IN THE SUPREME COURT OF WESTERN AUSTRALIA
COMMERCIAL AND MANAGED CASES LIST

CIV 2445 OF 2015

B E T W E E N:

SAVE BEELIAR WETLANDS (INC) First Applicant

and

CAROLE DE BARRE Second Applicant

and

THE HONOURABLE ALBERT JACOB MLA; MINISTER FOR ENVIRONMENT First Respondent

and

ENVIRONMENTAL PROTECTION AUTHORITY Second Respondent

and

COMMISSIONER OF MAIN ROADS Third Respondent

and

ATTORNEY GENERAL FOR WESTERN AUSTRALIA Intervener

WRITTEN SUBMISSIONS OF THE FIRST AND SECOND RESPONDENTS AND THE INTERVENER

Case Manager:	The Honourable the Chief Justice
Date of document:	25 November 2015
Filed on behalf of:	The First and Second Respondents and the Intervener
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GROUND 1

Introduction

1. In its report on the Roe Highway Extension (**the Report**),[1] the second respondent (**the EPA**) stated that "after all avoidance and minimisation actions have occurred … significant residual impacts remain".[2] After setting out those significant residual impacts, the EPA observed that:[3]

> *CCWs, threatened fauna, priority fauna and conservation areas are all critical assets in accordance with Position Statement 9 Environmental Offsets. Impacts to critical assets should be avoided and minimised as far as possible. The residual impacts are considered to be significant due to the importance of these assets.*

2. The EPA recommended the imposition of conditions to address these residual impacts, including conditions providing for offsets which the EPA considered would satisfactorily counterbalance the residual impacts.[4]

3. In ground 1, the applicants contend that the EPA fell into jurisdictional error because:

   (a) the EPA was required under the *Environmental Protection Act 1986* (WA) (**the Act**)[5] but failed to ask whether, and on what basis, an offsets package was capable of making the Roe Highway Extension proposal (**the Proposal**) environmentally acceptable (ground 1(a));

   (b) the EPA failed to have regard to mandatory relevant considerations, namely the following three documents published by the EPA (collectively, **the three documents**):

      (i) Position Statement 9 *Environmental Offsets* (**the Position Statement**);[6]

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1 See the affidavit of Alanna Bernice Fandry sworn 23 October 2015 (**Fandry affidavit**) at [51] and Attachment ABF 50, pp 16, 2282-2394.

2 Fandry affidavit Attachment ABF 50, p 2333 (p 40 of the Report).

3 Fandry affidavit Attachment ABF 50, p 2333 (p 40 of the Report).

4 See for example Fandry affidavit Attachment ABF 50, pp 2286-2289 and especially p 2288 (pp iii-vi and especially p v of the Report).

5 In these submissions, all references to statutory provisions are references to the provisions of the Act unless otherwise stated.

6 See the affidavit of Naomi Jane Arrowsmith affirmed 23 October 2015 (**Arrowsmith affidavit**) at [29] and Attachment NJA 5, pp 7, 49-84.

(ii) Guidance Statement 19 *Environmental Offsets – Biodiversity* (**the Guidance Statement**);[7] and

(iii) Bulletin 1 *Environmental Offsets – Biodiversity* (**the Bulletin**),[8]

which the applicants contend created a presumption that the EPA would recommend against approval of the Proposal because it was likely to have significant adverse impacts on critical assets (**the presumption**) (ground 1(b));[9] and

(c) the EPA failed to explain its departure from the presumption and, in so doing, failed to give adequate reasons (ground 1(c)).

Ground 1(a)

4. Based on the applicants' submissions, the gravamen of ground 1(a) is that the EPA never considered whether the Proposal was "inherently environmentally unacceptable"[10] despite being under a statutory duty to do so. So understood, ground 1(a) should be rejected for three reasons.

The applicants' submission involves reasoning from non-statutory concepts

5. The concept of the "environmentally unacceptable" and its counterpart, the "environmentally acceptable",[11] are not part of the statutory scheme. At best, they may be convenient shorthand expressions describing the outcome of the EPA's assessment[12] and the environmental impact assessment process provided for by Part IV of the Act.[13]

6. It is important to bear in mind that it is a mistake to begin the search for the meaning of a statute – or the obligations imposed by that statute – with

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7 See the Arrowsmith affidavit at [29] and Attachment NJA 6, pp 7, 85-126.

