The EPBC Act and Ramsar wetlands; an examination of the Greentrees decisions.

By Matthew Baird, Barrister, Wentworth Chambers, Sydney [1]

Introduction

The utility of the EPBC Act has had a number of significant tests in recent times. With the recent imposition of civil penalties totalling $450,000 plus legal costs together with extensive mandatory injunctions in **Minister for the Environment & Heritage v Greentree (No 3) [2004] FCA 1317 (14 October 2004)** it would seem that it has more than exceeded the dismal expectations of the conservation movement. Not only has this decision delivered a resounding result, it has also provided valuable guidance on several practical aspects of the application of the EPBC Act to Ramsar wetlands.

Background

When the Federal government proposed repealing the Environmental Protection Impact of Proposals Act it was generally perceived by environmental groups and the environmental law community as being another attempt by the Howard government to water down environmental assessment and protection in Australia. The failure of the government to heed to concerns of both industry and conservation groups to accede to Kyoto and the concerns expressed over the allocation of funds under the Natural Heritage Trust all contribute to a genuine concern over the idea that the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*'EPBC Act'*) would provide greater environmental protection.

The legislation itself was passed, despite the opposition of the Greens and ALP, after a significant number of amendments were agreed to by the Australian Democrats and the coalition. The debate lasted about 6 hours but the deal had been completed by the time the legislation had reached the Senate floor. The passage of the legislation, occurring at the same time at the debate over the GST, was a significant win for the government.[2]

Following the passage of the legislation[3] there were significant criticism of the government and the Democrats. As the conservation groups and environmental practitioners came to grips with the content of the legislation there was a great deal of the concern that the legislation would be unable to protect Australia's threatened environment. Significant concern was expressed over the question of the accreditation process and also over what activities would be determined as "key threatening processes" under the Act that would then trigger the environmental protection regime[4].

The Facts

The **Greentree** decision concerned the clearing of an area of land identified as the Windella Ramsar site.[5] The Minister contended that seven respondents damaged the Windella Ramsar site by clearing and ploughing it at some time between 27 June 2002 and 30 July 2003. It was contended by the Minister that the seven respondents had contravened s 16(1) of the *EPBC Act* by taking action that has, will have or is likely to have 'a significant impact on the ecological character of a declared Ramsar wetland'.

The Court heard that subject to certain exceptions, a '**declared Ramsar wetland**' is a wetland or part of a wetland designated by the Commonwealth under Art 2 of the *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, done at Ramsar, Iran on 2 February 1971 [1975] ATS 48 (the '**Ramsar Convention**'): *EPBC Act*, ss 17(1), 528. The Minister claims that four separate areas totalling 823 hectares, known as the 'Gwydir Wetlands: Gingham and Lower Gwydir (Big Leather) Watercourses'

1 Matthew Baird, MEIANZ, President NSW Division NELA, Barrister, Third Floor, Wentworth Chambers, Phillip Street, Sydney

2 The Bill was passed in the Senate on 23 June 1999 following a guillotine after over 400 amendments had been agreed to by the Coalition and the Democrats Senate Hansard p 6223, 23 June 1999 The Act came into force on 16 July 2000

3 The ACF, TWS and Greenpeace commented in a press release "The Democrats in particular, have faced two crucial environmental tests in the past month and they have failed both of them Their environmental credentials are in tatters They have done a dirty deal on diesel, and now a devastating deal on the environment legislation "

4 The key environment groups identified 83 key areas where the Bill was deficient See www wilderness org au/campaigns/policy/legislation/82reasons

5 Minister for the Environment & Heritage v Greentree (No 2) [2004] FCA 741, by Sackville J in the Federal Court, delivered 11 June 2004

(*'Ramsar Gwydir Wetlands'*), were duly designated by the Commonwealth under Art 2 of the Ramsar Convention, for the purposes of s 17(1) of the EPBC Act, on or about 14 June 1999. The Ramsar Gwydir Wetlands are located about 80 kilometres west of Moree in the north-west of New South Wales.

The specific allegations concerned one component of the Ramsar Gwydir Wetlands constituting an area of about 100 hectares, which was referred to in evidence as the Windella component of the Ramsar Gwydir Wetlands (the 'Windella Ramsar site'). The Windella Ramsar site is wholly within the boundaries of a property known as 'Windella' which itself comprises about 2,000 hectares.

In relation to the identities of the respondents the Court considered their respective positions at paragraphs [5] to [7].

The Minister sought penalties against three "Principal Respondents" Mr Greentree, Merrywinebone (a farming partnership) and Auen Grain Pty Ltd. Orders were also sought against all the respondents restraining them in the following terms from:

- engaging in land clearing, ploughing or cropping activities disturbing or affecting the soil inside and up to 40 metres outside the Windella Ramsar site;
- engaging in similar activities disturbing or affecting the soil within 40 metres 'on either side of the entire length of the watercourse' on Windella in and leading into the Windella Ramsar site; and
- engaging in any work designed to alter the flow regime of waters into and out of the Windella Ramsar site.

