Federal Court of Australia

Polaris Coomera Pty Ltd v Minister for the Environment [2021] FCA 254

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| File number: |  |
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| Judgment of: | **RANGIAH J** |
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| Date of judgment: | 22 March 2021 |
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| Catchwords: | **ADMINISTRATIVE LAW** – application for judicial review of Minister’s decision under s 75(1) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – where proposed development declared a controlled action – whether denial of natural justice – whether improper exercise of power – whether inadequate reasons – whether error of law – whether decision irrational – application dismissed with costs  |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 13 and 16*Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 3, 3A, 12, 15B, 18, 18A, 19, 37A, 37B, 67, 68, 75, 77, 87, 94, 95, 95C, 130, 134, 139, 266B, 523, 527E, Pts 3, 8 and 9 *Fair Trade Act 1974* (Cth) s 45D*Judiciary Act 1903* (Cth) s 39B  |
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| Cases cited: | *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593*Australian Brumby Alliance Inc v Parks Victoria Inc* [2020] FCA 605*Australian Competition and Consumer Commission v Pacific National Pty Limited* (2020) 378 ALR 1; [2020] FCAFC 77 *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* (2011) 180 LGERA 99; [2011] FCAFC 59*Booth v Bosworth* (2001) 114 FCR 39*BRF038 v Republic of Nauru* (2017) 349 ALR 67; [2017] HCA 44 *BVD17 v Minister for Immigration and Border Protection* (2019) 373 ALR 196; [2019] HCA 34*Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352*Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576*CSR Ltd v Eddy* (2005) 226 CLR 1*Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 73 ALD 321; [2003] HCA 26*Friends of Leadbeater’s Possum Inc v VicForests (No 4)* [2020] FCA 704*Giretti v Commissioner of Taxation* (1996) 70 FCR 151*Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123*Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291*Kim v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 38 AAR 31*Kioa v West* (1985) 159 CLR 550*Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24*Minister for Home Affairs v Omar* (2019) 272 FCR 589*Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160*Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421*Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164*Minister for Immigration and Multicultural and Indigenous Affairs v SZFDJ* [2006] FCAFC 53*Northern Inland Council for the Environment Inc v Minister for the Environment* (2013) 218 FCR 491*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152*SZDXZ v Minister for Immigration and Citizenship* [2008] FCAFC 109*Tillmanns Butcheries v Australasian Meat Industry Employees’ Union* (1979) 27 ALR 367*Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480  |
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| Date of hearing: | 22–23 September 2020  |
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| Counsel for the Applicant: | Mr S McLeod QC with Mr A O’Brien |
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| Solicitor for the Respondent: | Clayton Utz |

ORDERS

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|  | QUD 81 of 2020 |
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| BETWEEN: | POLARIS COOMERA PTY LTD ACN 130 648 056Applicant |
| AND: | MINISTER FOR THE ENVIRONMENT (COMMONWEALTH)Respondent |

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| order made by: | RANGIAH J |
| DATE OF ORDER: | 22 MARCH 2021 |

THE COURT ORDERS THAT:

1. The application is dismissed.
2. The applicant pay the respondent’s costs of the application.

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

REASONS FOR JUDGMENT

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RANGIAH J:

1. The applicant, Polaris Coomera Pty Ltd (ACN 130 648 056), is the proponent of a medium and high density residential development at Coomera in Queensland (**the Proposed Development**). The Proposed Development would require the destruction of about 135 hectares of Koala habitat.
2. On 25 November 2019, a delegate of the Commonwealth Minister for the Environment (the **Delegate**) made a decision under s 75(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**), that the Proposed Development is a “controlled action”, and that the “controlling provisions” are ss 18 and 18A of the EPBC Act (the **Decision**). The basis of the Decision was that the Proposed Development is likely to have a “significant impact” on the Koala.
3. The applicant has applied for judicial review of the Decision pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**) and s 39B of the *Judiciary Act 1903* (Cth).
4. The applicant’s originating application for judicial review relies on five grounds of review:
5. a breach of the rules of natural justice occurred in connection with the making of the Decision, as the applicant was not given a reasonable opportunity to be heard;
6. the making of the Decision was an improper exercise of power because:
	1. the Delegate failed to take into account relevant considerations;
	2. the Delegate took into account irrelevant considerations;
7. the Delegate’s reasons for the Decision were inadequate because they do not reveal any active intellectual engagement with the applicant’s submissions;
8. the Delegate misconstrued and misapplied ss 18 and 18A of the EPBC Act;
9. the making of the decisions was an improper exercise of power under the Act because the Decision was based on findings that were irrational, illogical or unreasonable and lacking an evident and justifiable basis.
10. I will describe the background and the legislative scheme before addressing the Decision and the grounds of review.

## Background

1. Since around 2008, the applicant has been proposing to develop a residential master planned community known as the, “Coomera Woods Master Planned Development”. The development would require the clearing of a large area of vegetation. Koalas are found in that area and in nearby areas.
2. The geography of the Proposed Development site and the areas surrounding it are of some importance in understanding the reasons for the Decision and the grounds of review.
3. Immediately to the north of the Proposed Development site is Pimpama State Secondary College (the **College**) and an adjacent residential development. Immediately to the north of the College and the adjacent residential development is Yawalpah Road, which runs east-west.
4. To the north of Yawalpah Road is Gainsborough Greens Estate, through which Gainsborough Drive runs. To the east of Gainsborough Greens Estate is a large area of bushland described in some of the material as a “Koala Conservation Area”. Yawalpah Road separates the Koala Conservation Area from areas, including the Proposed Development, to the south and south-west.
5. There are two one-way fauna exclusion fences between the Koala Conservation Area and Gainsborough Greens Estate. There is also a one-way fauna exclusion fence between the Koala Conservation Area and Yawalpah Road. The fences are designed to allow Koalas to move into the Koala Conservation Area, but to prevent them from moving out of that area.
6. The applicant alleges that there are barriers to the movement of Koalas from the Koala Conservation Area into the Proposed Development site. That issue goes to the importance of the Koala habitat that would be cleared and the importance of the Koala population that would be affected. The barriers are alleged to include the fauna exclusion fences, the College and the adjacent residential development, Gainsborough Greens Estate and Yawalpah Road. In addition, there are culverts below Yawalpah Road which the applicant asserted were permanently, partially flooded such that they act as barriers to the movement of Koalas under Yawalpah Road.
7. In particular, an issue before the Delegate was whether the fences would in fact prevent Koalas from leaving the Koala Conservation Area, crossing Yawalpah Road and eventually finding their way into the Proposed Development site.
8. On 22 December 2017, the applicant referred the Proposed Development to the Minister pursuant to s 68 of the EPBC Act. The referral was made in the prescribed form. The referral form completed by the applicant (**the Referral Form**) stated that the Proposed Development involved an area of approximately 147 hectares, of which 137 hectares would be cleared for development with the remaining 10 hectares to be retained as open space or an ecological or conservation corridor. The 10 hectares would be connected to an existing ecological corridor that allows Koalas to move north east from the Proposed Development to the Koala Conservation Area to the north of Yawalpah Road.
9. The completed Referral Form provided a detailed assessment of whether the Proposed Development would have a significant impact on the Koala, concluding:

The proposed action is not considered to have a significant impact on this species for reasons that include:

The Coomera Woods site does not contain habitat critical to the survival of the koala as a species:

* the site scores a 4 under the Koala Habitat Assessment Tool in the Koala Referral Guidelines;
* the site is surrounded by substantial barriers, suffers from side effects caused by surrounding uses, the habitat is degraded and the site is too small to support a minimum viable population; and
* there is no link between the site and any other koala habitat area that provide (sic) adequate connectivity for the purposes of ensuring long term genetic fitness and ensuring proper access to habitat areas critical to the survival of the species.
1. On 4 May 2018, the applicant submitted a request to vary the Proposed Development such that the area for clearing was reduced to approximately 135 hectares. The request to vary was granted on 21 May 2018.
2. On about 7 May 2018, Planit Consulting Pty Ltd, on behalf of the applicant, provided to the predecessor of the Department of Agriculture, Water and the Environment (the **Department**) a report entitled, *New Information relating to the ecological corridor and Koala Habitat Assessment Score – Polaris Coomera Pty Ltd – Coomera Woods Master Planned Development (EPBC 2017/8134)* (the **2018 Planit Report**).
3. On 5 July 2018, a delegate of the Minister for the Environment determined that the proposed action was a “controlled action” under s 75(1) of the EPBC Act. The applicant applied for judicial review of this decision and, on 7 February 2019, this Court set aside the decision by consent and remitted it for a new decision.
4. On about 28 February 2019, the applicant provided to the Department a further report from Planit Consulting Pty Ltd entitled, *Coomera Woods Supplementary Koala Evaluation and Assessment* (the **2019 Planit Report**)
5. On 25 November 2019, the Delegate made the Decision, namely that the Proposed Development is a “controlled action” under s 75(1) of the EPBC Act and that the “controlling provisions” are ss 18 and 18A. The Delegate also decided, pursuant to s 87(1) of the EPBC Act, that the Proposed Development is to be assessed on preliminary documentation (**the Assessment Decision**). The Assessment Decision is also the subject of the applicant’s application for judicial review, but it is unnecessary to deal with it in any detail as its making was consequential upon the making of the Decision. If the Decision is set aside, the Assessment Decision must also be set aside.
6. The basis for the Decision was the conclusion that the Proposed Development is likely to have a “significant impact” on the Koala. As a consequence of the Decision, the Proposed Development is prohibited, subject to the assessment and approval processes under Pts 8 and 9 of the EPBC Act.
7. The applicant filed an originating application for judicial review on 19 March 2020, seeking orders setting aside the Decision and the Assessment Decision and an order that the applicant’s referral be remitted to a different delegate to be decided according to law.

## The Legislative Framework

1. It is necessary to set out the relevant legislative provisions upon which the applicant relies, and to describe the policy instruments involved in the making of the Decision.

### Judicial Review

1. The applicant seeks judicial review of the Decision pursuant to s 5(1) of the ADJR Act and s 39B(1) of the Judiciary Act.
2. Section 5 of the ADJR Act provides, relevantly:

**5 Applications for review of decisions**

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

…

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

…

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

…

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

…

1. Although the respondent describes the Decision as, “preliminary” in nature, he has not submitted that it is not “a decision to which this Act applies”, nor that the applicant is not a “person aggrieved by the decision”.
2. Section 16(1) of the ADJR Act sets out the orders the Court, “may, in its discretion, make”. A Court may refuse relief where the outcome of the decision was not affected by the legal error that has been established, see, for example, *Giretti v Commissioner of Taxation*  (1996) 70 FCR 151 at 165.
3. It appears that the applicant relies upon s 39B of the Judiciary Act against the possibility that the ADJR Act does not apply to the Decision, but the respondent has not contested that the ADJR Act applies. The applicant relies upon the same grounds under the ADJR Act and the Judiciary Act, except that the inadequacy of reasons ground appears confined to the former.
4. In order to obtain relief under s 39B, it is necessary to establish jurisdictional error. In *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, the plurality held at [29] that where a statute confers decision-making authority, “[t]he statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance”. Their Honours held at [30]:

…the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made…

1. This was confirmed by the plurality in *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, which held at [45] that, “[a] breach is material to a decision only if compliance could realistically have resulted in a different decision”.