8 See the Arrowsmith affidavit at [29] and Attachment NJA 7, pp 7, 127-129.

9 In the written submissions on behalf of the applicants filed 20 November 2015 (**AS**) [20], the applicants also contend that the presumption must arise from the terms of section 44(2)(b) for the reasons given in AS [1]-[11]. However, that contention does not fall within ground 1(b), which is expressed in terms of the three documents.

10 See for example AS [29]-[31].

11 As to which see AS [2]-[4].

12 As set out in the report to be prepared under section 44.

13 As set out in the implementation statement or decision of the first respondent (**the Minister**) contemplated by section 45.

anything other than the text of the statute, such as judicial elaborations, ministerial statements, historical considerations or, in this case, convenient shorthand expressions.[14] It is therefore a mistake to import a non-statutory concept such as the "environmentally unacceptable" into the statutory scheme and then seek to reason from that concept.

7. The contention, at [4] of the applicants' submissions, that the EPA acts beyond power if it recommends approval for a proposal which it has determined, if implemented, would be environmentally unacceptable,[15] is a test without meaning. In any event, even if the test were known to the Act, the statutory scheme does not (and could not) require the EPA to determine the environmental unacceptability of a proposal in a vacuum devoid of consideration of conditions which might be imposed in respect of the implementation of that proposal.

8. When attention is directed in accordance with principle to the statutory text, it is apparent that the text does not support, whether expressly or by implication, any requirement that would support ground 1(a).

The statutory scheme does not require the approach for which the applicants contend

9. In preparing its report under section 44, section 44(2)(b) requires the EPA to include a recommendation that the Minister determine either:

   (a) that the proposal may be implemented (with or without being subject to any conditions or procedures) (**a positive recommendation**); or

   (b) that the proposal may not be implemented (**a negative recommendation**).

10. However, neither section 44 nor the Act more generally requires the EPA to:

   (a) separately consider whether to make a negative recommendation; and

   (b) only then consider whether there are any conditions or procedures which may address the impacts of the proposal being assessed.

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[14] See *Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307; (2013) 45 WAR 471, 501-502 [167] (Martin CJ).

[15] AS [4].

11. Nor is there anything in the nature of that process which supports such a requirement. In assessing a proposal, questions of identifying key environmental factors,[16] impacts on those factors, how they might be addressed and whether the EPA should make a positive or negative recommendation are linked and can be considered together.

12. If the EPA considers that there are conditions or procedures which can satisfactorily address those impacts, it is open to the EPA under the statutory scheme to decide to make a positive recommendation subject to those conditions or procedures. As the Report discloses,[17] that is what the EPA did in its assessment of the Proposal.

13. Alternatively, the EPA may conclude after considering possible conditions or procedures that the impacts cannot be satisfactorily addressed through the imposition of conditions or procedures. In those circumstances, depending in part upon the significance of the impacts in question, the EPA may decide to make a negative recommendation.

14. The EPA is, of course, required to have regard *inter alia* to the objects of the Act[18] and its own objectives[19] in assessing a proposal. However, once again there is nothing in those provisions which requires the EPA, expressly or by implication, to consider whether to make a negative recommendation either before, or separately from, considering any conditions or procedures which may address the proposal's impacts and support a positive recommendation.

The protection of the State's environment does not require the approach for which the applicants contend

15. The applicants rely on these and other provisions[20] for the proposition that the EPA "must perform its functions and exercise its powers under section 44 for

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16 That such factors must be identified is apparent from section 44(2)(a).

17 Fandry affidavit Attachment ABF 50 pp 2288-2289 (pp v-vii of the Report) which sets out management measures to reduce indirect residual impacts; section 7.1 at pp 2341-2342 (pp 48-49 of the Report) which summarises the conditions; Appendix 4 at pp 2373-2393 which sets out a schedule of recommended conditions.

18 See section 4A.

19 See section 15.

20 See AS [3], which refers to sections 4A, 7(2), 8, 15 and 44(2)(a).

the purpose of protecting the environment". However, this characterisation of the EPA's functions and powers is so general as to be another non-statutory label and, with respect, offers no assistance in determining the extent of the EPA's jurisdiction and, hence, whether the EPA has fallen into jurisdictional error.

