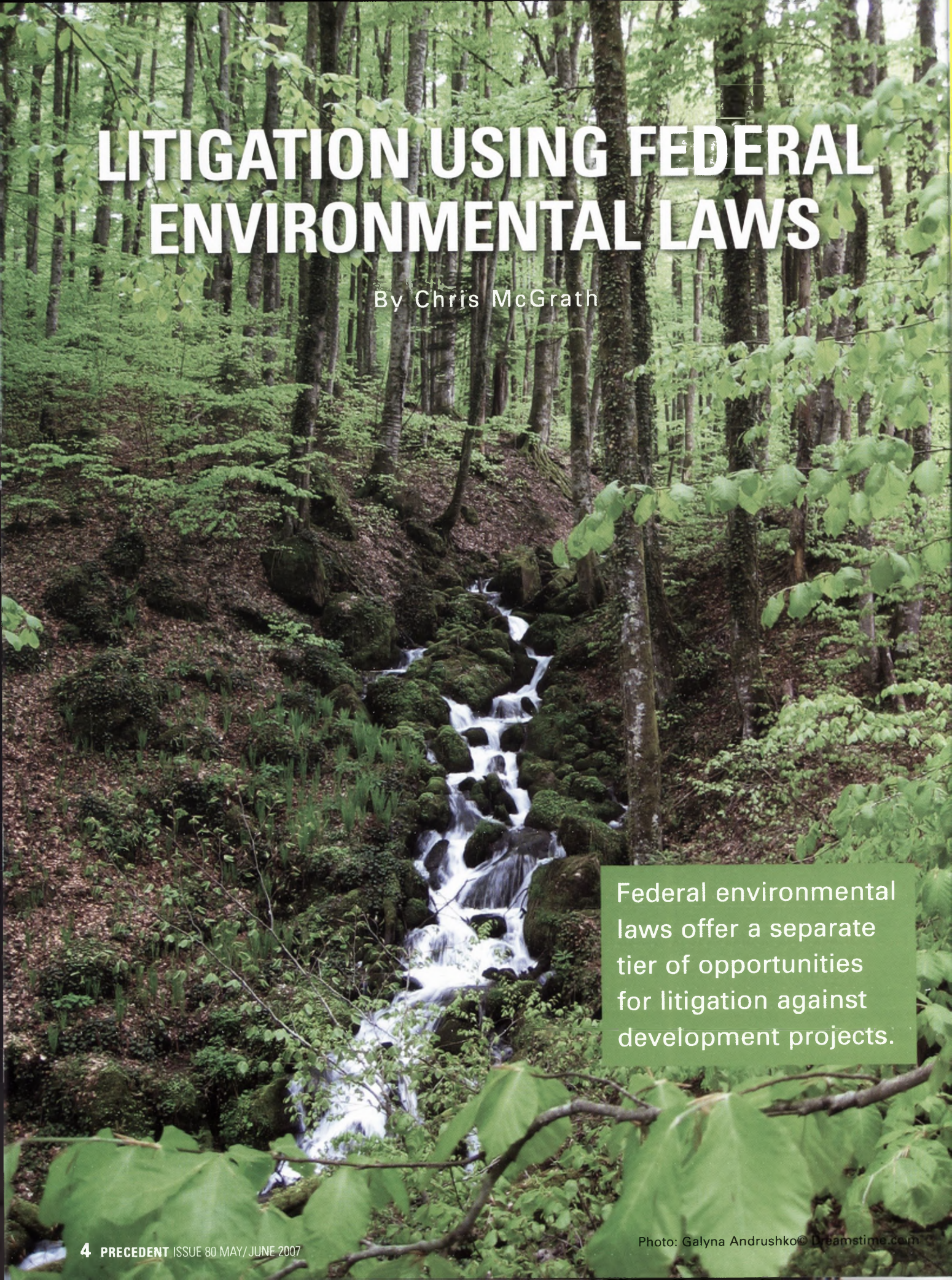
LITIGATION USING FEDERAL ENVIRONMENTAL LAWS

By Chris McGrath



Federal environmental laws offer a separate tier of opportunities for litigation against development projects.

