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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES
DISTRICT REGISTRY

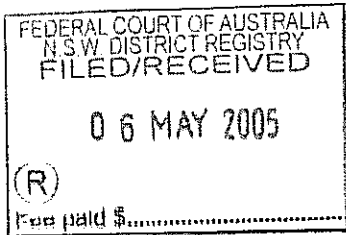
NO NSD 1591 OF 2004

On appeal from a single judge of the Federal Court of Australia

RONALD GREENTREE
First Appellant

AUEN GRAIN PTY LIMITED
Second Appellant

MINISTER FOR THE ENVIRONMENT AND HERITAGE
Respondent



RESPONDENT'S OUTLINE OF SUBMISSIONS

Grounds 2(a), (b) and (c) (AB1166-1167) - no lawful designation of the Windella Ramsar site.

1. The trial judge's conclusion on the issue of adequacy of designation is set out at [123] to [137] of the judgment (AB1089-1094). In summary his Honour held as follows:
 - [124]: "Designate" in s.17(1), in its ordinary usage, would connote no more than that the site's *"location is identified and sufficient information is provided to enable the approximate boundaries of the site to be determined"*.
 - [126], [127] and [128]: "Under Article 2", as these words appear in s.17(1), only requires that the designation be referable to the Article; that is, that the power to make the designation should be sourced from the Article. It does not require that the designation should have complied with such prerequisites as the treaty, on its proper construction, may stipulate.
 - [128]: In particular the requirement of s.17(1) that a designation be "under Article 2" does not disclose *"a legislative intent that a purported designation of a wetland will be ineffective to create a 'declared Ramsar wetland' if, at the time of the purported designation, the Commonwealth fails to describe the boundaries of the site precisely or to limit the boundaries on a map"* [as required by Article 2 – quoted in [28] at AB 1058].
 - [129]: The maps submitted by the Minister to the Ramsar Convention Bureau on 2 June 1999 (described in detail in paras [82]-[85]) *"together with the other material supplied by the Minister, was sufficient for the Ramsar Windella site to be 'designated by the Commonwealth under Article 2...' within the meaning of s.17(1) of the EPBC Act"*.



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- [132]-[136]: "Art 2(1)...does not require a Contracting Party to provide a precise description of the boundaries of a wetland and a map delimiting those boundaries as a pre-condition for a valid designation of a wetland under the Convention".
 - [137]: Further in any event the maps and information supplied to the bureau by the Minister on 2 June 1999 satisfied the requirement of Art 2(1) that "*the boundaries of each wetland shall be precisely described and also delimited on a map*".
2. The last two bullet points are independent grounds for the conclusion on this issue. That is, independent of each other and both independent of the learned trial judge's construction of s.17(1).
 3. Para 1.2 of the Appellant's submissions accurately identifies the paragraphs of his Honour's judgment in which factual findings were made as to the manner in which the location of the Windella wetland was specified to the Convention bureau.
 4. It is respectfully submitted that his Honour's reasoning in the above paragraphs cannot be faulted. Nothing in the wording of the Act supports construing s.17 as if it imported the Articles of the Convention, so as to limit what would constitute a "designation" for the purposes of the statute to documents or other communications which conform strictly to the terms of the Convention. The section does not speak of or limit itself to "designations" which conform strictly to the requirements of Art 2. Explicit words in the section to that effect would be required before the Court could be obliged to treat as ineffectual in form a designation document just because it did not fulfill the requirements of Art 2.
 5. In further support of his Honour's conclusions, it is submitted the question of whether a particular document or communication fulfilled the obligation of the Commonwealth, as a Convention party, under Art 2 is not justiciable by the domestic Courts of Australia. It is a matter concerning the executive's exercise of its prerogative with respect to the performance of an international undertaking or transaction. It is comparable to the decision of the executive to enter into the international obligation in the first place and is non justiciable for similar reasons. Compare *Minister for the Arts v Peko-Wallsend Ltd* (1987) 75 ALR 218 per Wilcox J at 253 and the cases cited there.
 6. Under international law, Australia has assumed obligations in relation to the wetland as a result of its inclusion on the List. Whether the designation complied with the requirements of the Convention cannot be adjudicated upon by the Courts of Australia in these circumstances and is statutorily irrelevant. This submission derives some support from *Queensland v The Commonwealth* (1989) 167 CLR 232, although in that case the Court was concerned with whether a decision and action by an international body was justiciable. Namely, the decision of a Committee established under the Convention for the Protection of the World Cultural and Natural Heritage to include wet tropical rainforests in Queensland on the World Heritage List. Under s.3A(1)(a)(iii), *World Heritage Properties Conservation Act, 1983*, inclusion of a property on the List was one of the available bases upon which property could be proclaimed under the Act, giving rise to various statutory protections for it. Further, inclusion on the List gave rise to international obligations of Australia, under the Convention, to protect the property. The existence of such international obligations was one of several alternative prerequisites to proclamation, provided for in the statute (s.6(2)(b), *World Heritage*

