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ORIGINAL

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
No. NSD 1591 of 2004

RONALD GREENTREE and AUEN GRAIN PTY LIMITED
Appellants

MINISTER FOR ENVIRONMENT and HERITAGE
Respondent

OUTLINE OF APPELLANTS' SUBMISSIONS

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1. The Ramsar Site designation issue

1.1 The appellants contend that the trial judge erred in:

(a) holding that the Windella site was duly designated under Article 2 of the Ramsar Convention;

(b) finding that the documentation supplied by the respondent was sufficient to effect designation of the Windella site under Article 2;

(c) holding that a Ramsar wetland may be designated without its boundaries being precisely described or delimited on a map.

1.2 The findings of fact as to the designation process:

In February 1999, the then landowner of Windella signed the Memorandum of Understanding (judgment para 67).
The NSW Government prepared the Ramsar Information Sheet and maps, in that the Department of Land and Water Conservation (NSW) had the National Parks and Wildlife Service (NSW) complete the RIS, following the Ramsar Bureau's approved form, and Mr Bowen of the NPWS prepared maps. (69 – 74, 77)
The DLWC's memorandum requesting the work specified the requirements of an 'ideal' Ramsar site map: showing the boundaries of the property, the map scale, latitude and longitude, compass bearing, basic topographic and hydrological features (drainage, rivers, permanent water), landmarks (roads, direction and distance to Moree township if possible). (71)
The RIS form gave one set of geographical coordinates for the Windella site, indicating a point at the approximate centre of the site. (79)
The maps showed a quadrilateral shape as the Windella site; they did not show latitude or longitude; they did not provide geographical coordinates for the four corners of the site; and they did not show the boundaries of the property itself (83)
Had Mr Bowen been asked to include on his maps latitude and longitude,

topographical information, statements as to main habitat types, shire boundaries, state boundaries, local government areas, roads, watercourses and other features, he would have had no problem in doing so. (76)
The unaltered RIS and NPWS maps were sent by the Minister to the Ramsar Bureau on 2 June 1999, with a request to add the Windella site to the List. (82)
The Windella site was then listed and remains on the List. (87)
Four months after the designation documents were received by the Bureau, Environment Australia was sent by the NPWS Mr Bowen's map file showing only the boundaries of the site. That file was stored on EA's database. A computer program can be used to 'translate' other data in the EA database to identify the coordinates of the four corners of the Windella site. (84, 85)
The public had access to the maps through the EA website. (86)

1.3 The Ramsar Convention's designation requirements:

Article 2(1) of the 1975 Ramsar Convention (AB2.740) provides that in designating a suitable wetland for inclusion in the List, "(t)he boundaries of each wetland shall be precisely described and also delimited on a map..."
A data sheet for the description of Ramsar sites (later the RIS) was recommended for use by the contracting parties at their 1990 conference. It was accompanied by explanatory notes and guidelines. (33, 35)
At that time, the geographical coordinates required in the RIS were those of the approximate centre of the wetland, and the 'outline map of the site' required was, "whenever possible, to include geographical coordinates ... administrative boundaries, the boundary of the Ramsar site ... the distribution of the main wetland habitat types, main roads and other notable features." (35)
In 1993, the conference of the parties requested that designation data include, inter alia, "a map showing definitive site boundaries". (36)
In 1996, the conference of the contracting parties resolved that "the boundaries of each wetland (for listing) shall be precisely described and also delimited on a map". (37)
The relevant operational objective of the 1996 conference was to "ensure that the maps and descriptions of Ramsar sites submitted to the Ramsar database by the contracting parties at the time of designation are complete, in the approved standard format of the (RIS)." (38)
In 1997 the Bureau revised the explanatory note referring to the outline map of the site, stating that it "should be ... the most detailed and up-to-date map of the wetland available" and stating that the 'ideal' Ramsar site map "will clearly show the boundaries of the Ramsar site ... latitude, longitude ... administrative boundaries (e.g. province, district, etc), and display topographical information, the distribution of the main wetland habitat types and notable hydrological features. It will also show major landmarks (towns, roads, etc)." (40)
The 2002 conference of the contracting parties approved this statement: "The provision of a suitable map or maps is a requirement under Article 2.1 of the Convention – it is fundamental to the process of designating a (wetland) and is an essential part of the information supplied in the (RIS). Clear mapped information

about the site is also vital for its management", and specified that maps provided on designation should "clearly show the boundary of the Ramsar site." (42)

1.4 Construction of s.17(1) of the *EPBC Act*

The *EPBC Act* only protects "declared Ramsar Wetlands". A site will only be protected if it satisfies the definition in s.17(1) of a "declared Ramsar Wetland". Section 17(1) therefore provides the gateway to the protection of Ramsar Wetlands in Australia.

Accepting that the *EPBC Act* must be given a construction consistent with its objects and purpose, the primary purposes to be discerned from the objects of the Act (s.3(1)) are:

> "(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance;
>
> ...
>
> (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples;
>
> ...
>
> (e) to assist in the co-operative implementation of Australia's international environmental responsibilities"

The *EPBC Act* states the manner in which it sets out to achieve these objectives: (s.3(2)) provides that "the Act:

> "(a) recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas; and
>
> (b) strengthens intergovernmental co-operation, and minimises duplication, through bilateral agreements; and
>
> (c) provides for the intergovernmental accreditation of environmental assessment and approval processes; and
>
> (d) adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; and
>
> ...
>
> (f) includes provisions to enhance the protection, conservation and presentation of world heritage properties and the conservation and wise use of Ramsar wetlands of international importance; and
>
> ...
>
> (g) promotes a partnership approach to environmental protection and biodiversity conservation through:
>
> (i) bilateral agreements with States and Territories; and
>
> (ii) conservation agreements with land-holders; and

(iii) recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity; and
(iv) the involvement of the community in management planning."

