

**Answers to Written questions on notice**  
**Greg McIntyre SC, Law Council of Australia**

1. Question: You say in your submission that the issue is "whether the decision makers failed to take into account relevant considerations which they were obliged to take into account" when making the decision to approve the YARA Ammonium Nitrate plant. You then list a number of those relevant considerations, including the issue of cumulative emissions. Rocks are subject to weathering and an increased acid pollution load will weather them faster. Should the Commonwealth have considered the cumulative impact of the pollution from the YARA Fertiliser plant at the same time as the proposed emissions from the TAN plant?
- o Should the Commonwealth have considered the total pollution load from the Port, the Liquefied Natural gas plants and the Fertiliser plant at the same time?
  - o Does failure to have done so constitute failure to take relevant considerations into account?

Answer: The considerations must be considerations which the Commonwealth Minister, as decision-maker, was obliged by law to take into account in making the decision. Under the *Environmental Protection and Biodiversity Act* (EPBC Act). The objects of the EPBC Act include, at s 3:

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

The Commonwealth Minister for the Environment, acting on behalf of the Commonwealth, in making a decision to approve an action which is likely to have a significant impact on the National Heritage values of a National Heritage place, is obliged to take into account the mandatory relevant considerations -

- (i) which are set out in s 136 of the EPBC Act, which includes "any other information the Minister has on the relevant impacts of the action" (s 136(2)(e)); and
- (ii) National Heritage management principles (EPBC Act s 137A(a), s 324Y, EPBC Reg 10.1 and Sch 5B), which include that "management of National Heritage places should ensure that their use and presentation is consistent with the conservation of their National Heritage values" (principle 4, EPBC Reg, Sch 5B).

Given the Commonwealth's knowledge of the liquid ammonia facility, which was the subject of the Minister's decision in 2001, it comprised 'information on the relevant impacts of the action', and its cumulative impact with the TAN plant was, by necessary inference, part of what was obliged to be considered as part of the impact of the action. A failure to take that into account was a failure to take into account a relevant consideration.

2. Question: Does the Commonwealth have the power to require the Company to meet conditions that haven't been met before any further license is issued or any further variation is considered?

Answer: The Commonwealth Minister may suspend approval of an action where it is believed on reasonable grounds that there has been a contravention of a condition

of the approval (EPBC Act s 144(2a)(a)(i)) or a thing required to be done within a specified time has not been done (EPBC Act s 144(2a)(a)(ii)). If the approval was suspended then any licence which might be granted by the State would be unable to be exercised while the Commonwealth Minister's approval was suspended. The Minister also has power to revoke an approval, for similar reasons (EPBC Act s 145), and to reinstate an approval suspended or revoked (EPBC Act s 145A).

3. Question: Is the Commonwealth Minister in breach of the EPBC by approving a development when he/she does not know what impact the projected emissions will have on the petroglyphs for which the site is National Heritage listed?

Answer: A Minister would not normally be described as having 'breached' legislation while exercising a statutory power such as this. However, the decision to approve the development may be found by a Court to be invalid where the decision has not been made in accordance with law. A Minister may fail to make a valid decision where the decision is made in circumstances where the Minister has insufficient information to make a rational decision as the 'relevant impacts of the action' to ensure that the National Heritage place is being managed in a manner which ensures that its "use and presentation is consistent with the conservation of [its] National Heritage values". If the Minister, when making the decision, did not know what impact the projected emissions would have on the petroglyphs for which the site is National Heritage listed, the decision of the Minister may be invalid because it fails to take into account a matter which is a necessary consideration relevant to the decision.

4. When it is brought to the Minister's attention that the Commonwealth is in breach of its obligations under EPBC by approving a development without taking all relevant matters into account, what is the Minister legally required to do?

