

**LITIGATION
UNDER THE
ENVIRONMENT
PROTECTION
and
BIODIVERSITY
CONSERVATION
ACT (CTH) 1999
at March 2008**

Speaker: Ruth Beach, Solicitor



CASE STUDY 1:

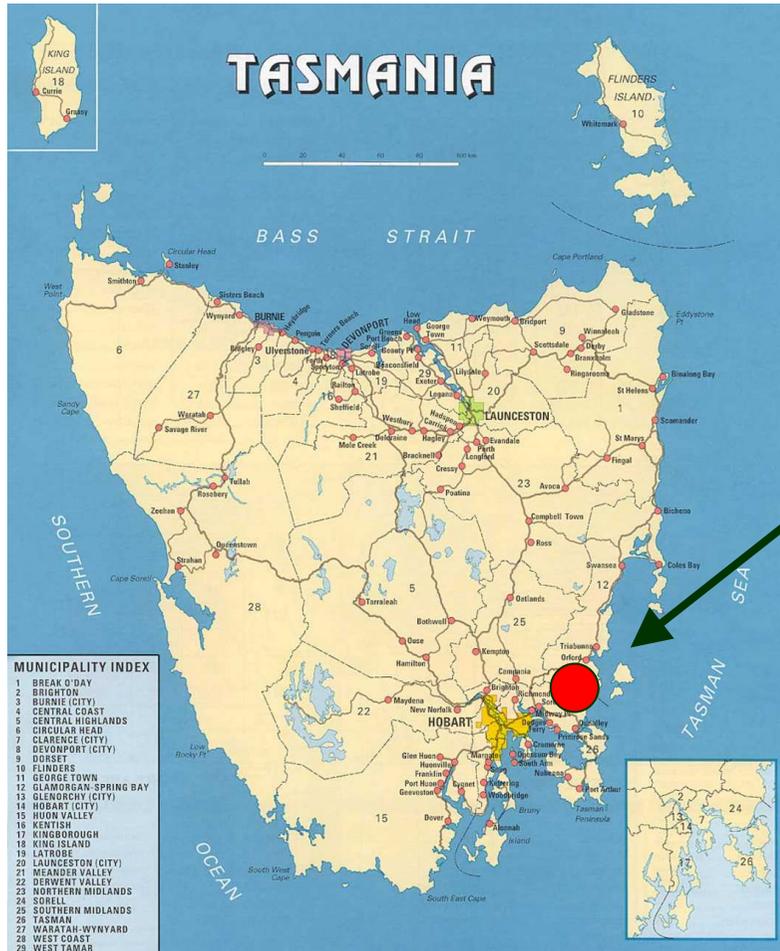
Brown

V

Forestry Tasmania

(The Wielangta Forest decision)

**[2006] FCA 1729
(19 December 2006)**



Wielangta Forest

Unmarked map from <http://www.tas.gov.au/tasmaniaonline/about/maplarge.asp>. Red marking not to scale!

Broad-toothed stag beetle

“the Beetle”



- “Stag beetles are an ancient lineage thought to have evolved with the dinosaurs over 200 million years ago”
- Have managed to “survive in places like Wielangta which is a refuge against climate change”
- One of rarest animals in Tasmania
- Mainly found in old growth forests in tropical areas & moist temperate zones
- The beetle plays a vital role in the forest ecosystem by “breaking down dead wood, releasing nutrients, and priming old logs for a succession of other plants and animals”
- Recorded at <40 sites

Sources: Text - <http://www.bobbrown.org.au/files/campaigns/extras/Wedge-tailed%20eagle.pdf>

Graphics - <http://www.parks.tas.gov.au/threatened/beetle.html>

Tasmanian wedge-tailed eagle “the Eagle”



