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# Flying foxes, dams and whales: Using federal environmental laws in the public interest

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*This article examines the current opportunities and obstacles for public interest environmental litigation at a federal level in Australia. It provides a survey and a series of five case studies of public interest litigation under the Environment Protection and Biodiversity Conservation Act 1999 (Cth). The main conclusions reached are that standing and lack of substantive laws are no longer the major obstacles to public interest environmental litigation in Australia at a federal level. The main obstacles are the threat of adverse costs orders, a general lack of financial resources, and the lack of merits review. These obstacles inhibit public interest litigation enforcing the law and promoting good decision-making by government. The article concludes with recommendations to alleviate these obstacles under the EPBC Act and the emerging climate change regime.*

## INTRODUCTION

Litigation by private individuals to protect the environment, or public interest environmental litigation, is an important component of modern environmental legal systems. It contributes to achieving sustainable development, the overarching objective of environmental legal systems, by increasing enforcement of environmental laws and promoting good decision-making by governments about activities impacting on the environment. As Brian Preston points out, it can also develop important legal and administrative principles, provide a focus for public debate, and highlight issues for law reform.<sup>1</sup>

The objective of this article is to discuss the opportunities and obstacles for public interest environmental litigation at a federal level in Australia. It builds upon a substantial existing body of writing. In particular, Ben Boer, in 1986, identified five main reasons for the relatively few number of public interest legal actions taken to protect the environment:<sup>2</sup>

- lack of appropriate environmental legislation;
- lack of sufficiently broad standing provisions;
- lack of public knowledge about environmental legislation;
- lack of a history of public interest litigation; and
- lack of funds for public interest litigation.

This article reviews the progress in addressing these issues at a federal level in Australia using a survey and five case studies of public interest environmental litigation under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), including one case where litigation did not occur because of the lack of merits review. The results of the survey are shown in an Appendix, which provides a complete list of EPBC Act civil cases as at 16 July 2008. There have been 31 civil cases in which interlocutory or final judgments have been delivered under the EPBC Act since its commencement; 26 of these cases involved public interest litigation. The five case studies are

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<sup>1</sup> Preston BJ, "The Role of Public Interest Environmental Litigation" (2006) 23 EPLJ 337.

<sup>2</sup> Boer B, "Legal Aid in Environmental Disputes" (1986) 3 EPLJ 22 at 23.

representative of the procedural and substantive issues in these public interest environmental cases. The empirical approach used here adopts the research principles and methodology of “real world research” espoused by Colin Robson.<sup>3</sup>

Public interest environmental litigation at a federal level in Australia is significant for a number of reasons, and analysis of it is worthy of special consideration, despite the fact that most public interest environmental litigation in Australia concerns State and Territory laws. One reason for this is that there are potentially wide opportunities for such litigation under the EPBC Act due to the broad jurisdiction created by the Act and the wide standing provided for conservationists to restrain offences against the Act. The opportunities for public interest environmental litigation at a federal level are additional to opportunities for litigation under State and Territory laws. Further, unlike many State and Territory environmental laws, the EPBC Act directly regulates State, Territory and local government activities and cannot be avoided.<sup>4</sup> Public interest environmental litigation at a federal level is also important because federal cases have the potential to foster legal principles applicable throughout Australia.

This article is structured in four parts. In the first part, “public interest environmental litigation” is defined and its role explained. In the second part, the general obstacles to public interest litigation are considered. In the third part, five case studies are presented of recent public interest environmental litigation at a federal level in Australia. In the fourth part, issues for the future are discussed, such as the need for increased merits review of decisions under the EPBC Act and the establishment of a public fund to assist public interest environmental litigation. In addition, the lessons from experience under the EPBC Act are applied to the emerging regulatory response to climate change, and recommendations are made for creating an appropriate role for public interest litigants in the Australian emissions trading scheme.

## WHAT IS PUBLIC INTEREST ENVIRONMENTAL LITIGATION?

### The public interest

The concept of “the public interest” is elusive and consequently has been the subject of considerable debate.<sup>5</sup> The wry comment has been made that, “what interests the public is not necessarily public interest litigation”.<sup>6</sup> It has also been said that the public interest is not a concept that can be defined within precise boundaries and opinions will always differ as to what is or is not in the public interest.<sup>7</sup> One author has even argued that “the public interest is an inescapably political concept that virtually dissolves under analysis”.<sup>8</sup> This criticism goes too far. At the very least, the concept of the public interest is useful to connote some benefit to the community as opposed to private interests and benefits. The essence of the concept of the public interest is that it involves a *public benefit*.

The expression, “the public interest”, is widely used in Australian legislation and by Australian courts; however, no clear definition of what it means exists in legislation or case law. Tamberlin J provided a useful summary of the concept in *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at [8]-[12]:

The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public

<sup>3</sup> Robson C, *Real World Research* (2nd ed, Blackwell Publishers, 2002).

<sup>4</sup> For example, in *Schneiders v Queensland* [2001] FCA 553, a conservationist was able to challenge culling of dingoes by the State of Queensland in the Fraser Island National Park and World Heritage Area: see McGrath C, “The Fraser Island Dingo Case” (2001) 18(3) EPLJ 269.

<sup>5</sup> See the debate over the concept in *Oshlack v Richmond River Council* (1998) 193 CLR 72; *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229.

<sup>6</sup> As pointed out in *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 at 513; *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 777; *London Artists Ltd v Littler* [1968] WLR 607 at 619; *Hollier v AMSA (No 2)* [1998] FCA 975.

<sup>7</sup> See *Right to Life Assn (NSW) Inc v Secretary, Department of Human Services & Health* (1995) 56 FCR 50 at 59 per Lockhart J.

<sup>8</sup> Martin P, “Defining and Refining the Concept of Practising in ‘the Public Interest’” (2003) 28(1) Alt LJ 3 at 3.

interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances. ...

The expression “the public interest” is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination. By way of example, town planning legislation frequently lists a number of factors that a local council or planning body is required to take into account when making a determination, with a concluding consideration being a generalised reference to the public interest and the circumstances of the case. ...

The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where **the** public interest resides. [emphasis in original]

Hayne J also noted in *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at [55]-[56]:

It may readily be accepted that most questions about what is in “the public interest” will require consideration of a number of competing arguments about, or features or “facets” of, the public interest. As was pointed out in *O’Sullivan v Farrer* (1989) 168 CLR 210 at 216:

[T]he expression “in the public interest”, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only “in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view”.<sup>9</sup>

The “classical definition” of “in the public interest” then is something of a moving feast that depends on the objects of the legislation in question and the circumstances of each case.

## Public interest environmental litigation

“Public interest litigation” adopts the concept of “the public interest” in the context of litigation. The Australian Law Reform Commission (ALRC) has discussed the meaning of “public interest litigation”:

The courts have preferred to leave the definition open and to determine the question of public interest on the basis of the circumstances of each case. However, the courts give some guidance as to how the question is to be approached. A widely accepted approach is to see whether the case affects the community or a significant sector of the community or involves an important question of law.<sup>10</sup>

Adopting the general approach used by the courts,<sup>11</sup> the ALRC specified three criteria to identify public interest litigation, namely that:

- the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community;
- the proceedings involve the resolution of an important question of law;
- the proceedings otherwise have the character of public interest or test case proceedings.<sup>12</sup>

<sup>9</sup> *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.

<sup>10</sup> Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation*, Report No 75 (1995) at [13.2].

<sup>11</sup> For example, *Engadine Area Traffic Action Group Inc v Sutherland SC (No 2)* [2004] NSWLEC 434 at [15] per Lloyd J.

<sup>12</sup> Australian Law Reform Commission, n 10 at [13.2]-[13.14]. See also the definition of “public law proceedings” in the draft *Standing (Federal and Territory Jurisdiction) Bill 1985* (Cth) provided in Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report No 78 (1996).

Enid Campbell criticised these criteria as “singularly vague” and “so broadly framed as to embrace many cases of kinds which the courts have not hitherto recognized within the category of public interest litigation”.<sup>13</sup> These criticisms are insightful and valid but, unfortunately, she did not suggest an alternative or better definition.

Michael Barker defined “public interest environmental litigation” as litigation with the particular object of obtaining a legal remedy from a court, or a decision or ruling from an administrative tribunal, that has the effect of conserving or protecting, or advancing the conservation or protection of, the environment.<sup>14</sup>

Barker’s definition is much more precise and useful than the ALRC definition but it has one major flaw: it does not limit the concept to litigation undertaken by members of the community. No doubt much environmental litigation undertaken by government regulators has a strong purpose of protecting the public interest in the environment but the concept of “public interest environmental litigation” generally will be understood to mean only that undertaken by members of the community. Exclusion of litigation undertaken by or on behalf of the government from the concept of “public interest litigation” avoids the surreal and arid arguments advanced in *Latoudis v Casey* (1990) 170 CLR 534, and by McHugh J in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [71], that most cases involving criminal prosecutions and constitutional and administrative law are also “public interest litigation” for the purpose of costs orders.

Another limitation of the definitions adopted by both the ALRC and Barker is that they do not include the purpose of the litigation as being a criterion for identifying public interest litigation. Proceedings by many private litigants may incidentally satisfy the definitions proposed by the ALRC and Barker, but if their principal purpose is to protect or vindicate private rights and interests they should not be regarded as “public interest” cases. For example, litigation by a major corporation challenging tax exemptions for plantation forestry might be a test case that resolves an important question of law and might even have the effect of protecting the environment, but if the purpose is private gain then the litigation can hardly be regarded as a “public interest” case.

Building on these considerations, “public interest litigation” is defined here as proceedings in a court or tribunal undertaken by a private individual or community group where the dominant purpose is not to protect or vindicate a private right or interest but to benefit the public. In essence: it is litigation by a private individual to benefit the public.

Protecting the environment is something that benefits the public;<sup>15</sup> therefore, “public interest environmental litigation” can be defined as proceedings in a court or tribunal undertaken by a private individual or community group where the dominant purpose is not to protect or vindicate a private right or interest but to protect the environment.<sup>16</sup> In essence: it is litigation by a private individual to protect the environment.

The public interest in the protection of the environment may conflict with a public interest in the development of a resource, promoting employment, or some other social or economic matter.<sup>17</sup> Put another way, as noted by many of the judges in the *McKinnon case* referred to above, a question about “the public interest” will seldom have only one dimension and will normally require consideration of a number of competing arguments about, or features or “facets” of, the public interest. This does not deprive litigation undertaken to protect the environment of being “public interest litigation” because

<sup>13</sup> Campbell E, “Public Interest Costs Orders” (1998) 20 Adel LR 245 at 255, 257.

<sup>14</sup> Barker M, “Standing to Sue in Public Interest Environmental Litigation: From ACF v Commonwealth to Tasmanian Conservation Trust v Minister for Resources” (1996) 13 EPLJ 186 at 186.

<sup>15</sup> While private interests may also be involved (for instance, where the litigant is a neighbour opposed to a proposed development), there is no question that the protection of the environment is a matter of public interest: see *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 477-482 per Barwick CJ and 486-487 per Jacobs J; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 149 at 155 per Mason ACJ.

<sup>16</sup> The “environment” is used here in its widest sense and includes biodiversity, water quality, air quality, noise, amenity, aesthetics and cultural heritage.

<sup>17</sup> As discussed by Jacobs J in *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 486-487.

the purpose of the litigation is to protect a matter of public interest. The resolution, according to law, of any conflict with other matters of public interest will be inherent in the litigation.

Public interest environmental litigation faces obstacles for access to justice in the courts beyond those experienced generally by private litigants. One reason for this is that the common law has traditionally focused on the protection of private rights and excluded private litigants from seeking a remedy where no private right or interest was involved. This tradition has led to obstacles for public interest litigation, such as the concept of standing.

Reported environmental cases and the case studies discussed below show there are a number of essential ingredients for successful public interest environmental litigation. Building on the comments of Murray Wilcox in 1985,<sup>18</sup> these are:

- a suitable cause of action (such as public nuisance);
- standing to commence the action;
- availability of a suitable legal remedy (such as an injunction);
- sufficient evidence to support the cause of action;
- a person who is willing and suitable<sup>19</sup> to take the action; and
- sufficient resources (including financial resources, legal representatives, and expert witnesses) to conduct the litigation.

Lawyers representing public interest litigants must be wary of getting caught up in idealistic litigation that is not firmly based on a sound understanding of the law and the mechanics of litigation. Ron Merkel QC, a distinguished public interest lawyer in the field of civil rights has a pithy adage for this: “A public interest lawyer is interested in the client’s *cause of action* not the client’s *cause*.”<sup>20</sup>

### Different types of public interest environmental litigation

Public interest environmental litigation is a relatively small subset of environmental litigation in Australia.<sup>21</sup> Most litigation involving environmental issues involves disputes between government and developers, particularly planning disputes between local governments and proponents of development under State and Territory planning laws.<sup>22</sup>

Environmental litigation at first instance (that is, in trial courts not appellate courts<sup>23</sup>) can generally be divided into three main functional groups, two of which have distinct sub-categories:

1. Litigation by private individuals to enforce common law or statutory rights protecting the environment.
2. Litigation against government administrative decisions involving environmental matters by:
  - a. merits review; or
  - b. judicial review.
3. Litigation by governments to enforce laws protecting the environment by:
  - a. civil enforcement; or
  - b. criminal prosecution.

<sup>18</sup> Wilcox M, “The Role of Environmental Groups in Litigation” (1985) 10 *Adelaide Law Review* 41.

<sup>19</sup> A model environmental litigant is prudent, rational, reasonable, and willing to listen to professional legal advice. Irrational and unreasonable litigants have great difficulty gaining public and professional support for their case.

<sup>20</sup> Merkel R, *Public Interest Advocacy* (Seminar hosted by the International Commission of Jurists (Qld) Inc, Brisbane, 13 November 2006).

<sup>21</sup> See generally, Preston BJ, *Environmental Litigation* (Lawbook Co, 1989); Bates G, *Environmental Law in Australia* (6th ed, Butterworths, 2006), Chs 7 and 8.

<sup>22</sup> Consider, for example, the number of cases and the parties involved in litigation in the Queensland Planning and Environment Court at <http://www.sclqld.org.au/qjudgment> viewed 1 August 2008, and the New South Wales Land and Environment Court at [http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll\\_caselaw.nsf/pages/cl\\_1ec](http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll_caselaw.nsf/pages/cl_1ec) viewed 1 August 2008. Victoria, South Australia, the Australian Capital Territory, and Northern Territory have similar low levels, while in Western Australia lack of standing continues to make public interest environmental litigation extremely rare.

<sup>23</sup> Appeals from all of these categories are similar and generally concern errors of principle only. See, eg *House v The King* (1936) 55 CLR 499 at 504-505.



These main categories and sub-categories of environmental litigation are quite different in the character of the parties, procedures, legal issues, evidentiary issues, or remedies available. In litigation by governments, for example, no questions of standing arise and governments wield far greater investigative and financial resources than are available to most private litigants. Litigation by government to enforce environmental laws is normally very different in practice to litigation by private individuals.

Public interest environmental litigation falls into the first two of these categories, as the three basic types of public interest environmental litigation are: enforcing the law, merits review, and judicial review. While litigation between government and developers accounts for the majority of environmental litigation in Australia, public interest environmental litigation has a disproportionate influence in terms of its effect on the system overall, with many important principles and high profile matters being decided in public interest litigation. Litigation under the EPBC Act, listed in the Appendix, is unusual compared with State planning legislation in that most of the litigation has been undertaken by public interest litigants and very few cases have involved disputes between the government and a developer or land holder.

