ADMINISTRATIVE LAW AND ENVIRONMENTAL DISPUTES

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Environmental disputes have provided the context for the development of a wide range of administrative law principles. Indeed, the Chief Judge of the NSW Land and Environment Court has recently suggested that they have been 'at the forefront of development of administrative law'[1].

The reason for this has a lot to do with the absence of opportunities for merits review of environmental decisions and, in particular, environmental decisions that are, or have the potential to be, controversial. When members of the public are unhappy with a decision that is likely to impact on their environment and do not have an adequate opportunity to seek merits review of the decision, they are inevitably drawn to looking for other means of challenging the decision. While this will often involve the use of political lobbying and public awareness campaigns, many ultimately turn to the law for assistance with the result that judicial review has become a common response to delay or overturn controversial environmental decisions.

Inevitably, as applicants are generally really seeking to prevent an unwanted development proposal from going ahead rather than seeking to ensure compliance with administrative law principles for their own sake, the arguments put forward by applicants often stray into questioning the merits of proposals. This is particularly so where decisions are challenged on the grounds that a decision-maker has failed to take a relevant matter into account or that a decision is so unreasonable that a reasonable decision-maker could not have come to it.

The courts, however, are generally anxious to avoid being drawn into a consideration of the merits of a proposal under challenge in judicial review proceedings. An explanation of the difference between merits review and judicial review and an example of an oft heard warning against Courts straying into merits review under the guise of judicial review is to be found in the following passage from the judgement of Wilcox J in *Williams v Minister for the Environment and Heritage*[2]. His Honour said:

> First, the essential difference between judicial review and merits review is that, in merits review cases, but not judicial review cases, a court may substitute its own view about the facts of the case for that of the original decision-maker. In judicial review cases, determination of the relevant facts is solely for the original decision-maker. In the course of considering a ground of review that is made available to an aggrieved party by common law or statute - for example, by section 5 of the ADJR Act - it may be necessary for a Court to consider carefully the decision-maker's reasoning which led to the findings of fact. However, under the guise of doing this, it should not substitute its own view of the facts for that taken by the original decision-maker. The rationale of this rule was explained by Spigelman CJ, of the New South Wales Supreme Court, in *Bruce v Cole* (1998) 45 NSWLR 163 at 184-185. His Honour said:
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> 'it is necessary to avoid the temptation to express a conclusion in terms of one of the recognised grounds for judicial review, whilst in truth making a decision based on the merits. In a democratic society such conduct transgresses the proper limits of judicial intervention. It will, if often repeated, undermine the basis for judicial independence and the fundamental role which judicial impartiality plays in the social stability of the nation and the maintenance of personal freedom of its citizens'.

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As well as oft repeated warnings along the same lines, it is also common to find statements in judgments about the validity of controversial decisions expressly stating that in coming to a conclusion on the legal issues that have been raised, no view is being expressed on the merits of the particular decision. For example, in handing down the Court's decision in relation to a challenge to the decision to go ahead with the channel deepening project in Port Phillip Bay[3], North J said[4]:

> A final observation should be made in view of the public profile of this case. The channel deepening project has attracted much public attention, particularly in Melbourne. Some people hold very strong views opposed to the dredging on environmental and other grounds. It is important to emphasise that in this case, the Court was not called upon to make a judgment as to whether the channel deepening project is a good thing or a bad thing or whether it is harmful to the environment or not.
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> State and Federal laws provide for a very elaborate process of assessment of those matters. The law then requires the Minister to evaluate the benefits and detriments of the proposal. The Court has a limited function. It can only consider challenges to the process by which the Minister made his decision and determine whether the Minister acted in accordance with the law. In this case, the Court has determined that the arguments raised by the applicant in that regard cannot be sustained.

Challenges to controversial environmental decisions have been based on most of the usual grounds of administrative law challenge. Environmental decisions have been attacked on the basis that the decision-maker has failed to consider relevant matters (or sometimes has taken into account irrelevant matters), that objectors have been denied procedural fairness in the way the decision has been made, that the decision-maker has acted for an improper purpose or failed to comply with a legislative condition precedent before making the decision. When all else fails, manifest (or *Wednesbury)* unreasonableness has also been raised, albeit without much success. Environmental disputes have also played an important role in the development of principles of practice and procedure such as the award of costs in public interest litigation and, of course, the rules of standing.

Unfortunately, however, while the traditional grounds of judicial review can sometimes focus on the issues that are actually of concern to the community (this is often the case when a decision-maker is said to have failed to consider relevant matters), more often than not they do not, and focus on technical grounds that, while they can delay or overturn the environmental decision in dispute, generally leave unaired the real reasons underlying public opposition to the decision.

This paper will consider the contribution some recent environmental disputes have made to the development of administrative law principles.

Failure to consider

The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is perhaps the most common basis on which a dissatisfied objector in an environmental dispute may seek to challenge the validity of a decision to allow a project to go ahead. In the Commonwealth jurisdiction the ground is to be found in s 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977* but this is substantially declaratory of the common law[5].

Not every failure to take a relevant matter into account will lead to the invalidity of an administrative decision. The relevant principles were explained by Mason J in the following well known passage in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [6]as follows:

(a) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he or she is bound to take into account in making that decision.

(b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act.

(c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision.

(d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

(e) Failure to consider relevant factors – was the decision-maker obliged to consider the factors said to have been overlooked?

In *Your Water Your Say Inc v Minister for the Environment Heritage and the Arts*[7], Heerey J was faced with a challenge to a proposed desalination plant on the Gippsland Coast near Wonthaggi. The project involved the desalination of seawater which was then to be piped some 85km to Melbourne.

