

FEDERAL COURT OF AUSTRALIA

The Wilderness Society (Tasmania) Inc v Minister for the Environment [2019]

FCA 1842

File number: TAD 45 of 2018

Judge: **MORTIMER J**

Date of judgment: 12 November 2019

Catchwords: **ENVIRONMENT LAW** – application for judicial review of a referral decision made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – where a delegate of the Minister decided under s 75 of the Act that the proposed action was not a “controlled action” – where delegate adopted Departmental brief as reasons for decision – whether delegate’s decision involved an error of law or misdirection due to erroneous view of Act’s requirements, including task under s 75 – where delegate relied on assessment of proposed action conducted by the Tasmanian Parks and Wildlife Service under the “Reserve Activity Assessment” (RAA) process – where delegate took into account mitigation and avoidance measures proposed by proponent under RAA process in deciding action was not a “controlled action” – whether non-compliance with s 77A of the Act – whether delegate was required to consider whether to exercise power in s 74A of the Act before making decision under s 75 – application allowed

Legislation: *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 11, 13

Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 12, 15A, 18, 18A, 19, 32, 33, 38, 74A, 74AA, 75, 77, 77A, 85, 131A, 134, 321, 322

Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) reg 4.03, Schs 2, 5

Environmental Management and Pollution Control Act 1994 (Tas)

Land Use Planning and Approvals Act 1993 (Tas)

National Parks and Reserve Management Act 2002 (Tas) ss 19-28, 48, 51

State Policies and Projects Act 1993 (Tas)

Convention for the Protection of the World Cultural and

Natural Heritage, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) arts 1, 2

Cases cited:

Akpata v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 65

Animals' Angels e.V. v Secretary, Department of Agriculture [2014] FCAFC 173; 228 FCR 35

Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources [2008] FCAFC 3; 166 FCR 54

Ayan v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 7; 126 FCR 152

Friends of Leadbeater's Possum Inc v VicForests [2018] FCA 178; 260 FCR 1

Minister for Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190; 139 FCR 24

Minister for Immigration and Citizenship v SZGUR [2011] HCA 1; 241 CLR 594

Queensland Conservation Council Inc v Minister for the Environment and Heritage [2003] FCA 1463

Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated [2016] FCAFC 129; 244 FCR 21

Stambe v Minister for Health [2019] FCA 43; 364 ALR 513

Tarkine National Coalition Inc v Minister for the Environment [2015] FCAFC 89; 233 FCR 254

Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2) [2016] FCA 168; 215 LGERA 1

Triabunna Investments Pty Ltd v Minister for Environment and Energy [2019] FCAFC 60

Triabunna Investments Pty Ltd v Minister for the Environment and Energy [2018] FCA 486; 160 ALD 243

Yasmin v Attorney-General of the Commonwealth of Australia [2015] FCAFC 145; 236 FCR 169

Date of hearing: 26 March 2019

Date of last submissions: 24 May 2019

Registry: Tasmania

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 182

Counsel for the Applicant: Mr E M Nekvapil

Solicitor for the Applicant: Environmental Defenders Office (Tasmania) Inc

Counsel for the Respondent: Ms A Mitchelmore with Ms F I Gordon

Solicitor for the Respondent: Australian Government Solicitor

ORDERS

TAD 45 of 2018

BETWEEN: **THE WILDERNESS SOCIETY (TASMANIA) INC**
Applicant

AND: **MINISTER FOR THE ENVIRONMENT**
Respondent

JUDGE: **MORTIMER J**

DATE OF ORDER: **12 NOVEMBER 2019**

THE COURT ORDERS THAT:

1. The notice signed on 31 August 2018 and given and published under s 77 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), relating to the decision made on 31 August 2018 by the respondent's delegate that the action the subject of the EPBC Act Referral 2018/8177 is not a controlled action, be set aside with effect from the date of these orders.
2. On or before 4 pm on 26 November 2019, the parties are to submit to the Court a proposed form of order, reflecting the Court's reasons for judgment and which directs the respondent about the form of notice which must be issued under s 77 of the EPBC Act, and the time in which the notice should be published.
3. If a proposed form of order cannot be agreed between the parties, on or before 4 pm on 26 November 2019, the parties are each to submit a proposed form of order, together with submissions of not more than two pages as to why the Court should accept the form of order proposed.
4. The parties are to confer and attempt to agree on any further appropriate relief in respect of ground 3 of the application for judicial review, taking into account the Court's reasons and the relief granted in relation to ground 2.
5. Any agreed submissions as to any further relief in respect of ground 3 are to be filed on or before 4 pm on 26 November 2019.
6. In the absence of an agreed position:

- (a) the applicant is to file and serve submissions on the appropriate form of relief in respect of ground 3, limited to five pages, on or before 4 pm on 3 December 2019; and
 - (b) the respondent is to file and serve submissions on the appropriate form of relief in respect of ground 3, limited to five pages, on or before 4 pm on 10 December 2019.
7. Subject to any further order, the question of any further appropriate relief will be determined on the papers.
 8. The respondent pay the applicant's costs of and incidental to the proceeding, to be fixed by way of an agreed lump sum.
 9. In the absence of agreement as to an appropriate lump sum for the applicant's costs, the question of an appropriate lump sum be referred to a Registrar.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MORTIMER J:

1 This is an application for judicial review of a decision of a delegate of the respondent made
on 31 August 2018. By that decision, the delegate determined that a proposed action by Wild
Drake Pty Ltd (**Wild Drake**) was not a controlled action, for the purposes of the *Environment
Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

2 For the reasons set out below, the application substantially succeeds.

FACTUAL BACKGROUND

3 The factual background to the delegate's decision is not in dispute. The material which was
before the delegate was also not in dispute, including material about the nature and content of
the proposed action. The respondent's submissions also set out some of the factual
background, and the applicant did not appear to cavil with that summary. I have based this
section on the respondent's submissions and the material before the delegate.

4 Wild Drake proposed to construct and operate a small-scale tourist operation on Halls Island,
Lake Malbena, which is north-east of Derwent Bridge, Tasmania. Halls Island is located
within the Walls of Jerusalem National Park in the Meander Valley region of the Tasmanian
Wilderness World Heritage Area, which I abbreviate in these reasons to "TWWHA".

5 In a summary prepared for the delegate, the action proposed by Wild Drake was described in
the following terms:

Wild Drake Pty Ltd (the proponent) is proposing to develop a small tourism
operation on a private leasehold property on Halls Island in Lake Malbena in the
Tasmanian Wilderness World Heritage Area (TWWHA). The proposal would see the
establishment of a standing camp to accommodate a maximum of six visitors for four
day stays. Visitors would arrive by helicopter from Derwent River Bridge and there
would be a maximum of 30 tours per year. Activities proposed include kayaking,
hill-walking, bushwalking, cultural interpretation, wildlife viewing and citizen
science opportunities.

6 For transport, it was proposed that there be constructed a helicopter landing site on the
mainland opposite Lake Malbena, in the TWWHA Central Highlands region and outside of
the Walls of Jerusalem National Park. It was proposed visitors would walk approximately
100 m from the helipad to the edge of Lake Malbena and would cross the lake in a row boat
to Halls Island.

7 The information given to the delegate expressly noted that the proponent had plans to develop a “second stage” of its tourism operation. That “second stage”, so described, involved the development of walking routes to the nearby Mt Oana, as well as to an Aboriginal heritage site. Wild Drake planned to conduct what it described as “cultural interpretation activities” at this site. As I note later on in these reasons, the “two stage” concept originated in an assessment of Wild Drake’s proposal by the Tasmanian Parks and Wildlife Service (**PWS**).

8 Wild Drake’s own description of its proposed action (which encompassed what subsequently became identified as “stage one” and “stage two”) was:

1. Proposal: To construct and operate a small-scale Standing Camp on Halls Island, Lake Malbena, Tasmania.

The primary theme of the project is one of cultural immersion, built around the Reg Hall and Walls of Jerusalem National Park narrative. This theme is to be enhanced by world-class interpretation of the listed Outstanding Universal Values found in the World Heritage area.

Key target markets will be discerning travellers looking for new discoveries, deep heritage and strong narratives, natural encounters and lean luxury.

Activities will include kayaking, hill-walking, bushwalking, cultural interpretation, wildlife viewing, and the chance to participate in choreographed ‘citizen-science’ style field trips with guest experts in the fields of science, art and culture. On-island activities will include continuing with the sixty-year history of poetry and art on the island, astronomy, botany, bird watching, and flora and fauna interpretation.

The small-scale, niche operation is aimed at the very top-end of the market. Ensuring that the proposed activities and outcomes are sensitive to the environmental and social expectations of operations in the TWWHA (Tasmanian Wilderness World Heritage Area), the scale will be extremely low: a maximum of 30 trips annually, with just 6 customers per trip.

9 Activities in, and the protection and conservation of, the TWWHA are regulated by the Tasmanian Wilderness World Heritage Area Management Plan (2016). This Management Plan was developed under the *National Parks and Reserve Management Act 2002* (Tas) (**NPRM Act**), and the brief to the delegate described the Management Plan as intended to “meet the requirements of the EPBC Act with respect to management plans for World and National Heritage properties”. A management plan for the TWWHA is required by the Management Principles set out in Sch 5 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) (**Regulations**). The Management Plan divides the TWWHA into four area Management Zones: Visitor Service, Recreation, Self-Reliant Recreation (SRRZ) and Wilderness.

- 10 Wild Drake holds a lease over Halls Island. Its lease conditions require approval to be granted before commencing the proposed tourism operation within the SRRZ area. Permissible activities within the SRRZ include: commercial aircraft landing, bushwalking, camping, commercial tourism, standing camp accommodation, kayaking and the use of non-motorised vessels. Wild Drake also holds a licence issued by the PWS. The licence conditions also require Wild Drake to secure approval before commencing the proposed tourism operation.
- 11 The approval was expressed in both cases to relate to approval granted by the PWS under what is called a “Reserve Activity Assessment” (**RAA**). This is an administrative policy, managed by the PWS and referred to in the TWWHA Management Plan. It has no apparent statutory basis. The applicant made something of its administrative status, especially in relation to ground 1. I return to that issue in my consideration of ground 1 below.
- 12 A project can be assessed under the RAA process at any of four levels. Wild Drake’s proposal was assessed at “level three”, and therefore a number of additional assessments and studies were required to assess the potential impacts of the proposal. The mitigation measures Wild Drake was required to apply as a result of the PWS assessment, and the modifications to some of its operations (such as helicopter routes, to which I return below), were put to the delegate as matters that Wild Drake would undertake to implement, in order to mitigate or avoid any likely impacts on matters of national environmental significance. That Wild Drake’s proposal was structured and considered by the delegate in this way also forms part of the applicant’s judicial review challenge, especially on ground 1.
- 13 The RAA process required there to be an EPBC Act referral by the proponent. This is consistent with the terms of cl 3.02 of Sch 5 of the Regulations, which provides:
- Before the action is taken, the likely impact of the action on the World Heritage values of the property should be assessed under a statutory environmental impact assessment and approval process.
- 14 This was how Wild Drake came to make a self-referral to the Minister under the EPBC Act. The referral was considered and determined under s 75(1) of the EPBC Act by a delegate of the Minister. There was no dispute that the delegate was lawfully empowered to make a decision of this kind under s 75(1) of the EPBC Act.

The brief to the delegate

15 The delegate received a detailed brief, with a large number of attachments. It is this brief, and its attachments, which form the material against which the applicant's grounds of judicial review are to be considered. It is necessary to describe what was in the brief to the delegate.

16 At the start of the brief, under the heading "Key Issues", were the following statements, reflecting the views and conclusions of those within the Department who were responsible for drafting the brief and recommendations to the delegate:

The proposal is not likely to have a significant impact on matters of national environmental significance (MNES) including the:

- Values of the Tasmanian Wilderness World and National Heritage Area (TWWHA);
- Tasmanian Wedge-tailed Eagle (*Aquila audax fleayi*) (endangered); and
- Alpine *Sphagnum* Bogs and Associated Fens (endangered) threatened ecological community (TEC).

The proposal is locally contentious, with 132 individual public comments and 808 campaign submissions received on the referral.

17 Having described the location, and the proposed helicopter access by guests, in the terms I have set out at [5] above, the brief then stated:

The proposed action involves the construction and operation of a standing camp over approximately 800m² consisting of three pre-fabricated twin-share accommodation structures, (approx. 4m x 3m), communal kitchen (approx. 8m x 4m), associated buildings with complete-capture pod systems for removal of grey water and sewage, gas or electric heating, board walks between huts where required and non-motorised transport on Lake Malbena. Helicopter activities relating to construction, maintenance and re-supply of the standing camp will occur within the standing camp footprint, utilising an area of sheet rock for depositing and collection of goods via slings.

The proposed tourist activities include kayaking, walking, cultural interpretation and wildlife viewing.

18 In describing the island itself, the brief set out one of the aspects of the island which was material to the referral; namely, the flora which was present:

Halls Island, an area of approximately 10 ha, is located within Lake Malbena which is one of many lakes in the high alpine plateau area of the TWWHA. Vegetation comprises *Eucalyptus subcrenulata* forest and woodland (7.8 ha), highland low rainforest and scrub (1.18 ha), lichen lithosphere (0.18 ha), *Athrotaxis selaginoides* rainforest (0.03 ha) and *Sphagnum* peatland (0.6 ha). The *Sphagnum* peatland meets the definition for the EPBC Act listed endangered Alpine *Sphagnum* Bogs and Associated Fens TEC.

19 The recommendation made in the brief to the delegate was in the following terms:

Under section 75 of the EPBC Act you must decide whether the action that is the subject of the proposal referred is a controlled action, and which provisions of Part 3 (if any) are controlling provisions for the action. In making your decision you must consider all adverse impacts the action has, will have, or is likely to have, on the matter protected by each provision of Part 3.

You must not consider any beneficial impacts the action has, will have or is likely to have on the matter protected by each provision of Part 3.

The Department recommends that you decide that the proposal is not a controlled action, because there are not likely to be significant impacts on any controlling provisions. The reasons for this recommendation are detailed further below.