The legislation recognises the need to integrate with the lawful use of land under state systems – s.43A and 43B are examples of specific exceptions to the application of the restrictions on actions that might have a significant impact on sites meeting the s.17(1) definition. The *EPBC Act* must operate in the context of the wide variety of state regulatory statutes that operate with respect to the land or the use of it:

- The *Native Vegetation Conservation Act* 1997 (NSW);
- the *Threatened Species Conservation Act* 1995 (NSW);
- the *Rural Fires Act* 1997 (NSW);
- the *Rural Lands Protection Act* 1998 (NSW);
- the *Catchment Management Authorities Act* 2003 (NSW);
- the *Fertilisers Act* 1985 (NSW);
- the *Noxious Weeds Act* 1993 (NSW);
- the *Plant Diseases Act* 1924 (NSW);
- the *Rivers and Foreshores Improvement Act* 1948 (NSW);
- the *Soil Conservation Act* 1938 (NSW);
- the *Water Act* 1912 (NSW);
- the *Water Management Act* 2000 (NSW);
- the *Wild Dog Destruction Act* 1921 (NSW).

The *EPBC Act* also recognises the role of bilateral agreements with the States and management agreements in relation to s.17(1) sites – these must be consistent with Australia's obligations under the Ramsar Convention. The Commonwealth has entered into no management agreements or bilateral agreements with respect o the Windella Ramsar site.

1.5 Because the *EPBC Act* Ramsar provisions implement an international convention, the rules as to construction of treaties will apply where the legislation expressly incorporates the convention definition of a term. The *EPBC Act* does not provide for the express incorporation of the Article 2 conditions for listing. (cf s.16(3): definition of ecological character). By referring to the terms of Article 2, the EPBC Act requires that the content of the designation documents be judged against the terms of Article 2 by a domestic court.

It is legitimate to have regard to the construction of Article 2 under international law – the contracting parties have adopted progressively more stringent interpretations of the requirement to precisely describe the Ramsar area. The application of Article 31 of the *Vienna Convention* therefore results in a construction that requires the Minister to provide to the Bureau documents which precisely describe the area and delimit it on a map.

In order for the treaty to be validly implemented in domestic law, relying on the external affairs power, the legislation giving effect to it must be reasonably adapted and appropriate to serve the purpose of the treaty (*The Commonwealth v Tasmania* (1983) 158 CLR 1 at 123 and 131 per Mason J: "the law must conform to the treaty and carry its provisions into effect" and at 232 per Brennan J). If carrying out the purpose of the Convention requires the protection of wetlands of international importance, the proper identification of those wetlands forms part of that purpose: *Richardson v Forestry Commission* (1988) 164 CLR 261 at 290.

Legislation which brought within the protection of the EPBC Act any site submitted for listing by the Commonwealth, regardless of its connection with the criteria supplied by the Convention, would not be appropriate and adapted for the purpose of giving effect to the treaty, and may be invalid. In the words of Brennan J on ss.9 and 12 of the *Racial Discrimination Act* 1975 (Cth) in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 260-261:

> "It remains to inquire whether ss 9 and 12 of the Act, which are the only provisions upon which Mr Koowarta's claim for relief might depend, were enacted in performance of Australia's obligation under the Convention. It was rightly conceded that ss 9 and 12 were enacted in implementation of the Convention. If there were a disconformity between ss 9 and 12 on the one hand and the Convention obligation on the other, the Convention obligation might fail to stamp the character of an external affair upon some part of the subject matter of ss 9 and 12, and further consideration would have to be given to their validity (cf *R v Burgess;; Ex parte Henry* and *Airlines of NSW (No 2)*, especially per Menzies J, at 141)."

Although the rules for construction of treaties are considered to be more liberal than those imposed by the common law (but possibly not more liberal than those advanced by the *Acts Interpretation Act* 1901 (Cth)) those rules require domestic courts to give effect to the plain meaning of ordinary words used in the treaty. *Applicant A v Minister for Immigration and Ethnic Affairs and Anor* (1997) 190 CLR 225 at 254 per McHugh J "Primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered." see *Andersen v Umbakumba Community Council* (1994) 126 ALR 121 at 124-5 for an example of domestic construction of treaty terms ("specified") according to the plain meaning of the words.[1]

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[1] In the expression, "specified" is the past participle of the verb "to specify". The ordinary meaning in the English language of "to specify" is to mention, speak of, or name (something) definitely or explicitly; to set down or state categorically or particularly; to relate in detail: *Shorter Oxford English Dictionary*, 3rd ed. In the context of Art 2, para 2(a) of the Termination of Employment Convention "specified" identifies a period of time or a task the scope and parameters of which are stated definitely. A "specified period of time" is a period of time that has certainty about it. (at 125)

An approach to construction of s.17(1) conformably with the Convention meaning does not prevent consideration of domestic rules of construction: *Shipping Corporation of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 CLR 142 at 158; (1980) 32 ALR 609 at 618. Construction of a treaty in accordance with the Vienna Convention requires that words be given effect, and the court is not "at liberty to consider any word as surplusage or insignificant" per Meagher JA *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110 at 114; *Commonwealth v Baume* (1905) 2 CLR 405 at 414.

Domestic rules of construction must be relevant where the legislation is intended to give effect to a variety of international instruments, as the EPBC Act is.

It is therefore necessary to have regard to the context in which the legislation is intended to operate to ascertain the reach of s.17(1), including:

- the effect that the protection of a site under that provision has on the rights and liberties of holders of proprietary interests in the land;
- the intent of s.43A that persons entitled to exercise rights under state law are entitled to continue to exercise them;
- the public interest in notifying the public of the site; and
- the nature and extent of the sanctions imposed by the EPBC Act for conduct contravening s.16 or s.17B.

Although these considerations might be considered as relevant only to the construction of statutes with no international element, their application here supports the appellants' contention that Parliament intended the words "designated under Article 2" to import strict requirements for description of the "declared Ramsar wetland".

It is also necessary to recognise that the treaty falls to be implemented in a federal system where the restrictions on the power of the Federal Parliament to make laws arising from the Constitutional allocation of powers between the State and the Federal sphere may require that implementation of treaties occur through several legislatures: *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 at 348 "The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures." See also per Stephen J in *New South Wales v Commonwealth* (135 CLR) at 445: "Whatever limitations the federal character of the Constitution imposes upon the Commonwealth's ability to give full effect in all respects to international obligations which it might undertake, this is no novel international phenomenon. It is no more than a well recognized outcome of the federal system of distribution of powers and in no way detracts from the full recognition of the Commonwealth as an international person in international law."

