of the proposed action,
as appropriate on account of the alteration and the notice shall be complied with and have effect as if a notice under clause 8(2). (See above, [18].)

62 On this occasion, the Territory Minister decided that the amended proposal would be formally assessed under the *Environmental Assessment Act 1982* (NT) by a Public Environment Report (PER). Guidelines for the preparation of the PER were produced by the EPA on 9 May 2006.

63 The guidelines required the PER to identify and describe the proposed alterations to the plan to convert the mine from underground to open cut operations and the change in environmental significance of the proposal by virtue of the alterations. It also had to address the findings made in AR 51,

by the collection of further appropriate data, the provision of supporting information, the redesign of the proposal, the preparation and demonstration of appropriate management measures, and the proposed monitoring plans to be implemented, as well as the formulation of appropriate contingency plans.

64 As to the diversion of the McArthur River, MRM was required in the PER to provide details of the design measures and proposed management strategies to demonstrate that downstream and upstream impacts to the McArthur River system, and impacts to the diversion channel, are minimised in any altered diversion design taking into account the issues raised in Appendix 1 of AR 51. MRM was to demonstrate that river morphology upstream and downstream of the realignment could be maintained during mine life and after mine closure; that the aquatic habitat integrity could be maintained both downstream (including estuarine, wetland and coastal areas) and upstream through the life of the mine and after mine closure; and that a functioning aquatic, riparian and riverine system in the diverted river channel is able to be established and sustained within a timeframe that would not cause fragmentation of fauna populations in the medium to long terms. It specified the need for detailed characterisation of the in-stream and riparian habitats of the existing river channel and detailed biological design specifications proposed for the realigned channel.

65 On 4 July 2006, MRM advised the Commonwealth Minister by letter that a PER had been lodged with the Northern Territory and would be available to the public for 28 days. A summary of the PER attached to that letter stated that:

Information sought by the Australian Government Department of Environment and Heritage has been covered in previous sections in relation to the river diversions and freshwater sawfish assessment.

66 With regard to the alterations from the previous proposal, the PER stated that '[t]he overall development proposed by MRM has not changed.' It stated that the design and planning of the proposed action had been completed in greater detail. It also stated that the 'modifications proposed for the project include design improvements for the diversion channels, additional safeguards for waste management and water quality,

an expanded environmental monitoring program, and a delivery model to improve social and economic benefits to the community.' The Minister's delegate described the controlled action as:
... [expansion of] the existing McArthur River zinc/lead/silver mining and processing operations, including the diversion of the McArthur River, development of a zinc refinery and weir on the Glyde River, and all associated infrastructure and operations ...

The alterations identified above did not materially change the proposal from that which was identified as the controlled action.
67 The PER noted that a survey of freshwater sawfish had been undertaken in May 2006 to provide additional data. A total of 29 species of freshwater or brackish water fish species were recorded, including the capture of one sawfish at Eight Mile Waterhole. This occurred in a sampling trip of eight days carried out at the end of the wet season at 16 sites. A survey report appended to the PER noted that, due to water levels and flow rates being higher than average for that period, there was impeded access to parts of the river. Sampling sites were therefore selected on the basis of accessibility and flow rate, but included sites above and below the proposed diversion area, tidal and non-tidally affected waters and permanent waterholes.
68 The survey report noted that the capture of a freshwater sawfish at Eight Mile Waterhole supported the theory that juveniles migrate upstream from their estuary birthplace into fresh water habitat during the beginning of the wet season and highlighted the importance of upstream refuge pools. They migrate back to marine environments to breed and give birth. Consequently, it would be necessary for those fish to use the proposed diversion channel when travelling up and down the river. In respect of Djirrinmini Waterhole, the report considered that its shallow depth and limited size suggests that it is unlikely to represent an important refuge for freshwater sawfish throughout the dry season, but that this did not negate its importance as a resting pool for migrating freshwater sawfish and as a dry season refuge for smaller fishes, and it said that:
... the significance of this pool in terms of offering dry season refuge needs to be confirmed by subsequent sampling during the dry season and throughout the realignment program.

69 The survey report concluded that, as few large permanent waters exist

on the McArthur River, waterholes such as Eight Mile, and to a lesser extent Djirrinmini, represent important refuge habitat for fishes during the dry season, and that subsequent dry season sampling would be to confirm the significance of these pools and that of any waters remaining.
70 The key changes to the design of the diversion channels were said to result in channels which will replicate the form and function of the existing river and creek, and to ensure the channels will not be subject to significant erosion or sediment depositions. It was said that detailed design and planning into the speed of water flow, shape of the diversions, and use of rocks and woody debris to mimic the existing river and creek will ensure there are no detrimental impacts on the McArthur River up stream or down stream of the diversion. It was then asserted that the rehabilitation of the channels will provide a suitable environment for fish passage and establish a functioning riverine ecosystem.
71 The PER also commented on the relative importance of the population of freshwater sawfish in the McArthur River as compared to other sites in Australia. It stated:
Results of the ichthyological surveys of northern Australian rivers suggest those that contain permanent deeper waters, attributable to a large catchment area or spring/groundwater feeding etc, and which maintain a comparatively high level of interconnectedness between dry season pools, may contain higher numbers of sawfishes than those systems that have limited permanent waters or disjunct pools (Thorburn *et al*, 2003).

From a regional perspective, the upper reaches of the McArthur River may be described as marginal habitat for *P. microdon* in comparison to other Gulf rivers, such as the Roper River. It is possible that the permanent nature of estuarine waters and complex tidal delta of the lower McArthur River is more likely to hold higher numbers of *P. microdon* throughout the year than upper freshwater reaches.

72 It then asserted that a key design objective of the diversion was to ensure that the diversion channels did not create a barrier which would restrict or impede the up stream or down stream migration of fish species including freshwater sawfish, reduce the length of the potential migration period or result in the biological segregation of up stream and down stream populations of non-migrating species. It also noted that the proposed ongoing monitoring of fish distribution, abundance and migration data

would provide an indication of the utilisation of the diversion channels and the ability of the channels to function in an ecological sense. The PER further undertook that, if it was found that particular features of the channels were proving a barrier to fish passage, the design would be reviewed.

73 In respect of proposed monitoring programs for aquatic ecology, riparian birds and migratory birds, the PER stated:

All programs are currently in draft form as detailed information such as sampling size and frequency, sample sites, and data collection/analysis methods cannot be finalised until preliminary field survey trials are undertaken. Following initial field surveys, the programs will be refined and presented to the Northern Territory Government for comment, after which agreed commitments will be made.

The monitoring proposed in the PER had four key elements: monitoring fish populations in refuge pools and tidal reaches, monitoring fish and macro invertebrate populations in seasonal pool riffle habitats; monitoring for heavy metals in aquatic biota; and monitoring fish passage through the diversion channels.

74 MRM contended that the steps taken in respect of the PER were not taken as part of any assessment process undertaken for the purposes of Pt 8 of the Act. It says the PER process was a separate assessment process undertaken under, and for the purposes of, the Northern Territory legislation. The PER thus fulfilled two functions: as a PER for the purposes of the Northern Territory's assessment processes, and as utilised by MRM to provide to the Commonwealth Minister additional information for the purpose of the Minister making his decision under Pt 9 of the Act in the light of its response to the request for information under s 132 of the Act.

75 By letter of 1 September 2006 the Northern Territory Department of the Environment and Heritage provided the DEH with Assessment Report 54 (AR 54). It was based on the PER. That letter indicated the Northern Territory had completed its assessment of the relevant impacts of the controlled action. It said that MRH had incorporated the information requested by the DEH under s 132 in the PER. It also concluded that the provision of the PER and AR 54 would trigger s 130(5)(b) of the Act, such that the time in which the Commonwealth Minister had to make the decision resumed.

76 AR 54 records that submissions on the PER were received from government agencies and from the public, and that additional information sought by DEH had been included in the PER. No Supplement to the PER taking into account and responding to any public comments on the PER was prepared.
77 AR 54 states:
In presenting the amended proposal in the Public Environmental Report (PER) the proponent has adopted a similar approach to that taken in the previous Environmental Impact Statement (EIS) and Supplement. That is, rather than taking action to minimise longer term environmental impacts of operations, it proposes to wait to see if impacts occur and then take remedial actions. This is not best practice risk management as defined by AS/NZS4360: 2004-risk management, nor does it meet the principles underpinning ecologically sustainable development as set out in the intergovernmental agreement on the environment. (COAG 1992).