### The EPBC Act

1. The objects of the EPBC Act are set out in s 3(1), and include providing for the protection of the environment, especially those aspects of the environment that are, “matters of national environmental significance”. Another object is to promote “ecologically sustainable development”. These objects are, under s 3(2), to be achieved by, inter alia, including provisions to protect native species, and in particular to prevent the extinction, and promote the recovery, of threatened species.
2. Part 3 of Ch 2 of the EPBC Act prohibits the taking of actions that have or will have, or are likely to have, a significant impact on, “matters of national environmental significance”. These matters include Declared World Heritage properties, National Heritage places, wetlands of international importance and, relevantly, listed threatened species and communities.
3. This case concerns the Koala, which has been listed as a threatened species in the vulnerable category since 2 May 2012.
4. Section 18(4) of the EPBC Act provides that a person must not take an action that “has or will have” or “is likely to have” a significant impact on a listed threatened species in the vulnerable category. Section 18A(2) provides that a person commits an offence if the person takes an action that is “likely to have” a significant impact on a species that is a listed threatened species.
5. An “action” includes, relevantly, “a project” and “a development”: s 523(1). It is not in dispute that the Proposed Development is an action.
6. The word “impact” is defined in s 527E, and provides, relevantly, that an event or circumstance is an “impact” of an action taken by a person if, “the event or circumstance is a direct consequence of the action”. An “event” or “circumstance” is not defined in the EPBC Act. These are ordinary words that can be taken to have their ordinary meanings.
7. The phrase “significant impact” is not defined in the EPBC Act, but it has been held to mean an, “impact that is important, notable or of consequence having regard to its context or intensity’: *Booth v Bosworth* (2001) 114 FCR 39 at [99]-[100].
8. Section 19 provides for exceptions to ss 18 and 18A. Section 19(1) relevantly provides that an action falling under a subsection of ss 18 or 18A will not be prohibited where an approval of the taking of the action by the person is in operation under Pt 9 of the EPBC Act. Section 19(3)(b) also provides that an action falling under a subsection of ss 18 or 18A will not be prohibited if there is in force a decision of the Minister that the subsection is not a “controlling provision” for the action.
9. In assessing whether an action needs approval, it must be determined whether the action is a “controlled action”. Section 67 provides that a proposed action is a controlled action if:

…the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be (or would, but for section 25AA or 28AB, be) prohibited by the provision. The provision is a ***controlling provision*** for the action.

1. Section 68(1) provides that a person proposing to take an action which they think may be or is a controlled action must refer the proposal to the Minister for a decision as to whether it is a controlled action. Where a person proposing to take an action thinks it is not a controlled action, they may nonetheless refer the proposal to the Minister for a decision as to whether it is a controlled action pursuant to s 68(2). In a referral under s 68, the person must state whether or not they think the proposed action is a controlled action: see s 68(3).
2. The applicant in this matter referred the Proposed Development to the Minister for a decision upon whether or not the action is a controlled action in accordance with s 68. The Referral Form stated that the applicant did not think the Proposed Development was a controlled action as it would not have a significant impact on the Koala.
3. Section 75 of the EPBC Act describes what the Minister must decide, and the matters that the Minister must, and must not, consider:

**75 Does the proposed action need approval?**

*Is the action a controlled action?*

(1) The Minister must decide:

(a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and

(b) which provisions of Part 3 (if any) are controlling provisions for the action.

…

(2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:

(a) the Minister must consider all adverse impacts (if any) the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protected by each provision of Part 3; and

(b) must not consider any beneficial impacts the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protected by each provision of Part 3.

1. In this case, the Delegate determined that the Proposed Development was a controlled action, and that the controlling provisions were ss 18 and 18A of the EPBC Act.
2. Section 77(1) requires the Minister to give written notice of the decision under s 75(1) and to publish notice of the decision. Under s 77(4), the Minister must provide reasons for the decision if requested by a person who has been given the notice.
3. A determination under s 75(1) commences a process by which the Minister decides under Part 9 whether or not to approve the taking of an action that is a controlled action.
4. Where an action is determined to be a controlled action, the Minister is required, under s 87, to decide which approach will be used to assess the relevant impacts of the action. In this case, the Delegate decided that the Proposed Development was to be assessed on preliminary documentation.
5. Under ss 94, 95 and 95C(1), if the Minister determines that the Proposed Development is to be assessed on preliminary documentation and is satisfied that there is enough information to assess the relevant impacts of the action, the Secretary must prepare and give to the Minister a recommendation report relating to the action.
6. Section 130(1) (in Part 9) provides that, “the Minister must decide whether or not to approve, for the purposes of each controlling provision for a controlled action, the taking of the action”. Section 134(1) allows the Minister to attach conditions to the approval if satisfied that the conditions are necessary or convenient for protecting a matter protected by a relevant provision of Part 3.

## *The Guidelines and Policies*

1. The Delegate considered a number of guidelines and policies published by the Department. I will describe them briefly at this stage, and then in more detail later in these reasons.
2. The Department has published guidelines entitled, *Matters of National Environmental Significance: Significant impact guidelines 1.1 – Environment Protection and Biodiversity Conservation Act 1999* (the **Significant Impact Guidelines**). The purpose of the Significant Impact Guidelines is stated to be to assist any person who proposes to take an action to decide whether or not they need to make a referral to the Minister.
3. The Significant Impact Guidelines set out criteria for assessing whether it is likely that an action will have a significant impact on a vulnerable species:

**Significant impact criteria**

An action is likely to have a significant impact on a vulnerable species if there is a real chance or possibility that it will:

* lead to a long-term decrease in the size of an important population of a species
* reduce the area of occupancy of an important population
* fragment an existing important population into two or more populations
* adversely affect habitat critical to the survival of a species
* disrupt the breeding cycle of an important population
* modify, destroy, remove or isolate or decrease the availability or quality of habitat to the extent that the species is likely to decline
* result in invasive species that are harmful to a vulnerable species becoming established in the vulnerable species’ habitat
* introduce disease that may cause the species to decline, or
* interfere substantially with the recovery of the species.

(Underlining added.)

1. The Delegate placed particular weight upon the three underlined criteria.
2. The Department has published guidelines entitled the *EPBC Act referral guidelines for the vulnerable koala* *(combined populations of Queensland, New South Wales and the Australian Capital Territory)* (the **Koala Referral Guidelines**). One of the purposes of the Koala Referral Guidelines is stated to be to, “[p]romote a clear, consistent and transparent approach for making decisions on whether an action is likely to result in a significant impact on the koala”.
3. The Koala Referral Guidelines contain a “Koala habitat assessment tool” (the **Koala Habitat Assessment Tool**). The Delegate applied the Koala Habitat Assessment Tool when considering the criterion under the Significant Impact Guidelines of whether there was a real chance or possibility that the action would adversely affect habitat critical to the survival of the Koala. The Koala Habitat Assessment Tool identifies five primary attributes of Koala habitat, including, relevantly, “habitat connectivity”. There is a scoring system for each attribute. A total score of five or more for the five attributes indicates that affected habitat is critical to the survival of the Koala.
4. The Department also published a Profile for the Koala on the *Species Profile and Threats Database* (the **SPRAT Profile**). The SPRAT Profile provides information about Koala distribution, population, habitat, life cycle, feeding and movement patterns and threats, and strategies for threat abatement and recovery, mitigation and management.
5. The SPRAT Profile was addressed by the Delegate in the context of considering the applicant’s submissions concerning “habitat connectivity” under the Koala Habitat Assessment Tool. The applicant alleges that it was denied procedural fairness by the Delegate’s use of the SPRAT Profile.
6. The *Commonwealth Listing Advice for the Koala* (the **Koala** **Listing Advice**) was prepared by the Threatened Species Scientific Committee, and approved under s 266B of the EPBC Act. The Koala Listing Advice sets out the grounds on which the Koala is eligible to be included in the vulnerable category, the factors that contribute to its vulnerability, and information about what can be done to stop the decline, and support the recovery, of the species. The applicant alleges that it was denied procedural fairness by the Delegate’s use of the Koala Listing Advice.

## The Delegate’s Decision

1. The Delegate’s statement of reasons is lengthy, detailed and complex. That reflects the complexity of the legislative scheme and guidelines and policies, as well as the extensive submissions and material provided by the applicant.
2. At this stage, I propose to give an overview of the approach taken by the Delegate and the most significant findings made along the way to the ultimate decision. I will discuss relevant aspects of the Delegate’s reasons in more detail when considering the grounds of review.
3. The Delegate was required, under s 75(1) of the EPBC Act, to determine whether the Proposed Development was a “controlled action”, and, by the operation of ss 18(4), 18A and 67, this required a decision upon whether the Proposed Development would have, or be likely to have, a “significant impact” on the Koala.
4. The Delegate began by finding that the Proposed Development was likely to result in the direct clearing of 135.5 hectares of Koala habitat. The Delegate also found, applying information taken from the Koala Listing Advice, that the Proposed Development was likely to have an “impact” on the Koala population in the remaining ten hectares of the site because of the impacts of dogs and cars.
5. The Delegate then proceeded to consider whether these impacts would have, or were likely to have, a “significant impact” on the Koala. The Delegate considered this issue by reference to three of the criteria listed in the Significant Impact Guidelines.
6. The *first* criterion was whether there is a real chance or possibility that the Proposed Development would, “adversely affect habitat critical to the survival of the Koala”. The Delegate addressed this question by applying the Koala Habitat Assessment Tool under the Koala Referral Guidelines. The principal issue raised by the applicant concerned the attribute of “habitat connectivity”. The applicant submitted that no score for this attribute should be given, but the Delegate rejected this submission. The Delegate concluded (at para 7.75 of his reasons) that the Proposed Development would, “adversely affect habitat critical to the survival of the Koala”.
7. The *second* criterion was whether there is a real chance or possibility that the Proposed Development would, “modify, destroy, remove or isolate or decrease the availability or quality of habitat to the extent that the Koala is likely to decline”. The Delegate concluded (at para 7.80) that there was such a real chance or possibility.
8. The *third* criterion was whether there was a real chance or possibility that the Proposed Development would, “reduce the area of occupancy of an important population”. The Delegate concluded (at para 7.88) that the East Coomera Koala population was an important population, and that there was a real chance or possibility that the Proposed Development would reduce its area of occupancy.
9. The Delegate concluded (at para 7.89) that the Proposed Development was likely to have a “significant impact” on the Koala for the following reasons:
10. the proposed action will result in the loss of approximately 135.5 hectares of habitat with a score of 7, and intensify ongoing threats to a further 10 hectares of Koala habitat, as assessed under the EPBC Act referral guidelines for the listed Koala, which means that it is habitat critical to the survival of the Koala;
11. the proposed action is likely to have a significant impact on the Koala as it will decrease the availability of Koala habitat, and will therefore contribute to the decline of a vulnerable species;
12. the East Coomera Koala population is an important population of a vulnerable species, and therefore the proposed action is likely to have a significant impact on the Koala as it will reduce the area of occupancy of an important population of the species; and
13. the proposed action may remove or reduce connectivity to other areas of East Coomera and intensify threats such as vehicle strike and dog attack.
14. The Delegate ultimately (at paras 1.2 and 9.4) decided that the Proposed Development was a “controlled action” under s 75(1) of the EPBC Act, and that the “controlling provisions” were ss 18 and 18A of the EPBC Act.
15. The Delegate considered the approach to be used for assessment of the relevant impacts of the action. The Delegate found (at para 8.3) that assessment on preliminary documentation was the appropriate method of assessment.

## Consideration

### Ground 1: Whether there was a breach of the rules of natural justice

1. The first ground of review is that there was a breach of the rules of natural justice in connection with the making of the Decision, based on three allegations.
2. The *first* allegation is that the applicant was not given a reasonable opportunity to be heard in relation to the Delegate’s use of the SPRAT Profile.
3. The *second* allegation is that the applicant was not given a reasonable opportunity to be heard in relation to the Delegate’s use of the Koala Listing Advice.
4. The *third* allegation is that the Delegate’s failure to give genuine, realistic and real consideration to material relied on by the applicant amounted to a denial of procedural fairness.

#### The Delegate’s use of the SPRAT Profile

1. The Delegate applied a section of the SPRAT Profile entitled, “Impact-mitigation options for reducing the risk of fragmentation”, which set out dimensions and characteristics that are recommended for culverts in order to allow the passage of Koalas through them. The Delegate concluded (at para 7.36) that while it was possible that the culverts under Yawalpah Road would deter the movement of Koalas through them, that could not be confirmed without undertaking a Koala tracking study.
2. The applicant submits that that the Delegate’s application of the SPRAT Profile without disclosing, first, that he intended to do so and, second, the way he intended to use it, amounted to a denial of procedural fairness.
3. As to the second submission, the applicant asserts that the Delegate decided that the non-compliance of the culverts with the guidelines under the SPRAT Profile undermined a conclusion that they are a barrier, when in fact it supported the conclusion that the culverts are a barrier. The applicant submits that the Delegate thereby misconstrued and misunderstood the SPRAT Profile. The applicant’s submission seems to be that the use of the SPRAT Profile in a way contrary to its correct meaning without giving the applicant an opportunity to comment was procedurally unfair. The applicant submits that if given that opportunity, it would have provided further material or submissions, and that a different decision might have been made.
4. The respondent submits that the relevance of the SPRAT Profile to the decision was made plain to the applicant in the referral form it completed and, further, that the applicant was clearly aware of its relevance. The respondent submits that the applicant’s submissions demonstrate a misunderstanding of the Delegate’s reasoning. It is also submitted that the applicant was informed of the “critical issues” on which the decision could turn, and that was the full content of the procedural fairness obligation.
5. Procedural fairness requires that a person impacted by a decision be given an opportunity to deal with adverse information before the decision-maker that is “credible, relevant and significant”: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [17]; *Kioa v West* (1985) 159 CLR 550 at 628–629.
6. In some circumstances, procedural fairness requires that a decision-maker must go further than merely disclosing adverse information. In *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-592, the Full Court held:

It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.