20 The brief then set out the matters of national environmental significance which those Departmental officers drafting the brief had concluded were not engaged by the action because of any significant impact, or likelihood of significant impact, including:

- (a) the Tasmanian Wedge-tailed eagle, a listed threatened species;
- (b) the Alpine *Sphagnum* Bogs and Associated Fens TEC, a listed threatened ecological community; and
- (c) particular cultural and natural listed values for the TWWHA as a World Heritage area.

21 The brief set out, relevantly for each of these three matters, a number of “avoidance and mitigation measures” which the proponent had either proposed, or agreed, to undertake. In relation to the listed cultural values of the TWWHA, the brief also referred to consultation with the Tasmanian Aboriginal Heritage Council (**AHC**) about the proposed “stage two” of the tourist operation, which included visits to sites of cultural significance. However, the brief did not evaluate the impacts of this aspect of the operation:

The Department notes that the stage 2 proposal to undertake cultural interpretation activities at an Aboriginal heritage site (away from the proposal site) is not part of the referred action.

22 This conclusion by the Department appears to have flowed from the division imposed during the RAA process. It is clear from the terms of this conclusion that no consideration was given to the potential application of s 74A of the EPBC Act. The absence of such consideration gives rise to ground 3 of the judicial review application.

23 The values and species listed at [20] above are the ones which have relevance to the applicant’s grounds of judicial review. There were other listed threatened species mentioned in the brief, but none which are relevant to the grounds of judicial review, in the sense that no error is asserted in the delegate’s consideration of the risks to those species.

The delegate's decision

24 On 31 August 2018, the delegate signed the second page of the brief, indicating he agreed with the recommended decision. In correspondence to Wild Drake, two federal Ministers with relevant portfolios, the Director of the Tasmanian Environment Protection Authority (EPA) and the General Manager of the Tasmanian Department of Primary Industries, Parks, Water and Environment, the delegate described his decision that the proposed action by Wild Drake was not a controlled action as meaning the action:

... does not require further assessment and approval under the EPBC Act before it can proceed.

25 In signing off on the brief, the delegate also indicated his agreement with the draft notice to be published under s 77 of the EPBC Act, constituting the public notification of his decision. There is no dispute that this was in fact the form in which the s 77 notice was published. Certain aspects of that notice should be set out.

26 The proposed action was described in the following terms:

To construct and operate a small-scale tourist operation, including a standing camp on Halls Island, Lake Malbena, and helicopter access, approximately 20 kilometres north-east of Derwent Bridge, Tasmania, as described in the referral received by the Department on 28 March 2018...

27 The notice then indicated the proposed action was not a controlled action. No “particular manner” conditions were placed on Wild Drake in the notice, that being an available power under s 77A(1) of the EPBC Act, to which it will be necessary to return later in these reasons.

28 On 5 September 2018, the applicant sought reasons for the decision.

29 The delegate replied in a letter received by the applicant on 19 September 2018, which stated:

My decision was based on my consideration of the referral decision brief, dated 31 August 2018, for the Halls Island project which was prepared by the Department of Environment and Energy. I considered that the information in this brief was sufficient for me to make a referral decision that the Halls Island project was not a controlled action.

This correspondence and the brief are my statement of reasons.

In making my decision, I considered all the information and matters contained in the briefing material referenced above. I agreed with the Department's advice, findings of fact and reasoning iterated in the briefing. On that basis, I decided that the Halls Island project was not a controlled action.

(Footnote omitted.)

The delegate's "statement of reasons"

30 While it is not a matter which arises directly from any of the applicant's grounds of review, it is appropriate to say something about this method of complying with what was recognised by the delegate to be his statutory obligation pursuant to s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). There may be no difficulty in a decision-maker adopting, as her or his own, reasons that have been drafted by another person, and indeed reasons which form part of a "brief" put before that decision-maker for the purpose of that person determining how, or whether, to exercise a statutory power: see generally my observations in *Stambe v Minister for Health* [2019] FCA 43; 364 ALR 513 at [67]-[75], and [85]. What is not, however, acceptable in my opinion is for the decision-maker to use this method and, as part of this method, to refer to documents which the person requesting the reasons cannot access. That is what occurred here, on the evidence of Mr Bayley for the applicant: ten out of the 20 attachments to the brief were not publicly available. Mr Bayley subsequently made a Freedom of Information request for "various documents relating to the Referral and the Decision", which I infer was made in order to obtain copies of those attachments not made available to the applicant. The request had not been responded to by the time the applicant issued proceedings. Of course, the ADJR Act contains a time limit for the issuing of proceedings as of right: see s 11. Frequently, a statement of reasons is an integral part of any judicial review application under the ADJR Act: that is one of the core purposes of s 13.

31 The statutory purpose was frustrated in this case. Section 13 requires a decision-maker to set out her or his findings on material questions of fact. It is difficult to see how that obligation was complied with in this case. It is even more difficult to see how it was complied with in circumstances where only some of the documents contained in the delegate's brief were available to the applicant. The brief contained recommendations only, which cannot be understood without reference to the source documents. At the very least, it would not be appropriate for this method to become an accepted one, unless the person requesting the reasons is provided with all the documents before the delegate in her or his "brief", in circumstances where the contents of the brief are asserted to have been adopted by the delegate and to reflect her or his reasons. However, for the following reasons, the practice adopted by the delegate may be problematic in any event.

32 There are further potential difficulties which need not be resolved, as the matter proceeded, under an apparently common position, that the contents of the letter, read with the brief, satisfied the applicant's request for reasons under s 13 of the ADJR Act. Whether or not that

common ground is consistent with authorities of this Court, and of the High Court, is not a matter the Court has been asked to determine, but see *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 7; 126 FCR 152 at [53]-[57] (Allsop J, Jacobson J agreeing) and *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 65 at [52]-[59] (Lander J, Carr and Sundberg JJ agreeing).

One factual matter which needs to be disentangled

33 The parties took as their starting point what was set out in the Department’s brief to the delegate, and which the delegate adopted as his reasons, together with his correspondence. However, on closer examination of the Department’s brief, and in considering how the World Heritage provisions in subdiv A of Div 1 of Pt 3 of the EPBC Act were engaged in this particular referral, some complexities have emerged. Those complexities concern how, precisely, what is described in the Departmental brief as the “values” of the TWWHA have been identified, and how they can be linked back to the definition of “world heritage values” in subss (3) and (4) of s 12 of the EPBC Act.

34 Section 12(3) of the EPBC Act provides:

A property has *world heritage values* only if it contains natural heritage or cultural heritage. The *world heritage values* of the property are the natural heritage and cultural heritage contained in the property.

35 The terms “natural heritage” and “cultural heritage” are defined in s 12(4) of the Act by reference to the meanings given to them in the World Heritage Convention: *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

36 Article 1 of the Convention describes the term “cultural heritage”:

For the purposes of this Convention, the following shall be considered as “cultural heritage”:

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from

the historical, aesthetic, ethnological or anthropological point of view.

37 Article 2 goes on to describe the term “natural heritage”:

For the purposes of this Convention, the following shall be considered as “natural heritage”:

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

38 The brief to the delegate identified that the TWWHA is “inscribed on the World Heritage List under four natural (vii, viii, ix and x) and three World Heritage Area cultural (iii, v, vi) criteria”. Those criteria form part of the selection criteria pursuant to which the World Heritage Committee determines whether a property is eligible for inclusion on the World Heritage List. On 15 May 2007, a determination was made by the then Minister for the Environment and Water Resources that, on the basis of those seven World Heritage criteria, the TWWHA met the corresponding criteria to enable its inclusion on the Australian National Heritage List (being a different and further protective mechanism).

39 The TWWHA Management Plan, which was attached to the delegate’s brief, explains how the Tasmanian Wilderness came to be inscribed as a World Heritage property in the 1980s, including a description of the seven criteria which made it eligible for World Heritage status:

Central to the Convention is the concept of Outstanding Universal Value (OUV). World Heritage properties are recognised as being exceptional or superlative on a global scale on the basis of the values within them, that is, those values are outstanding from a global perspective. To be considered of Outstanding Universal Value, a property needs to:

- meet one or more of ten criteria;
- meet the conditions of integrity;
- if a cultural property, meet the conditions of authenticity; and
- have an adequate system of protection and management to safeguard its future.

...

At the time of publication, the TWWHA was one of only two World Heritage properties to fulfil seven of ten criteria. Those criteria are:

- (iii) to bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;
- (iv) to be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history;
- (vi) to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance;
- (vii) to contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;
- (viii) to be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features;
- (ix) to be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, freshwater, coastal and marine ecosystems and communities of plants and animals; and
- (x) to contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.

40 Chapter 2 of the TWWHA Management Plan, entitled “Statement of Values”, provides a non-exhaustive summary of the “cultural, natural and socio-economic values of the TWWHA”. It is apparent that the values of the TWWHA are identified by reference to the criteria set out at [39] above. The following information, contained in the brief to the delegate, also confirms that “examples of World Heritage values” for the TWWHA are sourced by reference to these seven criteria:

The Tasmanian Wilderness is inscribed on the World Heritage List under four natural (vii, viii, ix and x) and three World Heritage Area cultural (iii, v, vi) criteria. Further information on the Tasmanian World Heritage area, including listing criterion, can be found at <http://www.environment.gov.au/heritage/places/world/tasmanian-wilderness>.

The Department notes that when the Tasmanian Wilderness was listed in 1982, a Statement of Outstanding Universal Value was not required. A Statement of Outstanding Universal Value is the key reference for the future protection and management of the property. The Australian Government is working with the Tasmanian Government and technical advisory bodies to develop the Statement of Outstanding Universal Value. **In the meantime, examples of World Heritage values that contribute to the property's Outstanding Universal Value are identified under each criterion.**

The Department has identified a range of listed values that are relevant to the proposed action, which have been used to guide the significant impact assessment...

(Emphasis added.)

41 Notwithstanding the apparent intention to produce what seems to be an executive or administrative policy document described as a “Statement of Outstanding Universal Value”, no such final policy document was before the delegate, as the brief indicated. Therefore, for the purposes of this proceeding, it appears that the parties have proceeded on the basis that the Department itself identified the “World Heritage” values of the TWWHA by reference to the seven World Heritage criteria set out at [39] above.

THE APPLICANT’S GROUNDS OF REVIEW

Ground 1

42 The applicant contended that the delegate’s decision involved an error of law or was affected by jurisdictional error because of the delegate’s reliance on the impact assessment conducted by the PWS under the RAA process. That process, it contended, is one which has no statutory force and therefore any mitigatory measures which were imposed pursuant to the RAA, or might have been voluntarily assumed by Wild Drake in the related “Protected Matters Environmental Management Plan” (**PMEMP**) were, in effect, used as substitutes for the evaluation the delegate was required to make under s 75(1). The applicant contended such an approach allows s 75(1), and any non-statutory State process, to “displace” Pt 8 and Pt 9 of the EPBC Act.

43 The applicant relied on s 5(1)(f) of the ADJR Act to identify the purported error of law, and on the observations of Kiefel J (as her Honour then was) in *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (which is known as the *Nathan Dam* case) at [24], to the effect that an impugned decision could:

... be said to have involved an error of law (s 5(1)(f)) because it was based upon an erroneous view of the Act’s requirements.

Ground 2

44 The applicant contended that once Wild Drake had proposed to adopt the mitigation and avoidance measures set out in the PMEMP, which recorded measures identified as part of the RAA process, this should have led the delegate to consider whether it was because the proposed action was going to be undertaken “in a particular manner” that it would not have any significant impacts, or likely significant impacts, on the three matters of national environmental significance. In turn, the applicant contended this meant the delegate should have considered whether the terms of s 77A applied.

Ground 3

45 This ground has a similar premise to ground 2: a failure by the delegate to consider other aspects of the decision-making process set out in Pt 7 before making a decision under s 75(1). Ground 3 concerns the operation of s 74A. That section provides:

74A Minister may request referral of a larger action

- (1) If the Minister receives a referral in relation to a proposal to take an action by a person, and the Minister is satisfied the action that is the subject of the referral is a component of a larger action the person proposes to take, the Minister may decide to not accept the referral.
- (2) If the Minister decides to not accept a referral under subsection (1), the Minister:
 - (a) must give written notice of the decision to the person who referred the proposal to the Minister; and
 - (b) must give written notice of the decision to the person who is proposing to take the action that was the subject of the referral; and
 - (c) may, under section 70, request of the person proposing to take the action that was the subject of the referral, that they refer the proposal, to take the larger action, to the Minister.
- (3) To avoid doubt, sections 73 and 74 do not apply to a referral that has not been accepted in accordance with subsection (1).
- (4) If the Minister decides to accept a referral under subsection (1), the Minister must, at the time of making a decision under section 75:
 - (a) give written notice of the decision to the person who referred the proposal to the Minister;
 - (b) publish in accordance with the regulations (if any), a copy or summary of the decision.

46 The factual basis for this argument lies in how the likely impacts of the “second stage” of the proposed action ought, on the applicant’s argument, to have been factored into the delegate’s decision.

Relief

47 The applicant contended that if it succeeded on either of ground 1 or ground 3, the delegate’s decision should be set aside. If it succeeded on ground 2, it contended the appropriate relief would be that the Minister should be compelled to amend, or re-issue, the s 77 notice.

THE MINISTER'S RESPONSE IN SUMMARY

Ground 1

48 The Minister's answer to this ground was essentially the one given on behalf of the Minister to the Full Court in *Triabunna Investments Pty Ltd v Minister for Environment and Energy* [2019] FCAFC 60. That is, in a decision under s 75(1), and as part of discharging the task of evaluating the adverse impacts of a proposed action, the delegate was entitled to look at any mitigation or avoidance measures proposed by Wild Drake, as those measures were described in the information before the delegate. If those measures affected any adverse impacts of the proposed action or their likely occurrence, and their extent, then the delegate was entitled to rely on those measures to decide the proposed action was not a controlled action. The Minister contended:

There is nothing in the text of s 75(1) of the EPBC Act that requires the Minister not to consider such measures, nor does such a negative stipulation arise as a matter of necessary implication.

(Original emphasis.)

Ground 2

49 In answer to this ground, the Minister submitted, as the Minister did in *Triabunna*, that measures put forward as mitigation or avoidance measures can be considered as forming part of the "action" and therefore the s 77A(1) obligation is not enlivened. The Minister then submitted further or alternatively that the obligation was not enlivened because there were, in fact, no component decisions made in this case.