The project was referred to the Commonwealth Environment Minister by the Victorian Department of Sustainability and Environment but in terms that expressly excluded from the referral, certain works referred to as 'the Preliminary Works'. These involved preliminary investigation works to obtain information for the purpose of project design, location and environmental assessment. The Preliminary Works included drilling and sampling, the construction of offshore structures above the seabed for seawater intake and discharge, the construction and temporary operation of seawater sampling units and the installation and operation of pre-treatment and/or desalination pilot units of a limited maximum capacity (6 ML/day).

Apart from the inlet and outlet pipes, all of the works were temporary and were to be removed at the completion of the testing regime. The applicant, a community group opposed to the project, sought review of the Environment Minister's decision to exclude the Preliminary Works from the environmental assessment of the project. One of the grounds of challenge was that in deciding what made up the controlled action for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the Delegate had failed to take into account a relevant consideration, namely, linkages between additional greenhouse gas emissions associated with the power generation required for the project. This argument was briefly dismissed by the Court, Heerey J saying (at para [22]):

> To establish the ground that a decision-maker has failed to take a relevant consideration into account (AD(JR) Act s5(2)(b)) it must be shown that he or she was bound by law to have regard to the particular consideration: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39. The question of greenhouse gas emissions was not such a matter.

Determining the scope of factors required to be taken into account by an examination of the relevant legislation

By way of contrast, another argument that a decision-maker was impliedly required to take the principles of ecologically sustainable development into account met with more success before the Land and Environment Court of NSW in *Walker v Minister for Planning*.[8] In that

case, the NSW Minister for Planning had approved a concept plan for a residential subdivision and a retirement village development at Sandon Point north of Wollongong. A report by the Director-General of the Department of Planning to the Minister did not contain material as to whether climate change flood risk was relevant to the project.

The Minister's decision was challenged on a number of grounds, one of which was that the Minister failed to take implied mandatory considerations into account, namely, ecologically sustainable development and the impact of the proposal on the environment. In relation to this ground, the applicant argued that the Minister failed to consider whether the impacts of the proposed development would be compounded by climate change and, in particular, whether changed weather patterns would lead to an increased flood risk in connection with the proposed development in circumstances where flooding was already identified as a major constraint on development of the site. These arguments were accepted by the Court despite the fact that climate change flood risk was not specifically mentioned in the relevant legislation as a matter the Minister was required to take into account. Biscoe J concluded:

> In my opinion, having regard to the subject matter, scope and purpose of the EPA Act and the gravity of the well-known potential consequences of climate change, in circumstances where neither the Director-General's report nor any other document before the Minister appeared to have considered whether climate change flood risk was relevant to this flood constrained coastal plain project, the Minister was under an implied obligation to consider whether it was relevant and, if so, to take it into consideration when deciding whether to approve the concept plan. The Minister did not discharge that function[9].

Did the failure to take a relevant factor into account have a material effect on the decision?

In *Lansen v Minister for Environment and Heritage*[10], Mansfield J was concerned with a challenge to the validity of an approval given by the Commonwealth Environment Minister under the EPBC Act for the McArthur River Mine in the Gulf Region of the Northern Territory. The approval related to a proposal to alter the mine from an underground mine to an open cut mine. The proposal involved a significant diversion of the McArthur River and the Environment Minister was concerned about the impact the proposal might have on migratory bird species as well as on the endangered species called the freshwater sawfish.

Before granting approval, the Minister required the potential environmental impacts of the proposal to be assessed and the results of the assessment to be reported to him. The assessment process was undertaken through the Northern Territory Minister for the Environment and Heritage, in accordance with a Bilateral Agreement between the Commonwealth and the Northern Territory which came into force on 19 March 2003.

The assessment process involved the preparation of an environmental impact statement, its exposure to public comment, and the proponent's response to the public comments. The results of that process were conveyed to the Commonwealth Minister by the NT Minister on 25 February 2006 by an Assessment Report. The Minister then asked for further information from the proponent concerning the potential impacts of the proposal on the freshwater sawfish and migratory bird species and how those impacts might be better minimised and monitored. After receiving the response, the Minister decided to approve the proposed action subject to a number of conditions.

The Minister's decision was challenged by seven native title claim groups with native title claims over land in the vicinity of the mine. One of the principal grounds of challenge was that the Minister was required to, but did not, take into account the conditions imposed by the Northern Territory on the proposal. These conditions related generally to the mine development and its environmental impacts.

Section 134(4)(a) of the EPBC Act states that in deciding whether to attach a condition to an approval, the Minister must consider 'any relevant conditions that have been imposed under a law of a State or self-governing Territory or another law of the Commonwealth on the taking of the action'. The applicants submitted that the NT conditions that were not considered by the Minister included conditions requiring compliance with commitments made by the proponent in its Mining Management Plan, maintaining an up-to-date Mining Management Plan, providing a sum of money as security to the Northern Territory Government, as well as a number of further detailed conditions for independent monitoring assessment of the environmental performance of the mine.

The Court held that these conditions were relevant and required to be taken into account by the Environment Minister by s 134(4)(a) of the EPBC Act. It also found that they were contained in an amended mining authorisation that the Minister did not see before he made his decision to grant the approval.

Mansfield J then went on to consider whether, adopting the formulation in *Peko-Wallsend*, it could be shown that the failure to take the conditions imposed by the Northern Territory into account could have materially affected the Minister's decision to grant the approval. His Honour proceeded to make a detailed comparison of the conditions imposed by the Environment Minister with those contained in the amended mining authorisation. The Commonwealth conditions included detailed requirements for the preparation of a Management and Monitoring Plan for the Freshwater Sawfish.

The Northern Territory conditions covered a wider range of things but in a more general way. They dealt with management systems, infrastructure, the diversion of the river, waste management, tailings storage, surface water quality, flood protection, groundwater, heritage, social impact, rehabilitation and closure of the mine, environmental management and biodiversity offsets. More relevantly, the Mining Management Plan contained various commitments under the heading 'Biology'. They include proposed monitoring and surveys of migratory birds in the area and of fish distribution, abundance and migration, aimed at establishing the effect of the river diversion.

