

Senate Estimates October 2015: Opening Statement on Regulatory Practices

I would like to take this opportunity to clarify matters regarding the approval of the proposed Carmichael Coal Mine and Rail project in Queensland.

At the request of the Commonwealth, Adani Mining and the Mackay Conservation Group, on 4 August 2015 the Federal Court set aside the approval decision for the Carmichael Project originally made in July 2014.

I would like to outline, first, why the Commonwealth took this position and, second, what the department has done since and ways to deal with legal risk in the future.

The decision to set aside the approval for Carmichael Coal

The request that the Court set aside the approval decision was made to eliminate uncertainty and risk that the Court could find the July 2014 approval of the Carmichael Project invalid due to failure by the department to attach physical copies of two new conservation advices – for the yakka skink and the ornamental snake – to the approval decision brief.

This uncertainty stemmed from the 2013 Federal Court decision in *Tarkine National Coalition v the Minister* in which approval for development of Shree Minerals' iron ore mine was set aside on the basis that the conservation advice for the Tasmanian Devil was not formally attached to the decision brief to the Minister.

On 12 January 2015, the Mackay Conservation Group challenged the Carmichael approval on the basis that the Minister had failed to provide sufficient consultation and take sufficient account of Adani's environmental history and climate change impacts.

On 12 June 2015, the Mackay Conservation Group added failure to formally consider the two conservation advices as a new ground to its case. This created uncertainty about the project and a risk that the approval could be overturned. Without accepting the substance of that claim, consistent with its obligations as a 'model litigant', the Commonwealth approached the other two parties to ask the court to set aside the original approval, which it did.

As a result of the Shree Minerals decision in 2013, the department changed its practice in two ways.

First, we instituted a process to check for relevant conservation advices during the Commonwealth's assessment process. As part of usual practice, officers checked for the relevant conservation advices as one of a range of tasks undertaken to complete an assessment. Other steps included considering the state's assessment and developing the department's advice to the Minister and any proposed Commonwealth conditions. This work was often done relatively early in the Commonwealth assessment to enable decisions to be made within the statutory time frame.

Second, we prioritised work on conservation advices, given that the court has said that conservation advices must be considered by the Minister, which led to an increase in conservation advices being prepared and considered.

With respect to the Carmichael decision, while the two conservation advices for the yakka skink and ornamental snake were not attached formally to the final approval brief, the department's brief did address the two species and the Minister's final approval decision for the Carmichael project directly and explicitly took into account the expected impacts of the mine on the skink and the snake. Specifically, the approval included conditions that require 5,600 hectares be set aside as an offset for the yakka skink and 135 hectares be set aside for the ornamental snake.

On this basis, the public can be reassured that the fact that the physical copies of the conservation advices were not attached to the brief had absolutely no impact on the environmental protections put in place to protect the two species. Not physically attaching the two conservation advices was a technical administrative matter. The Minister considered all material presented by the department at the time and expected that all relevant material was included in the briefing.

The Carmichael approval decision was remade on 14 October, with the two conservation advices formally attached to the final decision brief. The conditions relating to the two species were not altered as a result of the decision being remade. As the North Galilee Basin Rail project also did not have the conservation advice for the ornamental snake physically attached, this decision was remade by the Minister. Similarly, the conditions of approval for this species have not been changed.

Changes to departmental practices and ways to deal with legal risk

The department has taken two major steps to adapt further to the Shree decision and improve internal practices.

First, we have changed administrative practices to better ensure that all relevant statutory material, including conservation advices, are identified, considered and physically attached to all relevant decisions, including checking for relevant conservation advices again at the end of the Commonwealth's assessment process. Other changes include updating standard operating procedures, updating guidance to ensure the coordination and communication of information between different areas in the department, and moving to electronically automate coordination of documents relevant to statutory steps and decision briefs.

Second, and more generally, I have asked Mr Joe Woodward to review the regulatory practices and maturity of Environment Protection Group in the department, to provide a broad assessment of our regulatory capability and ways to improve our performance in implementing what is complex legislation. Mr Woodward is a former deputy of the NSW Environment Protection Agency and is an experienced and highly regarded environmental regulator. He will report by February 2016.

As Secretary, I am responsible for the performance of my department and for ensuring that appropriate changes are made to ensure that the decisions of the Minister are

legally robust and accord with the requirements of our legislation. The approach we have taken is to learn from what has happened and improve our regulatory and risk management systems.

It is also open to the Parliament to consider whether changes should be made to the EPBC Act to deal with instances where purely technical matters adversely affect approval decisions. The Parliament has previously considered, but not resolved, the so-called Shree amendments to the EPBC Act to ensure that not physically attaching particular documents would not invalidate an approval decision if all relevant information has been taken into account in making that approval.

I welcome any questions, Chair, and thank you for allowing me to make this statement.