FEDERAL COURT OF AUSTRALIA

Secretary, Department of Sustainability and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth)

[2013] FCA 1

Kenny J

3 August 2012, 4 January 2013

Environmental Law — Bushfire risk management — Proposal relating to — Referral of — To federal Minister — Decision under s 74B(1) of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) — Consideration of material not included in referral — Minister not prevented from taking into account reports and advice within his and his Department's knowledge in scrutinising a referral — Whether applicant should have been given opportunity to comment on such materials — Procedural fairness provided by resubmission and reconsideration processes — Mechanism allowing a short-cut in decision-making follows from a finding that proposal will clearly have unacceptable impacts on environment, and is not required to be separately considered — Minister able to consider all National Heritage values of National Heritage places, and not only those values appropriate and adapted to implementing Art 8 of the Convention on Biological Diversity 1992 obligations — Environment Protection and Biodiversity Conservation Act 1999 (Cth), ss 74B, 74C, 74D.

Administrative Law — Judicial review — Environmental proposal — Referral of — To federal Minister — Decision under s 74B(1) of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) — Consideration of material not included in referral — Minister not prevented from taking into account reports and advice within his and his Department's knowledge in scrutinising a referral — Whether applicant should have been given opportunity to comment on such materials — Procedural fairness provided by resubmission and reconsideration processes — Mechanism allowing a short-cut in decision-making follows from a finding that proposal will clearly have unacceptable impacts on environment, and is not required to be separately considered — Minister able to consider all National Heritage values of National Heritage places, and not only those values appropriate and adapted to implementing Art 8 of the Convention on Biological Diversity 1992 obligations — Environment Protection and Biodiversity Conservation Act 1999 (Cth), ss 74B, 74C, 74D.

The applicant referred, to the respondent, a proposal to conduct a research trial to investigate fuel and bushfire risk management in Victoria's high country using strategic cattle grazing pursuant to s 68(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act"). The respondent decided pursuant to s 74B of the EPBC Act that the proposed action would clearly have unacceptable impacts on a matter protected by Pt 3 of the EPBC Act, being the National Heritage values of the Australian Alps National Parks, and that the truncated decision-making process allowed by Div 1A of Pt 7 should therefore apply to the referral.

The applicant sought judicial review of that decision on four grounds, being: (i) the respondent should only have considered material included in the referral, and should not have taken into consideration reports and internal advice in the Department's possession; (ii) if, however, such material were able to have been considered by the respondent, the applicant should have had an opportunity to comment on it; (iii) the respondent should have given separate consideration to the second part of its decision — ie whether Div 1A of Pt 7 of the EPBC Act should apply to the referral — rather than assuming that it simply followed from the first part of its decision; and (iv) the EPBC Act only protected National Heritage values that were appropriate and adapted to give effect to Australia's obligations under Art 8 of the *Convention on Biological Diversity 1992*, done at Rio de Janeiro on 5 June 1992 ("the Biodiversity Convention"), whereas the respondent's decision relied on unacceptable impacts on those values including "recreation" and "aesthetic characteristics".

Section 74B of the EPBC Act provided that the decision-making process in relation to a relevant proposal was effectively short-cut in accordance with a mechanism provided by Div 1A of Pt 7 of the EPBC Act when, within 20 days of receiving a referral: (a) the respondent considered "on the basis of the information in the referral", that it was clear that the action would have unacceptable impacts on a matter protected by a provision of Pt 3, and (b) the respondent decided that Div 1A of Pt 7 should apply. Sections 74C and 74D then relevantly allowed a proponent to withdraw a rejected proposal and refer a new proposal, or request a reconsideration, with the latter involving a more extensive consultation and communication process than the s 74B decision.

Held: (1) Section 74B(1) of the EPBC Act does not prevent the respondent from drawing on his own and his Department's knowledge in order effectively to scrutinise or assess the information in the referral, and make the challenged decision. [53], [56], [85]

(2) The applicant was not denied procedural fairness when the respondent failed to allow it to respond to the reports and internal advice considered for the purpose of making the decision under s 74B, which is akin to a provisional decision. The applicant has adequate opportunity to respond to adverse information by the processes in ss 74C and 74D of the EPBC Act, before the decision can become final. [91], [104], [105]

(3) Where the respondent considers that a proposal will clearly have unacceptable impacts on a matter protected by Pt 3, it will follow (and need not be separately considered) that Div 1A of Pt 7 will apply to the referral. [116]

(4) In making a decision under s 74B, the respondent is only required to consider whether it is clear that the proposed action will have unacceptable impacts on the National Heritage values of a National Heritage place (including recreational and aesthetic values). The respondent is not required to decide whether prohibition of the action will be appropriate and adapted to implementing Art 8 of the Biodiversity Convention obligations, unless and until action is taken that has or is likely to have a significant impact on certain aspects of the environment, contrary to ss 15B(5) and/or 15C(9), (10). [162]-[169]

Cases Cited

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

Ackroyd v Whitehouse (Director of National Parks and Wildlife Service) (1985) 2 NSWLR 239.

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225.

Applicants S1266 of 2003 v Minister for Immigration and Multicultural Affairs [2006] FCA 1771.

Attorney-General (Canada) v Inuit Tapirisat of Canada [1980] 2 SCR 735.

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321.

Brisbane Land Pty Ltd v Pine Rivers Shire Council (No 2) [2000] 1 Qd R 363.

Bushell v Secretary of State for the Environment [1981] AC 75.

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross (2012) 87 ALJR 131.

Cooper v Wandsworth Board of Works (1863) 143 ER 414.

CREEDNZ Inc v Governor-General [1981] 1 NZLR 172.

Customs, Collector of v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280.

Daganayasi v Minister of Immigration [1980] 2 NZLR 130.

Immigration and Ethnic Affairs, Minister for v Wu Shan Liang (1996) 185 CLR 259.

Immigration and Multicultural Affairs, Re Minister for; Ex parte Miah (2001) 206 CLR 57.

Immigration and Multicultural and Indigenous Affairs, Minister for v QAAH of 2004 (2006) 231 CLR 1.

Immigration and Multicultural and Indigenous Affairs, Minister for v SZFDJ [2006] FCAFC 53.

Kioa v West (1985) 159 CLR 550.

Lansen v Minister for Environment and Heritage (2008) 174 FCR 14.

Martincevic v Commonwealth (2007) 164 FCR 45.

New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544.

Povey v Qantas Airways Ltd (2005) 223 CLR 189.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295.

R (on the application of National Association of Health Stores) v Department of Health [2005] EWCA Civ 154.

Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252.

SNF (Australia) Pty Ltd v Federal Commissioner of Taxation (2010) 79 ATR 193.

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152.

Twist v Randwick Municipal Council (1976) 136 CLR 106.

Whangamata Marina Society Inc v Attorney-General [2007] 1 NZLR 252.

Appeal

SGE McLeish SC, Solicitor-General (Vic), with *LG De Ferrari*, for the applicant.

PJ Hanks QC with *RJ Sharp*, for the respondent.

Court issued summary

(1) In accordance with the practice of the Federal Court in some cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at www.fedcourt.gov.au. This summary is also available there.

(2) This decision relates to an amended application filed in this Court on 14 June 2012 by the Secretary to the Victorian Department of Sustainability and Environment ("the applicant"). The applicant sought judicial review of a decision of the Commonwealth Minister for Sustainability, Environment, Water, Population and Communities ("the respondent").

(3) In December 2011, the applicant referred a proposal to the respondent under s 68(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act"). The Victorian Department proposed to conduct a research trial to investigate fuel and bushfire risk management in Victoria's high country using strategic cattle grazing, and considered that this proposed action was a "controlled action" under the EPBC Act requiring referral under s 68. Nine of the 10 proposed sites for the trial were partly or wholly within Victoria's Alpine National Park.

(4) On 31 January 2012, the respondent made the challenged decision. The decision, made under s 74B of the EPBC Act, was that the proposed action would clearly have unacceptable impacts on a matter protected by Pt 3 of the EPBC Act and that Div 1A of Pt 7 should apply to the referral. Specifically, the respondent considered that the proposed action would clearly have unacceptable impacts on the National Heritage values of the Australian Alps National Parks and Reserves, of which Victoria's Alpine National Park forms part. The effect of the challenged decision was that the respondent would not further consider approval of Victoria's proposed action under the EPBC Act unless Victoria modified its proposal and resubmitted it, or sought reconsideration of the decision under s 74C(3). The applicant did not take either of these steps. Instead, the applicant brought this proceeding.

(5) The applicant challenged the respondent's decision on four grounds. First, the applicant claimed that the respondent was not permitted by s 74B of the EPBC Act to take into account material that was not in the applicant's referral, because that section states that the decision is to be made "on the basis of the information in the referral". In making his decision, the respondent considered one article and two reports that the applicant had not provided in his referral documents, as well as advice produced internally in the Commonwealth Department. The applicant argued that this made the decision invalid.

(6) Secondly, the applicant claimed that the EPBC Act did not protect all National Heritage values, but only those whose protection was appropriate and adapted to give effect to Australia's obligations under Art 8 of the *Convention on Biological Diversity 1992*, done at Rio de Janeiro on 5 June 1992 ("the Biodiversity Convention"). The applicant argued that the respondent's decision relied on unacceptable impacts on National Heritage values including "recreation" and "aesthetic characteristics", which he claimed were not protected in this way and that this also made the decision invalid.

(7) Thirdly, the applicant submitted that if material not included in the referral could be considered by the respondent, the Victorian Department should have had an opportunity to comment on the material considered. Because the respondent provided no opportunity to comment on the article, reports and advice considered by him, the applicant argued that the decision was not validly made.

(8) Fourthly, the applicant submitted that s 74B(1) of the EPBC Act required the Minister to make two separate decisions: (a) whether relevant unacceptable impacts were clear; and (b) whether Div 1A of Pt 7 of the EPBC Act should apply to the referral. The applicant argued that the respondent had only made the first decision and had assumed that the second decision followed from the first, without giving the second separate consideration.

(9) None of the applicant's four grounds are successful and, accordingly, the applicant's amended application for judicial review of the respondent's decision is dismissed.

(10) On a consideration of the text, purpose and context of s 74B of the EPBC Act, that section does not prevent the respondent from taking into account his own and his Department's knowledge when deciding whether a proposal would clearly have unacceptable impacts on a relevant matter. The words "on the basis of the information in the referral" in that section focus the Minister's scrutiny on the referral, but do not prevent the Minister from drawing on his own and his Department's knowledge in conducting that scrutiny, provided that the information in the referral is treated as the foundation for the consideration. The applicant's interpretation of those words, as requiring the Minister to consider *only* the information in the referral, would deny the possibility for any effective scrutiny of referrals. The respondent was entitled to consider advice from his Department. He was also entitled to take into account the article and reports in question because they were within his own or his Department's knowledge: they were held in the Department's information system when the referral was received.

(11) As to the applicant's natural justice argument, it is true that, in general, a person likely to be affected by a decision must be given an opportunity to comment on adverse information likely to be taken into account. It is also true that the article, reports and advice considered by the respondent in this case were of this nature. In the context of Div 1A of Pt 7 of the EPBC Act, however, Parliament has provided for a reconsideration procedure in s 74D, as a part of which the applicant would have the opportunity to respond to adverse information before the decision could become final. The decision under s 74B is, in contrast, a provisional one. This undermines the applicant's argument that he should have been given the opportunity to respond to the materials

considered before the challenged decision was made. The applicant would have an opportunity to comment on those materials if he sought reconsideration under the statutory procedure set out in s 74D, but has not yet chosen to take this opportunity.

(12) The applicant's proposed interpretation of the structure of s 74B(1) is understandable on a bare grammatical reading of the text of that section, but fails when considered in the context of Div 1A of Pt 7 of the EPBC Act. The language of ss 74C and 74D, and the heading to Div 1A, reveal that, where the Minister considers that a proposal would clearly have unacceptable impacts on a relevant matter, it would follow that Div 1A of Pt 7 would apply to the referral. The applicant could not satisfactorily identify any factor that might lead to a decision that that Division should not apply even if unacceptable impacts on a relevant matter were clear. Even if the applicant's interpretation of s 74B(1) were correct, there is no evidence that the respondent failed to make the second decision in this case, or that there was any matter apart from his conclusion as to clear unacceptable impacts that he ought to have taken into account in making that second decision.

(13) The applicant's argument about the relationship between the challenged decision and the Biodiversity Convention fails for two reasons. First, the statement of reasons issued by the respondent on 31 January 2012 reveals that the respondent considered that the proposed action would clearly have unacceptable impacts on the ecology and species diversity of the Alpine National Park. This basis for the decision was independent of his subsequent findings regarding impacts on recreational and aesthetic values. As the parties accepted, the protection of biodiversity is appropriate and adapted to the implemention of Australia's international obligations under Art 8 of the Biodiversity Convention and, accordingly, there was a valid basis for the decision.

(14) Secondly, the applicant's argument depends on a misinterpretation of the EPBC Act. Section 74B requires the Minister to consider whether "it is clear that the action would have unacceptable impacts on a *matter protected by a provision of Part 3*" (emphasis added). A "matter protected by a provision of Part 3" is defined in s 34. In this case, where ss 15B(5) and 15C(9) to (10) regulated the proposed action, this expression meant "the National Heritage values of a National Heritage place". Effectively, in making his decision under s 74B, the Minister was only required to consider whether it was clear that the proposed action would have unacceptable impacts on the National Heritage values of a National Heritage place, which is what he did. Those values include recreational and aesthetic values. The Minister did not have to make any decision about whether prohibition of the action would be appropriate and adapted to implementing Art 8 Biodiversity Convention obligations, unless and until action was taken in contravention of ss 15B(5) and/or 15C(9) to (10).

(15) Finally, the respondent sought to argue that even protection of recreational and aesthetic characteristics would be appropriate and adapted to implementing Australia's obligations under Art 8 of the Biodiversity Convention. Given the above conclusions, it was unnecessary to decide this matter, although, in the absence of further argument, it would appear that

Australia's obligations under Art 8 of the Biodiversity Convention would not extend so far.

(16) For the reasons set out in the judgment, the applicant's amended application for judicial review of the respondent's decision is dismissed. The parties have 14 days to file written submissions on costs and, if no submissions are filed, there will be an order that the applicant pay the respondent's costs of and incidental to that application.

Cur adv vult

4 January 2013

Kenny J.

Introduction

1 By an amended application filed, with leave, on 14 June 2012, the Secretary to the Victorian Department of Sustainability and Environment ("the applicant") seeks judicial review of a decision of the Commonwealth Minister for Sustainability, Environment, Water, Population and Communities ("the respondent"). The amended application is made under s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the ADJR Act") and s 39B of the *Judiciary Act 1903* (Cth). The respondent's decision relates to a proposed research trial to investigate fuel and bushfire risk management in Victoria's high country using strategic cattle grazing ("the proposed action").

2 On 8 December 2011, the applicant referred the proposal to the respondent in accordance with s 68(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act"). Section 68(1) required a person proposing to take an action to refer the proposal to the Minister where that person thinks it may be or is a controlled action under the EPBC Act. The meaning of "a controlled action" is explained below at [47].

3 On 31 January 2012, the respondent made a decision under s 74B of the EPBC Act that the proposed action would have "clearly unacceptable impacts on a matter protected by Part 3 of the EPBC Act" and that Div 1A of Pt 7 of the EPBC Act should apply to the referral. This is the decision under challenge in this proceeding ("the challenged decision"). The significance of the challenged decision is discussed hereafter.