Mansfield J found that while there was clearly some overlap between the conditions imposed by the Environment Minister and those contained in the Northern Territory approval, the Commonwealth Minister's conditions had, as would be expected, a greater focus on the subject matter of the controlling provisions, namely, the freshwater sawfish, which is a listed threatened species. His Honour noted that the Commonwealth Minister's conditions incorporated the commitment made by the proponent but also required additional measures such as drafting contingency plans in advance, rather than reviewing the diversion design if problems arise. This led the Court to hold that the Minister's decision would not have been materially different if he had considered the NT conditions.

The channel-deepening project

The environmental assessment and approval for the channel deepening project in Port Phillip Bay was the subject of consideration by the federal Court in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts*[11] . The proceedings also raised issues about whether the Minister had failed to consider relevant matters, again raising the issue of whether the decision had been made having proper regard to the principles of ecologically sustainable development.

The environmental assessment process began in 2002 when the proponent referred the project to the then Commonwealth Environment Minister for a decision under s 68 of the EPBC Act as to whether the proposal was a 'controlled action'. A delegate of the Minister decided that it was as it was acknowledged that the dredging would or may have an

environmental effect on specified matters of concern to the Commonwealth, namely, declared Ramsar wetlands, listed threatened species, listed migratory species and Commonwealth land.

The Minister decided to approve the project in accordance with s 133 of the EPBC Act.

The applicant challenged the Minister's decision, arguing, inter alia, that:

(a) he had failed to take into account the principles of ecologically sustainable development in breach of s136(2)(a) of the EPBC Act;

(b) he had failed to take into consideration other relevant matters required to be taken into account by s136(1)(a).

In relation to the first ground, s 136(1) of the EPBC Act requires the Minister, in deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, to consider (amongst other things) social and economic matters and s136(2)(a) expressly requires the Minister in so doing to take into account the principles of ecologically sustainable development.

The principles of ecologically sustainable development are set out in s 3A as follows:

> **3A Principles of ecologically sustainable development**
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> The following principles are principles of ecologically sustainable development:
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> (a) decision-making processes should effectively integrate both long-term and short-term
> (b) economic, environmental, social and equitable considerations;
> (c) 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
> (d) environmental degradation;
> (3) the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
> (f) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
> (g) improved valuation, pricing and incentive mechanisms should be promoted.

The applicant contended that the evidence provided by the text of the statement of reasons showed that the Minister did not take into account the principles of ecologically sustainable development when considering the social impact of the channel deepening project.

In the statement of reasons, the Minister stated 'I took into account . . . the principles of ecologically sustainable development as required under s 136(2)(a) of the Act'. The applicant contended that under s 136(2)(a) the Minister's obligation was to take the principles of ecologically sustainable development into account in his consideration of social and economic matters. It went on to argue that the Minister's statement did not mention social matters and hence could not be read as a statement that ESD principles were applied in the consideration of social matters.

The applicant also argued that although the Minister had said in the statement of reasons that he had carefully considered all the information before him that related to social matters relevant to the proposal, there was no specific reference to him doing so by reference to the principles of ecologically sustainable development.

The Court rejected the applicant's contentions. North J pointed out that in the statement of reasons, the Minister explained that he took into account the principles of ecologically sustainable development and that he did so for the purpose of deciding whether or not to

approve the proposed action. This was a reference back to the opening words of s 136(1) which referred specifically to social matters. On this basis, the Court was not prepared to accept the applicant's contention that the Minister had failed to consider the principles of ecologically sustainable development in evaluating the social impact of the proposed action.

The applicant also argued that the Minister had failed to take into account other matters he was required to consider under s 136(1)(a) of the Act. That section required the Minister, in deciding whether or not to approve the channel-deepening project, to consider matters relevant to the approval of the project. The applicant argued that the Minister failed to consider three specific matters which were said to be relevant. These were the impact of maintenance dredging, the impact of oil or chemical spills and the impact of the removal and disposal of toxic sediment in the north of Port Phillip Bay. The applicant also contended that the Minister failed to consider these matters taking into account the principles of ecologically sustainable development contrary to s 136(2)(a) of the Act.

The applicant argued that the Minister's obligation to take these matters into account arose by implication from the subject matter, scope and purpose of the Act. After referring to the principles laid down in the *Peko-Wallsend* case, North J concluded that:

> Section 136(1)(a) left it to the Minister to decide what were the matters relevant to the protected matters which he should take into account. The section does not suggest that there was a defined set of specific matters to be taken into account such as might be intended if the section had referred to 'all matters relevant' or 'the matters relevant'.
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> In his statement of reasons, the Minister discussed each of the protected matters, namely, the listed threatened species, the listed migratory species, the Ramsar wetlands of international significance, and the environmental impact on Commonwealth land in the area. In this discussion, he considered matters which he had determined to be relevant to those protected matters.
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> There is nothing in the subject matter, scope or purpose of the Act which required the Minister to take into account the impact of maintenance dredging, the impact of oil or chemical spills or the impact of the removal and disposal of toxic sediment in the north of the Bay[12].

The Court also rejected the applicant's argument that the Minister had failed to properly consider these matters in accordance with s 136(2) when taking into account the principles of ecologically sustainable development. After reviewing the Minister's statement of reasons, North J concluded that not only had the Minister expressly stated that he had taken the principles of ecologically sustainable development into account but there was actually 'little scope to apply those principles to the consideration of the protected matters because in nearly all instances the Minister made an express finding that the protected matter would not be significantly affected by the channel-deepening project'[13].