See also *Victoria v The Commonwealth* (1994) 138 ALR 129 at 146:

"When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states."

and at 147:

"Where a treaty relating to a domestic subject matter is relied on to enliven the legislative power conferred by s 51(xxix) the validity of the law depends on whether its purpose or object is to implement the treaty. This was explained, in a passage with which we respectfully agree, by Dawson J in *Richardson v Forestry Commission*:

> "The power to make laws with respect to external affairs contains no expression of purpose and in that respect it is like most of the other powers contained in s 51 of the Constitution. It is not a power to make laws for the purpose of cementing international relations or achieving international goodwill or even for implementing international treaties. The implementation of treaties falls within the power because it is a subject matter covered by the expression "external affairs". And the purpose of legislation which purports to implement a treaty is considered not to see whether it answers a requirement of purpose to be found in the head of power itself, but to see whether the legislation operates in fulfilment of the treaty and thus upon a subject which is an aspect of external affairs."

In this context, purpose is not something found in the head of power. Rather, it is a test for determining whether the law in question is reasonably capable of being considered as giving effect to the treaty and therefore as being a law upon a subject which is an aspect of external affairs."

1.6 His Honour made the following observations in his judgment:

(132) Clearly enough, a contracting party designating a wetland is obliged by the Ramsar convention to provide the information specified in Article 2.

(134) There are obvious advantages to ensuring that parties define the boundaries of a designated wetland precisely...

(136) The Commonwealth's process was less than meticulous in all respects.

(134) Article 2(1) of the Ramsar convention does not say that the boundaries of the designated wetland must be precisely described or delimited on a map at the time of designation.

1.7 It is impossible to see how his Honour's statement at (132), in which he acknowledges that in designating a site, the contracting party is obliged to provide the Article 2(1) information, can be reconciled with (135), where he states that Article 2(1) does not say that the boundaries of the designated wetland must be precisely described or delimited on a map at the time of designation - unless there is special force in his words "at the time of designation".

If that be the distinction, it is unwarranted. Any neutral reading of Article 2(1) results in an interpretation that the obligation to 'precisely describe and also delimit on a map' the wetland's boundaries is one that arises at the time of designation, and is a continuing one.

1.8 The appellants' case was always that their actions did not affect a declared Ramsar wetland because the Windella site was not designated under Article 2 of the Convention. They argued that the purported designation did not conform to the obligations imposed by Article 2(1), in particular; and that the RIS and map specifications of succeeding contracting parties' conferences only served to emphasise the mandatory nature of the requirement to 'precisely describe and also delimit on a map' the boundaries of the Windella wetland.

1.9 The *EPBC Act* repeatedly imposes obligations on the Commonwealth to act consistently with Australia's obligations under the Convention (see, e.g. ss.52, 138, 333, 334, 335)

1.10 In his decision-making process, Sackville J acknowledged that:

- The EPBC Act repeatedly requires the Commonwealth's actions in relation to Ramsar wetlands be consistent with the Convention. (117)
- The s.17(1) definition of a declared Ramsar wetland closely follows the Article 2 definition and is integral to the s.16(1) prohibition; and requires that the site be 'designated ... under Article 2'. (121-123)
- There are two relevant concepts in s.17(1): designation by the Commonwealth; and that the designation be 'under Article 2'. (123)
- The meaning of 'under Article 2' is to be determined from its context. (126)

1.11 His Honour held that 'under Article 2' in the EPBC Act does not mean 'in accordance with', but merely identifies the source of the power to designate a wetland for listing. (126-7)

He proceeded to hold – apparently motivated by his comment that a defective designation would, if the appellants' submissions were correct, "render a wetland of international significance devoid of legal protection" (131) – that:

(a) Article 2 does not require precise description of the site as a precondition of valid designation (132) or, at least, such precise description was not required at the time of designation (134); in the alternative

(b) the map of the Windella site was sufficient for a skilled interested person to ascertain the coordinates for each of the corners of the Windella site, and thus the map did precisely define the boundaries. (137)

1.12 In rejecting the appellant's argument on the designation point, the trial judge described himself as adopting a purposive approach to 'treaty interpretation' (133, 134), saying that

> "(I)t would not enhance the object of the Ramsar convention to withhold the conservation regime because of a failure to provide an adequate description of the boundaries..." (134)

It is respectfully submitted that this betrays an erroneous approach: what the court was required to do was interpret the Convention, then to determine whether the *EPBC Act* was consistent with the Convention, and lastly to determine whether what the Commonwealth did in purporting to designate the site was consistent with the *EPBC* Act. The crucial words for interpretation are 'designated under Article 2', which occur in s.17(1), not the Convention. It is nothing to the point that the contracting parties have never expressed an intention that a defective designation should deny a site listing, because the requirements of Article 2 must be given content under domestic law. The appellants did not argue that the designation was invalid as a matter of international law, but that the failure to comply with Article 2 in the process of designation deprived the wetland of the protection of the EPBC Act.

1.13 Sackville J purportedly adopted a purposive approach to the construction of s.17. The question he asked himself was in essence whether the particular documents gave sufficient information to enable the area to be identified for the purpose of conferring protection under the EPBC Act. This circular construction does not assist in giving content to the definition. The requirement to adopt a purposive construction is found in s.15AA *Acts Interpretation Act* 1901 (Cth), which provides that: "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

The *EPBC Act* plainly must strike a balance between the object of protecting the environment, and the far-reaching effect of the legislation on personal and proprietary rights. The various communications from the convention parties on

the mapping requirements for designation documents suggest that the object of protecting internationally significant wetlands is promoted by clear and accurate description of their location.

The effect of adoption of the construction contended for by the appellants might be that some wetlands on the Ramsar list are not accorded the protection conferred by the *EPBC Act*. That is not inconsistent with the Convention – listing imposes on a Convention Party the obligation to protect the wetland, but does not itself bring about that protection. Nor does the *EPBC Act* authorise mere listing as the condition of protection under the Act – otherwise, s.17 would have provided that a declared Ramsar Wetland is one that is maintained on the Ramsar List. If the Convention itself provides no 'gateway' to recognition of a site as significant under international law, it is reasonable to infer that Parliament intended that protection under the *EPBC Act* was conditioned on an objective compliance with the requirements of Article 2 which were expressed in, but not enforced by, the terms of the Convention. It is this connection between compliance with the Article 2 requirements and the application of the *EPBC Act* that renders the legislation reasonably appropriate and adapted to implement the Convention in domestic law.