4 At the hearing of the matter, the applicant relied on the affidavit of Neil Stuart Robertson affirmed on 28 February 2012. At the time of making his affidavit, Mr Robertson was Acting Deputy General Counsel in the Legal Services Branch of the Victorian Department of Sustainability and Environment ("the Victorian Department"). The respondent relied on the affidavits of Charmayne Ann Murray affirmed on 7 May 2012, 17 May 2012 and 29 June 2012. On 7 May 2012, Ms Murray was acting Assistant Secretary, Environmental Assessment Branch 3 in the Commonwealth Department of Sustainability, Environment, Water, Population and Communities ("the Commonwealth Department"). The respondent also relied on the affidavit of Theodore Simon Leonard Hooy, Assistant Secretary Heritage South, Heritage and Wildlife Division in the Commonwealth Department, affirmed on 8 June 2012. There was no cross-examination.

5 The applicant also gave notice that the proceeding may involve a matter arising under the *Constitution of the Commonwealth* (the Constitution) or

involving its interpretation in accordance with s 78B of the *Judiciary Act*. This notice related to the applicant's second ground, discussed at [119] and following of these reasons.

Factual background

6 In December 2011, the Department proposed to conduct "a research trial to determine whether strategic cattle grazing is an effective tool for fuel and bushfire risk management in Victoria's high country". The research trial was "intended to be conducted over a period of five years, commencing in 2012 with the intention to place cattle in research sites on 1 December 2012". Ten sites were identified but only six sites were to be used at any one time.

7 Nine of the 10 sites selected for the proposed cattle grazing research trial are partly or wholly within the Australian Alps National Parks and Reserves ("the alpine national parks"), which were included in the National Heritage List on 7 November 2008: see *Commonwealth of Australia Gazette* (No S237, 7 November 2008) ("the Commonwealth Gazette No S237 (2008)").

8 As noted above, on 8 December 2011, the applicant referred the proposed action to the respondent under s 68(1) of the EPBC Act ("the referral") by completing and submitting to the respondent the prescribed referral form with the prescribed information, the details of which were contained in a number of attachments: see EPBC Act, s 72.

9 The prescribed referral form explained the nature of the information sought and the use to which it would be put. The referral form stated:

> The purpose of a referral is to obtain a decision on whether your proposed action will need formal assessment and approval under the EPBC Act. Your referral will be the principal basis for the Minister's decision as to whether approval is necessary and, if so, the type of assessment that will be undertaken.
>
> …
>
> The referral form should contain sufficient information to provide an adequate basis for a decision on the likely impacts of the proposed action. You should also provide supporting documentation, such as environmental reports or surveys, as attachments. Coloured maps, figures or photographs to help explain the project and its location should also be submitted with your referral. Aerial photographs, in particular, can provide a useful perspective and context.

10 The referral form advised that there were "a number of possible decisions regarding [a] referral"; and that these possible decisions were:

> **The proposed action is NOT LIKELY to have a significant impact and does NOT NEED approval**
>
> …
>
> **The proposed action is NOT LIKELY to have a significant impact IF undertaken in a particular manner**
>
> …
>
> **The proposed action is LIKELY to have a significant impact and does NEED approval**
>
> …
>
> **The proposed action would have UNACCEPTABLE impacts and CANNOT proceed**

(Emphasis added.)

11 Broadly speaking, the referral submitted by the applicant provided the details

of the proposed action and an assessment of its likely impacts. The referral was said only to apply to particular "physical activities required to deliver the research trial", namely:

> • cattle transport to and from research sites each year for five years; and
> • [p]lacement of cattle in research sites which will involve grazing of 400 adult equivalent cattle across six research sites for a maximum period of 1 December to 30 April each year for five years.

The referral indicated that, in the view of the Victorian Department, the proposed action was a controlled action and likely to have an impact on "National Heritage places (sections 15B and 15C)" and "[l]isted threatened species and communities (sections 18 and 18A)". The referral had numerous attachments, including mapping details, a National Heritage listing desktop assessment, a flora and fauna desktop assessment and a risk assessment of matters of national environmental significance.

12 On 14 December 2011, the Commonwealth Department received the referral, which it published on its website: see EPBC Act, s 74(3). On the same day, letters were sent to the Minister for Agriculture, Fisheries and Forestry and the Minister for Families, Housing, Community Services and Indigenous Affairs inviting comment: see s 74(1). No comment was made in response to these letters.

13 The respondent's departmental officers prepared a referral decision brief ("the brief") and provided it to the respondent on 24 January 2012 for his consideration and decision. The brief consisted of a briefing paper ("the briefing paper"), the appendices mentioned below and a covering memorandum entitled "Referral Decision — Investigation of Fuel and Bushfire Management in Victoria's High Country Using Strategic Cattle Grazing" ("the covering memorandum"). The covering memorandum recommended that the respondent "consider the recommendations and make the decisions set out in the EPBC Act Briefing Package at Attachment A".

14 The briefing paper and the appendices examined the referral and the proposed action's likely impacts. The briefing paper noted that:

> In assessing the impacts of the proposed action on [the alpine national parks], the department has had regard to the referral documentation, the Commonwealth Government Gazette Notice for the listing of the Australian Alps National Parks and Reserves National Heritage Place and literature that is available to the department on grazing in the [the alpine national parks].

The briefing paper advised the respondent that:

> If you decide that the proposed action is clearly unacceptable, you are required to make this decision on the basis of information contained in the referral. Previously, the Australian Government Solicitor has advised that general pre-existing information of which you are aware or which is held by the department can be used in conjunction with the information in the referral for the purposes of making a "clearly unacceptable" decision. Accordingly, the brief draws from both sources. You may not consider other information such as the public comments received during the referral process.

The briefing paper recommended a decision that the proposed action was clearly unacceptable, because the proposed action would "have clearly unacceptable impacts on the National Heritage values of a National Heritage Place (section 15B & section 15C)".

15 The appendices included the referral; reports on Matters of National Environmental Significance from the Commonwealth Department's Environment Reporting Tool; the Commonwealth Department's policy statement *Significant Impact Guidelines 1.1*: *Matters of National Environmental Significance* (2009); and a copy of the Commonwealth Gazette No S237 (2008). Also included in the appendices were:

- Appendix B4: a copy of Wahren CHA, Papst WA and Williams RJ, "Long-Term Vegetation Change in Relation to Cattle Grazing in Subalpine Grassland and Heathland on the Bogong High Plains: An Analysis of Vegetation Records from 1945 to 1994" (1994) 42 *Australian Journal of Botany* 607 ("the Wahren article");
- Appendix B5: a copy of a report to Parks Victoria prepared by Groves RH entitled *Grazing in the Victorian High Country: An assessment of the scientific adequacy of grazing studies in the Victorian High Country 1945-1998, with some recommendations for future research*, dated April 1998 ("the Groves report");
- Appendix B6: a copy of the report of Victoria's Alpine Grazing Taskforce, *Report of the Investigation into the Future of Cattle Grazing in the Alpine National Park*, published by the Victorian Department in May 2005 ("the Taskforce report"); and
- Appendix C: a one and a half page advice prepared by an officer of the Commonwealth Department's Heritage and Wildlife Division, entitled "The Clear Unacceptability of Cattle Grazing in the Australian Alps National Parks and Reserves National Heritage Place", expressing the view that cattle grazing in alpine and sub-alpine areas "has been considered as clearly unacceptable for a very long time by many sectors of society" ("the Heritage and Wildlife advice"). An attachment consisting of 11 pages of background information and quotations summarising the perspectives of a range of stakeholders formed part of the Heritage and Wildlife advice.

16 The referral did not include copies of the Wahren article, the Groves report or the Taskforce report, although the applicant accepted that they were public documents. For the purposes of briefing the respondent, the respondent's departmental officers had retrieved the Wahren article, the Groves report and the Taskforce report from the Commonwealth Department's internal files existing as at 14 December 2011.

17 Whilst there were no copies of the Wahren article, the Groves report or the Taskforce report in the referral, attachment 7 to the referral referred to the Taskforce report. Under a heading "2.3. Cattle grazing in the high country", attachment 7 stated, amongst other things:

> In 2004 the Victorian Government established an Alpine Grazing Taskforce. The Taskforce investigated and reported on options relating to the future of cattle grazing in the Alpine National Park.
>
> The Taskforce found that there are strongly held views on whether or not cattle grazing should continue in the Alpine National Park. On the one hand, the activity is seen as a significant part of the cultural heritage of the high country, and important to the livelihoods of licensees. On the other, it is seen to pose a threat to the ecological values of the Alpine National Park.
>
> In 2005 the Victorian Government cancelled grazing licenses in the Alpine National Park. Cattle were allowed to continue to graze on the adjacent public land.

This passage led the respondent to contend that, although the Taskforce report was not included in the referral, it was effectively incorporated in it by reference. As appears below at [88], it has not proved necessary to rule on this contention.

18 In the same vein, the respondent noted that the Taskforce report referred more than once to the Groves report and the Wahren article — the Groves report having a particular significance in the findings of the Taskforce report.

19 Of course, the referral did not include a copy of the Heritage and Wildlife advice; nor did it include copies of, or references to, the statements from the various sources referred to in that advice. For the purpose of briefing the respondent, the respondent's department had prepared the Heritage and Wildlife advice, drawing on "the documents and expertise" within the Commonwealth Department. According to Mr Hooy, with one exception, each document mentioned in the Heritage and Wildlife advice was held in the Commonwealth Department's store of information at the time the referral was received; the exception was a source identified as the "Australian Academy of Science 2004 Submission to the Alpine Grazing Taskforce, Victoria, June 2004, Canberra" ("the Academy of Science 2004 submission") which was encountered and downloaded by a departmental officer while checking the accuracy of other quotations. All of the documents mentioned in the Heritage and Wildlife advice were available to the public via the internet or public libraries.

20 Ms Murray, who coordinated and supervised the preparation of the brief for the respondent, deposed that, at the time that she undertook these duties, she believed that the applicant would have been familiar with the Wahren article and the Groves report. This was because: (1) she understood that they were widely-cited papers on the topic of grazing in the Alpine National Park; (2) the Taskforce report, mentioned in attachment 7 to the referral, cited both the Wahren article and the Groves report; and (3) the Taskforce report was prepared for the former Victorian Minister for Environment and Climate Change and published by the Victorian Department in 2005. Ms Murray added that:

> At the time when I co-ordinated and supervised the preparation of the brief, I understood that, as a result of the Alpine Grazing Taskforce Report, remaining grazing licences were not renewed by the Victorian Government.

21 On 31 January 2012, the respondent made the challenged decision under s 74B of the EPBC Act that the proposed action would have clearly unacceptable impacts on a matter protected by Pt 3 of the EPBC Act and that Div 1A of Pt 7 of the EPBC Act should apply to the referral. On the same date, the respondent signed and dated as "considered" the covering memorandum. On the first page of the briefing paper, the respondent marked that he had considered the information in the brief (including a briefing paper and appendices); agreed with the departmental recommendation; and signed the notification of the decision, the statement of reasons and a letter to the Victorian Department. The briefing paper disclosed that the respondent had before him the appendices accompanying the briefing paper when he made the challenged decision.

22 Also on 31 January 2012, the respondent signed and dated a document headed "Notification of DECISION THAT THE ACTION IS CLEARLY UNACCEPTABLE" ("the notification of decision") and a document headed

"Statement of Reasons for a Decision that the Action is Clearly Unacceptable under the [EPBC Act]". Hereafter, the latter document is referred to as "the respondent's statement of reasons".

23 The notification of decision was relevantly in the following terms:

Proposed action	
proposed action	To conduct a research trial involving strategic cattle grazing within the Alpine National Park [See EPBC Act referral 2011/6219].
Decision:	**Action is clearly unacceptable**
status of proposed action	The proposed action will have clearly unacceptable impacts on a matter protected by Part 3 of the EPBC Act. Division 1A of Part 7 of the EPBC Act applies to this referral.
relevant protected matter	National Heritage places (section 15B and 15C)

24 After outlining the referral, the respondent's statement of reasons reiterated that:

> 5. On 31.1.12, I decided that the proposed action would have clearly unacceptable impacts on the National Heritage values of the Australian Alpine National Parks and Reserves, a National Heritage place and that Division 1A of Part 7 of the EPBC Act applies to the referral.

25 The respondent's statement of reasons listed (at paragraph 6) the evidence or other material upon which the respondent's findings were based. Significantly for this case, the list included the Wahren article, the Groves report, the Taskforce report and the Heritage and Wildlife advice. The respondent's statement of reasons expressly referred (at paragraph 12) to the Wahren article, the Groves report and the Taskforce report in explaining a particular finding.

26 The parties agree that the National Heritage values considered by the respondent in his statement of reasons are National Heritage values of the alpine national parks, of which the Alpine National Park in Victoria is a part. The proposed action is to occur in Victoria's Alpine National Park.

27 The parties also agree that the alpine national parks cover an area in respect of which Australia has obligations under Art 8 of the *Convention on Biological Diversity 1992*, done at Rio de Janeiro on 5 June 1992 (1760 UNTS 79, entered into force 29 December 1993), as amended and in force for Australia from time to time ("the Biodiversity Convention"). This is the Biodiversity Convention referred to in the EPBC Act: EPBC Act, s 528.

Application for judicial review

28 The applicant seeks relief under s 39B of the *Judiciary Act*, through the writs of certiorari and mandamus, and the setting aside of the challenged decision under s 16 of the ADJR Act. Each of the applicant's stated grounds was said to constitute jurisdictional error. In the case of grounds 1, 2 and 3, they were also said to make out the grounds for which provision is made in s 5(1)(c), (d) and (f) of the ADJR Act. Ground 3 was said to make out the grounds for which s 5(1)(a) and (c) of the ADJR Act provided.

29 The applicant's stated grounds are as follows:

Ground 1

The respondent made the challenged decision on the basis of information that was not in the referral and thereby exceeded the power in s 74B(1)(a) of the EPBC Act. The information to which the Minister should not have had regard was the Wahren article, the Groves report, the Taskforce report and the Heritage and Wildlife advice (with its attachment).

Ground 2

By relying on National Heritage values for the alpine national parks the protection of which was not appropriate and adapted to give effect to Australia's obligations under Art 8 of the Biodiversity Convention, the respondent relied on unacceptable impacts on matters that were not protected by Pt 3 of the EPBC Act and thereby exceeded the power in s 74B(1)(a) of the EPBC Act. The values of "recreation", "aesthetic characteristics" and "social values", upon which the respondent relied, were not appropriate and adapted to give effect to Australia's obligations under art 8 of the Biodiversity Convention.

Ground 3

The respondent breached obligations of natural justice in failing to give the applicant an opportunity to comment on the material not in the referral to which the respondent had regard in making the challenged decision.

Ground 4

The respondent failed to consider whether Div 1A of Pt 7 of the EPBC Act should apply to the referral, as required by s 74(1)(b) of the EPBC Act.

The parties' submissions

30 With respect to ground 1, the applicant submitted that the words "on the basis of the information in the referral" in s 74B(1)(a) of the EPBC Act meant that the respondent was not authorised to reach a conclusion as to relevant unacceptable impacts on the basis of any information not forming part of the referral. This meant, so the applicant submitted, that the respondent should not have relied on the Wahren article, the Groves report, the Taskforce report or the Heritage and Wildlife advice since they were not "in the referral", in the sense that the referral did not include copies of them, or references to them. In breaching the limitation to which s 74B(1) gave rise, the challenged decision was said to be vitiated.