Taking irrelevant factors into account

In *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*[14], the Full Federal Court was asked to review a decision by the Commonwealth Environment Minister that an action comprising the construction and operation of an open cut coal mine and colliery facility at Anvil Hill in the Hunter Valley of New South Wales was not a 'controlled action' for the purposes of s 67 of the EPBC Act.

The action was referred to the Environment Minister to decide whether it was a controlled action. An action is a controlled action if it has or is likely to have a significant impact on a matter protected by Part 3 of the Act. The Minister's decision that it was not enabled the project to go forward without the need for approval or further environmental assessment under the EPBC Act (the environmental assessment of the proposal would then have taken place entirely under the relevant NSW legislation).

The applicant argued that the Minister's decision was based on 'irrelevant considerations'. The irrelevant considerations were whether that in considering whether the project would have a significant impact on 'a listed threatened ecological community' namely the 'White Box – Yellow Box, Blakely's Red Gum Grassy Woodlands' the Minister had improperly taken into account descriptions of ecological communities which were not published pursuant to the Act but were contained in a separate, privately maintained classification system.

The Full Court rejected the attack. The applicant argued that 'White Box – Yellow Box, Blakely's Red Gum Grassy Woodlands' was a community listed as critically endangered under the EPBC Act and that any decision about whether a particular community fell within that description was required to be made under the EPBC Act itself. It necessarily followed that reliance on a private classification system to make such a decision involved the taking into account of an irrelevant consideration. At first instance, Stone J had held that to fall within the listed community as defined in the listing the area must have a dominance of White Box, Yellow Box or Blakely's Red Gum and that as these species were not present in sufficient numbers to form the listed community this led to the conclusion that a significant impact on listed ecological communities was not likely. The Full Court found that there was no error of law disclosed by this reasoning.

Breach of a precondition to the exercise of power

The *Anvil Hill* case also raised an argument that the Minister had failed to comply with an essential precondition to the exercise of his discretion. This required the Court to consider whether a precondition to the Minister's exercise of discretion under s 75(1) of the EPBC Act was that the proposed action has, will have or is likely to have, a significant impact on a matter protected by Part 3 of the EPBC Act. Section 75(1) is in the following terms:

> (1) The Minister must decide:
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> (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.

The Court also rejected this ground of challenge. The Court held that the language of s75 and the related provisions did not require any objective factual determination as a condition precedent to the exercise of the Minister's power to make a decision as to whether an action is a controlled action. The Court pointed out that there are no references in the legislation to expressions such as 'Where there is a significant impact, the Minister may…. ' or, 'If there is likely to be a significant impact, the Minister may…. ', each of which may suggest the existence of a condition precedent to the exercise of the power by the Minister.

Instead, the Court noted that s 75 imposes an obligation on the Minister to decide whether a proposed action is a controlled action. In making this decision, the Minister must take into account the elements of a controlled action as defined by s 67 which involves a determination of whether the proposed action has, will have or is likely to have, a significant impact on a matter protected by Part 3 of the Act. The Court concluded that[15]:

> The duty to make this determination is assigned to the Minister. It is not given to a court or tribunal and is not expressed as an objective matter. As a result the performance of the duty is not properly to be regarded as a condition precedent to the exercise of the power in s 75.

Using similar reasoning, the Full Court also rejected an argument that the question of whether a proposed action has, will have or is likely to have a significant impact on a matter protected by Part 3 of the Act was a 'jurisdictional fact' which could be reviewed by the Court[16].

Breach of rules of procedural fairness

In *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources*,[17] the Full Federal Court considered an appeal relating to the approval of the proposal by Gunns Limited to develop a bleached Kraft pulp mill at Bell Bay in northern Tasmania. Two of the grounds of challenge were that:

- the Minister denied the applicant procedural fairness by setting a period of only 20 days for public comment on the assessment report for the project

- the Minister had acted for an improper purpose by taking into account Gunns' commercial imperatives in setting a 20-day period for comment on the assessment report for the project.

Gunns referred the proposal to construct and operate the pulp mill to the Minister for Environment and Water Resources for the Minister's decision whether or not the proposal was a 'controlled action' within the meaning of the EPBC Act. The EPBC Act prohibits a person from taking a controlled action without an approval under Pt 9 of the Act[18].

The Minister made the following decisions under s 75(1) of the EPBC Act:

- the proposal to construct and operate the pulp mill was a controlled action; and

- the relevant controlling provisions of Pt 3 of the EPBC Act were those concerned with listed threatened species and communities (ss18 and 18A), listed migratory species (ss 20 and 20A) and Commonwealth marine areas (ss23 and 24A).

The Minister also decided under s 87 of the EPBC Act that the assessment approach to be used for assessment of the relevant impacts of the controlled action was an assessment on preliminary documentation under Pt 8 Div 4 of the EPBC Act.

The Minister required Gunns to publish the information that it had provided on the proposed action to allow for public consultation on the potential impacts of the project. The Minister directed that the information be available for third party comment for 20 business days and this was done.

On 17 May 2007, the Wilderness Society Inc instituted proceedings in the Federal Court seeking judicial review of the Minister's decision. The challenge raised a number of arguments about the proper interpretation of provisions of the EPBC Act. It also raised arguments about procedural fairness and improper purposes.

In relation to procedural fairness, the applicant argued that, by setting a period of only 20 days for public comment on such a significant proposal, the Minister had denied members of the public a reasonable opportunity to make comments to inform the Minister's decision as to whether to approve the project. This was argued to amount to a denial of procedural fairness.

The Court rejected the attack on this ground. Branson and Finn JJ (with whom Tamberlin J agreed on this point) began by carrying out a close examination of the relevant provisions of the EPBC Act. While their Honours accepted that the purpose of the provisions requiring public comment was to promote informed decision making by the Minister, they noted that a major 'preoccupation' of the Act was on efficient and timely decision-making, or what their Honours described as an approach of 'studied haste'[19].