…

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

(Underlining added, citations omitted.)

(Cited with approval in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [29] and [32]; *BRF038 v Republic of Nauru* (2017) 349 ALR 67; [2017] HCA 44 at [59].

1. The obligation may extend to giving the person, “an opportunity to deal with that part of the information which the decision-maker proposed to take into account in arriving at a decision adverse to the interests of the person affected”: *Minister for Immigration and Multicultural and Indigenous Affairs v SZFDJ* [2006] FCAFC 53 at [43].
2. It is necessary to examine the context in which the SPRAT Profile was considered by the Delegate.
3. The Delegate was required to consider whether the Proposed Development would have a “significant impact” on the Koala. The Delegate applied the criteria from the Significant Impact Guidelines. In particular, the Delegate considered whether there was a real chance or possibility that the action would:
* adversely affect habitat critical to the survival of the species;
* modify, destroy, remove or isolate or decrease the availability or quality of habitat to the extent that the Koala is likely to decline;
* reduce the area of occupancy of an important population of Koalas.
1. The Delegate found there was a real chance or possibility that the Proposed Development would have each of these impacts.
2. In considering the criterionof whether there was a real chance or possibility that the Proposed Development would adversely affect, “habitat critical to the survival of the species”, the Delegate applied the Koala Habitat Assessment Tool under the Koala Referral Guidelines. The Koala Habitat Assessment Tool identifies five attributes of Koala habitat: Koala occurrence; vegetation composition; habitat connectivity; key existing threats; and recovery value. Each attribute is allocated a score between zero and two. The scores are added together to give a total score out of 10, which provides an indication of the overall value of habitat in the impact area. A score of four or less indicates that the habitat is not critical to the survival of the Koala, while a score of five or more indicates that it is critical.
3. The score that is assessed for “habitat connectivity” depends on whether the impact area is part of a “contiguous landscape”, and the size of that landscape. For a coastal area, if there is a contiguous landscape that is greater than 500 hectares, the score is two; if it is between 300 hectares and 500 hectares, the score is one; and if it is less than 300 hectares, the score is zero.
4. The term “contiguous landscape” is defined in the Koala Referral Guidelines to mean:

An area of koala habitat that is greater than 300 ha in the coastal context, or greater than 500 ha in the inland context, which encompasses no barriers but is bounded by barriers.

1. The term “barrier” is defined to mean:

A feature (natural or artificial) that is likely to prevent the movement of koalas. Natural barriers may include steep mountain ranges (cliffs), unsuitable habitats, major rivers / water bodies or treeless areas more than 2 km wide. Artificial barriers may include infrastructure (such as roads, rail, mines, large fences etc.) without effective koala passage measures, or developments that create treeless areas more than 2 km wide.

1. Accordingly, the score for “habitat connectivity” under the Koala Habitat Assessment Tool depended upon whether the Proposed Development site is part of a “contiguous landscape” in excess of 300 hectares. As the Proposed Development area is only 147 hectares, it was necessary to determine whether the site formed part of a “contiguous landscape” together with the Koala Conservation Area. This depended upon whether there were barriers likely to prevent the movement of Koalas between the two areas. The applicant submitted that there were a number of such barriers.
2. Section 2 of the prescribed referral form deals with, “Matters of National Environmental Significance”. The prescribed form states:

The following resources can assist you in your assessment of likely impacts:

* Profiles of relevant species/communities (where available), that will assist in the identification of whether there is likely to be a significant impact on them if the proposal proceeds;
* Significant Impact Guidelines 1.1—Matters of National Environmental Significance;

…

1. The first dot point was hyperlinked to documents including the SPRAT Profile. The second dot point was hyperlinked to the Significant Impact Guidelines. The SPRAT Profile contained a hyperlink to the Koala Referral Guidelines.
2. In the completed Referral Form submitted to the Department, the applicant addressed the Koala Referral Guidelines, including the Koala Habitat Assessment Tool. The applicant stated in the Referral Form that, “[a] recent assessment hereunder by Planit of the referral site against the Koala Habitat Assessment Tool also determined that the referral site does not contain critical habitat to the survival of this species”. The Referral Form went on to address the five attributes of Koala habitat. As to “habitat connectivity”, the Referral Form asserted that there was no contiguous landscape of sufficient size.
3. It appears that the Department sent correspondence to the applicant on 16 March 2018 indicating a preliminary view that the site contained critical habitat and that the Proposed Development would have a “significant impact” on the Koala. That correspondence is referred to in the first sentence of the 2018 Planit Report, which went on to make submissions addressing the preliminary view. The correspondence is also referred to in the report of Planit Consulting Pty Ltd provided to the Department on 3 April 2018, entitled, *Supplementary Species Assessment Report – Polaris Coomera Pty Ltd – Coomera Woods Master Planned Development (EPBC2017/8134).* Surprisingly, the correspondence of 16 March 2018 is not in evidence.
4. The 2018 Planit Report contended that the habitat in the Proposed Development site should be given a total score of four under the Koala Habitat Assessment Tool, indicating that it was not critical to the survival of the Koala. It was submitted that the “habitat connectivity” score should be assessed as zero, on the basis that the Proposed Development site was not part of any “contiguous landscape” exceeding 300 hectares.
5. To reiterate, the Koala Conservation Area was to the north-east of the Proposed Development site. Yawalpah Road runs between the Koala Conservation Area and a “conservation corridor” that connects with the Proposed Development site. Effectively, the Koala Conservation Area and Proposed Development site were divided by Yawalpah Road.
6. The 2018 Planit Report argued that there were barriers to the movement of Koalas from the Koala Conservation Area to the Proposed Development site so that they were not part of a contiguous area. The report argued that the one-direction fauna exclusion fencing on the northern side of the Yawalpah Road reserve was a barrier. In addition, the report argued that Yawalpah Road itself was a barrier. In that context, it was contended that culverts running under Yawalpah Road would not allow Koalas to make their way under Yawalpah Road from the north and into the Proposed Development site. The 2018 Planit Report stated:

There are a series of hydraulic culverts within the ecological corridor and crossing underneath Yawalpah Road. Council road design drawings show that the culverts are 1.8m in diameter. The culverts extend under the Yawalpah Road embankment and are approximately 40m long.

The length of piping and absence of fauna furniture and permanent inundation would preclude movements through them by koalas from the conservation areas to the ecological corridor.

The culvert outlets are located north of the Yawalpah road reserve boundary and thus north of the one direction fauna exclusion fence. The culverts are partially submerged and aquatic plants are growing at both the inlet and outlet of the culverts, indicating that the culverts are permanently submerged (refer to Figure 7). Koalas cannot cross through the culverts and move from the north to the south.

1. The 2018 Planit Report contended that as there was no contiguous area of more than 300 hectares, the score for “habitat connectivity” under the Koala Habitat Assessment Tool should be zero.
2. The 2019 Planit Report also addressed the Koala Referral Guidelines and the Koala Habitat Assessment Tool. That Report asserted, relevantly, that Yawalpah Road forms an artificial barrier and has no Koala passage, and that the score for “habitat connectivity” should be zero. The 2018 and 2019 Planit Reports submitted that the total score should be four, indicating that the affected habitat was not critical.
3. In applying the Koala Habitat Assessment Tool to determine whether the Proposed Development would adversely affect habitat critical to the survival of the Koala, the Delegate assessed the total score at seven. In arriving at that score, the Delegate assessed the score for “habitat connectivity” at two, deciding that the Proposed Development, together with the Koala Conservation Area were a “contiguous landscape” of greater than 500 hectares. In reaching that conclusion, the Delegate addressed the arguments made in the 2018 and 2019 Planit Reports about barriers between the Proposed Development site and the Koala Conservation Area.
4. As an aside, the 2018 and 2019 Planit Reports seemed to accept that Koalas could cross from the Proposed Development site into the Koala Conservation Area, but not the opposite way. The parties implicitly proceeded on the basis that a two-way connection is required. The parties’ focus was upon whether Koalas could travel south or south-west out of the Koala Conservation Area and into the Proposed Development site.
5. The 2018 and 2019 Planit Reports contended that the barriers included one-direction Koala exclusion fences, the College and an adjacent residential development and Yawalpah Road. It was also argued that the culverts would not allow the passage of Koalas under Yawalpah Road because the culverts were too long (40 m) and too narrow (1.8 m) and were permanently, partially flooded, while lacking “fauna furniture”.
6. These arguments concerning the culverts were evidently intended to engage the section of the SPRAT Profile entitled, “Impact-mitigation options for reducing the risk of fragmentation”, and were understood as such by the Delegate. That section of the SPRAT Profile describes measures that can be taken to reduce the risk of a Koala population becoming fragmented because of artificial barriers. The measures include the construction of bridges, land bridges and road tunnels. One measure is described as, “Underpasses (reinforced concrete box cell culverts)”. They are defined as:

…one or more adjacent, enclosed channels below the road formation and typically located where drainage along a watercourse is required. Culverts are laterally square (box culvert), rectangular or semi-circular in shape.

1. The SPRAT Profile recommends the following dimensions and characteristics for culverts to allow the passage of Koalas:

So that Koalas will be able to move through, a culvert should be:

* a maximum 40 m in length
* a minimum 2.4 m in height and width, and
* have a low-flow channel incorporated in the design, especially if they are a combined drainage and Koala-impact-mitigation structure.
1. The SPRAT Profile also states that benches should be installed longitudinally along underpasses, well above the average water level, to allow Koalas to walk along the benches. This appears to be what the 2018 Planit Report was referring to when it described an absence of “fauna furniture”.
2. In his reasons, the Delegate addressed the applicant’s argument that Koalas are unable to pass through the culverts, as follows:

7.35 With respect to the hydraulic culverts, I noted that the Species Profile and Threats (**SPRAT**) Profile for the Koala states that a culvert should be a maximum 40 metres in length, a minimum of 2.4 metres in height and width, and have a ‘*low-flow channel incorporated in the design, especially if they are a combined drainage and Koala-impact-mitigation structure*’.

7.36 The hydraulic culverts underneath Yawalpah Road do not meet these specifications, as they are only 1.8 metres in width (according to Planit Consulting’s report of 7 May 2018). While it is possible that the design of the culverts under Yawalpah Road would deter Koalas from using them to move along the conservation corridor, I considered that it would not be possible to confirm whether Koalas are in fact deterred by the culverts without undertaking a Koala tracking study in that area.

7.37 After considering the information provided by Planit Consulting, I was of the view that:

a. although the fence at the interface between the Gainsborough Greens residential development and a Koala conservation area, and the fence along Gainsborough Drive, are likely to limit the movement of Koalas into the Gainsborough estate, it is not clear that those fences would limit Koala movement into the conservation corridor;

b. although the fence installed along Yawalpah Road is likely to limit Koala movement into the conservation corridor, I do not consider this fence is a complete barrier to Koala movement, noting the evidence that this force is not being maintained in accordance with the Queensland Department of Transport and Main Roads’ *Fauna Sensitive Road Design Manual* (Volume 2: Preferred Practices); and

c. although it is possible that the hydraulic culverts under Yawalpah Road would prevent Koala movement into the conservation corridor, this could only be definitively known by undertaking a Koala tracking study.

