

Speech by the Hon. Justice Brian J Preston SC*

“Protected Areas in the Courts: An Overview”

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Introduction

The conservation of biological diversity – the variety of ecosystems, species and genetic material – requires both in-situ and ex-situ conservation. In-situ conservation involves conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings.¹ An important means of in-situ conservation is establishing and managing protected areas. The IUCN has defined a protected area as:

A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long term conservation of nature with associated ecosystem services and cultural values.²

IUCN has developed several categories of protected areas, which are classified according to their management objectives. These are: Ia) Strict Nature Reserve;³ Ib) Wilderness Area;⁴ II) National Park;⁵ III) Natural Monument or Feature;⁶ IV)

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¹ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1970 UNTS 79 (entered into force 29 December 1993) art 2.

² IUCN, ‘What is a protected area’ (4 November 2013)

<http://www.iucn.org/about/work/programmes/gpap_home/pas_gpap/> accessed 20 October 2014.

³ IUCN, ‘Protected Areas Category Ia’ (22 January 2014)

<http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/gpap_cat1a/> accessed 20 October 2014.

⁴ IUCN, ‘Protected Areas Category Ib’ (22 January 2014)

<http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/gpap_category1b/> accessed 20 October 2014.

Habitat/Species Management Area;⁷ V) Protected Landscape/Seascape;⁸ and VI) Protected area with sustainable use of natural resources.⁹

The achievement of in-situ conservation of biological diversity depends on the commitment and involvement of all branches of government – the legislature, executive and judiciary – as well as other relevant stakeholders. The function of the legislature is to legislate, to create both statutes and subordinate legislation such as regulations, to establish systems of protected areas. These are the laws that provide for the establishment and management of terrestrial and marine protected areas. The function of the executive is to execute the laws, both legislation and the common law, concerning protected areas. The executive identifies, nominates, dedicates and manages protected areas in accordance with the protected area laws, and enforces those laws.

The function of the judiciary is to judge, to resolve disputes by adjudication. Judging disputes involves finding, interpreting and applying the protected area laws. The judiciary protects and upholds the rule of law. Upholding the rule of law involves upholding and enforcing laws, properly made and within power, concerning protected areas. In this way, courts ensure good governance, which promotes ecologically sustainable development.

This paper explores the critical role the judiciary plays in interpreting, applying, upholding and enforcing laws relating to protected areas. It does so by examining the cases that the courts, particularly in Australia and New Zealand, have determined involving disputes over protected areas and protected area laws. The cases may be

⁵ IUCN, 'Protected Areas Category II' (22 January 2014) <http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/gpap_pacategory2/> accessed 20 October 2014.

⁶ IUCN, 'Protected Areas Category III' (22 January 2014) <http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/gpap_category3/> accessed 20 October 2014.

⁷ IUCN, 'Protected Areas Category IV' (22 January 2014) <http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/gpap_category4/> accessed 20 October 2014.

⁸ IUCN, 'Protected Areas Category V' (22 January 2014) <http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/gpap_category5/> accessed 20 October 2014.

⁹ IUCN, 'Protected Areas Category IV' (22 January 2014) <http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/gpap_category6/> accessed 20 October 2014.

grouped into five categories: 1) cases challenging decisions to identify, nominate or declare a protected area; 2) cases challenging decisions to permit or prohibit an activity in a protected area; 3) cases concerning the enforcement of laws protecting a protected area; 4) cases involving activities not directly within a protected area, but which may nevertheless have an impact on a protected area either through upstream or downstream impacts, or by impacting on a 'buffer zone' to a protected area; and 5) cases against public agencies who are responsible for protecting protected areas, based on the doctrine of the 'public trust'.

Identification, nomination and declaration of a protected area

The first category is cases challenging decisions to identify, nominate or declare a protected area. This section will discuss decisions concerning the identification, nomination and inclusion of properties in the World Heritage List, pursuant to the World Heritage Convention, and a decision on a refusal to declare a protected area.

*Richardson v Forestry Commission*¹⁰ concerned the first stage of identification of an area as a potential world heritage property. The High Court of Australia considered the validity of the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 (Cth)* ('Commission of Inquiry Act'). The Commission of Inquiry Act provided for the establishment of a Commission of Inquiry to ascertain whether the Lemonthyme area and the Southern Forests area in Tasmania ('the protected area') were, or contributed to, a world heritage area. Section 16 of the Commission of Inquiry Act prohibited certain actions in the protected area during an interim protection period whilst the inquiry was being undertaken. Richardson, the Commonwealth Minister for the Environment and the Arts, commenced an action against the Tasmanian Forestry Commission and a timber company, alleging that they had done acts which were unlawful under s 16 of the Commission of Inquiry Act, and sought injunctions restraining the defendants from doing those acts during the interim protection period.

The plaintiff contended that the Commission of Inquiry Act was a valid exercise of the legislative power with respect to external affairs in s 51(xxix) of the Australian Constitution, being an implementation of the World Heritage Convention to which

¹⁰ (1988) 164 CLR 261.

Australia was a party. The defendants submitted that the Commission of Inquiry Act was invalid to the extent that it prohibited the doing of acts in the protected area during the interim protection period. The defendants contended that the World Heritage Convention did not impose any obligations on Australia with respect to the Lemnathyme and Southern Forests areas before Australia accepted that the land had world heritage values, or until the land was entered in the World Heritage List.¹¹

Mason CJ and Brennan J stated that the defendants' submission failed to take 'sufficient account of the nature of the obligations imposed by the Convention, especially the obligations imposed on each State with respect to the cultural and natural heritage in its territory'.¹² They stated: 'the object of the Convention is to protect...heritage. In this setting identification is not an obligation independent and distinct from the obligation to ensure protection'.¹³ The taking of action by way of interim protection pending a determination of an area's world heritage values may be 'supported as action which can reasonably be considered appropriate and adapted to the attainment of the object of the Convention'.¹⁴ They concluded that the Commission of Inquiry Act was valid in its entirety.¹⁵ Wilson, Dawson and Toohey JJ agreed that the Act was wholly valid.¹⁶ Deane and Gaudron JJ held that the Act was valid except for parts of s 16, which provided for interim protection measures.¹⁷

*Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*¹⁸ concerned the second stage of nominating an area for inclusion in the World Heritage List. Peko-Wallsend Ltd ('Peko-Wallsend') were the holders of mineral leases originally obtained in 1969 under the *Mining Act 1939* (NT). The leases were in respect of sites in the Northern Territory that in 1984 were proclaimed to be part of Kakadu National Park, a national park under the *National Parks and Wildlife Conservation Act 1975* (Cth). The *National Parks and Wildlife Conservation Act 1975* (Cth) permitted the continuation of existing interests for the recovery of minerals. In 1986, the federal

¹¹ Ibid 288.

¹² Ibid.

¹³ Ibid 290.

¹⁴ Ibid 291.

¹⁵ Ibid 296.

¹⁶ Ibid 307, 328, 337.

¹⁷ Ibid 317-319, 348.

¹⁸ (1987) 15 FLR 274.

Cabinet announced a decision to nominate Stage II of Kakadu National Park for inclusion in the World Heritage List. This had the effect of making the Stage II area 'identified property' under s 3(2) of the *World Heritage Properties Conservation Act 1983* (Cth) ('Heritage Properties Act'). Identified property could be declared by the Governor-General to be property to which ss 9 or 10 of the Heritage Properties Act applied. Section 9 made it unlawful to do a prescribed act without the consent of the Minister, and s 10 made it unlawful to carry out mining operations. No opportunity was afforded to Peko-Wallsend to make submissions to Cabinet before the decision to nominate was made. At first instance, Peko-Wallsend sued for an injunction, and a declaration that the nomination was invalid as a denial of natural justice. The primary judge held that Cabinet was bound by the principles of natural justice to afford Peko-Wallsend an opportunity to be heard, and, since Cabinet had failed to do so, the nomination was void.¹⁹

The Minister appealed the decision, claiming that the decision of the federal Cabinet to nominate Stage II of Kakadu National Park for inclusion in the World Heritage List was immune from judicial review because it was a decision made under the royal prerogative, being an act done towards a nation or body under an international treaty. A Full Federal Court of Australia (Wilcox J, with whom Bowen CJ and Sheppard J agreed), held that the fact that the decision to nominate Stage II involved the exercise of the royal prerogative did not necessarily preclude judicial review.²⁰ The critical matter was the nature and effect of the decision.²¹ As the decision to nominate did not alter the mining rights or obligations of the respondent, or deprive the respondent of any benefit or advantage which it could legitimately expect to continue, Wilcox J concluded that the decision to nominate was not justiciable, and that it did not attract the obligation to accord natural justice to affected persons.²² The Court allowed the appeal, and set aside the order of the primary judge.²³

¹⁹ *Peko-Wallsend Ltd v Minister for Arts, Heritage and Environment* (1986) 13 FCR 19, 45.

²⁰ *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FLR 274, 304.

²¹ *Ibid.*

²² *Ibid* 306-307.