This, the Court observed, could be expected to create some tension between the conduct of the assessment processes (including the involvement of the public) and the expeditious finalisation of the approval process.

Having regard to the scheme of the Act, the Court rejected the applicant's contention that the Minister was under an obligation to afford objectors procedural fairness when fixing the time allowed for comment. Their Honours explained[20]:

> In our view, the appellant's submission on this ground of appeal misconceives the nature and purpose of the provision for public comment in the scheme of the Act. The submission simply assumes it enshrines a statutory procedural fairness requirement of sorts. Whether this is so, indeed whether it is at all helpful to resort to the language of procedural fairness in relation to the public comment provisions, is questionable. Irrespective of whether the duty to accord procedural fairness is properly to be characterised as a common law duty subject to a contrary statutory intent or as an implied legislative qualification on a statutory discretion, it is clear that, in either case, any consideration of whether such a duty exists at all in a given instance and, if so, what is its content, depends first and foremost upon a critical examination of the statutory framework within which the statutory power in question falls to be exercised. Such an examination of the EPBC Act leads inevitably to a rejection of the appellant's submission.

Improper purpose

The applicant in the *Gunns* case also argued that that the Minister had made his assessment approach decision under s 87 and determined a period of consultation under s 95(2)(c) for the purpose of satisfying Gunns' commercial imperative to have these decisions made no later than August 2007. This, it was argued, was a substantial operative purpose of the Minister when making his decisions, and was extraneous to the purpose for which the decision-making power was conferred under those sections of the Act.

The applicant relied on a number of matters to support this contention but principally on the Minister's request to his Department that it should agree with Gunns on a timetable for completion of the assessment of the project, the agreement on the timetable and the fact that the relevant decisions were in fact made in accordance with the timetable

In relation to this aspect of the case, the Court's reasons were given by Tamberlin J (with whom Branson and Finn JJ agreed). His Honour reiterated the comment made by the trial judge, Marshall J, that an allegation of improper purpose ' is a serious one which should not be lightly inferred'.[21]

His Honour went on to say that, in his view, the matters referred to by the applicant, considered either individually or collectively, were not sufficient to support any inference of improper purpose. At most, the matters complained of established that the Minister fulfilled his obligations under the Act while also endeavouring to cooperate with Gunns' request, to the extent that his duties under the Act allowed him to do so. This did not meet the test of substantiality necessary to establish improper purpose.[22] His Honour concluded that there was no evidence to suggest that the Minister agreed to assist Gunns 'in such a way as to compromise or depart from the purpose of his statutory powers in the Act'.

In reaching this conclusion, Tamberlin J referred to evidence given before the trial judge by a Departmental officer that the Minister had discussed with him the assessment approach decision, and had asked him why the assessment was to be done on preliminary documentation rather than through a more onerous environmental impact statement. Tamberlin J observed that the fact that the Minister had considered different options for his assessment approach decision, and raised at least one of these options with his Departmental advisers, suggested that there was no improper collaboration between the Minister and Gunns to accommodate the latter's commercial requirements. His Honour concluded that the Minister's cooperation in seeking to meet Gunns' timetable was entirely

consistent with the stated objective in s 3(2)(d) of the Act that the process for deciding the assessment approach should be 'efficient and timely'[23]. Having regard to these matters, the Court did not accept that the Minister took into account or gave substantial weight to any improper purpose when making his decisions.

Manifest unreasonableness

When all else fails, objectors trying to overturn a decision to approve an unwanted project will turn to a challenge based on the ground that the decision is manifestly unreasonable - one that no reasonable decision-maker in the same situation could have come to. Of all the grounds of challenge potentially available this is the one that carries the most risk that a Court will be drawn into a consideration of the merits of the decision under challenge. Perhaps because of the Court's general reluctance to do so, the law reports are littered with examples of environmental cases in which the ground has been raised but ultimately rejected by the Courts[24].

One example is the channel-deepening case. There, the Minister was obliged by provisions of the EPBC Act to inform 'any other Minister whom the Environment Minister believes has administrative responsibilities relating to the action' of the Environment Minister's proposed decision[25]. In challenging the validity of the Minister's decision, the applicant argued that the material before the Minister established that there were tourism and climate change issues involved in the channel-deepening project and the decision by the Environment Minister to inform neither the Minister for Tourism nor the Minister for Climate Change of his proposed decision to approve the project was so unreasonable that a reasonable Minister could not have formed that belief.

North J observed that in order to succeed in such an argument, the applicant must establish that the Minister's conclusion, when viewed objectively, was 'so devoid of any plausible justification that no reasonable [person] could have reached [it]'.[26]

The applicant noted that the Administrative Arrangements Order provided that the two Ministers had administrative responsibilities for tourism and climate change respectively and argued that the relevant statutory provisions did not require that the administrative responsibilities be great or small, but simply that they exist. In these circumstances, it was argued that the Minister was effectively compelled to form the belief that the two Ministers had administrative responsibilities relating to the channel-deepening project and any decision otherwise was unreasonable.

The Environment Minister filed an affidavit made by Vicki Middleton, the Assistant Secretary in the Department of Environment, who had reported on the proposal to the Minister. In her affidavit, Ms Middleton explained the basis for her belief that the two Ministers did not have administrative responsibilities relating to the project. She said, in relation to the Minister for Tourism:

> I formed the view that I would not advise the Minister to invite the RET Minister's comments. In forming that view, I took into account that the identified potential impacts on local tourism operators were of a temporary nature. I also took into account that the RET Minister's principal role is to promote Australia as a tourist destination internationally, with no direct regulatory role in relation to local or specific tourism operations.