7.38 Accordingly, I did not consider that the information provided by Planit Consulting in its report of 7 May 2018 was sufficient to allow me to conclude that there are barriers that in fact prevent Koala movement between the proposed site and large areas of contiguous habitat located to the north east of the proposed site.

1. The Delegate went on to consider whether Yawalpah Road was a barrier, and concluded (at 7.43(b)) that it was not, as Koalas are capable of crossing two-lane roads. The Delegate determined that it was possible for Koalas to cross Yawalpah Road and move into the Proposed Development site through the “conservation corridor” to the north-east of the site, or through a vegetated area along the College fence line, or a strip of vegetation to the north-west of the site.
2. The Delegate concluded that the Proposed Development site and the Koala Conservation Area formed a “contiguous landscape” of more than 500 hectares (at paras 7.47 and 7.61). The Delegate assessed the score for “habitat connectivity” at two. Taking into account the Delegate’s scoring of the other habitat attributes, the total score under the Koala Habitat Assessment Tool was assessed at 7 (at para 7.73). As the total score exceeded five, it indicated that the Proposed Development site should be considered critical to the survival of the Koala (at para 7.73). In reaching that conclusion, the Delegate also took into account that the Proposed Development would result in the direct loss of 135.5 hectares Koala habitat and an ongoing impact on the remaining ten hectares (at para 7.76).
3. The applicant’s submission that the Delegate failed to disclose that he may rely on the SPRAT Profile has no substance. The prescribed form described the SPRAT Profiles as a resource that could assist the applicant in its assessment of likely impacts, and hyperlinked the SPRAT Profiles. The applicant implicitly referred to the SPRAT Profile in the Referral Form and the 2018 Planit Report when referring to the recommended dimensions for culverts. Accordingly, the applicant was aware of the SPRAT Profile and that it could be relevant to the decision. In circumstances which include that the applicant had engaged a firm of expert environmental consultants who were plainly aware of the SPRAT Profile, the applicant’s submission that procedural fairness required the Delegate to more specifically indicate that he may reply upon the document is fanciful.
4. The applicant’s next submission is the Delegate should have disclosed the *way* he proposed to rely on the SPRAT Profile, in particular, the section entitled, “Impact-mitigation options for reducing the risk of fragmentation”, dealing with recommendations for dimensions and characteristics of culverts. That submission must also be rejected. The effect of the 2018 and 2019 Planit Reports was to assert that Yawalpah Road itself formed a barrier to the passage of Koalas, and that the culverts under Yawalpah Road did not alleviate the effect of that barrier as Koalas could not pass through them. The applicant asserted that the culverts could not be traversed because they were only 1.8 m in diameter and were approximately 40 m long, referring to the guidelines in the SPRAT Profile. The Delegate considered this argument, but decided that although it was possible that the culverts would prevent Koala movement this could only definitively be determined by a Koala tracking study. It may be noted that the applicant had also argued that, as the culverts were permanently, partially submerged, Koalas could not pass through them, but the Delegate did not expressly address this argument, as will be discussed later in these reasons.
5. The applicant’s submission is premised upon a proposition that the Delegate misconstrued and misunderstood the SPRAT Profile by deciding that the fact that the culverts do not comply with the guidelines *undermined* any conclusion that they are a barrier. The Delegate made no such finding. The Delegate found that the fact that the culverts did not have the dimensions and characteristics recommended by the SPRAT Profile made it *possible* that Koalas would be unable to travel through them. In so finding, the Delegate did not accept the argument raised in the 2018 Planit Report that Koalas *could not* pass through. The finding demonstrates no misconstruction or misunderstanding of the SPRAT Profile. The applicant’s submission that the Delegate’s failure to draw his misunderstanding or misapplication of the SPRAT Profile to the applicant’s attention amounted to a denial of procedural fairness cannot be accepted.
6. Further, even if it is assumed that the Delegate misunderstood or misapplied the SPRAT Profile when finding that it was merely possible that Koalas could be prevented from moving through the culverts, any such error was ultimately immaterial to the Decision. The issue the Delegate was concerned with was “habit connectivity”, including whether Yawalpah Road was a barrier to the passage of Koalas from the Koala Conservation Area to the Proposed Development site. The Delegate resolved this issue by deciding that Koalas were capable of crossing Yawalpah Road itself (at paras 7.34, 7.43(b)). There has been no challenge to that finding. Once the Delegate decided that Koalas could cross Yawalpah Road, whether or not they could also pass under Yawalpah Road through the culverts became irrelevant. Even if the Delegate had decided that the culverts were impassable, the Delegate would still have given a score of two for “habitat connectivity” under the Koala Referral Guidelines.
7. In addition, any error in the Delegate’s conclusion that the “habitat connectivity” score was two could have made no ultimate difference to the Decision. That was because the Delegate scored the “recovery value” of the habitat at one, rejecting the applicant’s contention that the score for that attribute should be zero. Although the applicant points out that the Delegate took into account the connectivity of the Koala Conservation Area and the Proposed Development site in giving the score for “recovery value”, there has been no challenge to the finding that Koalas were able to cross Yawalpah Road. Even if the score for “habitat connectivity” were disregarded, the Delegate would have arrived at a total score of five, a level that indicated that the habitat in the Proposed Development site was critical.
8. Even if it is assumed that the Delegate denied the applicant procedural fairness in the manner alleged, that denial would have made no difference to the outcome of the Decision. That has two consequences. First, the grant of relief under s 16 of the ADJR Act is discretionary, and the Court would refuse relief where the error is immaterial. Second, the grant of relief under s 39B of the Judiciary Act requires jurisdictional error, and there is no jurisdictional error where an error is immaterial. Therefore, relief would not be granted.
9. The ground of denial of procedural fairness on the basis of the Delegate’s use of the SPRAT Profile cannot succeed.

#### The Koala Listing Advice

1. The second denial of procedural fairness alleged by the applicant concerns the Delegate’s use of the Koala Listing Advice. The applicant contends that the Delegate failed to disclose to the applicant that he may rely upon the Koala Listing Advice, and that this was procedurally unfair. The applicant argues, in the alternative, that the Delegate failed to disclose the *way* he proposed to rely upon the Koala Listing Advice.
2. The Delegate relied upon the Koala Listing Advice in two respects. First, he relied on statements in the Koala Listing Advice about threats to the Koala posed by dogs and cars for a finding that the Proposed Development would have an impact on the ten hectares of the site that were to be left uncleared. Second, he relied on statements in the Koala Listing Advice about threats to the Koala and the impact of loss of habitat on the Coomera-Pimpama Koala population for a finding in respect of the second criterion applied under the Significant Impact Guidelines that there was a real chance or possibility that the Proposed Development would decrease the availability or quality of habitat to the extent that the Koala species was likely to decline.
3. The applicant submits that the Delegate did not notify it that the Koala Listing Advice might be relied on in either of these ways, and that it was denied a reasonable opportunity to deal with relevant adverse matters that the Delegate proposed to take into account. The applicant submits that if it had received prior notice, it could and would have provided further material or submissions about these matters and that a different decision might have been made.
4. In the reasons, the Delegate began by finding that the Proposed Development was likely to result in the direct clearing of 135.5 hectares of Koala habitat and then considered whether the clearing and development would have an impact on Koala habitat in the remaining ten hectares of site. The first use of the Koala Listing Advice complained of by the applicant was as follows:

7.10 The *Commonwealth Listing Advice for the Koala* was approved by the Minister under section 266B of the EPBC Act on 30 April 2012. It sets out the grounds on which the Koala is eligible to be included in the vulnerable category, the main factors that are the cause of it being eligible, and information about what could appropriately be done to stop the decline of, or support the recovery of, the Koala.

7.11 The *Commonwealth Listing Advice for the Koala* notes that current threats to the Koala include fragmentation and habitat isolation, dogs and vehicles. The advice also notes that dogs and vehicles are two threats that are closely associated with urban expansion, and that exposure of the Koala to both threats is increasing as land adjacent to Koala habitat is developed and occupied and there is, accordingly, an increased human population in the local area. The *Commonwealth Listing Advice* for the Koala also notes that impacts from cars and dogs is likely to be further compounded by the effects of diseases such as chlamydia, affecting the viability of Koala populations.

7.12 I therefore also considered that the proposed action is likely to have an impact on the remaining 10 hectares of the proposed site that the proponent has proposed to set aside as open space and conservation areas.

1. Up to this point the Delegate was considering whether the Proposed Development would have an “impact” on the two distinct parts of the site, rather than directly considering whether it would have a “significant impact” on the Koala.
2. The Referral Form referred to and hyperlinked the SPRAT Profiles. The SPRAT Profile for the Koala in turn referred to and hyperlinked the Koala Listing Advice. The Koala Listing Advice was described in the SPRAT Profile for the Koala as part of the, “information to assist regulatory considerations”.
3. In the completed Referral Form, the applicant expressly referred to the Koala Listing Advice, in the context of a submission about the extent of the Koala population in south-east Queensland. In addition, the applicant noted that, “[s]ubstantial evidence of both frequent and regular mortality from vehicle strike and dog attack is known within the immediate proximity of the project site”. The 2019 Planit Report referred to, “continued persistence of threats to koala mortality, including domestic animals such as dogs, and vehicle strikes”. The 2018 Planit Report also discussed the extent of the existing Koala population in the East Coomera area.
4. The 2019 Planit Report addressed in detail the extent of the existing Koala population in the East Coomera area. It also expressly addressed the issue under the Significant Impact Guidelines of whether the Proposed Development would modify, destroy, remove or isolate or decrease the availability or quality of habitat to the extent that the species is likely to decline, including the extent of the existing Koala population upon the Proposed Development site.
5. There is no substance in the applicant’s submission that it was denied procedural fairness by the Delegate’s failure to disclose that he may rely upon the Koala Listing Advice. The prescribed form drew attention to the SPRAT Profile. The SPRAT Profile for the Koala drew attention to the Koala Listing Advice. The applicant expressly drew the Delegate’s attention to the Koala Listing Advice in the completed Referral Form. Therefore, any contention that it was unaware that the Delegate might make use of the Koala Listing Advice cannot be accepted.
6. The applicant’s submission that it was denied procedural fairness by the Delegate’s failure to disclose that he proposed to make use of the parts of the Koala Listing Advice dealing with the threats posed by dog strikes and vehicles to the Koala population that might remain in the uncleared ten hectares cannot be accepted. Through the SPRAT Profile, the applicant was put on notice that the Koala Listing Advice contained information that could, “assist regulatory considerations”. The obligation of procedural fairness did not require the Delegate to expose his mental processes or provisional views, but only to identify to the applicant any issue critical to the decision not apparent from the nature of the decision or the terms of the statute. The very nature of the decision involved whether the Proposed Development, including the proposal to clear 135.5 hectares of 147 hectares of Koala habitat, would have a significant impact upon the Koala. It was obvious that the impact of clearing and construction of residential housing upon any remaining population of Koalas in the residual ten hectares would be relevant to the Delegate’s decision. The Koala Listing Advice referred to the impact of cars and dogs, as did the Koala Referral Guidelines, and the applicant was plainly aware of those threats. The obligation of procedural fairness did not require the attention of the applicant to be drawn to an issue that was, or should have been, apparent from the nature of the decision that was required to be made, nor to the precise parts of the Koala Listing Advice that were relevant to that issue.
7. The second use of the Koala Listing Advice by the Delegate was in the context of considering the criterion in the Significant Impact Guidelines concerning whether the action would modify, destroy, remove or isolate or decrease the availability or quality of habitat to the extent that the Koala was likely to decline. The Delegate stated:

7.78 In considering whether there is a chance or possibility that the proposed action will contribute to the decline of the Koala, 1 had regard to the *Commonwealth [Listing] Advice* *for the Koala.*

7.79 This conservation advice identifies that the main threats facing the Koala are the loss and fragmentation of habitat, vehicle strike, disease, and predation by dogs. In relation to the East Coomera area, the conservation advice notes the following (at page 22):

*‘In the Gold Coast the Koala population was estimated at 4,724 Koalas (4316-5131 (95% confidence limits)) in 2007 (Phillips et al. 2007). This estimate includes a population of 510 Koalas (381-639) inhabiting the Coomera-Pimpama Koala Habitat Area where already approved development will see over a third of the resident Koala population lost. Anticipated further development will see additional losses, while an escalation of associated threats (e.g. cars, dogs) will invariably lead to further population decline. The population is likely to be rendered un viable (sic) (in fire absence of an assertive management response) once incidental mortality arising from the associated threats referred to above exceeded 6% of total population size (Phillips 2007)’.*

7.80 Given the impact of loss of habitat on the Coomera-Pimpama population identified in the *Commonwealth Listing Advice for the Koala*, and my findings that:

a. it is likely that the proposed action will result in the loss of a large contiguous area of approximately 135.5 hectares of habitat in which Koalas are known to occur;

b. although the proponent has set aside 10 hectares of the proposed site as open space and conservation areas, it is likely that the proposed action have an impact on the Koalas within that area; and

c. the proposed site comprises approximately 10 per cent of the habitat available to the East Coomera Koala sub-population,

I considered that the proposed action is likely to have a significant impact on a vulnerable species as there is a real chance or possibility that it will decrease the availability or quality of habitat to the extent that the Koala species is likely to decline.