²³ *Ibid* 310.

Three cases concern properties that had been accepted for inclusion in the World Heritage List. In *Commonwealth v Tasmania*,²⁴ the Australian government took legislative action to protect identified property, in south western Tasmania, that had been included in the World Heritage List. In 1978, the Tasmanian Hydro-Electric Commission proposed the construction of the Gordon-below-Franklin Dam that would have flooded a large section of the Franklin River in south-west Tasmania. To allow the dam to proceed, in 1982, Tasmania passed the *Gordon River Hydro-Electric Power Development Act 1982* (Tas), excised an area of national parks and vested the area in the Hydro-Electric Commission. The Commonwealth responded to this environmental threat. It nominated and the World Heritage Committee accepted a larger area of national parks in south-western Tasmania for inclusion in the World Heritage List. The Commonwealth then made the *World Heritage (Western Tasmania Wilderness) Regulations 1983* (Cth) ('World Heritage Regulations'), pursuant to s 69 of the *National Parks and Wildlife Conservation Act 1975* (Cth) ('National Parks Act'), and passed the Heritage Properties Act. These laws prohibited the construction of a dam or associated works in the excised area without ministerial consent.²⁵ The Commonwealth brought proceedings to restrain Tasmania and the Hydro-Electric Commission from proceeding with works authorised by the *Gordon River Hydro-Electric Power Development Act 1982* (Tas), claiming that the works were prohibited by the World Heritage Regulations, as well as the Heritage Properties Act. Tasmania counter-claimed for declarations that the Heritage Properties Act, s 69 of the National Parks Act and the World Heritage Regulations were invalid.

The majority of the High Court (Mason, Murphy, Brennan and Deane JJ) considered that the National Parks Act and the World Heritage Regulations were within the legislative power of the Commonwealth under s 51(xxix) of the Australian Constitution (external affairs power).²⁶ The majority also upheld the validity of the relevant sections of the Heritage Properties Act as valid expressions of the external

²⁴ (1983) 158 CLR 1.

²⁵ *World Heritage Properties Conservation Act 1983* (Cth) s 9; *World Heritage (Western Tasmania Wilderness) Regulations 1983* (Cth) reg 5.

²⁶ *The Commonwealth v Tasmania* (1983) 158 CLR 1, 136, 141, 178-179, 235, 239, 268.

affairs power.²⁷ The Court's decision affirmed that the external affairs power extended to enacting domestic legislation to give effect to Australia's treaty obligations.

In *Queensland v The Commonwealth*,²⁸ the Australian government again took action to protect identified property, this time in the north of Queensland, included in the World Heritage List. Queensland sued the Commonwealth for a declaration of invalidity of a proclamation made on 15 December 1988 pursuant to s 6(3) of the Heritage Properties Act in respect of property described as 'Wet Tropical Rainforests of North-East Australia', that had been included in the World Heritage List. The effect of the proclamation was to engage the protective provisions of the Heritage Properties Act in relation to the property. Queensland disputed that any part of the property was cultural or natural heritage under the World Heritage Convention. The central question considered by the High Court was whether the inclusion of the property in the World Heritage List was conclusive of the validity of the proclamation.

Queensland submitted that the listing of the property by the World Heritage Committee did not enliven the legislative power of the Commonwealth to prescribe a regime of control for the property's protection and conservation. The Commonwealth submitted that the inscription of the property in the World Heritage List was sufficient to establish that there was an international duty to protect and conserve it. The majority of the Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) determined that 'the existence of Australia's international duty is determined by the inclusion of the property in the World Heritage List...for the listing of the property determines its status for the international community'.²⁹ As the inclusion of the property in the World Heritage List was conclusive of its status in the eyes of the international community, it was 'conclusive of Australia's international duty to protect and conserve it'.³⁰

²⁷ Ibid 143, 179, 239, 268.

²⁸ (1989) 167 CLR 232.

²⁹ Ibid 242.

³⁰ Ibid.

*Friends of Hinchinbrook Society Inc v Minister for Environment (No 2)*³¹ involved the Great Barrier Reef that had been included in the World Heritage List. Areas within the Great Barrier Reef World Heritage Area were property to which ss 9 and 10 of the Heritage Properties Act applied. Certain acts were prohibited within the property unless the Minister granted consent. Under s 13(1) of the Heritage Properties Act, in determining whether or not to grant consent, the Minister was to have regard only to the protection, conservation and presentation of the property. The Minister granted consents to Cardwell Properties for dredging, removal of mangroves and coppicing of mangroves within the property. An environmental non-government organisation brought proceedings challenging the validity of the Minister's consents. The Society contended that the Minister had improperly exercised the powers conferred by ss 9 and 10 of the Heritage Properties Act, and committed a variety of legal errors in granting the consents. Sackville J of the Federal Court of Australia determined that none of the grounds advanced for challenging the Minister's decision to give consents had been made out.³² The Society appealed the decision, including on the ground that the Minister applied the wrong legal test by considering whether the acts in question were 'consistent with' the protection, conservation and presentation of the property, rather than 'having regard only' to the protection, conservation and presentation of the property as required by s 13(1) of the Heritage Properties Act. The Full Federal Court of Australia (Northrop, Burchett and Hill JJ) dismissed the appeal.³³ The test of consistency may be criticised if put forward as a general test, but that was not what the Minister had done.³⁴ The legislative requirement is that the Minister take into account only matters affecting the protection, conservation and presentation of the property and not other matters such as the effects on employment or economic or social matters.³⁵ The Minister had regard only to the three matters of protection, conservation and presentation and no other matters, and no error was shown.³⁶

³¹ (1997) 69 FCR 28.

³² *Ibid* 64-67, 70-71, 77-80.

³³ *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153, 192.

³⁴ *Ibid* 188.

³⁵ *Ibid*.

³⁶ *Ibid* 169, 179, 188.

There have also been challenges to decisions not to declare an area as a protected area under parks legislation. In *Akaroa Marine Protection Society Inc v Minister of Conservation*,³⁷ the Akaroa Marine Protection Society made an application seeking a marine reserve in Akaroa Harbour, in the South Island of New Zealand. The Minister of Conservation declined the application on the basis that the reserve would unduly interfere with, or adversely affect, existing recreational fishing. The Society judicially reviewed the Minister's decision. The High Court of New Zealand (Whata J) quashed the Minister's decision.³⁸ The Court held that the Minister had to consider the merits of the proposed reserve, including the wider public interest, and the extent to which the proposed reserve might serve the statutory purpose, and then weigh those matters against the implications for the existing use or right.³⁹ The Court held the Minister had failed to have regard to the potentially relevant consideration of the wider countervailing benefits of the reserve in assessing whether declaring the reserve would interfere unduly with or adversely affect existing recreational uses.⁴⁰

Permission or prohibition of activities in a protected area

The second category of cases arises after an area has been identified, nominated and declared to be a protected area. These are cases challenging decisions to permit or prohibit an activity within a protected area. They fall into four sub-categories: a) cases challenging Ministerial notifications prohibiting an activity in a protected area; b) cases challenging decisions to approve certain activities on the basis of inconsistency with the management objectives of a protected area; c) cases challenging decisions to approve certain activities on the basis of inadequate environmental impact assessment; and d) cases challenging the validity of a pre-existing right of use.

a) Ministerial notifications prohibiting an activity in a protected area

The case of *Professional Fishers Association Inc v Minister for Fisheries*⁴¹ is illustrative of the first subcategory of cases. The NSW Minister for Fisheries

³⁷ [2012] NZHC 933; [2012] NZRMA 343.

³⁸ *Ibid* [80].

³⁹ *Ibid* [50], [53], [60].

⁴⁰ *Ibid* [50]-[62], [78].

⁴¹ [2002] NSWLEC 15; (2002) 120 LGERA 61.

published in the *Government Gazette* two notifications under s 8 of the *Fisheries Management Act 1994* (NSW) to close Botany Bay and Lake Macquarie to commercial fishing after a period of five years. The effect of this notification was that only recreational fishers would be permitted to take fish from those areas. The Professional Fishers Association challenged the notifications and fishing closures on the basis that the Minister had failed to undertake environmental impact assessment before notifying the fishing closures.

Pearlman CJ of the Land and Environment Court of NSW held that the Minister was not bound to comply with the relevant environmental assessment requirements in pt 5 of the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA Act').⁴² These requirements did not apply to notifications under s 8 to close the waters to commercial fishing, because firstly a notification of a fishing closure did not involve an 'approval' (as it was not a 'consent, licence or permission or any form of authorisation');⁴³ secondly, the Minister was not a 'determining authority' for the purposes of pt 5 of the EPA Act (as he was not a person whose approval was required for the carrying out of an activity);⁴⁴ and thirdly, there was no activity to be carried out pursuant to the notifications; to the contrary, commercial fishing was prohibited.⁴⁵ Accordingly, Pearlman CJ dismissed the application.⁴⁶ The applicant appealed the decision to the NSW Court of Appeal.⁴⁷ The appeal was dismissed.⁴⁸

b) *Inconsistency with management objectives of a protected area*

The second subcategory involves cases challenging decisions to approve certain activities, on the basis that the activity is inconsistent with the purpose or management objectives of a protected area. Different types of protected areas are managed in accordance with different management principles. Two examples are s 9 of the *Wilderness Act 1987* (NSW), which provides management principles for wilderness areas, and s 30E of the *National Parks and Wildlife Act 1974* (NSW) ('

⁴² Ibid 65.