Environmental litigation by private individuals to enforce common law or statutory rights requires the plaintiff or applicant to call evidence to prove their case to obtain a remedy, such as damages or an injunction. Apart from common law causes of action such as private nuisance, many modern environmental laws can be enforced by members of the public because they grant standing to third parties to enforce the law by civil action or criminal prosecution. Private litigants tend to only seek civil remedies but, subject to certain qualifications, any person has standing to prosecute a criminal offence. In practice, however, the Director of Public Prosecutions (DPP) at State and Commonwealth levels will intervene to stop such “private prosecutions”.<sup>24</sup> Rights to civil enforcement, therefore, are much more important in practice. One example of a statutory right to seek civil remedies to prevent breaches of the law is s 475 of the EPBC Act, which allows conservationists to seek an injunction to prevent offences against the Act. Such litigation normally only occurs where government fails to act. The *Flying Fox case* and the *Japanese Whaling case*, discussed below, are two examples of public interest litigants using this provision to seek injunctions to restrain breaches of the EPBC Act. Both cases were brought after the federal government failed to enforce the EPBC Act.

Litigation to enforce a common law or statutory right protecting the environment can typically be defeated by the person whose conduct is complained of obtaining all relevant government approvals for their project or activity. This is because the typical mechanism for environmental “command and control” laws is to prohibit harm to the environment unless an approval is gained under the statute by the person causing the harm. Once an approval is gained, the harm caused to the environment is lawful provided that the approval is complied with. The EPBC Act operates in this manner by prohibiting a person taking an action having a significant impact on a matter protected by the Act *unless approved by the Minister*. If a developer gains such an approval the only way to challenge the development is to challenge the approval either through merits review or judicial review. The vast majority of developers seek relevant government approval before taking contentious actions or quickly seek such approval once the need to obtain it is raised by objectors to a development, thus making avenues to challenge government approvals very important in practice for public interest litigants.

Merits review of government administrative decisions occurs where the question for the court or tribunal in reviewing a government decision is: what is the right decision to make on the facts according to law? The Administrative Review Council (ARC) suggests the principal objective of merits review is to ensure that administrative decisions are correct and preferable: correct, in the sense that they are made according to law; and preferable, in the sense that, if there is a range of decisions

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<sup>24</sup> See Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985), Ch 7 – Private Prosecutions, at [342]. Section 13 of the *Crimes Act 1914* (Cth) provides open standing to prosecute federal criminal offences. Section 9(5) of the *Director of Public Prosecutions Act 1983* (Cth) allows the Commonwealth DPP to intervene in a private prosecution. Part 4 of the *Prosecution Policy of the Commonwealth* sets out the criteria used by the DPP in deciding whether to intervene in, and discontinue, a private prosecution under federal law: see <http://www.cdpp.gov.au/Prosecutions/Policy> viewed 10 July 2008.

that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.<sup>25</sup> This objective is directed to ensuring fair treatment of all persons affected by a decision and also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers as well as enhancing the openness and accountability of decisions made by government.<sup>26</sup> Examples of environmental decisions that are subject to merits review are decisions concerning wildlife trade permits made under Pt 13A of the EPBC Act. These decisions can be appealed to the Administrative Appeals Tribunal (AAT) pursuant to s 303GJ of the Act. Many planning decisions at a State level are subject to merits review in specialist courts or tribunals such as the New South Wales Land and Environment Court and the Queensland Planning and Environment Court.

In contrast, in judicial review the courts are generally limited to determining whether a government administrative decision is legal according to the requirements of the statute under which the decision was made and common law requirements such as natural justice.<sup>27</sup> The question is not whether the government decision was right or preferable on the facts of the case. For example, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) provides a right of judicial review by the Federal Court of many administrative decisions of the Commonwealth government. The limited role of a court in judicial review proceedings is often stressed by courts in controversial cases such as the *Gunns Pulp Mill case* in which the Full Court stated at the beginning of its judgment:

It is necessary to stress that the Federal Court has no jurisdiction to consider the merit or wisdom of any decision of the Minister. The sole concern of the Federal Court in this matter, both before the primary judge and on appeal, was the legality of the decisions made by the Minister that were the subject of the proceeding before the primary judge.<sup>28</sup>

Judicial review does not suit the issues most public interest litigants wish to raise against poor development approved by government. The limitations of judicial review for public interest environmental cases are well illustrated by a series of decisions in the *Friends of Hinchinbrook case*.<sup>29</sup> Despite serious deficiencies in the planning and environmental impact assessment for the planned marina, hotel and housing estate impacting on World Heritage values and threatened species identified by a Senate inquiry,<sup>30</sup> the Federal Court dismissed an application for judicial review and awarded costs against the conservation group.

Judicial review is seldom a cause of action that addresses the main complaint made against approval of a poor development. Most public interest litigants concerned about approval of a development wish to challenge the merits of the decision – that a decision was wrong and the proposed development should have been refused because of its environmental impacts. Judicial review may, however, be the only avenue to challenge the decision. For such cases judicial review is like trying to fight the development in a straight-jacket – the public interest litigant wants to say, “the development is a bad idea and shouldn’t be allowed”, but the judicial review process prevents this issue being raised. Instead, litigants are forced to try to find some procedural error in the decision-making process to challenge or simply concede that they cannot challenge the decision at all.

In addition to these basic types and primary functions of environmental litigation, some public interest environmental litigation has a “strategic purpose” or function because it is undertaken for a wider purpose than simply the specific legal remedy between the parties before the court. For instance,

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<sup>25</sup> Administrative Review Council, *What Decisions Should be Subject to Merit Review?* (AGPS, Canberra, 1999) at [1.3], <http://www.ag.gov.au/agd/www/archome.nsf> viewed 25 July 2008.

<sup>26</sup> Administrative Review Council, n 25 at [1.4] and [1.5]. See also the discussion of the objectives of merits review in Ch 2 of Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals – Report No 39* (AGPS, Canberra, 1995), <http://www.ag.gov.au/agd/www/archome.nsf> viewed 25 July 2008.

<sup>27</sup> See generally Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (3rd ed, Lawbook Co, 2004).

<sup>28</sup> Stated in the court summary of effect of reasons for judgment in *TWS v Turnbull* [2007] FCAFC 175.

<sup>29</sup> *Friends of Hinchinbrook v Minister for the Environment (No 2)* (1997) 69 FCR 28; *(No 3)* (1997) 77 FCR 153; *(No 5)* (1998) 83 FCR 304; 84 FCR 186.

<sup>30</sup> Parliament of the Commonwealth of Australia, *The Hinchinbrook Channel Inquiry* (AGPS, Canberra, 1999).

litigation can be regarded as strategic if it is intended to determine or demonstrate an important legal principle of wider application that will better protect the environment in other situations. A case is also strategic if it is intended to highlight a failure of government regulators to enforce the law and to embarrass them into enforcing the law properly in the future.

Litigation may also be a part of a wider public campaign against a proposed development or issue. Tim Bonyhady's classic book, *Places Worth Keeping*, provides excellent examples of wider public environmental campaigns of which litigation formed a part.<sup>31</sup> One of these is the 1970s campaign to protect Fraser Island. The seminal case of *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473, involving objections to the grant of mining leases on Fraser Island, formed but one part of the ultimately successful campaign to end mining and logging of the island. The idea of "strategic environmental litigation" is a useful one to bear in mind.

### **Why is public interest environmental litigation important?**

The fundamental reason why public interest environmental litigation is important is that it promotes sustainable development, the overarching objective of modern environmental legal systems, by helping to protect the environment. It does this by increasing enforcement of environmental laws and enhancing transparency, integrity and rigour in government decision-making about activities impacting on the environment. Empowering members of the community to enforce environmental laws as surrogate regulators is a smart and potentially efficient form of regulation that is a legitimate policy instrument used in modern legal systems.<sup>32</sup> Empowering public interest litigants to challenge government decisions, particularly through merits review, promotes good decision-making and public acceptance of government decisions. It can also develop important legal and administrative principles, provide a focus for public debate, and highlight issues for law reform.<sup>33</sup>

While there is no question that the governments will continue to be the main enforcers of environmental laws because of their far greater resources and investigative powers, as the ALRC concluded in 1996:

Political, bureaucratic and financial constraints mean the Attorney-General and other government plaintiffs cannot adequately represent the public interest in all matters. There is an important role to be played by private plaintiffs in the maintenance of the rule of law through the review of government decisions and the enforcement of statutory rights and obligations.<sup>34</sup>

Despite its importance there remain significant obstacles to public interest environmental litigation in Australia. This is the next topic to be addressed.

### **GENERAL OBSTACLES TO PUBLIC INTEREST ENVIRONMENTAL LITIGATION**

The five main obstacles identified by Professor Boer, noted above, are used here as the framework for discussing the general obstacles to public interest environmental litigation at a federal level in Australia.

#### **Lack of appropriate environmental legislation**

Obviously, without laws protecting the environment there could be little public interest environmental litigation. The Australian environmental legal system has developed rapidly over the past 30 years, particularly during the 1990s. There are now complex and relatively comprehensive environmental laws, including State and local government planning, pollution control, vegetation management, and fisheries laws. The response to climate change is still in its infancy but it is escalating rapidly at the present time.

<sup>31</sup> Bonyhady T, *Places Worth Keeping* (Allen & Unwin, 1993).

<sup>32</sup> Gunningham N and Grabosky P, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998), Chs 3 and 6.

<sup>33</sup> Preston, n 1. Australian Law Reform Commission, n 10 at [13.6], suggests a number of general benefits of public interest litigation but note the criticisms of Campbell, n 13 at 257.

<sup>34</sup> Australian Law Reform Commission, n 12 at [4.15]. Similarly, see Australian Law Reform Commission, n 24.



The enactment of the EPBC Act in 1999 was a major reform of federal environmental laws that, while by no means perfect or a panacea, fundamentally improved the availability of appropriate environmental legislation at a federal level in Australia.<sup>35</sup> It covers a wide range of issues, including World Heritage properties, threatened species, migratory species, Commonwealth areas and actions, international wildlife trade, and the protection of cetaceans in the Australian Whale Sanctuary. Many of these matters are protected as “matters of national environmental significance” in Pt 3 of the Act. An action that has, will have or is likely to have a significant impact on a matter of national environmental significance is known as a “controlled action” and requires approval under Pts 7-9 of the Act. One of the major contributions of this legislation to the Australian environmental legal system is that it directly regulates State and Territory governments and cannot be avoided by them for large infrastructure projects such as dams and highways.

The major deficiency in the EPBC Act from the perspective of facilitating public interest environmental litigation to promote sustainable development is the lack of merits review of virtually all decisions under the Act. Prior to the 2006 amendments to the EPBC Act, merits appeals to the AAT were available for only relatively minor permits, plans and conservation orders under Pts 13, 13A and 15 of the EPBC Act.<sup>36</sup> There were only six appeals under those provisions<sup>37</sup> yet most of these limited appeal rights were lost in 2006. Merits appeals have never been available against decisions concerning controlled actions under Pts 7-9 of the Act. While s 475 of the Act allows third parties to seek an injunction from the Federal Court to restrain a contravention of the Act, including damage to matters of national environmental significance, only judicial review is available against decisions concerning controlled actions.

Yet despite the lack of merits review and debate about the operation of the EPBC Act,<sup>38</sup> the case studies discussed below indicate that, at the very least, lack of appropriate environmental legislation is no longer a major obstacle to public interest environmental litigation at a federal level in Australia.

### **Lack of sufficiently broad standing provisions**

“Standing” or locus standi to undertake litigation refers to the rules that determine whether a person initiating legal proceedings is recognised by the courts as an appropriate party to do so.<sup>39</sup> Standing is concerned with the relationship between the instigating party and the subject matter of the proceeding, rather than with the issues of fact and law raised by the claim on which the proceeding is based.<sup>40</sup> Standing forms one “screening device” used by the courts to prevent misuse of court processes.<sup>41</sup>

At common law, only the Attorney-General, a person granted the Attorney-General’s fiat (that is, consent) to a relator action, or a person with a special interest in the subject matter of the litigation could undertake proceedings to prevent a public wrong and protect the public interest.<sup>42</sup> In practice Attorney-Generals around Australia have rarely granted their consent to third parties to litigate to protect the public interest, particularly where government actions have been challenged. As a

<sup>35</sup> See generally, Department of Environment, Water, Heritage and the Arts, <http://www.environment.gov.au/epbc> viewed 25 July 2008; McGrath C, “Key Concepts of the EPBC Act” (2005) 22 EPLJ 20; Godden LC and Peel J, “The Environment Protection and Biodiversity Conservation Act 1999 (Cth): Dark Sides of Virtue” (2007) 31(1) Melb Uni LR 106.

<sup>36</sup> Under ss 206A, 221A, 243A, 263A, 303GJ and 473 of the EPBC Act. Following the 2006 amendments appeals to the AAT are only available under ss 206A, 303GJ and 473.

<sup>37</sup> Listed in the Appendix.

<sup>38</sup> See Macintosh A, “Why the Environment Protection and Biodiversity Conservation Act’s Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives” (2004) 21 EPLJ 288; McGrath C, “Swirls in the Stream of Australian Environmental Law” (2006) 23(3) EPLJ 165.

<sup>39</sup> Australian Law Reform Commission, n 24, p 3 at [3]. See generally, Bates, n 21, Ch 6.

<sup>40</sup> Australian Law Reform Commission, n 24, p 11 at [20].

<sup>41</sup> Others include: denial of legal existence; capacity; non-justiciability; and hypothetical questions. See Australian Law Reform Commission, n 24, p 13 at [23].

<sup>42</sup> *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114; *Gouriet v Union of Post Office Workers* [1978] AC 435 at 481; *ACF v Commonwealth* (1980) 146 CLR 493 at 526-530; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 608-609.

consequence third parties have depended upon establishing standing through showing a special interest in the subject matter of the proceedings or in accordance with widened standing provided under legislation.<sup>43</sup>

Public interest litigation to protect the environment using federal environmental laws in Australia was largely frozen for 20 years by the traditional, “special interest” test of standing stated by Gibbs CJ in *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 526-530.<sup>44</sup> Under this test a litigant must show they are likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if their action succeeds; or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if their action fails. Harm to a person or a proprietary interest, such as damage to the plaintiff’s land caused by pollution, is sufficient but a “mere intellectual or emotional concern” is insufficient. This test has often posed a significant obstacle to third parties wishing to enforce environmental laws or challenge government decisions because they are unable to show any personal or proprietary loss due to the conduct or decision being challenged.

Despite trenchant criticism of the special interest test as too narrow and strong recommendations for its abolition by the ALRC,<sup>45</sup> it has remained the dominant common law test for standing. Christopher Stone’s call three decades ago for legal rights to be extended to natural objects has fallen on deaf ears.<sup>46</sup> The courts have, however, increasingly adopted a liberal interpretation of the special interest test that is difficult to reconcile with the decision of Gibbs CJ in *Australian Conservation Foundation Inc v Commonwealth*. For example, in *North Coast Environment Council v Minister for Resources* (1994) 55 FCR 492, Sackville J held a conservation group was a “person aggrieved” and had a “special interest” to seek judicial review of a decision to grant an export licence for woodchips under the ADJR Act.<sup>47</sup>

Again, the enactment of the EPBC Act in 1999 has fundamentally improved the federal legal system and has provided sufficiently broad standing for public interest litigation to protect the environment. Sections 475 and 489 of the EPBC Act provide standing for individuals and organisations to seek injunctions to restrain offences against the Act or judicial review. In summary, the criteria for standing under these sections are that the applicant:

- for an individual, is an Australian citizen or ordinarily resident in Australia;
- for an organisation, is incorporated (or otherwise established) in Australia with objects that include the protection or conservation of, or research into, the environment; and
- engaged in a series of activities for protection or conservation of, or research into, the environment, at any time in the two years immediately prior to the alleged offence or the making of the application.

