EXTENDED STANDING – ENHANCED ACCOUNTABILITY? JUDICIAL REVIEW OF COMMONWEALTH ENVIRONMENTAL DECISIONS

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I. INTRODUCTION

The general test for standing in Australia requires an applicant to have a 'special interest' in the subject matter of the action.[1] It is well known that under this test environmental groups face challenges in being granted standing. So, what happens when legislation extends standing to allow these groups to bring judicial review proceedings? The cases and academic literature suggest that there may be a number of consequences. It may be that other factors such as costs, non-justiciability, or powers to stay proceedings for being an abuse of process operate to curb inappropriate proceedings.[2] It is also possible that standing-related issues are handled by the grounds of judicial review. This could occur in two different ways. Judges may be wary of being drawn into what they regard as political disputes[3] and take a restrained approach to the grounds of review that emphasises orthodox limitations. Or, they may see extended standing as a sign that legal accountability is to be enhanced and that a progressive approach to the grounds of review is warranted.[4]

This article examines the consequences of extended standing with reference to cases determined under the primary Commonwealth environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the 'EPBC Act'). Section 487 of this Act extends standing under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the 'ADJR Act') to environmental groups. The EPBC Act judicial review cases are suited to a study of standing for two reasons.

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[1] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 527 (Gibbs J). Technically there are separate tests for standing in Australian law for different remedies. However, it is also recognised that there is 'broad agreement' or, at least, a tendency towards 'convergence' between the different tests: *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124, 132 (Gummow J); M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 745.

[2] *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 263 [39] (Gaudron, Gummow and Kirby JJ).

[3] H Burmester, 'Limitations on Federal Adjudication' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227, 228-229, 252; P Cane, 'Open Standing and the Role of Courts in a Democratic Society' (1999) 20 *Singapore Law Review* 23, 29; R Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669, 1670.

[4] See *Oshlack v Richmond River Council* (1998) 193 CLR 72, 90-1 [47]-[49] (Gaudron and Gummow JJ), 114-5 [116]-[119] (Kirby J); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 431-2 [18]-[22] (Black CJ and Finkelstein J).

The first is that Commonwealth environmental litigation has been the site of many of the major battles in the development of Australian standing rules and a study of cases that would not have been permitted under the general rules, or would at least have been uncertain, can inform administrative lawyers about the consequences of extended standing. Modern Australian standing law starts with the case that established the special interest test, *Australian Conservation Foundation v Commonwealth*.[5] The environmental group in that case failed to gain standing to challenge actions taken under the prior Commonwealth environmental legislation, the *Environment Protection (Impact of Proposals) Act 1974* (Cth). Some of the later cases that liberalised the special interest test also involved challenges by environmental groups to actions under the 1974 Act.[6] While the standing of environmental groups is still tested in contexts in which standing has not been extended,[7] s 487 has largely stopped standing being disputed in judicial review proceedings under the EPBC Act. This raises a question about the consequences of this change – that is, whether the substance of standing tests, namely that the applicant's rights or interests are directly affected by the decision, has merely moved to other elements of judicial review.

The second reason that the EPBC Act cases are relevant to a study of standing is that they highlight the significance of standing to the limits of judicial review. Environmental groups criticised judicial review in submissions to the recent 10 year review of the EPBC Act (the 'Hawke Review').[8] They submitted that judicial review is an inadequate accountability mechanism for decisions made under the Act primarily due to the 'tick-a-box' approach to whether relevant matters are considered by the decision-maker and the limited nature of procedural fairness in environmental decision-making processes.[9] If the cases support these criticisms – this is examined in Part IV below – they raise an interesting question: why extend access to an accountability institution that cannot adequately review the decision?

This article examines these questions in the following manner. Part II sets out the extended standing provision in the EPBC Act and discusses its historical context. Part III examines whether alternative filtering mechanisms, such as non-justiciability, have been employed to deal with issues that would otherwise have been dealt with under standing. Part IV looks at the Federal Court cases dealing with decisions under the EPBC Act to assess whether the environmental groups' criticisms of the Federal Court's application of the grounds of review are valid.

My conclusion is that extended standing has not resulted in other mechanisms being used to filter out inappropriate proceedings. The burden has instead fallen onto the grounds of review. The grounds have been applied in an orthodox, restrained manner that substantially limits the effectiveness of judicial review proceedings brought by

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[5] (1980) 146 CLR 493.

[6] *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516.

[7] Empirical research into Australian standing cases has found that environmental groups are the type of public interest organisation whose standing is most often challenged in the cases: R Douglas, 'Uses of Standing Rules 1980-2006' (2006) 14 *Australian Journal of Administrative Law* 22, 28.

[8] A Hawke, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Interim Report* (June 2009).

[9] A Hawke, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Interim Report* (June 2009), 314 [20.34]-[20.37].

environmental groups for decisions made under the Act. In the terminology commonly used for the elements of accountability,[10] extended access to the courts may have expanded the range of persons and groups 'to whom' the Minister and delegates are accountable[11] but the standards by which their decisions are tested, the 'for what' dimension, lack purchase in review of EPBC Act decisions.