31 The applicant acknowledged that, in general, a decision-maker can take into account his or her "general pre-existing knowledge and experience" when making a decision and, in a Minister's case, this may include the "collective knowledge, experience and expertise" of officers in his or her Department (citing Lord Diplock in *Bushell v Secretary of State for the Environment* [1981] AC 75 (*Bushell*) at 95). Nevertheless, the applicant maintained that the express wording of s 74B(1)(a) of the EPBC Act negated this general proposition. As the applicant's written submissions put it, "[t]he words 'on the basis of the information in the referral' constitute a limitation on the power, restricting the Respondent to such information as is contained in the documents constituting the referral".

32 The applicant submitted that this interpretation was supported by the structure of s 87(3), as well as the context and purpose of s 74B(1). Thus, the applicant submitted:

> If the information in the referral were insufficient for the Respondent to determine

> summarily that the conclusion (namely, that the action would have unacceptable impact) "is clear", the EPBC Act envisages that the normal process in Divisions 1 and 2 would be followed.
>
> …
>
> The legislative intent for a summary process for dismissal, on the basis that it "is clear" to the Respondent that the action would have "unacceptable impacts" (a higher threshold than "significant impact", the requirement upon which the controlling provisions in Part 3 of Chapter 2 are based), would be undermined if the Respondent were to engage in a more in-depth assessment that took into account, for example, other scientific materials. The summary nature of the power itself militates against giving the words "on the basis of the information in the referral" anything other than their ordinary meaning.

33 Referring to paragraphs 6, 12 and 13 of the respondent's statement of reasons, the applicant submitted that the respondent based his findings upon, and expressly relied upon, information contained in the Wahren article, the Groves report, the Taskforce report and the Heritage and Wildlife advice; and since this information was not in the referral, the respondent exceeded his power under s 74B(1).

34 The applicant made an alternative submission at the hearing that, even if s 74B(1) did not totally preclude the respondent from utilising his own and his Department's knowledge, s 74B(1) limited the extent to which the respondent could refer to material outside the referral. On this alternative submission, the line had been crossed when the respondent had regard to the attachment to the Heritage and Wildlife advice, which contained "material … in the nature of what might be received from some people, were there to be a public comment process".

35 Secondly, the applicant submitted that, in making the challenged decision, the respondent relied upon certain National Heritage values not protected by a provision of Pt 3 of the EPBC Act. The respondent's statement of reasons identified ss 15B and 15C as the provisions protecting the National Heritage values of a National Heritage place without specifying particular subsections relevant to the referral, although the respondent's submissions acknowledged that the only Pt 3 provisions relevant to National Heritage values were ss 15B(5) and 15C(9) to (10). Those subsections, the applicant submitted, apply only to actions the prohibition of which is appropriate and adapted to give effect to Australia's obligations under Art 8 of the Biodiversity Convention, pursuant to ss 15B(6) and 15C(14). The applicant argued that it was not appropriate and adapted to this goal to prohibit actions with clearly unacceptable impacts on "recreation", "aesthetic characteristics" and "social values". The applicant submitted that "[n]one of these values supports a prohibition that is appropriate and adapted to give effect to Australia's international obligations under Art 8, even though the place — [the alpine national parks] — is one in respect of which Australia has such obligations". Accordingly, the applicant contended that ss 15B to 15C did not protect the values on which the respondent relied and that the respondent's decision exceeded his power under s 74B(1)(a).

36 Thirdly, the applicant submitted that, even if the respondent was entitled to consider information not forming part of the referral, the applicant was entitled to natural justice in relation to reliance on such information. The applicant maintained that by relying on the Wahren article, the Groves report, the

Taskforce report and the Heritage and Wildlife advice (including its attachment) without providing the applicant an opportunity to respond, the respondent failed to afford natural justice.

37 Finally, the applicant submitted that s 74B(1) required the respondent to make two separate discretionary decisions; and that while the respondent had considered whether the proposed action would have unacceptable impacts under s 74B(1)(a), the respondent had failed to consider separately whether Div 1A of Pt 7 of the EPBC Act should apply to the referral under s 74B(1)(b). The applicant argued that this constituted an error of law.

38 The respondent, on the other hand, contended that the challenged decision had been validly made.

39 The respondent submitted, first, that he was not prohibited from taking into account the Wahren article, the Groves report, the Taskforce report and the Heritage and Wildlife advice. This was either because he was not prohibited from having regard to information outside the referral; or because each of those sources was "in the referral" within s 74B(1)(a) or (in the case of the Heritage and Wildlife advice) did not constitute "information". In the event that the respondent was prevented from taking these materials into account, the respondent submitted that transgression of this restriction did not result in invalidity of the challenged decision.

40 As to the natural justice argument, the respondent submitted that Parliament had made provision for natural justice or procedural fairness in the reconsideration process in Div 1A of Pt 7 of the EPBC Act, which the applicant has not pursued. The respondent maintained that, once the applicant submitted its referral, it had no separate right to be heard before a decision was made under s 74B, after which the more extensive reconsideration process would redress any unfairness to the applicant — a factor that also indicated that the applicant's judicial review application was premature. The respondent also maintained that there had been no unfairness in this case because "the views expressed and information conveyed in the reports and advice were well-known to [the applicant], and [the respondent's] likely reliance on those views ought reasonably to have been anticipated by [the applicant]".

41 The respondent denied that there was any basis for interpreting s 74B(1) to require the respondent to consider separately whether Div 1A of Pt 7 should apply to a referral once he was satisfied that the proposed action would clearly have relevant unacceptable impacts. The respondent maintained that he had plainly decided that Div 1A of Pt 7 should apply to the referral and that this was sufficient.

42 The respondent submitted that the protection of biodiversity was the principal and an independent basis for the challenged decision and that the decision was therefore plainly connected to the implementation of Art 8 of the Biodiversity Convention. In any event, in the respondent's submission, the obligations in Art 8 extend to the protection of the recreational and aesthetic values of biological diversity.

Legislative framework

43 In order to understand the parties' respective positions, it is necessary to explain two aspects of the legislative scheme established under the EPBC Act. The first is the environmental impacts assessment process under the EPBC Act and, in particular, the process under Div 1A of Pt 7. The second is that part of the EPBC Act concerned with "National Heritage values of a National Heritage

place" and the relationship of those values to the Biodiversity Convention. I deal with the second aspect later in these reasons when considering the applicant's ground 2.

44 Of general relevance are the objects of the EPBC Act set out in s 3(1). In particular, s 3(1)(a) to (e) relevantly read as follows:

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

45 Part 3 of the EPBC Act prohibits a person taking an action that has, will have or is likely to have a significant impact on certain aspects of the environment: see, relevantly in this case, ss 15B(5) and 15C(9) to (10). These aspects fall into two broad categories: (1) "matters of national environmental significance" (the subject of Pt 3, Div 1); and (2) "proposals involving the Commonwealth" (the subject of Pt 3, Div 2).

46 The following paragraphs discuss the key provisions for the environmental impact assessment process under the EPBC Act.

47 The prohibitions in Pt 3 of the EPBC Act do not apply to an action if an approval of the taking of the action by the person is in operation under Pt 9 of the EPBC Act for the purpose of the relevant provision in Pt 3: see, in this case, ss 15B(8)(a) and 15C(16)(a). Thus, where a prohibition in Pt 3 of the EPBC Act applies to an action (in which case, the action is a "controlled action": see s 67), the prohibition will cease to apply to the action if the Minister approves the taking of the action under Pt 9 of the EPBC Act: see s 67A.

48 The usual process by which the Minister decides whether or not to approve the taking of a proposed action is set out in Ch 4 of the EPBC Act. This process involves:

1. the "referral" of the proposal to the Minister under Div 1 of Pt 7 of the EPBC Act (s 68);
2. a decision by the Minister under Div 2 of Pt 7 as to whether the action is a controlled action (that is, whether the action requires approval) and which provisions of Pt 3 (if any) would apply to the taking of the action if it were not approved: see s 75(1). The provisions that would apply absent approval are referred to as the "controlling provisions": s 67.
3. assessment of the "relevant impacts" of the action (as defined in s 82) by one of a number of specified methods to be chosen by the Minister under Pt 8 of the EPBC Act (s 87) within 20 business days after the Minister receives the referral (s 88(1)); and
4. following the receipt of the results of the assessment process chosen by the Minister, a decision by the Minister under Pt 9 of the EPBC Act as to whether or not to approve the taking of the action: s 130(1). After receiving the assessment documentation, the Minister may approve the

taking of the action for the purposes of a controlling provision (s 133(1)) and may attach conditions to the approval of the action in certain circumstances (s 134(1)).

49 Division 1A of Pt 7 provides a mechanism to "short-cut" the Ch 4 decision-making process described above. Section 74B is in the following terms:

> (1) This Division applies to the referral of a proposal to take an action if, within 20 business days after the Minister receives the referral:
>
> (a) the Minister considers, on the basis of the information in the referral, that it is clear that the action would have unacceptable impacts on a matter protected by a provision of Part 3; and
>
> (b) the Minister decides that this Division should apply to the referral.
>
> (2) If this Division applies to a referral, any other provisions of this Chapter that would, apart from this subsection, have applied to the referral cease to apply to the referral.
>
> (3) Subsection (2) has effect subject to paragraph 74D(6)(a).

50 Where Div 1A of Pt 7 applies to a referral, the provisions of Ch 4 of the EPBC Act that would otherwise have applied to the referral cease to apply to the referral. Thus, for example, ss 75, 87 and 130 cease to apply where Div 1A of Pt 7 applies.

51 Relevantly for this case, the Minister must, as soon as practicable after making the decision under s 74B(1)(b), give written notice of the decision to the person proposing to take the action; and the notice must state that the Minister considers that the action would have unacceptable impacts on a matter protected by a provision of Pt 3 and set out the reasons for the Minister's decision: s 74C(1) to (2). Having been notified, the person proposing to take the action may, pursuant to s 74C(3):

> (a) withdraw the referral and take no further action in relation to the proposed action; or
>
> (b) withdraw the referral and refer a new proposal to take a modified action to the Minister in accordance with Division 1; or
>
> (c) request the Minister, in writing, to reconsider the referral.

52 Section 74D makes separate provision for a process of reconsideration, should a proponent request reconsideration. The process in s 74D is more elaborate than the process in s 74B. Section 74D provides:

> (1) This section applies if the Minister receives a request under paragraph 74C(3)(c) to reconsider a referral.
>
> Inviting public comment
>
> (2) The Minister must, within 10 business days after receiving the request, publish on the internet:
>
> (a) a notice stating that the Minister proposes not to approve the taking of the action that is the subject of the referral; and
>
> (b) the reasons for the Minister's decision; and
>
> (c) an invitation for anyone to give the Secretary, within 10 business days (measured in Canberra), comments in writing on:
>
> (i) the impacts that the action would have on a matter protected by a provision of Part 3; and
>
> (ii) the Minister's proposal to refuse to approve the taking of the action.

Report about relevant impacts of action

(3) Within 10 business days after the end of the period for comment under paragraph (2)(c), the Secretary must:

(a) prepare a written report about the relevant impacts that the action has or will have, or is likely to have, on a matter protected by a provision of Part 3; and

(b) give the Minister:

(i) the report; and

(ii) a copy of any comments received by the Secretary within the period for comment.

In preparing the report, the Secretary must have regard to the comments referred to in subparagraph (b)(ii).

Decision following reconsideration

(4) Within 20 business days after receiving the report under subsection (3), the Minister must:

(a) if the Minister still considers that it is clear that the action would have unacceptable impacts on a matter protected by a provision of Part 3 — decide to refuse to approve the taking of the action; or

(b) decide that the referral is to be dealt with under the provisions of this Chapter that, because of subsection 74B(2), have ceased to apply to the referral.

(5) If the Minister decides to refuse to approve the taking of the action, the Minister must, within 10 business days after making the decision, give notice of the decision to:

(a) the person proposing to take the action; and

(b) the person who referred the proposal to the Minister (if that person is not the person proposing to take the action).

Note: The person proposing to take the action may request reasons for the refusal and the Minister must give them. See section 13 of the *Administrative Decisions (Judicial Review) Act 1977*.

(6) If the Minister makes a decision under paragraph (4)(b):

(a) the provisions of this Chapter that, because of subsection 74B(2), have ceased to apply to the referral start to apply to the referral; and

(b) for the purposes of the application of those provisions, a day is not to be counted as a business day if it is:

(i) on or after the day the Minister received the referral; and

(ii) on or before the day the Minister makes the decision under paragraph (4)(b).

Note: If the Minister had already complied with section 74 in relation to the referral before the Minister made the decision under paragraph 74B(1)(b) in relation to the referral, the Minister is not required to comply with section 74 again.

Consideration: Grounds 1, 3 and 4

Ground 1

53 For the reasons stated below, I would reject the applicant's primary contention in support of ground 1 that s 74B(1) prevented the respondent from drawing on his own and his Department's knowledge in making the challenged decision. I would also reject the applicant's alternative submission that, even if

s 74B(1) did not totally preclude the respondent from drawing on his own and his Department's knowledge, s 74B(1) relevantly limited the extent to which the respondent could draw on such material.

54 As regards ground 1, the difference between the parties centred on their different construction and characterisation of the words "on the basis of the information in the referral" in s 74B(1)(a). The applicant affirmed, and the respondent denied, that these were words of limitation.

55 It has been said that, in construing the words of a statutory provision, the duty of a court is to give the words the meaning that the Parliament is taken to have intended them to have. In performing this duty, a court must have regard to the text and general purpose of the provision, considered in the context of the statute as a whole: see, for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*) at 381-384 and the authorities there cited; and more recently, *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 87 ALJR 131; 293 ALR 412 at [23]-[41] (French CJ and Hayne J). The context of a statute includes the overarching constitutional framework in which the statute operates: this is a matter which the Parliament is taken to have had in mind at the time of enactment. This is partly reflected in s 15A of the *Acts Interpretation Act 1901* (Cth).

56 Consideration of the text, the overarching constitutional framework, the general purpose of s 74B and its statutory context lead me to reject the construction for which the applicant contends.

The text of s 74B

57 The starting point is the text of s 74B, which is set out above: see [49]. The applicant submitted that the words "on the basis of the information in the referral" meant that, in making a decision under s 74B(1), the Minister could *only* have regard to the information in the referral. That is, these words were words of limitation and, in consequence, the Minister could not have regard to information that was not in the referral but in the possession of the Minister's Department.

58 The obvious difficulty with the applicant's proposed construction is that it requires s 74B(1)(a) to be read as if the word "only" were included in this paragraph. Of course, the word "only" does not appear at all: s 74B(1)(a) does not in fact read "only on the basis of the information in the referral" or something similar. Further, and contrary to the applicant's submissions, I do not consider that the word "only" must necessarily be implied to ensure that the words "on the basis of the information in the referral" have a meaningful operation. Rather, I accept that, in decision-making under s 74B, the Minister can be said to have made a decision "on the basis of the information in the referral" so long as the Minister treats the information in the referral as the *foundation* for his consideration. That is, these words require the Minister to scrutinise the information in the referral with a view to making a decision under s 74B(1). They are words of limitation only in the sense that they make the information from the *proponent* of the proposed action the focus of the Minister's consideration.

59 There are strong indications that the words "on the basis of the information in the referral" are not words of limitation in the sense that they preclude resort to the Minister's own knowledge or that of his Department. If the Minister were not permitted to draw on his own knowledge and the knowledge of his

departmental officers, it is difficult to imagine that there could be any effective scrutiny or assessment of the information in the referral. The fact that the Minister must make his consideration "on the basis of the information in the referral" does not mean that the Minister must accept that information; yet the Minister cannot scrutinise or assess that information "with an empty mind", to use the respondent's words. Save in those rare cases where the information in the referral in terms demonstrates that the proposal would have the relevant unacceptable impacts, the Minister would be unable to reach the view that s 74B(1) contemplates unless the Minister could draw on his and his Department's knowledge. Practically speaking, Div 1A of Pt 7 would become a dead letter — a provision that has lost its practical force without being formally repealed. Unless the Minister has knowledge of this kind available to him, it is difficult to conceive of other than the rarest circumstance in which the Minister could properly invoke the process for which provision is made in Div 1A of Pt 7. For the reasons set out below, this result would defeat the purpose of Div 1A of Pt 7.