1. It may be seen that the Delegate made use of the Koala Listing Advice in the context of considering the extent of the existing population of Koalas in the East Coomera area and the impact of the loss of habitat that would be caused by the Proposed Development upon that population.
2. There is no substance in the applicant’s submission that the Delegate was required to disclose the way he proposed to make use of the Koala Listing Advice. The applicant had expressly referred to the Koala Listing Advice in the context of making a submission about the extent of the Koala population in south-east Queensland and expressly made submissions concerning the loss of Koala habitat that would be caused by the Proposed Development. The applicant was well aware of the relevance of the extent of the existing population of Koalas in the East Coomera area. In any event, the very nature of the decision made apparent the relevance of the extent of the existing population and the impact on that population of the loss of habitat that would be caused by the clearing and development. The Koala Listing Advice was drawn to the applicant’s attention through the SPRAT Profile. There was no denial of procedural fairness through the Delegate’s use of the Koala Listing Advice.

#### Alleged denial of procedural fairness by reason of failure to give proper, genuine and real consideration to matters relied upon by the applicant

1. The applicant submits that it was denied procedural fairness by reason of the Delegate’s failure to give proper, genuine and real consideration to matters relied upon by the applicant. The submission has not been explained, but appears to involve a proposition that a failure to give proper, genuine and real consideration to a matter necessarily means that the decision-maker has failed to provide a reasonable opportunity to the person affected by the decision to be heard.
2. As the submission was not developed, its merit is difficult to assess. In any event, the submission ultimately depends upon whether or not the Delegate failed to give proper, genuine and real consideration to matters relied upon by the applicant, an issue that will be dealt with later in these reasons.

### Ground 2: Failure to consider submissions

1. As expressed in the originating application, Ground 2 contends that the making of the Decision was an improper exercise of power because the Delegate failed to take into account relevant considerations. The ground reads as if the error alleged is a failure to take into account relevant considerations in the sense described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-41. However, in oral submissions, it was explained that the ground is that the Delegate failed to consider material submissions made by the applicant.
2. There are five submissions which it is alleged were made by the applicant but were not considered by the Delegate, namely submissions that:
* the culverts under Yawalpah Road were permanently submerged;
* Gainsborough Drive was a barrier to the movement of Koalas;
* the College and the adjacent residential development were a barrier to the movement of Koalas;
* an area of vegetation to the north of the Proposed Development site had been cleared and developed;
* the Proposed Development was not likely to modify, destroy, remove or isolate or decrease habitat to the extent that the Koala species was likely to decline.
1. In relation to the fifth of these matters, the applicant also argues that the Delegate relied upon outdated information, whereas the 2019 Planit report contained the most recent and accurate information.
2. Further, the applicant submits that the Delegate “failed properly to consider” material in the 2019 Planit Report in reaching the conclusion that there was a real chance or possibility that the proposed action would reduce the area of occupancy of an important Koala population
3. The applicant relies upon *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 where Gummow J held:

However, what was required of the decision-maker, in respect of each of the applications, was that in considering all relevant material placed before him, he give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy…

(Citations omitted.)

1. In *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [30], the High Court cautioned against this ground encouraging, “a slide into impermissible merit review”. The High Court held at [34] that the Federal Court had impermissibly employed the language of “proper, genuine and realistic consideration” to register the Court’s response to a weighing of the evidence with which the Court disagreed.
2. In *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 73 ALD 321; [2003] HCA 26, at [24] Gummow and Callinan JJ articulated a related principle that, “[t]o fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord…natural justice”.
3. In *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352, the Full Court at [43]–[48] proceeded on the basis that even though there was no explicit statutory duty upon the Minister to “consider” representations that were made, it was necessarily implicit in the statutory regime that there was such an obligation. The Full Court held that the discharge of that obligation required the Minister to engage in an active intellectual process with reference to those representations.
4. In *Minister* *for Home Affairs v Omar* (2019) 272 FCR 589, the Full Court at [37] confirmed the Minister’s obligation was to, “engage in an active intellectual process with significant and clearly expressed relevant representations.” The Full Court observed at [39] that this may require more than simply acknowledging or noting that the representations have been made and, depending on the nature and content of the representations, may require the Minister to make specific findings of fact.
5. In *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593, the Full Court held:

46 It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised “with an eye keenly attuned to error”. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

1. In *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* (2011) 180 LGERA 99; [2011] FCAFC 59 at [44] and [47], the Full Court held:

[44] The obligation of a decision-maker to consider mandatory relevant matters requires a decision-maker to engage in an active intellectual process, in which each relevant matter receives his or her genuine consideration (see *Tickner v Chapman* (1995) 57 FCR 451 at 462 and *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [105]). However, in the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard, it is generally for the decision maker to determine the appropriate weight to be given to them. The failure to give any weight to a factor to which a decision-maker is bound to have regard, in circumstances where that factor is of great importance in the particular case, may support an inference that the decision-maker did not have regard to that factor at all. Similarly, if a decision-maker simply dismisses, as irrelevant, a consideration that must be taken into account, that is not to take the matter into account. On the other hand, it does not follow that a decision-maker who genuinely considers a factor but then dismisses it as having no application or significance in the circumstances of the particular case, will have committed an error. The court should not necessarily infer from the failure of a decision-maker to refer expressly to such a matter, in the reasons for decision, that the matter has been overlooked. But if it is apparent that the particular matter has been given cursory consideration only so that it may simply be cast aside, despite its apparent relevance, then it may be inferred that the matter has not in fact been taken into account in arriving at the relevant decision. Whether that inference should be drawn will depend on the circumstances of the particular case (see *Minister for Immigration and Citizenship v Khadgi* (2010) 274 ALR 438 at [58]–[59]).

…

[47] A statement of reasons under s 13 of the Review Act does not require a decision-maker to pass comment on all of the material to which his attention has been drawn and to which he has had regard. What the provision requires is that the decision-maker set out his or her findings on ‘material questions of fact’. While a failure to include a matter in a statement of reasons may justify a court inferring, as a matter of fact, that the matter was not taken into account, such an omission is not necessarily conclusive (see *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 485). Whether that inference will be drawn in a particular case will depend on all the circumstances (see *ARM Constructions Pty Ltd v Commissioner of Taxation* (1986) 10 FCR 197 at 205).

(Underlining added.)

1. In *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 at [76], the Full Court held that in assessing whether a court should infer that a decision-maker failed to consider a submission or material advanced by an applicant, regard must be had to, “the facts of each particular case and the…reasons as a whole, and the reasons must be construed in a practical and common-sense manner and not with an eye keenly attuned to the perception of error”.
2. The applicant bears the onus of establishing that the relevant material was not considered: *BVD17 v Minister for Immigration and Border Protection* (2019) 373 ALR 196; [2019] HCA 34 at [38]; *SZDXZ v Minister for Immigration and Citizenship* [2008] FCAFC 109 at [25].
3. In order to establish legal error on the basis of a failure to consider submissions made by the applicant, it must be established that the submissions:
4. were articulated in, or arose clearly from, the material before the Delegate;
5. were not considered by the Delegate, in the sense that the Delegate failed to engage in an active intellectual process with the representations;
6. were significant, in the sense that they might realistically have resulted in a different decision.
7. I will proceed to consider the applicant’s case in respect of each of the submissions which it is alleged were not considered by the Delegate.

#### Whether the Delegate failed to consider the applicant’s submission that the culverts were permanently, partially submerged

1. The applicant alleges that the Delegate failed to consider the applicant’s submission contained in the 2018 Planit Report that the culverts under Yawalpah Road were permanently submerged, such that they act as a barrier to Koala movement. The 2018 Planit Report stated:

The length of piping and absence of fauna furniture and permanent inundation would preclude movements through them by koalas from the conservation areas to the ecological corridor.

... The culverts are partially submerged and aquatic plants are growing at both the inlet and outlet of the culverts, indicating that the culverts are permanently submerged…

1. The 2018 Planit Report contends that the permanent, partial submersion of the culverts is a barrier to Koala movement. The submission was clearly articulated and, subject to the question of materiality, the Delegate was required to consider it.
2. As I have observed, in applying the Koala Habitat Assessment Tool, the Delegate considered the issue of “habitat connectivity”, which required consideration of whether the Proposed Development site formed part of a “contiguous landscape” with the Koala Conservation Area to the north of Yawalpah Road. This required consideration of whether the landscape encompassed any barriers likely to prevent the movement of Koalas. The Delegate noted that the 2018 Planit Report identified a number of barriers to Koala movement, including, “a series of hydraulic culverts underneath Yawalpah Road”. The Delegate referred to the recommendations in the SPRAT Profile for the dimensions and characteristics for culverts, noting the dimensions and specifically quoting the recommendation that culverts should, “have a low-flow channel incorporated in the design, especially if they are a combined drainage and Koala impact mitigation structure”.
3. The Delegate stated that, “[a]fter considering the information provided by Planit Consulting”, he was of the view that, relevantly, although it was possible that the culverts would prevent Koala movement, this could only be definitively known by undertaking a Koala tracking study. The Delegate ultimately concluded that he, “did not consider that the information provided by Planit Consulting in its report of 7 May 2018 was sufficient to allow me to conclude that there are barriers that in fact prevent Koala movement”.
4. The Delegate clearly considered the recommendations for the dimensions and design of hydraulic culverts, including the recommendation for a low flow channel. However, there was no express discussion of the submission that a barrier to Koala movement was that the culverts were permanently, partially submerged. There are only two possibilities: either the Delegate considered the submission, or overlooked the submission. The issue is as to which inference should be drawn.
5. In my opinion, the appropriate inference is that the Delegate considered, and did not overlook, the submission that the culverts provided a barrier to the movement of Koalas because they were permanently, partially submerged. Upon a reading of the relevant passages of the reasons as a whole, this is indicated by several matters. The Delegate referred to the culverts as “hydraulic culverts”, indicating that he was aware that they were designed to allow the flow of water. The Delegate expressly quoted the recommendation of the SPRAT Profile that culverts be constructed with a “low-flow channel”, demonstrating that the Delegate was alert to the issue of inundation. The Delegate stated that he had considered “the information provided by Planit Consulting”, but did not consider that it was sufficient to allow a conclusion that there were barriers to Koala movement. The Delegate’s statement that he had considered the Planit Consulting reports in reaching that conclusion should be accorded weight. The 2018 Planit Report cannot be regarded as providing unequivocal evidence of permanent inundation, referring to the presence of aquatic plants and providing a single undated photo of the submerged culverts, but providing no further, independent information about the permanency and depth of inundation, and failing to address the ability of the Koalas to walk, or swim through the water. In those circumstances, the Delegate’s finding that it was merely possible that Koalas would be unable to travel through the culverts was entirely open to the Delegate. The absence of express reference to the issue of permanent, partial inundation is explicable by a “rolled up” finding that, for all the reasons given in the 2018 Planit Report, it was merely possible, but not certain, that Koalas would be unable to travel through the culverts. The reasons are generally detailed and indicate a clear understanding of the issues, including barriers to the movement of Koalas across and under Yawalpah Road. It seems quite unlikely that the Delegate simply overlooked the issue of permanent, partial inundation raised by the applicant. I infer that the issue was considered.
6. In any event, the issue of whether Koalas could travel through the culverts under Yawalpah Road was ultimately immaterial, as the Delegate later concluded that Koalas could cross the surface of Yawalpah Road. Even if the Delegate overlooked the submission that the culverts were permanently, partially submerged, the error could have made no difference to the outcome. The submission cannot be described as “significant”: see *Omar* at [37], [41], [45]-[46], *WAEE* at [46]. Any such error was not an error of law, nor jurisdictional error. Further, any relief under the ADJR Act would be refused as a matter of discretion.