Further orders were sought to undertake specific repairs measures.

The legislation

Under the EPBC Act s.16 provides that a person must not take action that

> *(a)has or will have a significant impact on the ecological character of a declared Ramsar wetland; or*
> *(b)is likely to have a significant impact on the ecological character of a declared Ramsar wetland.*

The Act provides for civil penalties of 5,000 penalty units for an individual or 50,000 penalty units for a body corporate[6]. Under s.17B of the EPBC Act it is an offence to take action that results or will result in a significant impact on the ecological character of a declared Ramsar wetland. However the current case was a civil action seeking penalties and orders.

Section 481(1) of the *EPBC Act* provides that the Minister may apply on behalf of the Commonwealth to the Federal Court for an order that a person contravening a civil penalty provision pay the Commonwealth a pecuniary penalty. Section 16(1) is a civil penalty provision.

Section 475 of the *EPBC Act* empowers the Court to grant injunctions. It relevantly provides as follows:

> *'(1) If a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of this Act or the regulations:*
>
> *(a) the Minister; or*
>
> *(b) ...*
>
> *(c) ...*
>
> *may apply to the Federal Court for an injunction.*
>
> *(2) If a person has engaged, is engaging or is proposing to engage in conduct constituting an offence or other contravention of this Act or the regulations, the Court may grant an injunction restraining the person from engaging in the conduct.*

6 A penalty unit is defined by s 4AA(1) of the *Crimes Act 1914* (Cth) to mean $110. It follows that the maximum civil penalty for breach of s 16(1) of the *EPBC Act* is $550,000 in the case of an individual and $5,500,000 in the case of a body corporate.

(3) If the court grants an injunction restraining a person from engaging in conduct and in the Court's opinion it is desirable to do so, the Court may make an order requiring the person to do something (including repair or mitigate damage to the environment).

(4) If a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail to do an act, and the refusal or failure did, does or would constitute an offence or other contravention of this Act or the regulations, the Court may grant an injunction requiring the person to do the act.'

The heading to s 17 is 'What is a declared Ramsar wetland?' Section 17(1) answers that question as follows:

'A wetland, or part of a wetland, designated by the Commonwealth under Article 2 of the Ramsar Convention for inclusion in the List of Wetlands of International Importance kept under that Article is a ***declared Ramsar wetland*** *as long as the wetland or part is not:*

(a) excluded by the Commonwealth from the boundaries of a wetland in the List under that Article; or

(b) deleted by the Commonwealth from the List under that Article.'

The *Ramsar Convention*, for the purposes of s 17(1), means the text of the *Convention* as in force immediately before the commencement of the *EPBC Act*: s 528.

Section 17(2) of the *EPBC Act* provides that a wetland is also a declared Ramsar wetland if a declaration to that effect made by the Minister is in force. Section 17A empowers the Minister to make such a declaration if satisfied that the wetland is of international significance. No Ministerial declaration had been made in respect of the Gwydir Wetlands.

In the case before Sackville J there was significant discussion over whether the Windella Ramsar site had been properly included in the list of Ramsar site and over the accuracy of the identification of the site under the EPBC.

A further argument advanced by the respondents was that s.16(1) of the EPBC Act did not apply to their actions because of theses activities were excluded by operation of s.16(2)(b) of the Act.

Section 16(2)(b) provides that s 16(1) does not apply to an action if Part 4 lets the person take the action without an approval under Part 9. Section 43A of the *EPBC Act* is in Div 6 of Part 4. It provides as follows:

'(1) A person may take an action described in a provision of Part 3 without an approval under Part 9 for the purposes of the provision if:

(a) the action consists of a use of land...and

(b) the action was specifically authorised under a law of...a State...before the commencement of this Act; and

(c) immediately before the commencement of this Act, no further environmental authorisation was necessary to allow the action to be taken lawfully.'

*Section 43A(2) defines '**environmental authorisation**' to mean, relevantly:*

'an authorisation under a law of...a State...that has either or both of the following objects (whether express or implied):

(a) to protect the environment;

(b) to promote the conservation and ecologically sustainable use of natural resources.'

The term 'action', which is used in both ss 16 and 43A of the *EPBC Act*, is defined in s 523 to include:

(a) a project; and

(b) a development; and

(c) an undertaking; and

(d) an activity or series of activities; and

(e) an alteration of any of the things mentioned in paragraph (a), (b), (c), or (d).'

Section 524(2), however, provides that:

> *'A decision by a government body to grant a governmental authorisation (however described) for another person to take an action is not an* ***action****.'*

The expression 'government body' is defined to include a State, but does not mention a State agency or a body established under State law: s 524(1).

The Respondents defences

The Court recited in detail the provisions of the Ramsar Convention[7] and then considered the challenge to the sufficiency of the Minister's evidence by the respondents and the two "affirmative" defences advanced by the respondent [46]. These were set out at [47] to [49] of the judgment.