⁴³ Ibid 72.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid 78.

⁴⁷ [2002] NSWCA 145; (2002) 54 NSWLR 585.

⁴⁸ Ibid 597.

NPW Act'), which outlines the purpose of reserving land as a national park, and the management principles for areas reserved as national parks.

In *Woollahra Municipal Council v Minister for Environment*,⁴⁹ the Director of the NSW National Parks and Wildlife Service approved the refurbishment and use of historic buildings in Sydney Harbour National Park by a private university, the William E Simons School of Business Administration of the University of Rochester in the United States, to conduct post-graduate courses in business administration. Development consent for the proposed use was not required under the relevant environmental planning instruments, if the purpose of the use was a purpose authorised by the NPW Act. Subsequently, the Minister granted licences under ss 151(1)(f) and 152(1) of the NPW Act to use the buildings and lands within the national park. The NSW Court of Appeal (Gleeson CJ, Kirby P and Samuels JA) held that use of the national park for the purposes of a private university teaching business management was not a purpose authorised by the NPW Act.⁵⁰ Kirby P held that a private university teaching business management to a small group of persons for a fee could not be seen as advancing the objective of the zone in the relevant local environmental plan, being the preservation and management of national parks for conservation and recreation purposes.⁵¹ Furthermore, such a use had nothing to do with the purposes of a national park.⁵² Parliament's purpose was to confine business operations within national parks to those strictly necessary for, and incidental to, recreational and conservation purposes.⁵³ Samuels JA stated that 'the Minister could not enjoy a power to grant a licence for some purpose wholly inimical to the objects of a national park...and involving activities hostile to its environment'.⁵⁴ Leases and licences may be granted only for the purposes of preserving, managing and maintaining the natural attributes of a national park and of establishing, managing, and maintaining facilities and amenities for the comfort, recreation and entertainment of tourists and visitors.⁵⁵

⁴⁹ (1991) 73 LGRA 379.

⁵⁰ *Ibid* 383, 385, 397-398, 401.

⁵¹ *Ibid* 390.

⁵² *Ibid* 395.

⁵³ *Ibid* 397.

⁵⁴ *Ibid* 400.

⁵⁵ *Ibid*.

In *Packham v Minister for Environment*,⁵⁶ the majority of the NSW Court of Appeal (Kirby P and Sheller JA) determined that a purported licence granted under s 151(1)(f) of the NPW Act for private vehicular access through Sydney Harbour National Park to private land was not for a purpose permitted by the NPW Act.⁵⁷ The statutory licensing power only enables the Minister to grant licences to occupy or use lands within a national park for a purpose which promotes or is ancillary to its preservation or use and enjoyment as a private park or for public recreation.⁵⁸

In *Blue Mountains Conservation Society Inc v Director-General of National Parks and Wildlife*, Lloyd J of the Land and Environment Court of NSW set aside an approval granted to undertake commercial filming and associated activities in a site located within the Blue Mountains National Park, and the Grose Wilderness.⁵⁹ Lloyd J held that the production of a commercial feature film was not consistent with the objects of the NPW Act or the purpose of reserving land as a national park and that the filming activity did not satisfy any of the management purposes in s 9 of the *Wilderness Act*.⁶⁰

In *Tasmanian Conservation Trust Inc v State of Tasmania*,⁶¹ an environmental non-governmental group contended that a management plan for the Lake Johnston Nature Reserve, intended to conserve stands of Huon Pine and other flora species and communities of conservation significance, included objectives that were not applicable to nature reserves (concerning promotion of tourism) or authorised by the *National Parks and Wildlife Act 1970* (Tas). Underwood J of the Supreme Court of Tasmania held that, although the Act did not expressly forbid the inclusion in a management plan for each class of reserved land (protected area) of an objective not listed in Sch 4 of the Act for the applicable reserved land, that was the intention of Parliament.⁶² In the circumstances of this case, however, all of the objectives in

⁵⁶ (1993) 80 LGERA 205.

⁵⁷ *Ibid* 211, 229.

⁵⁸ *Ibid* 209, 228.

⁵⁹ [2004] NSWLEC 196; (2004) 133 LGERA 406, 417.

⁶⁰ *Ibid* 413-415.

⁶¹ (2000) 109 LGERA 219.

⁶² *Ibid* 221-222.

the management plan for the reserve were found, on a reading of the whole plan, to be authorised by Sch 4 of the Act.⁶³

In *Willoughby City Council v Minister Administering the National Parks and Wildlife Act*, Stein J of the Land and Environment Court of NSW held that a lease of land in Garigal National Park near Sydney for the construction of a single-storey building incorporating tea rooms and reception area, and the use of such facilities for catered private functions and receptions, such as weddings, was prohibited under cl 9 of the Warringah Local Environmental Plan 1985, as it involved the use of land for a purpose not permitted by the NPW Act.⁶⁴ The use of the land for private functions necessarily excludes public use and recreation of the park.⁶⁵

In *Conservation of North Ocean Shores Inc v Byron Shire Council*,⁶⁶ the Land and Environment Court of NSW (Preston CJ) held that a decision of the Byron Shire Council to grant development consent for the Splendour in the Grass Music Festival to take place was invalid and of no effect, as the development was for a purpose that was prohibited on part of the land on which the development was to be carried out, being land in a Habitat Zone.⁶⁷ The development was held to be inconsistent with the objectives of the Habitat Zone, which included identifying and protecting significant vegetation and wildlife habitats, and prohibiting development that was likely to have a detrimental effect on such wildlife habitats.⁶⁸

In *Otehei Bay Holdings Ltd v Fullers Bay of Islands Ltd*,⁶⁹ the Crown acquired Urupukapuka Island, in the Bay of Islands in New Zealand, as a recreation reserve. The acquisition was subject to an existing lease for a fishing lodge, but that leasehold interest was brought within the reserves legislation. The Crown granted successive leases to private interests for a café and restaurant and accommodation. The majority of the New Zealand Court of Appeal (Harrison and Wild JJ) held that the leasehold interest in existence when the Crown acquired the island was

⁶³ Ibid 226-227.

⁶⁴ (1992) 78 LGERA 19, 28.

⁶⁵ Ibid 27.

⁶⁶ [2009] NSWLEC 69; (2009) 167 LGERA 52.

⁶⁷ Ibid 75-77, 80.

⁶⁸ Ibid 58.

⁶⁹ [2011] NZCA 3000; [2011] NZRMA 473.

extinguished when the reserves legislation was amended in 1996 and that since then the Crown and the successive lessees had been acting unlawfully in allowing the activities (the leases) on the island that were not authorised by a concession granted under the *Conservation Act 1987* (NZ).⁷⁰

In *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*,⁷¹ the Environmental Defence Society challenged a decision of the Board of Inquiry to change the Marlborough Sounds Resource Management Plan so that salmon farming became a discretionary rather than a prohibited activity at eight locations throughout the Marlborough Sounds, and a decision of the Board to grant resource consents to The New Zealand King Salmon Co Ltd ('King Salmon') to undertake salmon farming at these locations and one other. Policies 13(1)(a) and 15(a) of the New Zealand Coastal Policy Statement ('NZCPS') provided that areas of the coastal environment with outstanding natural character and outstanding natural landscapes were to be protected from inappropriate subdivision, use and development through the avoidance of adverse effects or activities on them. Section 67(3) of the *Resource Management Act 1991* (NZ) ('the RMA') required the Board of Inquiry to give effect to the NZCPS.

The Board acknowledged that the areas in question were of outstanding natural character and were an outstanding natural landscape, and that the proposed salmon farm would have significant adverse effects on that natural character and landscape. Despite this, the Board granted the plan changes and the resource consents. The Board considered it was required to give effect to the NZCPS as a whole and to reach an 'overall judgment' on King Salmon's application in light of the principles in pt 2 of the RMA. The Society appealed the Board's decision to the High Court, which dismissed the appeal.⁷² The Society sought, and was granted, leave to appeal to the Supreme Court of New Zealand. The Society submitted that the Board's findings that policies 13(1)(a) and 15(a) would not be given effect to if the plan change was granted meant that King Salmon's application had to be refused. The Society challenged the Board's 'overall judgment' approach. The majority of the Supreme

⁷⁰ Ibid [66], [82].

⁷¹ [2014] NZSC 38; (2014) 17 ELRNZ 442.

⁷² *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2013] NZHC 1992; [2013] NZRMA 371.