Where the words of the statute, and the Convention, are capable of being given a literal meaning consistent with the objects of the statute (and the Convention), there is no good reason for departing from the literal interpretation of the words (*Cooper Brooks (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 at 321) in favour of some less rigorous construction based purely on a so-called 'purposive' approach to the statute.

Penal consequences

1.14 His Honour was bound to interpret the words in their *EPBC Act* context. In that process, he had to take into account the extraordinary penal consequences of a contravention of s.16(1), and the extraordinary impact of the section on the appellant's fundamental rights relating to use of their own land. It is important that the Minister may unilaterally declare a site to be a Ramsar wetland, against the will of its owner: s.326.

In *Donaldson v Broomby* 40 ALR 525, which concerned the statutory power of arrest without warrant, Deane J said this at 525-6:

> It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable.

By analogy it is submitted that it is of equal importance to the existence and protection of the appellants' property rights that any statute denying them those

rights will be strictly confined to its terms. *A fortiori* is this the case where the penalties imposed by the statute are of such extraordinary significance. See Mason CJ in *Chu Kheng Lim v Minister for Immigration, Local Government, and Ethnic Affairs* (1992) 176 CLR 1 at 12

Words in a statute must be given meaning

1.15 The first and fundamental meaning of 'under Article 2' is 'in accordance with Article 2': see *Energy Resources of Australia v Commissioner of Taxation* [2003] ATC 4024 at para 37.

His Honour was in error in holding that the words merely pointed to the source of the Commonwealth's power to legislate. If that were the case, the words 'Article 2' would have no work to do in s.17(1), and it would read simply:

> ...designated by the Commonwealth under the Ramsar Convention...

By referring, in particular, to the mandatory provisions for designation of sites and not referring merely to the Convention as the source of power, the legislature was specifying that designation had to accord with those provisions. The appellants submit that the words "under Article 2" are apt to amplify the requirement from one which requires the Commonwealth simply to "specify" or "indicate" the area of the Ramsar site and "does not necessarily require the giving of precise geographical co-ordinates for the designated site, or the provision of a map which precisely defines the boundaries of the site in the manner of a survey" (para 124) to one which DOES import the Article 2 conditions of 'precise description' and 'delineation on a map'.[2] *See Chu Kheng Lim v Minister for Immigration, Local Government, and Ethnic Affairs* (1992) 176 CLR 1 at 12 per Mason J.

Ramsar site declarations are subject to challenge:

1.16 s.17(4) refers to 'the validity of a declaration' and, plainly, a declaration would be invalid if it did not specify the period for which it is to be in force: see s.17(6).

His Honour gave examples of potential challenges to the validity of "purported" Ramsar designations on judicial review grounds (110, 122) and foresaw that a purported designation may be held *ultra vires* on the grounds that the site does not satisfy the Article 1(1) definition of a wetland. (128) That question would involve

[2] 'delineate' means "To trace out by lines, trace the outline of, as on a chart or map." (OED). A 'map' is "A drawing or other representation of the earth's surface or a part of it made on a flat surface, showing the distribution of physical or geographical features (and often also including socio-economic, political, agricultural, meteorological, etc., information), with each point in the representation corresponding to an actual geographical position according to a fixed scale or projection; a similar representation of the positions of stars in the sky, the surface of a planet, or the like. Also: a plan of the form or layout of something, as a route, a building, etc."

the determination of the validity of an action under domestic law with reference to compliance with the Convention, because the Article 1(1) definition is expressly adopted as the EPBC Act definition by s.528.

It is clear, then, that a purported designation will not be unchallengeable in domestic law because it has been placed on the List – listing is not *ipso facto* conclusive of validity.

1.17 At (128), his Honour was prepared to find that the word 'designated' imports a requirement that some degree of specificity is required, but that he could not discern a legislative intention that a purported designation will be ineffective if the Commonwealth failed to describe precisely the boundaries of the site or delimit them on a map. The EPBC Act provides in s.326(3) that a failure duly to seek the agreement of a landowner to a site's designation will not affect the validity of that designation. It also provides in s.327(3) that a failure to give notice in the Gazette of the designation of the wetland will not render the designation invalid.
In other words, the legislature has expressly provided that certain noncompliance with some statutory obligations will not affect validity. No such protection is given in the case of noncompliance with s.17(1).

1.18 It is not to the point that, as His Honour pointed out, Mr Greentree may have had no difficulty locating the approximate position of the wetland. The state of knowledge of individuals cannot control the determination of whether the wetland fulfils the s.17(1) requirements. The EPBC Act contemplates that there will be public notice of the designation of the wetland, and that definition must itself be sufficient to enable a member of the public to know with some degree of certainty the area that the Commonwealth seeks to protect (*Chapman v Tickner* (1995) 55 FCR 316 at 366).

1.19 The trial judge sought also to support his purposive approach by referring to the practice of the contracting parties – acknowledging that they have repeatedly urged the submission of complete maps and site descriptions at the time of designation – in never suggesting that noncompliance would result in exclusion from the List. (135)

Not only have the contracting parties thus made it clear that they expect the requirement to 'precisely describe and also delimit on a map' the site is to be complied with, demonstrating that the 'practice' is consistent with the appellants' position; but it is also the case that it would be quite foreign for a Convention to declare non-compliance to be fatal under the parties' domestic law.

1.20 Instead of focusing on the words 'under Article 2', the trial judge relied upon possible meanings of the isolated word 'designate' to conclude that the obligation on the Commonwealth is to 'indicate or specify' the site, not necessarily with

precision or with the map mandated by Article 2(1), but sufficiently to identify its approximate boundaries (124) to an interested and skilled person, resorting to the Minister's website and with access to a computer program that translates the electronic file data into correct coordinates of latitude and longitude. (85)

His Honour's approach is erroneous because it extracts 'designated' from its context, and it flies in the face of the express terms of Article 2(1), even without the amplification of the explanatory notes successively adopted by the contracting parties, including Australia. The idea of 'approximate boundaries' being compliant with the Commonwealth's obligations is untenable, as is the overly-robust view his Honour took of the ordinary person's capacity to engage in the expert process that yields the precision that Article 2(1) requires. In any event, the Minister's website is not the RIS, and neither is it the accompanying maps.