It is recognised that taking a precautionary and best practice risk management approach will potentially raise the level of capital investment required to commence operation. Information contained in the PER as well as discussions with representatives of the company indicated that the proponent places a value on avoiding/deferring such expenditure.

78 After referring to the use of reactive management techniques, the AR 54 states:
The approach adopted by the company requires a heavy reliance on rigorous monitoring, and clear and agreed understanding of trigger points for action (which in turn requires a good understanding of ecological implications of any impacts of the mining operation). The PER does not demonstrate that this approach is backed up with appropriate levels of knowledge and understanding.

79 AR 54 said that the absence of a baseline study of dispersal of freshwater sawfish in the McArthur River system was a "notable limitation in the material presented" and that a dispersal study could serve as a baseline against which use of the diversion channel could be monitored. In addition to impacts on the migration of the freshwater sawfish from the river realignment, it considered impacts by water drawdown in Djirrinmini Waterhole, particularly during the late dry season, and the risk of

downstream estuarine delta contamination. As to the 2006 survey, it said:
The 2006 survey does not represent a particularly comprehensive nor substantial baseline for the ongoing assessment of impacts upon freshwater sawfish; and does not provide any detail on dispersal patterns.

80 AR 54 also noted uncertainty about possible risks to significant biodiversity values in the coastal and marine environments around the lower McArthur River, so that the project should include a substantially enhanced monitoring program. It recorded:
That EIS and PER for this proposed development suggest a number of monitoring programs that may or may not be developed for various aspects of biodiversities. In most cases, these monitoring programs are indicative only, based on currently very limited (or no) baseline information, have had no assessment of statistical power (the effectiveness with which change can be detected), and no clearly developed linkage with management or regulatory response.

81 Nevertheless, AR 54 includes the observation by the expert engaged by the Northern Territory Environment Protection Authority that the shortcomings in the draft EIS and its Supplement had been meaningfully addressed in the PER. That is plainly so. It would be surprising if those shortcomings had not been addressed in a responsive way. That does not, however, mean that they had been fully addressed and resolved to the satisfaction of the Minister.

Consideration after Provision of Assessment Report 54

82 Before any approval decision can be made, s 131(1) of the Act requires the Commonwealth Minister to

(a) inform any other Minister whom the Environment Minister believes has administrative responsibilities relating to the action of the decision the Environment Minister proposes to make; and

(b) invite the other Minister to give the Environment Minister comments on the proposed decision within 10 business days.

Pursuant to that section, requests for comment were sent to the Commonwealth Minster for Industry, Tourism and Resources and the

Commonwealth Minister for Families, Community Services and Indigenous Affairs on 15 September 2006.

83 The letters did not contain information as to the decision which the Commonwealth Minister proposed to make. They referred to an attached draft decision, but due to an administrative error, a copy of the draft decision was not sent to the Commonwealth Minister for Industry, Tourism and Resources until 19 September 2006. It is unclear as to whether the Commonwealth Minister for Families, Community Services and Indigenous Affairs ever received a copy of the draft decision. In any event, no comments were received from either Minister relating to the proposed decision. It is not suggested that any such shortcomings vitiate the Minister's decision.

84 On 17 October 2006, the NT Minister for Mines and Energy informed the Commonwealth Minister that the proposed controlled action had been approved under the NT Mining approval process.

85 On the same day, the Commonwealth Minister's Department received a Mining Management Plan (the MMP) from MRM. It was subtitled "Update for period October 2006 to October 2007". It was to be lodged with the Northern Territory Department of Primary Industries, Fisheries and Mines. According to the Commonwealth Minister's reasons for decision, the MMP was received as a response to a request under s 132 of the Act. It is unclear whether the MMP was included in the brief that went to the Commonwealth Minister on 18 October 2006. Furthermore, it is unclear whether the MMP was provided to the Commonwealth Minister at all before he made his decision.

86 Pursuant to s 133 of the Act, the Commonwealth Minister approved the proposal, subject to certain conditions, on 20 October 2006.

87 The conditions imposed by the Commonwealth Minister of course limited the approval to the proposed action, and required:

• the preparation and approval of a freshwater sawfish management and monitoring plan before the realigned channel is connected to the McArthur River (condition 2);

• the approval of a monitoring program to assess the impact of metal pollution at Bing Bong Port on listed migratory birds within six months (condition 3);

• annual reports after commencement of mine construction demonstrating compliance with the conditions of the approval (condition 4);

• an independent audit of compliance with the conditions and the effectiveness of measures to mitigate impacts on listed threatened and migratory species within three years of the commencement of mine construction (condition 5); and

• the revision of plans approved under the conditions (conditions 6-7).

88 The details of condition 2 was as follows:

2. Within 6 months of the date of this approval, the person taken the action must submit for the Minister's approval the freshwater sawfish management and monitoring plan with respect to protection of the threatened freshwater sawfish (*pristis microdon*) in the McArthur River.

The plan must include:

(a) ecology and biology of the freshwater sawfish,

(b) description of the existing environment,

(c) potential impacts of the realignment of the river, including impact on up stream migration,

(d) development of criteria against which the effectiveness of this plan may be measured;

(e) management actions to ensure longevity of McArthur River sawfish population,

(f) actions in the event of fish becoming trapped in the realigned section of the river,

(g) ongoing monitoring of the freshwater sawfish population over the life of mining operations, and

(h) establishment of a community awareness and education program.

The plan must be approved at least one wet season before the realigned channels is connected to the McArthur River. The approved plan must be implemented.

89 On 19 December 2006, in response to a request made on behalf of the applicants under s 13 of the *Administrative Decisions (Judicial Review Act) 1977* (Cth), the Minister gave a statement of reasons for his decision. The statement records in summary the reasons for the decision to be:
In making the decision on whether to approve the taking of the proposed action, I took into account (among other matters) the principles of ecologically sustainable development as required under section 136(2)(a) of the EPBC Act, and the precautionary principle as required under section 391 of the EPBC Act.

In making the decision on whether to approve the taking of the proposed action, I also took account of the impacts of the proposed action, and the commitments made by the proponent to mitigate the impacts of the action and the requirements of the Northern Territory Minister for Mines and Energy. I found that if I approved the proposed action subject to conditions reflecting those commitments and requirements plus additional requirements in relation to the preparation and implementation of plans and independent audit of compliance, the impacts of the action on listed migratory species and listed threatened species would be sufficiently mitigated such as not to be unacceptable.

I was satisfied that MRM has the ability to construct and operate the McArthur River open cut mine and implement appropriate measures to mitigate impacts on listed migratory species and listed threatened species.

In the light of my findings set out above, I decided to approve the proposed action subject to conditions set out in Annexure 1 to the instrument of approval, a copy of which is attached.

THE CONTENTIONS

90 There were four principal matters ultimately argued by the applicants as demonstrating reviewable error on the part of the Minister under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and as demonstrating jurisdictional error on his part so as to enliven the entitlement to relief under s 39B of the *Judiciary Act 1903* (Cth).

91 The first, added by the second further amended application, is that the Minister failed to assess the relevant impacts of the controlled action under Pt 8 of the Act when he was required to do so. I have dealt with that contention earlier in these reasons: see [16]-[36]. Although the Agreement was not in force on 4 March 2003 when the Minister decided that MRM's proposed action was a controlled action, it came into force on 19 March 2003. I concluded that, by reason of ss 81 and 83 of the Act, from that time the assessment of the relevant impacts of the controlled action was to be undertaken in accordance with the Agreement. Subject to the other contentions, that is how the assessment was done.