- Different (larger) type of wedge tailed eagle than on mainland
- Population probably <1500
- With logging on top of all other human-induced mortality, extinction risk of >90%
- A top predator in the food chain
- Sparsely distributed and living mainly in forests
- Breeds in tallest trees of old growth eucalyptus forests
- Threatened by: loss of habitat, shooting, poison, collision with power lines & disturbance of breeding (through logging)

Sources: Graphics - www.parks.tas.gov.au/wildlife/birds/wteagle.html

Text - <http://www.bobbrown.org.au/files/campaigns/extras/Wedge-tailed%20eagle.pdf>

Swift Parrot "the Parrot"



- They breed only in Tasmania – on the east coast, but spend winter on the Australian mainland
- 1995-96 Summer count of Swift Parrots estimated the population at <1000 breeding pairs
- The population does not appear to be increasing
- Mostly feed on the nectar of blue-gum flowers
- Breed in old hollow trees

Sources: Text – <http://www.parks.tas.gov.au/threatened/swift.html>
Graphics - <http://www.parks.tas.gov.au/threatened/swiftpic.html>



EPBC Act: Objects

- Act passed in 1999 and came into force on 16 July 2000
- EPBC Act attempted to clarify the role of the Commonwealth Government in environment protection

Section 3 *“(1) The objects of this Act are:*

- (a) to provide for the **protection of the environment**, especially those aspects of the environment that are **matters of national environmental significance**; and*
- (b) to promote **ecologically sustainable development** through the conservation and ecologically sustainable use of natural resources; and*
- (c) to promote the **conservation of biodiversity**.....”*



Matters of National Environmental Significance (MNES)

Part 3 EPBC Act

- World heritage property
- National heritage property
- Wetlands of international importance
- Listed threatened species and communities
- Listed migratory species
- Protection of environment from nuclear action
- Marine environment



Objects (cont)

Section 3(2) *In order to achieve its objects, the [EPBC] Act:*

....

(e) enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions to:

(i) protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species) and ensure the conservation of migratory species; and

(iii) protect ecosystems by means that include the establishment and management of reserves, the recognition and protection of ecological communities and the promotion of off-reserve conservation measures; and

(iv) identify processes that threaten all levels of biodiversity and implement plans to address these processes....



Section 18(3) EPBC Act (Part 3)

*“A person must not take an **action** that:*

- (a) has or will have a **significant impact** on a listed threatened species included in the endangered category; or*
- (b) is **likely to have a significant impact** on a listed threatened species included in the endangered category.”*

Civil penalty:

- (a) individual—5,000 penalty units;
- (b) body corporate—50,000 penalty units.

Value (as calculated from *Crimes Act 1914* (Cth) s4AA)

- Individual < \$550,000
- Body corporate < \$5,500,000



Definitions

Section 523 *Action* includes:

- *a project;*
- *a development;*
- *an undertaking;*
- *an activity or series of activities; and*
- *an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).*

Significant impact: concept undefined therefore Courts decide.
(impact now incs direct & indirect – section 527E)



Controlled Action

- Proponent refers action to Federal Minister
- Minister has 20 business days to decide if approval required under EPBC Act
- Minister to consider if action likely to have significant impact on matter of national environmental significance
- If yes, EPBC Act approval needed: controlled action
- Environmental assessment to be carried out
- If no, EPBC Act approval not needed



Regional Forest Agreement

- s4 RFA Act defines RFA inter alia as agreement providing for:
 - comprehensive, adequate and representative reserve system
 - ecologically sustainable management and use of forested areas
- TAS RFA applies to the whole of Tasmania
- To provide long term stability of forests and forest industries
- However, at [44] the appellate court recognises that:
 - “the agreement is redolent of **compromise between various competing interests**, in particular the timber industry and conservation of the environment”*; and that
 - “forestry operations are to continue”* albeit pursuant to state legislation.
- Commonwealth Government can't enforce provisions of RFA, but can end the agreement & require new assessment & management planning



Section 38 EPBC Act

- s38(1) “*Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.*”
- If Regional Forestry Agreement, then forestry operations exempt from Part 3 requirements
- RFA itself to address issues regarding biodiversity conservation
- TAS RFA to ‘protect’ priority species through reserve system or management prescriptions.