Court (Elias CJ, McGrath, Glazebrook and Arnold JJ) allowed the appeal. The Court rejected the Board's 'overall judgment' approach. The NZCPS gives substance to pt 2 of the RMA in relation to the coastal environment.⁷³ Policies 13(1)(a) and 15(a) give primacy to preservation or protection of outstanding natural areas and landscapes and provide an environmental bottom line.⁷⁴ Because the Board did not give effect to policies 13(1)(a) and 15(a), the Board did not give effect to the NZCPS as required by s 67 of the RMA.⁷⁵

c) *Inadequate environmental assessment of impacts to a protected area*

The third subcategory involves cases challenging decisions to approve certain activities on the basis of inadequate environmental impact assessment, or a failure to take into account the impacts of an activity on a protected area.

In *Sustainable Fishing and Tourism Inc v Minister for Fisheries*, Talbot J of the Land and Environment Court of NSW granted declarations that the granting of a commercial fishing licence and a fishing boat licence by the Minister for Fisheries to a commercial prawn trawler and fisher was unlawful.⁷⁶ The commercial fishing licence authorised the taking of fish for sale in the Ocean Hauling Restricted Fishery and the Estuary General Restricted Fishery in the ocean and estuaries in the vicinity of the Manning River and Taree in NSW.⁷⁷ Talbot J determined that the Minister had failed to consider to the fullest extent possible all matters likely to affect the environment by reason of commercial fishing activity, as envisaged by s 111 of the EPA Act.⁷⁸

In *Guthega Development Pty Ltd v Minister Administering the National Parks and Wildlife Act*,⁷⁹ the operator of an existing ski resort at Guthega challenged the decision of the Minister to grant a lease for the purposes of a proposed new ski resort at Blue Cow in Kosciuszko National Park, on the basis that the environmental impact statement ('EIS') was not in conformity with the statutory obligations under

⁷³ Ibid [85], [152].

⁷⁴ Ibid [131], [132], [135(b)].

⁷⁵ Ibid [154], [174].

⁷⁶ [2000] NSWLEC 2; (2000) 106 LGERA 322, 338.

⁷⁷ Ibid 330.

⁷⁸ Ibid 336.

⁷⁹ (Unreported, Land and Environment Court of NSW, Cripps CJ, 5 November 1985).

the EPA Act. However, the Land and Environment Court of NSW held, and the NSW Court of Appeal (Samuels, Mahoney and Priestley JJA) affirmed, that there was no failure to satisfy the environmental assessment requirements of ss 111 and 112 of the EPA Act.⁸⁰

Unusually in *National Parks and Wildlife Service v Stables Perisher Pty Ltd*,⁸¹ it was the recipient of a development approval who sought a declaration that the approval was void and of no effect because of the failure of the approval authority to obtain and consider an EIS before granting the approval. Stables Perisher had been granted consents for the construction of a ski lodge at Perisher Valley, an area within the Kosciuszko National Park. A disaffected ski club commenced proceedings in the Land and Environment Court of NSW seeking a declaration that the consents were void because of the failure to obtain an EIS in accordance with s 112 of the EPA Act. Stables Perisher then obtained an EIS, and made a further application for consent. In the meantime, building work had been undertaken. Consent was again granted, but on much more stringent conditions than the original consents. Stables Perisher instituted a cross-application in the proceedings, alleging that the original consents were invalid because of the failure to obtain an EIS and, by virtue of its reliance upon the original consents that were unlawfully and invalidly given, it had incurred costs in undertaking building work. Those costs were wasted by the new consents. Stables Perisher sought damages in compensation for those costs. The ski club did not proceed with its action but Stables Perisher continued with its claim for compensation. At first instance, Bignold J held that the Court had jurisdiction to deal with a claim in tort for general damages.⁸² The Service appealed that decision. The NSW Court of Appeal (Gleeson CJ, Kirby P and Meagher JA) held that the Land and Environment Court did not have jurisdiction to deal with a claim in tort for general damages.⁸³

⁸⁰ *Ibid*; *Guthega Development Pty Ltd v Minister Administering the National Parks and Wildlife Act 1974 (NSW)* (1986) 7 NSWLR 353, 369.

⁸¹ (1990) 20 NSWLR 573.

⁸² *Stables Perisher Pty Ltd v National Parks and Wildlife Service* (1990) 69 LGRA 386.

⁸³ (1990) 20 NSWLR 573, 583, 586, 587.

d) *Validity of a pre-existing right of use of a protected area*

In contrast to the cases involving a new activity, the case of *Scharer v State of NSW*⁸⁴ involved an access road that had existed on Crown land before it was reserved as part of a national park under the NPW Act. Section 153(3) of the NPW Act provided that 'any easement or right of way over lands in a national park...which was in force immediately before the lands were reserved...shall continue in force and shall be deemed to have been granted under this section'. An adjoining landowner claimed he had constructed the access road over the Crown land in reliance upon representations that, if he did so, he would thereafter have access to his land over that road. He claimed this gave rise to a proprietary estoppel entitling him to a right of way which was preserved and continued in force by s 153(3). He alleged that after the land was reserved as Nattai National Park, the National Parks and Wildlife Service had erected locked gates on the road that prevented him having free access to his land. Pearlman CJ of the Land and Environment Court of NSW held that a proprietary estoppel arose in favour of Mr Scharer, which entitled him to a perpetual and general right of way over the road.⁸⁵

The State of NSW appealed the decision to the NSW Court of Appeal. Tobias JA, with whom Sheller JA and Ipp JA agreed, held that, on the contrary, there was no promise to grant a proprietary interest in the nature of a right of way in the road, which could give rise to a proprietary estoppel.⁸⁶ Furthermore, the relevant Crown lands legislation prohibited any dealing with Crown lands except in accordance with the legislation. The legislation contained no power to grant a right of way over Crown land. Hence, any promise to grant a proprietary interest in the nature of a right of way in the road would have been outside power and not in accordance with that legislation.⁸⁷ The Court held that the primary judge erred in holding that a proprietary estoppel arose, which entitled Mr Scharer to a perpetual and general right of way

⁸⁴ [2003] NSWLEC 23; (2003) 125 LGERA 104.

⁸⁵ Ibid 119.

⁸⁶ *State of NSW v Scharer* [2003] NSWCA 328; (2003) 131 LGERA 208, [59].

⁸⁷ Ibid.

over the road.⁸⁸ The Court allowed the appeal, and set aside the orders made by the primary judge.⁸⁹

Enforcement of protected area laws

In order to ensure that protected areas are managed in accordance with their management principles, it is crucial that laws protecting the protected areas are adequately enforced. The third category of cases concerns the enforcement of protected area laws. These cases include: a) criminal prosecutions for offences committed within a protected area; and b) civil proceedings seeking to remedy or restrain a breach within a protected area.

a) Criminal enforcement

Individuals and organisations have been prosecuted for a wide range of offences committed within a protected area. Many of these cases have involved offences committed within national parks.

Two examples of prosecutions for offences against the *National Parks Act 1980* (NZ) are *Department of Conservation v Moir*,⁹⁰ and *Mawhinney (Department of Conservation) v Gunn*.⁹¹ In the first case, Moir Farms and Stuart Moir (one of the Directors of Moir Farms) were convicted of offences against s 60 of the *National Parks Act*, by a) using national park land to supply water for farming operations; b) scattering pasture seed on park land; c) conducting farming operations on park land; and d) wilfully damaging vegetation on park land. Fines were imposed on Mr Moir totalling \$2,500, and on Moir Farms totalling \$23,500. On appeal, the fines against Moir Farms were decreased by the High Court of New Zealand to \$10,000.⁹² In *Mawhinney (Department of Conservation) v Gunn*, the defendant was charged with committing an offence against s 5(2) of the *National Parks Act 1980* (NZ), in that he took eels from within the Fiordland National Park without the consent of the Minister.

⁸⁸ Ibid [63].

⁸⁹ Ibid.

⁹⁰ [2010] DCR 574.

⁹¹ (Unreported, District Court of Dunedin, Kean J, 5 December 1990).

⁹² *Moir Farms (Maimai) Ltd v Department of Conservation* [2011] NZAR 694, [73], [76].

After dealing with two preliminary points, Kean J permitted the prosecution to proceed to its next stage.⁹³ However, the prosecution did not proceed.

There have also been cases seeking to enforce offences committed in marine parks or sanctuaries. Two of these cases concerned offences committed within the Great Barrier Reef Marine Park. In *White v Patterson*,⁹⁴ the prosecutor appealed against the decision of a Queensland District Court judge to quash the conviction of the respondent for negligently using a Marine National Park Zone of the Great Barrier Reef Marine Park for the purpose of fishing, contrary to s 38CA(1) of the *Great Barrier Reef Marine Park Act 1975* (Cth). The Queensland Court of Appeal (McMurdo P, Muir and Chesterman JJA) held that the respondent knew of the existence of the zone and that fishing was not permitted in it.⁹⁵ He planned to steer a course for fishing along part of the boundary of the zone.⁹⁶ As a commercial fisherman he needed properly functioning instruments of navigation and the skill to use them, but he had neither.⁹⁷ There was a 'very great falling short of the standard of care that a reasonable, skilful fisherman would exercise in the circumstances', and that the respondent's conduct merited criminal punishment.⁹⁸ The Court granted leave to appeal, allowed the appeal to set aside the judgment of the District Court quashing the conviction and ordered that the appeal against conviction be dismissed.⁹⁹

In *Walsh v Stay and Play Australia Ltd; Ex parte Walsh*,¹⁰⁰ the respondent was charged with offences against reg 13 of the *Great Barrier Reef Marine Park Regulations 1983* (Cth), made under the *Great Barrier Reef Marine Park Act 1975* (Cth), in relation to its operation of a vessel for the carriage of tourists to Green Island through the Marine National Park Zone without permission. The zoning plan forbade entry into the zone for the purposes of tourist facilities without permission. The magistrate had dismissed the charges, determining that there was no case to

⁹³ *Ibid.*

⁹⁴ [2009] QCA 320; (2009) 171 LGERA 28.

