

CAROL JEANETTE BOOTH

Applicant

ROHAN BRIEN BOSWORTH

First Respondent

FRANCES BRIEN BOSWORTH

Second Respondent

APPLICANT’S SUBMISSIONS IN REPLY

1. The Outline of Submissions of the Respondents raises two issues where further analysis may assist the Court, namely, the issues of the interpretation of “has, will have or is likely to have” and whether the Court may refer to the Commonwealth Government’s *Administrative Guidelines* in interpreting the meaning of “significant impact”.

MEANING OF “HAS, WILL HAVE OR IS LIKELY TO HAVE”

2. The use the terms “have, will have or likely to have” in s12 of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (“EPBC Act”), in a disjunctive manner indicates that these terms are not synonyms and that the legislature intend each to have a separate meaning.¹ In particular, while both “will have” and “likely to have” refer to future conduct, they are clearly not intended to be tautological.
3. The plain meaning of the word “likely” is:²

“**likely** ... **1.** probably or apparently going or destined (to do, be, etc.): *likely to happen*. **2.** seeming like truth, fact, or certainly, or reasonably to be believed or expected; probable: *a likely storey*. **3. a.** apparently suitable: *a likely spot to build on*.”

¹ It is accepted that a court construing a statutory provision must strive to give meaning to every word of the provision and that no word should be interpreted as superfluous, void or insignificant if a construction can be given to the word which is useful and pertinent: *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ; at 419 per O’Connor J; *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 12-13 per Mason CJ; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 per Mh, Gummow, Kirby and Hayne JJ.

² The Macquarie Library, *The Macquarie Dictionary*, 3rd ed, Macquarie University, 1997, p1244.

b. promising, as for the yielding of gold, oil, etc.: *she thought it a likely area.* 4. promising: *a fine likely boy – adverb* 5. probably.”

4. In *Australian Telecommunications Commission v Kreig Enterprises Pty Ltd* (1976) 27 FLR 400 (Sup Ct SA) at 406-410 Bray CJ, in construing the meaning of s139B of the *Post and Telegraph Act 1901 (Cth)*, found the phrase “was likely to interfere with” should be given its ordinary and natural meaning of “probable” and that there is a more than fifty per cent chance of the thing happening.
5. The reasoning of Bray CJ in *Kreig* was cited in a dictum of Bowen CJ (with whom Evatt J agreed) in construing the meaning of “would have or is likely to have” used in s45D of the *Trade Practices Act 1974 (Cth)* (“TPA”) in *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 42 FLR 331 (Full Court, FCA) at 339-340. However, Bowen CJ specifically did not decide the point.
6. However, Deane J in *Tillmans* held (at 345-348):

“‘LIKELY’

The word ‘likely’ can, in some context, mean ‘probably’ in the sense in which that word is commonly used by lawyers and laymen, that is to say, more likely than not or more than a fifty per cent chance ... It can also, in an appropriate context, refer to a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent. When used with the latter meaning in a phrase which is descriptive of conduct, the word is equivalent to ‘prone’, ‘with a propensity’ or ‘liable’.

...

The conclusion which I have reached is that, in the context of s.45D(1), the preferable view is that the word ‘likely’ is not synonymous with ‘more likely than not’ and that if relevant conduct is engaged in for the purpose of causing loss or damage to the business of the relevant corporation, it will suffice, for the purposes of the subsection, if that conduct is, in the circumstances, such that there is a real change or possibility that it will, if pursued, cause such loss or damage. Whether or not such conduct is likely (in that sense) to have that effect is a question to be determined by reference to well-established standards of what could reasonably be expected to be the consequence of the relevant conduct in the circumstances.”

7. In *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 87 the Full Court (Bowen CJ, Lockhart and Fitzgerald JJ), interpreting the meaning of “conduct which is likely to mislead or deceive” in s52(1) of the TPA, adopted the approach of Deane J in *Tillmans*. The Court held that conduct is likely to mislead or deceive if there is a “real or remote chance or possibility regardless of whether it is less or more than fifty per cent”.³
8. In *News Limited v Australian Rugby Football Limited* (1996) 64 FCR 410 (The Super League Case) at 564-565 in construing the meaning of “is or likely to be or ... would be or would be likely to be” in s4D(1) of the TPA, the Full Court (Lockhart, von Doussa and Sackville JJ) adopted the approach of Deane J in *Tillmans*. The Full Court held that the phrase “would be likely to be” conveys a

³ cf. *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305 per Northrop J; *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1980) 62 FLR 437 at 446 per Lockhart J; and *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1 at 48-51 per Franki J.

lower degree of likelihood that the phrase “would be” and, adopting the approach of Deane J in *Tillmans*, means “real chance or possibility”.