The Court noted that:

43 The respondents did not dispute the following facts:

(i) On 7 September 2002, Ms Francesca Andreoni, New South Wales Campaign Manager for the Wilderness Society, made an observation flight over Windella, in the course of which she observed that

- dredging of the Gingham channel (referred to at [61] below) had occurred within the Windella Ramsar site; and
- spoil had been piled on the northern side of the channel.

(ii) On 15 October 2002, a ground inspection revealed that approximately 20 per cent of the Windella Ramsar site in the north-eastern portion had been cleared of all ground cover and that the Gingham channel had been dredged and spoil stacked on the northern side of the channel.

(iii) On 13 December 2002, Mr Greentree, at a landholder meeting at the Mungindi Returned Servicemen's League ('RSL') Club asserted that he had 'notified [the Minister] that the [Windella Ramsar site] no longer exists on Windella'.

(iv) In February 2003, Mr Greentree instructed Mr Andrew Jones, the then farming operations manager of Greentree Farming, to clear and plough Windella in preparation for a seedbed. Most of the remaining uncleared and unploughed land on the Windella Ramsar site was cleared of ground cover and ploughed in late February or March 2003 in order to prepare a seedbed.

(v) On 30 July 2003, a ground inspection revealed that the entire Windella Ramsar site had been cleared of all ground cover and ploughed.

(vi) On 16 August 2003, a further ground inspection revealed that the Windella Ramsar site had been sown with wheat.

(vii) The clearing, ploughing and sowing carried out on the Windella Ramsar site on dates between 27 June 2002 and 16 August 2003 had an impact on the ecological character of the Windella Ramsar site.

The two "affirmative defences" were advanced by the Respondents and set out by the Court as follows:

47 First, the respondents submitted that the Windella Ramsar site had never been 'designated by the Commonwealth under Article 2 of the Ramsar Convention' within the meaning of s 17(1) of the *EPBC Act*. This was so, they argued, because the purported designation neither described precisely the boundaries of the relevant wetland, nor delimited it on a map, as required by Art 2 of the *Ramsar Convention*. At no time had the Commonwealth remedied this deficiency, with the consequence that the affected landholders could not ascertain the boundaries of the Ramsar sites on their land. Thus the Windella Ramsar site was not a 'declared Ramsar wetland' as defined in s 17(1) of the *EPBC Act*. It followed that the respondents could not have contravened s 16(1) of the *EPBC Act*, since their actions did not affect a 'declared Ramsar wetland'.

7 The *Ramsar Convention* was concluded at Ramsar, Iran, on 2 February 1971 It was signed by Australia on 8 May 1974 and entered into force on 21 December 1975 Art 10(1) The terms of the *Ramsar Convention* were reproduced in the judgment at [28]-[42] see Australian Treaty Series 1975, No 48 ([1975] ATS 48)

48 Secondly, the respondents submitted that s 16(1) of the *EPBC Act* did not apply to their conduct by reason of s 16(2)(b). The contention involved the following steps:

(i) s 16(2)(b) provides that s 16(1) does not apply to an action if Part 4 of the EBPC Act lets the person take the action without an approval under Part 9;

(ii) s 43A(1) (which is in Part 4) permits a person to take an action described in a provision in Part 3 (which includes s 16) without an approval under Part 9, if the action 'was specifically authorised under a law of...a State' before the commencement of the *EBPC Act* and immediately before the commencement no further 'environmental authorisation' was necessary to enable the action to be taken lawfully;

(iii) the respondents' actions in clearing the Windella Ramsar site were specifically authorised under

- the *Environmental Planning and Assessment Act 1979* (NSW) (*'**EPA Act**'*), and
- the *Noxious Weeds Act 1993* (NSW) (*'**Noxious Weeds Act**'*);

each of which was a law of the State of New South Wales enacted before the *EBPC Act*; and

(iv) no further environmental authorisation was necessary immediately before the commencement of the *EBPC Act* to allow the actions to be taken lawfully under those State laws.

49 The claim that the respondents' actions in clearing the Windella Ramsar site were specifically authorised under the *EPA Act* rested on the terms of the Moree Plains Local Environmental Plan 1995 ('**Moree LEP**') made under the *EPA Act*. Under the Moree LEP, the property Windella was zoned 'General Rural Zone No 1(a)'. The Moree LEP provided that such land could be developed, without development consent, for the purpose of agriculture. It was argued that since the clearing and cultivation of land and slashing of vegetation was carried out in the course of agricultural activities, the Moree LEP specifically authorised the clearing of the Windella Ramsar site at the time the *EPBC Act* came into force. No further environmental authorisation was required because (so it was said) the *Native Vegetation Conservation Act 1997* (NSW) (the *'**Native Vegetation Act**'*), which restricted the rights of landowners to clear native vegetation, did not apply to the clearing of the Windella Ramsar site. The *Native Vegetation Act* was inapplicable because, on the evidence, the ground cover on the site was dominated by lippia, an exotic plant, and any trees were dead.