#### Whether the Delegate failed to consider a submission that Gainsborough Drive was a barrier to Koala movement

1. The second submission alleged not to have been taken into account by the Delegate was a contention in the 2019 Planit Report that Gainsborough Drive was a barrier to Koala movement.
2. Gainsborough Drive is located within the Gainsborough Greens Estate, to the north of the Proposed Development. The reasons do not indicate that consideration was given to whether Gainsborough Drive is a barrier to Koala movement between the Koala Conservation Area and the Proposed Development site.
3. The applicant submits that 2019 Planit Report refers to Gainsborough Drive as a barrier in the following passages:

188. As shown on **Figure 3**, which is repeated below, the Impact Area is bounded by the following barriers:

…

(e) urban residential development and the Pimpama State Secondary College to the north.

…

196. The Pimpama State Secondary College and the urban residential development to the north of the Site includes a number of urban roads and residential fences which comprise an artificial barrier and which do not make provision for koala passage measures.

1. The reference to Figure 3 is to a map of the Proposed Development and surrounding areas. There is no reference in Figure 3 to Gainsborough Drive, although the index to Figure 3 does refer to the “Gainsborough Greens Estate (one way fauna exclusion fencing used throughout)”. However, the index also refers to “Pimpama Secondary College and Urban Residential Development”, which are immediately to the north of the Proposed Development, but south of the Gainsborough Greens Estate. Paragraph 188(e) clearly refers to the College and the adjacent urban residential development, but is unclear as to whether it is also intended to refer to the Gainsborough Greens Estate. Given that para 196 of the 2019 Planit Report refers only to the “Pimpama State Secondary College and the urban residential development to the north of the Site”, the appropriate inference is that para 188(e) is not intended to refer to the Gainsborough Greens Estate. This is reinforced by the fact that para 188 is concerned with the “Impact Area” being bounded by barriers, whereas Gainsborough Greens Estate does not directly bound the Proposed Development, being separated by the College, the adjacent urban residential development and Yawalpah Road.
2. Therefore, the 2019 Planit Report does not clearly articulate any argument that Gainsborough Greens Estate, let alone Gainsborough, acts as a barrier.
3. It may also be noted that the 2018 Planit Report stated that, “[a]s there is no exclusion fence along the southern side of Gainsborough Drive, koalas can still cross the road and move northwards — in the direction of the koala conservation area.”. The context in which this passage appears indicates that, while the applicant was asserting that the one-direction fencing facing Gainsborough Drive was a barrier, the applicant accepted Koalas were able to cross Gainsborough Drive itself, so that Gainsborough Drive itself was not a barrier.
4. There was no error made by the Delegate by reason of any failure to consider whether Gainsborough Drive was a barrier to Koala movement.
5. Even if it is assumed that an argument that Gainsborough Drive was a barrier was clearly articulated, it could not have affected the Decision. The Delegate found that Koalas could cross the fauna exclusion fencing between the Koala Conservation Area and Yawalpah Road (by using trees growing close to the fence), cross Yawalpah Road and enter the Proposed Development site through three different paths. Even if Koalas could not cross Gainsborough Drive, which was to the west and north of the Koala Conservation Area, that could not have affected the Delegate’s conclusion that Koalas could move south from the Koala Conservation Area and eventually into the Proposed Development site. Therefore, there would be no error of law or jurisdictional error, and the discretion under the ADJR Act would be exercised against the grant of relief.

#### Whether the Delegate overlooked the submission that the College and the adjacent urban residential development were a barrier to the movement of Koalas

1. In view of the submissions made at paras 188 and 196 of the 2019 Planit Report, the Delegate was required to consider whether the College and the adjacent urban residential development were a barrier. The Delegate did so expressly in his statement of reasons:

7.39 Planit Consulting’s report of 28 February 2019 states that the proposed site is also bounded by a number of barriers to Koala movement (including the one-way Koala exclusion fences and hydraulic culverts identified by Planit Consulting in its 7 May 2018 report). These are:

…

e. urban residential development and the Pimpama State Secondary College to the north.

…

7.43 However, I considered that it remains possible that Koalas could move towards large areas of contiguous habitat to the north east of the proposed site, and their movement would not be prevented by the following potential barriers identified by Planit Consulting:

…

c. Urban residential development and the Pimpama State Secondary College to the north as:

i. Planit Consulting does not provide any empirical evidence that urban residential development to the north of the proposed site is a barrier to Koala movement (such as a tracking study), which leaves open the possibility that Koalas are able to move through the urban residential development to the north of the proposed site;

ii. while Koala exclusion fencing is present at the Pimpama State Secondary College, there is vegetation between the College and Oxford Street to the north of the proposed site, which leaves open the possibility for Koalas to travel north from the proposed site, through the vegetated area, towards Yawalpah Road (noting that exclusion fencing has not been installed along Yawalpah Road at this point), and then to move northwards through bushland areas and around the northern end of the Gainsborough estate to large areas of contiguous habitat located to the north east;

…

1. It is apparent that the Delegate did address the applicant’s submission that the College and adjacent urban residential development acted as a barrier to Koala movement.

#### Whether the Delegate relied on outdated material

1. The applicant submits that the Delegate failed to consider recent and accurate information in the 2019 Planit Report supporting the submission that the College and the adjacent urban residential development acted as a barrier. It is submitted that the Delegate instead relied on outdated material showing that there was vegetation in those areas, when in fact that vegetation had been cleared.
2. In *Minister for Aboriginal Affairs v Peko-Wallsend Limited*, Mason J held at 44–45:

…Once it is accepted that the subject-matter, scope and purpose of the Act indicate that the detriment that may be occasioned by a proposed land grant is a factor vital to the exercise of the Minister’s discretion, it is but a short and logical step to conclude that a consideration of that factor must be based on the most recent and accurate information that the Minister has at hand.

…It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker.

1. The College and the adjacent urban residential development are located immediately to the north of the Proposed Development.
2. The 2019 Planit Report refers to the College and adjacent the urban residential development as a barrier:

203. Since the date of the decision on the Withdrawn Referral, further development has been undertaken in the immediate surrounds of the Site, in particular major upgrades to Yawalpah Road and Foxwell Road and the construction of residential development immediately to the north and to the east of the Site.

…

205. In addition, the development undertaken since 2015 has further reduced the area of koala habitat connected to the Site and increased the barriers to koala movement.

1. In oral submissions, senior counsel for the applicant went to a number of photographs contained in the 2019 Planit Report which it was submitted show that development in the urban residential development adjacent to the College has turned what was vegetation into a barrier to Koala movement. Figure 4 is an aerial photograph depicting the Proposed Development site and surrounding area in 2017. It also shows the College and, to the west of the College, a wide area of vegetation running north from the Proposed Development. Figure 1, which is an aerial photograph depicting the Proposed Development and surrounding area in December 2018, shows that the wide area of vegetation in Figure 4 has been cleared. Aerial photographs sourced from Google Earth were included in Attachment 2 of a request to vary the Proposed Development dated 4 May 2018. Those images also show that the vegetated area to the west of the College has been cleared. The request to vary also noted that, “the Google Earth images are outdated”, and that, “[d]wellings have been constructed on nearly all lots while the remainder are under construction”.
2. The applicant contends that the Delegate failed to consider the applicant’s clearly articulated submission, found at paras 203-205 of the 2019 Planit Report and supported by Figures 1 and 4 and the Google Earth images, that there was no vegetation allowing Koala movement north of the Proposed Development site. The applicant submits that the Delegate instead relied upon outdated material to conclude that the College and adjacent development did not provide any barrier.
3. The Delegate addressed the submission that the College and the adjacent residential development acted as a barrier to Koala movement at para 7.43(c) of the reasons. This included the finding that, “there is vegetation between the College and Oxford Street to the north of the proposed site, which leaves open the possibility for Koalas to travel north from the proposed site, through the vegetated area, towards Yawalpah Road…”. The vegetation referred to is a thin strip of trees between the College and the urban residential development, remaining after the clearing of the area of the wide strip of vegetation. The thin strip of trees is visible in aerial photographs attached to the request to vary the application dated 4 May 2018.
4. It is apparent that the Delegate was aware of the clearing, and did not overlook the applicant’s submission that there was no vegetation that would allow Koala movement north of the Proposed Development. The Delegate did not accept that submission, instead finding that there was some remaining vegetation that might provide a passage for Koalas. The Delegate’s finding was based on current information. The factual premise upon which the ground is based is not established.

#### Whether the Delegate failed to consider material contained in the 2019 Planit Report indicating the Proposed Development was not likely to destroy habitat to the extent that the Koala species was likely to decline

1. The applicant submits that the Delegate failed to consider the material contained in the 2019 Planit Report when considering the criterion of whether there was a real chance or possibility that the Proposed Development would decrease the availability or quality of habitat to the extent that the Koala species was likely to decline.
2. The 2019 Planit Report made the following submission:

257. The Proposed Action will result in the removal of approximately 135.5 ha of potential habitat and modification of approximately 10 ha through fragmentation.

258. The Proposed Action may result in the displacement of the 5 koalas which were observed on the Site by Planit Consulting in its surveys in 2017.

259. As stated in section 4.2.5 above, the area of contiguous potential koala habitat comprising the Impact Area (181 ha) is significantly smaller than the area estimated in the Biolink Report 2017 to be required to accommodate a MVP (~1,150 ha). The Impact Area is surrounded by barriers to koala movement such that koalas are prevented from moving between the Impact Area and other areas of koala habitat (see section 4.2.3 above).

260. Therefore, in the absence of the Proposed Action the koala population in the Impact Area would not be viable and would ultimately decline.

261. As the Proposed Action is likely to result in the displacement of some 5 koalas in an area which does not contain a viable or important koala population and which does not comprise habitat critical to the survival of the koala, the Proposed Action will not modify, destroy, remove or isolate or decrease the availability or quality of habitat to the extent that the species is likely to decline.

1. The applicant submits that these passages were not referred to in the Delegate’s reasons and were not considered at all.
2. I accept that paras 257–261 of the 2019 Planit Report raised a clearly articulated argument that the existing population of Koalas is small, unviable and unimportant, and the habitat is not critical to the survival of the Koala, so the Proposed Action would not affect the availability or quality of habitat to the extent that the species is likely to decline. The Delegate was required to consider this argument.
3. The Delegate considered the criterion in the Significant Impact Guidelines concerning whether the action may destroy habitat to the extent that the species is likely to decline. Relevantly, the Delegate considered the impact of loss of habitat on the Koala population in the Proposed Development site, stating:

7.80 Given the impact of loss of habitat on the Coomera-Pimpama population identified in the *Commonwealth Listing Advice for the Koala*, and my findings that:

a. it is likely that the proposed action will result in the loss of a large contiguous area of approximately 135.5 hectares of habitat in which Koalas are known to occur;

b. although the proponent has set aside 10 hectares of the proposed site as open space and conservation areas, it is likely that the proposed action have (sic) an impact on the Koalas within that area; and

c. the proposed site comprises approximately 10 per cent of the habitat available to the East Coomera Koala sub-population,

I considered that the proposed action is likely to have a significant impact on a vulnerable species as there is a real chance or possibility that it will decrease the availability or quality of habitat to the extent that the Koala species is likely to decline.