Ground 3

50 The short answer the Minister gave to ground 3 was that s 74A(1) does not impose any duty to consider whether to exercise the power conferred by that section. In addition, the Minister submitted that on the evidence before the Court, the Court should not infer the delegate failed to consider whether the proposed action was part of a larger action and that s 74A was engaged.

THE PARTIES' TRIABUNNA SUBMISSIONS

51 When this matter was argued, a Full Court of this Court was reserved on *Triabunna*, a decision of some relevance to the issues in this proceeding. At the conclusion of the hearing the Court proposed, and the parties accepted, that it was appropriate, first, for no decision to be made in this proceeding until the Full Court's decision was handed down, and second, that

the parties should have an opportunity to make supplementary submissions on the application of that decision to the grounds of review in this proceeding. The Full Court's decision in *Triabunna* was handed down on 15 April 2019, and the parties subsequently filed supplementary written submissions in accordance with orders made by the Court. Where appropriate, I deal with the parties' supplementary submissions, and the *Triabunna* decision, in my resolution of each ground of review below. I set out here a summary of the parties' contentions.

52 The applicant contended the Full Court's decision in *Triabunna* supported its submissions on ground 1, although this case is distinguishable because in *Triabunna* there had been express consideration of s 77A and there was no debate that the decision made was a "component decision". The applicant contended the reasons of each member of the Full Court accepted that the two concepts of "the action" and the "manner" in which an action is carried out have "definite legal content", so that it is not for the executive (through the Minister or a delegate) to determine what they mean, or what is included in them, in any given situation. The applicant submitted that were the Minister or a delegate simply able to consider all mitigation and avoidance measures as part of the action, s 77A "would be undermined".

53 In contrast, the Minister submitted that the primary significance of the Full Court's decision in *Triabunna* for this proceeding is in relation to ground 2, noting the applicant made no submissions about the effect of the decision on ground 2. In that regard, the Minister made two principal submissions.

54 First, the Minister accepted she could no longer press the contention that s 77A does not require specification of any manners that are "inherent components of the proposed action", and – properly – withdrew certain parts of her principal written submissions accordingly.

55 Second, the Minister accepted that she could no longer press an argument that there was, in fact, no component decision to enliven s 77A, and – again properly – withdrew other parts of her principal written submissions accordingly. The Minister contended that it was still essential to "consider whether any component decision was made and precisely what the terms of that decision were", so as to identify a correlation between reduction in significant impact and the manners in question, relying on *Triabunna* at [209] and [228].

56 Nevertheless, the Minister maintained that not every part of the delegate's decision that referred to avoidance or mitigation measures could or should properly be characterised as a

component decision. The Minister identified two component decisions in the delegate's reasons:

- (a) one relating to the impact of the proposed action on the threatened ecological community of Alpine *Sphagnum* Bogs and Associated Fens. The Minister now admits that the delegate decided that s 18 and s 18A, and s 12 and s 15A of the EPBC Act were not controlling provisions because the delegate believed that the action would be taken in accordance with the avoidance and mitigation measures set out in the PMEMP, and this meant the delegate believed the action would be undertaken in a "particular manner" for the purposes of s 77A; and
- (b) another relating to the impact of the proposed action on World Heritage natural criteria (viii), (ix) and (x), by reason of the potential contamination of Lake Malbena from construction and operations of the camp. The Minister now admits that the delegate decided that s 12 and s 15A of the EPBC Act were not controlling provisions because he believed the action would be taken in accordance with the avoidance and mitigation measures specified in the Wilderness Characteristics – Protected Matters Environmental Management Plan, so as to manage greywater, sewage and rubbish. The Minister therefore admits the delegate believed the proposed action would be undertaken in a "particular manner" for the purposes of s 77A.

57 The Minister did not make the same admissions about the way the delegate had approached any potential impacts on the Tasmanian Wedge-tailed eagle, or impacts associated with helicopter transport and visual impacts from the standing camp. Nor did the Minister make any similar admissions about what the delegate believed in terms of potential impacts on Indigenous archaeological sites (being TWWHA cultural values (iii), (iv) and (v)) from construction and operation of the camp.

58 The Minister disagreed with the applicant's emphasis on the effect of *Triabunna* on ground 1, save to accept that because of the admissions the Minister now makes, the delegate made one or more "component decisions", and that "then the obligation in s 77A(1) arose and was not satisfied".

59 The Minister also recognised that the Full Court's decision confirmed what the Minister submitted was common ground between the parties: namely that where a component decision has been made, but the decision has not been lawfully reflected in the s 77 notice, the appropriate relief is to order that the notice be amended and re-issued. Given the admissions

made, the Minister accepted that relief should issue on ground 2, and submitted that “the appropriate relief would be the setting aside and re-issuing of the notice, specifying relevant manners”.

The applicant’s reply submissions on *Triabunna*

60 Despite the Minister’s admissions, the applicant’s reply submissions did not embrace them. It instead submitted that:

... the Department’s reasons, which applied the same basic approach (the subject of ground 1) to all of the potential impacts, had nothing to do with s 77A. It is distinctly possible that the Department’s approach in August 2018 reflected the approach of Kerr J at first instance in *Triabunna* (in April 2018).

61 The applicant submitted that the delegate’s reasons “cannot be shoehorned into s 77A(1)”.

The “*Nathan Dam*” point

62 The Minister contended that the applicant raised a “new argument” at the hearing, relying on Kiefel J’s decision (as her Honour then was) in the *Nathan Dam* case. The Minister contended that the circumstances of the proposed action in this case could not be compared with the circumstances in *Nathan Dam*, on the basis that the potential impacts of “the possible second stage” of this proposed action would not be “indirect consequences” of the first stage. The Minister also submitted:

Moreover, in a context where all parties proceeded on the basis that any second stage would need to be separately referred under the EPBC Act, there is no question here of ignoring possible impacts which was a real concern in *Nathan Dam*.

63 In reply on this matter, the applicant contended, relying on *Minister for Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190; 139 FCR 24 at [60] (the Full Court appeal of the *Nathan Dam* case), that the further activities that might occur if the first stage was approved “were clearly ‘within the contemplation’ of the proponent, having formed part of its original business plan”. It contended the fact that the second stage could be assessed separately did not preclude it from being characterised and considered as an indirect impact.

64 Justice Kiefel’s consideration of indirect impacts in *Nathan Dam* was a matter raised by the applicant in its principal written submissions: see [34]-[35]. I am not persuaded there was any “new argument” about it. However, I am also not persuaded this argument advances the applicant’s judicial review application, as I explain below.

RESOLUTION

65 Where necessary to the resolution of each ground of review, I make findings of fact in relation to the way the parties sought to characterise aspects of the brief which the delegate adopted as part of his reasons for decision.

66 I have set out my opinion as to the structure of the EPBC Act in several previous decisions: *Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* [2016] FCA 168; 215 LGERA 1 at [19]-[34]; *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178; 260 FCR 1 at [64]-[94]; and most recently in *Triabunna* at [93]-[108]. Although an appeal from my decision in *Tasmanian Aboriginal Centre* was allowed by the Full Court (see *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* [2016] FCAFC 129; 244 FCR 21), the general structure of the legislative scheme which I described was not the subject of any criticism. I adhere to and adopt the opinions I expressed in those judgments.

67 It will be necessary to examine some particular aspects of the scheme which I have not dealt with in detail in these earlier decisions.

Particular findings on statutory scheme

The statutory task

68 The statutory task given to the Minister (or delegate) by s 75(1)(a) is to decide whether a proposed action “is a controlled action”.

69 “Controlled action” is a defined term. Section 67 provides:

An action that a person proposes to take is a **controlled action** if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be (or would, but for section 25AA or 28AB, be) prohibited by the provision. The provision is a **controlling provision** for the action.

70 The definition given by the statute to “controlled action” requires the Minister or delegate, in order to discharge her or his statutory task under s 75(1)(a), to decide whether the taking of the action without approval under Pt 9 would be prohibited by a provision in Pt 3.

71 In what follows, and so as not to make the reasoning more complex than it needs to be, I put to one side the applicant’s argument in ground 3 about “stage two” of Wild Drake’s proposal. I have also assumed that the Department (and the delegate, by adopting the Department’s

brief) correctly identified the World Heritage cultural and natural values in issue in respect of Wild Drake's proposal: the applicant has not contended otherwise.

72 To apply what I have outlined in [68]-[71] above to the impugned decision, the delegate was required to determine whether:

- (a) the taking of the action by Wild Drake (described at [5], [17] and [26] above, and as described in the referral by Wild Drake and in the brief which was adopted by the delegate as his reasons);
- (b) without approval under Pt 9;
- (c) would be prohibited by, relevantly:
 - (i) s 12(1), concerning declared World Heritage properties; or
 - (ii) s 18, concerning listed threatened species and communities; or
 - (iii) any of the applicable criminal offence provisions in Pt 3, eg s 15A or s 18A.

73 This is consistent with what was said by the Full Court about the concept of "controlled action" in *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* [2008] FCAFC 3; 166 FCR 54 at [26] (Tamberlin, Finn and Mansfield JJ).

74 Taking as an example the action description prepared by the Department and set out in these reasons at [5], in respect of the three matters of national environmental significance identified in the applicant's judicial review application, in order to make the determination set out at [72], the delegate was required to decide whether:

- (a) by Wild Drake developing a small tourism operation on Halls Island and establishing a standing camp to accommodate a maximum of six visitors for four day stays, where visitors would arrive by helicopter from Derwent River Bridge and there would be a maximum of 30 tours per year, and where visitors would engage in activities such as kayaking, hill-walking, bushwalking, cultural interpretation, wildlife viewing and citizen science opportunities;
- (b) there would be, or would likely be, a significant impact on:
 - (i) the cultural and natural values of the TWWHA (specifically the relevant cultural values identified by the Department by reference to

criteria (iii), (iv) and (vi) and the relevant natural values identified by the Department by reference to criteria (vii), (viii), (ix)); and/or

- (ii) the Tasmanian Wedge-tailed eagle species; and/or
- (iii) the threatened ecological community identified as Alpine *Sphagnum* Bogs and Associated Fens.

The consequence of the statutory task

75 I accept the applicant’s submission that, in construing and understanding the nature of the task of the Minister (or delegate), the statutory consequences of a determination that an action is not a controlled action are an important consideration.

76 Relevantly, s 12(2)(c) provides that the prohibition in s 12(1) does not apply if:

... there is in force a decision of the Minister under Division 2 of Part 7 that this section is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner[.]

77 Section 19(3)(b) is to the same effect, in relation to the prohibitions in s 18 and s 18A.

78 In its written submissions, the applicant described this as an “immunity”. Whether or not this is an accurate description, the underlying point has some force. A decision under s 75 that an action is not a controlled action disengages the prohibitions in any relevant provision in Pt 3 in respect of that action. Otherwise, as the applicant submitted, in general terms the taking of an action remains governed by the conditions for its lawfulness set out in Pt 3, unless and until the taking of the action is approved under Pt 9, with or without conditions. I say “in general terms” because provisions such as s 12 (and its equivalents for other matters of national environmental significance) do recognise other circumstances in which the Pt 3 prohibitions are disengaged, or not engaged, such as whether any provisions in Pt 4 (titled “Cases in which environmental approvals are not needed”) apply. However, in circumstances where a decision has been made under s 75, and provided the action is not undertaken in any materially different manner, then the effect of s 12(2)(c) and s 19(3)(b) is to disengage the protective effects of the Pt 3 prohibitions.

Sections 74A and 77A

79 I agree with the applicant’s written submissions at [30] that, in terms of the structure of the statutory scheme, consideration of whether s 74A applies to the action in question is a matter which comes before any decision under s 75. Consideration and application of s 74A may

mean there is no s 75 decision. I also agree with applicant's written submissions at [32] that the s 77A power has to accompany a s 75 decision, because it is another way of deciding an action is not a controlled action. So much is now clear on the authority of the Full Court judgments in *Triabunna*. These propositions were not contested by the Minister.

The RAA

80 The RAA has no status under the EPBC Act: this fact is not unimportant. The EPBC Act is, to say the least, a complicated legislative scheme. Legislative judgments have been carefully and thoroughly made about the circumstances in which the prohibitions in Pt 3 of the Act are either not to be engaged (see for example s 38 and my reasons for judgment in *Friends of Leadbeater's Possum*), or might be disengaged (a decision under s 75 that an action is not a controlled action being one example).

81 Part 4 sets out some of the substitute assessment processes recognised by the legislative scheme:

- A Ministerial declaration might be made under s 33, exempting an action from the need to be approved under Pt 9, but this will only occur where there is an "accredited management arrangement" or an "accredited management process": see s 32(a), and the definitions of these terms in s 33(2) and (2A).
- The taking of an action might be covered by a bilateral agreement between the Commonwealth and a State or Territory, on the basis that under such an agreement the Minister has accredited a management arrangement or an authorisation process.

82 The same is true of the broader, historical, exemption for the conduct of forestry operations: see my reasons in *Friends of Leadbeater's Possum* at [95]-[135].

83 Further, if the taking of an action is to be assessed under Pt 8, after a decision made under s 75 that it is a controlled action, various levels of scrutiny can be applied to the action, including a State-based process: see s 85, and the reference to an accredited assessment process.

84 The point to be made is that Parliament, through this complex legislative scheme, has decided what kinds of substitute assessment processes will meet the standards required to protect matters of national environmental significance. State-based processes have an important role to play, but that role has been identified, or provided for, in the EPBC Act itself.

85 The RAA is not included in the legislative scheme of the EPBC Act. It does not occur under a bilateral agreement. As the applicant submitted, the Minister has entered into a bilateral agreement with Tasmania under Ch 3 of the Act. Schedule 1 to that bilateral agreement identifies three classes of action to which the bilateral agreement applies, defined by reference to assessments under specified provisions of the *State Policies and Projects Act 1993* (Tas), the *Environmental Management and Pollution Control Act 1994* (Tas), and the *Land Use Planning and Approvals Act 1993* (Tas). The applicant submitted the RAA process was not done under any of those provisions, and I accept that submission.