Brown (Applicant)

- Injunction – stop Wielangta forestry operations
- Declarations:
 - TAS RFA not a RFA (within the meaning of EPBC Act and RFA Act)
 - Forestry operations likely to have significant impact on the broad-toothed stag beetle, the wedge-tailed eagle and the swift parrot
 - Forestry operations in Wielangta forest not undertaken in accordance with TAS RFA
 - Given present practises this unlikely to change



Justice Marshall (in response to agreed facts):

- Forestry operations likely to continue (2013)
- Forestry operations are “actions”
- Beetle, eagle and parrot all within Wielangta
- Forestry operations likely to have significant impact on threatened species
- TAS RFA is an RFA
- s38 exemption only applies if forestry operation undertaken in accordance with RFA
- Forestry operations not in accordance with RFA



Critical Points: Significant Impact

Justice Marshall at [94]:

“Even though forestry operations in Wielangta and the proposed forestry operations will cause a loss of breeding and foraging habitat for the eagle which is relatively insignificant in the context of other factors causing loss to such habitat, that loss can still be considered ‘significant’ in the context of legislation which is designed ‘to protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species)...’.

Loss of habitat caused by forestry operations, while small when compared to other causes, has a significant impact on a threatened species where ‘to protect’ is seen as a duty not just to maintain population levels of threatened species but to restore the species.”



Critical Points: Cumulative Effect

Justice Marshall at [102]:

“...the present and likely future forestry operations of Forestry Tasmania in Wielangta will, in the context of the EPBC Act, have a significant impact on the eagle, notwithstanding the presence of other impacts which may be even more significant....

The forestry operations of Forestry Tasmania will, as the applicant contends, ‘have a significant impact on the eagle because they form part of the well established cumulative impact of native forest harvesting in Tasmania on the eagle’. This is in the context of such operations being controlled by one operator, Forestry Tasmania.”



Section 38 RFA Exemption

Justice Marshall at [238]ff:

- s38 exemption alternative method to achieve EPBC Act objects
- But insufficient to pay mere “lip service” to RFA
- State of Tas to ensure forestry operations carried out in accordance with RFA otherwise s 38 exemption will not apply.
- CI 68 RFA: State of Tas agrees to protect priority species
- *“An agreement to protect means exactly what it says. It is not an agreement to attempt to protect , or to consider the possibility of protecting, a threatened species. It is a word found in a document which provides an alternative method of delivering the objects of the EPBC Act in a forestry context.”*



HELD:

- Wielangta forestry operations not carried out in accordance with the RFA.
- Therefore no exemption & EPBC Act applies.
- Injunction granted.



Appeal: *Forestry Tasmania v Brown* [2007] FCA 186 (30 Nov 2007)

- Before hearing of appeal various TAS RFA clauses amended.
- Eg: Cl 68 was:
the parties “*agree to protect Priority Species.... through the CAR Reserve System*”
to: “*The parties agree that the CAR Reserve System ... protects rare and threatened fauna.*”
- Changes did not affect the Full Court’s decision.
- The fact that the promissory nature of the clauses taken away didn’t matter because legislature treated the agreement as RFA.



Justices Sundberg, Finkelstein & Dowsett:

- s6(4) RFA Act: *“Part 3 of the EPBC Act does not apply to an RFA forestry operation that is undertaken in accordance with an RFA”*
- s6(4) RFA Act is in the same terms as s38 EPBC Act
- Explanatory memorandum to RFA Bill - expected that RFAs be exempt from EPBC Act referral process
- Exemption applies
- RFA provides that certain of the State’s key obligations are unenforceable – points against the State giving a warranty that the CAR system will protect species.
- The CAR Reserve System was intended to be a developing process. Not intending to protect the species through a fully fledged system from day one.
- Tas does not agree to protect the priority species. It agrees to protect them *“through the CAR Reserve System”*.