And she said in relation to the Minister for Climate Change and Water:

> I formed the view, however, that the Minister for Climate Change had a broader policy portfolio, rather than any direct regulatory or approval responsibilities in relation to the proposal, and on that basis I decided that I would not advise the Minister to invite the Minister for Climate Change's comments.

North J observed that the interpretation of the concept of administrative responsibilities adopted by Ms Middleton required that the Ministers have direct regulatory or approval roles in relation to the channel-deepening project. Whether right or wrong, his Honour found that this approach was tenable and not so unreasonable that a reasonable Minister could not adopt it. His Honour went on to say:

> Further, in relation to the Minister for Tourism, Ms Middleton had regard to the temporary nature of the impact of the project on tourism. Behind this consideration seems to lie a view that a long term impact might give rise to administrative responsibilities, whilst a short term impact may not.

The applicant did not seek to demonstrate that such an approach was completely untenable. The applicant's challenge based on unreasonableness cannot be upheld[27].

Misleading conduct

While well settled as a potential source of invalidity, it has been (perhaps thankfully) a rare thing for an environmental decision to be challenged on the grounds of bad faith or fraud. In a recent case, however, the NSW Land and Environment Court was required to consider something close to such a claim – an allegation that misleading conduct by a developer might provide grounds for a successful challenge to a development consent.

In *Anderson v Minister for Infrastructure, Planning & Natural Resources*,[28] a challenge was made to the validity of a development consent framed broadly in terms of *Wednesbury* unreasonableness but which alleged that the decision was manifestly unreasonable because it was made as a result of misleading conduct by the developer and its environmental consultants. The applicants did not allege, however, that the alleged failure to provide the information was fraudulent, deliberate or in bad faith.

The proceedings were brought by Aboriginal elders on behalf of the Numbahjing Clan within the Bundjalung Nation. The proceedings involved a challenge to the validity of a development consent granted by the Minister for Infrastructure, Planning and Natural Resources for a housing subdivision on land at East Ballina in Northern New South Wales.

A key issue in the proceedings was an allegation that the consent was invalid because the Minister did not consider an historically recorded massacre of Aboriginal people in about 1854 in the area in which the subject land was located. It was argued that, when the Minister made his decision, he knew that the land was of 'high significance' to Aboriginal people but it is said that he did not know why, nor that the main reason was the massacre.

The applicants submitted that the Minister’s decision was invalid because the consultant and the developer misled the Minister by not providing relevant information in their possession to the Minister as to why the land was culturally significant to the Aboriginal people. This information was said to have been contained in documents held by the consultant and the developer.

Biscoe J noted that it was well settled that an administrative decision may be void in circumstances where there has been 'fraud or misrepresentation' on the part of the person benefited by the decision[29]. His Honour observed however that the question whether the phrase 'fraud or misrepresentation' should be read disjunctively so that an innocent misrepresentation may of itself result in invalidity had not been clearly answered.

The respondents submitted that there was no room for a concept of innocent misrepresentation within the ambit of administrative law. They submitted that the phrase 'fraud or misrepresentation' should be interpreted as 'fraud or deliberate misrepresentation' and referred to a number of cases in the Federal Court that had considered the effect of

'fraud or misrepresentation' upon a decision to issue a search warrant. His Honour referred to a Queensland decision concerning the setting aside of a search warrant[30] in which Chesterman J had said[31]:

> It is not clear from the authorities whether 'fraud or misrepresentation' where it operates to allow a decision to be re-opened is limited to fraudulent misrepresentations or whether an innocent misstatement will suffice. On the basis that a mistake as to the facts is not sufficient to overcome the prohibition against re-making decisions, it may well be that an innocent misrepresentation is not enough. The word 'misrepresentation' should perhaps be understood as referring to fraudulent misrepresentation and 'fraud' as referring to dishonesty of a more general kind, so that only conduct of that kind will vitiate a decision and allow the power to be exercised afresh.

Biscoe J was content to follow the same reasoning to hold that 'misleading conduct which is not characterised by fraud, bad faith or the like is, at least generally, insufficient to vitiate an administrative decision'[32].

Standing

The judicial review of decisions concerning environmental disputes has also made a significant contribution to the development of principles of practice and procedure and, in particular, in relation to the rules of standing and the award of costs in public interest proceedings. In relation to standing, while legislative reforms in many jurisdictions enable judicial review proceedings to be brought by 'any person'[33] or by individuals or organisations able to demonstrate involvement over a period of time in environmental activities,[34] the common law rules of standing developed through a series of environmental disputes in the 1980s and 90s continue to be of relevance in jurisdictions in which statutory reforms have not been implemented.[35]

The starting point for any discussion of the rules of standing is the decision of the High Court of Australia in *Australian Conservation Foundation Inc v The Commonwealth of Australia.*[36] In that case, the Court considered the continuing relevance of the well-known second limb of the test of standing laid down in *Boyce v Paddington Borough Council*.[37] It will be recalled that in that case Buckley J said:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (eg, where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

In the *ACF* case, the High Court was asked to expand the 'special damage' requirement to include the special interest the Australian Conservation Foundation had in the protection of the environment. While the ACF failed to persuade the Court that it should be given standing in the particular matter before the Court (a challenge to the approval of a large tourist resort at Farnborough in Queensland), the judgments laid the foundation for the development of the rules of standing in future cases in a way that has made it considerably easier for conservation groups to challenge environmental decisions.

