
Public interest litigation and the Environment Protection and Biodiversity Conservation Act

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The third party standing provisions in the Environment Protection Biodiversity Conservation Act 1999 (Cth) are generous and permit a wide scope of review by environmental interest individuals and groups. A number of high profile proposals have been challenged in various ways providing the Federal Court with the opportunity to consider the application of the Act to referrals, assessment methods, preliminary works and assessment bilateral agreements. The decisions reviewed in this article provide guidance for future proponents in the formulation of referrals and progressing their referrals. Costs orders in "public interest litigation" are also reviewed.

INTRODUCTION

The standing provisions¹ in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) provide environmental and community interest groups, and like minded individuals (often referred to as "public interest litigants"), the opportunity to enforce the Act's environmental protection provisions or to seek judicial review. When the EPBC Act was first tabled there were concerns that the open standing provisions would open the floodgates to public interest litigation and stall development and the economy. Indeed, the first injunction granted under the EPBC Act was to Dr Carol Booth to prevent the electrocution of hundreds of spectacled flying foxes by a lychee farmer near Cardwell, North Queensland.² Nine years later, the majority of applications involving the EPBC Act are brought by third parties with public environmental interests.

While those on the receiving end of a Federal Court application would perhaps view the litigation as an unwelcome delay, there have been tangible benefits stemming from the judicial examination of the issues raised. Many of the public interest cases brought to the Federal Court have been instrumental in fleshing out provisions in the EPBC Act or providing guidance on the assessment and decision-making process, as well as the scope of the Minister's discretion when making a decision.³ There have been a number of recent cases (involving some high profile proposals) which warrant review because of the issues raised and the decisions reached. This article reviews four recent decisions and identifies the contribution the decisions make to the understanding and application of the controlled action provisions in the EPBC Act.

BLUE WEDGES INC V MINISTER FOR THE ENVIRONMENT AND HERITAGE [2008] FCA 8

Blue Wedges Inc is an organisation established with the aim of protecting the waters of Port Phillip, Western Port and Blue Wedges Bay. The Federal Court challenges by Blue Wedges arose from a

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¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 475-476.

² *Booth v Bosworth* (2001) 117 LGERA 168.

³ For example, see, *Queensland Conservation Council Inc v Minister for the Environment* (2004) 134 LGERA 272 (the Nathan Dam case) held that adverse impacts of an action assessed under the EPBC Act include both direct and indirect effects of the action. A proposed 880,000 ML dam on the Dawson River was alleged to have an adverse impact on the Great Barrier Reef World Heritage Area (a matter of national environmental significance) due to downstream irrigation of agricultural land by persons other than the proponents. The court accepted that these indirect offsite effects should be considered by the Environment Minister in deciding whether to approve the action. See also, *Mees v Roads Corporation* (2003) 128 FCR 418, which examined the issue of what information should be included in referral documentation under the EPBC Act. The court held that the proponent's failure to refer the "strong chance" of a future freeway link was misleading and this decision has guided subsequent proponents.

proposal to dredge Port Phillip Heads, Port Phillip Bay, the Yarra River and its approaching channels. The facts span over several years and the history of the referral, assessment process and court hearings is set out in Table 1 below.

TABLE 1 Blue Wedges Inc v Minister for the Environment and Heritage Timeline

Date	Event
February 2002	Referral by predecessor of Port of Melbourne Corporation.
March 2002	Decision by Environment Minister that the proposal was a controlled action.
May 2002	Decision by Environment Minister under s 87 of the EPBC Act that the mode of assessment would be an accredited assessment process (Environmental Effects Statement under Victorian legislation).
July 2004	EES (Environmental Effects Statement) released for public comment.
February 2005	First panel report released.
March 2005	Supplementary EES required.
March 2007	Supplementary EES released for public comment.
October 2007	Second panel report released November 2007. Victorian's Minister's assessment provided to the Federal Environment Minister.
20 December 2007	Approval decision made by Environment Minister.
15 January 2008	Decision by Heerey J dismissing the application (in relation to the 20 December approval) by Blue Wedges.
18 January 2008	The Environment Minister releases Statement of Reasons for Grant of Approval.
30 January 2008	Blue Wedges lodge application in relation to the Statement of Reasons and an application for an interim stay of dredging. Federal Court orders no dredging to commence until the Environment Minister approves the EMP required under his Statement of Reasons.
6 February 2008	Federal Court mediation.
20 February 2008	Federal Court hearing. (North J observed that two grounds of the application by Blue Wedges were weak).
3 March 2008	Hearing before North J who reserves his decision.
28 March 2008	Decision by North J dismissing the application.

On 15 January 2008, Heerey J dismissed both grounds of the appeal lodged by Blue Wedges against the 20 December Approval Decision by the Commonwealth Environment Minister.⁴ A second application was lodged later in January 2008 under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), on the basis that the Minister failed to take into account relevant considerations in granting his

⁴ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008). This decision was in relation to the approval decision on 20 December 2008.

approval.⁵ This application was in relation to the Statement of Reasons for Grant of Approval published by the Environment Minister on 18 January 2008.⁶ This matter was dismissed by North J on 28 March 2008.