16. Neither the provisions upon which the applicants rely, nor the general concept of protecting the environment, require the EPA to consider whether to make a negative recommendation either before, or separately from, considering any conditions or procedures which may address a proposal's impacts and support a positive recommendation. To suggest otherwise is to ignore both:

    (a) the extent to which questions about how the object of the Act and the EPA's objectives are to be pursued and attained are a matter for judgement; and

    (b) the broad scope which the EPA possesses to tailor the requirements of an environmental impact assessment process to the circumstances of the proposal before it.[21]

The EPA did not fall into jurisdictional error

17. In the absence of credible evidence to the contrary, the EPA is presumed to have complied with the duties imposed by the Act and to have taken relevant matters into account.[22]

18. For the reasons set out above, the EPA was not required to consider whether to make a negative recommendation either before, or separately from, considering any conditions or procedures which may address the proposal's impacts and support a positive recommendation. The EPA recognised certain impacts, satisfied itself that those impacts could be appropriately addressed by offsets which it identified and made a positive recommendation as it was entitled to do.

19. Ground 1(a) should be dismissed.

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21 See for example sections 10, 40 and 122.

22 *Bienke v Minister for Primary Industries and Energy* [1996] FCA 35; (1996) 63 FCR 567, 576 (Black CJ, Davies and Sackville JJ).

Ground 1(b)

Mandatory relevant considerations

20. It may be accepted that the three documents contemplate the presumption applying to the assessment of certain proposals.[23]

21. As the applicants submit,[24] whether something is a mandatory relevant consideration is a matter of statutory construction, having regard to the subject matter, scope and purpose of the Act.[25] However, it will generally be difficult, if not impossible, to imply a mandatory relevant consideration from generally stated objects.[26] That is essentially what the applicants invite the Court to do.

22. The applicants rely upon:[27]

    (a) the object of the Act and the objectives of the EPA under sections 4A and 15 respectively;

    (b) the functions of the EPA under section 16(a) and (n);

    (c) the powers of the EPA under section 17(3)(b) and (d); and

    (d) sections 38, 39A and 44, which respectively address the referral of a proposal to the EPA, decision-making by the EPA on whether to assess the proposal and the EPA's obligation to provide the Minister with a report on the outcome of its assessment,

    all of which are expressed in general terms.

23. None of those provisions expressly make any of the three documents a mandatory relevant consideration. Nor is it apparent how it could be implied from those provisions that any of the three documents is something which the EPA must consider in assessing a proposal.

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23 See for example the Arrowsmith affidavit Attachment NJA 5, p 67 (p 14 of the Position Statement).

24 AS [39].

25 The leading case on the point remains *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; (1986) 162 CLR 24, 39-40 (Mason J).

26 See for example *Arnold v Minister administering the Water Management Act 2000* [2014] NSWCA 386 [84] (Tobias AJA, Meagher and Barrett JJA agreeing).

27 AS [39].

24. In particular:

(a) the EPA's function of conducting environmental impact assessments under section 16(a) and the EPA's function of establishing and developing criteria for assessing the extent of environmental change, pollution and environmental harm under section 16(n) do not make any of the three documents a mandatory relevant consideration. The sections merely empower the EPA to perform those activities when it determines it is appropriate to do so and do not give rise to any binding obligation on the EPA to apply the three documents;

(b) the EPA's power to provide advice to the Minister under section 17(3)(b) is not relevant to the subject matter of the three documents and cannot make any of them a mandatory relevant consideration; and

(c) the EPA's power to consider and make proposals as to the policy to be followed in the State with regard to environmental matters under section 17(3)(d):

(i) does not, on its terms, contemplate that the EPA will itself make or finalise those policies;

(ii) is not relevant to the subject matter of any of the three documents; and

(iii) cannot make any of the three documents a mandatory relevant consideration.

25. The three documents may be contrasted with environmental protection policies, which the EPA may prepare and seek approval for[28] and, on being approved by the Minister, have the force of law.[29]

26. As none of the three documents are mandatory relevant considerations, ground 1(b) should be dismissed.

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[28] See section 16(f).

[29] Section 33(1).

The presumption is not a mandatory relevant consideration

27. If the applicants' contention is that the mandatory relevant consideration is the presumption arising from the three documents, then the following can be said.