50 In the alternative, the respondents relied on the obligation imposed by s 12 of the *Noxious Weeds Act* on the occupier of land (including the proprietors) to control noxious weeds, as required by the control category specified in relation to the weeds concerned. Since lippia had been declared to be a noxious weed for the purposes of the *Noxious Weeds Act*, the respondents were under a duty to remove it from the Windella Ramsar site. This amounted to a specific authorisation to clear the site without the need for any further environmental authorisation.

The importance of the second argument is clear in that there are also many LEP's that allow, in rural area, agriculture without development consent. That has been raised as a defence to a charge of clearing of native vegetation under the Native Vegetation Conservation Act 1997 (NSW). However in the case of **Oates & Anor v Director General of the Department of Infrastructure Planning and Natural Resources [2004] NSWLEC 164**, Lloyd J dismissed the claim that the Moree Plains LEP as subordinate legislation made under Pt 3 Div 1 of the Environmental Planning and Assessment act could override the operations of the Native Vegetation Conservation Act 1997 holding at [6] "It is a principle of statutory interpretation that subordinate legislation, cannot override the operation of an Act. This principle was applied by Kirby P in *Water Board v Glambedakis* (1992) 28 NSWLR 694 at 701-702 and by Pearlman J in *Nymboida Shire Council v Skar Industries Pty Limited & Anor* (NSWLEC, Pearlman J, 7 March 1997, unreported)."

The Federal Court's decision

(1) Was the site 'designated' under the Convention?

The Court considered carefully the evidence presented to it that led to the final listing of the site unde the Ramsar Convention. Significant evidence was tendered that went to the manner and method followed in identifying the area that should have been part of the wetland.

Sackville J held:

> 117 The provisions in the *EPBC Act* relating to declared Ramsar wetlands are supported by s 51(xxix) of the *Constitution*, which empowers the Parliament to make laws with respect to 'External affairs'. The drafting of the *EPBC Act* reflects an appreciation of the need for legislation implementing a treaty to which Australia is a party to give effect to the treaty by means capable of being reasonably considered appropriate and adapted to that end: *Richardson v Forestry Commission* (1988) *164 CLR 261*, at 289, per Mason CJ and Brennan J; at 300, per Wilson J; at 311-312, per Deane J; at 342, per Gaudron J. This can be seen in repeated references in the *EPBC Act* to the requirement that actions taken by the Commonwealth in relation to declared Ramsar wetlands be consistent with the *Ramsar Convention*: see, for example, ss 334(2), 335(2).
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> 118 The *EPBC Act* must be construed against the background of the *Ramsar Convention* itself. Article 2(1) imposes an obligation upon each Contracting Party to designate suitable wetlands within its territory for inclusion on the List maintained by the Bureau established under Art 8. Each Contracting Party is obliged to designate at least one wetland to be included in the List when signing the *Convention* or depositing its instrument of ratification (Art 2(4)). Article 2(2) specifies the criteria to be applied in the selection of wetlands for the List. Each Contracting Party has the right to add to the List further wetlands or, because of its urgent national interests, to delete or restrict the boundaries of wetlands already included by it in the List (Art 2(5)). A Contracting Party has obligations to promote the conservation of wetlands in its territory included in the List (Art 3).

His Honour then considered the differences between the operation of the Ramsar Convention and the provision governing the *Convention for the Protection of the World Cultural and Natural Heritage.*

> 119 It will be seen that the *Ramsar Convention* operates in a different manner from the *Convention for the Protection of the World Cultural and Natural Heritage* considered in, among other cases, *Queensland v Commonwealth* (1989) 167 CLR 232. Under the *World Heritage Convention*, each State Party has the responsibility to identify and delineate properties within its own territory which are part of the cultural or natural heritage. However, a property can be included in the World Heritage List only if the World Heritage Committee considers that the property has outstanding universal value in accordance with certain guidelines. Thus the Committee exercises a 'gateway' function in determining whether a property should be placed on the World Heritage List.
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> 120 By contrast, the role of the Bureau pursuant to Art 8 (2)(b) of the *Ramsar Convention* is to maintain the List and **be informed** by the Contracting Parties of any additions or deletions concerning wetlands included in the List in accordance with Art 2(5). The bureau is also required to forward notification of any alterations to the List to all Contracting Parties (Art 8(2)(d)). This limited role is consistent with each Contracting Party's **right** under Art 2(5) to add further wetlands to the List or, in defined circumstances, to remove wetlands from the List.

A consequence of this distinction was that, in the opinion of Sackville J:

> 127 In my view, s 17(1) of the *EPBC Act*, read in context, is not intended to incorporate any particular requirement derived from Art 2 of the *Ramsar Convention* as a precondition for the valid designation of a wetland for inclusion in the List. It must be remembered that Art 2 obliges the Commonwealth, as a Contracting Party, to designate at least one wetland for inclusion in the List and gives it the right to add further wetlands to the List. The Bureau's role is confined, for present purposes, to maintain the List and act on information provided by Contracting Parties. Bearing this in mind, it seems to me that the expression 'under Article 2 of the Ramsar Convention for inclusion in the List', as used in s 17(1), is intended only to identify the source of the Commonwealth's obligation or right to designate a wetland of international significance for inclusion in the List.