86 Nor is the RAA an “accredited assessment process” conducted by the State of Tasmania. It is not a recognised substitute for a Pt 8 assessment. It is not, therefore, a process which is intended to enable the disengagement of Pt 8 and Pt 9.

87 Any conditions imposed under the RAA, or undertakings given by Wild Drake to the PWS pursuant to the RAA cannot, in law, be a substitute for the discharge of the Minister’s (or delegate’s) statutory task under s 75.

Identifying the action for the purposes of this statutory task

88 In *Triabunna*, each of the judgments of the Full Court made some observations relevant to the question of how to identify the action for the purposes of the statutory task in s 75.

89 Justice Besanko emphasised the need to look carefully at the relevant facts (at [11]-[12], and [14]):

In my respectful opinion, the answer lies in the facts. The question is whether the particular matters are capable of being characterised as particular manner requirements and then, importantly, whether the Minister believes that Part 3 is not a controlling provision for the action because the action will be taken in accordance with those particular matters. If yes, then those matters must be specified in the notice given under s 77 by reason of s 77A of the Act. Whether the matter is part of the initial proposal or added later by the applicant who identifies it as a mitigating feature is not to the point; it is its significance to the decision-making process which is important.

The use of K-Grid and of bundled lines are certainly capable of being particular manner requirements. In my opinion, a close examination of the delegate’s reasons indicates that the use of K-Grid and of bundled lines were reasons the delegate believed that ss 18 and 18A of the Act were not controlling provisions for the proposed action. The delegate made it clear in [34] of his reasons that the risks of entanglement, vessel strikes and noise disturbance would be significant in terms of impact and, therefore, engage ss 18 and 18A of the Act, but for the mitigating measures directed to those matters. In my opinion, [30] and [31] of the delegate’s reasons make it quite clear that the use of K-Grid and of bundled lines were part of the measures which reduced the impacts of the action to a level below significant.

....

As I have said, the approach of the primary judge as to the use of K-Grid, and the parties on the appeal both as to the use of K-Grid and of bundled lines, proceeded on that basis that they were important features of the proposed action. In light of the delegate's reasons, that approach is correct. It means, I think, that there is only one possible outcome in terms of the correct approach to the decision-making process and that is that the use of K-Grid and of bundled lines should be included in particular manner requirements in the notice under s 77 of the Act.

90 Ultimately, and despite the absence of any reference to s 77A in the brief to the delegate, the approach I have taken to the delegate's decision in this case is not dissimilar from Besanko J's approach in *Triabunna*.

91 At [49], Flick J emphasised that the regulatory requirement to "describe" a "proposed action" (in the Regulations) must be understood in the context of the scheme's provision for persons other than the proponent to make a referral: that is, it may well be a person other than the proponent who will be, for the purposes of Pts 8 and 9, describing the "action".

92 In my respectful opinion, what constitutes an action is not a subjective issue: it has to be objectively capable of being identified. It is a statutory concept, including a concept upon which criminal liability can turn. While it might be fact-dependent, ultimately, there must be a correct, and an incorrect, identification of an action in order for the scheme to operate: see my reasons in *Triabunna* at [193].

93 While, as Flick J observed in *Triabunna* at [51], there may be no "legislative imperative" to *describe* the proposed action "with particularity", *identification* of the proposed action is critical to the legislative scheme, including the civil and criminal prohibitions in Pt 3. The concept of "action" in the legislative scheme is distinct from, and anterior to, the concept of the "impact", or consequences of an action. That distinction is also a key component of the scheme. That distinction could be obliterated, or rendered meaningless, if it was the case that an action could be defined down to its minutiae and could include all the mitigation or avoidance measures that might be necessary to avoid the likelihood of an impact. Mitigation or avoidance measures, agreement to refrain from taking an action in a particular manner, changes to the manner in which an action might be taken – all these matters might end up being specified in a s 77A decision, or they might end up as conditions if an action becomes a controlled action. But in my opinion one cannot escape the fundamental structure of the legislative scheme by seeking to incorporate into the concept of an "action" the very protections, through mitigation and avoidance measures, which the Act seeks to ensure are

observed for matters of national environmental significance. The Act does not establish some kind of executive negotiation mechanism between a proponent, the Minister and her or his Department, away from public scrutiny, by which some agreement can be reached as to a suite of mitigation and avoidance measures so that it is only where a negotiated outcome cannot be reached that Pt 8 and Pt 9 are engaged.

Ground 1

94 The applicant's submissions about the nature and relevant content and processes of the Management Plan for the TWWHA, including the RAA process, are set out at [43]-[60] of its principal written submissions, and the Minister's submissions did not in substance dispute what is in those paragraphs. I accept them. As well as the Management Plan, the regulatory mechanism employed in respect of the use of land in the TWWHA appears to be (relevantly) the grant of a lease or licence under s 48 of the NPRM Act and the potential to cancel that lease or licence under s 51, for – amongst other matters – breach of conditions.

95 The Management Plan purports to adhere to the requirements of s 321 and s 322 of the EPBC Act, concerning the management of World Heritage properties. Section 321 provides:

321 Co-operating to prepare and implement plans

(1) This section applies in relation to a property that is included in the World Heritage List.

(2) The Commonwealth must use its best endeavours to ensure a plan for managing the property in a way that is not inconsistent with Australia's obligations under the World Heritage Convention or the Australian World Heritage management principles is prepared and implemented in co-operation with the State or Territory.

Note: The Commonwealth and the State or Territory could make a bilateral agreement adopting the plan and providing for its implementation.

(3) Subsection (2) does not apply in relation to so much of a property as is in the Great Barrier Reef Marine Park.

Note: A zoning plan must be prepared under the *Great Barrier Reef Marine Park Act 1975* for areas that are part of the Great Barrier Reef Marine Park. In preparing a zoning plan, regard must be had to the Australian World Heritage management principles.

96 Thus, one of the purposes of the TWWHA Management Plan is the discharge of the Commonwealth's obligation under this provision, and in that discharge, compliance with its international obligations under the World Heritage Convention. The Plan states as much in the executive summary. These purposes are also reflected in Sch 5 of the Regulations. However, there is no suggestion by the terms of s 321 and s 322 of the EPBC Act that the

existence of a management plan in World Heritage areas, nor an actor's compliance with it, is a method of avoiding, or disengaging, the controlled action provisions in Pt 8.

97 For the purposes of ground 1, the key point is that the functions and objectives of a management plan such as one made under ss 19-28 of the NPRM Act, and taking into account the lease and licence provisions in s 48, are obviously much broader.

98 As the brief to the delegate stated, and consistently with cl 3.02 of Sch 5 to the Regulations, the RAA process required an EPBC Act referral. It did not, in its terms, purport to be a substitute for the EPBC Act process: quite the contrary, it required a proponent such as Wild Drake to seek and obtain statutory permission to take an action under the EPBC Act. That is a critical fact which should not be overlooked: the RAA process did not purport to be of the same character as a bilaterally accredited process, or any other substitute process for which the EPBC Act provides and for which it accordingly provides an exemption. The brief also stated that the RAA process "will be finalised after the EPBC Act referral decision, and assessment if required has been completed...".

99 In my opinion the brief, adopted by the delegate as his reasons, made it clear that the delegate believed the action could be taken without a significant impact on any of the identified matters of national environmental significance only if it was carried out in a particular manner. Indeed, in my opinion the brief, standing as the delegate's reasons, indicated that the delegate's belief incorporated a number of aspects about how the action needed to be carried out, in order to avoid any likelihood of significant impact. I note that unlike *Triabunna*, this is not a situation where the delegate made any finding about actual significant impact and then how to avoid it. This is a decision centring on the "likelihood" of significant impact, rather than the formation of a view there *would* be such an impact.

100 The following matters have contributed to the finding of fact I make about how the delegate's reasons (ie the brief) should be interpreted.

101 Despite the conduct of the RAA, and the imposition of a series of conditions on Wild Drake through that process, the Department sought further information on the delegate's behalf from Wild Drake. That information was set out in a letter which was contained in Attachment B1 to the delegate's brief, and relevantly stated:

Our initial examination of your referral indicates that there is insufficient information to allow us to consider all the relevant issues. To assist the Department in making a decision on the referral, please provide the following information:

- identification of the values of the Tasmanian Wilderness World Heritage Area that may be impacted by the proposed action;
- management measures proposed to avoid and mitigate impacts on the identified values, including increased fire risk;
- survey information for the helipad site;
- location of proposed walking paths from the helipad to the boat launch;
- the system proposed to manage waste (including waste water and sewage) on Halls Island;
- measures to be imposed under local and state government approvals; and
- conditions attached to the current Halls Island leasehold.

102 These were all material issues, most of which went directly to the consideration of any adverse impacts on the applicable Pt 3 matters (see s 75(2)).

103 The result of this request was, amongst other material, the submission by Wild Drake of the PMEMP for the proposed action. In the introduction, the PMEMP described its overall purpose as:

... to ensure that the impact and avoidance strategies and procedures prescribed in the *Halls Island Consideration of MNES, potential impacts, avoidance and mitigation measures* are identified, encapsulated and implemented within the proposed activities and actions.

104 The *Halls Island Consideration of MNES, potential impacts, avoidance and mitigation measures* was another document provided by Wild Drake in response to the Department's request for further information. It is a document of substantial length, which as part of its title indicated its purpose was to address "potential impacts, avoidance and mitigation measures". The document identified each relevant World Heritage value, and other matters of national environmental significance (such as the presence of threatened flora and fauna) and in respect of each, set out the potential impacts, the level of risk, the consequences of those potential impacts, the measures which would be taken to manage or avoid the potential impacts, and the contended risk and likelihood of significant impact if those measures were taken. Although the extracts are lengthy, it is necessary to set out three examples, so that the detail can be understood, as it is the method which these extracts reveal, and the delegate's acceptance of what was in this document, that informs how the applicant contends the delegate misunderstood his task under s 75(1), for the purposes of ground 1. The delegate's acceptance of these measures, in the terms they are expressed, is also important to my conclusion that the delegate did, in fact, form a belief about the "particular manner" in which the action would be carried out.

105 The first example relates to one of the TWWHA's World Heritage values:

Value: Criteria ix; Values representing significant ongoing geological processes, biological evolution and man's interaction with his natural environment

Matter: Impacts to relatively undisturbed landscape.

Potential impacts (to establish the likelihood of a significant impact on MNES): Disturbance from infrastructure and on-island use.

Likelihood Low. Built-infrastructure will be located in an area with existing human-habitation / structures and use (modified apparent naturalness).

Consequence: Disturbance to the relatively undisturbed landscape.

Risk: Low.

Mitigation and management measures

Existing measures (RAA, lease and licence conditions) to be fully adopted

- RAA Step 6 Activity controls # 4.1.3.1, 4.1.3.2, 4.1.4.1, 4.1.5.1, 4.1.8.1, 4.2.3.3, 4.2.3.4, 4.2.5.1 and implement all RAA Step 8 Conditions
 - 1) 4.1.3.1: (Geoconservation) Camp will be installed using hand-tools / battery operated tools only. Minimal ground disturbance, no excavations or changes to water-courses.
 - 2) 4.1.3.2: (Western Tasmania Blanket Bogs) Sites are avoided. Any interaction with sites will involve minimal ground disturbance, perforated decking and boardwalking.
 - 3) 4.1.4.1: (Landscape & Viewfield) Sympathetic building material selection, no reflective materials, muted bush tones.
 - 4) 4.1.5.1: (Wilderness and wild rivers, NWI (National Wilderness Inventory) 14+) Restrict maximum group sizes of 6 customers, restrict number of commercial trips to 30 per year. Sympathetic building designs and scale. Adhere to strict flight path and impact minimisation prescriptions in Attachment 10.
 - 5) 4.1.8.1: (Water quality / CFEV (Conservation Freshwater Ecosystem Values) Values) Installation of complete-capture sewage and greywater pods. Greywater will be back-loaded with each trip, for disposal outside of the TWWHA. Sewage will be collected annually in pods and emptied off-site.
 - 6) 4.2.3.3: (Recreational values, established uses) Minimise helicopter use, use helicopter route as described which avoids recorded & formal walking routes, and all significant recreational fishing waters. Restrict annual trip (booking) numbers during peak season (Oct-May) to 25 trips. Adhere to impact minimisation prescriptions in Attachment 10.
- Step 8 Conditions:
 - 7) (Wilderness Character) Prepare and comply with an Operations Plan to include: 'Fly Neighbourly Advice and identified flight path between Lake St Clair and helipad. Conditions are also to be

incorporated into the lease and licence. Adhere to helicopter prescriptions in Attachment 10 to minimise point-impacts.

- Lease and Licence conditions including: 12.4, A2.2(d,l,k,l,m), A2.4(a), A2.5(d), A3.8d(i), A3.8e(l,ii), B1.2(c), B1.2(f), C2.2, C4(A, Bii, Bvii, Bviii, Bix, BxiiC)
 - 8) 12.4: Compliance with management objectives. The Operator must not do anything that is inconsistent with the management objectives (for the purposes of the Act (*National Parks and reserves Management Act 2002 Tas*)) applicable in respect of the Land.
 - 9) A2.2 (d,l,k,l,m): (l) the design must minimise environmental impacts through:
 - (i) appropriate footprint design and techniques for the three accommodation huts and the communal kitchen hut, with exact locations and size of huts to be determined in conjunction with the (Tas) Minister;
 - (ii) the use of a selection of products, materials and methods that reduce or minimise impacts (including in respect of water use, waste production and generation); and
 - (iii) the development and implementation of actions to ensure that the natural and heritage values of the Park are preserved.
 - (m) all kitchens, toilets and bathrooms must be designed with a complete capture system. All grey and black waste water must be removed from the Land regularly and disposed of at a Central Highlands Council approved disposal facility.
 - (k) the design must maximise the retention of existing vegetation and topography.
 - (i) materials used in external surfaces of the Development must be low-visibility in colour and similar to surrounding vegetation (including a mixture of timber and steel materials in muted bush tones).
 - (d) the design must protect and present the values of the setting in which the Development is to occur, including in respect of the selection of materials and scale of buildings being complementary and sensitive to the surrounding environment (including vegetation type) with a reduced visual impact.
 - 10) A2.4 (a) l,ii: The Operator must prepare an operations manual detailing the operational practices of the Operator in respect of both the Approved Use and the Licensed Activities (Operations Manual). The Operations Manual must include:
 - (i) details of the FNA (Fly Neighbourly Advice) and an identified flight path between the identified area of Lake St Clair and the Conservation Area (helipad), including ensuring a standard operating procedure of over-flying potential (*wedge tail eagle) nesting habitat by approximately 1000m altitude where possible (except for the end points of the flight), travelling along the pre-determined

route of minimum likelihood of nests and avoiding tight manoeuvres and hovering (including ensuring that any flight path is not within a 1km line of sight of known eagles nests and that any flight does not include any 'view' of the nest);

- (ii) impact mitigation measures which are noted in the North Barker Flora and Fauna Assessment dated 21/11/2016, for Riverfly RIV002:

A 2.5(d): Construction Environmental Management Plan

- (d) details of how impact mitigation will be managed including the development of site management plan dealing with listed species and communities of the island, risk mitigation measure and supervision

- 11) A3.8d (l): The Operator must ensure that any helicopter used in connection with the construction and/or operation of the Development:

- (i) uses the flight path provided by the Lessor to ensure minimal airtime and minimal impacts on other users of the area;

- 12) A3.8e (l,ii): (e) Except for emergency situations, helicopters:

- (i) must not be operated at frequencies greater than those from time to time approved in writing by the Minister; and
- (ii) must operate substantially in accordance with any applicable operations schedule from time to time approved in writing by the (Tas) Minister.