Answer: If it was brought to the Minister's attention that the decision to approve the development may not have been made in compliance with the EPBC Act, the Minister would not be legally required to do anything of its own initiative. The Minister would have power to revoke the approval, if he chose to exercise it. The Minister has power to revoke an approval (EPBC Act s 145(2)) or suspend an approval (EPBC Act s 144(2)), where -

- (a) the action has had, or the Minister believes that the action will have, a significant impact that was not identified in assessing the action on a matter protected by a provision of Part 3 for which the approval has effect; and
- (b) the approval would not have been granted if information that the Minister has about that impact had been available when the decision to approve the action was made.

If the Minister did not choose to exercise those powers or it was concluded that the circumstances did not satisfy the statutory requirements for the exercise of those powers, any person with a special interest in the subject matter may apply to a Court to seek a declaration or obtain a writ of certiorari on the basis that the Minister's

decision was subject to a jurisdictional error because of its failure to comply with the requirements of the EPBC Act. The Court has a discretion whether or not to grant such relief, taking into account the circumstances which have given rise to the bringing of the application and the time which has elapsed since the making of the decision being challenged.

5. Question: If the Commonwealth, now having approved the plant, finds that it was illegal to have done so, and further finds that no additional emission load is safe for the protection of rock art, what is the Commonwealth legally obliged to do?
- Could it change the conditions to require no emissions?
  - If that is not possible, if relocation of the plant to the Maitland Industrial Estate is a solution, what compensation provisions might apply?

Answer: If the Commonwealth concludes that the approval of the plant was not in accordance with the requirements of the EPBC Act, the Commonwealth is not legally obliged to do anything of its own initiative. However, the Commonwealth Minister has the power to revoke the approval on the basis set out in s 145(2) of the EPBC Act, which is referred to in Answer 4 above. The Commonwealth Minister also has power to revoke, vary or add to conditions, pursuant to s 143(b) or (ba) of the EPBC Act, where -

(b) both of the following conditions are satisfied:

(i) the action has had a significant impact that was not identified in assessing the action on any matter protected by a provision of Part 3 for which the approval has effect, or the Minister believes the action will have such an impact;

(ii) the Minister believes it is necessary to revoke, vary or add a condition to protect the matter from the impact; or

(ba) all of the following conditions are satisfied:

(i) the action has had a significant impact on a matter protected by a provision of Part 3 for which the approval has effect, or the Minister believes the action will have such an impact;

(ii) the Minister is satisfied that the impact is substantially greater than the impact that was identified in assessing the action;

(iii) the Minister believes it is necessary to revoke, vary or add a condition to protect the matter from the impact.

If the amendment of the conditions to require no emissions resulted in the plant not being able to operate or not being able to operate at its present location, and resulted in a relocation of the plant, that would not result in any obligation of the Commonwealth to compensate any party. The Commonwealth is only obliged to compensate parties in respect to its decisions where the decision results in the acquisition of property: *Constitution* s 51(xxxi). The question of whether the Commonwealth has acquired property is a complex one, depending upon the particular factual circumstances: see *Tasmania v Commonwealth* ("*Tasmanian Dams Case*") [1983] HCA 21; (1983) 158 CLR 1; *Newcrest Mining (WA) Ltd v Commonwealth* [1997] HCA 38, (1997) 190 CLR 513; *Australian Tape Manufacturers Association v Commonwealth* ("*Blank Tapes Levy Case*") [1993] HCA 10; (1993) 176 CLR 480.

However, the conclusion to be reached in the present circumstances is probably to be found in the case of *Health Commission v Peverill* [1994] HCA 8, (1994) 179 CLR 226, where it was said that If a right is subject to alteration or revocation, its alteration or extinguishment does not constitute an acquisition of property. Given the powers of the Minister in the EPBC Act to revoke the approval or vary the conditions of the approval, described above, provided that any revocation or variation occurs in exercise of the powers identified above, any resultant change to the approval, including a relocation of the plant, would not amount to an acquisition of property and would not result in any compensation provisions applying which placed any obligation upon the Commonwealth to compensate Yara Pilbara Fertilisers Pty Ltd.