1.21 The fact that there is no gatekeeper in the Ramsar listing mechanism, as contrasted with the World Heritage Listing process (119, 120), only militates against any conclusion that listing will *ipso facto* validate a designation. It thrusts the onus on the unsupervised designating party to get it right.

Operation in a federal system

1.22 The environmental protection regime is plainly intended by Parliament to operate in conjunction with State systems of land management (s.43A *EPBC Act*) under environmental instruments such as the Moree LEP. This environmental instrument has effect by reference to the location of land within the State cadastral boundaries. It is submitted that it would have been unlikely that Parliament intended that the Commonwealth Minister have no regard whatsoever either to the basis on which the State environmental instruments operate, or to the strict regulations governing the identification of boundaries in State legislation – pursuant to the Surveying Act 2002 (NSW), the Surveying Regulation 2001 (NSW) (ss.9,10 and Form 1) the Real Property Act 1900 (NSW) (ss.28V, 114) and the Conveyancing Act 1919 (NSW) (Division 3 of part 23). If the requirement to designate under Article 2 is given a strict construction, it is more likely to accord with the objects and mechanisms expressed in s.3(1)(d) and s.3(2)(a)-(d) of the *EPBC Act*.

The operation of s.16 and s.17B constitute an affectation (Royal Sydney Golf Club v Federal Commissioner of Taxation (1955) 91 CLR 610 at 624) in the nature of a statutory covenant operating either as a latent defect in title or a material latent defect in quality (Re City of London Real Property Co Ltd [1949] 1 Ch 581 at 585). It is a restriction affecting the property or its owner to its or his or her detriment and does not arise solely because of the operation of a law of general application (Borthwick v Walsh (1980) 41 LGRA 144 at 150; Ballard v Way (1834) 1 M & W 520, 150 ER 540).

Such a restriction on the rights of the owner of the land could only arise because s.109 of the Constitution renders inoperative, to the extent necessary under the federal law, the provisions of s.42 of the Real Property Act that a registered proprietor holds the land subject to those interests recorded in the Register and "absolutely free" of all other interests.

The appellant argues that s.17 can only be "reasonably appropriate and adapted to" carrying into effect the Commonwealth's obligations under the Ramsar Convention if it is construed in such a way as to require the identification of the land in a manner that is consistent with the system of boundary identification and delineation of land under the existing state cadastre, which requires a strict construction of the terms of Article 2 of the Convention.

2. The issue of significant impact on the wetland ecosystem

2.1 The appellants, who at all times conceded their actions had had 'an impact' on the ecological character of the wetland, contend that the trial judge erred in finding that each of them had caused a significant impact on the ecological character of the Windella wetland.

2.2 The findings of fact on the issue of the degree of the impact caused:

Such were the shortcomings of the Minister's evidence that the appellants will only be liable if it can be proved that their activities in February and March 2003 had a significant impact on the ecological character of the site as it was immediately before those activities. (194-197)
By October 2002 about 20 percent of the site was cleared. (198)
The site's habitat value was (already) generally diminished as a consequence of the Copeton Dam's operation, by a lack of water, the effect of fire, the presence of exotic weeds, and (lawful) dredging of the Gingham channel. (198)
Lippia, which inhibits the growth of wetland plants, had spread extensively throughout the land system. (58)
Some native wetland plants were present on the site. (198)
The 'constructed' stock and domestic water channel (the Gingham channel) prevented water from spreading overland (58, 61) and thus prevented or inhibited wetland plant growth.
Some native trees were on the site. (198) About 15-20. (93)
Dead timber on the site provided bird habitat. (198)
The site had (before the relevant period) lost some of the attributes of a pristine wetland*, and (after the appellants' activities) it retained important attributes including the potential to regenerate fairly swiftly. (198)
Inundation of the site would allow native wetland plants to reestablish themselves over time. (199)

The appellants' activities had a significant impact on the ecological character of the site, because (80 percent, less the sides of the channel) had been cleared, ploughed and sown with wheat. (199, 59)

* His Honour's reference to loss of the attributes of a pristine wetland is manifestly inappropriate. The Windella site was never a natural (much less a pristine) wetland. It was a man-made environment where wetland plants had grown alongside an artificial channel, dug to bring stock and domestic water to farms that had been deprived of natural inundations by the Copeton Dam's construction. *(AB71.10-15; AB93.13-21; AB94.19-24; AB313; AB343a)*. His Honour conceded at AB2.1151 (62) that "the Windella Ramsar site, prior to the contravening conduct taking place, was not a pristine wetland."

2.3 There is an immediate problem with the finding that the significant impact was in part caused by the site being 'later sowed with wheat': wheat was not sown in the period February/March 2003, but at some time between 30 July 2003 and 16 August 2003. That is four months outside the period in which his Honour found the contravention took place.

Insofar as the trial judge relied upon an activity allegedly undertaken at some other time, he fell into error by taking into consideration when assessing the significance of the impact what must have been a separate contravention.

In this regard, Sackville J's statement at (206) that "I infer Mr Greentree also gave instructions to sow wheat on the Windella Ramsar site and that those instructions were duly carried out" is quite unsatisfactory: not only is it unsupported by the findings of fact from which the inference is said to have been drawn, but – perhaps more importantly – there is no finding as to when Mr Greentree gave the instructions. Unless his Honour made a finding of fact that the instructions were given in February/March 2003, he was precluded from taking the sowing of wheat into account when he assessed the ecological impact issue. And he made no such finding.

2.4 Despite his Honour's reference to the "entire site" being cleared and ploughed, the evidence was that more than 50 percent of the site was infested with the noxious weed lippia. (*AB29.1-6, see also AB28.14; AB39.2; AB53-4; AB85; AB328; AB378*) Clearing and ploughing of the vast majority of the site can have had no adverse effect on its ecological character *as a wetland*.