- 13) B1.2(c,f): B1.2 General Obligations

- (c) to comply with all requirements and recommendations of the FNA (as may be amended generally or in respect of the Business only where such amendments are agreed between the parties acting reasonably) at all times during the Term including ensuring the recommended flight paths and altitude requirements are followed at all times when the helicopter is operating (provided that in the event of any inconsistency between the FNA and any requirements of CASA or relevant legislation the requirements of CASA or relevant legislation will take precedence to the extent of the inconsistency);

- (f) discourage smoking from occurring on the Land and within the Park generally but in the event smoking occurs the Operator must ensure that appropriate butt storage is provided and all butts are removed from the Land and disposed of appropriately.

- 14) C2.2: At all times while on a Activity the Operator must use all reasonable endeavours to ensure that the environment and ecology of the Licensed Area is in no way damaged by the Experience Guides and Clients including ensuring all staff and Clients clean, dry and disinfect any waders or equipment prior to accessing the Land and the Licensed Area.

- 15) C4 (A, Bii, Bvii, Bviii, Bix, BxiiC): C4 Transport Service
- (a) The Operator must not operate or use, or arrange for the operation or use of, a helicopter within the Park except in accordance with this clause C4.
 - (b) The Operator may operate or use, or arrange for the operation or use, of a helicopter within the Park subject to the following provisions:
 - (ii) ensure that the flight path enclosed at Attachment B 'Flight Paths' is followed at all times;
 - (vii) complies with the FNA including ensuring a standard operating procedure of over-flying potential nesting habitat by approximately 1000m altitude where possible (except for the end points of the flight), travelling along the pre-determined route of minimum likelihood of nests and avoiding tight manoeuvres and hovering (including ensuring that any flight path is not within a 1km line of sight of known (wedge tailed) eagles nests and that any flight does not include any 'view' of the nest);
 - (viii) unless otherwise agreed in writing by the (Tas) Minister, helicopters must only land and take-off from the recognised landing pad, the final location to be determined in accordance with Schedule A;
 - (ix) except for helicopter operations required for the construction of the Development or in respect of emergency situations, helicopters must only be used for supply and servicing runs in respect of a Land or in connection with maintenance of the Operator's Improvements and in accordance with the approved Operations Manual in accordance with clause A2.2;
 - (xii) except where necessary because of overriding safety considerations, the Operator must ensure that helicopters:
 - (c) are operated in a manner that minimises noise and disturbance to other users of the Park;

- Additional proponent proposed measures

- 16) The Standing Camp site will be rested from commercial activities for the period June-September annually (4 months), with the minor allowance of up to 5 commercial trips (20days) during this period, as per RAA approvals.

Risk after mitigation and management measures are in place: Low. Appropriate Standing Camp design and siting ensures that infrastructure does not impact on areas relatively undisturbed landscape. Low volume helicopter use and impact mitigation measures ensure that impacts on other users of the landscape is minimised.

Likelihood of a significant impact: Low – no significant visual or physical impacts from Standing Camp infrastructure, and minimal impacts from associated site usage.

Value: Criteria X – Values of the most important and significant habitats where threatened species of plants and animals of outstanding universal value from the point of view of science and conservation still survive.

Matter: Habitats where threatened species of plants and animals of outstanding universal value from the point of view of science and conservation communities' and species of conservation significance still survive (eg: *sphagnum* peatland, *Athrotaxis selaginoides* rainforest).

Potential impacts (to establish the likelihood of a significant impact on MNES): Trampling & track formation related to on-island activities and proposed walking routes from helipad to lake edge.

Likelihood: Low-Moderate.

Consequence: Damage to the integrity of susceptible features arising from trampling, track formation and subsequent erosion.

Risk: Moderate.

Mitigation and avoidance measures

Existing measures (RAA, lease and licence conditions) to be fully adopted

- RAA Step 6 Activity controls # 4.1.1.1, 4.1.1.3, 4.1.1.4, 4.1.3.1, 4.1.3.2 and implement all RAA Step 8 Conditions
 - 1) 4.1.1.1: Adopt all mitigation measures prescribed in the avoidance of trampling (on-island) within the Flora and Fauna Assessment:
 - a. Avoid routes through MSP's, or facilitate passage across MSP's by installing raised, perforated boardwalking. Risk is mitigated.
 - b. Education and supervision during trips, in relation to avoidance of trampling.
 - c. Siting of standing camp among ORO or WSU communities.
 - d. Create visitor exclusion zones, excluding visitors from sensitive communities MSP, RKP and *Pherosphaera hookeriana* communities (see Site Plan Map).
 - 2) 4.1.1.3: Install raised, perforated boardwalk along area of existing impact.
 - 3) 4.1.1.4: Ensure on-island routes/tracks avoid *Pherosphaera hookeriana*. Where existing routes pass by this species (near the natural rock landing), use short lengths of boardwalk to ensure clear walking route that avoids plant species. Education and supervision to re-enforce impact mitigation. Utilise no-access areas for visitors, see Site Plan Map including exclusion zones.
 - 4) 4.1.3.1: Camp will be installed using hand tools / battery-operated tools only. Minimal ground disturbance, no excavations or changes to water-courses.
 - 5) 4.1.3.2: Blanket bog sites are avoided.
- Step 8 Conditions:

- 6) Implement all avoidance and mitigation measures outlined in the Flora and Fauna Assessment; prepare a Construction Environmental Management Plan (CEMP) covering the construction phase, to be approved by the PWS.
 - 7) Through the CEMP, make staff and contractors working on Halls Island aware of the location of threatened plants and threatened native vegetation communities to ensure no inadvertent impact to these natural values.
 - 8) Flag work area to avoid inadvertent disturbance of threatened plants (*Pherosphaera hookeriana* pines) during construction. Include in CEMP.
 - 9) Locate the Halls Island landing such that these plants do not need to be removed, but if this is not practicable or safe, and any of these threatened pines need to be taken, then a permit to take under the *Threatened Species Protection Act 1994* will be required from PCAB prior to any impact.
- Lease and Licence conditions including A2.3, A2.4 (ii), A2.5(d), C2.2
- 10) A2.4 Operations Manual
 - (b) The Operator must prepare an operations manual detailing the operational practices of the Operator in respect of both the Approved Use and the Licensed Activities (Operations Manual). The Operations Manual must include:
 - (ii) impact mitigation measures which are noted in the North Barker Flora and Fauna Assessment dated 21/11/2016, for Riverfly RIV002, including:
 - (A) avoiding MSP - *Sphagnum* peatland, RKP - *Athrotaxis selaginoides* rainforest and *Pherosphaera hookeriana* locations (the Operator, where necessary, can apply to construct boardwalks over locations not specified in the RAA, which application will be subject to the written consent of the Minister including any necessary further assessment);
 - (D) using continual education and supervision as part of the overall interpretation and presentation of the Land to ensure minimal impact.
 - 11) A2.5: Construction Environmental Management Plan - The Operator must, before making any application for Development Approval to the Central Highlands Council and/or undertaking any Development Works on the Land prepare a plan ('Construction Environmental Management Plan'), in a form and substance satisfactory to the Minister, to deal with the following matters:
 - (d) details of how impact mitigation will be managed including the development of site management plan dealing with listed species and communities of the island, risk mitigation measure and supervision;
 - 12) C2.2 Management of the Environment: At all times while on an

Activity the Operator must use all reasonable endeavours to ensure that the environment and ecology of the Licensed Area is in no way damaged by the Experience Guides and Clients including ensuring all staff and Clients clean, dry and disinfect any waders or equipment prior to accessing the Land and the Licensed Area.

- Additional proponent proposed measures
 - 13) Additional on-site assessments (30 May 2018) have identified a suitable helicopter landing location (see Helipad Site 2 - Proposed Helipad and access to Halls Island Vegetation Survey 20 May 2018) consisting of naturally exposed bedrock. It is the intention of the proponent to use this area as the Helicopter Landing Site (HLS) without the requirement for added infrastructure (subject to HLS approval from helicopter contractors and meeting applicable CASA regulations). Should infrastructure (formed helipad) be required due to OH&S and/or CASA requirements, a raised perforated deck shall be installed at Site 2, as per Flora and Fauna Assessment impact mitigation prescriptions.
 - 14) Walking route from heli-landing site to the lake-edge shall follow the sclerophyll forest / open plain edge as prescribed in the Flora and Fauna Assessment addendum. When using the route between the western plain edge, and the lake edge, customers and guides shall use fan-out walking techniques to avoid trampling and track formation. Incorporate into CEMP / Operations Manual.
 - 15) Traversing of susceptible poorly drained habitats including sphagnum, blanket bogs and wetlands shall be avoided through the CEMP / Operations Manual

Risk after mitigation and avoidance measures are in place: Low. Activities that could result in trampling are mitigated, and activities that could lead to track formation are avoided.

Likelihood of a significant impact: Negligible-low. Avoidance measures, along with mitigation measures such as education and supervision result in a negligible to low risk of significant impact.

107 The third example relates to one of the key threatened flora species:

Community / species: Alpine Sphagnum bogs and Associated Fens - MSP

Potential impacts (to establish likelihood of a significant impact on MNES): Trampling & track formation related to on-island activities and proposed walking route to and from helipad

Likelihood: Low-moderate.

Consequence: Damage to the integrity of susceptible soils arising from trampling, track formation and subsequent erosion.

Risk: Low-moderate.

Mitigation and avoidance measures

Existing measures (RAA, lease and licence conditions) to be fully adopted

- RAA Step 6 Activity controls # 4.1.1.1, 4.1.1.3, 4.1.3.1, and implement all RAA Step 8 Conditions
 - 1) 4.1.1.1: Adopt all mitigation measures prescribed in the avoidance of trampling (on-island) within the Flora and Fauna assessment:
 - (a) Avoid routes through MSP's, or facilitate passage across MSP's by installing raised, perforated boardwalking. Risk is mitigated.
 - (b) Education and supervision during trips, in relation to avoidance of trampling
 - (c) Siting of standing camp among ORO or WSU communities.
 - (d) Create visitor exclusion zones, excluding visitors from sensitive communities MSP, RKP and *Pherosphaera hookeriana* communities (see site map)
 - 2) 4.1.1.3: Install raised, perforated boardwalk along area of existing impact (through MSP)
 - 3) 4.1.3.1: Camp will be installed using hand tools / battery-operated tools only. Minimal ground disturbance, no excavations or changes to water-courses.
- Step 8 Conditions:
 - 4) Implement all avoidance and mitigation measures outlined in the North Barker Flora and Fauna assessment report; prepare a Construction Environmental Management Plan (CEMP) covering the construction phase, to be approved by the PWS.
 - 5) Through the CEMP, make staff and contractors working on Halls Island aware of the location of threatened plants and threatened native vegetation communities to ensure no inadvertent impact to these natural values.
 - 6) Flag work area to avoid inadvertent disturbance of threatened plants (*Pherosphaera hookeriana* pines) during construction. Include in CEMP.
 - 7) Locate the Halls Island landing such that these plants do not need to be removed, but if this is not practicable or safe, and any of these threatened pines need to be taken, then a permit to take under the Threatened Species Protection Act 1994 will be required from PCAB prior to any impact.
- Lease and Licence conditions including A2.3, A2.4 (ii), A2.5(d), C2.2
 - 8) A2.4 Operations Manual
 - (a) The Operator must prepare an operations manual detailing the operational practices of the Operator in respect of both the Approved Use and the Licensed Activities (Operations Manual). The Operations Manual must include:
 - (ii) impact mitigation measures which are noted in the North Barker Flora and Fauna Assessment dated

21/11/2016, for Riverfly RIV002, including:

- (A) avoiding MSP - Sphagnum peatland, RKP - *Athrotaxis selaginoides* rainforest and *Pherosphaera hookeriana* locations (the Operator, where necessary, can apply to construct boardwalks over locations not specified in the RAA, which application will be subject to the written consent of the Minister including any necessary further assessment);
 - (D) using continual education and supervision as part of the overall interpretation and presentation of the Land to ensure minimal impact.
- 9) A2.5: Construction Environmental Management Plan - The Operator must, before making any application for Development Approval to the Central Highlands Council and/or undertaking any Development Works on the Land prepare a plan ('Construction Environmental Management Plan'), in a form and substance satisfactory to the Minister, to deal with the following matters:
- (d) details of how impact mitigation will be managed including the development of site management plan dealing with listed species and communities of the island, risk mitigation measure and supervision;
 - ii C2.2 Management of the Environment: At all times while on an Activity the Operator must use all reasonable endeavours to ensure that the environment and ecology of the Licensed Area is in no way damaged by the Experience Guides and Clients including ensuring all staff and Clients clean, dry and disinfect any waders or equipment prior to accessing the Land and the Licensed Area.
- Additional proponent proposed measures
- 10) Additional on-site assessments (30 May 2018) have identified a suitable helicopter landing location (see Helipad Site 2 - Proposed Helipad and access to Halls Island Vegetation Survey 20 May 2018) consisting of naturally exposed bedrock within a HHE (Eastern alpine heathland) community. It is the intention of the proponent to use this area as the HLS without the requirement for added infrastructure (subject to HLS approval from helicopter contractors and meeting applicable CASA regulations). Should infrastructure (formed helipad) be required due to OH&S and/or CASA requirements, a raised perforated deck shall be installed at Site 2, as per Flora and Fauna Assessment impact mitigation prescriptions.
- 11) Walking route from heli-landing site to the lake-edge shall follow the sclerophyll forest / open plain edge as prescribed in the Flora and Fauna Assessment addendum. When using the route between the western plain edge, and the lake edge, customers and guides shall use fan-out walking techniques to avoid trampling and track formation.