28. The three documents do not apply the presumption to every proposal where there is a "significant residual impact":

    (a) As test 4 of the Position Statement identifies, the question is whether "residual environmental impacts remain significant but not so significant that the activity is likely to be found environmentally unacceptable (including in a cumulative impacts context)";[30]

    (b) As stated in the Guidance Statement, "[t]he 'significance' of a proposal...is also likely to influence the extent and type of environmental offsets that may be required...it is the EPA's interpretation of 'significance' on a case-by-case basis that influences the decision to assess, the consideration of offsets and the EPA's advice to the Minister...".[31]

29. These tests were observed by the EPA as discussed below at [32] to [33].

The presumption does not arise under the Act

30. Further, and contrary to the applicants' submission,[32] the presumption does not arise from the Act.

31. The applicants rely upon the following features of the statutory scheme to support their contention that the presumption does arise from the Act.[33] However, those features do not support the existence of such a statutory presumption.

    (a) *The long title.* The long title does what long titles do – describe in general terms the matters for which the Act is intended to provide. That general description makes no reference to the presumption (or any

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30 Arrowsmith affidavit Attachment NJA 5 p 71 (p 18 of the Position Statement).

31 Arrowsmith affidavit Attachment NJA 5 p 91 (p 4 of the Guidance Statement). See also Arrowsmith affidavit Attachment NJA 5 p 104 (Figure 2 of the Guidance Statement).

32 AS [20].

33 AS [20], citing AS [1]-[11].

other presumption) and cannot support the implication of such a presumption.

(b) *The objects of the Act under section 4A.* Section 4A provides that the object of the Act is to protect the environment of the State, having regard to certain principles set out in a table to the section. Protection does not necessarily entail non-interference with the environment, as otherwise there would be no need for the environmental impact assessment process provided by Part IV of the Act which is predicated upon there being a proposal that is likely, if implemented, to have a significant effect on the environment.[34] Further, the principles which appear in the table neither refer to nor support the implication of the presumption.

(c) *The objectives of the EPA under section 15.* Section 15 provides that the EPA's objective is to use its best endeavours to protect the environment and to prevent, control and abate pollution and environmental harm. Once again, the objective of protecting the environment does not necessarily entail non-interference with the environment. Further, the objective of preventing, controlling and abating pollution and environmental harm does not refer to or support the implication of the presumption.

(d) *The expertise and independence of the EPA.* Section 7(2) provides for the EPA to comprise five members appointed on account of their interest in, and experience of, matters affecting the environment generally. Section 8 provides for the independence of the EPA and its chairman by providing that, subject to the Act, they are not subject to the direction of the Minister. These features of the statutory scheme do not support the existence of the presumption. Instead, they contemplate that the EPA will have the expertise and independence to assess a proposal under Part IV of the Act on its merits in accordance with the statutory scheme, having regard *inter alia* to the key environmental

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[34] See sections 37 (definition of "significant proposal") and 38.

factors, impacts on those factors and how those factors may be addressed.

(e) *The terms of section 44(2)(b).* As has already been submitted[35], section 44(2)(b) requires the EPA to include in its report prepared under section 44 either a positive recommendation or a negative recommendation. However, the possibility that the EPA may make a negative recommendation does not provide any statutory basis for a presumption that the EPA will make a negative recommendation. Nor, for the reasons given above in respect of ground 1(a), does the general concept of protecting the State's environment require such a presumption.

In any event, the use of offsets was consistent with the three documents

32. To the extent that the Court finds that the three documents or the presumption in it are mandatory relevant considerations, the applicants must show that there was a failure to consider those documents. The burden for the applicants to discharge is the subject of debate within the case law.[36] The divergence in the authorities does not need to be resolved in this matter[37] because the evidence does not meet the burden on either test – it identifies that the EPA considered and applied the tests as set out in the Position Statement as to when and how offsets would be approved:[38]

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35 These submissions [9].

36 On one characterisation of the burden, the applicants must show that the decision-maker has not considered it either at all: *Marshall v Metropolitan Redevelopment Authority* [2015] WASC 226 [108] (Pritchard J) citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 40-41 (Mason J). On another characterisation of the burden, the applicants must show that the EPA failed to give it proper, genuine and realistic consideration: *Re Shire of Carnarvon; Ex parte Humphrey* [2005] WASCA 182, [60] (McLure JA, LeMiere AJA agreeing), but cf *A v Corruption and Crime Commissioner* [2013] WASCA 288; (2013) 306 ALR 491, 515-516 [88] - [92] where Martin CJ and Murphy JA concluded it was unnecessary to determine which line of authorities was to be preferred.