⁹⁵ *Ibid* 36.

⁹⁶ *Ibid.*

⁹⁷ *Ibid* 37.

⁹⁸ *Ibid* 36-37.

⁹⁹ *Ibid.*

¹⁰⁰ [1992] 1 Qd R 321.

answer, because boat transportation did not involve provision of tourist facilities. The Queensland Supreme Court (Macrossan CJ, Derrington J and de Jersey J) determined that there was a case to answer.¹⁰¹ The provision of boat transport for tourists to Green Island was the provision of tourist facilities.¹⁰² The Court made the order nisi for review and remitted the matters to the magistrate.¹⁰³

In *Sidhom v Robinson*,¹⁰⁴ the applicant appealed against his conviction for an offence against cl 7(1)(a) of the *Marine Parks Regulation 1999* (NSW) (made under the *Marine Parks Act 1997* (NSW)) of attempting to harm animals in a sanctuary zone. The offence related to the pumping of saltwater nippers (an animal) in a location at Jervis Bay which was declared to be a sanctuary zone within Jervis Bay Marine Park. The Land and Environment Court of NSW (Preston CJ) held that it was not open to the Court to allow an appeal against a conviction that is restricted to a ground that involves a question of law on the basis that the Local Court has misattributed weight to relevant considerations, as this would not involve a question of law alone.¹⁰⁵ However, in any event, the Court would not have dismissed the charge without proceeding to conviction because of the seriousness of the offence of the conduct of harming animals in a sanctuary zone.¹⁰⁶ Accordingly, the Court dismissed the appeal.¹⁰⁷

Criminal proceedings have also been brought to enforce offences committed in listed world heritage properties. One such case was *R v Dempsey*.¹⁰⁸ The applicant appealed against the sentence of 12 months imprisonment, imposed for the offences of destroying forest products contrary to s 56(1) of the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) and stealing with a circumstance of aggravation. The applicant had cut down and removed 25 trees in an area of about one hectare of rainforest in the Wet Tropics World Heritage Area in North Queensland. A public auction yielded \$45,000 for their sale. The Queensland Court

¹⁰¹ Ibid 326, 329.

¹⁰² Ibid 329.

¹⁰³ Ibid 329-330.

¹⁰⁴ [2007] NSWLEC 408; (2007) 154 LGERA 169.

¹⁰⁵ Ibid 175.

¹⁰⁶ Ibid 181.

¹⁰⁷ Ibid.

¹⁰⁸ [2002] QCA 45; (2002) A Crim R 113.

of Appeal (Davies, McPherson and Williams JJA) dismissed the appeal, finding that the action taken by the appellant was a 'serious, blatant and cynical act of environmental destruction for commercial gain'.¹⁰⁹

In *R v Boyle*,¹¹⁰ a grazier cleared 13 hectares of mountain forest in the Main Range National Park in South East Queensland. The national park was part of the Gondwana Rainforests of Australia World Heritage Area. The cleared area separated two of the grazier's properties and the clearing allowed his cattle to move between the properties and increased the size of his pasture. The grazier was prosecuted for taking a natural resource in a protected area in contravention of s 62 of the *Nature Conservation Act 1992* (Qld). The grazier pleaded guilty. To avoid imprisonment, he offered to donate 480 hectares of other forested land owned by him for inclusion in the Main Range National Park. Hoath DCJ of the District Court of Queensland convicted him of the offences as charged, fined him \$10,000, and ordered him to pay compensation of \$410,000 with provision allowing this to be paid by transfer of the 480 hectares to the Queensland government.¹¹¹ However, after the sentence was imposed, the grazier was found to be logging the land he had offered to be transferred. The grazier was re-sentenced to pay an increased fine of \$50,000 plus the previously ordered compensation of \$410,000 with provision for this to be paid by transfer of the 480 hectares to the Queensland government.¹¹²

In *Plath v Chaffey*,¹¹³ an oological (bird egg) collector collected eggs from the nests of breeding birds of four threatened species and two protected fauna species on Lord Howe Island, NSW, which is listed in the World Heritage List. The oological collector was convicted of offences against s 118A(1)(a) and 98(2)(a) of the NPW Act for harming animals of a threatened species and protected fauna respectively. Having regard to his impecuniosity, instead of a fine, he was ordered to perform 80 hours of community service and pay the prosecutor's costs.¹¹⁴

¹⁰⁹ Ibid 115.

¹¹⁰ (Indictment No 1909 of 2004, Unreported, District Court of Queensland, Hoath J, 17 December 2004).

¹¹¹ Ibid 7.

¹¹² Environmental Law Publishing, 'R v Boyle criminal prosecution' <<http://www.envlaw.com.au/boyle.html>> accessed 5 November 2014.

¹¹³ [2009] NSWLEC 196.

¹¹⁴ Ibid [98], [110].

b) *Civil enforcement*

Civil proceedings have also been brought to remedy or restrain breaches of the law within a protected area. Two cases have involved contraventions of the EPBC Act. In *Minister for the Environment & Heritage v Greentree (No 2)*,¹¹⁵ Sackville J of the Federal Court of Australia found that Mr Greentree and Auen Grain Pty Ltd had contravened s 16(1) of the EPBC Act by clearing a large tract of land for farming activities on the Gwydir Wetlands, a listed Ramsar site under the Ramsar Convention on Wetlands,¹¹⁶ that had a significant impact on the ecological character of the site.¹¹⁷ Sackville J determined that the Minister was entitled to injunctive relief, and that the respondents were liable to a civil penalty.¹¹⁸ The judge imposed a \$150,000 penalty on Mr Greentree, and a \$300,000 penalty on Auen.¹¹⁹ These determinations were upheld on appeal.¹²⁰

In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*,¹²¹ an environmental non-governmental organisation commenced proceedings seeking injunctive relief and declarations under the EPBC Act in relation to whaling activities undertaken by the respondent in the Australian Whale Sanctuary. The Sanctuary was established by s 225 of the EPBC Act. The Society claimed that the respondent's whaling fleet was responsible for committing a number of offences against the EPBC Act, including killing, injuring, intentionally taking, treating and possessing cetaceans in the Australian Whale Sanctuary. Allsop J of the Federal Court of Australia determined that the respondent had contravened ss 229, 229A-D and 230 of the EPBC Act.¹²² Taking into account the public interest nature of the claim, Allsop J held that the practical difficulty of enforcement was not a reason to

¹¹⁵ [2004] FCA 1317; (2004) 138 FCR 198.

¹¹⁶ *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

¹¹⁷ [2004] FCA 1317; (2004) 138 FCR 198, 250.

¹¹⁸ *Ibid.*

¹¹⁹ *Minister for the Environment and Heritage v Greentree (No 3)* [2004] FCA 1317; (2004) 136 LGERA 89, 110.

¹²⁰ *Greentree v Minister for Environment and Heritage* [2005] FCAFC 128; (2005) 144 FCR 388, 401.

¹²¹ [2008] FCA 3; (2008) 165 FCR 510.

¹²² *Ibid* 525.

withhold relief, and granted an injunction restraining further breaches of the EPBC Act.¹²³

There have also been civil cases seeking to remedy and restrain breaches of the NPW Act. In *Director-General, Department of Environment, Climate Change and Water v Venn*,¹²⁴ the Director-General brought civil enforcement proceedings alleging two breaches of the NPW Act: a breach of s 118A(2) in that Mr Venn picked plants of two endangered ecological communities; and a breach of s 156A(1)(b) in that Mr Venn damaged and/or removed vegetation, soil, sand or similar substance from land which was reserved as a nature reserve under the Act. Mr Venn had arranged for earth moving contractors to clear an area within the Colongra Swamp Nature Reserve, on the banks of Lake Munmorah, and deposit and spread the fill over the cleared area. The Land and Environment Court of NSW (Preston CJ) declared that Mr Venn had breached s 118A(2), and found that there was a threatened or apprehended breach of both s 118A and s 156A.¹²⁵ The Court made orders restraining Mr Venn from carrying out specified actions on the Reserve, and required Mr Venn to arrange for the preparation of a remediation action plan,¹²⁶ and subsequently to remediate the land.¹²⁷

In *Whitehouse v Remme*,¹²⁸ the Director of the National Parks and Wildlife Service sought injunctive relief and damages for breach of by-laws and regulations under the NPW Act and for common law trespass. The respondent bulldozed trees and native vegetation in the Blue Mountains National Park to provide more direct road access for heavy vehicles to various rural properties. Stein J of the Land and Environment of NSW made declarations that the respondent had breached the by-laws and regulations under the NPW Act and ordered that he be restrained from undertaking further work to establish the road and from using the road.¹²⁹

¹²³ Ibid 525-526.