2.5 The ecological character of the site prior to the appellants' actions (the baseline that his Honour agreed (197) had to be established by evidence) should fairly have been described as a degraded environment, dominated by noxious weeds, but with a small number of native trees, some dead timber of bird habitat value,

and some wetland plants along the banks of the man-made channel. But that is not the focus of s.16(1). As the judgment makes clear at (188), 'ecological character' refers to the character of the wetland ecosystem, not the general environment of the site.

Further, the evidence was that the site itself possessed dynamic ecological characteristics (AB69.15, AB160.5); was unstable ecologically and was never going to be stable (AB160.25-30); was so small that it was unlikely to be critical habitat for threatened species (AB354, Bacon affidavit) or migratory birds (AB355, Bacon affidavit); and would not function as a wetland in dry seasons (AB161.12-18).

2.6 Thus the baseline that the trial judge had to establish was strictly in relation to the ecological character of the site as a wetland,

> 'the sum of the biological, physical, and chemical components of the wetland ecosystem and their interactions which maintain the wetland and its products, functions, and attributes' (188)

Notably, his Honour approvingly relied upon the contracting parties' definition of 'ecological character' in the absence of any definition in the *EPBC Act*.

His Honour thus erred in focusing upon the impact on the general environment when he was required to assess the impact on the wetland ecosystem.

2.7 The components of the wetland ecosystem on the Windella site in February 2003, as found by the trial judge, were the Gingham channel and the water it carried, the wetland plants growing in the channel and on its banks, the habitat for waterfowl provided by standing dead timber on the site, and the site's capacity to regenerate its wetland vegetation fairly swiftly from the seedbed in the soil.

2.8 The components of the wetland ecosystem on the Windella site at the end of March 2003 (following the appellants' activities) were: the Gingham channel and the water it carried, the wetland plants growing in the two-metre strip on each side of the channel, and the site's retained capacity to regenerate its wetland vegetation fairly swiftly from the seedbed in the soil (199).

In 2001, before the alleged contraventions, Mr McCosker inspected the site and found that:

> There has been a general decline in the health of the wetland vegetation and no major waterfowl breeding events since 2000 because of the drought. (AB1.314 para 11)

2.9 The only wetland attribute of the site proved to have been lost as a consequence of the appellants' activities in February/March 2003 was its standing dead timber

as waterfowl habitat, and there was no evidence or finding of fact as to the significance of the loss of that component of the wetland ecosystem. If it could be argued that the capacity of the ecosystem to regenerate was adversely affected - and that could only be quantified as having been reduced from a capacity to regenerate 'fairly swiftly' (198) to a capacity to regenerate 'over time' (199) – but that would require the trial judge to make the appropriate finding, isolated from issues of general damage to the site's environment, which he failed to do.

2.10 Further and quite independently of the 'wrong test' point, His Honour extracted evidence given by Mr McCosker (201), impliedly adopting it as accurate and relevant to the issue of impact that the appellants' activities had had on the wetland ecosystem. The problem with that is that Mr McCosker's opinion was not about the impact the appellants' action had caused, but its likely future impact, and was predicated upon the appellants continuing to cultivate and crop the site:

> "***Cropping and continued cultivation*** of the wetland is likely to further reduce the ability of the wetland to recover...
>
> ***Continued cropping in the wetland*** is likely to further alter the character of the wetland ... ***Harvesting of wheat*** will result in transporting nutrients out of the wetland ...
>
> Under ***a cropping regime***, plant growth only occurs during dry phases. (W)heat will die (as a consequence of) prolonged inundation (depriving) fauna of the abundant food sources that are normally available in a flooded wetland supporting native vegetation. On this basis, it is likely that significant impacts resulting from the loss (of) plants, habitat and food resources will ... continue and the opportunity for the wetland to reestablish itself will become increasingly ***difficult if cropping continues within the wetland***."
>
> (emphases added)

The insuperable (for the Minister) problem with Mr McCosker's evidence is that it is exclusively of relevance to a contravention of s.16(1)(b) – and Sackville J found that the appellants has contravened only s.16(1)(a).

It also needs to be observed that the assumption upon which the entirety of Mr McCosker's extracted evidence is predicated is erroneous: the appellants have been enjoined from any agricultural activity whatsoever on the site. Applying the maxim *omnia praesumuntur rite et solenniter esse acta*, the trial judge had to assess significance of impact on the assumption that there would be no future cropping or continued cultivation; and the area of the site planted with wheat would not be harvested.

2.11 The trial judge's finding on the 'significant impact' is to be found in (199):

> The simple fact is that the entire site, other than a narrow strip on either side of the Gingham channel and the area already cleared (20 percent), was cleared and ploughed and later sown(August 2003) sown (30 percent) with wheat ... even in its cleared state, an inundation of the site would allow a range of native wetland plants to reestablish themselves over time, at least if they did not have to compete with crops.

Reliance on the 'simple' fact of clearing may be simplistic. It is not clearing that proves the contravention, but its effect on the wetland ecosystem. The vast majority of the clearing had no impact even on the general environment apart from killing off the invasive weeds which were suppressing the growth of native groundcover. There was no native groundcover before the lippia was cleared and ploughed. There was no evidence, and no finding of fact, that the sowing of wheat four months later, on 30 percent of the site, had any impact on the wetland ecosystem. In any event, the sowing of wheat at some later time may not be taken into account.

2.12 Thus the 'significant impact' decision depends on the evidence adduced of the appellants' activities affecting the wetland ecology, not its general environmental character.

Insofar as the trial judge addressed the correct question, his 'summary' was this (198):

> (W)hile the Windella Ramsar site had lost some of the attributes of a pristine wetland, it retained important attributes, including the potential to regenerate relatively swiftly.

2.13 Hence it is submitted that the trial judge made no finding of fact in relation to the impact of the appellants' activities in February/March 2003 on the site's wetland ecosystem which enabled him to be satisfied that that impact was 'significant'– as that term is used in *Booth v Bosworth* (2001) 114 FCR 32 at 65 ("important, notable, or of consequence") – least of all to the very high standard dictated by s.140 of the *Evidence Act* which, in the present case, must be so close to the criminal standard as to make no difference to a requirement of proof beyond reasonable doubt.