37 If the Court considers that the question of which burden should be applied does need to be resolved then the first and second respondents and the intervener consider that the appropriate burden is that the applicants must show that the decision-maker failed to consider the matter at all. The Act offers no indication as to the weight to be accorded to relevant considerations, and it is the decision-maker's role and not the court's to determine the appropriate weight to be given to a relevant consideration because no jurisdictional error arises because it merely fails to place adequate weight upon a relevant consideration: *Marshall v Metropolitan Redevelopment Authority* [2015] WASC 226 [117] (Pritchard J).

38 Arrowsmith affidavit Attachment NJA 5 p 71 (p 18 of the Position Statement).

(a) the EPA determined to assess the proposal (test 1);[39]

(b) the EPA expressly considered the proponent's avoidance and minimisation efforts (test 2);[40]

(c) the EPA found that there were residual environmental impacts on critical assets, and expressly stated that the residual impacts were considered to be significant because of the importance of those assets (and not because of the size of those impacts) (tests 3-4);[41]

(d) the EPA recommended the use of direct offsets to manage the residual impacts, including recommending offsets which viewed objectively have a net positive effect on the environment: for terrestrial fauna were in a 3:1 offset ratio of habitat,[42] 3:1 offset ratio for wetlands,[43] and 2:1 offset ratio for conservation areas[44] (tests 5-7);

(e) the conditions imposed for the offsets impose clear controls on the adequacy of the offset land and allowed for contingency measures,[45] with plans to be drawn up as to the timing and implementation of the offsets[46] (tests 8-10).

33. While the Guidance Statement and the Bulletin were not expressly referred to in the Report, that is understandable given the way the offsets policies are read together[47] and, in any event, the lack of an express reference to the Guidance

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39 Fandry affidavit Attachment ABF 7 p 192 (Record of determination to assess).

40 Fandry affidavit Attachment ABF 50 p 2333 (p 40 of the Report).

41 Fandry affidavit Attachment ABF 50 p 2333 (p 40 of the Report).

42 Fandry affidavit Attachment ABF 50 p 2333 (p 40 of the Report).

43 Fandry affidavit Attachment ABF 50 p 2335 (p 42 of the Report).

44 Fandry affidavit Attachment ABF 50 p 2336 (p 43 of the Report).

45 Fandry affidavit Attachment ABF 50 p 2334 (p 41 of the Report).

46 Fandry affidavit Attachment ABF 50 p 2382-2384 (Condition 12 of the Report).

47 The foreword to the Position Statement states that "*the EPA is also currently preparing a Guidance Statement on environmental offsets which will be tailored directly to the environmental impact assessment process for development proposals.*": Arrowsmith affidavit Attachment NJA 5 p 52 (p i of the Position Statement).

The Position Statement also describes the Guidance Statement as a "companion paper": Arrowsmith affidavit Attachment NJA 5 p 71 (p 18 of the Position Statement).

The Foreword to the Guidance Statement states that "*the advice complements and should be read in conjunction with Position Statement No. 9 Environmental Offsets (EPA, 2006) which provides*

Statement and the Bulletin will not of itself lead to an inference that they were not considered.[48]

Ground 1(c)

34. As the applicants recognise, there is no express requirement in the Act for the EPA to provide written reasons for its recommendations and there is no obligation at common law on an administrative decision maker to provide reasons.[49] Further, an administrative decision cannot be quashed merely because inadequate reasons are provided, in the absence of any statutory obligation to meet a certain standard in the delivery of reasons.[50] However, the applicants contend that such an obligation should be inferred from the existence of an appeal right under section 100(1)(d) for a person who "disagrees with ... the content of, or any recommendation in, the report prepared under section 44 in respect of a proposal". That contention should be rejected.

35. The reference in section 100(1)(d) to "the content of, or any recommendation in, the report", upon which the applicants place significance,[51] does not support an inference that the EPA is required to give reasons beyond what is required by section 44. Section 44(1) identifies the purpose of the report – namely, to report to the Minister on the outcome of its assessment of a proposal. Section 44(2) identifies what must be set out in that report, namely:

    (a) a positive or negative recommendation (the recommendation to which section 100(1)(d) refers);[52] and

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the EPA's overarching position on environmental offsets.": Arrowsmith affidavit Attachment NJA 5 p 86.