As will be seen in the case studies below, the widened standing for civil enforcement and judicial review provided in the EPBC Act has been effective in overcoming the traditional limitation of lack of standing for public interest environmental litigation for conservationists and conservation groups.

There are, however, still significant gaps in standing for third parties to enforce federal environmental laws such as the *National Greenhouse and Energy Reporting Act 2007* (Cth). That Act does not contain any provision for third parties to enforce it or seek judicial review of administrative

<sup>43</sup> For a review of these matters see Australian Law Reform Commission, n 24.

<sup>44</sup> See also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Shop Distributive & Allied Employees Assn v Minister for Industrial Affairs of the State of South Australia* (1995) 183 CLR 552; *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247.

<sup>45</sup> Australian Law Reform Commission, n 24; Australian Law Reform Commission, n 12 at [4.11].

<sup>46</sup> Stone CD, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (William Kaufmann Inc, 1972).

<sup>47</sup> See also *ACF v Minister for Resources* (1989) 19 ALD 70 at 73; *TCT v Minister for Resources* (1995) 55 FCR 516; *Shop Distributive & Allied Employees Assn v Minister for Industrial Affairs of South Australia* (1995) 183 CLR 552 at 558; *Right to Life Assn (NSW) Inc v Secretary, Dept of Human Services & Health* (1995) 56 FCR 50 at 64-65; *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 261; *NQCC v Executive Director*, QPWS [2000] QSC 172; *Save the Ridge Inc v ACT* [2004] ACTSC 13.

decisions made under it. If this approach is taken for the Australian emissions trading scheme proposed to be established by 2010 then the potential for effective enforcement of the scheme will be significantly impeded. Experience under the EPBC Act indicates that providing standing for public interest litigants to enforce the legislation significantly promotes enforcement.

Widened standing is a critical step towards allowing public interest environmental litigation to play an effective role in protecting the environment but standing is not the only barrier. As Michelle Joyce commented:

There are various barriers to access to justice for the public interest litigant, such as legal aid restrictions, power imbalances between the parties and the risk of an adverse costs order, which offer some explanation as to why the floodgates have not opened under the open standing provisions.<sup>48</sup>

### **Lack of public knowledge about environmental legislation**

Knowledge and legal resources are crucial for effective public interest litigation to protect the environment. The environmental legal system is often complex, convoluted and illogically structured with multiple legislative schemes and government administrators. Complex issues of law and fact commonly arise with which ordinary members of the community are unfamiliar.

In 1981, prior to the formation of the Environmental Defender's Office (EDO), at a symposium of the Environmental Law Association (later the National Environmental Law Association<sup>49</sup>), it was noted:

[There] is a significant resource imbalance in the area of environmental assessment and ... people other than developers ... rarely have adequate legal advice and representation. The imbalance is so severe as to call into question the possibility of obtaining ... community involvement ... Examples were cited of ... inquiries where developers were represented throughout by counsel, solicitors and technical experts but objectors were without either legal or technical assistance. The result was not only to leave a sense of unfairness but to deprive the decision makers of proper assistance.<sup>50</sup>

These comments illustrate the fact that lack of legal assistance can be a decisive obstacle to litigation for people wanting to protect the public interest in the environment. In contrast, developers are commonly able to obtain the leading legal minds and experts to assist in the approval of their project. This is not a criticism of developers but merely a statement of fact and recognition of an initial imbalance and disadvantage commonly experienced by public interest litigants in environmental cases.

The most important step to redress the obstacle that lack of knowledge and resources provide for public interest environmental litigation in Australia was the founding of the EDO in New South Wales in 1981-1985 and later establishment of the Australian Network of EDOs.<sup>51</sup> The EDO now makes a vital contribution to public interest environmental litigation in Australia. The provision of public seminars and publications such as legal handbooks written in plain language for community members to read and understand, are significant aspects of the role played by the EDO and other community legal centres in education.<sup>52</sup> At an international level the Environmental Law Alliance Worldwide (ELAW) provides a loose network for public interest lawyers to protect the environment.<sup>53</sup>

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<sup>48</sup> Joyce MK, "Privative Clauses Under ss 35 & 104A of the Environmental Planning and Assessment Act 1979 (NSW) and the Implications for Public Interest Environmental Litigation" (1998) 15 EPLJ 362 at 362-363 (footnotes omitted). These comments apply equally to public interest litigation under other legislation.

<sup>49</sup> See National Environmental Law Association, <http://www.nela.org.au> viewed 25 July 2008.

<sup>50</sup> Quoted in Robinson D, "The Environmental Defender's Office NSW, 1985-1995" (1996) 13 EPLJ 155 at 155-156.

<sup>51</sup> See Environmental Defenders Offices, <http://www.edo.org.au> viewed 25 July 2008; Boer, n 2 at 35-37; Robinson, n 50.

<sup>52</sup> For example, Farrier D and Stein P (eds), *Environmental Law Handbook: Planning and Land Use in New South Wales* (4th ed, Redfern Legal Centre Publishing, 2006).

<sup>53</sup> See Environmental Law Alliance Worldwide, <http://www.elaw.org> viewed 25 July 2008; Anton D, "The Global Environment and the Public Interest" (1996) 13 EPLJ 269 at 277-281.

To redress the common imbalance between parties undertaking public interest environmental litigation and well financed opponents an environmental litigation fund or the provision of government funding (legal aid) for public interest litigation is necessary. These matters will be discussed later in this article.

## **Lack of a history of public interest environmental litigation**

The history of public interest environmental litigation in Australia now stretches over three decades. The many cases that have now been conducted and the accumulated knowledge maintained through the EDO network mean that this factor is no longer a significant obstacle to public interest environmental litigation under federal laws in Australia.

## **Lack of funds for public interest environmental litigation**

### **Costs**

Lack of funds is a major obstacle for public interest environmental litigation because of the costs associated with litigation generally. "Costs" are the legal expenses of a party in conducting litigation.<sup>54</sup> These expenses include court filing fees, solicitors and counsel's professional fees, expert witness fees and out-of-pocket expenses such as photocopying of documents. Costs do not generally include any payment for a party's own time spent conducting the litigation.

There are two main aspects to the problem of costs: (1) lack of financial resources to pay court filing fees, lawyers and experts to conduct the litigant's own case; and (2) having to pay the other party's legal costs if the litigation is lost. The former aspect is generally overcome in significant environmental cases by one of the EDO offices acting as the solicitor, and counsel and experts acting on a pro bono, reduced fee, or speculative fee basis. The latter aspect often forms a greater hurdle to public interest environmental litigants at a federal level. In an oft-quoted address to a National Environmental Law Association conference in 1989, Toohey J commented:

There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that "costs follow the event" is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.<sup>55</sup>

Government funding to pay for costs of litigation, often known as legal aid, is not available for environmental litigation outside of New South Wales.<sup>56</sup> Legal aid for public interest environmental cases was available at a federal level 20 years ago<sup>57</sup> but no longer operates. For a short time in 1995-1996 a federal legal aid scheme existed, known as the "National Test Case Fund",<sup>58</sup> but it was abolished after a change in the Commonwealth government in 1996.

In some courts and tribunals statutory provisions that each party pays their own costs except in special circumstances have replaced the general rule that costs follow the event. Such a rule is known as an "own costs" rule. For example, s 4.1.23 of the *Integrated Planning Act 1997* (Qld) provides an

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<sup>54</sup> See generally Cairns B, *Australian Civil Procedure* (7th ed, Lawbook Co, 2007).

<sup>55</sup> Quoted in Stein P, "The Role of the NSW Land and Environment Court in the Emergence of Public Interest Environmental Law" (1996) 13 EPLJ 179 at 180; Edwards K, "Costs and Public Interest Litigation After *Oshlack v Richmond River Council*" (1999) 21(4) Syd LR 680 at 680; Australian Law Reform Commission, n 10 at [3.9].

<sup>56</sup> Molesworth S, "Provision of Legal Aid for Environmental Issues: The Squeeze on Environment Defender's Office" (1992) 9 EPLJ 286; Mossop D, "The Justice Statement: A Mixed Bag for Environmental Law" (1995) 12 EPLJ 237; Comino M, "Improving Access to Justice for the Environment" (1996) 13 EPLJ 225.

<sup>57</sup> See Boer, n 2 at 28; Bragg J, "Community Litigants in the Queensland Planning and Environmental Legal System" (2006/2007) 12(54) QEPR 79.

<sup>58</sup> This was established under the Prime Minister's *Justice Statement*. See Mossop, n 56; Comino, n 56.

own costs rule for proceedings in the Queensland Planning and Environment Court.<sup>59</sup> This is subject to limited exceptions where costs can be awarded, for instance where the court considers the proceeding (or part of the proceeding) to have been frivolous or vexatious. In *Mudie v Gainriver Pty Ltd (No 2)* [2003] 2 Qd R 2271 at [34], McMurdo P and Atkinson J recognised:

It seems likely that one purpose [of] the general rule that each of parties bear their own costs, consistent with the objectives of the Act, is to ensure that citizens are not discouraged from appealing or applying to the Planning and Environment Court because of fear that a crippling costs order might be made against them. The provision no doubt also recognizes the public interest character of some applications in the Planning and Environment Court. For that reason, there is often an understandable judicial reluctance ... in finding proceedings brought by citizens to be frivolous or vexatious.<sup>60</sup>

In courts and tribunals where an own costs rule applies there is, therefore, little risk of an adverse costs order being made against a public interest environmental litigant, although even the cost of paying one's own lawyers and experts to run (often lengthy) cases can be significant.

However, for litigation at a federal level under the EPBC Act and the ADJR Act in the Federal Court, the usual rule is costs follow the event. This means the losing side is ordered to pay the winning side's legal costs. These costs can be enormous – amounting to hundreds of thousands or even millions of dollars – and be crippling or even terminal for most community litigants. For example, Dowsett J awarded costs against an unsuccessful environmental litigant in a test case of climate change under the EPBC Act case.<sup>61</sup> The trial had lasted two days, involved three respondents represented by senior and junior counsel, and no expert witnesses were called. Preliminary cost estimates from the three respondents totalled \$332,000 and led to the conservation group, with assets of less than \$200, being wound up.<sup>62</sup>

The High Court's decision in *Oshlack v Richmond River Council* (1998) 193 CLR 72 is the leading authority that there is no general "public interest" exception to the usual rule that costs follow the event, although a court may have discretion not to award costs against an unsuccessful environmental litigant.<sup>63</sup> Such discretion has rarely been exercised at a federal level<sup>64</sup> and offers scant comfort to public interest environmental litigants.<sup>65</sup> Whitlam J ordered costs against a community group that was unsuccessful in seeking relief under the EPBC Act despite submissions based on the public interest nature of the proceedings and *Oshlack* and the Full Court upheld that approach.<sup>66</sup>

<sup>59</sup> Another example is Class 1 proceedings in the NSW Land and Environment Court – see *Grant v Kiama Municipal Council* [2006] NSWLEC 70. The normal rule as to costs applies in Class 4 proceedings but see the cases cited at n 64 in relation to public interest litigation.

<sup>60</sup> Footnotes in original omitted. See also *Robina Land Corp Pty Ltd v Albert SC* [1995] QPLR 209; *Wilson v Laidley SC* [1994] QPLR 65; *Wheldon v Beaudesert SC* [1995] QPLR 177; *Frazier v Brisbane CC* [2000] QPELR 31; *Walls Quarries Pty Ltd v Warwick SC* [2004] QCA 457; *Crowther v Queensland* [2005] QPEC 118 at [16].

<sup>61</sup> *WPSQ Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736.

<sup>62</sup> See Ruddock K, "The Bowen Basin Coal Mines Case: Climate Law in the Federal Court", Ch 11 in Bonyhady T and Christoff P (eds), *Climate Law in Australia* (Federation Press, 2007) pp 184-185.

<sup>63</sup> See also Baird R, "Public Interest Groups and Costs – Have the Flood Gates been Opened?" (1998) 15 EPLJ 294.

<sup>64</sup> The decision in *Oshlack* arose from Class 4 proceedings in the NSW Land and Environment Court. That court has subsequently been more willing, though still rarely, to not award costs against unsuccessful public interest litigants in Class 4 proceedings. See *Plumb v Penrith CC* [2003] NSWLEC 161 at [28]; *Engadine Area Traffic Action Group Inc v Sutherland SC (No 2)* [2004] NSWLEC 434 at [15]-[21]; *Cranky Rock Road Action Group Inc v Cowra SC* [2006] NSWLEC 159.

<sup>65</sup> See *Friends of Hinchinbrook Society Inc v Minister for the Environment (No 5)* (1998) 84 FCR 186; *Hollier v Australian Maritime Safety Authority (No 2)* [1998] FCA 975; *South-West Forest Defence Foundation (No 2) v Department of Conservation & Land Management (No 2)* (1998) 72 ALJR 1008; [1998] HCA 35; *Scott v Secretary, Department of Social Security* [2000] FCA 1450; *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379; *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229; *Mees v Kemp* [2004] FCA 549; *Save the Ridge Inc v Commonwealth* [2005] FCA 157; [2006] FCAFC 51.

<sup>66</sup> *Save the Ridge Inc v Commonwealth* [2005] FCA 157; *Save the Ridge Inc v Commonwealth* [2006] FCAFC 51.



Similarly, Marshall J awarded costs against The Wilderness Society (TWS) in the *Gunns Pulp Mill case* despite submissions on the public interest nature of the proceedings.<sup>67</sup>

However, two recent decisions of the Federal Court have breathed a faint life into the seemingly cold corpse of special orders for costs based on *Oshlack* in proceedings under the EPBC Act. In the *Blue Wedges case*, Heerey J declined to award costs against an unsuccessful challenge to the Minister's approval of dredging of Port Phillip Bay. His Honour held, "this is a clear case for the application of the *Oshlack* approach" because the application for judicial review raised a matter of "high public concern" and "novel questions of general importance as to the approval process under the [EPBC Act]" that could not "have been seen from the start as hopeless and without merit", and "there was not unreasonable delay ... in bringing [the] application".<sup>68</sup>

In the appeal in the *Gunns Pulp Mill case*, the Full Court ordered the unsuccessful appellant, TWS, to pay 70% of the Minister's costs and 40% of the costs of Gunns Ltd, the second respondent in the case. The Full Court noted that the appeal raised issues of critical importance to the Minister in his administration of the Act and at least one difficult issue of construction that were probably not recognised by the Minister's departmental advisors such that:

[I]t was of general importance both to the Minister and the public that the law concerning the construction of the provisions of the EPBC Act with which this appeal was concerned should be clarified.<sup>69</sup>

The Full Court in the *Gunns Pulp Mill case* cited *Oshlack* in attaching significance to the facts that TWS:

[W]as concerned, along with a large section of the Australian community, to avoid harm to the Australian environment. The appellant was not seeking financial gain from the litigation; rather it appropriately sought to resolve a dispute, which had engaged the emotions of many, concerning the proper administration of the EPBC Act in the Court rather than elsewhere.<sup>70</sup>

The decisions not to award costs or to award only a proportion of the costs against unsuccessful public interest litigants in the *Blue Wedges case* and the *Gunns Pulp Mill case* offer some hope to future public interest litigants that costs may not be awarded against them if they are unsuccessful. These cases stand out against the many other decisions, including under the EPBC Act, where the principles in *Oshlack* have not prevented the normal costs rule being applied to award costs against unsuccessful public interest litigants. Consequently, unsuccessful public interest litigants have only a faint hope that costs will not be awarded against them although the chances of this occurring seems better in high-profile cases.