¹²⁴ [2011] NSWLEC 118.

¹²⁵ Ibid [284], [348].

¹²⁶ Ibid [348].

¹²⁷ *Director-General, Department of Environment, Climate Change and Water v Venn (No 3)* [2012] NSWLEC 31, [29].

¹²⁸ (1988) 64 LGRA 375.

¹²⁹ Ibid 386.

In *Australian Conservation Foundation Inc v South Australia*,¹³⁰ the plaintiffs sought a declaration that proper planning under the *Planning Act 1982* (SA) ('the Planning Act') had not been followed in respect of a proposed development in the Flinders Ranges National Park, and sought an injunction restraining the development. The proposed development involved the construction of a tourist accommodation complex to be developed at a site within the Flinders Ranges National Park, approximately three kilometres away from the spectacular natural landform of Wilpena Pound. The defendants asserted that the plaintiffs did not have standing to bring the action, and, in the alternative, that the Planning Act did not apply to a reserve constituted under the *National Parks and Wildlife Act 1972* (SA). The Supreme Court of South Australia (Jacobs J) held that the plaintiffs did have standing, but held that the defendants were not bound to comply with the provisions of the Planning Act as development in national parks was outside the ordinary planning process.¹³¹

Upstream, downstream or buffer zone impacts

The fourth category of cases is cases involving activities not directly within a protected area, but which may nevertheless have an impact on a protected area either through upstream or downstream impacts, or by impacting on a 'buffer zone' to a protected area.

a) Upstream or downstream impacts

Most of the cases in this subcategory have involved challenges, by way of judicial review, of decisions permitting a certain activity, on the ground that there was a failure to consider a relevant downstream or upstream impact.

In *Minister for Environment & Heritage v Queensland Conservation Council Inc*,¹³² an environmental non-governmental organisation judicially reviewed decisions of the Commonwealth Minister to approve a controlled action, namely, the construction of a dam, to be called the Nathan Dam, on the Dawson River in central Queensland. The Dawson River joined the Mackenzie River to become the Fitzroy River, which flowed

¹³⁰ (1989) 52 SASR 288.

¹³¹ Ibid 298, 302, 303.

¹³² [2004] FCAFC 190; (2004) 139 FCR 24.

into the Great Barrier Reef World Heritage Area. Some public submissions regarding the proposed action expressed concern about the cumulative impacts of the proposed action resulting from downstream irrigation of agricultural land. The submissions suggested that irrigation of land adjacent to river-beds had the potential to increase nutrient concentrations and other agricultural pollutants downstream of the dam, including in the Great Barrier Reef World Heritage Area. However, the Minister determined that potential impacts of the irrigation of land by persons other than the proponents, using water from the dam, were not impacts of the proposed action.

The Full Court of the Federal Court of Australia (Black CJ, Ryan and Finn JJ) held that the primary judge was correct in determining that the Minister had construed 'all adverse impacts' too narrowly in not taking into account downstream impacts.¹³³ The Court held that the consideration of impacts was not confined to direct physical effects of the action, and included effects which were 'sufficiently close to the action to allow it to be said...that they are, or would be, the consequences of the action on the protected matter'.¹³⁴ The phrase 'all adverse impacts' included impacts which could 'reasonably be imputed as within the contemplation of the proponent of the action'.¹³⁵ The Court determined that the use of water downstream from the dam, including its use for growing and ginning cotton, was within the contemplation of Sundaw as the proponent of the action.¹³⁶

In *Alliance to Save Hinchinbrook v Environmental Protection Agency*,¹³⁷ an environmental non-governmental organisation judicially reviewed the decision of the Queensland Environmental Protection Agency to issue a marine parks permit for the construction of two breakwaters which were to intrude into the Great Barrier Reef Marine Park. One of the grounds of challenge was that the Agency had failed to take into account the downstream impacts of the breakwaters, namely, the increased use of boats in the area adjacent to the location and the resultant impact of that increased boat use on the environment, including through increased boat strikes on

¹³³ Ibid 39.

¹³⁴ Ibid 38.

¹³⁵ Ibid 39.

¹³⁶ Ibid 40.

¹³⁷ [2006] QSC 084; (2006) 145 LGERA 32.

dugongs and snub fish dolphins. However, the Supreme Court of Queensland (Jones J) held that there was no failure to consider these issues.¹³⁸

There have also been instances of civil proceedings to restrain the carrying out of actions that would have an adverse upstream or downstream impact on a protected area. One such example is *Booth v Bosworth*.¹³⁹ The applicant applied for a prohibitory injunction under s 475(2) of the EPBC Act restraining the respondents from killing Spectacled Flying Foxes on or near their lychee orchard. The respondents operated a lychee fruit farm in North Queensland, near the Wet Tropics World Heritage Area. They had erected an electric grid to electrocute flying foxes coming to eat the lychee fruit. Branson J of the Federal Court of Australia held that the Spectacled Flying Foxes contributed to the world heritage values of the Wet Tropics World Heritage Area.¹⁴⁰ An action leading to a significant impact on the population of the Spectacled Flying Foxes was likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area, constituting a contravention of s 12 of the EPBC Act.¹⁴¹ The Court granted an injunction restraining the respondents from killing the flying foxes.¹⁴²

Similarly, the Planning and Environment Court of Queensland granted enforcement orders under the *Nature Conservation Act 1992* (Qld) requiring other lychee farmers to dismantle electric grids on their lychee farms that were killing thousands of flying foxes.¹⁴³

In the aquatic environment, courts have considered the impacts of works, such as dams, diversion structures and culverts, on the passage of fish, including to and from protected areas.¹⁴⁴

¹³⁸ *Alliance to Save Hinchinbrook v Environmental Protection Agency* [2006] QCA 084; (2006) 145 LGERA 32, 46.

¹³⁹ [2001] FCA 1453; (2001) 114 FCR 39.

¹⁴⁰ *Ibid* 56.

¹⁴¹ *Ibid* 66.

¹⁴² *Ibid* 66, 68.

¹⁴³ *Booth v Yardley* [2006] QPEC 119; [2009] QPELR 299; *Booth v Frippery Pty Ltd* [2007] QPEC 99; *Booth v Frippery Pty Ltd* [2008] QPEC 122.

¹⁴⁴ *Re Auckland Regional Council* [2002] NZRMA 241; *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd* [2008] FCA 1900; [2008] 164 LGERA 432; *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 4)*

Another scenario could be if insufficient water was provided to protected wetlands, such as Ramsar sites. It is possible that an upstream activity could be held to have a 'significant impact' on a Ramsar wetland, and thus contravene the EPBC Act. In a report in 2008, the CSIRO found that consumptive use in the Murray-Darling Basin had resulted in reduced flows down the Murray River into the Coorong Ramsar site.¹⁴⁵ Falling lake levels and lack of flow into the Coorong lagoon led to a reduction in vegetation and the disconnection and drying of wetlands.¹⁴⁶

b) Impacts on a buffer zone

An activity or development can also impact on a protected area by impacting on a 'buffer zone' to a protected area. Buffer zones have been defined as:

Any area, often peripheral to a protected area, inside or outside, in which activities are implemented or the area managed with the aim of enhancing the positive and reducing the negative impacts of conservation on neighbouring communities and neighbouring communities on conservation.¹⁴⁷

In some cases, protected areas legislation makes provision for buffer zones. For example, Div 2 of Pt 5 of the *Great Barrier Reef Marine Park Act 1975* (Cth) provides for the preparation of 'zoning plans' for the Great Barrier Reef Marine Park. One of these zones is a 'buffer zone' which accounts for approximately three per cent of the Park.¹⁴⁸ The objective of this zone is to provide for the 'protection and conservation of areas of the Marine Park in their natural state, while allowing the public to appreciate and enjoy the relatively undisturbed nature of the area'.¹⁴⁹

Some environmental planning instruments in NSW also apply to buffer zones. According to s 4 of State Environmental Planning Policy ('SEPP') 26 – Littoral

[2009] FCA 1013; *Wide Bay Conservation Council v Burnett Water Pty Ltd (No 8)* [2011] FCA 175; (2011) 192 FCR 1.

¹⁴⁵ CSIRO, 'Water Availability in the Murray-Darling Basin' (Report, CSIRO, 2008).

¹⁴⁶ Ibid.

¹⁴⁷ Arthur Ebregt and Pol De Greve, 'Buffer Zones and their Management: Policy and Best Practices for Terrestrial Ecosystems in Developing Countries' (Theme Studies Series 5: Forests, Forestry and Biological Diversity Support Group, National Reference Centre for Nature Management, October 2000) 7.