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Most litigation involving development projects, pollution, and other environmental issues occurs under state and territory laws, but federal environmental laws can also be very important. The main federal environmental legislation is the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act) [1]

Although the EPBC Act overlaps state and territory environmental laws, it does far more than merely duplicate them. At the very least, federal supervision of large development projects, particularly state and territory government infrastructure projects, creates what might be called a 'healthy federal tension' for environmental decision-making in Australia.

Prior to the enactment of the EPBC Act, state and territory governments were largely free to approve their own projects without having them independently assessed for their environmental impact. There is no question that, at least in some cases, the integrity of the impact assessments of such projects suffered because of the local political hurly-burly surrounding them.

The EPBC Act imposes a new tier of federal decision-making, and also requires higher levels of integrity and rigour in environmental impact assessment than were required under previous state, territory or Commonwealth laws.

A good example is the current fiasco involving the $2 billion Gunns pulp mill, proposed to be built north of Launceston in Tasmania. The developer, Gunns Ltd, recently withdrew from the joint state and federal assessment process over alleged delays and costs in obtaining approval for the project. The state government responded by watering down the development-approval process under special legislation, to fast-track the approval. The integrity of the state-approval process is highly questionable and, in such a context, the approval requirements imposed by the EPBC Act provide important oversight of the state process.

This article briefly examines the opportunities and obstacles for litigation under the EPBC Act.

Awareness of the development-assessment processes and opportunities for litigation under the EPBC Act is important for lawyers in two main ways. First, for lawyers acting for clients who oppose development projects, the EPBC Act provides potential opportunities to improve the decision-making process and, if that fails to lead to a satisfactory outcome, to litigate. Second, for lawyers advising clients who wish to carry out medium- to large-scale development projects, practitioners need to understand the extra approval requirements and possibilities for litigation under the EPBC Act.

SNAPSHOT OF THE EPBC ACT

The regulatory mechanism in the EPBC Act of most general and practical importance is the requirement for approval of 'controlled actions'. These include actions:

- that have a significant impact on matters of national environmental significance; or
- by the Commonwealth or involving Commonwealth land with a significant impact on the environment.

> The EPBC Act has created opportunities for litigation, mainly because of its broad standing provisions.

The current list of matters of national environmental significance is:

- the world-heritage values of a declared world heritage property;
- the national-heritage values of a national heritage place;
- the ecological character of a declared Ramsar wetland (that is, a wetland of international significance for migratory bird species listed under the Ramsar Convention);
- listed threatened species and ecological communities;
- listed migratory species;
- the environment if the action is a nuclear action; and
- the environment in a Commonwealth marine area.

The process of approving a controlled action under the Act potentially involves three stages: referral, assessment and approval. At the first stage, a person refers a proposed action to the minister for determination of whether the >>

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proposal involves a controlled action. If the answer is 'yes', it is assessed in accordance with the EPBC Act. Finally, the minister determines whether or not the action should proceed, and whether any conditions should apply.

OPPORTUNITIES AND OBSTACLES TO LITIGATION

The EPBC Act has created opportunities for litigation mainly because of its broad provisions covering who has standing to bring actions. Section 475 gives third parties standing to seek an injunction to restrain offences against the Act. Section 487 allows third parties to seek judicial review of decisions under the Act. These standing provisions are so broad that virtually any conservationist or conservation group can seek an injunction or judicial review under the Act.

The two main limitations on litigation under the EPBC Act are the cost of litigation and the lack of opportunities for merits review.

Costs of litigation

Civil litigation under the EPBC Act occurs in the Federal Court and the normal costs rule applies, so that the losing party normally pays the winning party's legal costs. In an oft-quoted address to a National Environmental Law Association conference in 1989, Toohey J commented:

> 'There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that "costs follow the event" is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of case to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.'