Application before Heerey J

The Minister's Approval Decision was challenged on two grounds. First, Blue Wedges argued that the action referred to the Minister in 2002 was different from the action assessed by the Victorian Environment Minister in 2007. As a consequence there was no lawful basis for the Minister to approve the project because it had not been the subject of a referral, a decision under s 75, the selection of a mode of assessment under s 87, or the receipt of assessment documentation under s 133 of the EPBC Act.⁷

In the alternative, Blue Wedges argued that the 2007 assessment did not adequately assess the relevant impacts of the proposal and/or provide enough information to enable the Minister to make an informed decision.

The Application was dismissed on both grounds by Heerey J.

In relation to the first argument, Heerey J found that changes could be made to a proposed action between the referral and approval stages. In fact, the recently inserted s 156A⁸ supported this conclusion. The Explanatory Memorandum for the 2006 amending Bill noted:

This amendment allows a person who had referred an action to the Minister for assessment and approval to request the Minister to accept a variation to the action...The purpose of this amendment is to provide greater flexibility for dealing with changes during the assessment process by providing a formal process for the variation of proposed actions.⁹

Heerey J found that the formal process for seeking a variation to the original proposal coupled with the words in s 156A that a person "may...request the Minister to accept a variation...of the original proposal" suggested that informal changes could be made.¹⁰ Furthermore, he observed that it could not "possibly be the case that literally no changes at all can take place in the action between referral and approval".¹¹ The function of the referral process is "not to fix in stone all the details of a proposed action for the subsequent approval process".¹²

Heerey J also observed that some changes to referrals might be positive for the environment. If the argument advanced by Blue Wedges was correct, then this would be a strong disincentive for proponents to keep looking for environmentally friendly changes to a project.¹³

Although there were differences between the 2002 project as referred and the project as it was assessed in 2007, Heerey J found that "the action as described in the referral was to deepen the shipping channels at Port Phillip Heads, in Port Phillip and the Yarra River and its approaching channels".¹⁴ The project the subject of the Approval Decision was also for deepening shipping channels.¹⁵

⁵ This application was made under s 487(3) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁶ Statement of Reasons for Grant of Approval under the *Environment Protection Biodiversity Conservation Act 1999* (Cth) dated 18 January 2008, [9]-[20].

⁷ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008) at [8].

⁸ *Environment and Heritage Legislation Amendment Act (No 1) 2006* (Cth).

⁹ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008) at [42].

¹⁰ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008) at [42].

¹¹ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008) at [19].

¹² *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008) at [22].

¹³ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008) at [20], [23].

¹⁴ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008) at [59].

¹⁵ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008) at [59].

In relation to the second argument, Blue Wedges submitted that in treating both the project in its 2007 form and the project as referred in 2002 as the same action, the assessment was limited in that it did not consider all the matters under Pt 3 of the EPBC Act.¹⁶ Hence there was not enough information for the Minister to make an informed decision. Heerey J found that the Minister had power to request specified information relevant to the making of the decision under s 132 of the Act, and the exercise of this power depends “not upon an objective assessment of the sufficiency of the information before the Minister but on the Minister’s judgement...as to whether he or she has enough information to make an informed decision”.¹⁷ Accordingly, the Minister was not prevented from making the decision.

Costs order by Heerey J

Notwithstanding the usual consequence that costs follow the event, no costs order was made. Heerey J referred to the rule in *Oshlack v Richmond City Council* (1998) 193 CLR 72 and determined that there were matters of high public concern, novel questions of general importance as to the approvals process under the EPBC Act, and a disparity in the level of representation of the parties.

Application before North J

Eleven days after the Minister released his Statement of Reasons for Grant of Approval, Blue Wedges filed a further application before the Federal Court, and sought a stay of the dredging until the determination of the application. Port of Melbourne Corporation (PMC) opposed the stay on the ground that the costs of delay were in the vicinity of \$250,000 per day. The Federal Court referred the stay application to the District Registrar Lagos for mediation, where it was agreed that PMC could commence dredging less contentious parts of the channel deepening project.¹⁸

The hearing before North J commenced on 20 February 2008. In this instance, three grounds were relied upon by Blue Wedges, namely:

- The Minister failed to take into account the principles of ecologically sustainable development when considering social matters relating to the proposal. In the alternative, Blue Wedges argued that if the Minister did take into account the principles of ecologically sustainable development, he did not do so in the way required by s 136(1) and (2)(a) of the EPBC Act.
- The Minister failed to inform other Ministers with administrative responsibilities relating to the action, and invite comments about the proposed action from such Ministers.¹⁹
- The Minister failed to consider 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. Blue Wedges argued that these constituted “relevant matters” which the Minister should have considered under the EPBC Act.

With regard to the first ground, North J rejected Blue Wedges’ contention that the Minister must consider each of the matters referred to in s 136(1) when taking into account the principles of ecologically sustainable development. According to his Honour, the Minister “was entitled to consider the matters together and to take the principles of ecologically sustainable development globally”.²⁰ It is not necessary for the Statement of Reasons to separately consider each of the principles of ecologically sustainable development. According to his Honour:

[T]he Minister was obviously aware of the principle of ecologically sustainable development referred to in s 3A(e) because he applied it by requiring PMC to fund certain conservation activities in relation to

¹⁶ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008) at [61].