2.14 His Honour's words at (196):

> "I cannot find to the requisite standard that the ploughing and clearing occurred ... between 27 June 2002 and September or October 2002..."

would indicate that he had in mind the s.140 requirement, but mere reference to 'the requisite standard' is question-begging. In the circumstances of a quasi-criminal proceeding, it is necessary for the trial judge to express the standard that he intends to apply.

2.15 As his Honour observed, the evidence of the impact of the activities ... was not as clear or systematic as might have been expected. (194) In the light of that reservation, and his Honour's tentative statement that "the evidence ***may*** be sufficient" to enable a finding as to ecological impact, S.140 becomes even more important.

3. The environmental authorisation issue

3.1 The appellants abandon this ground of the appeal.

4. The severity of the pecuniary penalties
(low-numbered paragraph references are to the judgment of 14.10.04, beginning at AB2.1133)

4.1 The contravention found by the trial judge was taking an action in February/ March 2003 that had a significant impact on the ecological character of a declared Ramsar wetland. (220) Although the Minister alleged under s.16(1)(a) and (b) that the appellants took action that had a significant impact; or (would) have a significant impact; or was likely to have a significant impact on the ecological character of the wetland, the trial judge found only that there had been a past (perfect) significant impact (see also 2) the first component of s.16(1)(a).

4.2 The trial judge imposed upon the first appellant a fine of $150,000, which is about one-quarter of the maximum penalty; and upon the second appellant a fine of $300,000 which is about one-twentieth of the maximum penalty.

4.3 The judgment explains the difference between the penalties as a mechanism to avoid penalising Mr Greentree "twice over". (82) His Honour says that had Auen been the sole contravenor, he would have fined it $400,000, which is about one-fourteenth of the maximum penalty.

4.4 By referring to 'a total penalty of $450,000' as 'appropriate in the circumstances', his Honour was treating that sum as a fine to be imposed *de facto* on Mr Greentree, who is the controlling mind of the company, and its only shareholder. His Honour was not making a judgment on the discrete culpability of the two appellants, measured against the maximum, and neither was he assessing their relative culpabilities for a single contravention committed by two persons. What he was doing was splitting Mr Greentree's penalty between himself and the company.

4.5 His Honour held, as he was entitled to do within his discretion, that both appellants' contravening conduct was deliberate, in that they were both aware the clearing activities would constitute a contravention of the EPBC Act. (48)

4.6 There is an injustice, in all the circumstances, in imposing any but a nominal penalty on Mr Greentree. He, being its *alter ego* and owner, acted *qua* Auen when he caused the site to be cleared. He had no role as an individual in the contravention, but was solely functioning as the mind of the company. The deliberateness of the company's act is wholly dependent upon Mr Greentree's deliberateness as its decision-maker. If the trial judge considered the contravention by Auen merited a penalty of $400,000 *sans* Mr Greentree, then the justice of the case required that figure to be the total penalty – because, as his Honour acknowledged – a further fine upon Mr Greentree amounts to double punishment.

4.7 But, in any event, the total fine – whether $400,000 or $450,000 – is manifestly excessive.

4.8 The trial judge, in deciding penalty, was obliged to have regard to all relevant matters, including those set out at s.481(3)(a) to (d).

(a) Nature and extent of the contravention – s.481(3)(a)

The nature of the contravention is that it was found to be deliberate; the extent is that it was of about one month's duration (February/March 2003).

Instead of making a finding under this paragraph on the extent of the contravention (i.e. its duration/sustained character), his Honour mistakenly focused on the extent of the damage to the site, finding that 'virtually the whole site was cleared and ploughed' and that wheat had subsequently – after the contravention – been sown (59).

A succession of errors is revealed: ecosystem damage was 'double counted' in the trial judge's consideration of ss.(3)(a) and (b). Further, his Honour in assessing damage took into account the sowing of wheat - which was, if anything, a separate contravention four months later.

(b) Nature and extent of any loss or damage suffered as a result of the contravention – s.481(3)(b)

This is the sole criterion for consideration of the degree of damage to the site and its effect on the wetland's capacity to regenerate itself.

It is submitted that the words 'loss or damage suffered' import a concept of loss of the wetland, or damage to it – whether irreparable or temporary.

All the experts agreed that the site will regenerate itself. Mr McCosker, whose evidence Sackville J found to be generally helpful:

> These Ramsar wetlands retain an intrinsic ability to withstand the effects of fire, drought and extensive flooding at various times and have always retained the capacity for plant or animal species to return to the sites when conditions become favourable again. This inherent ability to restore former values according to particular environmental conditions at the time is an intrinsic value of the Gwydir Ramsar wetlands. (AB1.316 para 22)

Mr McCosker returned to the site on 16 August 2003 and found the site saturated:

> (A) range of wetland plants had germinated following the inundation... this suggests that if the site were to be left alone, these species would reestablish within the wetland (AB1.318 para 34)

In other words, in addressing this criterion relating to penalty, the damage to the wetland ecosystem must be regarded as temporary and remediable. The trial judge's intention was to make remediation orders to be carried out at the appellants' expense, something he was also required to take into consideration on this score.

Sackville J erred in assessing these matters by taking into account "ecological damage to the Windella Ramsar site", finding that "virtually the entire area was cleared and ploughed and about one-third of the site was subsequently sown with wheat" and that "the native vegetation remaining on the site in February 2003 was almost entirely removed" (63). He was bound to focus on loss of or damage to the wetland ecosystem, not the ecology of the entire site.

(c) The circumstances in which the contravention took place – s.481(3)(c)

The trial judge held against the appellants that theirs was a commercial motive. It is hard to see what other motive could lead to a contravention, unless it were one of vindictive destructiveness or vandalism. To be motivated by a wish to farm one's own property is less reprehensible than the only imaginable alternative.

A finding that Mr Greentree had a sense of grievance about not being able to farm all his land was made. There was no evidence, and no finding of fact, from which this inference could have been drawn.

His Honour rejected the appellants' assertion that Mr Greentree honestly believed he had withdrawn the Windella site from its Ramsar designation.