Costs can be enormous – amounting to hundreds of thousands or even millions of dollars – enough to cripple or even bankrupt most third-party, public interest litigants. For example, in a judicial review case under the EPBC Act involving greenhouse emissions from two large coal mines,[2] preliminary (untaxed) cost estimates from the three respondents totalled $332,000. Burdened with costs, the unsuccessful conservation group, with assets of less than $300, was wound up.

The High Court's decision in *Oshlack v Richmond River Council*[3] is the leading authority that there is no general 'public interest' exception to the usual rule that costs follow the event, although a court may have discretion not to award costs against an unsuccessful environmental litigant. Such discretion has rarely been exercised at a federal level, and offers scant comfort to public interest environmental litigants. In *Save the Ridge Inc v Commonwealth*,[4] Whitlam J ordered costs against a community group that was unsuccessful in seeking relief under the EPBC Act, despite submissions based on the public interest nature of the proceedings and *Oshlack*. The full court upheld this approach,[5] which bodes ill for future arguments based on *Oshlack* in proceedings under the EPBC Act.

Merits review

In addition to the risk of adverse costs orders, the main obstacle to litigation under the EPBC Act is the lack of merits review. Merits review is not available for either applicants or third parties for decisions concerning controlled actions under the EPBC Act – generally the most important kind of decisions that relate to the protection of the environment.

Judicial review is typically of little use for environmental litigation, where it is the poor nature of an administrative decision that needs to be redressed. If the minister or their delegate has 'ticked all the right boxes' and been careful in writing their reasons for decision under the EPBC Act, then what is factually a very poor decision allowing highly damaging development cannot be challenged.

The opportunities and obstacles for litigation under the EPBC Act are well-illustrated by two case studies.[6] The first considers an action for injunctive relief against large-scale killing of flying-foxes by fruit-growers. The second case study considers seeking judicial review against a decision to build a large dam to supply water for irrigation.

These case studies form part of a steady trickle of litigation now running in the Federal Court using the EPBC Act. Four other cases are of particular note, each involving an application for an injunction under s475 of the EPBC Act:

- *Mees v Roads Corporation*,[7] in which Gray J found that the Victorian government had provided misleading information to gain approval under the EPBC Act.
- *Minister for Environment and Heritage v Greentree (No. 3)*,[8] in which Sackville J granted an injunction, rehabilitation order and pecuniary penalties totalling $450,000 under the EPBC Act against a wheat farmer and his company. The employees of the company, acting on the farmer's instructions, had deliberately cleared and ploughed 100 hectares of a Ramsar wetland on freehold land in northern NSW in preparation for planting a wheat crop. The decision was upheld on appeal.
- *Humane Society International v Kyodo Senpaku Kaisha Ltd*,[9] in which the full Federal Court granted leave to a conservation group to serve originating process in Japan against a Japanese company whaling in the Australian Whale Sanctuary adjacent to the Australian Antarctic Territory, in contravention of the EPBC Act.[10]
- *Brown v Forestry Tasmania (No. 4)*,[11] in which Marshall J granted an injunction against forestry operations in Tasmania found to be having a significant impact on threatened species in breach of the EPBC Act.[12] The decision is currently subject to appeal. >>

INJUNCTIVE RELIEF – THE FLYING FOX CASE

This case provides an example of the opportunities and obstacles for seeking injunctive relief to restrain offences against the EPBC Act.

In late 2000, a conservationist, Dr Carol Booth, investigated farmers who were killing thousands of flying foxes, using a large electric grid, to protect their lychee fruit crop. The lychee orchard was located on private land outside the Wet Tropics World Heritage Area in North Queensland. The flying foxes flew from the Wet Tropics World Heritage Area to feed on the lychee crop each night.

Dr Booth informed the state and federal government agencies responsible for nature conservation, but they took no action to stop the culling. She approached relevant conservation groups to take action to halt the operation of the electric grids through a public interest case, but they were unwilling to risk an adverse costs order being awarded should the case be lost. Due to the unwillingness of government regulators or conservation groups to take action, Dr Booth decided to take action herself.

Merits review is not available for decisions concerning controlled actions under the EPBC Act.

