



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

Implications - construction of the term "likely" in the EPBC Act

Scott McLeod QC and Angus O'Brien

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Background

The applicant proposed a medium and high-density residential development in Coomera, Queensland. The proposed development would require the destruction of about 135 hectares of Koala habitat.

In November 2019, a delegate of the Commonwealth Minister for the Environment made a decision under s 75(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) that the proposed development was a "controlled action", and that the "controlling provisions" are ss 18 and 18A of the EPBC Act. The basis of the decision was that the proposed development is likely to have a "significant impact" on the Koala.

The Proceedings

The applicant applied for judicial review of the decision pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth).

The applicant submitted that the Minister's decision breached rules of natural justice, that the delegate took into account irrelevant considerations and failed to take into account relevant considerations, that the delegate's reasons were inadequate, that sections of the EPBC Act were misconstrued and misapplied, and that the decision was based on findings that were irrational, illogical or unreasonable.

Rangiah J dismissed the application, finding that none of the grounds of review succeeded.

Implications - construction of the term "likely" in the EPBC Act

The decision is notable for its consideration of the meaning of the term "likely" in ss 18 and 18A of the EPBC Act. As the Court acknowledged in its reasons, the proper construction of this term had not been authoritatively decided.

Sections 18 and 18A of the EPBC Act relevantly provide that a person must not take an action that "is likely" to have a significant impact on certain species. The same or similar language is used in cognate provisions of the EPBC Act.

The delegate had interpreted ss 18 and 18A as requiring only that there be a "real chance or possibility" that the action would have a significant impact.

The applicant submitted that that this involved an error of law because the word "likely" meant "more probable than not". That is, it set a higher threshold than a mere "real chance or possibility".

In the result, Rangiah J accepted the Minister's submission that the term "likely" meant a "real or not remote chance or possibility", by analogy with the interpretation of similar provisions in competition and consumer legislation.

It seems likely that his Honour's determination in this regard will be widely referred to in future cases concerning decisions under the EPBC Act.

Counsel and judgment

Scott McLeod QC and Angus O'Brien appeared for the Applicant, instructed by Colin Biggers & Paisley.

The judgment is published [here](#).



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