Rather than 'special damage', the Court accepted that it was sufficient for a plaintiff to show what Gibbs J described as 'a special interest in the subject matter of the action'.[38]

In a well-known passage, Gibbs J said[39]:

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain

> some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

The concept of special interest was developed further by the High Court's decision in *Onus v Alcoa of Australia Ltd*.[40] In that case, the descendants and members of a particular group of Aboriginal people were custodians of the relics of those people. It was held that they had standing to bring proceedings to restrain the defendant from carrying out work which would interfere with the relics of their people, allegedly in breach of the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic). As guardians of the relics, according to their laws and customs, the appellants were held to have a special interest in their preservation. Stephen J made the following observations concerning special interest:[41]

> …the distinction between this case and the ACF case is not to be found in any ready rule of thumb, capable of mechanical application; the criterion of 'special interest' supplies no such rule. As the law now stands, it seems rather to involve in each case a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter. The present appellants are members of a small community of Aboriginal people very long associated with the Portland area; the endangered relics are relics of their ancestors' occupation of that area and possess for their community great cultural and spiritual significance. While Europeans may have cultural difficulty in fully comprehending that significance, the importance of the relics to the appellants and their intimate relationship to the relics readily finds curial acceptance. It is to be distinguished, I think, and will be perceived by courts as different in degree, both in terms of weight and, in particular, in terms of proximity, from that concern which a body of conservationists, however sincere, feels for the environment and its protection. Courts necessarily reflect community values and beliefs, according greater weight to, and perceiving a closer proximity to a plaintiff in the case of, some subject matters than others. The outcome of doing so, however rationalized, will, when no tangible proprietary or possessory rights are in question, tend to be determinative of whether or not such a special interest exists as will be found standing to sue.

In *North Coast Environment Council Inc v Minister for Resources*, [42] Sackville J undertook a comprehensive survey of the development of the authorities on standing since and including *Australian Conservation Foundation Inc v the Commonwealth*. . Based on that survey, his Honour identified the following general principles:[43]

- The plaintiff must demonstrate a 'special interest' in the subject matter of the action. A 'mere intellectual or emotional concern' for the preservation of the environment is not enough to constitute such an interest. The asserted interest 'must go beyond that of members of the public in upholding the law … and must involve more than genuinely held convictions'.
- A plaintiff may be able to demonstrate a special interest in the preservation of a particular environment. An intellectual or emotional concern is no disqualification from standing to sue.
- An allegation of non-compliance with a statutory requirement or an administrative procedure is not enough of itself to confer standing.
- The fact that a person may have commented on environmental aspects of a proposal does not of itself confer standing to complain of a decision based on an environmental assessment process.
- An organisation does not demonstrate a special interest simply by formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment.

Applying those principles, Sackville J held that the North Coast Environment Council, an incorporated environmental protection group, had standing to challenge a decision by the Minister to grant an export licence for the export of wood chips. The factors his Honour considered relevant were that:[44]

- North Coast was the peak environmental organisation in the north coast region of New South Wales, having 44 environmental groups as members. Its activities related to the areas affected by the operations generating the woodchips that were the subject of the export licence.
- North Coast had been recognised by the Commonwealth since 1977 as a significant and responsible environmental organisation. This recognition had taken the form of regular financial grants for the general purposes of the organisation. While the grants had been modest, they were recurrent and reflected acceptance by the Commonwealth of the significance of the role played by North Coast in advocating environmental values.
- North Coast had been recognised by the Government of New South Wales as a body that should represent environmental concerns on advisory committees. The most important form of recognition for present purposes had been membership of North Coast's nominees on the Forestry Policy Advisory Committee, the role of which was to advise the State Minister on forestry matters, including the management of State forests. This and other forms of participation in official decision-making processes showed that the State government had accepted North Coast as a representative of environmental interests.
- North Coast had conducted or coordinated projects and conferences on matters of environmental concern, for which it had received significant Commonwealth funding. While these had not specifically concerned forest management or wood chipping, they reflected North Coast's standing as a respected and responsible environmental body.
- Finally, it had made submissions on forestry management issues to the Resource Assessment Commission and had funded a study on old growth forests, focusing upon the Wild Cattle Creek State Forest. Similar principles were applied by Sackville J in *Tasmanian Conservation Trust Inc v Minister for Resources*.[45]

The acceptance of the standing of groups like the North Coast Environment Council and the Tasmanian Conservation Trust to bring proceedings to challenge environmental decisions represents a significant departure from the narrow rules laid down in *Boyce v Paddington Borough Council*[46]. What is clear is that to satisfy the common law rules of standing an environmental group needs to do more than simply demonstrate a general interest in or commitment to the protection of the environment. As Bates has observed[47], what is relevant is the ability of the association to properly represent the public interest and this will depend upon the degree of closeness the association can demonstrate with the subject matter of the decision sought to be challenged.

Costs

While courts are generally given a discretion as to what orders for costs will be made on the conclusion of a piece of litigation, the traditional rule is that the successful party is entitled, in the absence of disentitling conduct, to expect to receive an order that its costs be paid by the unsuccessful party. The relaxation of the traditional rules of standing both by the cases discussed above and by legislative reforms, however, may well be an 'empty gesture'[48] if environmental groups are still faced with the prospect of substantial costs orders if proceedings brought to challenge environmental decisions are unsuccessful.

The Land and Environment Court of NSW has for many years been prepared to depart from the usual order for costs where a party could demonstrate that proceedings had been brought in the public interest rather than to protect a private interest of their own. This approach was challenged in *Oshlack v Richmond River Council*[49], enabling the High Court to review the Land and Environment Court's approach.

In that case, a majority of the High Court upheld the discretion to refuse to make an order for costs in appropriate cases and upheld the trial judge's decision to take into account that the unsuccessful party's motivation in bringing the proceedings had been to enforce compliance with the relevant environmental law and the preservation of an endangered koala habitat, the fact that a significant number of members of the public shared that view, and that the basis of the challenge was arguable.[50] It is fair to say, however, that while the decision of the High Court in *Oshlack's* case opened the door for environmental groups to resist costs orders a little, the Courts will generally still take a good deal of persuading that the usual rule as to costs should be departed from.[51]

A similar approach has been taken by the Federal Court. For example in *The Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources*[52], the Full Federal Court was prepared to take into account[53] that:

- the issues raised concerned the proper construction of the EPBC Act and were of general importance to both the Minister and the general public;
- the applicant was concerned, along with a large segment of the Australian community to avoid harm to the Australian environment;
- the applicant was not seeking financial gain from the litigation but had sought to resolve a dispute concerning the proper administration of the EPBC Act in the Court rather than elsewhere.