As a result, on the contention that the Windella wetland had not been validly designated as a Ramsar wetland, his Honour concluded:

> 132 In any event, I do not think that the assumption underlying the respondents' submissions is sound. In my view, Art 2(1) of the *Ramsar Convention* does not require a Contracting Party to provide a precise description of the boundaries of a wetland and a map delimiting those boundaries as a pre-condition for a valid designation of a wetland under the *Convention.* Clearly enough a Contracting

Party designating a wetland is obliged by the *Ramsar Convention* to provide the information specified in Art 2(1). But that does not mean that the consequence of a failure to provide the information concerning a wetland is that the designation process is ineffective to attract the rights and duties flowing from the inclusion of the wetland in the List.

133 As McHugh J explained in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, at 252-256, the correct approach to treaty interpretation, in the light of Art 31 of the *Vienna Convention on the Law of Treaties*, is to examine the 'ordinary meaning' of the treaty and the 'context...object and purpose of the treaty'. Taking into account the context, object and purpose (at 255)

'is consistent with the general principle that international instruments should be interpreted in a more liberal manner than would be adopted if the court were required to construe exclusively domestic legislation'.

It is also necessary to take into account any subsequent agreement between the parties regarding the interpretation of the treaty and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation: Art 31(3) of the *Vienna Convention.*

Sackville J concluded that "the material supplied by the Minister was sufficient for an interested person to ascertain, albeit by the application of some skill, the co-ordinates for each of the four corners of the site. This in my view was adequate to satisfy Art 2(1) of the *Ramsar Convention*." [137]

(2) Where the actions specifically authorised by State law?

His Honour then turned to the submission that s.16(1) of the EPBC did not apply to the action carried out on the Windella Ramsar site as they were actions within s.43A(1) of the EPBC Act.

In making his decision Sackville J asked the question of whether the Respondents' actions were specifically authorised under NSW state law. The Court considered the operation of the law as at 16 July 2000 and examined the EP&A Act and the Moree LEP.

It was accepted that under the Moree LEP "agriculture" was a purpose for which development consent was not required under the provision of the 1(a) (General Rural) zone of the subject land. The Court considered the meaning of the word 'under' and whether the fact that an action was permissible meant that it had been "specifically authorised under a law of the ...State".

Sackville J held:

153 The language of s 43A(1)(b) of the *EPBC Act* implies that there is a distinction between an action which is authorised under an Act and one which is specifically authorised. It may well be that the Minister is correct to submit that an action is not 'specifically authorised' for the purposes of s 43A(1)(b) unless the relevant instrument (in this case the Moree LEP, read with s 76(1) of the *EPA Act*) authorises particular activities on a particular site. But that in my view does not mean that the authorisation must only relate to a single site or to a single activity on land. It is in my view enough that the authorisation covers a defined class of activities or identifiable land which includes the subject land.

154 In this case, Windella was zoned 'Rural General' by the Moree LEP, an instrument made pursuant to the *EPA Act*. The zoning of Windella was effected by a map which specifically identified land within the area of Moree Plains Shire Council that was zoned 'Rural General'. The map showed that Windella was part of the land zoned 'Rural General'. The Moree LEP identified particular activities that could be undertaken on land zoned Rural General without development consent. Section 76(1) of the *EPA Act* states that if the environmental planning instrument provides that 'specified development' may be carried out without development consent, a person may carry out the development in accordance with the instrument. In my opinion, at the relevant dates, the Moree LEP, read with s 76(1) of the *EPA Act*, specifically authorised agriculture on Windella, including the Ramsar Windella site. The agricultural activities so authorised included clearing and cultivation and slashing vegetation.

> 155 It follows that the actions of the respondents (or those of them responsible for clearing and cultivating the Ramsar Windella site) were specifically authorised under a law of the State, namely the *EPA Act*.

However the Minister contended that this was not the end of the matter as that even if the respondents' actions had been specifically authorised under a State law before the commencement of the *EPBC Act* (s 43A(1)(b)), at that time a further environmental authorisation was necessary to allow the actions to be undertaken lawfully (s 43A(1)(c)). This further authorisation was required because of the operation of the *Native Vegetation Act*[8],("the NVC Act") which commenced on 1 January 1998 (that is, before the commencement date of the *EPBC Act*). It was contended by the Minister that s 21(2) of the *Native Vegetation Act* prohibited the clearing of the Ramsar Windella site without authority and that the respondents had obtained no such authority for their actions. Thus those actions were unlawful in the absence of further environmental authorisation.