¹⁷ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (15 January 2008) at [65]-[66].

¹⁸ *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [2008] FCA 399 at [57]-[60].

¹⁹ This requirement is stated in s 130(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

²⁰ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [78].

the protected matters. That he did not apply it to the limited social matters considered demonstrates that he did not regard it as appropriate for the purpose, not that he did not take the principle into account when considering social matters.²¹

With regard to the second ground, Blue Wedges argued that the Minister for Tourism and the Minister for Climate Change were relevant ministers under s 131(1)(a) of the EPBC Act. North J found that the Minister was entitled to rely on the recommendations of his department and its officers. Affidavits presented to the court showed that departmental officers had considered the impacts of the project on tourism and climate change, and formed the view not to advise the Minister to invite comments from these portfolios.²² North J inferred from this evidence that the Minister had not breached s 131(1)(a).²³ In relation to the third ground, Blue Wedges failed to establish that s 136(1)(a) bound the Minister to take into account the three allegedly “relevant matters” involving impacts.²⁴ North J found nothing in the subject, scope or purpose of the EPBC Act required the Minister to take into account the three matters. Maintenance dredging was not the subject of the Approval Decision and it was to occur in the future.²⁵ The Supplementary Environmental Effects Statement rated the risk of oil and chemical spills as extremely low, and in such circumstances it could not be said that the EPBC Act required the Minister to take such matters into account.²⁶ The court also found that there was “voluminous material” before the Minister which expressed the expert view that the risk from contaminated sediments had been properly addressed and there was no significant environmental impact relating to this matter.²⁷

North J noted that even if, contrary to the view expressed, the Minister was required to consider the three matters argued to be relevant, the evidence showed that he had considered the assessment documentation. The “mere fact that not every issue was addressed in the Statement of Reasons” did not preclude forming the view that the Minister had considered the assessment documentation provided to him.²⁸

Costs orders of North J

Costs were sought by the respondents (Commonwealth and State governments and the Port of Melbourne) on the basis that they were successful in resisting the application by Blue Wedges. North J is reported as expressing reservations in the way the respondents pursued costs given the assets of Blue Wedges were disclosed as \$2,700. Nevertheless, North J held that the application by Blue Wedges could be distinguished from the first Blue Wedges matter before Heerey J in that “no novel point of construction or matter of particular importance in the administration of the statute had to be determined”.²⁹

²¹ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [88].

²² *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [99], citing affidavit of Vicki Middleton (Assistant Secretary of Environmental Assessment Branch, Department of Environment, Heritage and the Arts). Departmental officers had formed the view that the impact on local tourism would be of a “temporary nature”, and that the Minister for Climate Change “had a broader policy portfolio, rather than any direct regulatory or approval responsibilities in relation to the proposal”.

²³ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [101]. North J applied the objective test of *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 821 and held that the decision of the Minister not to inform certain ministers “was not so unreasonable that a reasonable minister could not have formed the belief”.

²⁴ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [111]. Section 136(1)(a) gives the Minister discretion to decide what are relevant matters which should be taken into account.

²⁵ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [118].

²⁶ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [118]-[119]. According to North J, the SEES rated the risk of a major oil spill from collision with the dredger in the Bay “as almost impossible, and the chance of a collision with the dredger in the entrance to the Bay leading to an oil spill as around 3 in 1 million”.

²⁷ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [121]-[122].

²⁸ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [123].

²⁹ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 1106 (15 July 2008) at [10].

Also of relevance was the fact that Blue Wedges applied for leave to amend its application to remove causes of action following the first day of hearings on 20 February 2008. Argument then took place in relation to the reformulated application of Blue Wedges, however the first respondent (Minister for the Environment, Heritage and the Arts) required an adjournment to respond. On this basis North J held that “the conduct of the applicant in continuing a case which could not be justified and which it recognised could not be justified warrants the application of the ordinary rule”.³⁰

Further, North J held Blue Wedges:

[C]annot call into aid its responsiveness where the fundamental problem was a misconception of the law which gave rise to at least two days of wasted hearing time. It would be an odd result if the nature of the litigation, namely public interest environmental litigation, would justify a departure from the ordinary rule where such a history existed.³¹

THE WILDERNESS SOCIETY V MALCOLM TURNBULL AND GUNNS LTD [2007] FCA 1179

This case involved an application by the Wilderness Society in relation to the decision by the Commonwealth Environment Minister to approve a proposed bleached craft pulp mill and ancillary chemical production and infrastructure at Bell Bay Tasmania.

The Wilderness Society’s appeal was heard together with an appeal by a small group of businesses, The Investors for the Future of Tasmania.³² The Investors’ appeal was on similar grounds to that of the Wilderness Society.³³ Marshall J dismissed the appeal, noting that the reasons for his judgment should be read together with that of the decision in the *Wilderness Society case*.

It is helpful to outline the history and events leading to the Approval Decision and the sequence of Federal Court challenges following. As can be seen, a number of referrals were made by Gunns Ltd. Table 2 provides a chronological outline.