92 The second contention was that the Minister failed to comply with procedures with which he was required to comply, and was not authorised by the Act or erred in law, in approving the controlled action on 20 October 2006 upon conditions. It, and the other contentions proceeded on the basis that the assessment procedure to be adopted was that specified under the Agreement. The Territory Minister selected an assessment approach in accordance with the Agreement of an environmental impact statement, and so provided AR 51 to the Minister on 23 February 2006. It was argued that there then followed a series of legal errors:

1. the Minister wrongly regarded AR 51 as an assessment report under the Agreement, and as required by s 47(4) of the Act when it did not have that character because it contained inadequate information;

2. the Minister was not therefore entitled to seek further information from MRM under s 132 of the Act;

3. the Territory Minister then erroneously adopted an alternative or additional assessment under the Agreement of a public environmental report, at least in part to procure the further information sought by the

Commonwealth Minister;

4. the PER then prepared by MIM, at least in part for the purpose of providing the further information sought by the Minister, but was provided to the Minister without any supplement addressing the public submissions made in response to it;

5. the Territory Minister in then providing AR 54 to the Minister also did not take into account any submissions made by the public in response to the PER;

6. consequently AR 54 did not itself qualify as an assessment report as required by the Agreement and s 47(4), and in any event it did not so qualify because it also did not contain adequate information to have the character of an assessment report because it did not contain a statement of conditions for approval of the controlled action that the Northern Territory may, or proposed to, apply to the controlled action.

93 The third contention was that the Minister erred in law in failing to take into account relevant conditions imposed under a law of the Northern Territory on the taking of the controlled action and in failing to comply with the procedures specified in s 134(4)(a) of the Act in respect of the conditions in the amended mining authorisation imposed by the Northern Territory Minister of Mines.

94 The fourth contention was that the Minister failed to take into account relevant considerations, namely the absence of surveys for the freshwater sawfish to assess the impacts of the controlled action on that species, and the principles of ecologically sustainable development and the precautionary principle in making his decision.

95 I shall address the contentions (other than the first, which I have already dealt with) in sequence.

WHETHER MINISTER RECEIVED AN ASSESSMENT REPORT UNDER THE ACT

96 The receipt of an assessment report is a precondition to the exercise of the Minister's power under s 133. That is clear from the terms of s 133(1):

After receiving an assessment report relating to a controlled action... the Minister may approve for the purposes of a controlling provision the taking of the action by a person.

97 An assessment report is defined in the dictionary in s 528 to have the meaning given by s 130(2). Relevantly, in the case of an assessment under a bilateral agreement, s 130(2) says an assessment report is a report given to the Minister as described in s 47(4) of the Act.
98 Section 47(4) of the Act requires that a bilateral agreement must provide for the Commonwealth Minister to receive:
... a report including, or accompanied by, enough information about the relevant impacts of the action to let the Minister make an informed decision whether or not to approve under Part 9 (for the purposes of each controlling provision) the taking of the action.

That requirement is met by cl 6.1 and 6.3 of Sch 1 and cl 15.1 of the Agreement. Clause 6.1 of Sch 1 requires the preparation of a report and cl 15.1 requires that the report be provided to the Commonwealth Minister. Clause 6.3 of Sch 1 of the Agreement states that an assessment report should contain:
... enough information about the relevant impacts of the action to let the Commonwealth Environment Minister make an informed decision whether or not to approve the taking of the action under the *Commonwealth Environment Protection and Biodiversity Conservation Act 1999*, including:

(a) a description of:

(i) the action; and
(ii) the places affected by the action; and
(iii) any matters of national environmental significance that are likely to be affected by the action; and

(b) a summary of the relevant impacts of the action; and

(c) a description of feasible mitigation measures, changes to the action or procedures to prevent or minimise environmental impacts on relevant matters of national environmental significance proposed by the proponent

or suggested in public submissions; and

(d) to the extent practicable, a description of any feasible alternatives to the action that have been identified through the assessment process, and their likely impact on matters of national environmental significance; and

(e) a statement of conditions for approval of the action that may be imposed to address identified impacts on matters of national environmental significance; and

(f) a statement of State or Territory approval requirements and conditions that apply, or are proposed to apply, to the action when the report is prepared, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the action.

99 Clause 3.1 of Sch 1 to the Agreement states that the Guidelines for the EIS on which AR 51 was based are a written description of matters relating to the environment which are to be dealt with in the EIS. That is to ensure that the EIS contains enough information about the controlled action for the Minister to make an informed decision.

100 It is important to recognise that it is cl 6.3 that specifies or imposes requirements for an assessment report. Section 47(4) of the Act does not; it specifies requirements for a valid bilateral agreement. It has not been argued that the Agreement is invalid. The applicants contended, however, that an assessment report that does not comply with cl 6.3 will not be an assessment report because it is not a report prepared in the manner specified in the schedule to the Agreement. Thus, they contended, pursuant to cl 10.1 of the Agreement and s 47(1) of the Act, the controlled action must otherwise be assessed under Part 8 of the Act before the Commonwealth Minister could make his decision. If that has not occurred, then the Commonwealth Minister will not have the jurisdiction to make the decision under s 133, because an assessment report has not been received.

101 The Minister contended that the applicants’ argument is answered by the existence of s 132. He submitted that s 132 operates after the receipt of an assessment report and so is predicated upon an assessment report which

does not contain sufficient information for the Minister to make a decision. It allows the Minister to seek further specified information relevant to making the decision, albeit from confined sources. It follows that the operation of s 132 would be frustrated if an assessment report contemplated in s 133 must contain enough information to make the decision without resort to s 132. That argument is said to be reinforced by the operation of s 130 which concerns the timing of a decision. Section 130(1A) states that the time in which to make the decision starts after the receipt of an assessment report and s 130(5) stops the running of the time to make a decision between the date a request is made under s 132 and the date when the requested information is received. If a report is only an assessment report and therefore able to enliven the power under s 133 if it already has sufficient information for the Minister to make a decision, the operation of both s 130 and 133 is said to be frustrated.

102 The Minister contended that s 132 is the leading provision and the requirements of an assessment report found in the Agreement are subordinate, in the sense outlined in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 29; (1998) 194 CLR 355 at 382 (*Project Blue Sky*). If that were so, the requirement of the receipt of an assessment report containing sufficient information to make a decision may need to give way to the practical operation of s 132.

103 The contention that the existence of s 132 envisages an assessment report that does not contain sufficient information for the Minister to make a decision whether or not to approve an action under Part 9 is obviously correct in some circumstances. Section 132 can operate in circumstances where the assessment report that begins the approval process (of which s 132 is a part) is not one which requires sufficient information for the Minister to make a decision. For example, actions that are assessed on preliminary documentation under Division 4 of Part 8 of the Act are to be the subject of a report, but the content of that report is not outlined. Similarly an assessment report prepared in relation to a PER under s 100 of the Act (rather than under a bilateral agreement) has specified content requirements. The same can be said for assessment reports under s 105 of the Act concerning actions assessed by EIS.

104 Furthermore, when an action is assessed under Pt 8 of the Act by PER or EIS, the Minister must, in the guidelines for preparation of those

documents, ‘seek to ensure that’ the document contains sufficient information to make an informed decision whether or not to approve the action: s 102(2) and s 97(2). If the Minister is satisfied that the PER or EIS does not contain a sufficient level of information, the Minister has a discretion, but not an obligation, to refuse to accept it: ss 99(3) and 104 (3). Thus a situation could arise whereby a PER or EIS prepared under the Act with insufficient information, and a report (the content of which is not stated in the Act) based on those documents, is received by the Minister. Having decided to accept the documents, which the Minister did not think contained sufficient information to make a decision, the Minister could then seek further information under s 132. It follows that, even if the applicants’ contention is correct, s 132 would not be otiose.

105 However, I do not consider that the general work of s 132 is limited to such circumstances. Whether or not the Minister has sufficient information to make an informed decision must ultimately be decided by the Minister. I do not accept that the Act envisages that the Minister should receive a report and then have to either reject it because it does not contain enough information, or make a decision on the basis of that report without more. That is particularly so in light of s 132, and the object of the Act explained in s 3(2)(d) that it:

... adopts an efficient and timely commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; ...