1. The reasons addressed went on to address another criterion in the Significant Impact Guidelines, namely whether there was a real chance or possibility that the action would reduce the area of occupancy of an important population. In that context, the Delegate addressed the viability of the Koala population in the Proposed Development site as follows:

7.83 In considering whether there is a chance or possibility that the proposed action will reduce the area of occupancy of an important population, I have had regard to information provided in the referral and the report prepared by Planit Consulting on 28 February 2019 titled ‘*Coomera Woods Supplementary Koala Evaluation and Assessment*’, which the proponent submitted to the Department on that date. In that report, Planit Consulting states that the Koalas occurring within the area impacted by the proposed action are not considered an ‘important population’, and therefore that the proposed action will not reduce the area of occupancy of an important population, for the following reasons:

a. the population within the impacted area is not identified as an important population in a recovery plan;

b. the five Koalas that Planit Consulting identified within the proposed site during a survey are not considered a source for breeding or dispersal, as the impacted area is not large enough to sustain the minimum viable population of Koalas and is not connected to other areas of Koala habitat, and the existing level of connectivity to the rural sub-population of Koalas is unable to maintain the current population;

c. the population is not a population that is necessary for maintaining genetic diversity, as the area is not connected to other areas of Koala habitat and the population is not large enough to allow for dispersal; and

d. the population is not a population that is near the limit of the species’ range, as the species is well known within the East Coomera area and a sustainable population can be established within the rural area of East Coomera through the protection and conservation of land within the rural landscape considered necessary for maintaining genetic diversity.

1. The Delegate ultimately rejected the applicant’s submission that the Proposed Development did not contain a viable or important Koala population, stating:

7.86 I accepted Planit Consulting’s view that Koalas present at the proposed site are not part of a population that is near the limit of the species range. However, for the reasons stated above, did not agree with Planit Consulting’s conclusion that the proposed site does not form part of a contiguous landscape. As I have found that the proposed site is part of a contiguous landscape, I did not accept Planit Consulting’s submission that the Koala population cannot be considered a source for breeding or dispersal, or that the population is not necessary for maintaining genetic diversity.

1. It is clear that the Delegate considered the applicant’s submissions regarding the importance and viability of the Koala population in the Proposed Development area, including at paras 257-261 of the 2019 Planit Report. The fact that the reasons do not specifically compartmentalise the submissions made into the criteria to which they were directed in the 2019 Planit Report, does not mean that the submissions were not considered. It has not been demonstrated that there was a failure by the Delegate to take into account the relevant submissions made in the 2019 Planit Report when considering the criterion that the action may destroy habitat to the extent that the species is likely to decline.

#### Whether the Delegate failed to consider a submission in the 2019 Planit Report that the Proposed Development would not lead to a long-term decrease in the size of an important population of Koalas as the area did not contain an important population

1. The applicant submits that the Delegate “failed properly to consider” material in the 2019 Planit report in concluding that there was a real chance or possibility that the Proposed Development would reduce the area of occupancy of an important Koala population.
2. The 2019 Planit Report contained the following material about the population of Koalas at the Proposed Development site:

237. The population within the Impact Area does not meet the examples stated in the definition of “important population” stated within the Significant Impact Guidelines, as follows:

(a) *Not identified as on important population in a recovery* plan - The population within the Impact Area is not identified as an important population in a recovery plan.

(b) *Not a key source population either for breeding or dispersal* - The 5 individuals confirmed within the Site during the survey conducted by Planit Consulting are not considered a source for breeding or dispersal. As stated in section 4.2.3 above, the Impact Area is not connected to other areas of koala habitat and is therefore not suitable for breeding or dispersal. The confirmed population within the Site is considered to be a ‘sink’, where extinction rates exceed immigration rates and therefore reducing breeding opportunities and dispersal of individuals. Further, the Impact Area is not large enough to sustain a MVP of 170 koalas (see section 4.2.5 above) and the existing level of connectivity to the rural sub-population is unable to maintain the current population.

(c) *Not a population that is necessary for maintaining genetic diversity*- As the Impact Area is not connected to other areas of koala habitat and the population is not large enough to allow for dispersal, the population within the Impact Area is not considered necessary for maintaining genetic diversity. The individuals within the Impact Area are segregated from the rural sub-population by key threats and barriers including major arterial roads and one-way koala exclusion fencing, reducing opportunities for maintaining genetic diversity within the Impact Area. It is also noted that chlamydia is prevalent within the East Coomera koala population (21 % of koalas examined from East Coomera tested positive for this disease [Koala Conservation Plan for East Coomera 2014, Page 9]). This disease is more likely to occur within urban sub-populations which are affected by other stressors and limited breeding partners. The disease is easily spread within smaller populations such as that recorded within the Site (5 individuals) as there is reduced immigration from the rural sub-population, which is likely a healthier population given the increase (sic) genetic diversity, larger population and reduced stressors (i.e. edge effects, domestic animals, vehicle strike, urban development, etc.). It is considered that the displacement of 5 individuals from within the urban sub-population is not important for maintaining genetic diversity of the whole East Coomera Koala Population (rural and urban sub-populations),

(d) *Not a population that is near the limit of the species’ range* - The population is not near the limit of the species’ range. The species is well known within the East Coomera area and a sustainable population can be established within the rural area of East Coomera through the protection and conservation of land within the rural landscape (see the Biolink Report 2017, page 62)

238. In summary, the population within the Impact Area is not necessary for the species’ long-term survival for the following reasons:

(a) *Does not meet any examples of on important population* - As demonstrated in paragraph 237 above, the population within the Impact Area does not meet the examples stated in the definition of “important population” stated within the Significant Impact Guidelines.

(b) *Impact Area incapable of supporting a viable population* - The area of contiguous habitat comprising the Impact Area is some 181 ha, which is significantly less than the area of at least ~1,150 ha estimated to sustain a MVP of 170 koalas (see section 4.2.5 above). The Impact Area is therefore incapable of supporting a viable population.

239. In addition, the Study Area does not contain on important population particularly for the following reasons:

(a) *Not identified as on important population in a recovery plan* - The population within the Study Area is not identified as an important population in a recovery plan.

(b) Not a viable sub-population

(i) The population estimate for the urban sub-population derived from the ECKCP (40 koala) is substantially less than the minimum number of koalas required for the population to be viable (170 koalas; see section 3.3 above).

(ii) The Biolink Report 2017 determined that the urban sub-population is unlikely to be viable (see page 49 of the Bio link Report 2017 and paragraph 210 above). Further, this conclusion was made in the context of population estimates which are highly likely to be significantly inflated (see section 3.3 above).

(c) One-way barriers being required by the Council - As a result of recommendations in the Biolink Report 2017, the Council is requiring, by way of development conditions on development approvals, the construction of one-way koala exclusion fencing to prevent the movement of koalas from the rural area into the urban area (see paragraph 210(d) above).The individual koalas within the Study Area are therefore being segregated from the rural sub-population, preventing the use of the Study Area for breeding or dispersal.

240. On this basis the Site Impact Area and Study Area do not contain an important population and therefore the Proposed Action will not lead to a long-term decrease in the size of an important population.

1. I accept that the Delegate was required to consider these aspects of the applicant’s submission when deciding whether there was a real chance or possibility that the Proposed Development would reduce the area of occupancy of an important Koala population.
2. The applicant submits that the Delegate paraphrased the matters set out at para 237 of the 2019 Planit Report in a manner which oversimplifies, and thus effectively ignores, critical information, and fails to address at all the matters outlined in other relevant paragraphs of the 2019 Planit Report, in particular at paras 238(b) and 239(b).
3. The Delegate discussed whether the Proposed Development would reduce the occupancy of an important population at paras 7.81–7.88 of the reasons. In particular, at para 7.83 (extracted earlier), the Delegate summarised the applicant’s submissions regarding why the Proposed Development would not reduce the area of occupancy of an important population.
4. Sub-paragraphs (a) to (d) of para 7.83 of the reasons addressed the submissions made by the applicant in sub-paras (a) to (d) of para 237 of the 2019 Planit Report. The reasons stated that the Delegate, “had regard to information provided in…the [2019 Planit Report]”. I find that the Delegate did address the submissions contained in para 237 of the 2019 Planit Report.
5. The applicant submits that the Delegate did not address the submission at para 238(b) of the 2019 Planit Report, namely that the Proposed Development area is not capable of supporting a viable population of Koalas because the area of contiguous habitat is not large enough to support a minimum viable population.
6. The Delegate concluded at para 7.86 that he did not agree with the conclusion in the 2019 Planit Consulting Report that the Proposed Development did not form part of a contiguous landscape, stating that:

7.86 I accepted Planit Consulting’s view that Koalas present at the proposed site are not part of a population that is near the limit of the species range. However, for the reasons stated above, I did not agree with Planit Consulting’s conclusion that the proposed site does not form part of a contiguous landscape. As I have found that the proposed site is part of a contiguous landscape, I did not accept Planit Consulting’s submission that the Koala population cannot be considered a source for breeding or dispersal, or that the population is not necessary for maintaining genetic diversity.

1. The Delegate had found earlier in the reasons at paras 7.45 and 7.47 that the Proposed Development was part of a contiguous landscape greater than 500 ha in size, which was greater than the size of 181 ha estimated in the 2019 Planit Report. The Delegate also found at para 7.69 of the reasons that the contiguous landscape was capable of supporting a viable population of Koalas, stating as follows:

7.69 As I found earlier in this statement of reasons, I considered that the proposed site is connected to large areas of Koala habitat that do not contain complete barriers to Koala movement, and that the proposed site itself is a large area comprising approximately 10 per cent of the remaining habitat available to the East Coomera Koala sub-population. Accordingly, I considered that the proposed site is part of a large, connected area of habitat that supports Koalas.

1. It is clear that the Delegate addressed the submission contained in para 238(b) of the 2019 Planit Report that the area of contiguous habitat was not large enough to support a minimum viable population, and rejected it on the basis that the Proposed Development formed part of a larger contiguous landscape that was capable of supporting a viable population of Koalas.
2. The applicant submits that the Delegate did not address the submission at para 239(b) of the 2019 Planit Report that there was not a viable sub-population of Koalas in the Proposed Development, with the population being substantially less than the minimum number required for the population to be viable.
3. The Delegate, at para 7.86, stated that he did not accept, “Planit Consulting’s submission that the Koala population cannot be considered a source for breeding or dispersal, or that the population is not necessary for maintaining genetic diversity”. It is apparent that the Delegate considered the submission made in the 2019 Planit Report regarding the viability of the Koala population in the Proposed Development, and rejected that submission.
4. Therefore, I do not accept that there was a failure by the Delegate to consider, or properly consider, the applicant’s submissions at paras 237–240 of the 2019 Planit Report. The error alleged by the applicant is not established.
5. The second ground of review in the originating application also asserts that making of the Decision was an improper exercise of power conferred by the EPBC Act because the Respondent took into account irrelevant considerations.
6. First, it is alleged that the Delegate took into account his erroneous construction or application of the SPRAT Profile for the Koala as described in respect of Ground 1.
7. Second, it is alleged that the Delegate took into account incorrect and out-dated information that there was an area of vegetation to the north of the subject site, relying on its case in respect of Ground 2.
8. Third, the applicant argues that the Delegate took into account incorrect and out-dated information in determining that the proposed action was likely to modify, destroy, remove or isolate or decrease the availability or quality of habitat to the extent that the Koala species was likely to decline, relying upon its case in respect of Ground 2.
9. In the applicant’s written submissions, Ground 3 seems to be subsumed into Grounds 1 and 2. These three submissions fail at a factual level for the reasons I have given in relation to Grounds 1 and 2.