As a general rule, costs remain a very real threat and public interest litigants in the Federal Court should expect to be ordered to pay the costs of the other parties if they are unsuccessful. This was reiterated by Heerey J subsequent to his decision in the *Blue Wedges case* by awarding costs against a public interest litigant which unsuccessfully challenged a decision that the Gippsland desalination plant did not require approval under the EPBC Act. Heerey J ordered costs after finding that the "case did not raise any novel questions of general importance about the operation of the EPBC Act or any difficult questions of construction" and raised issues that were "spectacularly irrelevant".<sup>71</sup>

In addition to costs, there are two further obstacles for public interest environmental litigation that arise because of lack of funds: undertakings as to damages and security for costs.

### **Undertakings as to damages**

Undertakings as to damages are given by an applicant for an interim or interlocutory injunction to pay the damages suffered by the respondent should the application for an injunction ultimately fail at trial.

<sup>67</sup> *TWS v Turnbull* [2007] FCA 1863. See also *Investors for the Future of Tasmania Inc v Minister for the Environment & Water Resources* [2007] FCA 1864.

<sup>68</sup> *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 8 at [73].

<sup>69</sup> *TWS v Turnbull* [2008] FCAFC 19 at [9].

<sup>70</sup> *TWS v Turnbull* [2008] FCAFC 19 at [10].

<sup>71</sup> *Your Water Your Say Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 900 at [3], [7].

For large development projects such damages may amount to hundreds of thousands of dollars or greater. Failure to give an undertaking as to damages is generally fatal to seeking an interim or interlocutory injunction. Given that the time taken from commencing an action to having the case fully heard in court may be six to 12 months, the inability to provide an undertaking as to damages and thereby gain an interim or interlocutory injunction can render litigation to protect the environment futile.

Under the EPBC Act as originally enacted, a person seeking an interlocutory injunction was not required to give an undertaking as to damages. As originally enacted, s 478 of the Act provided:

**478 No undertaking as to damages**

The Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.

Despite s 478, a failure to offer an undertaking as to damages was still a factor that weighed against the court granting interlocutory injunction. This was apparent from one of the few cases to seek an interlocutory injunction under the EPBC Act – *Booth v Bosworth* [2000] FCA 1878. In that case Spender J considered in declining to grant an interim injunction under s 475 of the EPBC Act, “the fact that if an injunction were to be granted the respondent would suffer loss which he would be unable to recover should he succeed at the final trial”.<sup>72</sup>

In the first eight years of operation of the EPBC Act only four cases sought interlocutory injunctions under s 475. Each was unsuccessful despite s 478.<sup>73</sup> There was very little, if any, evidence of s 478 being abused to bring frivolous or vexatious actions for interlocutory injunctions. The application for an interim injunction in the *Save the Ridge* case was on a very tenuous basis but was a genuine attempt to resolve a dispute on the application of the EPBC Act and it was not vexatious or an abuse of process.<sup>74</sup> Despite the lack of evidence of s 478 being used for frivolous or vexatious litigation, it was removed in 2006 ostensibly to “work towards ensuring the elimination of vexatious injunctions by third parties”.<sup>75</sup> This amendment has been criticised as unnecessary and likely to reduce legitimate litigation by public interest groups.<sup>76</sup> The Australian Labor Party criticised this amendment while in opposition<sup>77</sup> but it remains to be seen if s 478 will be returned to the EPBC Act.

Somewhat ironically, s 478 of the EPBC Act led directly to amendment of Queensland’s nature conservation legislation to remove the requirement to give an undertaking as to damages when seeking an interim injunction<sup>78</sup> and this provision has since been successfully used to obtain an interim injunction where no undertaking as to damages was offered.<sup>79</sup> That case is the only example in Australia where such a provision has been successfully relied upon to seek interim orders pending trial. The applicant in that case also succeeded at trial.<sup>80</sup>

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<sup>72</sup> *Booth v Bosworth* [2000] FCA 1878 at [30].

<sup>73</sup> *Booth v Bosworth* [2000] FCA 1878; *Schneiders v Queensland* [2001] FCA 553; *Jones v Queensland* [2001] FCA 756; *Save the Ridge Inc v National Capital Authority* [2004] FCA 996; [2004] FCAFC 209.

<sup>74</sup> *Save the Ridge Inc v National Capital Authority* [2004] FCA 996; [2004] FCAFC 209.

<sup>75</sup> Senate Standing Committee on Environment, Communications, Information Technology and the Arts (SSCECITA), *Report on the Environment and Heritage Legislation Amendment Bill (No 1) 2006 [Provisions]* (Senate Printing Unit, 2006) p 9 at [2.19] – Majority Report.

<sup>76</sup> SSCECITA, n 75, pp 30-32, 71-72, 99-100.

<sup>77</sup> SSCECITA, n 75, pp 71-72.

<sup>78</sup> Section 173E of the *Nature Conservation Act 1992* (Qld).

<sup>79</sup> *Booth v Yardley* [2006] QPEC 116, <http://www.envlaw.com.au/yardley.html> viewed 25 July 2008.

<sup>80</sup> *Booth v Yardley* [2006] QPEC 119, <http://www.envlaw.com.au/yardley.html> viewed 25 July 2008.

## Security for costs

Security for costs is a slightly different issue that may form a procedural block to a meritorious case conducted by a community group. Security for costs refers to the provision of a financial security to pay the reasonable expected costs of the defendant/respondent should the action eventually fail.<sup>81</sup> Again this can amount to hundreds of thousands of dollars, which is beyond the means of most community groups.

Security for costs is only relevant to community groups acting as incorporated associations or companies. A natural person will not be ordered to provide security for costs because of a public policy adopted by the courts that individuals should not be prevented from pursuing legal remedies purely due to lack of financial resources.<sup>82</sup> However, community groups normally wish to act *as a group* and incorporation of an association is the obvious way to give a legal identity to the group. It is perfectly understandable that private individuals concerned about a matter of public interest are normally reluctant to risk their own finances and their house to protect the public interest. Many people with families simply cannot risk being bankrupted by an order for costs against them personally. Security for costs therefore becomes a real issue in many cases because community groups have sought to limit the liability of individuals in the group by incorporating an association. Such groups tend to have few funds to pay costs of litigation or adverse costs orders.

The public interest is a relevant factor in deciding an application for security for costs.<sup>83</sup> In the *Friends of Hinchinbrook case*, Branson J rejected an application for security for costs where the legislative scheme was such that legitimate organisations concerned with World Heritage properties should be able to agitate issues “in the interests of justice”.<sup>84</sup> However, in a dispute about a Sydney toll road, Hely J rejected an argument that the public interest nature of the litigation meant that the court should not require a security for costs and ordered the applicant to provide \$223,193 as security for costs.<sup>85</sup> The applicant was unable to satisfy the order and the proceedings were subsequently dismissed. Similarly, in litigation against a tobacco manufacturer, Wilcox J rejected an argument that the public interest nature meant that no security for costs should be required and made an order for security at a “relatively low figure” of \$300,000, with proceedings to be dismissed in default of security.<sup>86</sup> These cases illustrate the procedural obstacle that security for costs can provide for public interest litigation.<sup>87</sup>

Of particular relevance to litigation under the EPBC Act, in the protracted *Save the Ridge case*, a community group seeking an injunction and other relief in relation to alleged offences against the EPBC Act was ordered to provide security for costs of \$50,000.<sup>88</sup> An order for security for costs of \$10,000 was also made against the community group in an appeal in the same case.<sup>89</sup> The group was able to provide the security on both occasions but ultimately lost the proceedings and had costs awarded against it.<sup>90</sup>

In contrast, Marshall J refused an application for security for costs in judicial review proceedings brought against the approval of the Gunns Pulp Mill because:

<sup>81</sup> For example, s 56 of the *Federal Court of Australia Act 1976* (Cth).

<sup>82</sup> See *James v ANZ Banking Group Ltd* (1985) 9 FCR 442 at 445.

<sup>83</sup> *Webster v Lampard* (1993) 177 CLR 598; *Cameron’s Unit Services Pty Ltd v Kevin R Whelpton & Assocs (Aust) Pty Ltd* (1986) 13 FCR 46 at 52; *Ilait Nominees Pty Ltd v Murragong Nominees Pty Ltd* (1980) 48 FLR 385 at 387.

<sup>84</sup> *Friends of Hinchinbrook Society Inc v Minister for Environment (No 1)* (1996) 69 FCR 1 at 21-23.

<sup>85</sup> *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] FCA 918; [2001] FCA 1231.

<sup>86</sup> *Tobacco Control Coalition Inc v Phillip Morris (Aust) Ltd* [2000] FCA 1004.

<sup>87</sup> See also the example given of the Mt Etna Bat Caves case in Bonyhady, n 31, pp 67-69, where security for costs ultimately thwarted the litigation.

<sup>88</sup> *Save the Ridge Inc v Commonwealth* [2004] FCA 1167; [2004] FCA 1289.

<sup>89</sup> *Save the Ridge Inc v Commonwealth* [2005] FCA 355.

<sup>90</sup> *Save the Ridge Inc v Commonwealth* [2005] FCA 17; [2005] FCA 157; [2006] FCAFC 51.

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.<sup>91</sup>

Despite this decision, security for costs remains a significant obstacle for litigation undertaken by incorporated community groups in the Federal Court.

### **SLAPP litigation**

Another potential obstacle to public interest environmental litigation aligned to lack of funds is the use or threat of litigation by developers or governments to silence public dissent to a development project. SLAPPs (Strategic Lawsuits Against Public Participation) or “SLAPP suits” are terms coined by American authors George Pring and Penelope Canan to describe cases which have the effect of chilling free speech by stopping citizens from exercising their political rights or punishing them for having done so.<sup>92</sup> SLAPP litigation is relatively uncommon but the famous and ongoing *Gunns 20 case* brought by Gunns Ltd against 20 environmentalists for the campaign against logging in Tasmania has highlighted its use in recent years.<sup>93</sup> Brian Walters provided several case studies of the use of SLAPP suits in Australian environmental disputes in recent years, including the Hindmarsh Island affair and Port Hinchinbrook dispute, and noted that in Australia the favoured type of SLAPP writ is defamation.<sup>94</sup> These cases illustrate a point made by Stephen Keim about the use of SLAPP writs:

A developer might bring such an action against a spokesperson for a local environmental group who is opposing development. It does not matter greatly to the developer whether it is successful at trial. The developer will achieve its purpose by intimidating members of the group and by using up the group’s resources of time, money and ability to withstand stress. The matter may well not get to trial, being settled when the dispute is over and the action has served its purpose.<sup>95</sup>

As Keim pointed out, environmentalists can use relatively simple strategies which can markedly reduce the opportunity and likelihood of a SLAPP suit against them without detracting from the effectiveness of their public advocacy. For example, environmentalists can avoid defamatory statements by being careful not to publicly attack a developer’s character and by focusing public statements on the environmental or policy reasons why the development should not proceed.

While relatively simple strategies can reduce the opportunity and likelihood of SLAPP litigation, Greg Ogle makes a cogent case for law reform to protect public participation in democratic processes based on the *Gunns 20 case* and the *Hindmarsh Island case*.<sup>96</sup> He argues that the *Gunns 20 case* is the highest profile of a wave of new cases which use industrial and commercial law in relation to environmental and other community protest.<sup>97</sup> Like Pring, Canan, and Keim, he notes the “chilling effect” of SLAPP litigation on public debate:

The most obvious impact of these cases and threats is the possible effect of scaring people into silence.<sup>98</sup>

The case studies below did not involve the use of SLAPP writs but they illustrate how the main obstacles to public interest litigation under federal environmental laws operate.

<sup>91</sup> *Lawyers for Forests Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 588 at [14].

<sup>92</sup> Pring GW and Canan P, *SLAPPS: Getting Sued for Speaking Out* (Temple Press, 1996) pp 9-11, [http://www.temple.edu/tempress/titles/1228\\_reg.html](http://www.temple.edu/tempress/titles/1228_reg.html) viewed 25 July 2008.

<sup>93</sup> *Gunns v Marr* [2005] VSC 251; [2006] VSC 329; [2006] VSC 386; [2007] VSC 91. See <http://www.gunns20.org> viewed 25 July 2008.

<sup>94</sup> Walters B, *Slapping on the Writs: Defamation, Developers and Community Activism* (UNSW Press, 2003).

<sup>95</sup> Keim S, “The Civil Action for an Injunction to Prevent Direct Action Aiming to Protect the Environment: Some Tentative Thoughts” (1996) 13 EPLJ 209 at 209.

<sup>96</sup> Ogle G, *Gunning for Change: The Need for Public Participation Law Reform* (The Wilderness Society, 2006), [http://www.wilderness.org.au/articles/pdf/Gunning\\_for\\_Change\\_web.pdf](http://www.wilderness.org.au/articles/pdf/Gunning_for_Change_web.pdf) viewed 25 July 2008.

<sup>97</sup> Ogle, n 96, p 8.

<sup>98</sup> Ogle, n 96, p 9.

## CASE STUDIES OF LITIGATION

Five case studies will be used to illustrate the current obstacles and opportunities for public interest environmental litigation under federal laws in Australia. While the subject matter of litigation under the EPBC Act has varied enormously these cases have been selected for discussion because they are representative of the common procedural and practical issues faced in public interest cases that have been run since the commencement of the EPBC Act on 16 July 2000.<sup>99</sup> The Appendix to this article provides a complete list of EPBC Act cases as at 16 July 2008. Of a total of 31 civil cases, 26 were brought by public interest litigants and are, therefore, public interest litigation. A case study is given of the Paradise Dam, in which no litigation occurred, as an example of how lack of availability for merits review currently constrains public interest litigation aiming to improve the quality of decision-making under the EPBC Act.

The author of this article acted as junior counsel in each of the cases discussed.<sup>100</sup> The facts concerning the considerations leading to the proceedings are based on the author's direct knowledge and are provided with the consent of the client in each case.<sup>101</sup>

### The Flying Fox case

The *Flying Fox case* commenced in late 2000 when a conservationist, Dr Carol Booth, investigated lychee farmers who were killing thousands of flying foxes using a large electric grid over the two month lychee season to protect their crop. She informed the Queensland Parks and Wildlife Service (QPWS) of the operation of the electric grid. The QPWS responded by visiting the farm owner and issuing a retrospective permit to take 500 flying foxes. Subsequent complaints to the QPWS that the killing grossly exceeded the permit were ignored. Dr Booth also informed Environment Australia, the Australian government department then administering the EPBC Act, of the killing. Environment Australia requested further information but took no action when this was supplied.

When State and Commonwealth regulators took no action to stop the culling Dr Booth approached relevant conservation groups to take action to halt the operation of the electric grids through a public interest case. The conservation groups that might potentially have run the case were unwilling to risk an adverse costs order being awarded should the case be lost.

Due to the unwillingness or inability of government regulators or conservation groups to take action Dr Booth decided to take action herself. In doing so she was aware that, if she lost, it was likely that costs would be awarded against her that would bankrupt her. Dr Booth obtained assistance from the EDO Queensland, members of the Queensland Bar and several leading flying fox and World Heritage experts acting on a pro bono and speculative basis. Prior to the trial she also received public donations totalling some \$8,000 to assist in meeting the out-of-pocket expenses of the litigation.