(d) The fact that neither appellant had previously contravened the *EPBC Act* was taken into account in their favour under s.481(3)(d).

4.9 Other matters were taken into account as relevant considerations

(e) The fact that the maximum penalties for the contravention are very high.

The maximum penalty for manslaughter is life imprisonment, but that does not mean that a sentencing judge falls into error in imposing no more than a good behaviour bond on a battered wife. It is an error in principle to say that because the worst possible instance of a contravention carries a high penalty that all offences must carry high penalties. What is required is that the trial judge place the individual offence at a certain point in the scale of seriousness.

The most serious offence would be a repeated offence by a person, and one causing the gravest degree of loss and damage – total destruction of an inherently valuable wetland ecosystem, and for the worst possible motive.

His Honour simply failed to place either appellant's conduct on a scale of seriousness, leading to the inexplicable and erroneous incompatibility between the penalty imposed on Mr Greentree (one-quarter of the maximum), that imposed on Auen (one-twentieth of the maximum) and the so-called 'total penalty' (one-fourteenth of the maximum).

(f) Deterrence

Deterrence of a contravener is always an appropriate factor in a penalty. In the present case, deterrence of others is an academic consideration: there are only three other components of the Gwydir Ramsar wetlands, and all of their owners can safely be assumed to be well aware of their neighbour's plight. There is no evidence that any other Ramsar wetland in Australia is located on a farming property and thus at risk.

(g) Lack of contrition

It is submitted that the trial judge was quite wrong in the approach he took on this matter. He would appear to be punishing the appellants (both of them) because Mr Greentree took the position that his was an honest and reasonable mistake (71). To do so is not to demonstrate a lack of contrition, unless the court's view is that all persons who do not plead guilty must be more heavily punished – which is wrong in law. Contrition

may lead to a lower sentence or penalty, but failure to demonstrate it does not increase the penalty.

His Honour goes even further, implying that the appellants' counsel should have been instructed, on their behalf, to make an "unqualified acknowledgement" of wrongdoing and/or an expression of regret at the damage they caused. Not only is the implication unwarranted – the appellants respectfully contend that his Honour's finding that they contravened s.16(1) was wrong – but the inference is inescapable that the appellants have been more heavily punished because they did not indulge in some ritualistic exercise, whether sincere or not.

Then appellants were given no credit for the fact that they did not dispute any of the essential facts, sparing the expense to which the Minister would otherwise have been put and the time of the court. His Honour failed to acknowledge that the defences raised by the appellants were all in the nature of raising issues of statutory interpretation, in proceedings where no authority exists.

(h) As well as making a further reference at (72) to what he perceived to be a reprehensible lack of contrition, the trial judge discounted the appellants' undertakings to rehabilitate the site.

The fact is that the orders proposed by the appellants were more comprehensive, and would have been more effective and more expensive than those made by the trial judge: they accepted restraint of any agricultural activity on the site; and were that the appellants would do everything reasonable to obtain the landowners' consent to their ploughing in all lippia and replacing it with native grasses; keeping all livestock off the site for 30 months; planting 40 native trees as advised by the expert; and importing to the site dead timber for fauna habitat, as advised by the expert.

The inference is inescapable that his Honour held against the appellants the time at which they made the offer, and that he considered it was a response to the Minister's 'more onerous' proposals (proposals that Sackville J substantially rejected). If that be so, his Honour fell into error. The appellants were entitled to object to any remediation orders being made on the basis that the site would eventually rehabilitate itself, or simply to sit back and rely on the unenforceability of any such orders – without any greater penalty being imposed on them. Instead, the appellants undertook to seek the consent of the landowners to their undertaking the remedial works. They were given no credit for it.

(i) The appellants' submission in relation to costs was not that they were penalised already by having to pay the Minister's costs: it was that they

were penalised by the cost of their own legal representation in seeking to obtain the court's rulings on the meaning of a law that had not previously been the subject of any judicial consideration.

4.10 Further and independently of the above, the total penalty imposed is manifestly excessive

The Windella site is 108 hectares, in a property of 2,026 hectares, sold on 6 December 2001 for a price of $1,735,000 (AB2.581, 597).

Thus the price per acre of the property was about $1,140 per hectare, and the land value of the Ramsar site is about $120,000.

4.11 The site has little or no intrinsic value as a wetland: the evidence showed that it is not a natural wetland, and depends entirely on releases of 'environmental flows' from the Copeton Dam, into the man-made Gingham channel, or natural floods, for any value it may potentially have as a site for bird breeding or growth of native wetland plants. It was environmentally degraded before the appellants' contravention.

As the Minister's expert, Dr Bacon, conceded in his expert report (AB1.354):

> Due to the small size of the Ramsar wetland on Windella, it would be unlikely that (RIS) listed wetland species would solely be dependent on habitat within the Ramsar wetland (para 56)
>
> (T)he site is not large enough to support an ecologically significant proportion of the population of any of the species. Consequently, while the site's ecological* values have been diminished, the impact is unlikely to have a significant impact on any listed migratory species (AB1.355 paras 61, 62)
>
> * Dr Bacon comments here on the general environmental effect. Where he addresses the fauna of the wetland ecosystem, he says that there is not a significant impact.

4.12 The removal of trees is irrelevant to the issue of impact on the site's wetland ecosystem (see above), but – further – it is of little significance to the general environment: Dr Bacon (AB1.67)

> These isolated trees are of little ecological value, the ... connectivity is critical. (lines 17-24)

4.13 What was significant to the wetland ecosystem – here Dr Bacon agreed with the report of Dr Phillips – was the dredging of the Gingham channel, which removed

"water couch, marsh clubrush and some of the other rush and water plants referred to in the RIS" (AB1.76.24).

Not only did that work (dredging) occur outside the contravention period (in July or August 2002 (180), but his Honour found it to be lawful:

> The dredging of the existing channel is not properly described as clear[ing] native vegetation on any land, if even if some native vegetation ... has to be removed in the course of desilting. (180)

4.14 Quite simply, the total penalty is a gross overvaluation of the entire site in monetary terms, and an even less supportable assessment of the degree of impact on its wetland ecosystem.

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