After considering the possible options to stop the culling under state and Commonwealth laws, Dr Booth made an application for an injunction under s475 of the EPBC Act. A principal reason for this choice was the lack of standing for third parties to take action against breaches of Queensland nature conservation laws at the time.[13]

The case progressed to a three-day trial before Branson J, who ultimately granted an injunction restraining the operation of the electric grids and awarded costs to Dr Booth.[14]

JUDICIAL REVIEW – THE NATHAN DAM CASE

This case involved an application for judicial review against part of a decision by the federal environment minister concerning a major dam.

In 2002, Sudaw Developments Ltd referred a proposal under the EPBC Act to construct and operate an 880,000 megalitre dam, known as the Nathan Dam, in central Queensland. The proposal was to construct the dam on a river flowing into the Great Barrier Reef World Heritage Area (GBRWHA). The dam's major purpose was to supply irrigation water to 30,000 hectares of farmland, mostly to grow cotton, and to support other development.

Concerns were raised about pollution from the farming using water from the dam flowing to the GBRWHA, but the minister refused to consider the impacts of the associated agricultural development when assessing the dam's impact under the EPBC Act. Two conservation groups sought judicial review of this refusal under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), using the widened standing provided by s487. The groups alleged that the minister had failed to consider a relevant consideration, and that his decision involved an error of law in construing the meaning of 'all adverse impacts' in s75(2) of the EPBC Act.

In the trial decision, Kiefel J found that the indirect impacts of irrigators using water supplied by the dam were impacts of the dam.[15] This result was upheld on appeal to the full court.[16] The full court held that 'all adverse impacts' of an action are all of the adverse influences or effects of the action, whether direct or indirect, including the impacts of third parties. This is a very important, general principle for environmental impact assessment in Australia.

CONCLUSION

The EPBC Act provides an extra tier of opportunities for environmental litigation, in addition to litigation under state and territory laws. Lawyers advising clients who oppose development projects should therefore be aware of the potential opportunities under the EPBC Act to improve the decision-making process and, if that fails to provide a satisfactory outcome, to litigate. Lawyers advising clients who wish to carry out medium- to large-scale development projects should also understand the extra approval requirements and possibilities for litigation under the EPBC Act.

From a developer's perspective, the best way to avoid litigation is to refer any project that may impact on a matter protected under the EPBC Act through the process it sets out. There is no avenue for merits review of decisions about referrals under the Act.

While litigation involving environmental issues will continue to occur predominantly under state and territory laws, federal environmental laws are an important avenue for litigation for lawyers to be aware of. ■

Notes: **1** See generally, www.environment.gov.au/epbc and McGrath C, 'Key concepts of the EPBC Act' (2005) 22 EPLJ 20. **2** *WPSQ Proserpine / Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736 (Dowsett J). See www.envlaw.com.au/whitsunday.html. **3** (1998) 193 CLR 72. **4** [2005] FCA 157 **5** *Save the Ridge Inc v Commonwealth* [2006] FCAFC 51. **6** The author was junior counsel in each of the cases discussed. Background information on both cases, including pleadings, is available at www.envlaw.com.au/case.html. **7** (2003) 128 FCR 418; [2003] FCA 306. **8** [2004] FCA 1317. **9** (2006) 154 FCR 425; [2006] FCAFC 116. See www.envlaw.com.au/whale.html. **10** See www.envlaw.com.au/whale.html. **11** [2006] FCA 1729. **12** See www.on-trial.info/. **13** That situation has now changed: see *Booth v Yardley* [2006] QPEC 119 and www.envlaw.com.au/yardley.html. **14** *Booth v Bosworth* (2001) 114 FCR 39 (Branson J). See also McGrath C, 'The Flying Fox Case' (2001) 18(6) EPLJ 540 and www.envlaw.com.au/ffox.html. **15** *Queensland Conservation Council Inc v Minister for Environment & Heritage* [2003] FCA 1463. **16** *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; [2004] FCAFC 190 (Black CJ, Ryan and Finn JJ). See www.envlaw.com.au/nathan.html.

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