After considering the possible options to stop the culling under State and Commonwealth laws, Dr Booth made an application for an injunction under s 475 of the EPBC Act and sought an interim injunction. The EPBC Act was chosen for three reasons. First, s 475 of the Act provided standing for the action whereas State legislation, the *Nature Conservation Act 1992* (Qld), did not.<sup>102</sup> Secondly, s 478 provided that no undertaking as to damages would be required to obtain an interim injunction (critically important because Dr Booth did not have the funds to give such an undertaking). Thirdly, the proceedings provided an important test case of the EPBC Act.

<sup>99</sup> Merits review cases in the AAT are not included because of their rarity and the very limited rights to merits review under the EPBC Act.

<sup>100</sup> In the *Gunns Pulp Mill case* the author's involvement was limited to initial stages of the TWS litigation.

<sup>101</sup> Background information for the first three case studies, including copies of court documents and affidavits, is available at the Environmental Law Publishing website, <http://www.envlaw.com.au/case.html> viewed 25 July 2008.

<sup>102</sup> Lack of standing had defeated public interest environmental litigation previously in Queensland: see *Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd* [1989] 2 Qd R 512 (*Mt Etna Bat Caves case*).



Spender J heard the application for an interim injunction and dealt expeditiously with the issue of standing, concluding that the applicant's work for the care and well-being of flying foxes and her employment and voluntary work for conservation groups satisfied the requirements under s 475(6) of the EPBC Act.<sup>103</sup>

Despite being clearly concerned by the scale of the farmers' actions and the impacts on the world heritage values, Spender J declined to grant the interim injunction, principally because of the short time remaining in the lychee season (and therefore the operation of the electric grids) at the time of the hearing.

The case progressed to a three day trial before Branson J who ultimately granted an injunction restraining the operation of the electric grids and awarded costs to Dr Booth.<sup>104</sup> The costs paid by the farmers to Dr Booth were \$99,318.

The decision in the *Flying Fox case* has had a number of important consequences for the protection of the flying foxes. On 13 May 2002 the species at the centre of the case was listed as vulnerable under the EPBC Act. In addition, the case caused considerable embarrassment to the Queensland government and it announced that QPWS would no longer issue permits for the operation of electric grids, effectively outlawing their operation.<sup>105</sup>

In response to the injunction granted by Branson J, one of the lychee farmers applied for approval under the EPBC Act of the operation of the electric grid. The application for approval under the EPBC Act was ultimately refused by the Minister – the first refusal for a proposed action under the EPBC Act.<sup>106</sup>

The *Flying Fox case* also spurred the Queensland government into amend the *Nature Conservation Act 1992* (Qld) to allow third party standing for civil enforcement action in the Planning and Environment (P&E) Court.<sup>107</sup> Such proceedings have a major advantage of having an "own costs" rule so that the threat of adverse costs is avoided at least for the trial (any appeal is subject to the normal costs rule). Modelled on s 478 of the EPBC Act, the amended State legislation removed the requirement to give an undertaking as to damages when seeking an interim injunction.<sup>108</sup>

Dr Booth has since used the new standing provisions to bring two successful, though lengthy, cases against lychee farmers killing flying foxes with electric grids.<sup>109</sup> In both cases Dr Booth took action only after the QPWS again refused to act. The "own costs" rule was a major factor in the choice of the P&E Court in favour of the Federal Court in these cases.<sup>110</sup> The P&E Court granted an interim enforcement order restraining the operation of the grids in one case where no undertaking as to damages was offered.<sup>111</sup>

## The Nathan Dam case

The *Nathan Dam case* involved an application for judicial review against part of a decision by the Federal Environment Minister concerning a proposal to construct and operate an 880,000 megalitre dam, known as the Nathan Dam, in central Queensland. The river upon which the dam was proposed flows into the Great Barrier Reef World Heritage Area (GBRWHA). The dam's major purpose was to

<sup>103</sup> *Booth v Bosworth* [2000] FCA 1878 at [5].

<sup>104</sup> *Booth v Bosworth* (2001) 114 FCR 39; 117 LGERA 168; [2001] FCA 1453. See McGrath C, "The Flying Fox Case" (2001) 18(6) EPLJ 540; McGrath, n 38 at 170-172.

<sup>105</sup> Wells D in Queensland Parliament, *Hansard* (2001) pp 2331-2333.

<sup>106</sup> EPBC referral 2002/571 available by searching Referrals and Public Notices at the Department of Environment, Water, heritage and the Arts, <http://www.environment.gov.au/epbc> viewed 25 July 2008.

<sup>107</sup> Section 173D of the *Nature Conservation Act 1992* (Qld).

<sup>108</sup> Section 173E of the *Nature Conservation Act 1992* (Qld).

<sup>109</sup> *Booth v Yardley* [2006] QPEC 119, <http://www.envlaw.com.au/yardley.html> viewed 25 July 2008; *Booth v Frippery Pty Ltd* [2007] QPEC 099, <http://www.envlaw.com.au/frippery.html> viewed 25 July 2008.

<sup>110</sup> The author was counsel for Dr Booth in both cases.

<sup>111</sup> *Booth v Yardley* [2006] QPEC 116, <http://www.envlaw.com.au/yardley.html> viewed 25 July 2008.

supply irrigation water to 30,000 ha of farmland, mostly to grow cotton, and to support other development. Concerns were raised about pollution from the farming using water from the dam flowing to the GBRWHA but the Minister refused to consider the impacts of the associated agricultural development when assessing the impacts of the dam under the EPBC Act. Two conservation groups, Queensland Conservation Council Inc (QCC) and the World Wide Fund for Nature (Aust) (WWF), sought judicial review of this refusal under the ADJR Act using the widened standing provided by s 487 of the EPBC Act.

After the application for judicial review was filed in the Federal Court Registry, the threat of costs almost led to the case being discontinued before service of the proceedings on the Minister.<sup>112</sup> QCC and WWF were advised that, if the case were lost the award of costs to the Minister would likely be in the order of \$40,000-\$95,000 (this assumed a trial lasting one day, on legal issues only and without expert witnesses, and an appeal to the Full Federal Court but not to the High Court). Despite the fact that WWF was a large conservation group, this equated to one to two staff members being lost for other campaigns. QCC and WWF gave instructions to discontinue the case and the associate of Kiefel J, the judge before whom the directions hearing was to be held, was contacted to de-list the directions hearing. However, at the eleventh hour, the Australian Conservation Foundation (ACF) was contacted and it agreed to provide an indemnity for \$20,000 should the case be lost. A member of the public agreed to provide a similar indemnity for \$20,000 and a second member of the public donated \$5,000 for out-of-pocket expenses in the litigation. Only at this stage did QCC and WWF, still with considerable trepidation, agree to continue the case. The associate to Kiefel J was contacted and the matter re-listed for the directions hearing.

The matter proceeded and in the trial decision Kiefel J found that the indirect impacts of irrigators using water supplied by the dam were impacts of the dam.<sup>113</sup> This result was upheld on appeal to the Full Court.<sup>114</sup> The Full Court held that the “all adverse impacts” of an action are all of the adverse influences or effects of the action, whether direct or indirect, including the impacts of third parties. This was a very important, general principle for environmental impact assessment in Australia. The Minister was ordered to pay QCC’s and WWF’s costs and ultimately paid \$90,450 for both the trial and appeal.

Following the trial, the Minister reconsidered the likely impacts of the dam and decided that, when the impacts of associated downstream agriculture were considered, the dam is likely to have a significant impact on both the GBRWHA and listed migratory species.<sup>115</sup> The court case therefore led to an important factual outcome for the assessment of the dam itself. The project subsequently stalled for several years but in mid-2008 a revised proposal was referred to the Minister emphasising the water will be principally used by new coal mines and no new agricultural irrigation schemes are proposed.<sup>116</sup> No decision had been made on that proposal at the time of writing.

### The Japanese Whaling case

The *Japanese Whaling case* involved an application by the Humane Society International Inc (HSI) to the Federal Court to restrain illegal Japanese whaling within the Australia Whale Sanctuary adjacent to Antarctica.<sup>117</sup> HSI sought a declaration and injunction under s 475 of the EPBC Act against a Japanese whaling company conducting the whaling. The evidence presented in the case indicated the company had killed approximately 1,266 whales within the Australian Whale Sanctuary since it was declared on 16 July 2000 and that it intended to continue to whale there.

<sup>112</sup> The application had been filed without a final decision to accept the risk of costs to meet a 28 day time limit.

<sup>113</sup> *QCC v Minister for Environment & Heritage* [2003] FCA 1463.

<sup>114</sup> *Minister for the Environment and Heritage v QCC* (2004) 139 FCR 24. See McGrath, n 35 at 36-38.

<sup>115</sup> See public notices for EPBC referral 2002/770 at the Department of Environment, Water, Heritage and the Arts website, <http://www.environment.gov.au/epbc> viewed 25 July 2008.

<sup>116</sup> See public notices for EPBC referral 2008/4313, at the Department of Environment, Water, Heritage and the Arts website, <http://www.environment.gov.au/epbc> viewed 25 July 2008.

<sup>117</sup> See McGrath C, “The Japanese Whaling Case” (2005) 22 EPLJ 250. Background documents for this case are available at <http://www.envlaw.com.au/whale.html> viewed 25 July 2008.

Preparations for the case commenced 18 months prior to filing the application and involved very careful consideration of the potential liability for costs. Although the likelihood of the respondent paying any order for costs was extremely remote, EDO NSW and counsel agreed to act on a largely speculative basis because of the public interest nature of the case.

Because of the significance of the issues involved and the belligerent nature of the Japanese government to anti-whaling campaigns, HSI needed to consider its liability for costs of trial, appeal to the Full Court of the Federal Court, and appeal to the High Court. Even though costs were limited by the facts of the case being quite straightforward, no expert evidence being required, and the main issues likely to be in dispute being purely technical legal ones, the estimate of costs for a loss after appeal to the High Court was \$180,000.

Before commencing the litigation, HSI considered its political and diplomatic context, particularly the potential impact on Australia's relations with other parties to the Antarctic Treaty System (ATS) who dispute Australian sovereignty in Antarctica. HSI decided that, while the litigation would generate some diplomatic disagreement, it was not likely to jeopardise the cooperative relationships under the ATS or lead to negative environmental outcomes. Before initiating the litigation, HSI also advised the then Environment Minister, Ian Campbell MP, requesting the government act instead of HSI but the government stonewalled and did not respond to HSI's request.

After weighing up the very significant liability for costs and potential diplomatic dispute against the clear breach of Australian law and the potential benefits for whale conservation if successful, HSI commenced proceedings in October 2004. HSI initially sought leave from the Federal Court to serve the originating process in Japan. The trial judge, Allsop J, adjourned the hearing of the application for leave to serve pending the Attorney-General being given the opportunity to make submissions on the case.<sup>118</sup> The then Attorney-General provided submissions in which, in effect, he conceded that the whaling breached Australian law. Despite this he submitted that the Commonwealth would not enforce the law and, similarly, that the court should not allow HSI to enforce the prohibition of whaling because it "would be likely to give rise to an international disagreement with Japan".<sup>119</sup> Allsop J accepted this submission and refused to allow the case to proceed.<sup>120</sup>

HSI appealed against the refusal to allow the case to proceed and the Full Court, by majority, allowed the appeal and granted HSI leave to serve the Japanese whaling company in Japan.<sup>121</sup> The Full Court held that diplomatic and political considerations were irrelevant where, as here, the Parliament has provided that the action is justiciable in an Australian court.<sup>122</sup> The majority of the Full Court, Black CJ and Finkelstein J, also set out important principles for "public interest injunctions". Broadly speaking the principle that emerges from the majority judgment is that the Federal Court may grant an injunction under s 475 of the EPBC Act even if it may prove impossible to enforce where it serves the public interest objects of the Act by having an educative effect.<sup>123</sup> These principles bound the trial judge in the case, who ultimately granted the declaration and injunction sought by HSI pursuant to the principles for public interest injunctions stated by the majority of the Full Court.<sup>124</sup>

The case is not without its critics<sup>125</sup> and it remains to be seen whether it will achieve practical outcomes in terms of improved conservation of whales. The Japanese whalers appear likely to ignore

<sup>118</sup> *HSI v Kyodo Senpaku Kaisha Ltd* (2004) 212 ALR 551; [2004] FCA 1510.

<sup>119</sup> Attorney-General, *Outline of Submissions of the Attorney-General of the Commonwealth as Amicus Curie* (unpublished submissions, 2005) at [17], <http://www.envlaw.com.au/whale7.pdf> viewed 25 July 2008.

<sup>120</sup> *HSI v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664.

<sup>121</sup> *HSI v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 (Black CJ and Finkelstein J; Moore J dissenting).

<sup>122</sup> *HSI v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at [13] per Black CJ and Finkelstein J with whom Moore J agreed on this point (at [38]) though dissenting on the question of futility.

<sup>123</sup> See McGrath C, "Japanese Whaling Case Appeal Succeeds" (2006) 23 EPLJ 333 at 333-335.

<sup>124</sup> *HSI v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.

<sup>125</sup> For example, Blay S and Bubna-Litic K, "The Interplay of International Law and Domestic Law: The Case of Australia's Efforts to Protect Whales" (2006) 23 EPLJ 465.

the declaration and injunction and the new Australian government has retreated from a pre-election policy to enforce the EPBC Act against whaling in Australia's Antarctic waters.<sup>126</sup>

Despite the fact that, at this stage at least, this litigation has not led to effective enforcement of the EPBC Act, the decisions in this case represent legitimate steps towards enforcing the Act. At the very least the case has highlighted a serious breach of Australian law on a matter of considerable public concern. The decision of the Full Court is also of considerable significance for establishing important principles for public interest litigation in Australia.

## Paradise Dam

The *Flying Fox case*, the *Nathan Dam case*, and the *Japanese Whaling case* are all examples of public interest environmental litigation being undertaken successfully. The list of EPBC Act cases provided in the Appendix shows mixed results for public interest litigation under the Act but, still, each case is an example of litigation actually being undertaken. While the results of the litigation are mixed, each case shows that litigants have succeeded, to some degree at least, in finding a suitable cause of action and obtaining sufficient resources to conduct the case. It is more difficult to understand and provide evidence of litigation that is not undertaken because potential litigants either lack knowledge, a suitable cause of action, or sufficient resources to litigate.

The Paradise Dam is an example where a conservation group chose not to litigate under the EPBC Act because judicial review was not suitable to raise their concerns about the project or its approval under the Act. This project (at one stage called the "Burnett River Dam") involved construction of a major dam on the lower Burnett River, approximately 80 km southwest of Bundaberg in Queensland. This 300,000 megalitre dam was referred under the EPBC Act on 30 August 2001 and approved by the Minister under s 133 of the Act on 25 January 2002.<sup>127</sup> The Burnett River is one of only two known endemic populations of the Australian or Queensland lungfish (*Neoceratodus forsteri*), which was listed as vulnerable to extinction under the EPBC Act on 6 August 2003. As a result of this listing, on 8 August 2003 the conditions of the approval for the dam were varied to attach further conditions requiring the installation of a fish transfer device, ongoing monitoring and other measures to conserve lungfish. Construction of the dam was completed in 2005.<sup>128</sup>

Danielle Barnes and Angela Arthington explained the potential impacts of the Paradise/Burnett Dam on lungfish prior to the dam being constructed:

Impoundments currently inundate 128 km or 41% of the known range of lungfish in the main channel of the Burnett River. Further inundation of riffles, runs, glides and shallow pools caused by new weirs or large impoundments will represent an additional net loss of suitable lungfish spawning habitat ... The development of the Burnett Dam, a large impoundment, may not provide suitable habitat for mature lungfish and will almost certainly reduce the extent of suitable spawning habitat and contribute to increasing stress on the remaining areas of river habitat where spawning activity is concentrated ... the maintenance of lungfish populations will require management actions that aim to maintain high adult survival, limit the loss of suitable spawning habitat and provide for lungfish passage throughout the catchment. None of these management objectives is likely to be met to the degree necessary if major new water infrastructure is constructed on the Burnett River.<sup>129</sup>

QCC wished to challenge approval of the dam under Queensland and Commonwealth legislation on the basis of the impacts of the dam on lungfish and other environmental issues, together with the

<sup>126</sup> See McGrath C, "Injunction Granted in Japanese Whaling Case" (2008) 25 EPLJ 77.