Under the NVC Act section 21(2) provides that a person must clear native vegetation on any land except in accordance with a development consent that is in force or a native vegetation code of practice. The Court held that the evidence established that no development consent was in force at the relevant time authorising the clearing of the site.

Having considered an argument by the respondents as to the type of vegetation that may or may not have been found on the site, Sackville J concluded that evidence established that the site was a 'wetland' as defined in s.4(1) of the NVC Act, in addition the Court concluded that the site also had indigenous vegetation in the form of trees, namely coolabah and casuarina. These all fell within the definition of native vegetation in s.6 of the NVC Act.

His Honour concluded:

> 178 I conclude, therefore, that at the relevant time the respondents (or anyone else) required development consent under the *Native Vegetation Act* before they could clear the native vegetation on the Windella Ramsar site. The development consent required under the *Native Vegetation Act* is an 'environmental authorisation' for the purposes of s 43A(2) of the *EPBC Act*. This is because it is an authorisation under a law of New South Wales (the *Native Vegetation Act*) that plainly has the object of protecting the environment or promoting the conservation and ecologically sustainable use of natural resources. Mr Littlemore did not submit to the contrary

In relation to the question of whether the actions were authorised under the Noxious Weeds Act his Honour considered that arguments and concluded:

> 186 I am prepared to assume that the obligation imposed on the occupier of land by s 12 of the *Noxious Weeds Act* amounted to the specific authorisation of such action by the occupier as may be required to prevent the spread of lippia to an adjoining property (*EPBC Act*, s 43A(1)(b)) and that such action required no further environmental authorisation (s 43A(1)(c)). The difficulty facing the respondents, however, is that, on the agreed facts, the entire Windella Ramsar site was cleared in late July 2003 and within a short time thereafter had been sown with wheat. On no view can this conduct be described as 'action required under control category [W4c]' for the purposes of s 12 of the *Noxious Weeds Act*. Nor can it be described as a 'clearing authorised under the *Noxious Weeds Act*' for the purposes of s 12(c) of the *Native Vegetation Act*. Doubtless clearing and cultivating land has the effect of removing lippia and therefore preventing it from spreading to an adjoining property. But so would the destruction of an entire wetland containing a small amount of lippia. Section 12 of the *Noxious Weeds Act* must be read as requiring action limited to what is reasonably necessary to control noxious weeds to the extent envisaged by the relevant declaration. Plainly the actions taken on the Windella Ramsar site were not reasonably necessary to prevent the spread of lippia to adjoining properties. They were designed to cultivate the land with wheat. The conduct went well beyond what was required or authorised under the *Noxious Weeds Act*.
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> 187 It follows that the respondents' actions were not specifically authorised under a law of New South Wales for the purposes of s 43A(1)(b) of the *EPBC Act*.

8 Although the judgment cites the Native Vegetation Act as the Native Vegetation Conservation Act 1997 (NSW) it is made confusing by the passage of the Native Vegetation Act 2003 that was assented to onll December 2003 but has not yet been proclaimed.

(3) Was there a significant impact on the ecological character of the wetland?

However the EPBC prohibits an action that has or will have a "significant impact on the ecological character of a declared Ramsar wetland". The Court then considered the expression of 'significant impact'.

The Court held that it is a question of fact as to whether any particular action or actions has had or will have a significant impact on the ecological character of a declared Ramsar wetland. The outcome of that inquiry must, of course, take account of the broad definition of 'ecological character'. Section 12(1) of the *EPBC Act* prohibits the taking of an action that has or will have a 'significant impact' on the world heritage values of a declared World Heritage property. In *Booth v Bosworth* (2001) 114 FCR 39, Branson J recorded (at 65 [99]) the parties' agreement, based on a number of Australian authorities, that a 'significant impact' is 'an impact that is important, notably or of consequence having regard to its context or intensity'. [9]

The Court noted that the activities had occurred over a 13 month period and that it was difficult to assess the condition of the site prior to the clearing. This has been an issue raised in many SEPP 46 and NVC Act prosecutions where the pre-existing ecological values of the site can only be assessed by a post-clearing reconstruction. As the Court observed at 197:

> 197 It follows that the applicant cannot establish that any of the respondents have contravened s 16(1) of the *EPBC Act* unless the evidence shows that the clearing, ploughing and sowing carried out on the site in February and March 2003 had a significant impact on the ecological character of the site immediately before those activities took place. I accept that Mr Littlemore's submission that it is necessary to have a 'base line' in order to assess the impact of those activities on the ecological character of the Windella Ramsar site. That is, it is necessary to determine whether, immediately before the activities took place, the biological, physical and chemical components of the site gave it significance as an element of the Gwydir wetland eco-system. This does not necessarily mean, however, that the evidence must include a comprehensive and precise description of the ecological character of the site at a particular date (although, doubtless, that would have been helpful). Even without such a description, the evidence may be sufficient to enable the requisite assessment of the significance of the site and the impact of actions on its attributes as a wetland to be made.

Having had expert evidence before him, Sackville J concluded that the actions had a significant impact on the ecological character of the Windella Ramsar site.