The Bulletin refers readers to the Position Statement and the Guidance Statement for "more detailed information about offsets": Arrowsmith affidavit Attachment NJA 5 p 129 (p 3 of the Bulletin).

48 *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage & the Arts* [2011] FCAFC 59; (2011) 180 LGERA 99, 113 [47] (Emmett, McKerracher and Foster JJ).

49 AS [51].

50 *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; (2013) 252 CLR 480, 498 [43] (French CJ, Crennan, Bell, Gageler and Keane JJ).

51 AS [58].

52 Section 44(2)(b).

(b) the key environmental factors identified in the course of its assessment (the content to which section 100(1)(d) refers).[53]

As section 44(2) requires what can be described in terms of section 100(1)(d) as a recommendation and content, it cannot be inferred from section 100(1)(d) that anything more is required from the EPA.

36. This construction is reinforced by section 44(2a), which provides that the EPA "may, if it thinks fit, include other information, advice and recommendations in the assessment report". An inference that the EPA must include more in its report than what is required by section 44(2) is incompatible with the terms of section 44(2a).

37. It does not follow, of course, that a report which contains only a recommendation and a bare list of key environmental factors would satisfy the requirements of section 44. The Report is not so confined. However, section 44 does not impose a requirement to give reasons which includes the requirement for which the applicants contend. Such a requirement would be unworkable, shifting attention from the purpose of a section 44 report (which informs the Minister's exercise of power under section 45) and inviting challenges on the basis of a reading with an eye finely attuned to error.

38. The Minister's powers in respect of a section 100(1)(d) appeal do not support an inference that more is required than section 44(2) provides.

39. If the Minister is not content with the report provided by the EPA under section 44, the proposal can be remitted to the EPA[54] and the Minister can make a direction under section 43 in respect of the assessment of the proposal.[55]

40. For these reasons, ground 1(c) should be dismissed.

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53 Section 44(2)(a).

54 Section 101(1)(d) and (2).

55 It should be noted that these powers, and the position of the Minister in the environmental impact assessment process which culminates in section 45, cannot support the applicants' contention in AS [60] that the EPA "remains the principal decision maker".

GROUND 2

Ground 2(a)

41. The applicants do not pursue ground 2(a).

Ground 2(b)

42. In ground 2(b), the applicants contend that the EPA made a jurisdictional error because it assessed only the Proposal's impact on certain elements of the environment, in isolation from each other. In their submissions, they put the argument in this way: the EPA "failed to ask itself whether the Proposal as a whole was environmentally acceptable".[56]

43. It is necessary, with respect, to observe once again that the applicants are inviting the court to err by reasoning from non-statutory labels and concepts of great generality, such as the protection of the environment.[57]

44. Moreover, the applicants baldly state that the EPA in its Report "did not ask itself whether the Proposal's impact on the environment as a whole was acceptable but, rather, it limited its consideration to the Proposal's impact on different parts of the environment."[58] They do not demonstrate that the EPA took this approach.

45. The EPA structured the Report in the manner contemplated by section 44(2)(a), by reference to the key environmental factors it had identified. That was a convenient way in which to structure its analysis and to found its view that a positive recommendation should be made. It is not to be inferred from such a structure that the EPA took a fragmented approach to the assessment or failed in its statutory duty.

46. An administrative decision maker's reasons are to inform, and not to be construed minutely with an eye keenly attuned to discern inadequacy.[59] With

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56 AS [80].

57 See in this regard the generality of the statutory provisions upon which the applicants rely in AS [84].

58 AS [95].

59 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

respect, the applicants' contentions on ground 2(b) are inconsistent with that principle.

47. The EPA considered all relevant key environmental factors. Having done so, the EPA was in a position to form a view about what it should recommend and made a positive recommendation as it was entitled to do.

48. Alternatively, if the applicants' contention is that the assessment inadequately dealt with the totality of the factors to be considered because the EPA did not adequately give appropriate weight to each of those factors, that contention intrudes into the merits of the EPA's assessment. It is not a matter that can be impugned on judicial review[60] on the applicants' grounds.[61]

49. Ground 2(b) should be dismissed.

GROUND 3

50. In ground 3, the applicants contend that the EPA fell into jurisdictional error because it determined that offsets were necessary and yet recommended that the Minister impose condition 12-2, which empowers the CEO to agree that construction of the Proposal may commence notwithstanding that the proponent has failed to identify the offsets which the EPA considered to be necessary.