Properties Conservation Act, 1983). The obligation of Australia to protect the property arose, in the international community, from the decision of the Convention Committee. No determination of a municipal court could prevail over that decision: 167 CLR at 242.

7. It would be an extraordinary result if the EPBC Act, by s.16 and s.17, required the Courts of Australia to determine whether a purported designation by the Commonwealth was or was not valid according to the requirements of the Convention and resolutions adopted thereunder. If the sections had that effect they would require the Australian Courts to adjudicate upon matters of international law, contrary to principles clearly laid down in such cases as *Queensland v The Commonwealth* (supra) – perhaps leading to Australian Courts arriving at conclusions about the conformity of a particular designation to Convention requirements different from the conclusion which the Parties to the Convention themselves might reach and different from the position which would be binding as a matter of international law. Parliament cannot have intended by s.16 and s.17 to require the Courts to adjudicate on such an issue. For this additional reason, the Court is not called upon to determine whether the documents of 2 June 1999 were a designation complying with the requirements of Art 2.

8. The Appellants devote considerable argument to the contrary proposition, namely, that a “designation” does not satisfy s.17(1) unless it conforms to Art 2 of the Convention. It is not clear what if anything is said to flow from this in the instant case. It is implicitly contended that the documents relied upon by his Honour (at [82] - [85]) were not a “designation” for the purposes of the Convention because the boundaries of the wetlands were not “precisely described” therein and were not “delineated on a map”. The implication arises from para 1.5 of the Appellants’ submissions, sub-paras 2, 3. Further, the Appellants expressly assert that these words quoted from the Convention are to be interpreted strictly (para 1.5, sub-paras 5, 6, 7). But it is not apparent in what respect the Appellants contend that a “strict” construction of the Convention would not have been satisfied by the maps and information supplied by the Minister to the Bureau in this case. No deficiency of those documents is self-evident, given the evidence of Ms McDonald: [85] at AB 1080.

9. Para 1.22 of the Appellant’s submissions propounds an argument that “designation” in s.17(1) of the *EPBC Act* should be construed as requiring survey quality precision so as to identify the relevant site “in a manner that is consistent with the system of boundary identification and delineation of land under the existing state cadastre...”. This would well exceed the degree of accuracy which the subject matter of the provision would appear to dictate. Section 17(1) defines areas in respect of which s.16(1) prohibits actions that have or are likely to have a significant impact on the ecological character of a declared Ramsar wetland. The boundary of a declared Ramsar wetland need only be established for these purposes with accuracy sufficient for ascertaining whether an action will or is likely to have such an impact. To this end, a designation which purports to nominate the relevant wetland to the Convention bureau for inclusion on the list, which is reasonably capable of fulfilling that purpose and which is accepted by the Convention bureau as the basis for inclusion of the wetland on the list is adequate. The designation in this case, with the detail identified by his Honour at paras [82]-[85] of the judgment, fulfilled this requirement.