(4) Who took the prohibited action?

The evidence in its totality also persuaded the Court that it was Mr Greentree who took the actions and yet there was not sufficient evidence as against Merrywinebone or that the directors of Merrywinebone were informed of the proposed actions.

In relation to Auen Grains Pty Ltd, the Court held at 213:

> 213 Auen's position is, however, different from that of Merrywinebone. Mr Greentree is the controlling mind of Auen. He is the sole director and the only shareholder except for Prime Grain Pty Ltd which he also controls. Auen has the majority interest in the Greentree Farming partnership, which farms Windella. Mr Greentree's actions were carried out in order to advance Auen's interests as a partner in Greentree Farming.
>
> 214 On the principle articulated in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170-171, per Lord Reid, the actions taken by Mr Greentree were also those of Auen: see *Hamilton v Whitehead* (1988) 166 CLR 121, at 127, per Mason CJ, Wilson and Toohey JJ. Therefore Auen, like Mr Greentree, took actions which had a significant impact on the ecological character of the Windella Ramsar site, in contravention of s 16(1) of the *EPBC Act*. It follows that Auen has engaged in conduct consisting of a contravention of the *EPBC Act*. Thus the precondition to s 475(1) of the *EPBC Act* has been satisfied and the Minister may seek injunctive relief against Auen.

9 The Court noted at [191] The expression 'context or intensity' appears to be derived from the United States *National Environmental Policy Act* 42 USC SS 4332(2)(C) see *National Parks and Conservation Association v Babbitt* 241 F3d 722 (9th Cir 2001), at 731 v

215 Another way of addressing Auen's position is to do so from the perspective of the construction of s 16(1) of the *EPBC Act: Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 198 ALR 657, at 726 [342], per Heerey and Sackville JJ. Where the sole director and, in effect, the sole shareholder of a company takes action in the interests of the company and those actions have a significant impact on the ecological character of a declared Ramsar wetland, the company itself takes the action for the purposes of s 16(1) of the *EPBC Act*. To hold otherwise, in my opinion, would frustrate the objectives of the legislation.

This is of particular significance in relation to cases where individuals seek to hide behind the corporate shield.

(5) Penalties

Having held that Mr Greentree and Auen Grain Pty Ltd had contravened s.16(1) of the EPBC Act his Honour concluded that each was liable to a penalty under ss 16 and 481 of the Act and also for injunctive relief under s 475(2).

Judgment was delivered on 11 June 2004 and the orders required the parties come before the Court within 14 days with short minutes of orders consistent with the judgment. However the judgment on penalty was only delivered on 14 October 2004, **Minister for the Environment & Heritage v Greentree (No 3) [2004] FCA 1317**.

The findings included that Mr Greentree pay to the Commonwealth within 60 days of the orders a pecuniary penalty of $150,000 and the Auen Grain Pty Ltd pay to the Commonwealth within 60 days of these orders a pecuniary penalty of $300,000. Additionally there were orders made to prevent further actions likely to cause harm to the Windella Ramsar site and other orders for regeneration of the site.

In its consideration of penalty the Court observed that the Court's power to impose civil penalties is conferred by s 481(2) of the *EPBC Act*. If satisfied that a person has contravened a civil penalty provision (including s 16(1)), the Court may order the wrongdoer to pay to the Commonwealth, for each contravention, the pecuniary penalty that the Court determines is appropriate, being not more than the specified maximum.

Section 481(3) of the *EPBC Act* provides as follows:

> *'In determining the pecuniary penalty, the Court must have regard to all relevant matters, including:*
>
> *(a) the nature and extent of the contravention; and*
>
> *(b) the nature and extent of any loss or damage suffered as a result of the contravention; and*
>
> *(c) the circumstances in which the contravention took place; and*
>
> *(d) whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.'*

The criteria specified in s 481(3) of the *EPBC Act* are very similar to those specified in s 76(1) of the *Trade Practices Act 1974* (Cth) ('*TP Act*'), which governs the determination of pecuniary penalties for contraventions of certain provisions of the *TP Act*.

In relation to some of the orders sought by the Minister, including the engaging of a tree planting contractor and the planting of 1,000 seedlings and the carrying out of a survey on the wetland, it was conceded that the Proprietors of the land could not be compelled to consent to the planting of trees on the Windella Ramsar site. Sackville J had previously held that the evidence to show that the proprietors authorised the clearing of the wetland and held that the evidence did not establish in accordance with s 475(1) and (2) of the EPBC Act that the proprietors were engaged in or proposing to engage in conduct in contravention of the EPBC Act.[10] As a consequence there was no basis for orders to compel the planting as against the proprietors.