¹⁴⁸ Great Barrier Reef Marine Park Authority, 'Interpreting zones' (2011) GBRMPA

<<http://www.gbrmpa.gov.au/visit-the-reef/zoning/zoning-guide-to-using-the-marine-park/interpreting-zones>> accessed 20 October 2014.

¹⁴⁹ Ibid.

Rainforests, the Policy applies to land within 100m from the outer edge of land to which the SEPP applies. The Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 ('Sydney Harbour REP') also makes numerous references to 'adjoining land'. Clause 26(g) states that 'development on land adjoining wetlands should maintain and enhance the ecological integrity of the wetlands, and where possible, should provide a vegetative buffer to protect the wetlands'.

To date, there have been relatively few cases concerning a buffer zone to a protected area. One example is *Plath v Knox*.¹⁵⁰ In this case, the defendant was engaged by the owner of a property bordering Goulburn River National Park to conduct aerial spraying of an outbreak of the weed St Johns Wort on the property. The Registrar of Pesticides had made an order under the *Pesticides and Allied Chemicals Act 1978* (NSW) prohibiting the aerial spraying of herbicide within 150m horizontally from the boundary of specified areas, including Goulburn River National Park, without the prior consent of the Director-General of the National Parks and Wildlife Service. The defendant applied the herbicide at some points within the 150m buffer zone from the boundary of the National Park without first obtaining consent. Due to spray drift, the herbicide caused damage to vegetation in the area of the National Park approximately 3.7 hectares in size. The defendant was prosecuted for damaging reserved land contrary to s 156A(1) of the NPW Act. He was convicted and fined \$13,200.¹⁵¹

In *Ford v Ensor; Stratford District Court v Ensor*,¹⁵² the owner of land contiguous with protected areas cleared an access track through mature indigenous forest and erected a fence on his land for the purpose of establishing a game hunting park. The district plan imposed controls on rural activities undertaken contiguous with protected areas because of the importance to the district of those protected areas. The Environment Court of New Zealand (Dwyer J) declared that the activities undertaken without consent contravened the district plan and granted an enforcement order.¹⁵³

¹⁵⁰ [2007] NSWLEC 670.

¹⁵¹ *Ibid* [38].

¹⁵² [2010] NZRMA 208.

¹⁵³ *Ibid* [68]-[69], [86], [98]-[102].

In the Land and Environment Court of NSW, there have also been several administrative cases reviewing on the merits decisions to refuse consent for development buffering Sydney Harbour, a significant seascape.¹⁵⁴

Public trust litigation

The fifth category of cases involves actions by individuals and organisations seeking to prohibit activities in a protected area, or enforce the laws protecting protected areas, against public agencies who have responsibility to protect the protected areas. Such litigation has invoked the concept of the ‘public trust’.

The public trust doctrine has its origins in Roman law, specifically in the property concept of *res communis*. These are things which, by their nature, are part of the commons that all humankind has a right in common to access and use, such as the air, running water, the sea and the shores of the sea, and that cannot be appropriated to private ownership. Ownership of these common natural resources is vested in the state as trustee of a public trust for the benefit of the people. The state, as trustee, is under a fiduciary duty to deal with the trust property, being the communal natural resources, in a manner that is in the interests of the general public, who are the beneficiaries of the trust.

According to Sax, the idea of a public trusteeship rests upon three related principles:

First, that certain interests – like the air and the sea – have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principal purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted public benefit.¹⁵⁵

The public trust doctrine originally applied principally to the air and communal waters, such as running water and the sea. However, it has been liberated from its historical shackles so as to apply to other water resources (freshwater lakes and

¹⁵⁴ *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190; *Addenbrooke Pty Ltd v Woollahra Municipal Council (No 2)* [2009] NSWLEC 134; *Rose Bay Marina Pty Limited v Woollahra Municipal Council* [2013] NSWLEC 1046.

¹⁵⁵ Joseph L Sax, *Defending the Environment: A Handbook for Citizen Action* (Vintage Books, 1971) 165. See also Joseph L Sax, ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’ (1969-1970) 68 *Michigan Law Review* 471, 484-485.

subterranean water sources), forests, parklands, fish and wildlife, and other important natural areas.¹⁵⁶

The public trust concept has been incorporated from the Roman law into the English common law.¹⁵⁷ It has particularly developed in the United States.¹⁵⁸ A notable case concerned a freshwater lake. In *National Audubon Society v Superior Court of Alpine County*,¹⁵⁹ the Supreme Court of California held that the doctrine of public trust was an independent basis for contesting the allocation of water resources. The case concerned a challenge to diversion tunnels, constructed under government permit by the respondents, around California's second largest lake, Mono Lake. The water diversions resulted in a one-third reduction in the surface area of the lake, depletion of the bird communities which fed on the lake's shrimp, and a decrease in 'both the scenic beauty and the ecological values of Mono Lake'.¹⁶⁰

The National Audubon Society argued that the shores, bed and waters of the lake constituted a public trust and hence the state had a duty to protect the human and environmental uses of the lake and prevent anyone from acquiring a right to harm it. The majority of the Supreme Court of California agreed, holding that 'the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands

¹⁵⁶ Joseph L Sax, 'Liberating the Public Trust Doctrine from its Historical Shackles' (1980-1981) 14 *University of California Davis Law Review* 185; Charles F Wilkinson, 'The Public Trust Doctrine in Public Land Law' (1980-1981) 14 *University of California Davis Law Review* 269; Harrison C Dunning, 'The Public Trust: A Fundamental Doctrine of American Property Law' (1988-1989) 19 *Environmental Law* 515, 518-519; Gary D Meyers, 'Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife' (1988-1989) 19 *Environmental Law* 723, 728-731; Gary D Meyers, 'Divining Common Law Standards for Environmental Protection: Application of the Public Trust Doctrine in the Context of Reforming NEPA and the Commonwealth Environmental Protection Act' (1994) 11 *Environmental & Planning Law Journal* 289, 296-297; David Takacs, 'The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property' (2008) 16 *New York University Environmental Law Journal* 711, 718-720; Reed Watson, 'Public Wildlife on Private Land: Unifying the Split Estate to Enhance Trust Resources' (2012-13) 23 *Duke Environmental Law and Policy Forum* 291; Bradley Freedman and Emily Shirley, 'England and the Public Trust Doctrine' (2014) 8 *Journal of Planning & Environment Law* 839.

¹⁵⁷ Freedman and Shirley, above n 156, 842.

¹⁵⁸ See, eg, *Arnold v Mundy* 6 NJL 1 (Sup Ct NJ, 1821); *Illinois Central Railroad v Illinois* 146 US 387 (US Sup Ct, 1892); *Lake Michigan Federation v US Army Corps of Engineers* 742 F Supp 441 (N D Ill, 22 June 1990); *National Audubon Society v Department of Water and Power of the City of Los Angeles* (1983) 658 P 2d 709 (Sup Ct Cal, 17 February 1983). See also cases in Sax, above n 155; Jan S Stevens, 'The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right' (1980-1981) 14 *University of California Davis Law Review* 195.

¹⁵⁹ (1983) 658 P 2d 709 (Sup Ct Cal, 17 February 1983).

¹⁶⁰ *Ibid* 711.

underlying those waters'.¹⁶¹ As the doctrine of public trust was found to be integrated with, and not independent to, the appropriative water rights system, the state had a duty to take the human and environmental uses of the lake into account when planning the allocation of water resources as 'approval of (water) diversion without considering public trust values may result in needless destruction of those values'.¹⁶² Mono Lake was protected in 1981 by the Californian State Legislature including it within the Mono Lake Tufa State Natural Reserve and in 1984 by the Federal Government designating surrounding lands within the Mono Basin National Scenic Area.

Although the public trust doctrine is better developed in the United States, there are illustrations of application of public trust obligations in England and Scotland.¹⁶³ Less judicial consideration has been given to the public trust doctrine in Australia. However, there have been some cases in which the doctrine has been raised.¹⁶⁴ Two early examples are the proposal of the Victorian government in 1875 to sell part of Albert Park in Melbourne and the proposal of the NSW government in 1895 to grant a lease of part of the foreshore of Port Jackson to the Sydney Harbour Colliery Company so that it could establish a coal mine on Sydney Harbour.

In the Albert Park case, a local landowner, Henry Palmer, instituted proceedings in the Victorian Supreme Court, seeking an injunction to restrain the Board of Land and Works from selling part of the Park.¹⁶⁵ Unusually, the Court held that Mr Palmer did not have standing, but nevertheless considered the merits of the action. Molesworth J equated actions for breach of public trust with actions for public nuisance, and held that Mr Palmer needed to show 'particular damage'.¹⁶⁶ As the sale involved damage to the public in general, the damage could only be enforced by the Attorney-General

¹⁶¹ Ibid 712.

¹⁶² Ibid.