10. The Appellants' argument at para 1.22 appears to be solely based upon a perceived requirement of domestic law that Commonwealth legislation defining a protected area should be construed as adopting a state system of cadastral boundaries – although these are established for entirely different purposes. The argument draws no support from the extensive earlier reference to authority concerning the requirement for strict construction of an international treaty. On the contrary, the last subparagraph of para 1.22 seems to suggest that the treaty should be construed in accordance with the perceived requirement of the relationship between Federal and State law in Australia.
11. The documents and maps at AB744-761 were plainly intended by the Minister to designate the Windella area for the purposes of the Convention. They were capable of doing so, having regard to the attributes found by his Honour at [82]-[85] and they have been accepted by the Convention parties and acted upon. The Windella wetland, together with the other three components in the Gwydir catchment designated at the same time, have been included on the Convention bureau's list (not reproduced in AB)
12. If his Honour's statutory construction should not be upheld and the above submissions as to non justiciability be rejected, in any event his Honour was right to find that the material sent by the Minister to the bureau satisfied the Convention prerequisites:
 - 12.1. Art 2 leaves open the manner in which boundaries of a wetland are to be "precisely described".
 - 12.2. Precise description of boundaries would commonly be given by a plan, being a relatively large scale drawing with reference points such as coordinates, topographical features etc.
 - 12.3. There is nothing in Art 2 to prevent the use of a plan as a means of providing a precise description of boundaries. Although the Article uses the expression "and also delimited on a map", a map in this context should be taken to mean a document which locates and orients the relevant wetland in its wider geographical area. The use of the word "map" as a requirement additional to the precise specification of boundaries should not be taken as inconsistent with that precise description being given by way of plan.
13. The plans/maps attached to the designation documents (AB744-761) serve the dual functions of plans describing the boundaries with precision and of maps orienting the Windella site in the surrounding geography. The latter function is particularly served by the inset at AB759.
14. The requirement of "precisely described" boundaries in Art 2 should not be understood in the sense of seeking a survey standard or a conveyancing standard of precision. The Convention is directed to identifying and protecting wetland areas globally. A description for listing purposes satisfies all requirements of the Convention if it is sufficiently precise to create certainty about the areas over which the Contracting Party, which nominates the wetland, is assuming obligations such as those under Art 3 (AB741).

15. It is irrelevant that the electronic file was not sent to the Convention bureau with the designation documents and that it has not been sent since. Provision of the electronic file to the bureau was not a requisite for designation. It remains the case that the electronic data can aid an understanding of the hard copy photocopy maps and give them a degree of precision more than adequate for Art 2. If the Convention required more precision than that which could be scaled off the photocopy maps then the electronic file may be referred to.
16. Ms McDonald has established that the electronic data of the shape and location of the Windella component boundary, as taken by her from the Department's data base, is identical with the electronic file which had been sent through to the Department by NPWS in October 1999. That in turn was identical with the electronic data from which Mr Bowen had in March 1999 created the plans/maps of which photocopies were sent to the Convention bureau (not reproduced in AB).
17. The aerial photographs onto which Ms McDonald thus superimposed the Windella component boundaries (AB413, 414 and 416) are the equivalent of maps. The photograph images have been rectified to make them conform to a flat map projection: para 8 of Ms McDonald's report, AB404.
18. Also superimposed onto Ms McDonald's aerial photographs at AB413, 414 and 416 are the cadastral boundaries: para 13 of Ms McDonald's report at AB406. These are boundaries of the lots in deposited plans which can be related to the titles which make up the property of Windella. The cadastral boundaries have expressly not been put in issue by the Respondents. The title documents are not reproduced in AB.
19. The result is that the aerial photograph images now reproduced at AB413, 414 and 416 are in effect highly precise maps showing in great detail topographic information and title boundaries, from which the boundary of the Windella wetland site can be marked off on the ground with very great accuracy. This provides an exact identification, for the purposes of ss.16 and 17, EPBC Act, of the area within which the prohibitions of s.16(1) apply. It is notable that the Ramsar site thus delineated, for example by the orange boundary on the aerial map/photograph at AB416, substantially coincides with the area which the Respondents understood it to occupy. Their understanding is demonstrated by the limits of ploughing up to September/October 2002.

Grounds 2(d) and 2(e)(ii) (AB1167) - no action taken that had a significant impact.