51. They submit[62] that the CEO's discretion is inconsistent with the EPA's view that offsets are needed or required because the condition empowers the CEO to authorise construction to commence in circumstances where:

    (a) the CEO can have no confidence that suitable offsets will ever be identified; and

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60 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 41 (Gibbs CJ and Dawson J agreeing).

61 If a person disagrees with a decision of the EPA, the opportunity for merits review is provided by section 100, comprising an appeal to the Minister, dealt with by an appeals committee. The applicants, along with 163 other appellants, exercised those appeal rights, which resulted in some appeals being allowed and certain conditions strengthened: Affidavit of Emma Louise Bramwell dated 23 October 2015 (**Bramwell affidavit**) Attachment ELB 8 pp 189 – 191 (pp i – iii of the Appeal Convenor's report).

62 AS [73].

(b) the EPA knew, when it made its decision, that there was a real risk that no suitable offsets would ever be identified.

52. However, ground 3 mischaracterises what condition 12-2 authorises the CEO to do.

53. Condition 12-2 forms part of a suite of conditions dealing with residual impacts and risk management measures.[63] Those conditions contemplate that the CEO may permit fulfilment of the conditions prior to commencement of construction or "as otherwise agreed by the CEO". They do not contemplate, nor authorise, the CEO waiving fulfilment of the conditions entirely. The Act similarly would not authorise such a power being conferred on the CEO. The CEO's power to agree to a condition being fulfilled after the commencement of construction is to be read down accordingly.

54. In this context it does not strain credibility, contrary to the applicants' submission,[64] to suggest that the CEO might exercise the discretion so as to allow construction to commence, but confine that construction to an area which will entail no relevant environmental impacts.

55. Further, when the condition is properly understood its existence cannot support the conclusion, for which the applicants contend, that there was a constructive failure on the part of the EPA to exercise its jurisdiction.[65]

56. As to the contention that the EPA knew that there was a real risk that no suitable offsets would ever be identified, that contention strays impermissibly into merits review. Whether a condition is valid turns on whether the Minister has power to impose it, not on a judicial evaluation of the risks and probabilities associated with the condition (as opposed to a condition which is self-evidently impossible to fulfil).

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63 See condition 12-1, which refers to conditions 12-2 to 12-16: Bramwell affidavit Attachment ELB 40 p 499 (p 11 of the Minister's implementation statement).

64 AS [77].

65 AS [78]. It is also to be noted that, once again, the applicants have sought to characterise the nature of the EPA's jurisdiction by reference to non-statutory labels.

57. In any event, that contention is unfounded and is unsupported by the evidence. The applicants' three reasons as to why the EPA did not think that an offset could be found[66] should be rejected. It is incorrect to state that at the time of the Report, four years had passed since the referral and no offsets were available: the Report expressly identifies that until mid-2013, there was suitable land identified for offsets but for reasons beyond the proponent's control, the land is "likely" no longer able to be used as an offset.[67] Further, it proves nothing to say that the proponent is sophisticated and has an understanding of its offset obligations and that "limited offset options" were available to it. At the time of recommending the condition (less than three months after the original offset land had become unavailable), while it may have been the proponent's view that offset options were limited, it is also apparent in that meeting that the proponent was actively considering available options[68] and there is no evidence that alternative offset land would not be able to be found in the future.

58. For these reasons, ground 3 should be dismissed.

GROUND 4

59. The applicants contend that, because the Report is infected by jurisdictional error, the Minister's decision is similarly infected. As the EPA did not fall into jurisdictional error, it follows that the Minister did not do so.

60. If the Report is found to be invalid, it is accepted that in this case the Minister's discretion miscarried.[69]

OTHER PROCEDURAL MATTERS

Standing

61. There is an initial question of standing of the applicants to bring the judicial review application. The Minister and the EPA and the Intervener concede that

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66 AS footnote 62.