Incorporate into CEMP / Operations Manual.

- 12) Traversing of susceptible poorly drained habitats including sphagnum, blanket bogs and wetlands shall be avoided through the CEMP / Operations Manual

Risk after mitigation and avoidance measures are in place: Low. Activities that could result in trampling are mitigated, and activities that could lead to track formation are avoided.

Likelihood of a significant impact: Negligible-low. Avoidance measures, along with mitigation measures such as education and supervision result in a negligible to low risk of significant impact

108 The PMEMP itself contained a series of “subplans” to address potential impacts from aspects of the action. For example, under the topic of “construction”, the subplan described its objective in the following terms:

The objective of this plan is to ensure that all impact avoidance and mitigation measures relating to MNES are identified and implemented prior to the commencement of construction.

109 The PMEMP then went sequentially through a number of other areas of potential impact (eg weed and hygiene, Indigenous heritage, species and communities of significance, fire). For “species and communities of significance”, the relevant subplan stated the objective was:

... to ensure that all risk related to the proposed activities are avoided, or mitigated.

110 Taking the threatened ecological community of Alpine *Sphagnum* Bogs and Associated Fens as an example, the subplan cross-referenced back to earlier sections of the PMEMP which set out “mitigation and avoidance measures” for trampling and track formation (being one of the primary potential impacts for this species). That earlier part of the PMEMP stated:

2.3 Trampling and Track formation avoidance

To ensure that trampling, track formation and general disturbance of MNES species and communities is avoided and mitigated, the following measures will be fully adopted for use during the construction process:

- (a) Avoid routes through MSP’s, or facilitate passage across MSP’s by installing raised, perforated boardwalking. Risk is mitigated.
- (b) Education and supervision during trips, in relation to avoidance of trampling
- (c) Siting of standing camp among ORO or WSU communities.
- (d) Create visitor exclusion zones, excluding visitors from sensitive communities MSP, RKP and *Pherosphaera hookeriana* communities (see site map)
- (e) Install raised, perforated boardwalk along area of existing impact (MSP community south of Halls Hut)
- (f) Ensure on-island routes/tracks avoid *Pherosphaera hookeriana*. Where

existing routes pass this species (eg: near the natural rock landing), use short lengths of boardwalk or similar appropriate mechanisms to ensure a clear walking route that avoids the plant species. Education and supervision to re-enforce impact mitigation. Utilise no-access areas for visitors, see *Halls Island Preliminary Design Plan* for Site Plan.

- (g) Camp will be installed using hand tools / battery-operated tools only. Minimal ground disturbance, no excavations or changes to water-courses. A small four-stroke generator may be used during the construction process to charge electric tools. This shall be located on the ORO terrain to minimise risk of fire etc.
- (h) A Construction Environment Management Plan (CEMP) shall be prepared in accordance with the current RAA and Lease requirements, and will ensure that staff and contractors working on Halls Island aware of the location of threatened plants and threatened native vegetation communities to ensure no inadvertent impact to these natural values.
- (i) Flag work area to avoid inadvertent disturbance of threatened plants (*Pherosphaera hookeriana* pines) during construction. Include in CEMP.
- (j) Locate the Halls Island landing such that threatened plants (*Pherosphaera hookeriana* pines) do not need to be removed. If this is not practicable or safe, and any of these threatened pines need to be taken, then a permit to take under the Threatened Species Protection Act 1994 will be required from PCAB prior to any impact.

111 The PMEMP and its associated documents, along with the referral, were considered by the Department's Heritage Branch. The delegate was informed in the brief at certain points of the view of the Heritage Branch. For example, in the conclusion of the section of the brief titled "World Heritage properties", the delegate was advised that:

The Heritage Branch concludes that if the proposed avoidance, mitigation and management measures are implemented and adhered to, impacts to cultural heritage values, view fields and sites of exceptional natural beauty associated with the TWWHA, and impacts associated with trampling, fire, and the introduction of pests, weeds and pathogens, should be effectively mitigated.

112 The applicant submitted:

The Brief's authors approached the s 75(1) question on the assumption that the Proponent would adopt the mitigation measures proposed in the PMEMP. In other words, they considered impacts *as mitigated by the proposed measures*, rather than considering the likely adverse impacts without mitigation.

(Original emphasis.)

113 I accept that submission. It is apparent from the extracts above that the approach Wild Drake was, I infer, advised and encouraged by the Department to take to its referral was to put forward a case based on how any *likely* adverse impacts on matters of national environmental significance would be mitigated or avoided. The objective was to present a complete picture of sufficient mitigation and avoidance measures so as to persuade the delegate there was no

likely significant or adverse impact on any matter of national environmental significance, if those mitigation and avoidance measures were implemented in the taking of the action. The delegate's discharge of the statutory task in s 75, I am persuaded, was not undertaken by consideration of the action alone – taking any of the descriptions of the action which I have set out earlier in these reasons. It was undertaken by consideration of the particular manner in which the action would be carried out, and the large and complex suite of mitigation and avoidance measures which Wild Drake proposed, many of which had also been proposed and accepted (at least for the purposes of “draft approval”, as I note below) under the State's RAA process.

114 On the facts as they were before the delegate, the RAA process was incomplete and only “draft approval” had been received for “stage one” (the referral before the delegate). As I have already noted, on the facts before the delegate, Wild Drake was required by the RAA process to refer the proposed action under the EPBC Act. It could therefore not have been used as an assessment process if the action had been designated as a controlled action. Yet it was used to avoid a controlled action designation.

115 The Department treated the RAA as a substitute assessment process, and the delegate did the same by adopting the Department's reasoning. A clear example of this relates to the consideration of potential impacts on Indigenous heritage, and how they were dealt with in the brief. After referring to concerns expressed by the AHC about the “cultural interpretation site visits” Wild Drake proposed to undertake in the future, the brief stated:

The cultural site visits referred to by the AHC are those that form part of the stage 2 proposal, are not part of this referral and have not been approved to proceed in the PWS RAA.

116 That is a clear example of the Department and the delegate treating the non-statutory, State-based RAA process as the de facto assessment process. The scheme of the EPBC Act does not contemplate that will occur, outside the methods (such as bilateral agreements) for which it provides.

117 The substantive reasoning aspects of the brief bear out this characterisation of the delegate's approach. In relation to the Tasmanian Wedge-tailed eagle, the brief identified two features under the heading “Avoidance and mitigation measures”. First, what the PWS had identified as “management measures” (not circling around or hovering near eagles' nests or potential nests; to fly as highly, swiftly and directly over the nests as possible during breeding season (July-January); and to avoid flying within 1,000 m of the nests, horizontally or vertically,

particularly from July-January)), as well as a voluntary code of practice developed by the PWS called “Fly Neighbourly Advice”. Second, undertakings given by Wild Drake itself about “additional measures” to “further avoid disturbance impacts”: namely, no flights within a 1 km line-of-sight of known eagles’ nests, and that eagles observed in operational areas will be avoided; helicopter flights will not include a “viewing” of the nests; and that Wild Drake will adopt the flight route as prescribed in the “Wedge-Tailed Eagle Assessment” provided with Wild Drake’s referral information, being a route that avoids interactions with known nesting sites and utilises an area with a low probability of eagle nests.

118 Relevantly to the grounds of review, a similar approach was taken in respect of the Alpine *Sphagnum* Bogs and Associated Fens threatened ecological community, and to the World Heritage cultural and natural values which were to be protected.

119 In my opinion, and save for what I set out at [129]-[130] below, the approach taken by the delegate would have surrendered the statutory task, and control of the taking of the action, to an incomplete, non-statutory State process, outside the EPBC Act. It would not have been the task contemplated by s 75; it would have been a different task, and one not authorised by the EPBC Act.

120 As the applicant submitted in reply, the delegate’s decision meant that s 12(2)(c) and s 19(3) of the EPBC Act were engaged and Wild Drake was not exposed to injunctive or other procedures to enforce compliance with the prohibitions in Pt 3. Those prohibitions had been disengaged by the s 75 decision. Taking some hypothetical examples, the applicant submitted Wild Drake could thereby decide to vary the flight path of the helicopters, including flying lower (which may significantly impact any Wedge-tailed eagles in the vicinity), or might decide to conduct more than the 30 permitted visits per year (which may significantly impact on the wilderness values of the area), and the s 75 decision would render such changes, and such conduct, unregulated by the EPBC Act. In contrast, if the action had been a controlled action, and the measures proposed by Wild Drake, and set out in the RAA, had been imposed as conditions under s 134 of the EPBC Act, the Minister and the Department would have retained an ability to monitor and regulate any such changes and conduct. That ability was surrendered.

121 The Minister submitted at [32] of her principal written submissions, in a theme which ran throughout those submissions, that:

An action that was taken without the mitigation measures which were considered as part of the action that was the subject of the referral would be at risk of being characterised as different to the action that was the subject of the controlled action decision and be liable to enforcement action under a provision of Part 3 of the EPBC Act. In those circumstances, the Minister could also potentially call the action in under s 70 of the EPBC Act.

122 Of course, by this time, the conduct may have occurred and any adverse impacts may be too late to remedy. It is insufficient to point to possible remedial powers or the need for another round of allegations and counter allegations about whether the prohibitions in Pt 3 have been contravened. That is not how the EPBC Act is intended to operate. It is not intended to facilitate granular arguments to be made after potentially damaging conduct has occurred about whether an action is the same action or a different one to that which was approved. The fact that in a situation such as this, such granular arguments would be occurring in the context of a decision under s 75 that the action was not a controlled action at all would make the matter extremely difficult and complicated. That is not a workable solution to the problem which has arisen due to the approach taken by the Department and the delegate.

123 Further, the Minister's reliance on the fact that other State-based approvals were required (eg under the *Land Use Planning and Approvals Act 1993* (Tas)) before the action could be taken by Wild Drake does not ameliorate the situation. In several respects, the EPBC Act contemplates (and requires) coordination between State and Commonwealth assessment and approval processes: see *Tarkine National Coalition Inc v Minister for the Environment* [2015] FCAFC 89; 233 FCR 254 [3]-[17], [50] and [57]-[58]. The conditions power also expressly contemplates such co-ordination: see ss 134(3)(c), (3C) and (4)(a).

124 A further factor which supports this approach is the focus of the assessment processes in Div 3 of Pt 8, and of the decision-making requirements in Pt 9 (especially s 131A) on public participation and comment. Some of the assessment processes available under Div 3 of Pt 8 involve high degrees of public participation, such as an environmental impact statement or a public inquiry. The applicant submitted in reply:

The purposes of the Act are informed by the treaty obligations to which it gives effect, including (relevantly to the present case) articles 4 and 5 of the World Heritage Convention and articles 8 and 14 of the Biodiversity Convention. Article 14[(1)](a) of the Biodiversity Convention requires Australia, as far as possible and as appropriate, to “[i]ntroduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures”. Parts 5, 8 and 9 of the Act, and s 75(1), are integral components of the means by which Parliament has chosen to give effect to that obligation.

125 I accept that submission. The EPBC Act intends there to be a level of public participation. Its subject-matter is the protection and conservation of matters of national environmental significance. Their protection is a matter in which the Australian community has an interest, a fact the legislative scheme recognises.

126 The Regulations do require a proponent to supply information about mitigation measures in its referral, and although public submissions were invited (and were made) at the s 75 stage in respect of Wild Drake's referral, what is not intended by the scheme is that a de facto assessment process be conducted by the Department, in negotiation with a proponent and out of public view. Subject to the power in s 77A, what is being assessed under the statutory task in s 75 is the adverse impacts of the action, not the adverse impacts of the action once all avoidance and mitigation measures have been applied. Any other approach deprives the public of the participation the World Heritage Convention contemplates will be applied to the protection and conservation of World Heritage values in listed properties.

127 At [79] of its principal written submissions, the applicant contended (omitting footnotes):

The protective purposes of the Act are undermined if mitigation measures can be taken into account under s 75(1) as to whether there are likely to be significant impacts. If the Delegate's approach were appropriate, it would not make sense to have a bilateral agreement as a substitute for assessing environmental impacts, or to contemplate the Commonwealth approval picking up State conditions. Instead, the State could assess the impacts and impose conditions under applicable State legislation, and the Minister could then consider whether the impacts, *as assessed and then controlled under the State legislation*, were likely to be significant impacts.

(Original emphasis.)

128 There is force in this submission. There is a sense that the Department's approach, including its communications with the proponent prior to the recommendation made to the delegate, was not focussed on assessing the impacts of the action as it was outlined, but rather on discussing with the proponent what mitigation or avoidance measures might be taken so as to reduce the level of potential adverse impacts. As a pathway towards a component decision under s 77A, or as part of considering what kind of assessment process under Pts 8 or 9 should be undertaken, that process may well be legitimate and consistent with the scheme of the EPBC Act. If the Department's approach goes beyond this, then I agree with the applicant it can tend to frustrate the entire scheme of the EPBC Act. While administrative negotiations might avoid a longer, more complex, public and perhaps more resource intensive assessment process, it is not a course of conduct which the EPBC Act contemplates as an entire substitute for use of the mechanisms for which the Act provides so as to regulate the taking of an

action. Through a complex and prescriptive piece of legislation, Parliament has identified which substitute assessment and regulatory processes can be applied to the taking of an action which may engage Pt 3 of the EPBC Act. It has done so with precision. Outside those processes, what is available to the decision-maker (not the Department) is a decision under s 75 that the matter is a controlled action and the imposition of regulatory control through that process, or a component decision under s 77A.