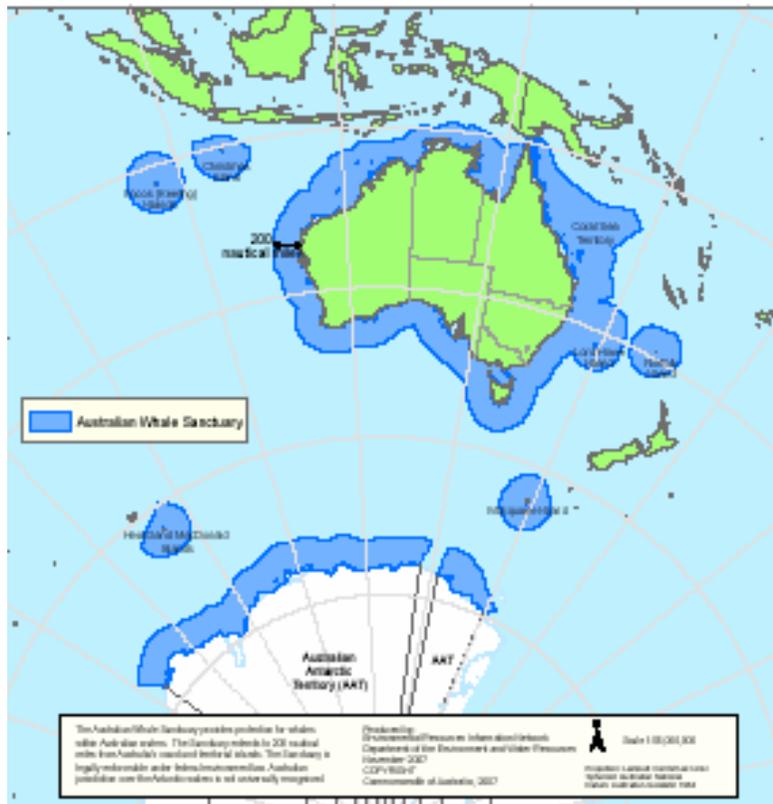


Current

- Senator Brown ordered to pay costs
- Senator Brown has applied to the High Court for leave to appeal the decision

CASE STUDY 2:

Australian Whale Sanctuary



<http://www.environment.gov.au/coasts/species/cetaceans/sanctuary.html>

***Humane Society
International Inc v
Kyodo Senpaku
Kaisha Ltd [2008]
FCA 3 (15 January
2008)***



Background

- Applicant, Humane Society Inc, organisation classified as “interested person” under s475(7)
- Respondent company incorporated in Japan
- s5 EPBC Act applies:
 - to all persons and vessels inc non citizens and vessels not registered in Australia
 - in Australia, its external territories and adjacent waters being, Australia's Exclusive Economic Zone
- Japan does not recognize the sovereignty over any part of Antarctica or attached water space as Australian
- s3 EPBC Act: achieve objects by establishing an Australian Whale Sanctuary “*to ensure the conservation of whales...*”
- s229-230 EPBC Act – offence to kill, injure, intentionally take or otherwise deal with whale in the sanctuary



Background (cont)

- DPP responsible for prosecuting EPBC Act offences – had decided not to prosecute
- 19 Oct 2004 – proceedings commenced
23 Nov 2004 – applicant ordered to serve Attorney General: matter best dealt with by government
- Justice Allsop: declined to grant leave to serve respondent outside jurisdiction
- Full Court on appeal:
 - Political considerations should not affect exercise of judicial discretion where action is otherwise justiciable
 - Considerations of futility of enforcement - premature
 - Granted leave to serve respondent
- Applicant unable to serve respondent
- Application for substituted service



The Issues & Outcome

- Respondent reports to IWC showed 2000-2007 (area > Aust Whale Sanctuary):
 - 3,558 minke whales killed
 - 13 fin whales killed
- Justice Allsop:
 - Declaration: Japanese whalers contravened the EPBC Act by killing, injuring, taking, interfering with whales within Australian Territory
 - Injunction to restrain whalers granted
- Enforcement
- Case confirmed that EPBC Act includes greater territory than mainland Australia & successfully tested the powers of “interested persons” to enforce the provisions of the EPBC Act.