60 At the hearing, the applicant sought to circumvent this outcome by allowing that the Minister need not put out of account his own personal understanding or belief about a matter relevant to a decision to be made under s 74B(1). In this context, the applicant acknowledged that there was "scope for a qualitative judgment about what is unacceptable". It seems unlikely, however, that the Parliament would countenance the Minister deciding by reference to his own understandings and beliefs, however mistaken they might be, but preclude reference to the facts relevant to those beliefs within the collective knowledge of the Minister's Department. Further, if the Minister may have regard to some but not all matters within his own knowledge, it would be difficult to identify in advance with any certainty where the line lay between matters that the Minister might permissibly consider and those he could not. The applicant's attempt to circumvent the difficulty raised by his proposed interpretation is unsuccessful.

61 Also at the hearing, the applicant developed the alternative submission to which reference has already been made that, whilst s 74B(1) did not totally preclude the respondent from utilising his own and his Department's knowledge, nonetheless s 74B(1) limited the extent to which the Minister might draw on material outside the referral. There were two aspects to this submission, which encounters a similar difficulty to the previous one. On the one hand, the applicant apparently accepted that the Minister might have regard to information linked to the referral because it was referenced within it, or was directly relevant to information in the referral and in the Department's possession at the time. On the other hand, the applicant espoused the position that whether or not it was permissible to resort to information beyond the referral depended on the comprehensiveness of the information within the referral: if it were comprehensive, then, so this argument ran, the Minister should stay within the four corners of the information in the referral; if not, the Minister might be justified in receiving information from his departmental officers. Neither approach would, if accepted, fix a workable standard that the Parliament should be taken to have intended to apply. On the first view, the Minister would be required to assess whether the information available to him within the Department was *sufficiently* "linked" or relevant to permit it to be taken into consideration. Neither the text of s 74B nor its context would support such an inquiry. On the second view, in order to assess whether or not the information in the referral was in fact comprehensive, the Minister would likely

need to consider the other information available to him within his Department in any event; and then he would have to draw a line between what could and could not be taken into account. Once again, the line would be difficult to predict in advance. The applicant's alternative submission finds no support in the text of s 74B(1).

The purpose of Div 1A of Pt 7

62 Division 1A of Pt 7 creates a kind of summary process: the effect of a decision under s 74B(1) is to take the referral outside the ordinary assessment and approval process in Ch 4 (unless and until the Minister, on a reconsideration of the s 74B(1) decision, determines that the ordinary process should in fact apply: s 74D(6)(a)).

63 The parties differed on the effect of a purposive approach to construing Div 1A of Pt 7. The applicant maintained that the Div 1A process was directed to the exceptional case. The applicant noted that the standard in s 74B(1) was higher than the "significant impact" requirement in the controlling provisions in Pt 3. The applicant argued that "[t]he legislative intent … would be undermined if the [r]espondent were to engage in a more in-depth assessment", and that "[t]he summary nature of the power itself militates against giving the words 'on the basis of the information in the referral' anything other than their ordinary meaning". The respondent argued, however, that the purpose of Div 1A would be defeated if the Minister could not draw on his and his Department's knowledge and expertise.

64 The legislative history of Div 1A indicates that its purpose was to enhance the efficiency of the assessment and approval processes in the EPBC Act. Neither the *Environment and Heritage Legislation Amendment Act (No 1) 2006* (Cth) ("the 2006 Amending Act") nor the Explanatory Memorandum to the *Environment and Heritage Legislation Amendment Bill (No 1) 2006* (Cth) ("the 2006 EM") indicate that the notion that the Minister's consideration was to be based on the information in the referral was intended to preclude the Minister from having regard to his own and his department's knowledge and expertise.

65 The 2006 EM evidenced that the 2006 Amending Act was intended to achieve efficiencies in time, cost and labour. The EM stated (at 3) that:

> Whilst the Act regulatory framework has been successful, the road testing has identified important areas where changes to the Act can be made to optimise its operation. These changes will reduce risks in administration of the Act, remove uncertainty and delay, minimise duplication, increase transparency and flexibility, and provide incentives to use the Act in a more strategic manner.

As part of this approach, an objective of the 2006 Amending Act was to reduce "[t]he number of decision points in the assessment and approval process" to increase efficiency in the administration of the EPBC Act processes: 2006 EM at 3, 8.

66 A particular benefit said to result from the proposed amendments to the EPBC Act's referral, assessment and approvals processes was the provision of "[n]ew processes which allow for more efficient consideration of proposals which have minor impacts or unacceptably high impacts": 2006 EM at 10. In this regard, the 2006 EM specifically stated (at 11):

> The amendments introduce a new process of assessment on referral information. For actions with low level impacts that would otherwise have been assessed at the level of preliminary documentation, this new process will reduce overall timeframes by at least six months. *The proposed amendments also allow the*

> *Minister to give a proponent an early indication if an action is not likely to receive approval under the Act.* This gives the proponent the opportunity to modify or change a proposal and resubmit a referral for assessment and approval.

(Emphasis added.)

67 When it came specifically to Div 1A, the 2006 EM stated (at 30):

> Division 1A establishes a new process that allows the Minister to make a prompt refusal for an action that would have unacceptable impacts on a matter protected by Part 3 of the Act. *This avoids the expense and time involved in conducting the full assessment and approval process under Chapter 4 for actions that would be unlikely to receive approval under Part 9 of the Act*. The scope and process for making a prompt refusal is established in three new sections of the Act — 74B, 74C, and 74D.

(Emphasis added.)

68 The 2006 EM makes it clear that the Parliament intended that the 2006 Amending Act would provide "for more efficient consideration of proposals which have minor impacts or unacceptably high impacts" (at 10), and that Div 1A was directed to the latter class. Another process was created for the former class: see 2006 Amending Act, Sch 1, Item 17 and EPBC Act, ss 92 to 93. The contextual significance of these two processes is discussed below.

69 As the 2006 EM clearly shows, Div 1A was introduced, amongst other reasons, to "allow the Minister to give … an early indication if an action is not likely to receive approval" in order to avoid the unnecessary time and expense otherwise involved in carrying out the Ch 4 processes: see [66]-[67] above. This object would not be sensibly be met if the Minister were unable to draw on his own and his department's knowledge and expertise in making a decision under s 74B(1), or if there were interposed further decisions to be made by the Minister as to whether and how much of that knowledge could be taken into account in a particular case.

Context: statutory considerations

70 The applicant also argued that his proposed construction was supported by contrasting s 74B(1) with s 87(3) of the EPBC Act. As stated below, I would reject this submission.

71 Section 87 is concerned with the assessment process under Div 3 of Pt 8. This process requires that, generally speaking, the Minister must decide, pursuant to s 87, on the approach to be used for assessment of the relevant impacts on the same day as the Minister decides under s 75(1) (in Div 2 of Pt 7) that the proposed action is controlled action: see s 88(2). Section 87(1) requires the Minister to choose one of the approaches referred to in that provision as the assessment approach; and s 87(3) provides that, in making that choice, the Minister must consider the following:

> (a) information relating to the action given to the Minister in the referral of the proposal to take the action; and
> (b) any other information available to the Minister about the relevant impacts of the action that the Minister considers relevant (including information in a report on the impacts of actions under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under Part 10 (about strategic assessments));
> (c) any relevant information received in response to an invitation under subparagraph 74(2)(b)(ii); and
> (d) the matters (if any) prescribed by the regulations; and

(e) the guidelines (if any) published under subsection (6).

72 The applicant submitted that s 87(3) showed that Parliament distinguished the information in the referral from other sources of information. Thus, s 87(3)(a) dealt with referral information whilst s 87(3)(b) dealt separately with any other information about relevant impacts that was available to the Minister. The applicant submitted that the information referred to in s 87(3)(a) corresponded to the information in the referral mentioned in s 74B(1).

73 Whilst the applicant's general observations about s 87(3) may be accepted, s 87(3) does not provide any real support for the applicant's principal contention concerning s 74B(1) of the EPBC Act. One may accept that the EPBC Act, in provisions such as ss 74B(1) and 87(3), distinguishes between various sources of information. In effect, such provisions set out the way in which information from a particular source may be dealt with, depending on the decision to be made. Thus, s 87(3) is concerned to ensure that the Minister considers information from diverse sources in making a decision as to the appropriate assessment approach with respect to a referral to which Div 1A of Pt 7 does not apply. The text, subject-matter and purpose of s 87(3) are therefore different from those of s 74B(1). In this circumstance, s 87(3) can provide little support for the applicant's contention.

74 Further, the applicant argued that the context of s 74B(1) and Div 1A supported his proposed construction of s 74B(1). Bearing in mind the matters mentioned below, I reject this submission. The applicant submitted that "[i]f the information in the referral were insufficient for the [r]espondent to determine summarily that the conclusion (namely, that the action would have unacceptable impact) 'is clear', the EPBC Act envisages that the normal process in Divisions 1 and 2 would be followed". This may be accepted. Further, as the applicant observed, where Div 1A of Pt 7 does not apply to a referral, the processes are different; and, by virtue of s 76(1), where the Minister believes on reasonable grounds that the information in the referral is insufficient to decide the issues of controlled action and controlling provisions (see s 75(1)), the Minister may request the proponent of the action to supply specified information. Section 74B(1) confers no like power; and, instead, specifically provides that the Minister consider the matter "on the basis of the information in the referral". This contrast between ss 74B(1) and 76(1) concerns the Minister's power to seek additional information from the proponent of the action. The contrast provides no basis for saying that, in decision-making under s 74B(1), the Minister cannot draw upon his own and his department's knowledge and expertise in considering whether, on the basis of the referral information that has been provided, "it is clear that the action would have unacceptable impacts".

75 Finally, the applicant referred to the difference between s 74B(1)(a) providing that the respondent should base his consideration on the information in the referral and s 74D(3)(b) providing for the Secretary's report to be given to the respondent. This difference does not support the applicant's argument. Rather, it is indicative of the more elaborate procedure contemplated by s 74D, which includes the preparation of a written report by the Secretary and its provision to the Minister, along with the comments made pursuant to s 74D(2)(c).

76 The respondent also referred to contextual matters to support the proposition that, in the EPBC Act, the idea of assessment based on "referral information" or "information in the referral" was not intended to prevent the Minister drawing

on his and the department's knowledge and expertise. The respondent's argument in this regard drew attention to the use of the expression "referral information" in the "assessment on referral information" process.

77 As mentioned above, the 2006 Amending Act introduced two separate processes, one to deal with proposals having a minor impact and another to deal with those having unacceptably high impacts. Whilst Div 1A of Pt 7 of the EPBC Act was directed to the latter category, a new assessment process, called "assessment on referral information", was directed to the former category. Provision was made in ss 92 and 93 of the EPBC Act for assessment on referral information; and this process was intended to be the least onerous and lengthy of the EPBC Act's assessment processes: see 2006 EM at 11.

78 When deciding whether an assessment on referral information is appropriate, the Minister must take into account specified criteria: see s 87(4A); *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) ("the 2000 Regulations"), reg 5.03A. Section 87(4A) and its reference to s 87(3) makes it clear that information relating to these criteria may lie outside the referral. Following an assessment on referral information, in deciding whether or not to approve an action, the Minister must take into account information outside the referral: see s 136. It is thus clear enough that the expression "assessment on referral information" in s 92 is not intended to limit information to which the Minister can have regard only to information in the referral itself. As the respondent submitted, this provides some slight additional support for the proposition that the expression "on the basis of the information in the referral" was not intended to limit the Minister in the way the applicant contends.

79 The differences between "assessment on referral information" and "assessment on preliminary documentation", which is the next level of assessment for which the EPBC Act provides, indicates that the significance of an "assessment on referral information" does not lie in the fact that the Minister cannot have regard to his own and his department's knowledge. Examination of the relevant statutory provisions indicates that the difference lies in the time taken to complete the processes and the number of compulsory information gathering steps involved. In essence, an assessment on referral information involves the preparation and internet publication by the Secretary of a "draft recommendation report", on which the public have 10 business days to comment (s 93), whereas an "assessment on preliminary documentation" may or may not involve the provision of further information, by the proponent or another person; and always involves the proponent publishing specified information, on which the public has an opportunity to comment: see ss 94 to 95C. Subsequently, under an "assessment on preliminary documentation", the proponent must prepare and publish a further document and any comments received following the first round of publication; and thereafter the Secretary prepares a recommendation report. The Minister must have regard to many of the same considerations, whichever of the two processes is adopted: see s 136.

80 The above considerations indicate that the notion of an assessment on "referral information" is not one in which the Minister is precluded from drawing on his own and his department's knowledge. This lends further strength to the proposition that the similar notion of ministerial consideration "on the basis of the information in the referral" under s 74B(1) is not intended to preclude the Minister from drawing on such knowledge. Both "assessment on

referral information" and consideration under s 74B(1) are the speediest and least onerous of the assessment processes. To preclude the Minister from having regard to his own and his department's knowledge in making a decision under s 74B(1) would apparently defeat the object that the Parliament had in mind in providing for the Div 1A process.

Context: general constitutional considerations

81 The Parliament has entrusted the decision-making to be made under s 74B(1) to the Minister not in a personal capacity but as the holder of the office for the time being. Under the Australian system of government, a minister is accountable to the Parliament for the discharge of his ministerial duties and for the department for which he is responsible. In discharging ministerial duties, a minister necessarily obtains information and advice from the officers of his department: compare *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (*Peko-Wallsend*) at 30-31 per Gibbs CJ, 45 per Mason J, 65-66 per Brennan J, citing *Bushell* at 95. In construing a statute creating administrative processes and in considering the lawfulness of an administrative action, account must be taken of "the practical realities as to the way in which administrative decisions involving judgments based on technical considerations are reached" at a governmental level: compare *Bushell* at 95 per Lord Diplock. In *Bushell* at 95, Lord Diplock also said in terms that are applicable not only in England but also in Australia (as well as New Zealand and Canada: see *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at 200-201 per Richardson J; *Whangamata Marina Society Inc v Attorney-General* [2007] 1 NZLR 252 at 275 per Fogarty J; and *Attorney-General (Canada) v Inuit Tapirisat of Canada* [1980] 2 SCR 735 at 753 per Estey J for the Court):

> Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head.

82 As the New Zealand Court of Appeal said in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 142, "[t]his is part of the working of the ordinary governmental machinery" (per Cooke J, with whom Richmond P and Richardson J agreed): see also *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at 319 per Lord Slynn, 340 per Lord Hoffmann, 344 per Lord Clyde.

83 Whether, as Lord Diplock said in *Bushell* at 95, "[t]he collective knowledge … of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge" for all purposes is not a question that need be answered here: compare *R (on the application of National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154; *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 567-568. It is enough that, in the ordinary course, Parliament can be taken to have known and expected that the Minister would obtain information from his department when engaged in decision-making under the EPBC Act, including s 74B.

84 Considered in this light, the applicant's concession that, generally speaking, the respondent would be entitled to rely on the knowledge and expertise of officers of the Commonwealth Department is properly made. Of course, the applicant argues that decision-making under s 74B is a special case, but, as

appears from the earlier discussion, there is little, if anything, to justify this proposition when the text, purpose and balance of the statutory context is considered. Accordingly, there is no sufficient indication to support the applicant's submission that Parliament did not intend the ordinary position to prevail.