TABLE 2 The Wilderness Society v Malcolm Turnbull and Gunns Ltd Timeline

Date	Event
15 December 2004	First referral made by Gunns for proposed pulp mill.
24 January 2005	Decision made by Ministerial delegate that proposal was a controlled action. Decision made that the action would be assessed by integrated impact assessment under Tasmanian law.
May 2005	Assessment process halted, Gunns changed location and scope of proposal.
August to October 2005	Second referral by Gunns, controlled action determination, assessment method determined to be integrated impact assessment.
28 March 2007	Gunns sought to withdraw August 2005 referral and make a third referral of the same proposal.

³⁰ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [13].

³¹ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 at [13].

³² *The Investors for the Future of Tasmania Inc v Minister for Environment and Water Resources* [2007] FCA 1179.

³³ However, there was a difference in the grounds in the applications dealing with the allegation that the Minister took into account Gunns’ commercial imperatives in making the 2007 assessment approach decision. In the Investors’ proceeding, ground nine stated that the decision was invalid or not authorised because the Minister took into account an irrelevant consideration. Ground 10 in the Wilderness Society proceeding alleged that the decision involved an improper exercise of power in that it was made for a purpose, or included a purpose, other than that for which the power was conferred. Marshall J rejected both grounds.

TABLE 2 *continued*

Date	Event
2 May 2007	Commonwealth Environment Minister accepted third referral, decision made that it was a controlled action, determination to assess the proposal on preliminary documentation.
17 May 2007	Application by the Wilderness Society for judicial review of two decisions of the Commonwealth Minister (controlled action decision and method of assessment decision).
9 August 2007	Decision by Marshall J dismissing all grounds of the application by the Wilderness Society.
14 August 2007	Appeal by the Wilderness Society to Full Federal Court.
22 November 2007	Appeal dismissed by Full Federal Court.
4 October 2007	Approval Decision by Commonwealth Minister.
5 December 2007	Appeal against Approval Decision by Lawyers for Forests (underway).
4 March 2008	Federal Court order that the Wilderness Society pay part of the costs of Gunns Ltd and the federal government in relation to the May 2007 application and August 2007 appeal.

Application before Marshall J

This application was made in relation to the decisions by the Minister to accept the third referral that the proposed action was a controlled action under the EPBC Act and that assessment would be on preliminary documentation. The *Wilderness Society case* was based on four grounds. These were:

- the third referral was invalid because Gunns had withdrawn an earlier referral;
- the Wilderness Society had been denied procedural fairness in that the period set for public consultation (20 days) was too short;
- in setting the public consultation period, the Environment Minister acted for an improper purpose, to accommodate a timeframe that suited the commercial interests of Gunns; and
- in considering all adverse impacts, the Minister was obliged to consider forestry operations undertaken pursuant to Regional Forestry Agreements.

The Federal Court (Marshall J) rejected all four grounds of the Wilderness Society application. In relation to the first argument (which was that the third referral was invalid because an earlier referral for the same action had been withdrawn), Marshall J found that although the referral and assessment process had been stopped this did not imply that that which had been stopped could not start again. Marshall J further found that it would be an inconvenient outcome if the proponent withdrew a referral because of financial constraints and was then prevented from re-referring the action. Marshall J found that if it was intended to be the consequence then the EPBC Act should have provided so unambiguously.³⁴

In relation to the public consultation argument, Marshall J found that the approach of the EPBC Act is one of studied haste. In this regard, the balance is between informed decisions and achieving efficiency in the decision-making process. Marshall J took into account the fact that the Minister's considerations in setting the time period included the fact that the proposal had been in the public arena for two years, that there is only a limited number of matters of national environmental

³⁴ *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1179 (9 August 2007) at [91].

significance and that the purpose of public consultation is to raise issues and not to do the actual assessment. Marshall J also found that previous consultation periods have been set at 10 and 25 days respectively.

Marshall J further found that the purpose of public consultation is to promote informed decision-making by the Minister. In setting public consultation the Minister is not required to accommodate the needs or desires of everyone who may wish to avail the opportunity of public comment. It is not the point that a more generous period would enhance the quality of comment, and although this may affect public confidence or satisfaction this is not an issue of legality.

In relation to the third ground raised by the Wilderness Society the Federal Court found there was insufficient indication to suggest that the Minister agreed to assist Gunns in such a way as to compromise or depart from his statutory powers under the EPBC Act. The judge observed there is nothing in the EPBC Act which prevents the Minister giving, within appropriate limits, some weight to the timetable Gunns considered necessary for assessment.³⁵

The fourth ground of appeal raised by the Wilderness Society related to Regional Forest Agreements. Marshall J found that there is specific provision in the EPBC Act which provides that Pt 3 of the Act does not apply to a forestry operation that is taken in accordance with a Regional Forestry Agreement. Marshall J concluded that the EPBC Act evinces a clear intention ordinarily to exclude forestry operations under the regional forestry agreements from the Act.