In context, in my judgment, the intersection of the requirements for an assessment report and the entitlement of the Minister to seek further information is clear enough.
106 The purpose of the assessment procedures either under Pt 8 or under a bilateral agreement is to obtain for the Minister the information upon which the Minister may make a decision whether or not to approve the controlled action.
107 In the information gathering process, however conducted, there are requirements for public exposure of the proposed controlled action and its possible environmental impacts. The proponent is given a full opportunity to identify and address the possible environmental impacts. The public, including the DEH and any other State or Territory instrumentality, is

given the opportunity to respond to the presentation by the proponent. The opportunity for public and external input is an important part of the information gathering process: see eg *Scurr v Brisbane City Council* [1973] HCA 39; (1973) 133 CLR 242; *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1986) 145 CLR 485. That may involve raising additional possible environmental impacts, as well as commenting upon the adequacy of the way in which the proponent proposes to address the identified possible environmental impacts. The scope of the matters which may be raised is only limited by relevance. Then the proponent is given the opportunity, and is obliged, to take the public comments into account and to respond to them. It is intended that the information then given to the Minister in the report should have enough information about the relevant impacts of the proposed controlled action to let the Minister make an informed decision whether or not to approve it.
108 However, s 132 recognises that, despite the process of information gathering resulting in the assessment report to the Minister, the Minister may not believe, on reasonable grounds, that he or she has enough information to make an informed decision whether or not to approve the controlled action. What the assessment report contains is the result of information gathering not under the direct control of the Minister. It is what the proponent and the public identify and present. The process, not unreasonably, is expected to produce (and in many if not most circumstances will produce) enough information for the Minister to make a decision under s 133. But s 132 provides the opportunity for the Minister to seek further information if the Minister does not consider that the information gathering process has not resulted in enough information coming forward to make an informed decision.
109 The assessment report, therefore, is a report of the information gathered during the process or one of the processes prescribed under Pt 8 or under a bilateral agreement. It need not be so complete that no Minister, on reasonable grounds, could not believe that there is not enough information to make an informed decision. But, in my view, it is required to satisfactorily present the material which has emerged in the applicable information gathering process.
110 In the case of assessment under a bilateral agreement, the information gathering process takes place outside the procedures available under Pt 8. Section 47(4) recognises that, as it requires the bilateral agreement to contain terms which will fulfil the expectations of the Act that the

assessment report will contain the information necessary for the Minister to make an informed decision. The requirements of the Agreement then are designed to fulfil that expectation. They are generally discussed above. Clause 6.3 of Sch 1 of the Agreement provides that the assessment report should contain enough information for the Minister to make a decision. The Guidelines for the EIS, described in cl 3.1 of sch 1 to the Agreement, on which AR 51 was based, are imposed to "ensure" that the EIS contains enough information for the Minister to do so. Necessarily, however, the Minister is given the power to require further information under s 132 of the Act.

111 Clearly, the matters set out in cl 6.3 of Sch 1 of the Agreement must be addressed. They are directed to ensuring that the Minister could, on the information in the assessment report and after taking into account the matters which the Act requires, form a view as to whether or not the controlled action should be approved. Each of the matters set out in cl 6.3 of Sch 1 must be addressed and informed by the preceding debate between the proponent and the public. But that does not preclude a Minister from believing "on reasonable grounds that he or she does not have enough information to make an informed decision." In other words, the bounds of reasonableness permit the Minister, on the one hand, to make a decision on the available information or, on the other, to decide that more information is required. In such a case where the Minister decides on the latter course, s 132 may be invoked and a request for further information made, as occurred in this matter. Accordingly, in my judgment, AR 51 was an assessment report provided it was a report based upon, and representing, the information gathered in accordance with the process imposed under the Agreement. The Agreement in turn had to (and did, or at least there is no contention that it did not) contain provisions about the process for assessment and its outcome to satisfy s 47(4) of the Act.

112 At the hearing, counsel for the Minister submitted that the Minister did have the ability to reject a purported assessment report that did not comply with the Agreement. However, it was submitted that that would only be done in an unusual case, where there is a "grotesque" deficiency. That may place too low a standard on the content of an assessment report. The deficiency must be one either of process in the information gathering stage, or of representation of the identified environmental impacts and the views as to their significance garnered through that process.

113 The outcome is consistent with an alternative contention put by MRM.

That was that an "informed decision" might simply be a decision that an action could not be approved without greater scientific certainty as to its environmental effects. Where an attempt to provide enough information to make an informed decision about an action does not include certain information that the Minister thinks is required for sufficient scientific certainty, the Minister may request further information.
114 The applicants' contention that AR 51 did not contain the information necessary to constitute an assessment report is said to be evidenced by the relevant conclusion in AR 51 itself and by the fact that the delegate of the Commonwealth Minister requested more information under s 132 of the Act. As it has not been argued that, if AR 51 constituted an assessment report, the Minister then exceeded his power by making the request for further information, the second of those two matters must be based on the nature of the further information requested than the part of the request.
115 The applicants did not contend that the information gathering processes prescribed by the Agreement, and then by the Administrative Procedures and the guidelines for an EIS, were not followed. Nor did the applicants contend that AR 51 did not reliably and appropriately represent the information and views gathered in that process. In the light of my conclusions about the nature of an assessment report under a bilateral agreement, there is therefore already a considerable obstacle to their contention that AR 51 did not constitute an assessment report.
116 The introduction to the section of AR 51 entitled "Environmental Impact Assessment" includes the following passages:
The issues of most concern include the following:-

1. The potential impacts associated with the realignment of the McArthur River and Barney Creek.
• The proponent has not provided adequate information to allow an informed decision on the nature of potential impacts associated with these diversions. An independent geomorphologist contracted by the EPA [Environment Protection Agency] identified key flaws in the modelling that was undertaken for the EIS. Consequently, the conclusions drawn from the modelling are likely to be compromised.
...
• The EIS failed to include hydrological information for Barney and Surprise Creeks. This is a major oversight considering the potential in larger floods for Barney Creek to pose greater risk to the mine

infrastructure, including the flood bund and OEF than the diverted McArthur River channel.

AR 51 went on to say:
In addition to the uncertainty of information relating to the River and Creek realignments, there were a number of other issues where a lack of supporting information prevented the EPA concluding that the potential environmental impact of the proposal was acceptable. In summary, these relate to the following:-

• The management, monitoring and contingency planning for the operations of the overburden emplacement facility;
• The management, monitoring and contingency planning for the operations of the tailings storage facility;
• Investigation of the potential for contaminant mobilisation to occur from non-acid forming material;
• The management, monitoring and contingency planning for the flood protection bund;
• A revegetation strategy for the River and Creek realignments demonstrating that an ecologically functional corridor could be achieved within the shortest timeframe possible;
• The impact of drawdown on the ecology of the McArthur River; and
• The potential impacts of the project on the Freshwater Sawfish.

The report goes on to outline its concerns with those issues in greater detail, and also refers to the lack of information about the impact of the proposal on migratory bird species.

117 The request for further information under s 132 included a passage in the following terms:

I have considered the assessment report and the supporting documentation and note the conclusion that there is insufficient information in the EIS to enable an adequate assessment of the impacts on the freshwater sawfish (Pristis microdon). This information is necessary to enable the decision-maker to make an informed decision on the action under Part 9 of the EPBC Act.

In light of the above, it is clear that the Territory Minister was of the view that the information in AR 51 was not sufficient to make an informed decision to approve the taking of the action under Part 9 of the Act. It was sufficient, by implication, for the Territory Minister not to approve the controlled action if that had been the role and responsibility of the Territory Minister.

118 In some detail, AR 51 addressed each of the matters set out in cl 6.3 of Sch 1 of the Agreement by reference to both the proponent's EIS and the responsive material of the public. The concerns raised by AR 51 about lack of information were each regarding issues on which public comment had been received or on which an independent report commissioned by the Northern Territory Environmental Protection Agency focussed. MRM had in turn replied to those issues raised. While AR 51 identified further information which might more clearly delineate the impact of the action, the potential possible impacts of the action were clear. The fact that the Territory Minister pointed out inadequacies or deficiencies in the picture presented by the information gathering process, and may have decided not to approve the controlled act (if that were that Minister's role) does not mean that AR 51 was not an assessment report. It clearly was a report which had enough information about the relevant impacts of the action to have enabled the Commonwealth Minister to make an informed decision not to approve the controlled action. It will not always be the case that an assessment report will provide material upon which the Minister's decision may be finely balanced. Sometimes it may be clear that the controlled action should not be approved. Sometimes it may be clear that the controlled action should be approved. And no doubt there is a range of possibilities in between. Sometimes, as here, the Minister may consider that further information within the confines permitted by s 132 will assist in making an informed decision.