In that case, the Court ordered the applicant to pay only 70% of the Minister's costs of the appeal and 40% of the costs incurred by Gunns Limited.

The application of these principles was considered again recently by Heerey J in a round of the channel-deepening project litigation[54] in circumstances reminiscent of the well known movie 'The Castle'.

His Honour having concluded that the application for relief must be dismissed, went on to consider an application by the respondents that the usual rule should apply and Blue Wedges should be ordered to pay the respondents' costs. After reviewing the principles set out above, his Honour then considered the particular circumstances of the applicant:

> Blue Wedges represents the interests of over 65 community and environment groups. It has been actively campaigning to raise public awareness of threats to the environment of Port Phillip Bay over many years. As such, it qualified for the express conferral of standing to bring proceedings such as the present one conferred by s 487(3) of the Environment Act. (The respondents in their defences objected to Blue Wedges' standing but did not pursue such objections at the hearing.)
>
> Blue Wedges' solicitor, Mr Michael Morehead, also acts for a number of businesses, such as diving schools, who fear they will be commercially damaged by the project. He had notified to the PoMC potential claims for compensation on their behalf. Nevertheless, this commercial element of the case does not gainsay the public interest which lies at the base of the present application.
>
> Mr Morehead initially had the services of counsel acting pro bono in a directions hearing in December but was unable to obtain such assistance for the hearing which, because of the urgency, took place during the holiday period. So Mr Morehead, who runs a one-man practice at Portsea, conducted the case himself. Against the combined resources of the Commonwealth and the State of Victoria, who were able to retain five barristers, including four senior counsel, Mr Morehead, on his own, advanced serious and competent argument, for which the court is grateful. He frankly informed the court that his

> appearance was not pro bono. Nevertheless, I doubt if his earnings from this case will propel him into the Australian Financial Review list of top fee earners.
>
> In my view, however, this is a clear case for the application of the *Oshlack* approach. The condition of Port Phillip Bay is a matter of high public concern, and not only for the four million or so Victorians who live around it. As might be expected, the project has attracted much controversy. On Saturdays, the Melbourne Age publishes a list of which it considers to be the 'Five Big Issues' of the week. Last Saturday, 12 January, Port Phillip Bay channel deepening was third, topped only by Andrew Symonds in the Sydney test and Hillary Clinton in New Hampshire.
>
> Although, as has been said in another context, there is a difference between what is in the public interest and what is of interest to the public…. in the present case, the two happen to coincide. There is a public interest in the approval decision itself, and equally in whether it has been reached according to law. Also, the application raised novel questions of general importance as to the approval process under the Environment Act.

Heerey J concluded that while the application would be dismissed, he would make no order as to costs.

Endnotes

1 'The Environment and its Influence on the Law', The Hon. Justice Brian J Preston, Keynote Address to Legal Aid New South Wales Civil Law Conference, 26 September 2007
2 (2003) 74 ALD 124 (at para [28])
3 *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399
4 At paras [127] to [131]
5 See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (at 39 – 40 per Mason J)
6 ibid
7 [2008] FCA 670, 16 May 2008
8 (2007) 157 LGERA 124
9 At para [166]
10 [2008] FCA 903, 13 June 2008
11 (2008) 157 LGERA 428
12 At paras [115] to [117]
13 At para [124]
14 (2008) 244 ALR 87
15 At para[26]
16 See *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55
17 (2007) 243 ALR 241
18 See Pt 3 of the EPBC Act.
19 At para[84]
20 At para[80]
21 At para [126] citing *Industrial Equity Ltd v DCT* (1990) 170 CLR 649 at 672 ; per Gaudron J
22 Referring to *Thompson v Randwick Corp* (1950) 81 CLR 87 at 106
23 At para [128]
24 For a rare example of the ground having been successfully raised see *Belongil Progress Association Inc v Byron Shire Counci*l [1999] NSWLEC 271 at [37]
25 Paragraph 131(1)(a)
26 Citing Lord Diplock in *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 821
27 At para [106]
28 (2006) 151 LGERA 229
29 Citing *Lego Australia v Paraggio* (1994) 52 FCR 542
30 *Firearm Distributors v Carson* [2001] 2 Qd R 26
31 At para [44]
32 At para [79]
33 For example, s123 of the *Environmental Planning and Assessment Act 1979* (NSW)
34 s 487 of the EPBC Act
35 For a recent example see *Friends of Elliston – Environment & Conservation Inc v South Australia* [2007] SASC 19
36 (1980) 146 CLR 493
37 [1903] 1 Ch. 109 (at 114)
38 (1980) 146 CLR 493 at 527
39 at 530–531
40 (1981) 149 CLR 27
41 at 42
42 (1994) 55 FCR 492

43 at 512
44 at 512 to 513
45 (1995) 55FCR 516
46 [1903] 1 Ch. 109
47 Bates, G, *Environmental Law in Australia*, 5th ed, 2002, at p. 157
48 *Oshlack v Richmond River Council* (1998) 152 ALR 83 (per McHugh J at [114])
49 (1998) 152 ALR 83
50 at paras [20 and [49] per Gaudron and Gummow JJ and at [133] and [136]–[144] per Kirby J
51 cf, for example, the refusal of the Court to depart from the 'usual rule' in *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411 and *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2)* (1998) 154 ALR 411 at [5] to [6] per Kirby J
52 [2008] FCAFC 19
53 at para 53s [8] to 10]
54 (2008) 245 ALR 584