Appeal to the Full Federal Court

The 9 August 2007 decision of Marshall J was upheld by the Full Federal Court on 22 November 2007.³⁶ Tamberlin J dissented, regarding the Minister's decision as invalid because he erred in law by not considering the Regional Forestry Agreement in question. In the view of Tamberlin J, the Regional Forestry Agreement was "incidental" to the construction and operation of the pulp mill. It thus fell within s 42(c) of the EPBC Act, which provides exceptions to the provision preventing Pt 3 from applying to forestry operations taken in accordance with Regional Forestry Agreements.³⁷ His Honour noted that the word "incidental" in s 42(c) was to be interpreted widely, and in this instance was:

[s]ufficiently wide to include the relationship between the operation of the pulp mill and the RFA forestry operations which will supply the necessary timber...Whether a particular forestry operation is in fact "incidental" to a particular action will require consideration of the proposed action and its degree of dependence and closeness of association with the relevant forestry operations.³⁸

Tamberlin J concluded that there was the necessary "relationship" between the operation of the pulp mill and the forestry operations supplying the wood.³⁹ The primary purpose of the pulp mill did not relate to forestry and therefore could be classed as an "action" for the purposes of s 42(2)(c).⁴⁰ Tamberlin J called for the Minister's decision to be set aside and declaratory relief granted to the Wilderness Society.⁴¹

³⁵ *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1179 (9 August 2007) at [245].

³⁶ *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175.

³⁷ Section 42(c) excludes the operation of s 38 where RFA forestry operations are "incidental to another action whose primary purpose does not relate to forestry".

³⁸ *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175 at [111]-[112].

³⁹ *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175 at [112].

⁴⁰ *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175 at [117].

⁴¹ *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175 at [122].

Costs order following the Full Federal Court decision

On 3 March 2008, a costs order was made against the Wilderness Society whereby they were ordered to pay 70% of the Minister's costs and 40% of Gunns' costs.⁴²

Approval Decision by Minister and Lawyers for Forests application

Litigation in relation to the proposal remains on foot with an appeal against the Approval Decision lodged in the Federal Court by Lawyers for Forests. The group sought judicial review of the Minister's decision of 4 October 2007 to approve the pulp mill. The approval attached conditions for further testing on the mill's effluent. Lawyers for Forests' case is that such conditions lack scientific certainty and further testing of effluent was required before the Minister's decision was made, so that adverse impacts of dioxins and furans could be determined.⁴³ The Association is challenging the Minister's decision on nine grounds. Among these are:⁴⁴

- the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) does not allow the Minister to impose conditions that he did in his Approval, as the conditions create a scheme which is outside the scope of the Act;
- the Minister did not take account of the precautionary principle in making his decision;
- the Minister did not have enough information to make an informed decision;
- the Minister did not seek further information before making his decision; and
- there was no evidence before the Minister to justify using a Canadian guideline (in approval conditions) to set maximum limits for the concentration of toxic chemicals in sediments.

On 30 April 2008, Marshall J refused Gunns' application seeking Lawyers for Forest pay security for Gunns' legal costs.⁴⁵ His Honour held that it would not be a proper exercise of the court's discretion to award security for costs simply because an impecunious applicant may be ordered to pay costs.⁴⁶ His Honour recognised the limited assets of Lawyers for Forests, but held:

Gunns has not satisfied its onus of demonstrating that a security for costs order should be made. To hold otherwise would stifle the litigation and prevent an applicant with standing to bring the application from agitating a matter which it considers to involve questions of public importance and which seems, on the material currently before the Court, to be made bona fide and raises arguable questions of law.⁴⁷

The Lawyers for Forests case was heard on 18-19 June 2008 before Tracey J. No decision has been handed down as of 20 September 2008.

YOUR WATER YOUR SAY INC V MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS [2008] FCA 670

This case examined the decision by the Commonwealth Environment Minister to approve a proposal to construct a reverse osmosis desalination plant located on the Gippsland Coast near Wonthaggi, Victoria. The Federal Court predominantly considered whether associated preliminary investigation works required approval under the EPBC Act.

On 31 December 2007, the Victorian Department of Sustainability and Environment referred the project to the Minister. The referral described the project and its potential impacts on the environment. However, the referral expressly stated that certain "preliminary works" were excluded from the scope of the referral and were "unlikely to have any significant environmental effects, including on matters

⁴² *Wilderness Society Inc v Malcolm Turnbull, Minister for Environment and Water Resources* [2008] FCAFC 19 (4 March 2008) per Branson, Tamberlin and Finn JJ.

⁴³ Further Amended Application filed on behalf of Lawyers For Forests in the Federal Court of Australia Victoria Registry. No VID 1112 of 2007 (dated 18 June 2008).

⁴⁴ Federal Court of Australia Victoria Registry. No VID 1112 of 2007 (dated 18 June 2008) at [1]-[4], [9].

⁴⁵ *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588. Note that this hearing was initially scheduled for 18 May 2008.

⁴⁶ *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588 at [14].

⁴⁷ *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588 at [14].

of national environmental significance”.⁴⁸ Under the heading “Excluded works and activities”, the referral set out a description of these preliminary works. Such works included:⁴⁹

- geotechnical drilling and sampling to determine site conditions;
- installation of pipes into horizontal directional drill holes from onshore entry points;
- construction of offshore marine structures above the seabed for seawater intake and discharge;
- construction and temporary operation of seawater sampling units;
- installation and operation of one or more pre-treatment and/or desalination pilot plants; and
- provision of power and water supply that is adequate for the construction and operation of the works.