85 For the reasons stated, I would reject the submission that s 74B(1) of the EPBC Act prevented the respondent from drawing on his own and his Department's knowledge in making the challenged decision. What the respondent could not do in making a decision under s 74B is undertake the kind of active inquiry contemplated in the assessment and approval processes provided for elsewhere in Pts 8 and 9 of the EPBC Act.

86 From time to time in the course of argument, the respondent sought to make something of the fact that the Minister would have been aware of some of the material and views in question. Thus, in written submissions, the respondent stated:

> For example, the Groves Report was part of the brief provided to the Minister in connection with the preparation of the *Environment Protection and Biodiversity Conservation Amendment Regulations 2011* … made on 19 October 2011, and was referred to (and quoted from) in the Explanatory Statement to those Regulations.

In this case, however, I do not consider that anything turns on the extent to which the Groves report (or any other item of information) was within the respondent's own knowledge. It was, as these reasons have sought to show, permissible for the respondent to draw on his own and his department's knowledge and expertise in making a decision under s 74B(1). It was enough that the Groves report, the Wahren article, the Taskforce report and the Heritage and Wildlife advice constituted information within either the knowledge of the respondent's department or the respondent's own knowledge at the time of the challenged decision. For these reasons too, it was also immaterial that the referral did not include within it copies of the Groves report, the Wahren article or the Taskforce report; and did not refer to the information in the Heritage and Wildlife advice.

87 This conclusion leaves only the question of whether the respondent erred in considering the Heritage and Wildlife advice in circumstances where one of the sources cited in its attachment, namely the Academy of Science 2004 submission, had not been in the Commonwealth Department's store of information at the time that the referral was received (see [19] above). I doubt that the downloading of this source could fairly be described as amounting to the undertaking of an active inquiry on a scale sufficient to vitiate the decision. Moreover, the significance of the quotations from this source to the brief is so minuscule that I consider their inclusion to be of no real consequence; these quotations occupied less than a third of a page of the 11 page attachment and there is no evidence that the respondent placed any specific reliance on them in making his decision.

88 For these reasons, ground 1 of the applicant's application fails. Having regard to this conclusion, it is unnecessary to consider the respondent's other submissions in opposition to this ground, including the respondent's submission that, since the referral referred to the Taskforce report and the Taskforce report referred to the Groves report and the Wahren article, then all three documents constituted "the information in the referral" within the meaning of s 74B(1).

Nor is it necessary to consider the respondent's submission that the Heritage and Wildlife advice did not constitute "information" in the relevant sense.

Ground 3

89 As noted earlier, the applicant contended that, even if the respondent was entitled to have regard to information that was not in the referral, he was entitled to an opportunity to comment on this material, and the respondent had breached obligations of natural justice in failing to afford him this opportunity.

90 For present purposes, it may be accepted that, as the applicant submitted, if applicable, the hearing rule requires that a person likely to be affected by a decision be given an opportunity to "deal with adverse information that is credible, relevant and significant to the decision to be made": see *Kioa v West* (1985) 159 CLR 550 (*Kioa v West*) at 628-629 (Brennan J). It was common ground that the Wahren article, the Groves report, the Taskforce report and the Heritage and Wildlife advice fell within this description. The applicant was not invited to comment on that information before the respondent made the challenged decision.

91 For the reasons stated hereafter, I would reject the applicant's contention that he was entitled to a separate opportunity to comment on the Wahren article, the Groves report, the Taskforce report and the Heritage and Wildlife advice before the respondent made the challenged decision. After making a referral, a proponent of a proposed action is not entitled to be heard before the Minister makes a decision under s 74B(1). This is because the procedure for notification in s 74C and reconsideration in s 74D of the EPBC Act is Parliament's statement of the procedural fairness required to be afforded in such a case.

92 As the High Court said in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26], "the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires" (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). Further, it is well recognised that the existence of a statutory right of review or appeal may affect whether and in what way the rules of procedural fairness apply at an earlier level of decision-making, although "[t]here is no inflexible rule that the presence of a right of appeal or review excludes natural justice": *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 (*Miah*) at [146] (McHugh J), also at [35] (Gleeson CJ and Hayne J); *Ackroyd v Whitehouse (Director of National Parks and Wildlife Service)* (1985) 2 NSWLR 239 (*Ackroyd v Whitehouse*) at 250 (Kirby P), 256 (Samuels JA, with whom Mahoney JA agreed); *Twist v Randwick Municipal Council* (1976) 136 CLR 106 (*Twist*) at 110 (Barwick CJ), 112, 116-117 (Mason J). In some circumstances, however, a statutory right of review may amount to a legislative statement of the applicable process rights, the result of which is to exclude a separate right to apply to a court for relief on the grounds of a breach of the rules of natural justice or procedural fairness in the initial decision-making.

93 In *Miah* at [146], McHugh J described some of the factors that the courts have considered relevant in determining whether or not a statutory right of appeal or review excludes or limits natural justice requirements. In particular, his Honour referred to whether the initial decision was a preliminary or final decision; whether the initial decision was made in public or private; the formalities required for making the initial decision; the urgency of the initial

decision; the nature of the appellate body; the breadth of the appeal; and the nature of the interest of the person concerned and the subject matter of the legislation.

94 When considered in the context of Div 1A of Pt 7, a number of these factors militate against the applicant's basic contention.

95 In the context of the EPBC Act, the nature of a decision under s 74B(1) is significant. A decision under s 74B(1) is more akin to a preliminary than a final decision. This is because once the proponent of the action and the person who made the referral (if not also the proponent) have been notified of the Minister's s 74B(1) decision in accordance with s 74C(1) to (2), besides withdrawing the referral entirely, they may "withdraw the referral and refer a new proposal" or request a reconsideration: see s 74C(3). If either of the latter courses are adopted, the proponent may take steps to address relevant aspects of the Minister's decision under s 74B(1), either by referring a new proposal or by giving comments in the reconsideration process: see s 74D(2)(c). Both would be assisted by the fact that the Minister is obliged to set out the reasons for this decision in the s 74C(1) notice: see s 74C(2)(b).

96 Further, the terms of s 74D demonstrate the provisional nature of a decision under s 74B(1). As Senior Counsel for the respondent put it, once a reconsideration request is made and received, the decision under s 74B(1) undergoes a kind of metamorphosis in that, once a reconsideration request is made and received, a decision under s 74B(1) is described in s 74D, which deals with the procedure for reconsideration, as merely a proposed decision. Thus, if a reconsideration request is made and received, the Minister is obliged within 10 business days to publish: a notice that the Minister "*proposes* not to approve the taking of the action that is the subject of the referral"; the Minister's reasons; and an invitation for anyone to give the Secretary comments within 10 business days on the impacts of the action and "the Minister's *proposal* to refuse to approve the taking of the action" (emphasis added). The outcome of the reconsideration process is, moreover, described in different terms from those used to describe a decision under s 74B(1). A decision adverse to a proponent under s 74D(4) is described as a decision "to refuse to approve the taking of the action", whereas a decision adverse to a proponent under s 74B is described as a decision that Div 1A "should apply to the referral". As the respondent submitted, taking account of the entirety of Div 1A, the use of the word "should" indicates a provisional, rather than an ultimate, decision, which is subject to further consideration in the event that the proponent seeks further consideration.

97 The preliminary or provisional nature of a decision under s 74B(1) tells against the applicant's natural justice contention. This is not a case where, by reason of a public dimension, the initial decision would have an adverse effect on a person's reputation or the like. The applicant relied on the decision in *Ackroyd v Whitehouse* to support his contention that he was entitled to an opportunity to deal with the material in question before an adverse decision was made. *Ackroyd v Whitehouse* not only concerned a very different statutory scheme, it also concerned the summary cancellation of licences "of considerable importance to the person holding them" (at 258, per Mahoney JA). The present is not a case akin to cancellation of a licence, notwithstanding the applicant's contrary submissions, and is clearly distinguishable.

98 Other significant factors inherent in the very scheme that Div 1A establishes

also militate against the applicant's submission. The scheme encompasses the formalities set down in the Division and the breadth of the reconsideration. The 2006 EM indicates that the formalities for which the Division provides should be considered as a whole. As already stated, the 2006 EM described Div 1A (at 30) as "establish[ing] a new process that allows the Minister to make a prompt refusal for an action that would have unacceptable impacts on a matter protected by Part 3 of the Act". The preliminary decision (under s 74B) is that Div 1A should apply, potentially culminating in the final decision under s 74D(4) to "refuse to approve the taking of the action". The formalities for which s 74C provides are as much part of the s 74D process as a product of the s 74B decision: whilst the giving of notice under s 74C(2) marks the end of the s 74B process, it also opens up the possibility of reconsideration.

99 Of course, s 74D is concerned with reconsideration by the Minister: it does not provide for independent merits review. In substance, the process for which s 74D expressly provides is more elaborate than the process contemplated under s 74B. Reconsideration under s 74D not only requires the Minister to make a decision de novo as to whether he considers "that it is clear that the action would have unacceptable impacts on matter protected by a provision of Part 3", but the reconsideration involves a more extensive process than the initial s 74B decision. These factors also tell against the applicant's argument on natural justice. Thus, where a reconsideration request is made and received under s 74C(3)(c), the Minister must comply with the publication requirements set out in s 74D(2)(a) to (b) and invite comment from "anyone" (which would include the proponent) in accordance with s 74D(2)(c): see [52] above. There is therefore provision in s 74D (in contrast to s 74B) for broad public notice and comment. Within 10 business days after the close of the public comment period, the Secretary to the Minister's department must "prepare a written report about the relevant impacts that the action … is likely to have", having regard to the comments that have been made under s 74D; and provide this report and the s 74D comments to the Minister: s 74D(3). These comments are therefore required to inform the report that goes to the Minister.

100 Whilst a decision under s 74B(1) is in the nature of a preliminary or provisional decision, a decision under s 74D(4) is not. Senior Counsel for the respondent stated, correctly in my view, that in making a decision under s 74D(4)(a) — to refuse to approve the taking of the action — the Minister would be required to give the proponent an opportunity to address any new information that was credible, relevant and significant to the s 74D decision about to be made. It would not be open to the Minister to take into account new material that the proponent had not had an opportunity to address; and, if the Minister in fact did so, the proponent's remedy would lie in judicial review for failure to accord procedural fairness or natural justice: see, for example, *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180; 143 ER 414; and more recently *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [12]-[15]; and the note to s 74D(5). This is because a decision under s 74D(4)(a) is the ultimate decision that would preclude a proponent from taking the relevant action with the benefit of the relevant statutory defence: see, for example, ss 15B(8) and 15C(16).

101 The applicant's complaint — that he was not given an opportunity to deal with the Wahren article, the Groves report, the Taskforce report and the Heritage and Wildlife advice — is misconceived. If the applicant sought reconsideration,

the applicant would have an opportunity to comment on the material, and the Minister would be obliged to give him an opportunity to address any new material that he had not had an opportunity to address.

102 A decision under s 74B is not necessarily urgent, in the sense to which McHugh J referred in *Twist*, but the 2006 EM and the time-limits prescribed in Div 1A indicate that timeliness is a significant consideration for the processes of the Division. This factor also militates against the applicant. Thus, a decision under s 74B(1) is supposed to be taken relatively speedily in that it must be within 20 business days after the Minister receives a referral, although a delay in decision-making does not of itself invalidate the decision: see ss 74B(1) and 518(1). Further, s 74B(2) expressly contemplates that a decision under s 74B(1) may be made without the Minister undertaking the consultation required by s 74, which would otherwise occur "[a]s soon as practicable" after the receipt of the referral: see also s 74D(6) and the attached note.

103 Finally, it is, of course, important to take account of the nature of a proponent's interest in relation to a decision under s 74B(1); and in this regard it is relevant to consider the options that are available to a proponent who has received an adverse notice under s 74C. The proponent's interest in a decision under s 74B is essentially an interest in a provisional decision. This also tells against the applicant's contention. As already noted, such a proponent has two options apart from withdrawing the referral and taking no further action. That is, in addition to having the right to request reconsideration, the proponent may submit a modified proposal under s 74C(3)(b). The existence of the s 74C(3)(b) option highlights the essentially preliminary or provisional nature of the decision under s 74B. As the 2006 EM explained (see [66] above), the amendments introducing Div 1A "allow the Minister to give a proponent an early indication if an action is not likely to receive approval under the Act"; and "gives the proponent the opportunity to modify or change a proposal and resubmit a referral for assessment and approval".

104 Whilst there is no question here of an appeal to a court or other independent body — a fact that may militate in favour of the applicant (*Miah* at [146]) — when Div 1A is considered as a whole, it is apparent that it provides for a stepped decision-making process, in which the significance of each step must be considered having regard to the process as a whole. Having regard to the nature of Div 1A and the various factors referred to earlier, I would conclude that, in making an adverse decision under s 74D, the Minister would have a duty to give an opportunity to a proponent to deal with new information if it were credible, relevant and significant to the decision to be made, but the Minister has no such duty when making a decision under s 74B(1). The Parliament intended that sufficient procedural fairness in respect of a decision under s 74B(1) would be given to a proponent by the processes in ss 74C and 74D. Therefore, the applicant had no separate right under s 74B(1) to an opportunity to comment on the Wahren article, the Groves report, the Taskforce report and the Heritage and Wildlife advice.

105 For these reasons, I would reject the applicant's ground 3. I note, moreover, that the respondent agreed in argument that it remained open to the applicant to request a reconsideration under s 74C(3)(c) in respect of the referral.

106 Given this conclusion, it is unnecessary to deal with the respondent's alternative arguments in response to this ground, including the respondent's contention that "there was no unfairness because the views expressed and

information conveyed in the reports and advice were well-known to the Secretary, and the Minister's likely reliance on the views and information ought reasonably to have been anticipated by the Secretary". This contention was directed to the Taskforce report, the Groves report and the Wahren article; and depended in part on the circumstances that the referral itself referred to the Taskforce report, which was a publication of the applicant's Department; and that the Taskforce report in turn referred at several places to the Wahren article and the Groves report, the latter having particular significance for the findings of the Taskforce report.

107 It suffices to note that this part of the respondent's argument was not without its difficulties. Amongst other things, as the applicant observed, a number of authorities indicate that procedural fairness requirements are not necessarily met merely by showing that an affected person was aware of the existence of the information; rather, that person must be given an opportunity to deal with that part of the information that the decision-maker proposes to take into account in arriving at an adverse decision: see *Kioa v West* at 628; *Minister for Immigration and Multicultural and Indigenous Affairs v SZFDJ* [2006] FCAFC 53 at [43]; *Applicants S1266 of 2003 v Minister for Immigration and Multicultural Affairs* [2006] FCA 1771 at [28]. Of course, these authorities concerned decisions under the *Migration Act 1958* (Cth) and therefore decisions made in a very different statutory context from the present. They would not be determinative of the respondent's argument: as already stated, whether a decision is subject to procedural fairness requirements and, if so, the nature of these requirements, will always depend on the statutory context. These authorities do, however, indicate that this part of the respondent's argument required more careful analysis than it was in fact given at the hearing.

Ground 4

108 The applicant submitted that s 74B(1) required the respondent not only to consider whether it was clear that the proposed action would have unacceptable impacts on a matter protected by a provision of Pt 3, but also to decide whether Div 1A of Pt 7 of the EPBC Act should apply to the referral. That is, the applicant's contention was that s 74B(1) required that, where the Minister considered that it was clear that the proposed action would have such impacts, the Minister had separately to decide whether or not Div 1A applied. The applicant contended that the Minister's failure to appreciate the existence of this separate discretion and to exercise it vitiated the challenged decision.