129 However, I do not ultimately reach the conclusion on ground 1 which might be suggested from what I have set out above. That is because the appropriate way to interpret the brief, consistently with the legislative scheme, is to see the decision through the lens of s 77A, as a component decision or decisions. Consistently with at least some aspects of the Minister's supplementary written submissions, I have concluded that what the delegate was in reality deciding was that he believed the action would not be likely to have a significant impact if carried out in a certain manner. In its outcome in terms of the content of the s 77 notice, the decision did not reflect this belief, and that is why ground 2 succeeds.

130 There will be a point beyond which the approach taken by the Department (and, I infer, an approach the Department encouraged the proponent to take) must inevitably result in a decision under s 75 being wholly set aside. That will occur where it is not possible to find that the decision-maker "believed" there would be no significant impact or no likelihood of significant impact because the action would be carried out in a particular manner. After some reflection, I have concluded that the better characterisation of what the delegate did is the one I have set out at [129]. I do not consider the delegate adopted an approach which entirely frustrated or avoided the statutory scheme.

Ground 2

131 The structure and content of the brief plainly suggests that the delegate did form a belief that ss 12, 15A, 18 and 18A were not controlling provisions for Wild Drake's action because the action would be taken in a particular manner. All of the materials to which I have referred under ground 1, in terms of the way the adverse impacts were identified, and the mitigation or avoidance measures then nominated, point to that conclusion.

132 The Minister has, in her supplementary submissions, conceded this to be the case in respect of only two matters of national environmental significance: the Alpine *Sphagnum* Bogs and Associated Fens threatened ecological community, and the World Heritage natural criteria

(viii), (ix) and (x) as they related to potential contamination of Lake Malbena from construction and operations.

133 I accept that concession, but I consider it does not go far enough, and it fails to recognise or give sufficient weight to the structure and reasoning of the brief as a whole, at least on the other matters of national environmental significance which were material or critical to the delegate's decision: namely the remainder of the World Heritage values, and the impacts of the proposed action on the Tasmanian Wedge-tailed eagle.

134 On the latter, the brief stated:

The locations of most active Wedge-tailed Eagle nests are known and recorded by the Tasmanian Department of Primary Industries, Parks, Water and Environment (DPIPWE). Mapping included in the referral indicates known nesting sites approximately 2 km from Halls Island and 4 km from the proposed helicopter flight route.

135 One might make the point that a problematic premise of this approach is that, first, there are apparently no undiscovered Wedge-tailed eagle nests and second, there are not likely to be any new nests discovered, whether because of destruction or abandonment of existing nests, or for other reasons. The material does not indicate whether any specific searches had been undertaken for other (otherwise unidentified) nest sites, nor how practical it would be to continue a 1 km exclusion zone around any new nests, nor whether the very presence of the camp might inhibit eagle pairs seeking out and constructing new nests, being, as the materials described them, "timid nesters".

136 Putting that matter to one side, what the finding extracted at [134] above does demonstrate is that the flight path to be taken by the helicopters transporting guests and supplies, including supplies to build the camp, would be critical to the question of adverse impact on the Tasmanian Wedge-tailed eagle, especially during the breeding season. The mitigation and avoidance measures which I have set out at [105] above, and indeed those set out in the brief itself, indicate that there would be adverse impacts if the measures were not taken. That is inherent in the nature of the measures: for example, it is assumed that circling or hovering above nests or potential nests, or "viewing" nests, would be adverse impacts. That is why they are proscribed. There could only have been a need to proscribe viewing of nests because it was otherwise a likely consequence of flying tourists around the area, who might wish to see local wildlife. The identified measure to fly "high, swiftly and directly" over nests during the breeding season indicates that at some point on their route, helicopters would be flying

over nests (at least, en route to the camp area). They were to be required to do so “swiftly”, “directly” and at height. That is because the proscription assumes if they did not, there may be an adverse impact. All these matters go to the obvious significant impact of the potential disruption of the breeding cycle of an endangered species. The structure of the brief discloses that the delegate believed it was the taking of the action in this particular manner which resulted in s 18 not being a controlling provision in respect of the Tasmanian Wedge-tailed eagle. Even if, as the brief stated, and the Minister contended, at the time of the delegate’s decision there were no known nests within the area of the proposed action, nor within 1 km of the proposed flight path, that is no more than a “point in time” position, in circumstances where the subject-matter to be protected is an active (and, the legislative scheme must be assumed to direct itself to, recovering and expanding) breeding population whose nest use may not remain static.

137 In relation to the other World Heritage values, the structure and approach of the brief was the same, and the same conclusion should be reached. To recap, the brief identified the following values as being relevant to the proposed action:

- **Cultural – iii, iv and vi:** disturbance impacts to Indigenous archaeological sites from construction and operations;
- **Natural – vii:** impacts associated with noise from the helicopter transporting and visual impacts from the standing camp;
- **Natural – viii, ix and x:** impacts to ecological and biological systems from trampling of vegetation, unmanaged fires, introduction of pests, weeds and pathogens, sediment and erosion, and contamination of Lake Malbena from construction and operations.

138 As to the cultural values (criteria (iii), (iv) and (vi)), the brief stated:

Based on advice from Aboriginal Heritage Tasmania (AHT) provided in the referral, the proponent considers there is a low probability of Aboriginal heritage being present on or adjacent to Halls Island.

139 The applicant did not dispute this contention by Wild Drake was open. However, what the brief also recognised, implicitly, and what the material before the delegate (especially from the AHC) recognised expressly, is that any disturbance or interference with matters of cultural significance to the Aboriginal community would be highly detrimental. In its submission regarding Wild Drake’s proposal, which was attached to the delegate’s brief, the AHC described the importance of a recently re-discovered heritage site, affected by Wild Drake’s “stage two” proposal. For present purposes, it is the depth and weight of potential adverse impact which the submission describes that matters:

Sites such as these are rare, highly significant and hold immeasurable value for Aboriginal people. Their protection is paramount and their significance far outweighs any potential short term gains from tourism or other activities.

140 Through emphasis placed on what was called the “An Unanticipated Discovery Plan”, the brief recognised the level of importance of *any* discovered Aboriginal site or “relic” during the construction and operation of the project. The implementation of the “An Unanticipated Discovery Plan” was a requirement under the RAA process. The brief stated:

The *An Unanticipated Discovery Plan* includes ceasing disturbance works in the event Aboriginal relics are found, the application of temporary buffers and assessment by suitable experts.

141 The brief noted that Wild Drake had “committed to the implementation of an Indigenous Heritage – Protected Matters Environmental Management Plan (IH EMP)”. It also noted that the IH EMP required “implementation of the requirements of An Unanticipated Discovery Plan”.

142 This is what allowed the brief to conclude:

... the measures proposed in the I[H]-EMP will ensure impact is avoided should relics be found during construction or operations.

143 In my opinion, what is clear is that without a plan of this nature, the delegate believed there could be an adverse impact if any sites or relics were discovered. That is in the context, as the AHC submission made clear, that the site Wild Drake was proposing to take visitors to as part of the proposed “stage two” was a recently re-discovered site. Thus, the prospect of more sites, or relics, or artefacts, being discovered was real.

144 In my opinion, the brief disclosed that the delegate believed it was the taking of the action in this particular manner, with the application of the “An Unanticipated Discovery Plan”, implemented under the IH EMP, which resulted in s 12 and s 15A not being controlling provisions in respect of the identified World Heritage cultural values.

145 As to the first natural value (criterion (vii)), the brief adopted the same approach. It set out a number of avoidance and mitigation measures for the noise impacts of the action (especially from the helicopter usage, and tourist numbers), and measures to avoid impacts on aesthetic values by reason of the design, location and construction of the camp. It was these matters which led to the delegate concluding any impacts from noise, on aesthetic values and any visual impacts could be avoided. It is obvious from the content of this aspect of the reasons that different designs for the camp were adopted, or different configurations for helicopter

flights, because the delegate believed there could otherwise have been adverse impacts to a significant level.

146 As the applicant noted at [53] of its principal written submissions, paragraph 8.2 of the TWWHA Management Plan deals specifically with wilderness values, and states:

... [t]he intrinsic value of wilderness was a key element in the advocacy for the protection and listing of the TWWHA. Its continuing integrity is therefore an important social value for many people. It is a central element in what many people value with respect to the TWWHA as a whole, and in effect it is often viewed as the principal value of the TWWHA.

147 Avoiding impacts on intrinsic wilderness values is no mechanical exercise. That is no doubt why Wild Drake spent so much time in its referral, and in its supplementary information, attempting to persuade the Department and the delegate that it could take this action in a way which was sensitive to the wilderness values of the area. The delegate accepted that could be done, but only if the specified range of mitigation and avoidance measures were taken – which is just another way of saying the action would be undertaken in a particular manner.

148 As to the second set of natural values (criteria (viii), (ix) and (x)), the same observation can be made, although the brief acknowledged there was a substantial overlap in the applicable avoidance and mitigation measures with the measures put forward for the Alpine *Sphagnum* Bogs and Associated Fens threatened ecological community. The brief made findings such as:

The proponent has provided avoidance and mitigation measures to avoid or reduce trampling, fire risk and introduced species or disease impacts. These are the same as described for the TEC above. The proponent will not be excavating for construction and will be making no changes to watercourses. The boat jetty is a natural rock slab and this will avoid eroding soil at the lakes edge.

149 This indicates that what Wild Drake would *not* do (or *should not* be permitted to do) was just as important to the delegate's belief about no adverse impacts to a likely significant level as Wild Drake's positive conduct. If watercourses were to be changed, then I consider, reading the decision as a whole, it is likely that would have been found to be a likely significant impact in this particular region. Therefore, belief that the proponent would take the action in a particular manner by *not* engaging in certain conduct (eg changing a watercourse) was also part of the delegate's approach.

150 Plainly, as the brief set out and the Minister now concedes, the measures taken to avoid contamination of Lake Malbena were "particular manner" measures. They were said to be:

The proponent has included measures to avoid contamination of the surrounding environment, including Lake Malbena. These measures are included in the Construction - Protected Matters Environmental Management Plan (C EMP) and the WC EMP [Wilderness Characteristics – Protected Matters Environmental Management Plan] including through:

- installation of complete-capture sewage and greywater pods;
- back-loading of greywater with each trip, for disposal outside of the TWWHA;
- annual collection of sewage in pods to be emptied off site;
- ensuring that all rubbish generated is properly collected and stored in a manner that it cannot be accessed by animals and properly disposed of at an authorised waste disposal site at the end of each stay;
- use of recyclable, compostable and/or reusable containers and wrappers wherever possible, no use of plastic bags or single use plastic bottles; and
- minimal ground disturbance and no excavations or changes to water-courses.

151 In summary, in my opinion all of the three sets of World Heritage values at [137] above were only identified as not engaging the controlling provisions in ss 12 and 15A because of the delegate’s belief that the action would be undertaken in a particular manner – the integers of that “manner” being set out in the brief.

152 The applicant submitted in its supplementary reply submissions that another way to interpret the brief is to read it as adopting the approach of Kerr J at first instance in *Triabunna Investments Pty Ltd v Minister for the Environment and Energy* [2018] FCA 486; 160 ALD 243, especially given that the delegate’s decision was made in August 2018 and Kerr J’s judgment was handed down in April 2018. Justice Kerr’s approach was not endorsed by the Full Court. I do not agree that this is the correct interpretation of the brief. Putting the outcome of the exercise of power under s 75 to one side, the structure of the brief did not approach the mitigation and avoidance measures as inherent parts of the action. It separated them out. That is apparent from the descriptions of the action which I have extracted above. The brief plainly acknowledged it was the specified mitigation measures which would reduce or avoid the adverse impacts of the action. It treated the two as separate.

Ground 3

153 I accept the applicant’s submission that a decision whether s 74A(1) is engaged is “logically anterior” to a decision under s 75. The Minister did not appear to dispute this. Rather, she made two points: first, that the applicant has not discharged its onus of proving no

consideration had been given to the application of s 74A(1); and second, that the Minister in any event had no duty to consider whether this provision was engaged.

Onus and its discharge

154 I accept the Minister’s submission that the applicant bears the onus of establishing, on the balance of probabilities, the error for which it contends; namely that the delegate did not consider whether s 74A(1) was engaged: see *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594 at [67] (Gummow J, Heydon and Crennan JJ agreeing).

155 The material before the delegate, to which I have referred above, makes it clear, and I find, that Wild Drake had planned, and proposed, a second aspect to its development on Halls Island. The Department and the delegate knew about the second aspect because it was referred to in the brief. Indeed, as I noted at [115] above, it was used as a reason for not addressing some potential adverse impacts that the delegate considered would only arise if Wild Drake proceeded with that aspect.

156 The Minister submitted this state of awareness on the part of the Department and delegate means the Court could not infer the delegate omitted to consider s 74A(1). I disagree. There was no reference at all to s 74A(1) in the brief, or in the material attached to it. In addition are the following matters:

- (a) In the brief to the delegate, next to the words “Recommended Decision”, there were only three options: NCA (no controlled action); NCA (pm) (no controlled action on the basis of a particular manner) and CA (controlled action). A s 74A decision was not even listed as an option.
- (b) The brief noted the referral described the proposed action as “stage one” and noted expressly that “[w]hile not part of this referral”, there were certain different “stage two” activities. This is the point at which, if it was considered, one would have expected to see a reference to s 74A(1). However, there was no such reference.
- (c) Later in the brief, it referred expressly to stage two being “progressed separately”. This is another point at which one would have expected to see a reference to s 74A(1), if the delegate was indeed being put on notice of a need to consider that provision.

157 What must be recalled in this context is the unusual situation where the brief has, in substance, been transformed into the delegate’s reasons. Different considerations might apply to an independently prepared set of reasons, in the usual way. Here, however, the first and

principal purpose of the brief was to advise and inform the delegate, in order that he could make a decision. This purpose strengthens the expectation that if the delegate was being asked to turn his mind to s 74A(1), the brief would have said so.