Such works were described as “temporary”, and undertaken to inform project design, location and environmental assessments.⁵⁰ The site would be rehabilitated following this preliminary work. The referral stated that it was necessary for the preliminary works to commence prior to the completion of any environmental assessment process, and further information on the preliminary works could be provided upon request.⁵¹

On 4 February 2008, a delegate of the Minister made the decision that the proposal was a controlled action. The decision stated that the “preliminary works” were excluded from the scope of the referral and did not require approval under the EPBC Act. The Your Water Your Say Action Group requested reasons for this decision pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The delegate provided a written response on 6 March 2008. The response concluded that, in the view of the Department of Sustainability and Environment, the preliminary works were unlikely to have any significant environmental effects on matters of national environmental significance. With regard to greenhouse gas emissions, the reasons stated that a possible link between the greenhouse gases arising from the proposed project and adverse impacts on matters protected by the EPBC Act were “uncertain and conjectural only”.⁵²

Grounds of application before Heerey J

The Your Water Your Say Action Group challenged the Minister’s decision on the following grounds:⁵³

- There was a “decision” by the delegate to exclude preliminary works.
- The decision to exclude preliminary works was beyond the power of the Minister because the preliminary works were a “component” of the project and could not be “carved out” of the project. “Carving” the preliminary works out of the project created “de facto development consent” for the preliminary works.
- In making the decision under s 75 of the EPBC Act, the delegate failed to take into account linkages between greenhouse gas emissions and potential adverse impacts on matters protected by the Act.
- The preliminary works would, or would be likely to, have a significant impact on matters of national environmental significance.

The Federal Court’s decision

Heerey J dismissed the application on all grounds. In relation to the first ground, his Honour held that the alleged decision to exclude preliminary works was in fact not a decision at all. According to his Honour, the preliminary works were expressly excluded from the referral and therefore did not form

⁴⁸ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 at [3].

⁴⁹ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 at [4].

⁵⁰ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 at [3]-[5].

⁵¹ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 at [12].

⁵² *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 at [15].

⁵³ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 at [9].

part of the “action” which was referred to the Federal Minister.⁵⁴ The s 75 decision of 4 February 2008 expressly stated that the preliminary works did not require approval due to their exclusion from the referral. The preliminary works were not the “subject of (the) proposal referred to the Minister”.⁵⁵ This disposed of the second ground as well.

In considering the first ground, Heerey J examined the interpretation of the term “decision”. His Honour pointed out that the term is not itself defined in the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Heerey J cited *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, noting that a decision will generally be “final or operative and determinative” rather than a “step along the way”, as well as “substantive” rather than “procedural”.⁵⁶ Heerey J noted that an essential element of a decision is choice between two or more possibilities. The delegate had made no such choice with regard to the preliminary works as she had not possessed power to do so. There was therefore no “de facto approval” of the preliminary works.

With regard to the third ground, Heerey J considered that the question of greenhouse gas emissions was not a matter which the delegate was bound by law to consider.⁵⁷ His Honour considered that, in any event, the delegate had considered the issue of potential greenhouse gas emissions.⁵⁸

In relation to the final ground, Heerey J found that the applicant failed to provide relevant or admissible evidence to show the preliminary works would cause environmental damage. While the applicant sought to tender two reports to support this ground, the author of the reports did not swear an affidavit and the reports were regarded as hearsay.⁵⁹ In any event, the judge found that the reports were not relevant to the present issues.⁶⁰ The application for an injunction restraining the preliminary works was thus dismissed.

Costs order by Heerey J

Heerey J ordered that the question of costs be decided on the papers. His Honour directed the respondents to file and serve written submissions as to costs within seven days, and the applicant to file and serve submissions within seven days thereafter. On 13 June 2008, Heerey J further considered the issue of costs in *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 900. His Honour applied the “general rule” that the losing party pays the successful party’s costs. His Honour distinguished the case from *Blue Wedges*, stating that unlike *Blue Wedges* there were no “novel questions of general importance about the operation of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) or any difficult questions of construction”.⁶¹

LANSEN V MINISTER FOR ENVIRONMENT AND HERITAGE [2008] FCA 903

The *Lansen* decision considered a proposal by McArthur River Mining Pty Ltd (MRM) to convert an underground lead and zinc mine into an open cut mine and to conduct associated works, including the diversion of the McArthur River. The case is of interest as it considers bilateral agreements under the

⁵⁴ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 at [17].

⁵⁵ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 at [17].

⁵⁶ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 at [19].

⁵⁷ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at [22], citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39.

⁵⁸ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at [22], citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39.

⁵⁹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at [24].

⁶⁰ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at [24].

⁶¹ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 900 at [3].

EPBC Act, as well as the Environment Minister's duty to consider ecologically sustainable development and the precautionary principle when assessing referrals.⁶²

The applicants comprised seven native title claim groups. Their particular concern was the diversion of McArthur River, including the potential impact on certain fish and migratory species in the region.

On 4 March 2003, a delegate of the Minister decided that the proposed action was a controlled action. On 19 March 2003, a bilateral agreement between the Commonwealth and the Northern Territory entered into force, declaring that any action assessed under the agreement did not require assessment under Pt 8 of the EPBC Act. Pursuant to the agreement, the Minister did not apply Pt 8 of the EPBC Act in considering MRM's application.