109 For the reasons about to be stated, the applicant's submissions in support of ground 4 should be rejected.

110 The strongest consideration in support of the applicant's contention is the structure of s 74B(1), which requires that the Minister "consider" the matter in s 74B(1)(a) and "decide" the matter in s 74B(1)(b). That is, absent other considerations, the text and structure would justify the proposition that the Minister was required to undertake a two-step inquiry: first, as to the impacts of the proposed action; and secondly, as to whether Div 1A should apply. As the applicant observed, the respondent's argument meant that, despite its use of the word "decide", s 74B(1)(b) in fact left virtually no discretion to the Minister once the Minister considered that it was clear that the action would have unacceptable impacts in accordance with s 74B(1)(a).

111 In considering s 74B(1), its role within Div 1A of Pt 7 must be taken into account. Section 74B is directed only to the question of whether or not Div 1A

is to apply to a referral. This is effectively the only decision made under s 74B; and the heading to Div 1A — "Decision that action is clearly unacceptable" — emphasises that it is the clear unacceptability of the action that attracts the Division. This is also reflected in the language of s 74B(1)(a) and (b). Thus, s 74B(1) states that Div 1A applies to the referral if the Minister considers, as s 74B(1)(a) directs, that it is clear that the action would have unacceptable impacts on a matter protected by a provision of Pt 3; and *decides*, as s 74B(1)(b) contemplates, that Div 1A should apply to the referral.

112 Considered together, the terms of ss 74B and 74C indicate that, if the Minister considers that it is clear that the proposed action would have unacceptable impacts on a matter protected by a Pt 3 provision, it would follow that Div 1A should apply. Section 74B(1) is inseparably linked to s 74C and, through s 74C, to s 74D. This is evident from the terms of s 74C. The notice given under s 74C(1) is notice of the decision under s 74B(1)(b) — that Div 1A applies to the referral — but, by virtue of s 74C(2)(a), the notice must state that the Minister considers that the action would have unacceptable impacts in terms of s 74B(1)(a) and, by virtue of s 74C(2)(b), "set out the reasons for the Minister's decision". In attaching the need to give reasons in s 74C(2)(b) to the unacceptable impacts statement in s 74C(2)(a), s 74C(2)(b) contemplates that the reasons for the decision that Div 1A applies (which is the subject of the notice) will be concerned with the matter of unacceptable impacts in the statement in s 74C(2)(a).

113 In this case, the Minister gave a notice in conformity with s 74C. Under the heading "Decision", the Minister stated: "[t]he proposed action will have clearly unacceptable impacts on a matter protected by Part 3 of the EPBC Act" and "Division 1A of Pt 7 of the EPBC Act applies to this referral". The Minister also set out reasons for his decision in accordance with s 74C(2); and these showed that he made the decision that Div 1A applied because he considered that the proposed action would have clearly unacceptable impacts on a matter protected by a provision of Pt 3. No error is disclosed in these documents.

114 If the Minister considers that it is clear that the proposed action would have unacceptable impacts on a protected matter, then it is difficult to conceive of any relevant consideration within the scheme of Div 1A or the EPBC Act that could lead the Minister not to decide that Div 1A applies. Once the Minister considers that the proposed action would have clearly unacceptable impacts, there is no effective choice that the Minister can make other than to decide that Div 1A applies to the referral. This conclusion is fortified by the 2006 EM and s 74D(4). As set out at [67] above, the 2006 EM states that "Division 1A establishes a new process that allows the Minister to make a prompt refusal for an action that would have unacceptable impacts on a matter protected by Part 3 of the Act". Section 74D(4) specifically provides that, on a reconsideration under s 74D, if the Minister still considers that the action would have unacceptable impacts on a protected matter, then the Minister *must* decide to refuse the taking of the action. Within the context of Div 1A, there is no reason to suppose that the matter relevant to a decision under s 74D(4) is not also the matter relevant to the provisional decision under s 74B(1).

115 In oral argument, the applicant sought to identify some factor that might lead the Minister to decide that Div 1A should not apply, notwithstanding that the Minister considered that the proposed action would have clearly unacceptable impacts on a protected matter. Various potential factors included "[that] for

whatever reasons it might be relevant to the purposes of the Act that the process should go through the full assessment process" and the Minister's belief that "further inquiry might produce a different result". If, however, the Minister considered that further inquiry might produce a different result, the Minister would not consider that the very high standard in s 74B(1)(a) was satisfied. That is, the Minister would not consider that it was *clear* that the proposed action would have *unacceptable impacts* on protected matters. Further, assuming the Minister was satisfied in terms of s 74B(1)(a), the applicant had difficulty identifying any specific factor that might lead the Minister to decide that Div 1A should not apply. In reply, the applicant specifically referred to the objects of the EPBC Act set out in s 3. These objects are served by the legislation as a whole; and do not indicate any factor that might lead the Minister to decide against the application of Div 1A once s 74B(1)(a) was satisfied. For example, the interests of fairness or transparency to which the applicant referred are apparently met by s 74C, allowing the proponent to refer a modified action or to request the Minister's reconsideration, and by s 74D where more elaborate procedures apply.

116 When the EPBC Act and the scheme of Div 1A of Pt 7 are considered as a whole, they do not support the applicant's submission that s 74B imposes an obligation on a Minister, who considers that it is clear that the action would have unacceptable impacts on a matter protected by a provision of Pt 3, separately to consider whether Div 1A should apply to the referral. Nothing in Div 1A, the structure of the EPBC Act or its general objects or purposes indicates that, apart from the matter dealt with in s 74B(1)(a), there could be some other relevant consideration that might persuade the Minister that Div 1A should not apply.

117 In support of the submission that s 74B(1)(b) required the Minister separately to consider the application of Div 1A, the applicant relied on *SNF (Australia) Pty Ltd v Federal Commissioner of Taxation* (2010) 79 ATR 193 (*SNF*) and *Brisbane Land Pty Ltd v Pine Rivers Shire Council (No 2)* [2000] 1 Qd R 363 (*Brisbane Land*). Both decisions concerned legislation that relevantly differed in language or context. *SNF* concerned a transfer-pricing provision in the *Income Tax Assessment Act 1936* (Cth); and, whilst the structure of s 136AD of that Act was similar to s 74B(1), the context and statutory history as evidenced in an Explanatory Memorandum showed that there was room for the Commissioner to decide not to make a determination to apply the relevant provisions: see *SNF* at [51]. *Brisbane Land* concerned a different form of statutory provision from s 74B(1), which gave rise to a relevant discretion that had been overlooked and therefore remained unexercised: see *Brisbane Land* at [14]-[17]. Both cases should be distinguished from the present case.

118 In any event, even if I am wrong in construing s 74B(1)(b) in this way, it does not appear to me that the applicant has established an error of the relevant kind. Even if in a hypothetical case, there might be a situation in which, though considering s 74B(1)(a) made out, the Minister might decide that Div 1A should not apply, it was not this case. As already stated, the respondent made a decision that Div 1A should apply; and evidently did so because he considered that the proposed action would have clearly unacceptable impacts on a protected matter. This was plainly a relevant consideration. There was no other potentially relevant consideration that it may be supposed the respondent had wrongly overlooked. In this circumstance, the fact that he did not mention any other

consideration does not show that he would not have considered one had it existed; nor does it in fact show that he failed to appreciate that he had a discretion under s 74B(1)(b), if indeed there was one.

Consideration: Ground 2

119 Under ground 2 of his amended application, the applicant argued that, by relying on the National Heritage values for the alpine national parks of "recreation", "aesthetic characteristics" and "social values", the respondent relied on matters that were not protected by Pt 3 of the EPBC Act and thereby exceeded the power in s 74B(1)(a) of the EPBC Act. The applicant's case was that the protection of these National Heritage values is not appropriate and adapted to give effect to Australia's obligations under Art 8 of the Biodiversity Convention. To understand this contention, it is necessary to refer to some other provisions of the EPBC Act.

Additional legislative framework

120 As mentioned earlier, the EPBC Act is concerned with the impacts of proposals on particular aspects of the environment, which are identified by means of the prohibitions and offences set out in Pt 3 of the EPBC Act. One of these aspects is "the National Heritage values of a National Heritage place". This is the subject of ss 15B and 15C in Subdiv AA of Div 1 of Pt 3 of the EPBC Act. The connection between "the National Heritage values of a National Heritage place" and the Biodiversity Convention is not straightforward; and, as explained below, is a product of Australian constitutional considerations.

121 The relevant constitutional considerations are best understood by reference to the background to the *Environment and Heritage Legislation Amendment Act (No 1) 2003* (Cth) ("the 2003 amending Act"), which introduced Subdiv AA of Div 1 of Pt 3: compare *Acts Interpretation Act 1901* (Cth), s 15AB.

122 The Second Reading Speech made by the Minister to the Senate on 15 November 2002 concerning the 2003 amending Act indicates that this Act was introduced following the 1997 Council of Australian Governments (COAG) Agreement on Commonwealth/State Roles and Responsibilities for the Environment: see Commonwealth, *Parliamentary Debates*, Senate, 15 November 2002, 6477 (Ian Campbell). The speech stated:

> COAG agreed on the need to rationalise existing Commonwealth/State arrangements for the identification and protection of heritage places. In this context, COAG agreed that the Commonwealth's role should be focussed on places of National Heritage significance.
>
> …
>
> There is a gap between state regimes, which protect places of local or state significance, and the world heritage regime, which protects places of significance to the world. This bill establishes a mechanism for the identification, protection and management of heritage places of national significance. Such places will be inscribed in a National Heritage List. This List will consist of natural, historic and Indigenous places that are of outstanding National Heritage significance.

123 The Explanatory Memorandum to the *Environment and Heritage Legislation Amendment Bill (No 1) 2002* (Cth) ("the 2003 EM"), which became the 2003 Amending Act, recorded (at 2) that:

> The Bill provides for heritage places of national significance in both Australia and abroad to be included in a National Heritage List. A place in the National Heritage List will be recognised as an additional matter of national environmental

> significance under the EPBC Act. The EPBC Act will then regulate an action that has, will have, or is likely to have a significant impact on the National Heritage values of a place listed in the National Heritage List.

124 The 2003 EM also stated (at 14) that s 15B (containing various provisions prohibiting actions that have, will have or are likely to have a significant impact on the National Heritage values of a National Heritage place) "is structured so as to rely upon the available heads of constitutional power to the greatest extent possible". According to the EM (at 14), s 15C "mirrors section 15B in regulating actions in relation to National Heritage places. However, it establishes criminal offences in the event of non-compliance".

125 The result is that, as the 2003 EM indicates, each subsection of ss 15B and 15C is expressed with a view to engaging a different head of Commonwealth constitutional power, for example, by reference to "a constitutional corporation, the Commonwealth or a Commonwealth agency", "a Commonwealth area", a Territory, trade and commerce, "indigenous heritage values" and, relevantly in this case, the external affairs power in s 51(xxix) of the Constitution.

126 In this case, the parties agreed that the only relevant subsections are those relying on the external affairs power and, in an exercise of this power, the implementation of the Biodiversity Convention in ss 15B(5) to (6) and 15C(9) to (14) of the EPBC Act. This then explains the connection between the concept of "the National Heritage values of a National Heritage place" and the Biodiversity Convention.

127 Section 15B(5) to (6) provide as follows:

> (5) A person must not take an action that has, will have or is likely to have a significant impact on the National Heritage values of a National Heritage place in an area in respect of which Australia has obligations under Article 8 of the Biodiversity Convention.
>
> Civil Penalty:
>
> (a) for an individual — 5,000 penalty units;
>
> (b) for a body corporate — 50,000 penalty units.
>
> (6) Subsection (5) only applies to *actions whose prohibition is appropriate and adapted to give effect to Australia's obligations* under Article 8 of the Biodiversity Convention. (However, that subsection may not apply to certain actions because of subsection (8).)

(Emphasis added.)

128 Section 15B(8) provides:

> (8) Subsections (1) to (5) (inclusive) do not apply to an action if:
>
> (a) an approval of the taking of the action by the constitutional corporation, Commonwealth agency, Commonwealth or person is in operation under Part 9 for the purposes of this section; or
>
> (b) Part 4 lets the constitutional corporation, Commonwealth agency, Commonwealth or person take the action without an approval under Part 9 for the purposes of this section; or
>
> (c) 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; or
>
> (d) the action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).

129 Section 15C(9) to (10A) provide as follows:

> (9) A person is guilty of an offence if:
>
> (a) the person takes an action; and
>
> (b) the action results or will result in a significant impact on the heritage values of a place; and
>
> (ba) the heritage values are National Heritage values of the place; and
>
> (bb) the place is a National Heritage place; and
>
> (c) the National Heritage place is in an area in respect of which Australia has obligations under Article 8 of the Biodiversity Convention.
>
> Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.
>
> (9A) Strict liability applies to paragraphs (9)(ba), (bb) and (c).
>
> Note: For strict liability, see section 6.1 of the *Criminal Code*.
>
> (10) A person is guilty of an offence if:
>
> (a) the person takes an action; and
>
> (b) the action is likely to have a significant impact on the heritage values of a place; and
>
> (ba) the heritage values are National Heritage values of the place; and
>
> (bb) the place is a National Heritage place; and
>
> (c) the National Heritage place is in an area in respect of which Australia has obligations under Article 8 of the Biodiversity Convention.
>
> Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.
>
> (10A) Strict liability applies to paragraphs (10)(ba), (bb) and (c).
>
> Note: For strict liability, see section 6.1 of the *Criminal Code*.

130 Section 15C(13) to (14) further provide:

> (13) An offence against any of subsections (1) to (10) (inclusive) is punishable on conviction by imprisonment of a term not more than 7 years, a fine not more than 420 penalty units, or both.
>
> Note 1: Subsection 4B(3) of the *Crimes Act 1914* lets a court fine a body corporate up to 5 times the maximum amount the court could fine a person under this subsection.
>
> Note 2: An executive officer of a body corporate convicted of an offence against this section may also be guilty of an offence against section 495.
>
> Note 3: If a person takes an action on land that contravenes this section, a landholder may be guilty of an offence against section 496C.
>
> (14) Subsections (9) and (10) only apply to *actions whose prohibition is appropriate and adapted to give effect to Australia's obligations* under Article 8 of the Biodiversity Convention. (However, those subsections may not apply to certain actions because of subsection (16).)

(Emphasis added.)

Section 15C(16) is in equivalent terms to s 15B(8) of the EPBC Act.

131 In summary, s 15B(5) prohibits a person from taking an action that has, will have or is likely to have a significant impact on the National Heritage values of a National Heritage place in an area in respect of which Australia has obligations under Art 8 of the Biodiversity Convention. This is subject to s 15B(6), which provides that s 15B(5) only applies to an action whose prohibition is appropriate and adapted to give effect to Australia's obligations

under Art 8 of the Biodiversity Convention. The prohibition ceases to apply in the circumstances set out in s 15B(8), including where there is an approval under Pt 9, or where the Minister has decided under s 75(1) that s 15B is not a controlling position in respect of the proposed action and the action is taken as proposed.

132 Further, the offences created by s 15C in respect of an action that results, will result or is likely to result in a significant impact on the National Heritage values of a National Heritage place mirror s 15B. The relevant offences, relating to the Biodiversity Convention, are those for which s 15C(9) to (14) provide. It is a defence if there is an approval under Pt 9 of the EPBC Act, or if the Minister has decided under s 75(1) that s 15C is not a controlling provision in respect of the proposed action and the action is taken as proposed.

133 At this point, it is convenient to note s 25A of the EPBC Act and reg 2.10 of the 2000 Regulations. Pursuant to s 25A(1):

> The regulations may provide that a specified action is taken to be an action to which a specified regulatory provision applies.