<sup>127</sup> See the public notices for EPBC referral 2001/422 available at the Department of Environment, Water, Heritage and the Arts website, <http://www.environment.gov.au/epbc> viewed 10 July 2008.

<sup>128</sup> See SunWater, [http://www.sunwater.com.au/burnettwater\\_paradisedam.htm](http://www.sunwater.com.au/burnettwater_paradisedam.htm) viewed 25 July 2008. Photographs of the completed dam are available at Stop Press Visual Media, <http://www.stoppress.com.au/damtour/paradise-dam/index.htm> viewed 25 July 2008.

<sup>129</sup> Barnes D and Arthington A, "An Early Test of the Water Act 2000 (Qld): Burnett Dam as a Case History" in *Water Law & Policy, Conference Proceedings* (4th Australasian Natural Resources Law and Policy Conference, 2002) pp 68-80 (citations omitted). Compare Armstrong G, "Where Wild Things are Dammed" (2004) 122 Ecos 18; World Wildlife Foundation, *To Dam or Not to Dam: Five Years on from the World Commission on Dams* (WWF, 2005) p 11; Arthington AH, "Australian Lungfish, *Neoceratodus Forsteri*, Threatened by a New Dam" (2008) *Environmental Biology of Fishes* (in press).

lack of economic benefit of the dam. The economics of the dam were highly doubtful at the time of its construction and even the Queensland Treasury had found the dam was economically unviable.<sup>130</sup>

QCC sought advice on legal avenues to challenge the Paradise Dam under Queensland law or the EPBC Act. It was advised that only judicial review was available against the Minister's approval of the dam under the EPBC Act and this was not likely to succeed given the inability to challenge the merits of the Minister's decision.<sup>131</sup> On the basis of this advice and the advice QCC received in relation to litigation avenues under Queensland laws, it decided not to undertake litigation against the approval of the dam. This is an example of litigation not being undertaken due to lack of appropriate laws.

Had the approval of the dam been subject to merits review the transparency, integrity and rigour of the approval process would have been improved and a seemingly poor decision may have been avoided. The dam appears to have failed both financially and environmentally. Two years after the dam was built for \$200 million<sup>132</sup> it was valued at \$76 million by its owner, Burnett Water Pty Ltd, a subsidiary of SunWater Ltd (itself a Queensland government owned corporation).<sup>133</sup> In addition to the loss of habitat identified by Barnes and Arthington, an audit of compliance with the EPBC Act conditions of approval of the dam by the then Department of Environment and Water Resources in 2007 found only partial compliance with the condition that the dam operator "must install a fish transfer device on the Burnett River Dam suitable for lungfish". The audit found that the upstream fishway was operating but "continuing drought conditions has meant that the Paradise Dam storage level has not reached the design operating range for the downstream fishway".<sup>134</sup>

### Gunns Pulp Mill case

The first of three cases brought against approval of the Gunns Pulp Mill provides another example of the limited nature of judicial review constraining potential public interest environmental litigation. This is a particularly important case study because the approval of the pulp mill under the EPBC Act generated the most heated public controversy in the history of the Act and a series of judicial review proceedings.

The proposed pulp mill had a convoluted assessment and approval process in which the proponent, Gunns Ltd, made three referrals of the proposed pulp mill under the EPBC Act, commencing in 2004.<sup>135</sup> The project was controversial for many reasons but particularly because of the increase in logging of Tasmanian forests that it would generate, air pollution of the Tamar Valley and the City of Launceston, marine pollution from a waste disposal pipeline into Commonwealth marine waters in Bass Strait, and the apparently highly-political nature of the approval process.<sup>136</sup> The second of the three referrals was to be assessed under the EPBC Act by the Tasmanian Resource Planning and Development Commission (RPDC) pursuant to the Tasmanian Assessment Bilateral

<sup>130</sup> See Armstrong, n 129 at 18; Queensland Conservation Council, *Review of the National Competition Council's (NCC) 2003 Assessment of the Burnett River Dam with Regard to Compliance to the CoAG Water Reform Framework* (QCC, 2004), <http://www.ncc.gov.au/pdf/AST6WtSu-008.pdf> viewed 25 July 2008; Institute for Sustainable Futures, *Burnett Region Least Cost Planning Report* (University of Technology Sydney, 2002), <http://www.travestonswamp.info/downloads/pdfs/ParadiseDamLeastCostPlanningStudy.pdf> viewed 19 June 2008.

<sup>131</sup> The author provided advice to QCC in relation to this matter, instructed by the EDO. QCC has consented to this matter being published.

<sup>132</sup> See Queensland Government, <http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=43954> viewed 25 July 2008.

<sup>133</sup> SunWater Ltd, *SunWater Annual Report 2005-06* (SunWater, 2006).

<sup>134</sup> Department of the Environment and Water Resources, *Final Compliance Audit Report Paradise Dam EPBC Ref. 2001/422* (DEW, 2007), <http://rogercurrie.files.wordpress.com/2008/04/burnett-audit-report.pdf> viewed 19 June 2008.

<sup>135</sup> EPBC 2004/1914, EPBC 2005/2262, and EPBC 2007/3385. Background information on these referrals is available at <http://www.gunnsulpmill.com.au> and <http://www.environment.gov.au> viewed 19 June 2008.

<sup>136</sup> There are innumerable articles in the popular press about the pulp mill and several websites devoted to the controversy surrounding the project such as The Wilderness Society, <http://www.wilderness.org.au/campaigns/pulp-mill> viewed 25 July 2008, Tasmanians Against the Pulp Mill, <http://www.tapvision.info> viewed 25 July 2008, Lawyers for Forests, <http://www.lawyersforforests.asn.au> viewed 25 July 2008, and <http://www.tamarpulpmill.info> viewed 25 July 2008.



Agreement.<sup>137</sup> This would have required public hearings and assessment of the project by the RPDC; however, Gunns withdrew from the RPDC assessment process in early 2007.<sup>138</sup> In response to Gunns' withdrawing from the RPDC process the Tasmanian government passed special and highly unusual legislation to enable the pulp mill to be assessed and approved by the Tasmanian Parliament directly.<sup>139</sup> Gunns submitted a third referral under the EPBC Act, which the Commonwealth Environment Minister assessed and approved subject to conditions.<sup>140</sup>

The Wilderness Society (TWS) made the first of three judicial review proceedings against the assessment and approval of the Gunns Pulp Mill.<sup>141</sup> It was unsuccessful at trial and on appeal, and chose not to seek special leave to appeal to the High Court. As is common in controversial judicial review cases, in dismissing the appeal by TWS the Full Federal Court stressed that it had no jurisdiction to consider the merit or wisdom of the decisions of the Minister and the court was concerned merely with the legality of the decisions.<sup>142</sup>

Had TWS been able to challenge the merits of the assessment and approval process of the pulp mill it would have done so but judicial review precluded such matters being raised. TWS was advised from the outset that only judicial review was available against decisions on referrals under the EPBC Act.<sup>143</sup> This case illustrates how public interest litigation is limited under the EPBC Act by lack of merits review of administrative decisions.

The cost of undertaking the litigation and the threat of adverse costs being awarded should the case fail was also very a significant issue for TWS in deciding to litigate. The cost of the litigation ultimately stopped an application for special leave to the High Court and was the principal reason that TWS chose not to challenge the approval<sup>144</sup> of the pulp mill in separate litigation.<sup>145</sup> Full costs of the Minister and Gunns were awarded against TWS for its loss at the three and a half day trial. The Full Court ordered TWS to pay 70% of the Minister's costs and 40% of Gunns' costs of the appeal.<sup>146</sup> At the time of writing neither the Minister nor Gunns had served TWS with a bill of costs but TWS estimated that it will ultimately pay the Minister and Gunns approximately \$200,000 to satisfy the orders to pay their costs of the trial and the appeal. This again displays the considerable obstacle that costs pose for public interest litigants.

## Lessons from the case studies

The case studies show the important roles played by public interest litigation in enforcing the EPBC Act and improving decision-making under it. The *Flying Fox case* and the *Japanese Whaling case* illustrate the role of public interest litigants in enforcing the Act, while the *Nathan Dam case* shows how it can contribute to improving administrative decision-making and how test cases can develop important legal principles of wide application.

<sup>137</sup> See the Department of the Environment, Water, Heritage and the Arts website, <http://www.environment.gov.au/epbc/assessments/bilateral/tas.html> viewed 25 July 2008.

<sup>138</sup> See the Resource Planning and Development Commission website, <http://www.rpdc.tas.gov.au/poss/pulp/whatsnew> viewed 25 July 2008.

<sup>139</sup> *Pulp Mill Assessment Act 2007* (Tas).

<sup>140</sup> See the Department of the Environment, Water, Heritage and the Arts website, <http://www.environment.gov.au/epbc/notices/assessments/2007/3385/information.html> viewed 19 June 2008.

<sup>141</sup> *TWS v Turnbull* [2007] FCA 1178; [2007] FCA 1863; [2007] FCAFC 175; [2008] FCAFC 19 (*Gunns Pulp Mill case*); *Investors for the Future of Tasmania Inc v Minister for the Environment & Water Resources* [2007] FCA 1179; [2007] FCA 1864 (*Second Gunns Pulp Mill case*); *Lawyers for Forests Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 588 (*Third Gunns Pulp Mill case*). A decision in the third case was still pending at the time of writing.

<sup>142</sup> Stated in the court summary of effect of reasons for judgment in *TWS v Turnbull* [2007] FCAFC 175.

<sup>143</sup> The author acted for TWS as counsel in the early stages of its challenge.

<sup>144</sup> The TWS challenge in the Federal Court involved the Minister's assessment of the pulp mill under Pts 7 and 8 of the EPBC Act rather than its ultimate approval under Pt 9 of the Act.

<sup>145</sup> Thanks to Greg Ogle of TWS for providing this information and cost estimates for this article.

<sup>146</sup> *TWS v Turnbull* [2008] FCAFC 19.

The case studies indicate that, of the five main reasons for the relatively small number of public interest legal actions taken to protect the environment identified by Professor Boer over 20 years ago,<sup>147</sup> lack of funds remains the major obstacle, however, lack of avenues for merits review of administrative decisions are also a block on litigation. Since the enactment of the EPBC Act lack of sufficiently broad standing provisions has not been a significant obstacle to public interest environmental litigation at a federal level.

The case studies form part of a steady trickle of public interest environmental cases now running in the Federal Court using the EPBC Act. Not all cases have been successful,<sup>148</sup> but, as the case studies show, several have been. Generally, cases are being won or lost on their legal merit because procedural issues, such as standing, are no longer the major obstacle.

Significantly, in most of the case studies, one of the EDO offices has been the instructing solicitor acting for clients with limited means but with important environmental issues to raise. If the EDO did not exist, quite possibly, the cases would simply not have occurred.<sup>149</sup> There is no doubt the EDO greatly alleviates the impediment that lack of funds cause to public interest environmental litigation in Australia.

Each of the case studies involved important public interest environmental litigation, but the threat of costs weighed strongly against the cases being undertaken. In the *Flying Fox case*, no conservation group would undertake the case because of the threat of costs and, but for the courage of one person willing to risk bankruptcy, the case would not have occurred at all. In the *Nathan Dam case*, which ultimately has led to a major principle being established for environmental impact assessment in Australia, the conservation groups involved came within a hair's breadth of discontinuing the case because of the threat of costs. Were it not for ACF and a member of the public offering indemnities to QCC and WWF if the case were lost, the *Nathan Dam case* would not have occurred. Similarly, HSI in the *Japanese Whaling case* only undertook the case after careful consideration of the potential for adverse costs weighed against the importance of the case.

## ISSUES FOR THE FUTURE

The case studies show that there is an important role for public interest environmental litigation in Australia at a federal level in protecting the environment but also that there are significant obstacles to such litigation. The threat of adverse costs is the most significant obstacle to public interest environmental litigation at present. The lack of merits review is another significant obstacle that restricts the ability of public interest litigants to promote good decision-making under the EPBC Act. Resolving these issues to promote enforcement and good decision-making under the EPBC Act is important for the future operation and development of environmental law in Australia.

Peter Grabosky, Neil Gunningham and Darren Sinclair emphasise the important roles of public interest litigants in modern environmental legal systems, including their legitimate role as surrogate regulators, while guarding against the shortcomings of public interest engagement. They suggest governments can promote these roles (and thereby improve the operation of environmental regulation) by directly subsidising public interest groups, making donations to community groups tax deductible, improving access to information, providing widened standing, and nurturing constructive engagement between business and non-government organisations (NGOs).<sup>150</sup> The following discussion builds upon these recommendations.

## Public interest cost orders

The High Court's decision in *Oshlack* means that the usual rule that costs follow the event will normally be applied against unsuccessful public interest environmental litigants, and this has been the

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<sup>147</sup> Boer, n 2 at 23.

<sup>148</sup> Noting several losses in cases listed in the Appendix.

<sup>149</sup> The EDO acted in all cases other than the *Gunns Pulp Mill case*. FitzGerald and Browne Lawyers acted for TWS in the *Gunns Pulp Mill case*.

<sup>150</sup> Gunningham and Grabosky, n 32, pp 101-104, 408-413.

general practice of the courts since *Oshlack*. As discussed previously, this places severe constraints on public interest environmental litigation due to the risk of adverse costs orders and, to a much lesser extent, requirements to provide security for costs. One way in which these constraints can be significantly alleviated while balanced against the role played by costs in compensating a successful party and deterring unmeritorious litigation is through the provision for courts to make public interest costs orders at the commencement of litigation in appropriate cases.

The ALRC recommended in 1995 that “public interest cost orders” should be provided for so that a public interest litigant could apply to the court or tribunal hearing the case for an order avoiding the usual rule that costs follow the event.<sup>151</sup> The relevant recommendations from the ALRC are worthwhile setting out in full:

13. Public interest costs orders

***Recommendation 45 – public interest costs orders***

A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that

- the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community
- the proceedings will affect the development of the law generally and may reduce the need for further litigation
- the proceedings otherwise have the character of public interest or test case proceedings.

A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.

***Recommendation 46 – objects clause***

The legislation establishing public interest costs orders should state that the object of such orders is to assist the initiation and conduct of litigation that affects the community or a significant sector of the community or will develop the law.

***Recommendation 47 – terms of a public interest costs order***

If the court or tribunal is satisfied that there are grounds for it to make a public interest costs order, it may make such orders as to costs as it considers appropriate having regard to

- the resources of the parties
- the likely cost of the proceedings to each party
- the ability of each party to present his or her case properly or to negotiate a fair settlement
- the extent of any private or commercial interest each party may have in the litigation.