¹⁶³ See, eg, *The Royal Fishery of the River Banne* (1611) 80 Eng Rep 540 (KB 1611); *Gann v Free Fisheries* (1865) 11 Eng Rep 1305 HL; *Kinloch v Secretary of State for India* (1882) 7 App Cas 619; *Lord Advocate v Clyde Navigation Trustees* (1891) 19 Rettie 174; *Tito v Waddell (No 2)* [1977] Ch 211.

¹⁶⁴ Tim Bonyhady, 'A Usable Past: The Public Trust in Australia' (1995) 29 *Environmental & Planning Law Journal* 329; Paul L Stein, 'Ethical Issues in Land-Use Planning and the Public Trust' (1996) 13 *Environmental & Planning Law Journal* 493; Bruce Thom, 'Climate Change, Coastal Hazards and the Public Trust Doctrine' (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 21.

¹⁶⁵ *Palmer v The Board of Land and Works* (1875) 1 VLR 80.

¹⁶⁶ Ibid 83.

of Victoria.¹⁶⁷ Molesworth J considered that even if the Board of Land and Works held the land as a public trust, it did not extend to ‘the preservation of those enjoyments for the holders of adjoining lands’.¹⁶⁸

A different outcome ensued in the threat to the foreshore of Sydney Harbour from coal mining. In an appeal by the Sydney Harbour Collieries Company against the recommendations of the Sydney Land Board in respect of their wharfage lease, the NSW Land Appeal Court declared that the Crown occupied ‘a position in relation to public lands something in the nature of a trustee under an obligation to dispose of or alienate those lands...only in the interest and for the benefit of the people of this Colony’.¹⁶⁹ The Court dismissed the appeal.¹⁷⁰

More recent challenges in Australia to government decisions invoking the public trust doctrine have had mixed success. In the 1970s, Canberra residents opposed to the construction of the Black Mountain Tower brought proceedings to restrain the construction of the proposed tower as an unlawful interference with the city’s environment and an unlawful exercise of the powers of the Postmaster-General and the executive of the Commonwealth.¹⁷¹ The proposed location of the tower was in an area that had been declared as a public reserve under the *Public Parks Ordinance 1928-1942* (ACT). The plaintiffs contended that there was a public trust in respect of the reserve arising out of the declaration of the reserve as a public park, and that the erection of the tower would be injurious to the environment of the mountain and the surrounding area. Without providing reasons, Smithers J held that there was not ‘any such trust or obligation upon the defendants arising out of the declaration of the reserve as a public park’.¹⁷²

In *Willoughby City Council v Minister Administering the National Parks and Wildlife Act*,¹⁷³ discussed above, Willoughby and Ku-ring-gai Councils challenged a decision of the NSW Minister for National Parks to lease part of the then Davidson State

¹⁶⁷ Ibid 88.

¹⁶⁸ Ibid 89.

¹⁶⁹ *Re Sydney Harbour Collieries Co* (1985) 5 *Land Appeal Court Reports* 243, 255.

¹⁷⁰ Ibid 258.

¹⁷¹ *Kent v Johnson* (1973) 21 FLR 177.

¹⁷² Ibid 221.

¹⁷³ (1992) 78 LGERA 19.

Recreation Area on Sydney's upper middle harbour. The area was later proclaimed to be part of Garigal National Park. Section 47B(1) of the NPW Act provided that the Minister could reserve land as a State recreation area for the purpose of 'public recreation and enjoyment'. Stein J held that any purpose which was not for this purpose was impermissible.¹⁷⁴ The lease in question was for a reception area and tea rooms, intended in part to hold private functions such as weddings. Stein J held that this use of land had the effect of excluding the public from the land, and was 'inimical to the purpose of the State recreation area' because it was not one for public recreation and enjoyment'.¹⁷⁵ The lessor and lessee submitted that nonetheless the Court should, in the exercise of its discretion, decline to grant orders declaring the lease and building consent void or requiring the demolition of the unlawful buildings. The Court disagreed, having regard to the status of the land as part of a national park. Stein J held:

I think it is clear from the legislation that national parks are held by the State in trust for the enjoyment and benefit of its citizens, including future generations. In this instance the public trust is reposed in the Minister, the director and the service. These public officers have a duty to protect and preserve national parks and exercise their functions and powers within the law in order to achieve the objects of the *National Parks and Wildlife Act*.¹⁷⁶

The concept of the public trust has also been invoked in cases concerning proposed activities in or development of harbour areas. In *Addenbrooke Pty Ltd v Woollahra Municipal Council*,¹⁷⁷ Biscoe J noted that Sydney Harbour 'provides pleasure not only to mariners but to many visitors from Australia and abroad'.¹⁷⁸ Consequently, the impact in that case of the proposed commercial marina on Rose Bay, an area of the Harbour, was of 'unusually wide public significance'.¹⁷⁹ The public importance of the Harbour has been acknowledged in the Sydney Harbour REP, which aims to ensure that the Harbour is maintained as an 'outstanding natural asset', and a 'public asset of national and heritage significance'.¹⁸⁰ Biscoe J stated that the Sydney

¹⁷⁴ Ibid 26.

¹⁷⁵ Ibid 27.

¹⁷⁶ Ibid 34.

¹⁷⁷ [2008] NSWLEC 190.

¹⁷⁸ Ibid [5].

¹⁷⁹ Ibid.

¹⁸⁰ Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 cl 2(1)(a).

Harbour REP attributed a 'unique legal status' to Sydney Harbour.¹⁸¹ Biscoe J compared this status as a public asset to the legal status accorded to Hong Kong's Victoria Harbour.¹⁸²

The public importance of the Hong Kong harbour, popularly known as 'Victoria Harbour', has been acknowledged in the enactment of the *Protection of the Harbour Ordinance* ('the Ordinance').¹⁸³ Section 3 of the Ordinance states that the harbour is to be 'protected and preserved as a special public asset and a natural heritage of Hong Kong people', and that for this purpose there shall be a 'presumption against reclamation in the harbour'.

In *Society for the Protection of the Harbour Ltd v Town Planning Board*,¹⁸⁴ the Society for Protection of the Harbour Ltd challenged decisions of the Town Planning Board to allow the reclamation of certain areas of the harbour for the provision of roads, a waterfront promenade, a harbour park, and the re-provisioning of various facilities. Following the public exhibition of the proposed reclamation, numerous written objections to the plan were lodged. The Board made limited amendments to the draft plan, and submitted the draft plan to the Chief Executive in Council for approval. These were the decisions challenged by the Society. At first instance, the Board submitted that s 3 of the Ordinance required the decision-maker to undertake a weighing exercise for the purpose of deciding whether the public benefits of the proposed reclamation outweighed the need to preserve the harbour. If so, the presumption against reclamation would be rebutted. Chu J held that the Board had misinterpreted the Ordinance.¹⁸⁵ She held that the presumption against reclamation would only be rebutted where there was a compelling, overriding and present public need for reclamation, there was no viable alternative to reclamation, and the proposed reclamation involved minimum impairment to the harbour.¹⁸⁶ She granted an order of certiorari to quash the decisions in question, and remitted the matter to

¹⁸¹ Ibid [46].

¹⁸² Ibid [47].

¹⁸³ See also the discussion of the public importance of Victoria Harbour in Berry Fong Chung Hsu, 'A Public Trust Doctrine for Hong Kong' (2011) 15 *New Zealand Journal of Environmental Law* 89.

¹⁸⁴ [2003] HKCFI 220; [2003] 2 HKLRD 787.

¹⁸⁵ Ibid [65], [78], [110].

¹⁸⁶ Ibid [50].

the Board to reconsider the draft plan and the objections.¹⁸⁷ The Board appealed that decision.

The Court of Final Appeal upheld this interpretation of the Ordinance.¹⁸⁸ The Court (Li CJ, Bokhary, Chan and Ribeiro PJJ and Mason NPJ) upheld Chu J's decision that s 3(1) established a 'statutory principle recognising the harbour as a special public asset'.¹⁸⁹ In exercising their powers, the Court held that public officers and public bodies had to have regard to the principle in s 3(1).¹⁹⁰ The Court upheld Chu J's determination that the presumption against reclamation could only be rebutted by establishing an 'overriding public need for reclamation', no reasonable alternative to the reclamation, and minimum impairment to the harbour.¹⁹¹

Conclusion

This paper has explained the important and fruitful role that the judiciary plays in helping to promote in-situ conservation of biological diversity and natural and cultural heritage by means of protected areas. The judiciary upholds and enforces the protected area laws of the legislature and the policies and decisions of the executive to establish and manage protected areas. The paper has explored the ways in which protected area laws have been interpreted, upheld and enforced by the courts, particularly in Australia and New Zealand, through their judicial decisions.

¹⁸⁷ Ibid [111].

¹⁸⁸ *Town Planning Board v Society for the Protection of the Harbour Ltd* [2004] HKCFA 27; (2004) 7 HKCFAR 1.

¹⁸⁹ Ibid [32].

¹⁹⁰ Ibid [38]-[39].

¹⁹¹ Ibid [44]-[49].