119 It should be noted that there are controls upon the Minister's power to seek further information under s 132. First, it must be in circumstances where the Minister believes that the further information is necessary. Secondly, that belief must be objectively maintainable; the Minister's belief must be on reasonable grounds. Thirdly, the request for information must be for specified information. The Minister is not at liberty, in effect, to embark upon a fresh information gathering process but is confined to seeking specified information which is considered to be absent from, or incomplete in, the assessment report. And finally, the sources of the

information are confined: the proponent (or designate) of the controlled action or, in certain circumstances, the commission. Those limits indicate that the information which the Minister may seek will be supplementary to, or complementary to, that contained in the assessment report.
120 It is consistent with that conclusion that the procedures imposed by the Agreement cannot be circumvented by the provision of critical and substantial material in response to a s 132 request, away from, and not subject to comment from the public. That would be inconsistent with the pre-condition to the power and the community inclusive objects of the Act in s 3(1)(d),(f) and (g). (I note that the Act has since been amended such that the public may comment on any proposed decision by the Commonwealth Minister: s 131A.)
121 The applicants have not contended that, if AR 51 was an assessment report, the Minister acted beyond power in seeking the further information which he identified. It is not therefore necessary to address that question.
122 The request for further information was to better inform the picture as to the impacts on the freshwater sawfish of the proposed controlled action, and to determine what further and more specific precautions might be taken to monitor whether the potential impacts might be occurring and, if so, how they might be remedied. I do not consider that the content of the request indicates in any way that AR 51 was, or was not, an assessment report for the purposes of the Minister making a decision under s 133 whether or not to approve the controlled action. The further information, depending upon its content, may have fortified the concerns expressed by the Territory Minister in AR 51.
123 For those reasons, I consider that AR 51 supplied to the Commonwealth Minister by the Territory Minister was an assessment report under the Act.
124 Once that step is taken, the other steps in the contention of the applicants as set out in [92] become less important.
125 Having received an assessment report, the Minister was entitled to seek further information within the confines of s 132. There was, as I have noted, no separate submission by the applicants that the decision to do so or the terms of the request for further information were not properly made once it was accepted (or assumed by the applicants for the purposes of their submissions) that AR 51 constituted an assessment report.
126 Ultimately AR 54 was the vehicle by which the further information was provided. It developed through the PER, which itself was exposed for

public comment. The fact that the public comments on the PER were not then subject to a supplementary report from MRM does not invalidate the process of providing further information to the Minister. MRM as the proponent of the controlled action was asked to give the further information. It was not required by the Agreement, or by any provision of the Act, to supplement the further information it was asked to provide by exposing it to public comment and then responding to that public comment. That feature of the process permitted by s 132 is an indicator of the limited nature of the further information which may be sought under s 132.

127

As I noted above, the PER fulfilled two purposes. In form and substance it was part of the Northern Territory assessment processes for a separate approval process. The fact that it was also a vehicle for the assembly of the further information requested by the Commonwealth Minister under s 132 was coincidental. That information could just as readily have been contained in a separate document.

128 The role of the Territory Minister under the Agreement had come to an end by the provision of AR 51. The fact the Territory Minister prepared and provided to the Commonwealth Minister AR 54 perhaps indicates a misconception about the ongoing role of the Territory Minister. As AR 54 indicates, MRM provided the further information requested by the Commonwealth Minister in the PER. Nevertheless, although the PER was not supplemented by a response on the public comments made in relation to it, AR 54 did report and make observations about the public comments. It included the observation that the further information provided by MRM indicated "reactive rather than preventative management strategies". It maintained the view that the freshwater sawfish was "significantly vulnerable" to potential impacts from the mine proposal, although its presence or absence in the McArthur River would not have a national significance given its other habitats. However, as I do not consider that it was other than a vehicle for MRM to convey to the Commonwealth Minister the further information which had been requested, it is not necessary to go into detail as to its contents.

129 I shall deal briefly with the applicants' contention that the Minister also did not receive any assessment report under the Act because AR 54 also did not have that status. That attack is made on two bases. The first is that AR 54 did not take into account any statement submitted by MRM

responding to public submissions. That is clearly so, as a fact, because MRM did not prepare any supplement to the PER addressing public submissions on the PER.
130 An assessment report is required by cl 6.2 of Sch1 of the Agreement to take into account:
(a) the [PER] or [EIS] (as the case may be);
(b) any comments provided by the public during the public comment period;
(c) the statement submitted by the proponent under Clause 5 of this Schedule; and
(d) any other relevant information available to the Northern Territory Minister.

131 Clause 5 of Sch 1 to the Agreement states:

Responding to public submissions

If the action is being assessed by the preparation of a [PER] or [an EIS], the proponent prepares, and submits to the Northern Territory Minister, a written statement which

(a) summarises issues relating to the relevant impacts of the proposed action raised in submissions received during the public comment period referred to in clause 4 of this Schedule; and
(b) addresses, to the greatest extent practicable, those issues.

132 As noted, it is not contested that no statement under cl 5 was prepared. Consequently no such statement was considered in AR 54. However, on the applicants' case this is only of consequence if AR 51 was not an assessment report under the Act. I have found above that AR 51 is an assessment report under the Act. The request for information under s 132 did not mean that the information-gathering process reverted back to the assessment stage so that the material prepared was subject to the requirements of the Agreement.

133 The guidelines for the preparation of the PER, on which AR 54 was based, make it clear that the PER's main purpose was to respond to the

requirements of the NT Minister and the NT Minister for Mines and Energy, in relation to the separate approval under the NT Mining approval process. MRM was asked concurrently to "address the information requirements of the Australian Government Department of the Environment and Heritage within the PER document."

134 In preparing AR 54, the Northern Territory Government, through its Environment Protection Agency, proceeded on the following assumption:

The additional information sought by the Australian Government has been included in the PER, however the assessment of the PER is not subject to the bilateral agreement. This is because the environmental assessment of the proposal is complete for the purposes of the Australian Government and it is now considering whether to grant approval to the proposal under Part 9 s 133 of the EPBC Act (the request for additional information was made in accordance with the approval process outlined in Part 9 s132 of the EPBC Act). The approval process under Part 9 of the EPBC Act is not subject to the bilateral agreement.

135 Consequently, the information provided in response to the s 132 request was not subject to the requirements of the Agreement. The fact that the information was provided in the form of documents that may have been created for the purposes of the Agreement may simply have been to avoid duplication of work that was already being undertaken for the NT Mining approval process. Whatever the reason, the Act does not specify the form in which a response to a request under s 132 should be given. There is nothing in the Act which has the effect of re-enlivening the assessment process once a request under s 132 is made. Any lack of transparency this may have given rise to in the past appears to be addressed by the new s 131A.
136 The second basis on which AR 54 is attacked is that it did not contain a statement of conditions that might be imposed by the Minister to address some of the identified impacts, or a statement of the conditions that have been applied or are proposed to be applied by the Northern Territory when the assessment report was prepared. Such statements are required by cl 6.3(e) and (f) of Sch 1 of the Agreement. However, for the reasons above, AR 54 was not subject to the requirements of the Agreement concerning an assessment report.

WHETHER COMMONWEALTH MINISTER FAILED TO CONSIDER CONDITIONS IMPOSED BY TERRITORY

137 Section 134 of the Act provides that the Minister may attach conditions to the approval of an action if he is satisfied that it is necessary or convenient for protecting a matter protected by Part 3 or repairing or mitigating damage to a matter protected by Part 3 (whether or not the damage has been, will be or is likely to be caused by the action).