### Ground 3: Failure to provide adequate reasons

1. The third ground of review is that the Decision involved an error of law pursuant to s 5(1)(f) of the ADJR Act because the Delegate failed to provide adequate reasons. The Delegate was required to provide the reasons pursuant to s 77(4) of the EPBC Act and s 13 of the ADJR Act.
2. Section 13(1) of the ADJR Act requires that a statement of reasons be in writing and set out, “the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision”.
3. The applicant submits, relying on *Wingfoot Australian Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [55], that the Delegate was required to explain his, “actual path of reasoning” in sufficient detail to enable a reviewing court to see whether the Decision was affected by an error of law.
4. The applicant submits that the reasons are inadequate for two reasons. First, it is submitted that no reason is given for the Delegate’s finding at para 7.37(a) that “it was not clear” that the Gainsborough Greens fauna exclusion fences would limit Koala movement into the conservation corridor.
5. The Delegate stated at para 7.37(a) that:

7.37 After considering the information provided by Planit Consulting, I was of the view that:

a. although the fence at the interface between the Gainsborough Greens residential development and a Koala conservation area, and the fence along Gainsborough Drive, are likely to limit the movement of Koalas into the Gainsborough estate, it is not clear that those fences would limit Koala movement into the conservation corridor;

b. although the fence installed along Yawalpah Road is likely to limit Koala movement into the conservation corridor, I do not consider that this fence is a complete barrier to Koala movement, noting the evidence that this fence is not being maintained in accordance with the Queensland Department of Transport and Main Roads’ *Fauna Sensitive Road Design Manual* (Volume 2: Preferred Practices);

…

1. The Delegate ultimately concluded (at para 7.38) that he did not consider that the information provided in the 2018 Planit Report was sufficient to allow him to conclude that there are barriers that would in fact prevent Koala movement between the Proposed Development and the Koala Conservation Area.
2. The Delegate had earlier noted (at para 7.33) that the one-direction fauna exclusion fencing facing the Gainsborough Greens development was generally constructed in accordance with the appropriate design standards which require Koala exclusion fencing to have a “three metre buffer free of vegetation (excluding grasses) on habitat side of the fence”. The Delegate then found (at para 7.34) that photographs included in the 2018 and 2019 Planit Reports of the one-direction exclusion fencing along the northern side of Yawalpah Road indicated that a three metre buffer from that fence is not being maintained and that it would be open to Koalas to use the trees close to the fence to climb over the fence from the conservation corridor, cross Yawalpah Road and move into the conservation corridor to the south.
3. The applicant’s submission seeks to read para 7.37(a) in isolation, and without consideration of the whole context. Paragraph 7.37, read as a whole, indicates that the Delegate accepted that the fences between the Gainsborough Greens development and the Koala Conservation Area would keep Koalas out of the Gainsborough Estate, but did not accept that those fences would have the effect of limiting Koala movement into the conservation corridor on the southern side of Yawalpah Road because Koalas could cross over the fence facing Yawalpah Road. I do not accept that the Delegate’s reasons failed to adequately explain why it was not clear that the Gainsborough Greens fences would limit Koala movement into the conservation corridor.
4. The applicant’s second submission is that the Delegate’s reasons at paras 7.81–7.88 for concluding that there was a real chance or possibility that the proposed action would reduce the area of occupancy of an important Koala population are inadequate as they paraphrase the applicant’s submissions at paras 237-239 of the 2019 Planit Report in a manner which oversimplifies, and thus effectively ignores, critical information.
5. This submission is related to the submission under Ground 2 that the Delegate “failed properly to consider” material in the 2019 Planit report in concluding that there was a real chance or possibility that the Proposed Development would reduce the area of occupancy of an important Koala population. In my opinion, the reasons explained the Delegate’s path of reasoning in sufficient detail to enable a reviewing court to see whether the Decision is affected by an error of law. I find that there was no failure to give adequate reasons.

### Ground 4: Whether there was an error of law

1. The fourth ground of review is that the Decision involved an error of law because the Delegate misconstrued and misapplied ss 18(4) and 18A(2) of the EPBC Act.
2. This ground is concerned with the proper construction of the phrase, “likely to have a significant impact”, in ss 18 and 18A of the EPBC Act. The applicant submits that in that phrase, “likely” means more probable than not.
3. The applicant submits that the Delegate directed himself to the inquiry set out in the Significant Impact Guidelines, namely whether there was a “real chance or possibility” that the Proposed Development would have a significant impact. It is submitted that the word “likely” contained in the statute means “probable”, not merely “possible”, such that the Delegate applied the wrong test.
4. The respondent submits that the terms of the Significant Impact Guidelines accurately capture the statutory test. The Significant Impact Guidelines state that, “[a]n action is *likely* to have a significant impact on a vulnerable species if there is a *real chance or possibility* that it will…” (emphasis added).
5. The Significant Impact Guidelines also provide guidance about when a significant impact is “likely”, stating as follows:

To be “likely”, it is not necessary for a significant impact to have a greater than 50% chance of happening; it is sufficient if a significant impact on the environment is a real or not remote chance or possibility.

1. In dealing with vulnerable species such as the Koala, the Significant Impact Guidelines provide, relevantly, that:

An action is *likely* to have a *significant impact* on a vulnerable species if there is a *real chance or possibility* that it will… reduce the area of occupancy of an important population… adversely affect habitat critical to the survival of a species… modify, destroy, remove or isolate or decrease the availability or quality of habitat to the extent that the species is likely to decline…

(Emphasis added.)

1. The Delegate applied the Significant Impact Guidelines. If the Significant Impact Guidelines misinterpret the phrase, “likely to have a significant impact”, in ss 18 and 18A of the EPBC Act, then the Delegate will have made the same error.
2. Section 18(4) of the EPBC Act, provide as follows:

*Vulnerable species*

(4) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the vulnerable category; or

(b) is likely to have a significant impact on a listed threatened species included in the vulnerable category.

1. Section 18A(2) provides that a person commits an offence if the person takes an action that is “likely to have” a significant impact on a species that is a listed threatened species.
2. The meaning of the word “likely” in the context of s 45D of the *Fair Trade Act 1974* (Cth) was considered in *Tillmanns Butcheries v Australasian Meat Industry Employees’ Union* (1979) 27 ALR 367. Justice Deane held at 380 that:

The word “likely” can, in some contexts, mean “probably” in the sense in which that word is commonly used by lawyers and laymen, that is to say, more likely than not or more than a 50 per cent chance (“an odds-on chance”)…. It can also, in an appropriate context, refer to a real or not remote chance or possibility regardless of whether it is less or more than 50per cent.

1. Justice Deane concluded at 382 that the word “likely” in s 45D meant a “real chance or possibility”.
2. In *Australian Competition and Consumer Commission v Pacific National Pty Limited* (2020) 378 ALR 1; [2020] FCAFC 77, Middleton and O’Bryan JJ held [243]–[244]:

243. …Strong arguments, based on the statutory text, can be made for construing the word “likely” to mean “probable”. However, the word “likely” has been construed to mean a likelihood that is less than probable for 40 years (from *Tillmanns*) and there is no evidence of widespread inconvenience in the application of the law. To the contrary, the law has been amended on numerous occasions without any suggestion that the dual legal standard should be changed…

244. Similarly, if the meaning of the word “likely” was being considered for the first time, we would have been inclined to adopt the meaning probable, but there is insufficient reason to change course at this point in time.

1. The standard accepted in *Tillmanns* has been adopted by this Court in a number of cases concerning the meaning of the word “likely” in the EPBC Act.
2. In *Booth v Bosworth* at [97]–[98], Branson J considered the meaning of “likely” in the context of s 12(1) of the EPBC Act. That provision prohibits an action that has, will have or is likely to have a significant impact on world heritage values of a World Heritage property. Justice Branson found it unnecessary to decide the meaning to be given to the word “likely”. However, her Honour stated at [98]:

It might well be thought that it would be consistent with the objects of the Act, as identified in s 3 of the Act, for the expression “likely” in par 12(l)(b) to be understood in the sense of “prone”, “with a propensity” or “liable”. Such an approach would be consistent with the “precautionary principle” which informs much environmental protection and conservation work (see the discussion of Sackville J of the “precautionary principle” in *Friends of Hinchinbrook Society Inc v Minister for Environment (No 2)* (1997) 69 FCR 28 at 78-80; 142 ALR 632 at 677-679). It would consequently tend to avoid the risk to biological diversity and the environment generally which would flow from the need for scientific certainty or confidence about the potential impacts of actions concerning which there has been limited scientific study…

1. In *Australian Brumby Alliance Inc v Parks Victoria Inc* [2020] FCA 605, O’Bryan J referred to the meaning of “likely” in s 15B(5) of the EPBC Act, which prohibits an action that “has, will have or is likely to have a significant impact on the National Heritage values of a National Heritage place”. His Honour did not decide the meaning of the word as the parties accepted the opinion of Branson J in *Booth* to be correct and applicable to s 15B(5).
2. In *Northern Inland Council for the Environment Inc v Minister for the Environment* (2013) 218 FCR 491 at [91]–[92], the parties were agreed that “likely” in the context of s 139(2) of the EPBC Act, means a, “real or not remote chance or possibility”, as distinct from a test of probability. Justice Cowdroy accepted that this was an appropriate interpretation of “likely”, and considered that, “[t]he relatively broad meaning attributed to “likely” accords with s 3(1)(a) to (e), which, as noted above, promote the protection and conservation of the environment.
3. In *Friends of Leadbeater’s Possum Inc v VicForests (No 4)* [2020] FCA 704, Mortimer J accepted the interpretation of “likely” in s 18 contended for by the parties, namely that it means, “a real or not remote chance or possibility”, citing *Northern Inland Council for the Environment Inc v Minister for the Environment.*
4. The applicant submits that in these cases, it was either unnecessary to decide the meaning to be given to “likely” (*Booth v Bosworth*), or the construction was agreed by the parties and not argued (*Australian Brumby Alliance; Northern Inland Council for the Environment Inc; Friends of Leadbeater’s Possum*).
5. In *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13], Gleeson CJ, Gummow and Heydon JJ observed that, “where a proposition of law is incorporated into the reasoning of a particular court, that proposition, even if it forms part of the ratio decidendi, is not binding on later courts if the particular court merely assumed its correctness without argument”. The applicant submits that the decisions relied upon by the Delegate have no precedential and little persuasive force.
6. I accept the applicant’s submission that the meaning of “likely” in ss 18(4) and 18A(2) of the EPBC Act has not been authoritatively decided.
7. Section 18(4) of the EPBC Act prohibits persons from taking an action that either, “has or will have” (para (a)), or, “is likely to have” (para (b)), a significant impact on a listed threatened species included in the vulnerable category. The applicant contends for a construction of “is likely to have” as meaning “will probably have”.
8. The phrase “will have” under para (a) does not indicate a requirement of certainty that an action will have a significant impact on a species that is a listed threatened species. It refers to an action will probably have such an impact. So much was accepted, correctly in my opinion, by the applicant: see *Kim v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 38 AAR 31 at [33].
9. If the applicant’s construction of para (b) is to be accepted, then “is likely to have” would have the same meaning as “will have” in para (a). Both would require that an action will probably have a significant impact on a listed threatened species included in the vulnerable category. That is an unlikely interpretation. First, if the applicant is correct, para (b) would be redundant as it would not add anything to para (a): see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71]. Second, the different language used in para (a) and para (b) indicates that different meanings are intended. Third, paras (a) and (b) are disjunctive, indicating that they are, at least in part, intended to cover different territory. Fourth, the structure of s 18(4), which separates paras (a) and (b), is consistent with the paragraphs having different meanings. These factors are inconsistent with the applicant’s construction.
10. In my opinion, the phrase, “is likely to have”, in para (b) of s 18(4) of the EPBC Act refers to a real or not remote chance or possibility. The same phrase in s 18A should be interpreted in the same way.
11. I am assisted in this conclusion by the reasoning in *Booth v Bosworth* and *Northern Inland Council for the Environment Inc*. A lower threshold accords with the objects set out in s 3(1)(a) to (ca) of the EPBC Act of protection and conservation of the environment and heritage. It is also consistent with one of the “principles of ecologically sustainable development” described in s 3A(b), that, “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”. Section 37B(2) requires that principle to be applied where the Minister is considering making a declaration under s 37A that a class of actions does not require approval under Part 9 for the purposes of a specified provision of Part 3 (which includes ss 18 and 18A). The principle is consistent with ss 18 and 18A, requiring something less than a balance of probabilities test when considering whether an action “is likely to have” a significant impact on a species that is a listed threatened species.
12. I note that the language of s 18(4) is very similar to that used in a number of other provisions of Ch 2 Pt 3 and in s 75 of the EPBC Act. The construction I favour produces no inconsistency with these provisions.

### Ground 5: Whether the decision was based on findings that were irrational, illogical or unreasonable and lacking an evident and justifiable basis

1. I do not understand the applicant to press the fifth ground of the originating application for judicial review.

## Conclusion

1. None of the grounds of review relied upon by the applicant have succeeded.
2. The application must be dismissed with costs.

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| I certify that the preceding two hundred and thirty-one (231) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah. |

Associate:

Dated: 22 March 2021