II. HISTORY AND CONTEXT OF THE EPBC ACT STANDING PROVISION

The extended standing provision in the EPBC Act should be contrasted with the general standing test that was established in *Australian Conservation Foundation v Commonwealth*.[12] Although the High Court in that case expanded the test, by changing the terminology from 'special damage' to 'special interest',[13] the environmental group's interest in enforcing environmental impact assessment provisions was insufficient. Justice Gibbs referred to its interest as a 'mere intellectual or emotional concern'.[14] The group's environment protection objects and the fact that it had made submissions in the decision-making process were thought to be irrelevant to whether it had a special interest sufficient to be granted standing.[15] This approach to the special interest test seems necessarily to exclude environmental groups from bringing public interest-based proceedings.[16]

Section 487 of the EPBC Act extends the standing requirements for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It removes the ADJR Act requirement that an applicant's interests are adversely affected,[17] a test that is recognised to be the same as the special interest test.[18] The EPBC Act provision extends standing to both individuals and organisations but this article will focus on the latter as they have been the focus of the cases. Section 487 of the EPBC Act

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[10] R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave McMillan, 2003), 22-3. See also J Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in M Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 115, 117-8; C Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38, 41.

[11] Note that judicial review is said to have a dual direction regarding the 'to whom' question as it requires the administrator to answer to a court but also to the individual or group who brings the proceedings: R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave McMillan, 2003), 76.

[12] (1980) 146 CLR 493.

[13] (1980) 146 CLR 493, 527. See also Mason J, 547.

[14] (1980) 146 CLR 493, 530-531. See also Stephen J, 539 a 'genuinely held conviction upon a topic of public concern' is insufficient for standing; Mason J, 548 that a 'mere belief or concern' is not sufficient for standing.

[15] (1980) 146 CLR 493, 531.

[16] It may be that the special interest restriction can be avoided by the group finding a plaintiff or co-plaintiff who will satisfy the special interest test because their financial interests are affected or they live near the particular development and have property interests affected by the decision: M Barker, 'Standing to Sue in Public Interest Environmental Litigation: From ACF v Commonwealth to Tasmanian Conservation Trust v Minister for Resources' (1996) 13 *Environmental and Planning Law Journal* 186, 196.

[17] *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 3(4).

[18] M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 790-1.

provides:

> An organisation or association (whether incorporated or not) is taken to be a person aggrieved by the decision, failure or conduct if:
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> (a) the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory; and
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> (b) at any time in the two years immediately before the decision, failure or conduct, the organisation or association has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment; and
>
> (c) at the time of the decision, failure or conduct, the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment.[19]

The primary conditions established by s 487 are that the organisation has engaged in environmental activities or research in the previous two years and that environment protection or research is included in its objects of association.[20]

Section 487 does not go as far as environmental legislation that provides for open standing by permitting 'any person' to bring judicial review proceedings, which is a common feature of environmental legislation in New South Wales,[21] but it can be regarded as having a similar scope as Federal Court case law that liberalised the special interest standing test. Environmental groups gained standing under this liberal approach when they satisfied the court of particular matters – such as recognition by governments, the nature of their membership, and the relevance of their activities.[22] While s 487 carries over the relevant activities requirement from the liberalisation cases, it adds incorporation or establishment in Australia and the organisation having objects that relate to environment protection, the latter being regarded in the liberalised standing case law as an insufficient factor.[23]

Section 487 establishes a representative form of standing. In order to understand the type of standing that is provided by s 487 it is worthwhile referring to the different forms of representative standing that have been distinguished by Cane:[24]

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[19] Section 475 of the EPBC Act provides similar scope for standing for proceedings for an injunction to restrain a person from engaging in conduct that is an offence or contravention of the Act.

[20] These requirements follow extensions to standing by Commonwealth environmental legislation enacted prior to the EPBC Act: *Endangered Species Protection Act 1992* (Cth), s 131; *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth), s 58A (inserted by Act No 7, 1996).

[21] Eg *Environmental Planning and Assessment Act 1979* (NSW), s 123; *Heritage Act 1977* (NSW), s 153; *Protection of the Environment Operations Act 1997* (NSW), s 252.

[22] Eg *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, 205-6; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 512-513; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516, 552-553.

[23] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 531 (Gibbs J); *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 512.

[24] P Cane, 'Standing, Representation and the Environment' in I Loveland (ed), *A Special Relationship?: American Influences on Public Law in the UK* (Clarendon Press, 1995) 123, 132-3.