67 Fandry affidavit Attachment ABF 50 p 2334 (p 41 of the Report).

68 Fandry affidavit Attachment ABF 47 p 2275 (Minutes of EPA Meeting No. 1054)

69 However, it is not accepted that in every case where the EPA's decision is found to be invalid, it follows that the Minister's decision is invalid: *Coastal Waters Alliance v Environmental Protection Authority* (1996) 90 LGERA 136, 151 (Rowland J), 159 (Franklyn J).

Ms de Barre has standing but do not concede that Save Beeliar Wetlands (Inc) has standing.

62. In those circumstances, it is unnecessary for this Court to determine whether Save Beeliar Wetlands (Inc) also has standing to obtain the claimed relief.[70]

Leave to apply out of time in respect of the Report

63. By chamber summons dated 14 October 2015, the applicants applied for an order to the effect that the application for judicial review was filed within time, or alternatively, that leave to apply out of time in respect of the Report be granted.

64. While that leave has been granted pursuant to consent orders dated 10 November 2015, for the purposes of clarity and completeness, the respondents' submission is that leave was required. The reasoning why this is the case is of importance. The applicants submit that because this is two-stage decision making and because the Minister is not bound to take the Report into account,[71] time does not run from the date of the Report.

65. If the applicants' characterisation is correct, then the Report is not a reviewable decision or conduct in respect of which a judicial review application could be made.

66. Though this is a case of two-stage decision making, where a preliminary decision by the EPA is advisory in nature, and the final decision is made by the Minister, the Report is itself reviewable. It sufficiently "determines" or is "connected with" the final decision.[72] Though the Minister is not bound to reach the same conclusion as the EPA, the Minister's power to make his decision is not enlivened until he receives a valid report from the EPA and "it is implicit in the scheme of the Act that the Minister must consider [the report] before exercising his powers under s. 45."[73]

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70 *Wilderness Society v Minister for Environment* [2013] WASC 307; (2013) 45 WAR 471, 478 [18] (Martin CJ).

71 AS [14].

72 *Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; (1996) 185 CLR 149, 159 (Brennan CJ, Gaudron and Gummow JJ).

73 *Wilderness Society v Minister for Environment* [2013] WASC 307; (2013) 45 WAR 471, 513 [210] (Martin CJ).

67. The 6 month limitation period runs from the date of the decision or when the applicant became aware of the decision, whichever was later. Though it is accepted that often it is appropriate for an applicant to await the final decision before seeking review,[74] the words of the *Rules of the Supreme Court* are not modified by the fact that the Report is a preliminary decision.[75]

G T W Tannin SC
State Counsel

C S Bydder

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74 For example, because a Court is more likely to refuse prerogative relief on discretionary grounds if a review application is brought in relation to a preliminary decision: *Coffey LPM Pty Ltd v Contaminated Sites Committee (No 2)* [2013] WASC 98 [37] (Hall J).

75 See, by analogy, *Director of Public Prosecutions for the Australian Capital Territory v The Honourable Acting Justice Brian Martin* [2014] ACTSC 104; (2014) 9 ACTLR 1 where it was held that a preliminary decision by the primary decision maker was reviewable, and that leave to apply for its review out of time was required to be granted.

LIST OF AUTHORITIES

LEGISLATION

1. **Environmental Protection Act 1986* (WA)
2. *Rules of the Supreme Court 1971* (WA), Order 56

CASE LAW

3. *Arnold v Minister administering the Water Management Act 2000* [2014] NSWCA 386
4. *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage & the Arts* [2011] FCAFC 59; (2011) 180 LGERA 99
5. **Bienke v Minister for Primary Industries and Energy* [1996] FCA 35; (1996) 63 FCR 567
6. *Coastal Waters Alliance v Environmental Protection Authority* (1996) 90 LGERA 136
7. *Coffey LPM Pty Ltd v Contaminated Sites Committee (No 2)* [2013] WASC 98
8. *Director of Public Prosecutions for the Australian Capital Territory v The Honourable Acting Justice Brian Martin* [2014] ACTSC 104; (2014) 9 ACTLR 1
9. *Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; (1996) 185 CLR 149
10. **Marshall v Metropolitan Redevelopment Authority* [2015] WASC 226
11. *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; (1986) 162 CLR 24
12. **Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259
13. *Re Shire of Carnarvon; Ex parte Humphrey* [2005] WASCA 182
14. **Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307; (2013) 45 WAR 471
15. *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; (2013) 252 CLR 480

* indicates authorities from which Counsel may read.