The orders the court or tribunal may make include an order that

- costs follow the event
- each party bear his or her own costs
- the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall
  - not be liable for the other party’s costs
  - only be liable to pay a specified proportion of the other party’s costs
  - be able to recover all or part of his or her costs from the other party
- another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties.
- An order under this provision will be subject to the power of the court or tribunal to make disciplinary and case management costs orders.

***Recommendation 48 – determining the resources of the parties***

When considering the “resources of the parties” the court must have regard to the financial circumstances of each party and to whether the financial capacity of any of the parties to pay an adverse costs order is being affected in whole or part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor.

***Recommendation 49 – timing of a public interest costs order***

<sup>151</sup> Australian Law Reform Commission, n 10, Ch 13 and Recommendations 45-49.

The court or tribunal may make a public interest costs order at any stage of the proceedings including at the start of the proceedings.

Murray Wilcox supported these recommendations for public interest cost orders<sup>152</sup> but Professor Campbell criticised the vagueness and generality of the recommendations. She suggested that “a better approach ... is to move for the incorporation of special costs regimes in particular statutes governing the exercise of particular jurisdictions”.<sup>153</sup>

An existing example of provision for public interest cost orders in Australian legislation is s 49 of the *Judicial Review Act 1991* (Qld).<sup>154</sup> That section relevantly provides (noting that the term, “public interest”, is not defined in the legislation):

#### 49 Costs—review application

- (1) If an application (the *costs application*) is made to the court by a person (the *relevant applicant*) who—
  - (a) has made a review application; or
  - (b) has been made a party to a review application ...; or
  - (c) is otherwise a party to a review application and is not the person whose decision, conduct, or failure to make a decision or perform a duty according to law, is the subject of the application;
 the court may make an order—
  - (d) that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made; or
  - (e) that a party to the review application is to bear only that party’s own costs of the proceeding, regardless of the outcome of the proceeding.
- (2) In considering the costs application, the court is to have regard to—
  - (a) the financial resources of—
    - (i) the relevant applicant; or
    - (ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
  - (b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
  - (c) if the relevant applicant is a person mentioned in subsection (1)(a)—whether the proceeding discloses a reasonable basis for the review application; and
  - (d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c)—whether the case in the review application of the relevant applicant can be supported on a reasonable basis.

Only a handful of applications have been made for orders under this section in the decade since it was enacted. However, a good example of the making of an order under this provision is *Alliance to Save Hinchinbrook Inc v Cook* [2005] QSC 355, which involved applications for judicial review of decisions concerning the construction of breakwaters at the entrance of a marina in the World Heritage-listed Hinchinbrook Channel under the *Marine Parks Act 1982* (Qld). After finding the applicant had limited financial resources, the application was in the public interest and there was a reasonable basis for the application, Jones J ordered that “the applicant will bear only the applicant’s own costs of the applications for statutory review ... regardless of the outcome of those proceedings”.

English courts have developed principles for granting “protective costs orders” to serve the function of “public interest costs orders” in public interest cases. The governing principles for the grant of protective costs orders in England and Wales are:

1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
  - i) The issues raised are of general public importance;
  - ii) The public interest requires that those issues should be resolved;
  - iii) The applicant has no private interest in the outcome of the case;

<sup>152</sup> Wilcox M, “Loosening the Shackles” (1996) 13 EPLJ 151 at 153-154.

<sup>153</sup> Campbell, n 13 at 257.

<sup>154</sup> Queensland legislation also provides an example of provision for the public interest in proceedings to be taken into account in deciding whether to order security for costs. See r 672(i) of the *Uniform Civil Procedure Rules 1999* (Qld).

- iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
  - v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a protective costs order.
  3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.<sup>155</sup>

The ALRC recommendations for public interest cost orders have not been adopted by the Commonwealth government. Despite Professor Campbell's criticisms, the case studies considered above and decisions such as *ASH v Cook* illustrate the need for such provisions and their utility. The English courts have recognised principles for such orders being made but there seems to be little movement by Australian courts to follow this lead without statutory intervention. Provision for public interest cost orders in the *Federal Court Rules* would considerably assist public interest litigants in the Federal Court under legislation such as the EPBC Act. Such provisions could be included in the EPBC Act alone if the government wished to limit their operation to environmental matters. However, the experience in Queensland has been that applications for public interest costs orders under s 49 of the *Judicial Review Act 1991* (Qld) are very rare. The decision in *ASH v Cook* is a rare example of successful reliance on such provisions. This indicates that inclusion of similar provisions in the *Federal Court Rules* would not result in a large number of cases seeking or obtaining such an order.

An alternative to allowing for public interest costs orders to be made is to amend the EPBC Act to make litigation under ss 475 and 487 subject to the "own costs" rule used in environmental courts, such as the Queensland Planning and Environment Court.<sup>156</sup> For example, the following provision might be inserted into the EPBC Act:

**478A Own costs of application for injunction**

- (1) Each party in an application for an injunction made under section 475 must bear their own costs for the proceedings.
- (2) However, the court may order costs for the proceeding as it considers appropriate in the following circumstances—
  - (a) the court considers the proceeding was instituted merely to delay or obstruct;
  - (b) the court considers the proceeding (or part of the proceeding) to have been frivolous, vexatious or an abuse of process; or
  - (c) a party has incurred costs because another party has defaulted in the court's procedural requirements.

Provision for either public interest cost orders or simply an "own costs" rule in the EPBC Act would be of considerable benefit to public interest environmental litigation under the Act.<sup>157</sup> On balance, recognising that cost orders play an important role in compensating a successful party for the expense of the court process and deterring unmeritorious litigation, provision for public interest cost orders in the EPBC Act or the *Federal Court Rules* is preferable. Such a measure would be likely to have no significant implications for increased government expenditure and it would both promote enforcement of the EPBC Act by public interest litigants as surrogate regulators as well as promoting the transparency, integrity and rigour of decision-making under the Act.

**Undertakings as to damages**

Linked to the need for public interest costs orders is the related issue of removing the requirement to provide an undertaking as to damages when seeking an interlocutory injunction. Section 478 of the EPBC Act originally prohibited the Federal Court requiring an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim/interlocutory injunction. That provision was removed as part of the 2006 amendments to the Act and the explanatory notes for the

<sup>155</sup> *R (Corner House Research) v Secretary of State for Trade & Industry* [2005] 1 WLR 2600; [2005] EWCA Civ 192 at [74].

<sup>156</sup> See s 4.1.23 of the *Integrated Planning Act 1997* (Qld).

<sup>157</sup> Ruddock, n 62, p 185, notes this point.



amendments stated:

This amendment brings the Act into line with other Commonwealth legislation where the Federal Court has the discretion whether or not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.<sup>158</sup>

The reason stated in the explanatory notes for the removal of s 478 is disingenuous. While it is true that the Federal Court has a discretion not to require an undertaking as to damages from an applicant for interlocutory relief, in practice that discretion is illusory as the court will invariably require such an undertaking.

Section 478 of the EPBC Act should be reinstated into the EPBC Act. It was not abused while it was included in the EPBC Act and it helps to promote enforcement of the Act. The risk of costs and the difficulty in conducting any litigation in the Federal Court are sufficient deterrents to abuse of such a provision. Any person seeking an interlocutory injunction under the EPBC Act needs to establish a prima facie case and that on the balance of probabilities the relief should be granted. These are significant obstacles to any application for interlocutory relief without adding the need to give an undertaking as to damages.

## Legal aid

In addition, or as an alternative, to changing the usual rule as to costs, one solution to the problem of lack of resources for public interest environment litigation is to provide government funding (ie legal aid). As noted earlier, legal aid for public interest environmental cases was available at a federal level 20 years ago<sup>159</sup> but no longer operates. For a short time in 1995-1996, a federal legal aid scheme existed known as the "National Test Case Fund"<sup>160</sup> but it was abolished after the change in the Commonwealth government in 1996. Legal aid has been available for environmental cases in New South Wales for many years but is not available in other States.<sup>161</sup> In 1995 the ALRC recommended that the Commonwealth should establish a legal assistance indemnity fund to assist public interest litigation generally<sup>162</sup> but this recommendation has not been adopted. Legal aid funding in all States and Territories and at a federal level would be the best solution to the lack of funds for public interest environmental litigation. Obviously, funding would be limited to cases having substantial legal merit.

## A public interest environmental litigation fund

If the federal government remains unwilling to extend legal aid to public interest environmental litigation can the community itself alleviate the problem that lack of funds poses for worthy environmental cases? One means to do this would be to establish a litigation fund based on public donations rather than government funding. Such funds have existed in Canada and the United States for many years<sup>163</sup> and have facilitated a large amount of public interest environmental litigation in those countries. Funding or donations provided by third parties for public interest litigation does not offend the old rules against maintenance and champerty. Public policy now recognises it is desirable, in order to facilitate access to justice, that third parties may provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation. That assistance may be altruistic or motivated by commercial gain.<sup>164</sup>

The resources available through a public interest environmental litigation fund would need to be considerable to make a real contribution to more than a handful of cases. To be able to provide indemnity for costs in even one significant public interest environmental case, the fund will need

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<sup>158</sup> *Environment and Heritage Legislation Amendment Bill (No 1) 2006* Explanatory Memorandum, p 88.

<sup>159</sup> See Boer, n 2 at 28; Bragg, n 57.

<sup>160</sup> This was established under the Prime Minister's *Justice Statement*. See Mossop, n 56; Comino, n 56.

<sup>161</sup> See Boer, n 2 at 30-35; Australian Law Reform Commission, n 10 at [18.9].

<sup>162</sup> Australian Law Reform Commission, n 10, Recommendation 58.

<sup>163</sup> See Boer, n 2 at 35.

<sup>164</sup> See *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at [65], [89]-[91].

capital of at least \$100,000. While making donations to the fund tax deductible would assist considerably, obtaining sufficient resources to allow the fund to operate effectively poses a sizable challenge.

If sufficient resources were available through public donations, the creation and operation of such a fund would be relatively simple. The fund would best be incorporated with a written constitution and stated objective or purpose “to facilitate effective public interest litigation to protect the environment”. The EDO network is the appropriate body to administer such a fund with the support of a board of directors comprised of representatives from conservation groups and eminent environmental professionals. Decisions concerning the provision of funding or an indemnity as to costs by the fund would be made by a board of directors or management committee comprised of directors being the principal solicitor of each of the State and Territory EDOs and other people with a legal or conservation background.

Considering how the lack of resources and the threat of adverse costs orders inhibits public interest environmental litigation, the creation of such a fund would have significant benefits for public interest environmental litigation at a federal level in Australia.

### **Merits review in the EPBC Act**

Whether there is a need for merits review in the EPBC Act is debatable. The inability to challenge the merits of the approvals of the Paradise Dam and the Gunns Pulp Mill illustrate how public interest litigation is limited under the EPBC Act by lack of merits review of administrative decisions. It is not possible to say for certain whether the Minister’s decisions to approve the dam or the pulp mill subject to conditions were correct or not but it is clear that the transparency, integrity and rigour of the processes by which the decisions were reached would have been markedly improved through merits review by an independent body such as the AAT.

As noted earlier, merits review is not available for either applicants or third parties in relation to decisions concerning controlled actions under Pts 7-9 of the EPBC Act, which are the decisions of most general importance for the operation of the Act in protecting the environment. Merits review by the AAT is available only for relatively minor permits, plans and conservation orders under Pts 13, 13A and 15 of the EPBC Act.<sup>165</sup>

As was discussed above, judicial review is typically of little use for environmental litigation where it is the poor nature of an administrative decision that needs to be redressed. If the Minister or their delegate has “ticked all the right boxes” and been careful in writing their reasons for decision under the EPBC Act, then what is essentially a very poor decision allowing highly damaging development may not be challenged. This leaves enormous room for political decision-making about a project, resulting in short-term, economic decision-making rather than the promotion of sustainable development. Decision-making subject to merits review would be expected to be less influenced by short-term, political considerations and more strongly based upon the evidence supporting or opposing a proposed development. Simply the existence of a right of merits review (as opposed to its exercise) can have a positive effect on the integrity of administrative decision-making, as decision-makers will act knowing of the potential that they may be required to justify their decision based on evidence in an independent court or tribunal.

The Administrative Review Council (ARC) suggests that, as a general principle, an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review, including decisions that affect intellectual and spiritual interests, and not merely property, financial or physical interests.<sup>166</sup> The ARC suggests there are two types of decisions that, by their nature, are unsuitable for merits review: legislation-like decisions of broad application; and decisions that automatically follow from the happening of a set of circumstances.<sup>167</sup>

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<sup>165</sup> See n 36 for a list of the relevant sections.

<sup>166</sup> Administrative Review Council, n 25 at [2.1]-[2.6].

<sup>167</sup> Administrative Review Council, n 25 at [3.1].

The ARC suggests factors that may exclude merits review based on the nature of the decision, the effect of the decision, and the costs of merits review. Of particular relevance to decisions under the EPBC Act the ARC suggests that merits review is generally inappropriate for:

- decisions relating to the allocation of a finite resource, from which all potential claims for a share of the resource cannot be met, and an allocation that has already been made to another party would be affected by overturning the original decision;
- policy decisions of a high political content (for example, decisions affecting Australia's relations with other countries, concerning national security, or concerning major political controversies); and
- decisions involving extensive inquiry processes, such as public inquiries and consultations that require the participation of many people (eg decisions made under the *Australian Heritage Commission Act 1975* (Cth) to enter a place on the Register of the National Estate).<sup>168</sup>

The ARC also suggests factors that do not justify excluding merits review, including:

- the decision subject to review is made by an expert body, or requires specialist expertise;
- there is a potential for a relatively large number of people to seek merits review of decisions under a particular decision-making power; and
- judicial review of the decision is available.<sup>169</sup>

Considering these guidelines there are strong factors in favour of allowing merits review in the AAT of decisions concerning controlled actions under Pts 7-9 of the EPBC Act, both from the perspective of applicants and third parties. Decisions under Pts 7-9 of the EPBC Act certainly affect the interests of applicants and the public interest in the protection of the environment. These decisions are neither legislative nor automatic. They will rarely, if ever, involve allocation of a finite resource, from which all potential claims for a share of the resource cannot be met, and an allocation that has already been made to another party would be affected by overturning the original decision. They are not policy decisions of a high political content as contemplated by the ARC. Although public consultation occurs regarding decisions, no public inquiries have been held under Pt 8 of the Act in the first eight years of the operation of the Act, even for the major dispute over the Gunns Pulp Mill. The decisions, therefore, do not generally involve extensive inquiry processes.

The major argument against amending the EPBC Act to allow for merits review of decisions under Pts 7-9 of the Act is that the appeal process would seriously lengthen the possible time and cost of the EPBC Act approval process for applicants and the Commonwealth. Even in highly efficient courts and tribunals considering similar planning and environmental issues, such as the Queensland Planning and Environment Court, merits review typically take three to six months to resolve. In the case of the Gunns Pulp Mill such delays are ostensibly why Gunns Ltd withdrew from the RPDC process and demanded swifter approval of the pulp mill. On the other hand, if good decision-making is the main objective, rather than merely a speedy decision, then merits review is attractive.