9. In the recent Full Court decision in *South Sydney District Rugby League Football Club Ltd v News Limited* [2001] FCA 862 (6 July 2001) at para 235, Merkel J followed the decision of the Full Court in the *News Ltd v Australian Rugby Ltd League* in holding that the use of “likely to be” meant there was “a real chance or possibility”. The Court in *South Sydney* was interpreting the meaning of “would or would likely to be” in s45(2)(a)(i) of the TPA. (See also the dictum of Heerey J at para 116).
10. Deane J’s approach in *Tillmans* was also adopted by the NSW Land and Environment Court in *Randwick Municipal Council v Crawley* (1986) 60 LGRA 277 at 279-281 per Stein J. In interpreting the phrase “would be likely to” in s37(1) of the *Strata Titles Act 1973 (NSW)* Stein J accepted that “there must be proved a real chance or possibility and certainty more than a remote or bare chance”.
11. The decision of Stein J in *Randwick MC v Crawley* was adopted the NSW Land and Environment Court in relation to “likely to” used in environmental legislation in *Jararius v Forestry Commission (NSW)* (1988) 71 LGRA 79 at 94 per Hemmings J; *Bailey v Forestry Commission of New South Wales* (1989) 67 LGRA 200 (LEC(NSW)) at 211 per Hemmings J; *Drummoyne Municipal Council v Roads and Traffic Authority of NSW* (1989) 67 LGRA 155 at 163 per Stein J.
12. In *Boughey v The Queen* (1986) 161 CLR 10 (with reference to *Tillmanns* and *Kreig*) a majority of the High Court (Mason, Wilson and Deane JJ with whom Gibbs CJ agreed; Brennan J dissenting) found that the phrase “likely to cause death” in s157(1) of the *Criminal Code 1924 (Tas)* conveys a notion of substantial, real and not remote chance, regardless of whether it is more or less than 50 per cent. The majority held that, in that context, “likely” should not be construed to mean more likely than not or to assume a specific degree of mathematical probability not conveyed as a matter of ordinary language or by the statutory context.
13. It is accepted that these decisions are no more than guides and that the real question for the Court is the intention of the legislature reading s12 of the EPBC Act in context and consistently with the purpose of the Act. However, adopting Deane J’s approach in *Tillmans* and the approach of the Full Court in *News Ltd* and striving to give a meaning to “likely to have” that is more than superfluous to “will have”, it is submitted that the correct interpretation of the phrase “likely to have” in s12 of the EPBC Act is a real chance or possibility regardless of whether it is less or more than fifty per cent.

REFERENCE TO THE ADMINSTRATIVE GUIDELINES

14. The Respondents submit that the Court should have regard to the Commonwealth Government’s *Administrative Guidelines*⁴ in interpreting “significant impact” in s12. The *Administrative Guidelines* state (at page 2) that:

⁴ Environment Australia, *Administrative guidelines for determining whether an action has, will have, or is likely to have a significant impact on a matter of national environmental significance under the*

“The guidelines are intended to provide general guidance on the types of actions that will require approval and the types of actions that will not require approval. They are not intended to be exhaustive or definitive. The particular facts and circumstances of a proposed action will need to be taken into account in determining whether that action will have a significant impact on a matter of national environmental significance.

In order to decide whether an action is likely to have a significant impact, it is necessary to take into account the nature and magnitude of potential impacts.

In determining the nature and magnitude of an action’s impact, it is important to consider matters such as:

- all on-site and off-site impacts;
- all direct and indirect impacts;
- the frequency and duration of the action;
- the total impact which can be attributed to that action over the entire geographic area affected, and over time;
- the sensitivity of the receiving environment; and
- the degree of confidence with which the impacts of the action are known and understood.”

15. In relation to World Heritage properties the *Administrative Guidelines* provide (at page 4):

“Criteria

An action has, will have, or is likely to have a significant impact on the World Heritage values of a declared World Heritage property if it does, will or is likely to result in:

- one or more of the World Heritage values being lost, or
- one or more of the World Heritage values being degraded or damaged.”

16. The Applicant submits that the Court should disregard the *Administrative Guidelines* because they are not created under any statutory power and can be no more than a statement of government policy of factors it will consider in determining whether an action will have a significant impact on a matter of national environmental significance. The Court is in a fundamentally different position to the Administrative Appeals Tribunal (“AAT”), in which government policy is a legitimate consideration.⁵ Brennan J (President), as he then was, held in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 643 that:

“there is a material difference between the nature of a decision of the [Administrative Appeals Tribunal] reviewing the exercise of a discretionary administrative power, and the nature of a curial decision. The decision of a court turns upon the application of the relevant law to the facts as found; a decision of the tribunal, reviewing a discretionary decision of an administrative character, takes into account the possible application of an administrative policy. ...

In this respect, the making of a discretionary administrative decision is to be distinguished from the making of a curial decision. Generally speaking, a discretionary administrative decision creates a right in or imposes a liability on an individual; a curial decision declares and enforces a right or liability antecedently created or imposed. The distinction is too simply stated, but it suffices to show that adjudication of rights and liberties by reference to governing principles of law is a different function from the function of deciding what those rights or liberties should be. The former function rightly ignores the policies of the executive government; the latter should not.”

Environmental Protection and Biodiversity Conservation Act 1999, Environment Australia, Canberra, 2000.

⁵ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419-421 per Bowen CJ and Deane J.

17. The Applicant submits that the Court should give a plain meaning to the term “significant impact” as set out in the Applicant’s outline of submissions. It is submitted that the *Administrative Guidelines* are inconsistent to the plain meaning of “significant impact” as the words “lost”, “damaged” or “degraded” contemplate different tests to that used in s12.⁶

MISCELLANEOUS

18. One final matter is that Applicant notes the commencement of the *Environment Protection and Biodiversity (Wildlife Control) Act 2001 (Cth)* on 11 July 2001 repealing s522B and inserting ss43B and 43C in the EPBC Act as set out in the Applicant’s Outline of Submissions.

These submissions were prepared on behalf of the Applicant by Dr Ted Christie of Counsel and Mr Chris McGrath of Counsel.

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⁶ Consequently may not form a valid basis even for an administrative decision: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 420 per Bowen CJ and Deane J; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640-641 per Brennan J (President) as he then was.