Under cl 1 of the Schedule to the agreement, the assessment was to be carried out under the *Environmental Assessment Act 1982* (NT). Clause 6 of the agreement required the Northern Territory Minister for Environment and Heritage to provide the Minister with an Assessment Report that takes into account the draft Environmental Impact Statement, the Supplement to the draft Environmental Impact Statement and any other relevant information. This was provided and the Minister then made a request for further information pursuant to s 132 of the EPBC Act. Following a response to this request, the Minister approved the proposal, subject to conditions, on 20 October 2006.

Application before Mansfield J

The applicants' first ground of appeal was that there had been no valid assessment of the controlled action as the assessment had taken place under the agreement and not the EPBC Act. Mansfield J held that, although Pt 8 applied when the Minister's decision was made under s 75, it ceased to apply to the assessment of the relevant impacts of that controlled action from 19 March 2003 (the day the agreement was executed).⁶³ This conclusion was in line with the object of the EPBC Act: "to promote a cooperative approach" to the protection and management of the environment between governments.⁶⁴

The three further grounds of appeal were more contentious. These were:

- The report provided to the Minister was not an "assessment report" under the Agreement as it did not contain enough information about the controlled action for the Minister to make an informed decision.⁶⁵
- The Minister erred in law in failing to take into account relevant conditions imposed under the *Mining Management Act 2001* (NT) following the Northern Territory approval process.⁶⁶
- The Minister had not properly applied the principles of ecologically sustainable development and the precautionary principle as required under ss 136(2)(a) and 391 of the EPBC Act.

With regard to the assessment report ground, Mansfield J stated that the Minister should reject only in limited cases a purported assessment report that did not comply with the agreement. He stated:

The deficiency must be one either of process in the information gathering stage, or of representation of the identified environmental impacts and the views as to their significance gathered through that process.⁶⁷

⁶² *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [21].

⁶³ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [26].

⁶⁴ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [27]. This object is specified in s 3(1)(d) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁶⁵ Section 47(4) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) recognises that bilateral agreements must contain terms which fulfil the expectations of the Act and thereby the assessment report must contain information necessary for the Minister to make an informed decision.

⁶⁶ This was said to lead to a breach of s 134(4)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which requires the Minister to consider any relevant condition that has been imposed under a State or self-governing Territory.

⁶⁷ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [112].

His Honour stated that an “informed decision...might simply be a decision that an action could not be approved without greater scientific certainty as to its environmental effects”.⁶⁸ The fact that the Northern Territory Minister, in a letter accompanying the assessment report, pointed out the inadequacies in the information gathering process, and may have decided not to approve the controlled action, did not prevent the document from being an assessment report.

Mansfield J further stated:

It will not always be the case that an assessment report will provide material upon which the Minister’s decision may be finely balanced.⁶⁹

The Minister is empowered under the EPBC Act to request further information. Mansfield J noted four controls which may act upon the Minister’s power to seek further information under s 132 of the EPBC Act. First, it must be in circumstances where the Minister believes that the further information is necessary. Secondly, that belief must be objectively maintainable. Thirdly, the request for information must be for specified information. Finally, the sources of information must be limited to information the Minister believes will supplement or complement the information contained in the assessment report.⁷⁰

His Honour concluded that the assessment report supplied to the Minister by the Territory Minister was an assessment report under the Act.⁷¹

With regard to the next listed ground of appeal, the Minister contended that he was aware of and had regard to the Northern Territory Mining Management Plan at least to the extent that the condition was referred to and described in a media release from the Northern Territory Minister for Mines and Energy.⁷² Mansfield J held this to be insufficient. The media release was not a substitute for having considered the actual terms of the conditions.⁷³ There was no direct evidence that the Minister had considered the Mining Management Plan and Mansfield J was satisfied that the Minister had breached s 134(4)(a) of the EPBC Act.⁷⁴

However, Mansfield J further held that the non-compliance with s 134(4)(a) did not result in the decision being invalid. His Honour applied the test for invalidity in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40, and found that the Northern Territory conditions were not materially different from those independently decided upon by the Minister. There was “no reason to think the Minister might have imposed conditions which in any way, in their substance, might have been additional to or more onerous than those he did impose”.⁷⁵

In relation to the final ground of appeal, Mansfield J considered the Minister’s Statement of Reasons, which said: “In making the decision on whether to approve the taking of the proposed action, I took into account (among other matters) the principles of ecologically sustainable development as required under s 136(2)(a) of the EPBC Act, and the precautionary principle as required under section 391 of the EPBC Act.”⁷⁶

Mansfield J held that this assertion is not, on its own, sufficient evidence that the requirements of those sections have been met.⁷⁷ However, his Honour held that the conditions attached to the decision to approve the action demonstrated that the Minister had taken those principles into account and in

⁶⁸ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [113].

⁶⁹ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [118].

⁷⁰ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [119].

⁷¹ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [123].

⁷² *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [150].

⁷³ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [148]-[151].

⁷⁴ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [151]-[152].

⁷⁵ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [168].

⁷⁶ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [182].