The effect of s 25A(5) is that both ss 15B and 15C are regulatory provisions.

134 Section 25A(3)(e) further provides that:

> Regulations made for the purposes of subsection (1) may only specify actions … whose regulation is appropriate and adapted to give effect to Australia's obligations under an agreement with one or more other countries.

The Biodiversity Convention is an agreement with one or more countries, pursuant to which Australia has obligations. Australia ratified the Biodiversity Convention in June 1993 and the Convention came into force in December 1993: see also s 25A(4) of the EPBC Act and reg 2.10 of the 2000 Regulations.

135 Regulation 2.10 of the 2000 Regulations states:

> For subsection 25A(1) of the Act and to give effect to Australia's obligations under Article 8 of the Biodiversity Convention, the grazing of domestic stock in the [alpine national parks] is taken to be an action to which subsections 15B(5) and 15C(9) and (10) of the [EPBC] Act apply.
>
> Note: The [alpine national parks] were included in the National Heritage List by an instrument published in Gazette No S237 on 7 November 2008.

136 As noted above, ss 15B and 15C operate with respect to the National Heritage values of a National Heritage place. A "National Heritage place" is a place that is included on the "National Heritage List": ss 324C(3) and 528. Division 1A of Pt 15 of the EPBC Act sets out the process by which a place is included on the "National Heritage List": see ss 324C and 528. A place may be included on the "National Heritage List" only if it is within the Australian jurisdiction and the Minister is satisfied that it has one or more "National Heritage values": s 324C(2). The expression "National Heritage value" is defined by s 324D (see also s 528).

137 Section 324D provides:

> (1) A place has a *National Heritage value* if and only if the place meets one of the criteria (the *National Heritage criteria*) prescribed by the regulations for the purposes of this section. The *National Heritage value* of the place is the place's heritage value that causes the place to meet the criterion.

(2) The *National Heritage values* of a National Heritage place are the National Heritage values of the place included in the National Heritage List for the place.

(3) The regulations must prescribe criteria for the following:

(a) natural heritage values of places;

(b) indigenous heritage values of places;

(c) historic heritage values of place.

The regulations may prescribe criteria for other heritage values of places.

(4) To avoid doubt, a criterion prescribed by the regulations may relate to one or more of the following:

(a) natural heritage values of places;

(b) indigenous heritage values of places;

(c) historic heritage values of places;

(d) other heritage values of places.

138 Regulation 10.01A(2) of the 2000 Regulations prescribes the National Heritage criteria for s 324D; and these criteria include:

(a) the place has outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history;

(b) the place has outstanding heritage value to the nation because of the place's possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;

…

(d) the place has outstanding heritage value to the nation because of the place's importance in demonstrating the principal characteristics of:

(i) a class of Australia's natural or cultural places; or

(ii) a class of Australia's natural or cultural environments;

(e) the place has outstanding heritage value to the nation because of the place's importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;

…

(g) the place has outstanding heritage value to the nation because of the place's strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;

(h) the place has outstanding heritage value to the nation because of the place's special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history; …

139 The alpine national parks were included on the National Heritage List in November 2008 and are therefore a National Heritage place. The National Heritage values for the alpine national parks appear in the Schedule to the Commonwealth Gazette No S237 (2008). Some statements regarding the National Heritage values in the Gazette were reiterated in the Minister's reasons for the decision.

140 The Schedule relevantly specified the National Heritage values of the alpine national parks as follows:

• *criterion (a)* — reg 10.01A(2)(a):

> The [alpine national parks] are part of a unique Australian mountainous region. Human interaction with the region has been distinctive in its response to the challenges and opportunities presented by this unique environment.

Reference was made to glacial and periglacial features, fossils, karst, biological heritage, moth feasting, transhumant grazing, scientific research, water harvesting and recreation.

- *criterion (b)* — reg 10.01A(2)(b): reference was made to landscapes and topography, glacial and periglacial features, fossils, alpine and subalpine ecosystems and the eucalypt flora community.
- *criterion (d)* — reg 10.01A(2)(d): reference was made to the North-East Kosciusko pastoral landscape.
- *criterion (e)* — reg 10.01A(2)(e): reference was made to the "powerful, spectacular and distinctive landscape highly valued by the Australian community".
- *criterion (g)* — reg 10.01A(2)(g): reference was made to "a special association with the Australian community because of their unique landscapes, the possibility of experiencing remoteness and as the only opportunity for broad-scale snow recreation in Australia".
- *criterion (h)* — reg 10.01A(2)(h): reference was made to the association of the alpine national parks with the works of Baron Ferdinand von Mueller, Eugen von Guerard, "Banjo" Paterson, Elyne Mitchell and David Campbell.

How ground 2 arises

141 Section 74B(1) required the respondent to form a particular view on whether the proposed action would have "unacceptable impacts on a matter protected by a provision of Part 3". As already noted, it was common ground that the only provisions of Pt 3 that were relevant in this case were ss 15B and 15C insofar as they related to the Biodiversity Convention. As also indicated above, it was common ground that the proposed action was to take place in an area in respect of which Australia has obligations under Art 8 of the Biodiversity Convention for the purposes of ss 15B(5) and 15C(9) to (10). It was also common ground that the values considered by the respondent in making the challenged decision were the National Heritage values of a National Heritage place: see EPBC Act, ss 324D and 528. The National Heritage place was, of course, the alpine national parks; and the National Heritage values, the values listed in the Schedule to the Commonwealth Gazette No S237 (2008).

142 The applicant's ground 2 relates to the criterion for the application of the prohibitions in ss 15B and 15C. A criterion for the application of the prohibitions in ss 15B(5) and 15C(9) to (10) is that their application to actions is appropriate and adapted to give effect to Australia's obligations under Art 8 of the Biodiversity Convention. This is the criterion set out in ss 15B(6) and 15C(14).

143 As indicated below, paragraphs 14-18 of the respondent's statement of reasons relied on the National Heritage values in criteria (e) and (g) — aesthetic and recreational values — to support his decision: see [138] and [140] above; also reg 10.01A(2)(e), (g) of the 2000 Regulations. The applicant contended that these values did not support a prohibition that was appropriate and adapted to give effect to Australia's international obligations under Art 8 of the Biodiversity Convention, even though the place was one in respect of which Australia had such obligations. The applicant's argument was that the respondent had considered the protection of biodiversity, together with aesthetic and recreational values, as a whole and "concluded *in a global way* that the

action was a protected action under sections 15B and 15C … without looking at the question of article 8 or Australia's obligations" (emphasis added). This meant, so the applicant said, that:

> [T]he Minister has relied on the protection of things which aren't protected by Division 1 of Part 3 in making the decision, so that the decision is infected by the consideration of unprotected matters.

Thus, the applicant submitted that the challenged decision exceeded the respondent's power under s 74B(1)(a).

144 The respondent replied that the protection of biodiversity was an independent basis for the challenged decision; and therefore the challenged decision was connected to the implementation of Art 8 of the Biodiversity Convention as required by ss 15B(6) and 15C(14) of the EPBC Act. The respondent further contended that there was no basis for the applicant's assumption that the protection of aesthetic and recreational values lacked the requisite connection to the Biodiversity Convention.

145 It should be noted at this point that, in addition to "aesthetic characteristics" and "recreation", the applicant's amended application also challenged the respondent's reliance on "social values". "Social values" were not the subject of argument at the hearing; and the applicant's case did not turn on any distinction between "social values" and "recreation" or "aesthetic characteristics". It suffices to note that the respondent's statement of decisions did not expressly refer to "social values" and that, to the extent that the values considered in that statement could be described as "social values", this would not change the analysis that follows.

The respondent's statement of reasons

146 The parties read the respondent's statement of reasons differently. In submitting that the respondent considered all matters "in a global way", the applicant contended that paragraphs 14-18 of the statement of reasons necessarily informed the respondent's conclusion at paragraph 19. As indicated already, the respondent's first argument was that his consideration of aesthetic and recreational values could not have made any difference to the challenged decision.

147 To assess these competing arguments, it is necessary to examine the respondent's statement of reasons. These reasons, which were given under s 74C, affirmed in opening that the respondent had decided on 31 January 2012 that the proposed action would have clearly unacceptable impacts on a matter protected by a provision of Pt 3 of the EPBC Act. This is the matter to which s 74B(1)(a) is directed. After setting out some statutory provisions and matters of background, the statement of reasons referred to the evidence or other material on which the respondent's findings were based and then set out findings on material questions of fact. These findings began with the relevance of National Heritage values to the referral:

> Findings on material questions of fact
>
> 7. The referral states that the proposed action will involve the introduction of cattle to parts of the Victorian high country. Nine of the 10 sites selected for the proposed cattle grazing research trial are located partly or entirely within [the alpine national parks].
> 8. *The National Heritage values of a National Heritage Place are a matter protected by section 15B and 15C of Part 3 of the EPBC Act.*

9. A National Heritage Place is a place that is included in the National Heritage List (subsection 324C(3) of the EPBC Act). [The alpine national parks] were declared a National Heritage Place on 4 November 2008.
10. The National Heritage values of the National Heritage place are those values of the place included in the National Heritage List for the place (subsection 324D(2) of the EPBC Act).

(Emphasis added.)

148 On the parties' construction of the EPBC Act, the statement at paragraph 8 introduced the potential for possible error, because it did not advert to the fact that ss 15B and 15C would only protect the National Heritage values of a National Heritage place by prohibiting action if the prohibition were appropriate and adapted to give effect to Australia's obligations under Art 8 of the Biodiversity Convention: see ss 15B(6) and 15C(14). I return to this hereafter.

149 Findings in relation to the National Heritage values relating to ecology and species diversity followed. They were as follows:

11. The National Heritage values for [the alpine national parks] include a number of heritage values relating to the ecology and species diversity of this National Heritage Place:
    - — "The Alps are one of eleven sites recognised in Australia by the IUCN as a major world centre of plant diversity … containing most of the contiguous montane to alpine environments in Australia …"
    - — "The AANP has outstanding heritage significance to the nation for possessing extremely uncommon aspects of Australia's natural history …"
12. A significant body of scientific and historical literature supports the clear conclusion that cattle grazing has unacceptable impacts on the ecology and species diversity of [the alpine national parks]. For example: — A study of vegetation structure and composition from the period 1945 to 1994 by Wahren *et al* (1994) found: "Our data clearly show that grazing by cattle has substantial impacts on the composition and structure of subalpine vegetation …"
    - — A review of grazing studies in the Victorian High Country by Dr Richard Groves, Senior Principal Research Scientist, CSIRO in 1998 found: "Results of scientific research assessed in this study on the effects of excluding grazing on vegetation composition in the high country of both New South Wales and Victoria, without exception, reveal the deleterious effect of grazing on native plant biodiversity and, to a lesser extent, on water yield. …"
    - — The Alpine Grazing Taskforce (formed from members of the Victorian Parliament) conducted an investigation into the benefits and impacts of cattle grazing in the Victorian Alpine National Park. The Taskforce's 2005 report found that "grazing modifies and damages vegetation in the park … [and] … cattle grazing is considered a significant threat to at least 25 flora species, 7 fauna species and 4 plant communities found in the park that are listed as rare, vulnerable or threatened with extinction .. [and that there are] … significant damaging impacts and no overall benefits for the environment from cattle grazing in the Alpine National Park".
13. *Based on the extensive body of evidence publicly available on this matter, I found that the information is clear and unambiguous in relation to the impacts of the proposed action, being the introduction of cattle grazing, on the ecology and species diversity* of [the alpine national parks].

> Accordingly, I found that the proposed cattle grazing research trial will have clearly unacceptable impacts on the heritage values of [the alpine national parks].

(Emphasis added.)

150 These findings, especially in paragraph 11, drew upon criteria (a) and (b) referred to at [140] above: see also reg 10.01A(2)(a) to (b) of the 2000 Regulations. They also drew on the Wahren article, the Groves report and the Taskforce report: see paragraph 12 of the statement of reasons at [149] above.

151 Thereafter, the statement of reasons set out findings in relation to aesthetic and recreational values:

> 14. The National Heritage values for [the alpine national parks] include a number of heritage values relating to aesthetics and recreational use:
>
> — "The AANP has outstanding heritage value for the longevity and diversity of its recreational use …"
>
> — "The AANP is a powerful, spectacular and distinctive landscape highly valued by the Australian community. The mountain vistas, including distinctive range upon range panoramas, snow covered crests, slopes and valleys, alpine streams and rivers, natural and artificial lakes, the snow-clad eucalypts and the high plain grasslands, summer alpine wildflowers, forests and natural sounds evoke strong aesthetic responses. … Recreational pursuits in these landscapes are enhanced by aesthetic appreciation of their wild and natural quality …"
>
> — "The Australian Alps have a special association with the Australian community because of their unique landscapes, the possibility of experiencing remoteness and as the only opportunity for broad-scale snow recreation in Australia …"
>
> 15. Cattle grazing within [the alpine national parks] is incompatible with the above heritage values. Visual impacts have an obvious and long-term effect on the aesthetic quality of the area. The presence of cattle would also detract from the natural and remote setting of the landscape across a large portion of the National Heritage Place.
>
> 16. The proposed cattle grazing trial will include sections of land within the complex of peaks and ridges between Mt Cobbler, Mt Howitt and the Bluff — which is specifically identified in the gazette notice as an example of a landscape of particular heritage significance.
>
> 17. Moreover, cattle grazing will decrease the value of [the alpine national parks] as a location for recreational use. The presence of cattle will detract from the wild and natural quality of the landscape and reduce the aesthetic appreciation of the area by visitors seeking experiences of remoteness in a natural environment (which are components of the listed values of the National Heritage Place).
>
> 18. In light of the above, I found that the information is clear and unambiguous in relation to the impacts of the proposed action, being the introduction of cattle grazing, on the aesthetic and recreational values of [the alpine national parks]. Accordingly, I found that the cattle grazing will have serious or irreversible impacts on the heritage values of [the alpine national parks].

152 These findings drew upon criteria (e) and (g) referred to at [140] above: see also reg 10.01A(2)(e), (g) of the 2000 Regulations. The statement of reasons concluded:

> Reasons for decision
>
> 19. In light of my findings, I was satisfied that the referred action would have a clearly unacceptable impact on the National Heritage values of [the alpine national parks] … National Heritage Place, a matter protected by section 15B and 15C of Part 3 of the EPBC Act.

153 Aside from the brief findings set out at paragraphs 7-10, the respondent's findings on material questions of fact fell into two separate groups — the first group (at paragraphs 11-13) is concerned with National Heritage values of ecology and species diversity and the second (at paragraphs 14-18), with National Heritage values of an aesthetic and recreational kind. This is important for the respondent's argument.

154 Their placement first in the statement of reasons and the nature of the finding at paragraph 13 strongly indicates that the first group of findings constituted the primary basis for the respondent's decision. Most importantly, it is clear from paragraph 13 that this group of findings was independent of the second group of findings. This is the effect of the conclusory statement in that paragraph that "[b]ased on the extensive body of evidence publicly available on this matter … the information is clear and unambiguous in relation to the impacts of the proposed action … on the ecology and species diversity of [the alpine national parks]". Plainly enough, the evidence to which this statement referred was the "body of scientific and historical literature", including the Wahren article, the Groves report and the Taskforce report, mentioned in paragraph 12 of the statement of reasons. The use of the words "clear and unambiguous" showed that, having regard to this evidence, the respondent had reached a firm conclusion regarding the impacts of the proposed action on the ecology and species diversity of the alpine national parks. Accordingly, I would infer from paragraph 13 that, independently of any other consideration, by reference to the impacts on the National Heritage values of ecology and species diversity (in criteria (a) and (b)), the respondent found that the proposed action "will have clearly unacceptable impacts on the heritage values of the alpine national parks". This was the matter to which s 74B(1)(a) directed attention.