20. His Honour summarised the evidence relevant to this issue at [88] –[108]. At AB 1110 (paras [198] and [199]) he found:
 - the Windella Ramsar site retained important attributes of a wetland before the actions of February and March 2003, "including the ability to regenerate relatively swiftly";
 - it followed inevitably that the undisputed actions of clearing, ploughing and later sowing to wheat of virtually the entire site in February and March 2003 had a significant impact on its ecological character;
 - criteria for assessing whether the actions had an impact on the site, as identified by the Respondent's expert Mr McCosker, were accepted [200] and

- Mr McCosker fairly applied these criteria in elaborating the significant impact in his report ([201] at AB1111).
21. Ms Andreoni's aerial photographs of 23 September 2002 (AB291-300) show the extent of clearing at the eastern end of the site by that date. No further clearing had been done up to 6 October 2002: at the latter date, Ms McDonald's aerial photo map at AB416 shows the exact extent of clearing.
 22. Dredging of the channel was carried out in the same period, between about late June 2002 and 23 September 2002: Mr Jones' affidavit, para 7, (AB279); tr. (AB136). Ms Andreoni's photographs at (AB291-300 clearly show the dredging spoil heaped on the north bank of the channel as at 23 September 2002.
 23. The balance of the clearing, right up to the edge of the channel, was done in about late February or March 2003: Mr Jones' affidavit, paras 10 and 11 (AB280).
 24. Ms Andreoni's photographs show the extent and nature of vegetation as at 23 September 2002, covering the whole of the site except for the small portions at the east end which had already been cleared. Dr Bacon's photographs nos. 1 and 2 (AB344) and no. 8 (AB348) show closer views of the vegetation. Mr McCosker's report at AB317-318 and 328 establishes the nature and species of this vegetation.
 25. A further significant aspect of the ecology of the site prior to the clearing was the quantity of fallen dead timber and the standing dead trees which provided habitat of value. This is described by Mr McCosker at tr. 399-400 (AB164-165)
 26. There is no dispute from the Respondents that all of the growing vegetation, dead logs and standing dead trees have been removed by the clearing and ploughing. At least one growing tree was destroyed by fire: Dr Bacon's photograph no. 6 (AB347). Photographs taken by Mr McCosker at (AB334-335) illustrate the completeness of the clearing and ploughing.
 27. That there has been an impact on the ecological character and that it has been significant is self evident from the comparison between photographs and descriptions of the site before clearing with photographs and descriptions afterwards, as referred to above. Respondent's counsel's own words are apposite: "its been sterilized" (tr. 399) (AB164).
 28. His Honour's conclusion on this issue was soundly based in the evidence and the Appellants' submissions show no basis for disturbing it. In particular:
 - Para 2.2 of submissions: It is bold to suggest that the evidence showed this was "never a natural...wetland". Of course there was a time before it was interfered with by the construction of the Gingham channel, the building of the Copeton Dam etc. But in any event, significant impact upon its ecological character did not depend upon its condition, prior to the conduct of the Appellants, having been "natural" or otherwise.

- Para 2.3: The finding of significant ecological impact did not depend upon the sowing of wheat. Complete destruction of every growing stalk of vegetation and comprehensive clearing of the land to the point of sterilisation was an ample basis for his Honour's finding.
- Paras 2.4 and 2.5: Evidence concerning lippia established that under prolonged inundation it would die back and natural species would regenerate from the seed bed. In those circumstances, his Honour was entitled to find that clearing of the land including the removal of all standing trees, standing dead timber and logs, which would support wildlife habitat in times of inundation had a significant impact.
- Para 2.10: Mr McCosker's evidence as to the likely impact of continued cropping was relevant to the Applicant's claim for injunctive relief. This did not detract from the strength of the evidence that sterilisation of the site prior to the sowing of crops had significant ecological impact.

Ground 2(e)(i) (AB1167) - clearing etc was permitted

29. As this ground of appeal is abandoned (Appellants' submissions para 3.1) the Respondent's Notice of Contention need not be considered either.

Ground 2(f) (AB1167)- level of pecuniary penalties

30. The maximum civil penalty for a contravention of s16(1) was \$550,000 in the case of the first appellant and \$5,500,000 in the case of the second appellant. The trial judge imposed penalties of \$150,000 and \$300,000 respectively - well below the maxima, particularly in respect of the corporate appellant.
31. The relevant matters to a determination of penalty are set out in s481(3) of the EPBC Act.
32. Very significant amongst his Honour's findings on this part of the case were the following:
- the contravention was deliberate in that the first appellant was well aware the action would have a significant impact on the ecological character of the Windella Ramsar site and that this would contravene the EPBC Act. (AB1147);
 - neither of the appellants had shown any contrition;
 - the first appellant had substantial assets, and neither of the appellants submitted that the imposition of substantial penalties would cause either of them financial hardship.
33. For the appellants to succeed on this ground of appeal they must demonstrate that the penalties are either manifestly excessive or that the trial judge erred in respect of a sentencing principle in the determination of penalty. Their submissions, in the paragraphs referred to as follows, fail to demonstrate error:

- Paras 4.2-4.4: These paras misunderstand para [82] of the judgment (AB 1157). That paragraph cannot be characterised as "splitting Mr Greentree's penalty between himself and the company" (para 4.4). Rather, his Honour determined an appropriate penalty for each of the Appellants and then made a concession with respect to the fine to be imposed on the company because of its indirect impact on Mr Greentree himself. If anything, this was an error of leniency to the company rather than of severity.
- Para 4.5 - 4.7: It is difficult to see how the finding of deliberateness of contravening conduct could lead to the conclusion that only a nominal penalty should have been imposed upon the person who was (a) in his own personal right one of the deliberate contraveners and (b) the mind and will of the corporate contravener. As the mind and will of the Second Appellant, Mr Greentree's deliberateness of conduct caused the corporation's conduct to be seen in a more serious light than would have been the case if the breach had occurred through inadvertence.
- Para 4.8(a): The brevity in time of the action did not mitigate the contravention, having regard to its physical extent. There was no error in so far as his Honour "focused on the extent of the damage to the site".
- Para 4.8(b): The capacity of the site to regenerate itself ignores the evidence (which his Honour accepted) about the extent of damage to it as habitat through the removal of standing dead timber, the destruction of growing trees which are extremely slow to re-establish and the complete removal of all dead logs to which the Respondent's experts attached considerable significance. Although the grasses, reeds and such species would likely regenerate, this does not detract from the seriousness of the deliberate breach involved in destroying them – laying the area to waste. The native species could only grow again under conditions of injunctive restraint upon the Appellants (which they resisted).
- Para 4.9(e): It was correct in principle for his Honour to have had regard to the maximum penalty as an indication from Parliament of the seriousness with which it regards breaches of these provisions. The fixing of fines at the levels which his Honour adopted did amount to placing the Appellant's conduct "on a scale of seriousness". A penalty imposed upon Mr Greentree of one quarter of the maximum and a penalty upon his company of one twentieth of the maximum are not at all inexplicable, having regard to the fact that the company's events could not have been committed without Mr Greentree committing his own breach and causing the company to commit its offence at the same time.
- Para 4.9(f): The Appellant's submissions about deterrence appear to assume that unless an actual likelihood of breach can be demonstrated, general deterrence may not be taken into account. This is novel in the law of sentencing.
- Para 4.9(g): His Honour was fully justified in finding that contrition was not present, having regard to the fact that Mr Greentree asserted the offences had been committed under an honest and reasonable mistake and his Honour rejected this and concluded that they had been deliberate. In short, Mr Greentree, in his personal capacity and as the mind and will of the Second Appellant, was dissembling in attempting to manipulate the Court in the sentencing process. The

Appellants' claim to credit for not having disputed essential facts is feeble. The charges were defended opportunistically. The Appellants belatedly raised what became a protracted argument about the sufficiency of designation. They litigated, fully, the issue whether the complete destruction and removal of all vegetation on the site was "significant" – in the face of the inevitable conclusion that this "sterilisation" of the land had been carried out by them. In sentencing, credit is usually allowed for an early plea of guilty, in part upon the utilitarian basis that the process of justice is thereby facilitated. There was no facilitation by these Appellants.

- Para 4.9(h): His Honour was entitled to have regard to the Appellants' failure to offer anything that would amount to substantial remediation of the site. Such an offer would have been significant to mitigate penalty, particularly as it would demonstrate a desire to set right the consequences of the breach and would be indicative of contrition.
- Paras 4.10 and 4.11: No error in penalty is demonstrated by the Court declining to accede to the offenders' judgments about the worth or otherwise of the subject protected wetland. This submission on behalf of the Appellants invites the Court to enter an environmental debate about the utility of protecting the site, rather than administering the penal law which Parliament has enacted to protect sites which are the subject of judgments made by (and designations lodged by) the Minister.



D.J. FAGAN SC

6 May 2005

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