CASE STUDY 3:

Blue Wedges Inc v Minister for the Environment, Heritage & the Arts [2008] FCA 8 (15 January 2008)



<http://www.portofmelbourne.com.au/business/portmaps/mainchannelmap.asp>; http://en.wikipedia.org/wiki/Port_Phillip



Background

- Port Phillip Bay: large bay adjoining Melbourne & St Kilda – home of beaches, recreational sport & marine life.
- Also home to Port of Melbourne – biggest container & general cargo port in Australia.
- Shallow port and some ships must bypass Melbourne.
- Port of Melbourne, with VIC Government support, wishing to dredge the Bay to make it deeper.
- 65 environmentalist groups & recreational bay users opposed the application. ‘Blue Wedges’ coalition formed.



Background (cont)

- Referred to the Federal Minister under EPBC Act for affecting MNES matters:
 - Wetlands of international importance (ss 16 and 17B)
 - Listed threatened species and communities (ss 18 and 18A)
 - Listed migratory species (ss 20 and 20A)
 - Action involving Commonwealth land that is likely to have a significant impact on the environment (ss 26 and 27A)

- Application as it was then was decided to be a Controlled Action & to be assessed by Victorian Environment Effects Statement process
- Action approved in December 2007 by Minister Peter Garrett



The Issues

- Blue Wedges:
 - Invalidity because action different:
 - 2002: Original referral
 - 2007 assessment of project of greater scale and nature
 - No lawful basis for approval
- Assessment inadequate:
 - Assessment does not adequately assess relevant impacts and so Minister can't make informed decision

The Issues: Action Different

Issue	2002	2007
Depth:	Dredging 1.5-2m	3,4m potentially 8m
Location:	Existing shipping alignment	Significant river works, works on berths and docks not previously included
Activities:	no mention of contaminated dredging material, nor need for disposal facility etc	
Scale:	limited scope “within existing shipping channel alignment”	Removing and disposing of 23 mill cubic meters of material ~2mx15m trench Melb – Syd
Ramsar Wetlands:	Impact on 4	Impact changed
Listed Threatened species:	Impact on 5	Impact on 18
Listed Migratory Species:	Impact on 4	Impact on 35
Commonwealth land:	One area	Three areas



The Outcome: Justice Heerey Federal Court

Held:

- Differing actions:
 - Common for proposal to change
 - Change may be positive for the environment (eg less dredging)
 - Assumption best that referrals made early in the process, therefore likely to be change
 - “action” very broad
 - s78 enables Minister to reconsider decision where new information or substantial change in circumstances regarding likely impacts
 - s156B not compulsory variation approval process (discretionary)



The Outcome (cont)

- Blue Wedges: Adequacy of assessment:
 - s82 – “relevant impacts of the project”. Did not consider Part 3.
 - 2007 assessment excluded maintenance dredging
 - Minister should have requested additional information (s132)
- Held: Assessment adequate. Minister has discretion as to whether to request additional information.
- Costs – not awarded. Applied *Oshlack v Richmond City Council* [1998] HCA 11



Current

- Blue Wedges has lodged application for appeal
- Interlocutory injunction application was threatened by Blue Wedges but withdrawn after mediation 5 February.
- Mediation:
 - Port of Melbourne will not dredge most sensitive areas until Appeal (this also in accordance with Federal Court order that there can be no dredging in some specific areas)
- Appeal listed for 20 February in the Federal Court



Thanks to Sophie Owen for her assistance with preparation for this presentation.