158 I find the delegate did not consider s 74A(1).

159 The next question is whether that failure to consider whether to exercise the power in s 74A(1) involves an error of law, and one which means the s 75 decision should be set aside. In its amended originating application, the applicant did not identify what kind of error it contended this failure constituted. The applicant's written submissions did not characterise the error either. In oral submissions, counsel for the applicant contended that there was a duty to consider the application of s 74A, in the circumstances of this case at least, because of what was raised in the referral material. As I understood it, counsel submitted the applicant need not go further than that, and the Court need not decide whether in every circumstance there would be a duty to consider the application of s 74A prior to making a decision under s 75.

160 I agree that the latter question need not be answered. Whether or not s 74A imposes a duty to consider if an action forms part of a "larger action" will be a question of statutory construction: see *Animals' Angels e.V. v Secretary, Department of Agriculture* [2014] FCAFC 173; 228 FCR 35 at [87] (Kenny and Robertson JJ, Pagone J agreeing). As the Full Court's decision revealed, the question may be a complex one.

161 However, what the Full Court also made clear in *Animals' Angels* at [89], by reference to a passage from *SZGUR*, is that in a particular case a failure to consider exercising a discretionary power conferred on a repository may amount to a legal error, and indeed an error affecting the jurisdiction of the repository of the power. In *SZGUR*, French CJ and Kiefel J (as her Honour then was) said at [22] (with my emphasis added):

The question whether s 427(1)(d) imposes a legal duty on the Tribunal to consider whether to exercise its inquisitorial power under that provision was answered in the negative by the Full Court of the Federal Court in *WAGJ v Minister for Immigration and Multicultural and Indigenous Affairs*. The Court held that absent any legal obligation imposed on the Tribunal to make an inquiry under s 427(1)(d) "[b]y a parity of reasoning ... there is no legal obligation to consider whether one should exercise that power". That view is correct. **That is not to say that circumstances may not arise in which the Tribunal has a duty to make particular inquiries.** That duty does not, when it arises, necessarily require the application of s 427(1)(d).

(Footnotes omitted.)

162 An error of the kind to which their Honours referred, arising in the particular circumstances of a given case, might be characterised in a number of different ways, depending on the statutory scheme involved, and the jurisdiction of the supervising court. It could be legal unreasonableness. It could be a failure to perform the statutory task of merits review. It could be the overlooking of a matter material to the performance of the statutory task in a given case.

163 In the present case, I am satisfied the particular facts and circumstances before the delegate meant that he should have considered the application of s 74A, but failed to do so. In terms of characterising the nature of the error, I consider it can be properly described as a failure to perform the statutory task required of the delegate under s 75 in the circumstances of this particular referral and the information provided to the delegate, given that the discretionary power in s 74A is an express part of the statutory scheme, and is a power of relevance only before a decision has been made under s 75.

164 Regulation 4.03(1) of the Regulations requires a referral to contain the information set out in Sch 2 to the Regulations, unless it is unreasonable to expect it to be included (reg 4.03(2)). Clause 4.01(i) of Sch 2 provides that a description of the proposed action must include “whether the action is a component of a larger action”.

165 In its referral, Wild Drake complied with this requirement (with my emphasis in bold and underlined, and including some typographical errors):

1.15 Is this action part of a staged development (or a component of a larger project)?

Yes

1.15.1 Provide information about the larger action and details of any interdependency between the stages/components and the larger action.

The State Government level RAA approval has been broken into two parts. This EPBC self referral only pertains to Stage One activities.

Stage 1 Activities, which are fully approved at the State level through the RAA process and subject to this EPBC self-referral:

- All developments and activities on Halls Island
- Helipad
- Walking route between the helipad and Halls Island
- The use of non-motorised watercraft on Lake Malbena; and
- Helicopter flight path

Stage 2 activities (not subject to this EPBC self-referral) requiring additional State assessment and approval include:

- Proposed walking routes to Mt Oana
- Proposed walking route to, and proposed cultural interpretation activities at the Aboriginal heritage site listed in the RAA (location details are not *publicly* identified in this table due to sensitivities, but are available to DOE assessment officers through the attached commercial-in-confidence RAA).
- Any additional walking routes

The proposed walking routes will require a natural values assessment (to be performed by Northbarker), and the proposed activities relating to Aboriginal cultural are reliant on the proponent further contacting, engaging and consulting with the Aboriginal Heritage Council (AHC), and the Aboriginal communities, outlining the details of the proposed development, and any proposed plans for activities including site visits, cultural heritage interpretation and planned access to Country projects.

The development and commencement of Stage 1 activities and infrastructure is not reliant on Stage 2 activities.

166 Thus, there was no equivocation from Wild Drake about its intention to undertake the actions described in “stage two”. It was indicating that it, as the proponent, did not consider the taking of that action to be part of its referral. When it is recalled it was required to self-refer under the EPBC Act as part of the RAA process, that position is explicable.

167 Indeed, the facts are stronger than this, as the applicant submitted. Originally, when putting its proposal to the PWS, Wild Drake put the proposal as a single proposal. In the RAA application, under the heading “Proposed activities include”, the following was set out (omitting references to coordinates and including some typographical errors in the original):

- Kayaking on Lake Malbena – operations will meeting Marine And Safety Tasmania (MAST) requirements.
- **A half-day walk up Mount Oana...adjacent to the Lake Malbena shoreline. This is adjacent to the Self-Reliant / Wilderness Zone boundary however we believe that the dry-sclerophyll and rock habitat found on the northern face is traversable without creating any significant impacts. Exact route to be determined with an on-site Flora and Fauna specialist in liaison with PAWS, and walks to be GPS tracked and reported annually for monitoring. See appendix Halls Island Maps, Map 4.**
- **Day-trip walks to Mary Tarn Aboriginal cultural site...A number of routes will be developed to minimise the use of any single route, and fan-out walking techniques will be used. Day-trips to Mary Tarn will again be tracked by GPS, and reported annually for monitoring. Areas of sensitive plant communities including Sphagnum listed in the Flora and Fauna Assessment will be avoided, and hard-wearing forest-edges along with well-drained grasslands will be used as the preferred area of travel. See appendix Halls Island Maps, Map 5 for matrix of walking routes.**

Aboriginal cultural interpretation is reliant on input, permission and facilitation from the wider Tasmanian Aboriginal Communities.

- European cultural interpretation at archaeological sites (chimney stack and horse paddock on southern side of Lake Loretta...
- On-island European cultural interpretation built around the Reg Hall and Walls of Jerusalem story.
- On-island passive activities (i.e. un-guided walking within WSU communities and boardwalking, to be defined in operations manual).
- Occasionally fly fishing specific activities around lakes Malbena, Loretta, Mary Tarn, Nugetena, as well as Eagle Lake and Kita Lake. Eagle and Kita Lake lay within ~ 100 metres of the self-reliant boundary, and prescribed impact-minimisation walking strategies will be used (eg fan-out, sticking to high and rocky ground etc) as per our existing fishing operations in the self-reliant and wilderness zone further south at Lake Ina. Furthermore, trip numbers to Kita Lake will capped at six per annum to minimise any potential or perceived impacts, and all trips will be GPS logged, and reported annually should monitoring be required. See appendix Halls Island Maps...

(Emphasis added.)

168 It was the PWS, not Wild Drake, which split the proposal, for the purposes of the RAA, into two parts. The copy of the RAA documentation in the Court Book indicates the proposal was divided into two stages under that process, in particular at “Step 8 – Draft Final Determination” where it is stated: “This RAA proposal has been broken into two stages of activities. Stage 1 has been approved, whilst stage 2 activities require additional assessment and approval”.

169 Therefore, the clarity in Wild Drake’s answer “yes” in the referral to the question whether the action was part of a staged development, or a component of a larger project, can be fully understood. From its perspective, the development at Halls Island certainly was all one action. It was the PWS which split the action into two stages during the RAA process. Under the heading “Stage 2 Activities” in Step 8 of the RAA documentation in the Court Book, the PWS stated that those activities required further assessment prior to approval in order to identify potential impacts on “natural and cultural” values and to facilitate further engagement and consultation between Wild Drake, the AHC and the Aboriginal community on matters concerning “Aboriginal heritage”.

170 Even if it were otherwise, the purpose and operation of s 74A(1) are not to be confined by the proponent’s perspective on whether a “stage” of an action is likely to be “separate” or not. Even more so, they are not to be confined by the perspective of those administering a non-statutory process contemplated under a State management plan. The whole purpose of s 74A

is to engage the Minister (or delegate) in the question of whether there is in reality a larger action, which needs to be assessed as a whole, and if so, to compel a referral of the larger action under s 74A(2). In the alternative, the Minister may decide, having considered the matter, there is not any larger action, or even if there is, that it is nevertheless appropriate for part of the action to proceed for consideration under s 75.

171 Separating an action into components may affect the length and complexity of any process under the EPBC Act. It may also lead to the Minister (or delegate) failing to appreciate the true level of impact of an action; or failing to understand how mitigation measures proposed to be taken (or which might be imposed) will operate in a context where further, and subsequent, action(s) are planned or proposed. In a case such as the present, where activities are described as occurring over two stages, a proponent may secure permission for one set of activities and then, once those activities are established, be in a quite different position to negotiate to undertake a second set of activities. That is, in effect, where the delegate's decision has placed Wild Drake. What these matters highlight, on facts such as those arising in the present case, is the need for consideration of whether, in reality, there is only one "action", even if a proponent presents the action as activities designed to occur in stages. The present case is probably an apposite example. On any view of the material before the delegate, the activities Wild Drake proposed in what the RAA process separated out as "stage two" were an extension of "stage one": taking tourists to different places, but still from the base at Halls Island. I do not say that to find in any way that the delegate was bound to find s 74A was engaged, but rather to illustrate that the facts of this referral provide a good example of the situation where there would be a real, not fanciful, question about whether s 74A(1) was engaged, and one to which the delegate should have turned his mind, in order properly to perform his statutory task under s 75.

172 Although, at times, the applicant's submissions appeared to suggest the Court should find that the error was a failure to *apply* the terms of s 74A, as expressed in the amended originating application and in the bulk of submissions, I have understood the error to be identified as a failure to *consider* whether s 74A was engaged. That is how the Minister's submissions also appear to have understood the alleged error.

173 In the circumstances of this particular referral, and taking into account the answers given by Wild Drake in the referral to questions expressly designed to direct attention to the operation of s 74A, I find that the delegate's failure to consider whether s 74A(1) was engaged meant

that the delegate's exercise of power under s 75 was affected. Section 74A can only operate prior to a decision being made under s 75: it has a "once off" effect.

174 Whatever the delegate might have determined about leaving "stage two" of the Halls Island action out of consideration for the purposes of s 75, the fact as I have found it is that he was not advised to consider it, and did not do so. That error materially affected the exercise of power under s 75, because one of the two options under s 74A was to decide not to accept the existing s 75 referral at all: the implication in s 74A(1) being that a proponent would be required to submit a referral containing the entire proposal, and then the s 75 exercise would be quite different.

175 Given the nature of the material before the delegate, the potential application of s 74A was squarely raised. In those factual circumstances, the delegate could not perform his task under s 75 without giving consideration to the terms of s 74A. The "once off" character of s 74A contributes to the materiality of the delegate's omission to consider its role on the facts of this case. Further, the terms of s 74AA(1)(d) also indicate that a decision whether or not to accept a referral under s 74A is a step the legislative scheme expects the Minister to consider in an appropriate case.

176 If it were otherwise, the Minister would be able, arbitrarily, to determine the circumstances in which she or he might examine if the action is part of a larger action, even if that matter had been expressly drawn to her or his attention by the proponent in the referral documentation (as the documentation requires). I do not consider the scheme intends such a disorderly result.

177 With respect, the authorities on which the Minister relied concern quite different circumstances. Authorities such as *Yasmin v Attorney-General of the Commonwealth of Australia* [2015] FCAFC 145; 236 FCR 169 concern whether relief in the nature of mandamus is available to compel a decision-maker to do what the decision-maker has either failed or positively refused to do. In *Yasmin* at [89], the Full Court also emphasised that the question whether a power carries with it a duty to consider its exercise is very much context dependent. In the present statutory context, I have not concluded one way or the other, whether the power in s 74A carries with it a duty to exercise it in every case. Rather, I have concluded that on the facts, the application of s 74A to this action was squarely raised, and therefore needed to be determined as part of the s 75 task.

178 As I noted at the start of these reasons, there was a debate between the parties about the use to which the applicant sought to put the *Nathan Dam* case. Having rejected the Minister's contention that this was a new argument, I otherwise accept the Minister's submission that the present situation, especially in relation to ground 3, is quite different. *Nathan Dam* concerned the nature of indirect impacts. The error identified by ground 3 concerns whether the delegate performed the statutory task. The nature of the impacts of "stage two" of Wild Drake's action was beside the point. The question was whether in the circumstances the delegate was required to determine if he was satisfied the referred action was part of a larger action, or not. I have decided he was.

Relief on ground 3

179 Having decided that the applicant's contentions on ground 3 should be upheld, there is a question about the appropriate relief to be granted. That question arises in light of the relief I have decided should flow in respect of ground 2 (that is, of the kind ordered by the Full Court in *Triabunna*), and in light of my rejection of the applicant's argument that the erroneous approach by the delegate to s 75 should lead to a setting aside of the delegate's decision under s 75. One option for consideration is whether there can be a remitter to the delegate for the purposes of considering whether he is satisfied s 74A is engaged, and whether, if he is so satisfied, the discretion there conferred should be exercised. There are no doubt other options. There is also a question whether this can be done without setting aside the s 75 decision. The applicant may wish to press for a setting aside of the s 75 decision. The parties should be given an opportunity to agree on relief, and in the absence of agreement, to make short submissions on the matter.

CONCLUSION

180 Ground 2 succeeds. Ground 1 does not succeed in its terms, but only because of the way I have understood the delegate's decision. Ground 3 succeeds on the facts, but the parties should be heard on the question of relief, given the Court's conclusion on ground 2.

181 The Court's orders as a consequence of ground 2 succeeding will reflect the orders made by the Full Court in *Triabunna*, although the parties will be given an opportunity to propose an appropriate formulation of the order relating to the contents of the s 77 notice.

182 The applicant has substantially succeeded and the usual order for costs should be made.

I certify that the preceding one hundred and eighty-two (182) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.

Associate:

Dated: 12 November 2019