10 See **Minister for the Environment & Heritage v Greentree (No 2) [2004] FCA 741** at [219].

On the question of pecuniary penalties Mr Fagan SC submitted that the contraventions by Mr Greentree and Auen of s 16(1) of the *EPBC Act* were in the 'worst category', warranting the imposition of the maximum pecuniary penalty, or at least a penalty close to the maximum. Mr Littlemore QC, by contrast, submitted that the contraventions were the product of an honest mistake and that Mr Greentree and Auen would incur sufficient penalties by an adverse costs order. He contended, therefore, that no pecuniary penalties should be imposed.

It was also submitted by Mr Fagan that there were aggravating circumstances [34] including that it was a deliberate clearing despite a clear knowledge of Mr Greentree's obligations under the EPBC Act.

The parties accepted "that the approach that had been applied in proceedings for pecuniary penalties under the *TP Act* was appropriate, subject to any necessary adaptations, to proceedings for pecuniary penalties under the *EPBC Act*." (see [50]).

Sackville J considered the role of the Court as follows:

> 51 In *TPC v CSR* French J set out a checklist of matters which subsequent cases have regarded as appropriate to take into account in proceedings for pecuniary penalties under the *TP Act*. Apart from the matters expressly mentioned in s 76(1), the checklist includes the following (at 52,152-52,153):
>
> '• The size of the contravening company.
>
> • The degree of power it has, as evidenced by its market share and ease of entry into the market.
>
> • The deliberateness of the contravention and the period over which it extended.
>
> • Whether the contravention arose out of the conduct of senior management or at a lower level.
>
> • Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
>
> • Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of *the Act* in relation to the contravention.'
>
> 52 In *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, Burchett and Kiefel JJ (with whom Carr J generally agreed) endorsed French J's checklist, although their Honours (at 292) regarded the list as an elaboration of the statutory requirement to consider 'the circumstances in which the act or omission took place' (cf 481(3)(c) of the *EPBC Act*).
>
> 53 In *NW Frozen Foods* the Court expressed the view that the deterrent effect of a penalty, both specific and general, is a factor to take into account in determining the appropriate penalty in a particular case. Burchett and Kiefel JJ said (at 294-295):
>
> *'The Court should not leave room for any impression of weakness in its resolve to impose penalties sufficient to ensure the deterrence, not only of the parties actually before it, but also of others who might be tempted to think that contravention would pay, and detection lead merely to a compliance program for the future.'*

There was some discussion of the principles involved as to whether the purposes of imposing a pecuniary penalty include punishment. His Honour made reference to a recent High Court case in *Rich v Australian Securities and Investment Commission* (2004) 209 ALR 271, at 280-281 [32], the High Court observed that '[a]t best, the distinction between "punitive" and "protective" is elusive'.

In assessing the penalty to be imposed Sackville J made a number of conclusions:

a) Both Mr Greentree and Auen knew that the contravention with have a significant impact on the wetland [59];

b) The actions were deliberate, it was more than "an isolated act of the kind that might occur as the result of an impulsive error of judgment" [61];

c) In mitigation the site was not a "pristine wetland" [62];

d) The actions caused "significant ecological damage" [63];

e) The evidence did not suggest that either of the respondents gained a substantial financial reward but that it was part of a commercial operation [65];

f) Neither the respondents had engaged in previous similar conduct under the EPBC Act [67];

g) The maximum penalties of $550,000 for an individual and $5,500,000 for a corporation reflect the 'public expression' by Parliament of the seriousness of the offence: *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683, at 698, per Kirby P (with whom Campbell and James JJ agreed); see also *Hayes v Weller (No 2)* (1988) 50 SASR 182, at 187, per Perry J (with whom King CJ and Jacobs J agreed) [68];

h) The penalties should act both as a specific deterrent and a public deterrent to others [69];

i) There was no "unqualified acknowledgment that their conduct was wrong. Nor have they expressed regret at the environmental damage that their conduct has caused". [71];

j) There was no evidence to suggest that there was no capacity to pay the penalties imposed [75];

k) The fact that the respondents would also have to pay the costs of the proceedings was not a factor to be taken into account to reduce the penalties imposed [76];

l) It was appropriate to take that fact into account in order to prevent Mr Greentree being punished, in effect, twice over as the sole shareholder (in effect) of Auen [78];

m) In imposing penalties for more than one offence that Court must ensure that the aggregate penalties are "just and appropriate", per *Mill v The Queen* (1988) 166 CLR 59, at 62-63, *per curiam; Pearce v The Queen* (1998) 194 CLR 610, at 623-624, per McHugh, Hayne and Callinan JJ [79].

The Court held that the cases involved deliberate and sustained contraventions by Mr Greentree and Auen but not such as to place the conduct in the worst category of contraventions. The Court imposed a penalty of $150,000 on Mr Greentree and $300,000 on Auen Grain Pty Ltd.

The Court imposed an order for cost against Mr Greentree and Auen but also order the Minister to pay the costs as against the other successful respondents.

This was a significant case and a clear win for the effectiveness of the EBPC Act as an environmental protection statute. The Court imposed significant penalties against the respondents found responsible for the actions. It is also likely that the penalties will be seen as being a deterrent to those who would deliberately contravene the EPBC Act.