⁷⁷ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [182], citing *Turner v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388 at 392.

particular had considered the lack of scientific certainty surrounding the population of freshwater sawfish.⁷⁸ His Honour held that this was the case “despite the fact that some scientific uncertainty remained”.⁷⁹

Orders of Mansfield J

On 13 June 2008, Mansfield J dismissed the application and gave the applicants leave to amend their further amended application. His Honour stated that he would hear the parties as to costs and other appropriate orders

CONCLUSIONS

The four cases reviewed all involved challenges to Ministerial decisions under the EPBC Act and raised interesting questions of the application and interpretation of the Act’s provisions. This pattern of public interest litigation and issues raised, does suggest that not only the Ministerial decision, but the Statement of Reasons, will continue to be tested before the Federal Court by third parties. Of the issues raised, the more significant are:

- The ability of the proponent to vary a proposal in the intervening period after referral but before approval. Section 156A of the EPBC Act makes provision for variation. Heerey J in *Blue Wedges* found that not allowing variation to proposals would be a strong disincentive for proponents to identify variations that result in more positive environmental outcomes.
- The authority of the Minister to request further information from the proponent under s 132 of the EPBC Act. Mansfield J in *Lansen* articulated four controls on this power, including that the Minister believe, objectively, that further information is necessary and the request is for specified information. The fact that the Minister did not request further information should not be used to infer that the Minister did not have enough information to make an informed decision. This ground has been raised by Lawyers for Forests in the Gunn Ltd application.
- Preliminary works can be properly excluded from the referral with the advantage that such works do not require approval before commencement. This can save valuable time for proponents. The proponent needs to accurately describe the referral and any works to be excluded. The EPBC Act authorises the Minister to request the referral of a larger action if satisfied that the project referred is part of a larger project. Furthermore, proponents excluding preliminary works from the scope of the referral should take care to ensure that they are not excluding works that may breach a Pt 3 provision of the EPBC Act.
- In the *Blue Wedges* (before North J) and *Lansen* decisions, the Federal Court considered the requirement for the Minister to take into account the principles of ecologically sustainable development. In *Blue Wedges*, North J found that it is not necessary for the Statement of Reasons to separately consider each of the principles of ecologically sustainable development. It was enough that the Minister was aware of the principles of ecologically sustainable development as evidenced by the requirement as a condition of approval that the Port of Melbourne Corporation fund certain conservation activities. Similarly in *Lansen*, Mansfield J found that the conditions attached to the approval decision demonstrated that ecologically sustainable development had been taken into account. Of note, Mansfield J did find that the assertion alone that the Minister had taken into account the principles of ecologically sustainable development as required under the Act, was not sufficient evidence that the requirements of the EPBC Act had been met.
- The decision in *Your Water Your Say* is useful with respect to the content of referrals under the EPBC Act. In contrast, in *Mees v Roads Corporation* (2003) 128 FCR 418 the Federal Court appeared to prefer a strict approach, holding that failure to reveal the “full picture” would render referral documentation misleading. In that case, the failure by the Victorian Roads Corporation to

⁷⁸ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [184]. Condition 2 required an ongoing freshwater sawfish management and monitoring plan, which had to be approved by the Minister at least one wet season before the realigned channel could be connected to the McArthur River. Condition 7 allowed the Minister to request a revised plan where appropriate. Further, if the Minister in future formed the view that the potential impact on the population was unacceptable, he has the power to vary the conditions under s 143(1) or revoke the approval under s 145.

⁷⁹ *Lansen v Minister for Environment and Heritage* [2008] FCA 903 at [184].

state that a freeway link was likely to be constructed in the future was held to be misleading in the context of the referral of the Scoresby Road bypass. This was so even though the evidence did not inevitably point to the freeway being constructed, but merely suggested it as a “strong chance”.⁸⁰ The court in *Mees* emphasised that the Environment Minister has no fact-finding role in examining a referral of a proposed action, and referral documentation must provide a “complete picture” of the proposed action.⁸¹ Ultimately it will depend on the facts of each proposal and a determination of whether proposed actions will have a significant impact on Pt 3 matters.

- In relation to costs, Heerey J was prepared to accept that novel questions of law were raised by Blue Wedges in their court challenges and did not award costs against them. The rule in *Oshlack v Richmond River Council* (1998) 193 CLR 72 is still relevant in public interest litigation but there is a threshold to satisfy in showing that there is strong public interest in the litigation and, in the *Blue Wedges* decision, novel questions of general importance. In *Gunns*, the Wilderness Society did not satisfy this test. Similarly in *Your Water Your Say*, costs followed the event. The importance of public interest litigation, however, has been noted by the Federal Court. On 15 July 2008, North J did not accept the submission by Blue Wedges that it acted in the public interest and should not be required to pay the costs of the federal and State governments and Port of Melbourne Corporation following its unsuccessful application in February/March 2008. Notably, in making the ruling, North J did mention that that the court was tiring of government arguing that it wants “scalps to hang on the fence” so that the next time it comes to court government could sound a warning that this is what lies ahead. The door is open for the governments and Port of Melbourne to pursue costs. The issue of costs in public interest litigation is an important one and never more so than in environmental law where the stakes are high and the issues are often complex ones of statutory interpretation and application.

⁸⁰ *Mees v Roads Corporation* (2003) 128 FCR 418 at [454].

⁸¹ *Mees v Roads Corporation* (2003) 128 FCR 418 at [456].