155 As already noted, broadly speaking, paragraphs 14-18 concerned National Heritage values of an aesthetic and recreational kind: see criteria (e) and (g). (I use this shorthand for convenience; to the extent that recreational values could be considered to fall under criterion (a), as the applicant at one point submitted, this would not change the substance of the following analysis.) The respondent's findings in these paragraphs were evidently additional to and independent of the finding at paragraph 13. Thus, the findings at paragraphs 14-18 were not only placed after the conclusory finding at paragraph 13 but were directed to different concerns. They related to a different subject matter — National Heritage values of an aesthetic and recreational kind (within criteria (e) and (g)) as opposed to the ecology and species diversity values of the parks (within criteria (a) and (b)). The effect of the proposed action on these values, as described at paragraph 18 of the statement of reasons, was said to be different from that in respect of the National Heritage values of ecology and species diversity. That is, the respondent's finding at paragraph 18 — that by reason of the impacts on aesthetic and recreational values, the proposed action "will have serious or irreversible impacts on [these] heritage values" — contrasts with his finding at paragraph 13 that, by reason of the impacts on the ecology and

species diversity, the proposed action "will have clearly unacceptable impacts on the heritage values" of the alpine national parks. Only the latter finding effectively mirrors the statutory language of s 74B(1)(a).

156 The applicant's submission that the challenged decision exceeded the respondent's power under s 74B(1)(a) assumed that the criterion of application in ss 15B(6) and 15C(14) was relevant to the respondent's task under s 74B(1)(a); and that, if applied to National Heritage values of an aesthetic and recreational kind (in criteria (e) and (g)), the prohibitions in ss 15B(5) and 15C(9) to (10) could not be regarded as necessary and adapted to give effect to an obligation under Art 8 of the Convention. On the applicant's submissions, this was because Art 8 created no obligation to protect the aesthetic and recreational values of natural habitats. The applicant put his argument in various ways. On the one hand, as noted above, the applicant submitted that the respondent's reliance on "unprotected matters" vitiated the challenged decision; and, on the other hand, it was said that the respondent erred in addressing the wrong question. In the latter regard, the applicant's argument seemed to be that the respondent erred because he failed to consider whether a prohibition on the proposed action that would have a significant impact on National Heritage values of an aesthetic and recreational kind was appropriate and adapted to give effect to an obligation under Art 8 of the Biodiversity Convention.

Independent basis for the decision

157 The simplest response to the applicant's submission is that first given by the respondent. This is that the findings at paragraphs 14-18 were separate and independent from the respondent's findings at paragraphs 11-13; and that the findings in paragraphs 14-18 could not have altered the respondent's conclusion at paragraph 13 as to the "clearly unacceptable impact" of the proposed action on the National Heritage values of the alpine national parks as expressed in their ecology and species diversity (in criteria (a) and (b)). These findings on their own justified the finding at paragraph 19 that "the referred action would have a clearly unacceptable impact on the National Heritage values of [the alpine national parks] … National Heritage Place, a matter protected by section 15B and 15C of Part 3 of the EPBC Act".

158 Assuming the parties' construction of the EPBC Act is correct, bearing in mind the administrative nature of the respondent's statement of reasons, nothing turns on the fact that the respondent did not expressly refer to ss 15B(6) and 15C(14), which were, in any event, picked up in the respondent's references to ss 15B and 15C in paragraph 19. In this context, it is enough to refer to *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (*Wu Shan Liang*) at 271-272, noting that it is well settled that the reasons of administrative decision-makers should not be "construed minutely and finely with an eye keenly attuned to the perception of error" (quoting *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287). As the Court in *Wu Shan Liang* at 272 went on to say, propositions such as this:

> recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.

159 Further, although the criterion of application in ss 15B(6) and 15C(14) was not specifically mentioned, the applicant accepted that the criterion was satisfied by the findings at paragraphs 11-13. The applicant accepted that, considered by

reference to the proposed action and the respondent's findings as to its impact on the National Heritage values of the ecology and species diversity of the alpine national parks, the prohibitions in ss 15B(5) and 15C(9) to (10) met the criterion of applicability in ss 15B(6) and 15C(14) as being "appropriate and adapted to give effect to Australia's obligations" under Art 8 of the Biodiversity Convention. Presumably the applicant was mindful of Art 8(d) (set out below), pursuant to which state parties undertook "as far as possible and as appropriate" to "[p]romote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings".

160 As noted above, the applicant's point was that the application of the prohibitions in ss 15B(5) and 15C(9) to (10) to the National Heritage values of an aesthetic and recreational kind could not be regarded as necessary and adapted to give effect to Art 8 of the Biodiversity Convention; and that this demonstrated reviewable error on the respondent's part. For reasons already foreshadowed, I would reject this argument. Assuming that the applicant's assumption about the interaction of s 74B(1)(a) and ss 15B(5) to (6) and 15C(9) to (14) is correct, the fact that the respondent considered not only the National Heritage values of the ecology and species diversity of the alpine national parks but also the National Heritage values of an aesthetic and recreational kind does not detract from the fact that the respondent's principal and independent finding at paragraph 13 established the necessary connection with Art 8 of the Biodiversity Convention. The fact that the respondent made other findings concerning the impact of the proposed action on the aesthetic and recreational heritage values of the alpine national park could not affect the principal finding at paragraph 13. Nor, in the circumstances of the case, does this justify the conclusion that the respondent addressed the wrong question so as to attract a right to relief. The respondent expressly addressed the question to which s 74B(1)(a) gave rise, as indicated by paragraph 19 and elsewhere in the respondent's statement of reasons. Regardless of any lack of connection between the findings at paragraphs 14-18 and Art 8 of the Biodiversity Convention, the challenged decision would still have been the same. The respondent's findings at paragraphs 14-18 could not have affected the outcome of the respondent's decision; and the supposed errors with respect to them do not entitle the applicant to the relief he seeks: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 384 (Toohey and Gaudron JJ); *Martincevic v Commonwealth* (2007) 164 FCR 45 at [67] (Finn, Kenny and Greenwood JJ); and *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 at [121]-[122] (Moore and Lander JJ), [303] (Tamberlin J dissenting in result).

161 Put another way, if, absent the Minister's approval under Pt 9, the proposed action would be prohibited by s 15B(5) because the protection of the ecology and species diversity of the alpine national parks was appropriate and adapted to give effect to Australia's obligations under Art 8 of the Biodiversity Convention, it would be immaterial that the prohibition on the same action also operated to protect other matters, such as the aesthetic and recreational values of the alpine national parks.

The proportionality test and s 74B

162 The second response to the applicant's ground 2 argument is that it depends on a misapprehension about the interaction of s 74B(1) and ss 15B(5) to (6) and 15C(9) to (14). The matter that s 74B(1)(a) requires the Minister to consider is

whether "it is clear that the action would have unacceptable impacts on *a matter protected by a provision of Part 3*" (emphasis added). Neither party paid much attention to the expression "a matter protected by a provision of Part 3"; both were apparently content to proceed on the assumption that the use of the expression in s 74B(1)(a) picked up ss 15B(5) to (6) and 15C(9) to (14) in the way the applicant argued. For the following reasons, I doubt that this is a correct assumption.

163 First, the expression "a matter protected by a provision of Part 3" is an expression used throughout the EPBC Act; and, via s 528, is given the meaning set out in s 34 of that Act. Section 34 provides as follows:

> 34 What is *matter protected* by a provision of Part 3?
>
> The *matter protected* by a provision of Part 3 specified in column 2 of an item of the following table is the thing specified in column 3 of the item.

Matter protected by provisions of Part 3		
Item	*Provision*	*Matter protected*
1	section 12	the world heritage values of a declared World Heritage property
1A	section 15A	the world heritage values of a declared World Heritage property
1B	section 15B	the National Heritage values of a National Heritage place
1C	section 15C	the National Heritage values of a National Heritage place
…		

164 In other words, s 34 lists the matters protected by a provision of Pt 3 by linking a Pt 3 provision to a "matter protected". Sections 15B and 15C are linked to the same "matter protected", namely, "the National Heritage values of a National Heritage place". Section 34, in conjunction with s 528, shows that when s 74B(1)(a) uses the expression "a matter protected by a provision of Part 3", Parliament intends that s 74B(1)(a) be construed by reference to the table in s 34. In satisfying s 74B(1)(a), the Minister is therefore required only to consider whether or not "it is clear" that the proposed action "would have unacceptable impacts" on a matter listed in that table as a "matter protected" by one of the listed provisions. If, as in the present case, the Minister considers that the action would clearly have unacceptable impacts on "the National Heritage values of a National Heritage place", which, pursuant to the s 34 table, is the matter protected by ss 15B and 15C, then that is the end of the Minister's consideration. The National Heritage values for the alpine national parks are the National Heritage values set out in the Schedule to the Commonwealth Gazette No S237 (2008): see [136]-[140] above. Accordingly, pursuant to s 74B(1)(a) of the EPBC Act, the question for the Minister's consideration is whether the proposed action would clearly have unacceptable impacts on those values.

165 The Minister is not required to make any judgment as to whether or not the proposed action would be prohibited by ss 15B and 15C if that action were taken without Ministerial approval. Sections 528 and 34 make it clear that, in the EPBC Act, this is not what Parliament intends by the expression "a matter protected by a provision of Part 3". This means that the Minister need not attempt the near-impossible task of reconciling the "unacceptable impacts" standard in s 74B(1)(a) with the "significant impact" standard in ss 15B(5) and

15C(9) to (10). Nor is the Minister required to consider whether or not the prohibitions in ss 15B(5) and 15C(9) to (10) would apply because they would be applicable to "actions whose prohibition is appropriate and adapted" to give effect to Australia's obligations under Art 8 of the Biodiversity Convention. This latter requirement would only fall for consideration when action was taken in contravention or supposed contravention of ss 15B(5) and 15C(9) to (10).

166 Further, there is no constitutional need for provisions such as ss 15B(6) and 15C(14) to be picked up in the Div 1A processes. At this stage, no action has been taken; and, if the Minister approves the action (assuming such approval is necessary) then the proponent of the action can avoid the force of the prohibitions in ss 15B(5) and 15C(9) to (10). If approval is not forthcoming, the prohibitions would apply only insofar as ss 15B(6) and 15C(14) permitted them to apply. There would, therefore, be no question of the prohibitions in ss 15B(5) and 15C(9) to (10) operating outside perceived constitutional limits.

167 There are other pragmatic reasons to prefer this construction of the EPBC Act. The nature of the assessment that the Minister is required to make on this, my preferred construction of ss 74B(1), 15B, 15C, 34 and 528 is straightforward compared with those arising under the alternative construction. These assessments are of the kind that Parliament might reasonably be taken to have required the responsible Minister to make in the "short-cut" processes for which Div 1A of Pt 3 provides. The alternative construction would require assessments ill-suited to these processes.

168 On this, my preferred construction, there could be no error of the kind the applicant propounds. In making the challenged decision, the respondent was never required to consider the criterion of application in ss 15B(6) and 15C(14). On this construction, the statement of reasons shows that the respondent did not ask the wrong question, take an irrelevant consideration into account or otherwise err.

169 For these reasons, the applicant's judicial review application in reliance on ground 2 is unsuccessful.

Obligations under Art 8 of the Biodiversity Convention

170 The respondent made another response to the applicant's ground 2 argument to the effect that the promotion of the aesthetic and recreational values did not lack the requisite connection to the Biodiversity Convention. Given the conclusion just stated, it is unnecessary to determine this matter. It suffices to explain why reference to the Biodiversity Convention shows that, on the material currently before the Court, I would not be inclined to accept this submission.

171 It may be accepted that, as the respondent submitted, treaties are interpreted in accordance with the *Vienna Convention on the Law of Treaties 1969*, done at Vienna on 23 May 1969, Art 31 of which provides that a treaty must be interpreted: in good faith, in accordance with the ordinary meaning of its terms in context and in light of the treaty's object and purpose: see *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ); *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at [24] (Gleeson CJ, Gummow, Hayne and Heydon JJ); and *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 240 (Dawson J), 251-256 (McHugh J). The context for the purpose of interpreting a treaty includes not only the text but its preamble and other matters.

172 The respondent relied on the preamble to the Biodiversity Convention, which begins as follows:

> The Contracting Parties,
>
> Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, *recreational and aesthetic values of biological diversity* and its components, …

(Emphasis added.)

173 The Convention's objectives, as stated in Art 1, include "the conservation of biological diversity [and] the sustainable use of its components".

174 For present purposes, Art 8 of the Biodiversity Convention relevantly provides:

> Each Contracting Party shall, as far as possible and as appropriate:
>
> …
>
> (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
>
> …
>
> (i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;

For the purposes of the Biodiversity Convention, "sustainable use" means "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations": see Art 2.

175 Whilst, as the applicant noted, Art 8 is directed to the maintenance of biological diversity, including the protection of ecosystems on which biodiversity depends, this is not its sole concern. Article 8 also obliges contracting parties, as far as possible and as appropriate, to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components: see Art 8(i).

176 The gravamen of the respondent's argument was that, having regard to Art 8(i), aesthetic and recreational matters were not irrelevant considerations because they fell within the concept of the conservation of biological diversity. This argument relied on the terms of the preamble to support the proposition that the conservation of biological diversity included the conservation of the aesthetic and recreational values of biodiversity. The respondent submitted that Art 8(i) gave rise to an obligation on Australia's part "to endeavour to provide the conditions needed for compatibility between present uses, on the one hand, and conservation of recreational and aesthetic values of biodiversity on the other". If this approach were accepted, then, so it was submitted, the respondent was entitled to have regard to aesthetic and recreational values in making the challenged decision because they were relevant to a matter protected by ss 15B(5) and 15C(9) to (10), since they established the necessary connection to the Biodiversity Convention required by ss 15B(6) and 15C(14) on this interpretation of the legislative scheme.

177 In the absence of further argument and perhaps reference to the travaux preparatoires, as already stated, I would not be inclined to accept the argument outlined above. The respondent's suggested construction of Art 8 of the Biodiversity Convention pays insufficient regard to the definition of "biological

diversity" in Art 2; and to the fact that the obligation in Art 8(i) is directed to providing "the conditions needed for compatibility between present uses and the conservation of biological diversity", as opposed to the conservation of aesthetic qualities or recreational uses per se. The respondent's argument disregards the fact that Art 8(i) is not directed to the protection of aesthetic values and recreational uses per se but to the protection of the conditions for compatibility between existing uses (which might, for example, include recreational uses) and biological diversity. The fact that the values of biological diversity mentioned in the preamble are advanced by the protection of biological diversity does not mean that the obligations in Art 8 to protect biological diversity (by in-situ conservation as defined in Art 2) extend to a separate obligation to protect the values of biodiversity.

178 The above discussion is designed to illustrate some of the difficulties with this aspect of the respondent's argument. Having regard to the conclusion stated above with respect to ground 2, it is unnecessary to say anything further about it.

Disposition

179 For the reasons stated, I would dismiss the applicant's amended judicial review application. Having regard to this outcome, in the absence of any further submissions, I would order that the applicant pay the respondent's costs of and incidental to the application, as amended. If either party wishes to contend for a different costs order, that party has 14 days in which to do so by filing written submissions in support of a different costs order.

Orders accordingly

Solicitors for the applicant: *Victorian Government Solicitor*.

Solicitors for the respondent: *Australian Government Solicitor*.

SARAH SOMERSET