138 The third contention of the applicants was that the Minister erred by failing to take account relevant considerations, being relevant conditions on taking the action imposed by the Northern Territory (the NT conditions) under the *Mining Management Act 2001* (NT) following the NT approval process. That was also said to have led to a breach of s 134(4)(a) of the Act which states that in deciding whether to attach a condition to an approval, the Minister must consider:

... any relevant conditions that have been imposed under a law of a State or self-governing Territory or another law of the Commonwealth on the taking of the action;

139 The consideration in s 134(4)(a) is directly related to s 134(3)(c), which states that the conditions that may be attached to an approval include:
... conditions requiring the person taking the action to comply with conditions specified in an instrument (including any kind of authorisation) made or granted under a law of a state or self-governing Territory or another law of the Commonwealth;

140 The applicants submitted that the NT conditions that were not considered by the Minister are found in the amended mining authorisation supplied to the DEH by the Northern Territory Minister for Mines on 13 October 2006. Those conditions include complying with commitments made by MRM in its Mining Management Plan, maintaining an up to date Mining Management Plan, providing a sum of money as security to the Northern Territory Government, as well as a number of further detailed conditions for independent monitoring assessment of the environmental performance of the mine.
141 The commitments made in Appendix D of the Mining Management

Plan are numerous. They concern management systems, infrastructure, the diversion of the McArthur River and Barney Creek, waste management, tailings storage, surface water quality, flood protection, groundwater, heritage, social impact, rehabilitation and closure of the mine, environmental management and biodiversity offsets. More relevantly, the Mining Management Plan contained various commitments under the heading 'Biology'. They include proposed monitoring and surveys of migratory birds in the area and of fish distribution, abundance and migration, aimed at establishing the effect of the river diversion.

142 Section 134(4)(a) only requires that *relevant* conditions imposed by the Northern Territory be considered by the Minster. In this instance, that is conditions relevant to the controlling provisions for the action, which form the subject matter of the Minister's decision. Accordingly, it was only mandatory for the Minister to consider the NT conditions that concerned threatened and migratory species.

143

The conditions relating to commitments in the Mining Management Plan, found in Schedule 1 to the amended mining authorisation, are clearly relevant, at least to the extent that they refer to monitoring of fish and migratory birds in the mine and river area. Indeed, MRM stated in its written submissions that relevant commitments in the Mining Management Plan extended to the monitoring of erosion of the river diversion, of the vegetation rehabilitation for migratory birds and of fish populations, surveys of freshwater sawfish, a commitment to leave open the existing river channel until the new channel was completed to an acceptable standard and surveys of fish populations in dry season refuge pools.

144 In my view, the independent monitoring assessment conditions in Schedule 2 to the amended mining authorisation are also relevant conditions. In MRM's submission, the monitoring conditions are not relevant because they are not directed to threatened or migratory species, but rather to the 'environmental performance of the Mine'. The monitoring conditions clearly encompass any direct effect that the mine's operation may have on threatened or migratory species. That the monitoring conditions also relate to other matters does not make them irrelevant. The controlling provisions refer to significant impacts upon those species. 'Impact' is not confined to direct physical effects of the action on those species. It includes secondary effects that can be said to be consequences of the action on those species: *Minister for Environment v Queensland*

Conservation Council [2004] FCAFC 190; (2004) 139 FCR 24, 38.
145 Consequently, the NT conditions, save for the conditions relating to security, were relevant and mandatory considerations for the Commonwealth Minister. The Minister's statement of reasons for decision quotes s 134 of the Act, and goes on to say
I also took account of ... the commitments made by the proponent to mitigate the impacts of the action and the requirements of the Northern Territory Minister for Mines and Energy. I found that if I approved the proposed action subject to conditions reflecting those commitments and requirements plus additional requirements in relation to the preparation and implementation of plans and an independent audit of compliance, the impacts of the action on listed migratory species and listed threatened species would be sufficiently mitigated such as not to be unacceptable.

146 However, the evidence suggests that the Minister did not see the amended mining authorisation before he made his decision. Furthermore, it is unclear whether the Mining Management Plan was included in the brief that was provided to the Minister. The Minister's supplementary written submissions note that compliance with the Mining Management Plan is a legal requirement for authorisation of mining activities under s 37 of the *Mining Management Act 2001* (NT). However, an attachment to the Minister's brief entitled "Legal Considerations Relating to Decision-Making Under Part 9 of the EPBC Act", while acknowledging that the NT conditions must be considered, merely stated with regard to them that:
The proposed development has previously undergone environmental assessment and approval by the Northern Territory Government. Compliance has been achieved with the provisions of the NT Environmental Assessment Act 1982 and work continues towards compliance with the NT Mining Management Act 2001.

147 In fact, the amended mining authorisation had been granted seven days before the Minster received the brief but neither the statutory condition, nor the conditions attached to the amended mining authorisation were identified. Nevertheless, it was submitted, the Minister, whether aware that compliance with the Mining Management Plan was a condition in the amended mining authorisation or not, must be taken to know that it was a statutory condition that MRM comply with their Mining Management Plan.

148 There are two problems associated with that contention. First, it would render otiose part of the operation of s 134(4)(a). Even if the statutory condition were taken to be known by the Minister, that does not mean that the conditions in the amended mining authorisation did not have to be considered. Secondly, there is no direct evidence that the Minister had considered the Mining Management Plan, so in any event it is not clear that he knew the content of any statutory condition.
149 In relation to the independent monitoring assessment conditions, the Minister submitted that, although it appears he did not see the amended mining authorisation before making his decision, he did have regard to a media release issued by the Northern Territory Minister for Mines and Energy dated 13 October 2006 (the media release). The media release was emailed to the Minister's office from staff in the DEH along with an answer to a possible parliamentary question on the topic of the proposed action. Part of the prepared answer to that question was:
I will take account of the specific details of the NT Mines and Energy Minister's decision and that of the NT Environment Minister when I now consider approval of the project under the EPBC Act.

150 It is the Minister's submission that he was aware of and had regard to the independent monitoring assessment condition "at least to the extent that that condition was referred to and described in [the Northern Territory Minister for Mines and Energy's] media release". The reference to the independent monitoring assessment condition in the media release was as follows:
MRM will fund independent experts to undertake ongoing monitoring during the life of the mine and make public reports on the assessments. The Territory Government will manage the engagement of the independent monitor.

The reference is necessarily brief, given its purpose. While the reference could be taken to have made the Minister aware that there was an independent monitoring condition, it is not a substitute for having considered the actual terms of the conditions, which has 10 detailed clauses and which run over some seven pages.
151 I am therefore satisfied that the Minister did not consider relevant conditions imposed by the Northern Territory on the taking of the controlled action. In particular, the relevant conditions are the

commitments made in the Mining Management Plan that are relevant to impacts on threatened and migratory species and the independent monitoring assessment conditions found in the amended mining authorisation.
152 The next step is to consider whether that failure to take into account a relevant consideration, and the resulting non-compliance with s 134(4)(a), results in the decision being invalid.
153 The applicants' further amended application appears to address separately the two components: failure to take into account a relevant consideration and failure to comply with the Act. If those grounds are made out, as I conclude is the case, then it is necessary to consider separately whether the error leads to an invalid decision that must be set aside.
154 It was the Act that made the Northern Territory's conditions relevant considerations. For a failure to take into account a relevant consideration, the test for invalidity is whether that failure could have materially affected the decision: *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24 at 40 per Mason J. His Honour there said:
Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision...

In oral submissions, counsel for the applicant contended that the Minister must show that not having considered the conditions "could not have made a difference, and that is an impossible standard in this case...". That goes too far. The test in *Peko-Wallsend* 162 CLR at 40 is that it could not have materially affected the decision.

155 Where there has been a failure to comply with a statutory obligation, the test is whether it was a purpose of the legislation that an act done in breach of the provision should be invalid: *Project Blue Sky* 194 CLR at 390. In this case, the same error of the Minister has given rise to both foundations for invalidity.

156 The applicants' written submissions suggested that the *Peko-Wallsend*

test should be qualified by the terms of the Act in this matter. They submitted that it is difficult to argue that the failure to take into account a relevant consideration could not have made any possible difference to the decision where the statute makes that consideration mandatory. They were nevertheless content in fact to apply the *Peko-Wallsend* test as prescribed, so it is not necessary to further consider that contention. The fact that the statute mandates the consideration does not inform whether or not, in this case, the consideration could have made a material difference. That is a question to be decided on the facts of each case.

157 It was the submission of MRM that this ground affects only the decision to attach conditions to the approval, rather than the approval itself. In my view, that is an unsatisfactory analysis. That is simply because it might result in the decision to approve an action then standing without any valid conditions. If the conditions are invalid because the Minister did not consider a mandatory consideration, then the decision to approve the action cannot stand. The Act clearly envisages that the conditions be used in order that a decision to approve the action will not result in unacceptable environmental consequences.