The potential for increasing the costs and length of time in gaining approval under the EPBC Act and for the administration of the Act is a real consideration weighing against allowing merits review. However, proponents of major developments who stand to make significant commercial profit from gaining approval for their project are rarely constrained by such costs, which typically form a small percentage of overall costs of a project and can be passed on to purchasers. From the Commonwealth government's perspective, the greater liability in allowing merits review is not challenges from public interest litigants but challenges from proponents who are dissatisfied with decisions under the Act that impose extra costs on their development. Developer appeals far outnumber public interest litigation under State planning laws that allow merits review. Where costly conditions are imposed on developers, challenging those conditions in a merit appeal can make good commercial sense. One way to reduce this exposure would be to restrict the right to seek merits review to third parties but such a measure would be inequitable for proponents who should also be entitled to challenge the merits of decisions that affect their interests. The extra costs and time involved in decision-making must also be

<sup>168</sup> Administrative Review Council, n 25, Ch 4.

<sup>169</sup> Administrative Review Council, n 25, Ch 5.

weighed against the benefits of improving the protection of the environment by promoting good decisions under the EPBC Act. If good decision-making is the main objective rather than merely cheap and speedy decisions then merits review is attractive.

Applying the guidelines of the ARC, merits review should be provided for both applicants and third parties to the AAT for administrative decisions under Pts 7-9 of the EPBC Act. Merits review does not guarantee that administrative decisions are correct and preferable but it certainly promotes good decisions as a general rule. A similar conclusion appears to be the case for other decisions under the EPBC Act, such as the decision to amend the list of threatened species and key threatening processes under s 184.

## Recommendations for EPBC Act

In summary, the following specific measures would substantially alleviate the remaining barriers to public interest environmental litigation at a federal level in Australia and facilitate its roles in enforcing and promoting good decision-making under the EPBC Act:

1. Insert a provision in the EPBC Act or in the *Federal Court Rules* allowing public interest litigants to apply to the Federal Court at the beginning of a case for a public interest costs order to avoid the usual rule as to costs as recommended by the ALRC in 1995 or modelled on s 49 of the *Judicial Review Act 1991* (Qld).
2. Reinsert s 478 into the EPBC Act to remove the requirement to provide an undertaking as to damages when seeking an interim or interlocutory injunction under the EPBC Act.
3. Re-establish government funding (legal aid) for public interest environmental litigation at a federal level for cases having substantial legal merit and administer it in a similar manner to the existing New South Wales Legal Aid scheme.
4. In the absence of, or in addition to, legal aid being re-established by the federal government, conservation groups and philanthropic organisations should establish an environmental litigation fund, administered by a board to approve funding requests, to fund public interest environmental litigation.
5. Provide merits review by the AAT of decisions under ss 75 and 133 of the EPBC Act in accordance with the recommendations of the ARC.

The first of these recommendations would be likely to be largely cost free for the federal government and would greatly alleviate the current threat of adverse costs orders for public interest environmental litigants.

## Recommendations for the Australian emissions trading scheme

The lessons from experience under the EPBC Act can and should be applied to improving the effectiveness of the emerging regulatory response to climate change by creating wide standing for enforcement and review of administrative decisions. Public interest litigation can play similarly important roles in enforcing and improving decision-making under the Australian emissions trading scheme (ETS) as it has under the EPBC Act. Such an approach would build upon Gunningham and Grabosky's recommendations to empower third parties (both NGOs and commercial competitors), which are in the best position to act as surrogate regulators as a strategy for designing effective and efficient regulatory systems.<sup>170</sup> Such an approach is consistent with providing open standing for "any person" to enforce statutory standards of behaviour under market-orientated and consumer protection laws such as the *Trade Practices Act 1974* (Cth).

Unfortunately, from the perspective of creating an effective regulatory regime, the role of public interest litigants and other third parties appears to be largely ignored by the emerging federal climate change laws. They are the poorer for this omission. The *National Greenhouse and Energy Reporting Act 2007* (Cth) (NGER Act) contains no provision for third parties to enforce it. Enforcement depends largely on the statutory body administering the Act – the Greenhouse and Energy Data Officer (GEDO). Section 55 allows merits review of many of the GEDO's decisions but no provision is made for third parties.

<sup>170</sup> Gunningham and Grabosky, n 32, pp 94-106, 408-413.

The Green Paper recently released by the Commonwealth as part of the consultation process of the proposed Australian ETS also contains no reference to the role of third parties in enforcement. Part 5.5 of the Green Paper, which provides a “broad outline of possible approaches to compliance and enforcement” of the ETS, is silent on the role of third parties.<sup>171</sup> While this outline is stated to be merely to “elicit early views of stakeholders”, enforcement is clearly modelled on a central regulator without third party involvement as surrogate regulators. The Green Paper suggests that, “the regulator’s decisions should be subject to appropriate review processes, including judicial review pursuant to the ADJR Act and merits review of decisions by the AAT”, but no mention is made of third parties and it appears that such rights will only be extended to the corporations affected by the decisions.<sup>172</sup>

Gunningham and Grabosky’s leading work on designing environmental regulation described “the traditional view of regulation as exclusively a governmental function” as “outmoded”,<sup>173</sup> but that is the approach proposed in the Green Paper for the Australian ETS. Experience under the EPBC Act indicates that public interest litigants can play an important role in enforcement and improving administrative decision-making.

Based on the Gunningham and Grabosky’s recommendations for designing effective environmental regulatory systems and the empirical experience under the EPBC Act analysed in this article, the following recommendations can be made for the design of the ETS:

1. Provide wide standing for public interest litigants and other third parties (including commercial competitors) to enforce the ETS as surrogate regulators.
2. Provide wide standing for public interest litigants and other third parties to challenge administrative decision-making under the ETS both through judicial review in the Federal Court and merits review in the AAT.
3. Provide for public interest costs orders to empower third parties to act as surrogate regulators in appropriate cases (the courts can refuse to grant orders in inappropriate cases).
4. Provide legal aid for cases with substantial legal merit.

Adopting these measures in the ETS is likely to significantly improve enforcement and compliance in a cost-effective manner. When compared with the difficulty, cost, and likely inefficiency of operating a central government regulator, sharing the responsibility for enforcement with third parties and empowering them to act as surrogate regulators can be a cost-effective and smart regulatory strategy. Exposing government decision-making under the ETS to judicial review and merits review by third parties will greatly improve the transparency, integrity, and rigour of those decisions in comparison to only exposing them to review by corporations affected by the decisions, as appears to be proposed by the Green Paper.

## CONCLUSION

Over the past 20 years there have been important improvements for public interest environmental litigation at a federal level in Australia. The analysis presented here indicates that public interest environmental litigation at a federal level in Australia is fulfilling its multiple roles in the legal system by increasing enforcement of environmental laws, promoting better decision-making by governments about activities impacting on the environment, developing important legal principles, providing a focus for public debate, and highlighting issues for law reform. The problem of lack of standing has largely been overcome by provision of wide standing for conservationists to enforce the EPBC Act and to challenge decisions under it through judicial review. The problems of lack of public knowledge and funds have been significantly alleviated by the establishment of the EDO network. The EDO plays a vital role in promoting public interest environmental litigation by providing legal knowledge, skills, and experience that is accessible and free for community litigants.

<sup>171</sup> Department of Climate Change, *Carbon Pollution Reduction Scheme Green Paper* (Australian Government, 2008) pp 215-216, 439, 448, <http://www.climatechange.gov.au/greenpaper/report/index.html> viewed 25 July 2008.

<sup>172</sup> Department of Climate Change, n 171, p 448.

<sup>173</sup> Gunningham and Grabosky, n 32, p 93.



However, there are undoubtedly remaining barriers. The common theme of the case studies presented in this article is the significant obstacle that costs pose to public interest environmental litigation. Costs are the largest single inhibitor to members of the public pursuing important cases to protect the environment. There is a real justification and need for statutory reform of the rule that costs follow the event in public interest environmental cases. There is also genuine need for legal aid and a public fund to be established to provide financial assistance for public interest environmental litigation.

The lack of merits review of administrative decisions under the EPBC Act is also a significant inhibitor of public interest litigation under the Act to protect the environment. Applying the principles stated by the ARC, merits review should be provided for decisions under Pts 7-9 of the EPBC Act. This would greatly promote the transparency, integrity and rigour of such decisions. Merits review would also reduce the potential political pain of the government in making controversial decisions by placing ultimate responsibility for such decisions in the hands of an independent body such as the AAT.

The experience of the operation of the EPBC Act provides important lessons for other environmental laws, including the Australian ETS that is proposed to be established by 2010. The first step to the ETS, the NGER Act, does not contain any provision for third parties to enforce it or to challenge administrative decisions made under it. If this approach is taken for the Australian ETS then the potential for effective enforcement and operation of the scheme will be significantly impeded. Experience under the EPBC Act indicates that providing standing for public interest litigants to enforce the legislation and challenge administrative decisions made under it significantly promotes enforcement and improves decision-making.

## APPENDIX – LIST OF EPBC ACT CASES

Cases decided under the EPBC Act (as at 16 July 2008) in rough chronological order and divided into four groups:

- A. Cases for injunctive relief and civil penalties;
- B. Judicial review cases;
- C. Merits review cases in the AAT; and
- D. Criminal prosecutions.

To avoid confusion, while many of these cases have been reported in the FCR, ALR or LGERA, only media neutral citations of different decisions in the history of each case are listed. Cases that have settled, been discontinued, or remain pending without any judicial decision at this stage are not included.

### A. Cases for injunctions and civil penalties

1. *Booth v Bosworth* [2000] FCA 1878; [2001] FCA 1278; [2001] FCA 1453; [2001] FCA 1718; *Bosworth v Booth* [2004] FCA 1623 (*Flying Fox case*).
2. *Schneiders v Queensland* [2001] FCA 553; *Jones v Queensland* [2001] FCA 756 (*Fraser Island Dingo case*).
3. *Mees v Roads Corp* [2003] FCA 306; [2003] FCA 410 (*Scoresby Freeway case*).
4. *Minister for the Environment & Heritage v Wilson* [2004] FCA 6 (Civil penalty of \$12,500 for shark netting in the Great Australian Bight Marine Park).
5. *Minister for Environment & Heritage v Greentree* [2003] FCA 857; [2004] FCA 741; [2004] FCA 1317; *Greentree v Minister for the Environment & Heritage* [2005] FCAFC 128 (*Greentree case*).
6. *Save the Ridge Inc v National Capital Authority* [2004] FCA 996; [2004] FCAFC 209 (*Canberra Gungahlin Drive Extension case* – injunction to restrain clearing).
7. *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; [2005] FCA 664; [2006] FCAFC 116; [2007] FCA 124; [2008] FCA 3; [2008] FCA 36 (*Japanese Whaling case*).

8. *Brown v Forestry Tasmania* [2005] FCA 1210; [2006] FCA 468; [2006] FCA 469; [2006] FCA 1729; *Forestry Tasmania v Brown* [2007] FCA 604; [2007] FCAFC 186; [2008] HCATrans 202 (*Bob Brown's Wielangta Forest case*).
9. *Minister for Environment and Heritage v Warne* [2007] FCA 599 (Civil penalty of \$25,000 for trawling in Mermaid Reef National Marine Park Nature Reserve, WA).

## B. Judicial review cases

1. *Humane Society International v Minister for the Environment & Heritage* [2003] FCA 64 (*HSI Flying Fox Administrative Guidelines case*).
2. *Queensland Conservation Council Inc v Minister for Environment & Heritage* [2003] FCA 1463; *Minister for the Environment & Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190 (*Nathan Dam case*).
3. *Mees v Kemp* [2004] FCA 366; [2004] FCA 549; [2005] FCAFC 5 (*Scoresby Freeway case (No 2)*).
4. *Tasmanian Conservation Trust v Minister for Environment & Heritage* [2004] FCA 883 (*Meander Dam case*).
5. *Save the Ridge Inc v Commonwealth of Australia* [2004] FCA 1167; [2004] FCA 1289; [2005] FCA 17; [2005] FCA 157; [2005] FCA 355; [2005] FCAFC 203; [2006] FCAFC 51 (*Canberra Gungahlin Drive Extension case – judicial review*).
6. *Paterson v Minister for the Environment & Heritage* [2004] FMCA 924 (*Powerlink transmission line case – lack of standing*).
7. *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736 (*Wildlife Whitsunday case*).
8. *Bald Hills Wind Farm Pty Ltd v Campbell, Minister for Environment & Heritage* [2006] FCA 848 (*Bald Hills Wind Farm case*).
9. *The Wilderness Society Inc v Turnbull, Minister for the Environment & Water Resources* [2007] FCA 1178; [2007] FCA 1863; [2007] FCAFC 175; [2008] FCAFC 19 (*Gunns Pulp Mill case*).
10. *Investors for the Future of Tasmania Inc v Minister for the Environment & Water Resources* [2007] FCA 1179; [2007] FCA 1864 (*Second Gunns Pulp Mill case*).
11. *Anvil Hill Project Watch Assn Inc v Minister for the Environment & Water Resources* [2007] FCA 1480; [2008] FCAFC 3 (*Anvil Hill Coal Mine case*).
12. *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 8; [2008] FCA 399 (*Port Phillip Bay dredging case*).
13. *Phosphate Resources Ltd v Minister for the Environment, Heritage & the Arts* [2008] FCA 385 (*Christmas Island Phosphate Mining case*).
14. *Lawyers for Forests Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 588 (*Third Gunns Pulp Mill case*).
15. *Your Water Your Say Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 670; [2008] FCA 900 (*Gippsland Desalination Plant case*).
16. *Lansen v Minister for Environment & Heritage* [2008] FCA 903 (*McArthur River Mine case*).

## C. Merits review cases in the AAT

1. *Wildlife Protection Assn of Australia Inc and Minister for the Environment & Heritage, Re* [2003] AATA 236 (NSW kangaroo management program).
2. *Wildlife Protection Assn of Australia Inc and Minister for Environment & Heritage, Re* [2004] AATA 1383 (Qld, SA and WA kangaroo harvesting plans).
3. *International Fund for Animal Welfare (Aus) Pty Ltd and Minister for Environment & Heritage, Re* [2005] AATA 1210; [2006] AATA 94 (*Asian Elephants case*).
4. *Humane Society International and Minister for the Environment & Heritage, Re* [2006] AATA 298 (*Southern Bluefin Tuna case*).
5. *Wildlife Protection Assn of Australia Inc and Minister for Environment and Heritage, Re* [2006] AATA 29; [2006] AATA 953 (Flinders and King Island, Tasmania, wallaby harvesting plans).

6. *Nature Conservation Council of NSW Inc and Minister for Environment & Water Resources, Re* [2007] AATA 1876 (*Grey Nurse Shark case*).

#### **D. Criminal prosecutions**

1. *Morgan v The Queen* [2007] NSWCCA 8 (appeal against sentence of imprisonment for smuggling bird eggs).

In addition to *Morgan v The Queen*, there have been approximately 30 prosecutions involving Ch 5 (Biodiversity conservation) offences decided summarily at the magistrates or local court level, according to annual reports on the operation of the Act.<sup>174</sup> For example the 2005-06 annual report on the operation of the EPBC Act notes:

Parks Australia successfully prosecuted five residents of the Cocos (Keeling) Islands for possession of 216 dead booby birds and 14 dead frigate birds, both listed migratory species. All of the defendants pleaded guilty in the Cocos (Keeling) Islands Magistrate's Court on 7 December 2005 and were convicted under section 211C of the EPBC Act and released on two-year (\$5,000) good behaviour bonds. Each was ordered to pay legal costs of \$2,173.9.

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<sup>174</sup> Available at the Department of the Environment, Water, Heritage and the Arts website, <http://www.environment.gov.au/about/publications/annual-report/index.html> viewed 10 June 2008.