158 A comparison of the conditions imposed by the NT Minister for Mines and Energy and the Commonwealth Minster are instructive as to whether consideration of the conditions in the amended mining authorisation could have materially affected the decision of the Minster. The Commonwealth conditions included the following:

2. Within six months of the date of this approval, the person taking the action must submit for the Minister's approval the Freshwater Sawfish Management and Monitoring Plan with respect to protection of the threatened Freshwater Sawfish (Pristis microdon) in the McArthur River.

The Plan must include:

(a) ecology and biology of the freshwater sawfish,
(b) description of the existing environment,
(c) potential impacts of the realignment on the river, including impact on upstream migration,
(d) development of criteria against which the effectiveness of this Plan may be measured,

(e) management actions to ensure longevity of McArthur River sawfish population,
(f) actions in the event of fish becoming trapped in the realigned section of the River,
(g) on-going monitoring of the freshwater sawfish population over the life of mining operations, and
(h) establishment of a community awareness and education program.

The Plan must be approved at least one wet season before the realigned channel is connected to the McArthur River. The approved Plan must be implemented.

2. Within six months of the date of this approval, the person taking the action must submit for the Minister's approval a monitoring program to assess the impact of metal pollution at Bing Bong Port on listed migratory birds (as discussed in section 11.4.4 of the PER). The monitoring program is to be implemented by the start of the migratory season in September 2007.

3. By 1 July of each year after commencement of mine construction and until the completion of mine decommissioning, the person taking the action is to provide written advice to the Minister for the Environment and Heritage demonstrating how the person taking the action has complied with the conditions of this approval. After this time no further report will be required.

4. Within three years of the date of commencement of construction, the person taking the action must ensure that an independent audit of compliance with the conditions of approval of the action and the effectiveness of measures to mitigate impacts on listed threatened and migratory species is carried out. The independent auditor must be accredited by the Quality Society of Australasia, or such other similar body as the Minister for the Environment and Heritage may notify in writing. The audit criteria must be agreed by the Minster and the audit report must address the criteria to the satisfaction of the Minister. An audit report must be given to the Minster within six months of the completion of the audit.
...

The NT conditions, on the other hand, are further reaching but are often more general in their application. They are summarised in [141] and [143] above.
159 Condition 2 of the Commonwealth approval is closest in content to a commitment – made a condition by Condition 1 of Schedule 1 of the amended mining authorisation – of MRM to monitor the fish population in the area of the proposed diversion. The commitment is summarised in an appendix to the Mining Management Plan as:
The proposed ongoing monitoring of fish distribution, abundance and migration data will provide an indication of the utilisation of the diversion channel including the freshwater sawfish, and the ability of the channel to function in an ecological sense. If, in subsequent years, the particular features of the channel prove to be a barrier to fish passage, a review of the design would be undertaken.

It is proposed to involve annual late dry season sampling of fish populations in the known refuge pools both upstream and downstream of the proposed river diversion. ...

Reference is also made to a more thorough explanation of that commitment set out in the PER and earlier in the Mining Management Plan.
160 Clearly, there is some overlap between the conditions, but the Commonwealth Minister's conditions have, as would be expected, a greater focus on the subject matter of the controlling provisions, namely the freshwater sawfish, which is a listed threatened species. Indeed the Commonwealth Minister's condition incorporates the commitment made by MRM but it requires additional measures such as drafting contingency plans in advance, rather than reviewing the diversion design if problems arise.
161
I find that the Minister's decision to impose Condition 2 in its terms would not have been materially different if he had considered MRM's fish monitoring commitment under the NT conditions. That is because, first, the Condition imposed by the Minister is more rigorous and focussed than MRM's prior commitment and because the Minister had already seen one form of that commitment in the PER.

162 The same can be said of Condition 3. The corresponding commitment relating to migratory birds in the Mining Management Plan refers to the very section of the PER that is quoted in the Commonwealth Minister's condition. The difference is simply that the Commonwealth Minister has imposed a time limit on the commencement of the monitoring program.
163 Condition 4 requires a report as to compliance with the other conditions. It is difficult to see how that condition could change if the Minister had considered the NT conditions.
164 Comparison between the independent auditing of compliance required by Condition 5 and the independent monitoring assessment conditions found in the amended mining authorisation leads to a similar conclusion. However, the Commonwealth Minister's auditing condition is again focused on the particular matters subject to his control, namely threatened and migratory species. It is difficult to see that the Minister would be satisfied that the more general monitoring required by the NT conditions would provide adequate information on the specific matters dealt with by the controlling provisions.
165 The other conditions imposed by the Minister are simply directed at defining the extent of the approval of revised plans, whether made at the Minister's request, or at MRM's own instigation, and limiting the time within which the approved action must commence. Again, it is difficult to see that those conditions could have materially changed as a result of consideration of the NT conditions.
166 The remaining question is whether the Minister could have imposed additional conditions on the approval if he had considered the NT conditions. As noted earlier in these reasons, s 3(2)(b), (c) and (g) of the Act state that in order to achieve its objects, the Act "strengthens intergovernmental co-operation, and minimises duplication, through bilateral agreements", "provides for the intergovernmental accreditation of environmental assessment and approval processes" and "promotes a partnership approach to environmental protection and biodiversity conservation through: (i) bilateral agreements with States and Territories".
167 Section 134(3)(c) embodies those methods of achieving the objects of the Act. It allows the Minister to attach a condition that the person taking the controlled action comply with the NT conditions. It is therefore clear that the Commonwealth Minister could have applied such a condition if he had considered the NT conditions. However, none of the other NT conditions are directed at the subject matters of the controlling provisions,

so there is no reason to think that the Commonwealth Minister could have or would have imposed such a condition (recalling that conditions may only be attached to approval under s 134 if the Minister is satisfied that the condition is necessary or convenient for protecting matters protected by Part 3 of the Act).

168 In my view, there is no real prospect that, if the Minister had considered the NT conditions, there would have been any material difference to the conditions which he imposed upon his approval of the proposed action. Indeed, I think it unlikely that the conditions he imposed would have been different in any respect other than, perhaps, in terms of expression to adopt language similar to that of the NT conditions. There is no reason to think the Minister might have imposed conditions which in any way, in their substance, might have been additional to or more onerous than those he did impose.

169 Consequently, I conclude that the decision of the Minister is not invalid by reason of his failure to consider a relevant consideration.

170 The failure to consider the NT Conditions also led to a breach of s 134(4)(a) of the Act. As noted above, a breach of a provision of the Act will make the Minister's decision invalid if 'it was a purpose of the legislation that an act done in breach of the provision should be invalid': *Project Blue Sky* 194 CLR at 390. If that is so, then it would be of no consequence if the requirement to consider the NT conditions was unnecessary or even undesirable in a given case: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; (2005) 215 ALR 162 at [77], [208]. Consequently, the finding that the breach would not have caused a material difference in the Minister's decision need not be taken into account: *SAAP* 215 ALR at [77], [209].

171 The starting point is to note that the language of s 134(4)(a) is mandatory. That is an important indication of the intention of Parliament: see *SAAP* 215 ALR at [173], [206]. I also note that the failure of the Minister to consider another mandatory consideration in s 134(4)(aa), being 'information provided by the person proposing to take the action or by the designated proponent of the action', is explicitly stated not to result in invalidity: s 134(5). On their face, these two matters point to an intention that a breach of s 134(4)(a) is to result in invalidity. However, the scope, objects and language of the Act must also be considered. To that end, the applicants also contended that the role of s 134(4)(a) in the attainment of the objects of the Act (see s 3(2)(b),(c) and (g)) is an

indication that invalidity results from its breach.
172 The explicit terms of s 134(5), which suggests that a breach of s 134(4)(aa) does not lead to invalidity, while staying silent as to the result of a breach of s 134(4)(a) or s 134(4)(b), is explained, in MRM's submission, by the history of the introduction of s 134(4)(aa) and (5) into the Act. The original Bill did not contain either of those sub-sections: *Environment Protection and Biodiversity Conservation Bill 1998* (Cth) cl 134. Sections 134(4)(aa) and 135 were later added, as explained by a supplementary explanatory memorandum, "to ensure that the proponent has an opportunity to comment on what conditions would be appropriate and effective." The supplementary memorandum also stated:
This amendment provides that in deciding whether to attach a condition to an approval, the Minister must consider information provided by the proponent. However, failure to consider the relevant information does not invalidate the Minister's decision.

MRM contends that the separate manifestation of those two sub-sections shows an intention that subs (5) was only to operate with regard to subs 4(aa), with no intention that its inclusion would raise inferences about subs 4(a) and 4(b), and that non-compliance with those sub-sections also does not lead to invalidity.
173 If that is the case, it is curious that subs (5) was included at all. In its absence subs 4(aa) would be treated in a similar manner to the rest of subs (4). It may simply have been a matter of inclusion for certainty, but why then would it not refer to subs (4) rather than just to subs 4(aa)? However, I accept the contention of MRM for reasons outlined below.
174 The explanatory memorandum has the following to say about conditions imposed by States or Territories:
The ability to impose a condition requiring compliance with conditions identified in another instrument is intended to facilitate the 'accreditation' of agreed conditions implemented primarily through approvals granted under State legislation. The requirement to consider any relevant conditions imposed by State or Territory laws or other Commonwealth laws is also intended to facilitate reliance on other regulatory regimes, where this is appropriate to avoid duplication.

175 That indicates that the purpose of s 134(4)(a) is to procure commonality and consistency in conditions, rather than to provoke the

Commonwealth Minister into considering conditions that might not otherwise have been considered. It may be accepted that consistency of conditions that the Minister might have imposed is desirable, to the extent State or Territory imposed conditions relate to areas of controlling provisions in the Act. The objective of consistency is not one which, if not achieved, would have been intended by Parliament to lead to the invalidity of the Minister's decision. Nor indeed would that have been the intention of Parliament if the objective of s 134(4)(a) was to oblige the Minister to consider imposing different (either more demanding or less demanding) conditions than he otherwise might have done so. That is the more obvious if it is recognised, as was the case here, that the relevant conditions in the NT conditions were not materially different from those independently decided upon by the Minister. Why should Parliament have intended to invalidate the Minister's decision in such circumstances? Indeed, the present case also illustrates that the Minister's awareness of relevant conditions imposed by a State or Territory is not necessarily routine. The consequence of invalidity is unlikely to have been intended by Parliament in such circumstances. There may be other circumstances in which the probable or possible conditions to be imposed by a State or Territory become known to the Minister, but in the formal and final form they are not conveyed to the Minister. This case provides an example, because the PER (provided to the Minister) contained proposed conditions very like the ultimate NT conditions. There is again no apparent reason why the Minister's decision should then be invalidated for his failure to comply with the terms of s 134(4)(a).

176 It is important to recognise that the Minister must independently be satisfied that the action should be approved on the basis of the conditions that he imposed. When weighed against the inconvenience of invalidity and other objects of the Act, invalidity for a failure to consider conditions imposed by a State or Territory is not a necessary or appropriate consequence: *Hatton v Beaumont* [1977] 2 NSWLR 211 at 266. As was noted by the Minister in his written submissions, that inconvenience would include uncertainty as to the status of the action, delay of actions that had otherwise been approved by the Minister and additional expense to the proponents. The High Court noted in *Project Blue Sky* 194 CLR at 392:

...it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act.

177 In addition, it is difficult to argue that the threat of invalidity is required to ensure that the Minister complies with the provision: see *Smith v Wyong Shire Council* [2003] NSWCA 322; (2003) 132 LGERA 148 at 155. The task of considering other conditions is not cumbersome and in fact operates to make easier the Minister's task, by allowing "accreditation" of State of Territory conditions, rather than drafting new conditions. There was no suggestion that the failure to comply with s 134(4)(a) here was a conscious decision, or through anything but inadvertence.
178 That conclusion is also fortified by s 143(c). It would accommodate any inconsistency between conditions imposed by the Minister and the NT conditions (if there were any). Section 143(c) of the Act allows conditions attached to an approval to be varied if the proponent agrees and the Minister is satisfied that the variation is necessary or *convenient* to protect a matter protected in Part 3. Thus, the apparent purpose of s 134(4)(a) can be achieved without invalidating a departure from it: see *Woods v Bate* (1986) 7 NSWLR 560 at 567.
179 For those reasons, despite the breach of s 134(4)(a), the conditions attached to the approval and the Minister's decision to approve the controlled action are valid, and the decision of the Minister is itself valid.

WHETHER COMMONWEALTH MINISTER PROPERLY APPLIED THE PRINCIPLES OF ECOLOGICALLY SUSTAINABLE DEVELOPMENT

180 The final ground upon which the applicants' application for review relies is that the Minister did not properly apply the principles of ecologically sustainable development, as required by s 136(2)(a), particularly the precautionary principle, which is also required to be taken into account by s 391, when considering whether or not to approve the controlled action. The other principles of ecologically sustainable development in s 3A have not been raised in relation to this ground.

181 The precautionary principle is defined in s 391(2) in a slightly different manner to that set out in s 3A(b), but with the same effect:

The **precautionary principle** is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible

environmental damage.

182 In his statement of reasons for decision, the Minister said:
In making the decision on whether to approve the taking of the proposed action, I took into account (among other matters) the principles of ecologically sustainable development as required under section 136(2)(a) of the EPBC Act, and the precautionary principle as required under section 391 of the EPBC Act.

However, that assertion is not, on its own sufficient evidence that the requirements of those sections have been met: *Turner v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388 at 392.
183 The applicants' chief concern with regard to this ground is that there is a lack of full scientific certainty as to the effect of the controlled action on the population of freshwater sawfish. A lack of full scientific certainty is demonstrated to some extent by the examples put forward by the applicants, including that a survey of the population had not been completed at the time of the approval, that AR 51 had concluded that there was insufficient information to assess the potential impacts on the population, and that the Minister had requested further information under s 132 of the Act.
184 The applicants submitted that the absence of discussion in the statement of reasons for decision concerning the lack of adequate surveys of the freshwater sawfish population is evidence that the precautionary principle had not been considered and that the Minister had therefore not considered the principles of ecologically sustainable development. However, despite the fact that some scientific uncertainty remained, the conditions attached to the decision to approve the action demonstrate that the Minister had taken those principles into account, and in particular had considered the lack of scientific certainty surrounding the population of freshwater sawfish.
185 As outlined above, Condition 2 required an ongoing freshwater sawfish management and monitoring plan, which had to be approved by the Minister at least one wet season before the realigned channel could be connected to the McArthur River. Furthermore, Condition 7 was as follows:
If the Minister believes that it is necessary or desirable for the better protection of the listed threatened species and/or migratory species to do

so, the Minister may request that the person taking the action make specified revisions to the plans, reports or strategies approved pursuant to paragraphs 2, 3, and 4 and submit the revised pan, report or strategy for the Minister's approval. The person taking the action must comply with any such request. The revised plan, report or strategy must be implemented.

186 Flowing from Conditions 2 and 7 is a retention of the Minister's ability to ensure the longevity of the freshwater sawfish population. In addition, if in the light of greater certainty about the impact of the action on the population – as a result of the Plan in Condition 2 or a request under Condition 7 – the Minister forms the view that the potential impact on the population is unacceptable, he has the power to vary the conditions under s 143(1) or to revoke the approval under s 145.
187 In my judgment, it has not been shown that the Minister did not consider and apply the precautionary principle as required by the Act. That is demonstrated both by the statement of his reasons for decision and in the imposition of Conditions 2 and 7. Those conditions were designed to address any lack of scientific certainty surrounding the potential impacts of the action on the population of freshwater sawfish.

CONCLUSION

188 As indicated earlier, I give the applicants leave to amend their further amended application in terms of the document entitled "Second Further Amended Application for an Order of Review" dated 18 February 2008 and attached to their "Submission on Additional Issue" filed on that date. However, the applicants have not made out any of the grounds of their application. The application must be dismissed. I will hear the parties as to costs and any other orders which may be appropriate.

I certify that the preceding one
hundred and eighty-eight (188)
numbered paragraphs are a true copy
of the Reasons for Judgment herein
of the Honourable Justice Mansfield.
Associate: Dated: 13 June 2008

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