- *Associational standing*: This form of standing occurs when an association represents persons or other organisations that have an interest in the proceedings. Section 487 is not related to associational standing because the removal of the requirement for an applicant's interests to be affected means that there is no need to examine whether the group represents its members' interests.[25]
- *Surrogate standing*: This occurs when the applicant represents the interests of a particular individual. In the context of environmental litigation, a form of surrogate standing occurs when the applicant represents an aspect of the environment, such as a species or a particular area of land.[26] Section 487 does not establish this form of standing because it does not limit access to the courts to those who have conducted research or activities into the particular aspect of the environment that is at risk in the particular case. It instead refers to activities or research into 'the environment' stated in a general sense. The provision is therefore broader than what would be provided for surrogate standing.
- *Citizen standing*: This form of standing arises when an individual or group represents the public interest. The extended standing provision in the EPBC Act seems to be a form of citizen standing. Its requirement for engagement in environmental activities and the inclusion of environment protection or research in its objects of association appears to be designed to ensure that the applicant is fit to represent the public interest in relation to the environment.[27]

The facilitation of judicial review by the extended standing provision in the EPBC Act is a fundamental change from the previous legislation, the *Environment Protection (Impact of Proposals) Act 1974* (Cth). Australian administrative lawyers will know that the 1974 Act was the legislation that was relevant in the primary standing case, *Australian Conservation Foundation v Commonwealth*. It is likely to be less well-known that the 1974 Act was designed to minimise judicial review of actions taken under it. The Minister stated in his second reading speech that the government had noted difficulties in the United States arising from its environmental impact assessment legislation due to 'too frequent resort to the courts'.[28] He said that the 1974 Act was designed to avoid this by 'making the impact statement requirement discretionary' and by incorporating impact assessment into the 'normal process of government decision-making'.[29] While it is unclear why the latter would minimise resort to the courts, the former succeeded in making the impact assessment requirements difficult to enforce and appears to have deterred judicial review challenges. Writing in 1994, Munchenberg found that only eight judicial review

[25] M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 767-71; P Cane, 'Standing, Representation and the Environment' in I Loveland (ed), *A Special Relationship?: American Influences on Public Law in the UK* (Clarendon Press, 1995) 123, 133-40.
[26] See eg CD Stone 'Should Trees Have Standing–Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450, 464-466; *Booth v Bosworth* [2000] FCA 1878 at [5]; *Sierra Club v Morton* 405 US 727 (1972), 744-45, 751-2 (Douglas J).
[27] Australian Law Reform Commission, *Standing in Public Interest Litigation*, (Report No 27, 1985), 123, 138-9.
[28] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1974, 4082 (Dr Cass).
[29] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1974, 4082 (Dr Cass).

actions had been litigated for decisions under the 1974 Act.[30] Much of the academic and judicial discussion of the Act related to whether the impact assessment system it established was enforceable[31] – a question that continued to be raised up to the late 1990s when the 1974 Act was superseded by the EPBC Act.[32]

In the same period that these difficulties were becoming apparent, the Australian Law Reform Commission published two reports on standing.[33] Both recommended that standing should be extended.[34] The second report published in 1996 recommended that an 'any person' provision should be implemented with two exceptions – contrary legislative intention and unreasonable interference with a person's private interests.[35] Although it is clear that this test was intended to be expansionary, the second exception would have created difficulties for environmental groups. The Commission explained that this exception would arise when a third party seeks to challenge a decision concerning the entitlements of another party. It fleshed out the exception with an example of an environmental group challenging a coal export licence. The concern was that the licensee would incur costs due to delay and possible inability to fulfil obligations to purchasers.[36] The example indicates that environmental groups would commonly be caught by the exception as many of the cases brought by them under the *Environment Protection (Impact of Proposals) 1974* (Cth) involved challenges to export licence decisions.[37] This recommendation would therefore have seriously limited environmental groups' access to the courts by unwinding the liberalisation of the special interest test developed by the Federal Court in the 1980s and 1990s.

The Australian Law Reform Commission's recommended standing test was not implemented. Yet only three years after its report, an extended standing provision was included in the EPBC Act that grants access to the courts for environmental groups. While the standing provision in the EPBC Act was obviously intended to extend standing, it is not clear why this was thought to be an appropriate reform. Senate

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[30] S Munchenberg, 'Judicial Review and the Commonwealth Environment Protection (Impact of Proposals) Act) 1974' (1994) 11 *Environmental and Planning Law Journal* 461, 462 (footnote 7).
[31] S Munchenberg, 'Judicial Review and the Commonwealth Environment Protection (Impact of Proposals) Act) 1974' (1994) 11 *Environmental and Planning Law Journal* 461; R Fowler, 'The Prospects of Judicial Review in Relation to Federal Environmental Impact Statement Legislation' (1977-8) 11 *Melbourne University Law Review* 1; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 546-7 (Stephen J).
[32] *Randwick City Council v Minister for the Environment* (1999) 106 LGERA 47, 70-1 [73]-[76]. See also *Margarula v Minister for Environment* (1999) 92 FCR 35 for difficulties regarding the thresholds in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
[33] Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996); Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985).
[34] Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985), 138-9; Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996), [4.32], [5.24]-[5.25].
[35] Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996), 'Recommendation 2' [5.25].
[36] Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996), [4.19]-[4.22].
[37] Eg *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516; *Margarula v Minister for Environment* (1999) 92 FCR 35.

Committee reports reveal that industry and environmental groups debated whether the extended standing provision was too narrow or too wide.[38] Environmental groups submitted that a person may have a legitimate interest in bringing proceedings even if they have not undertaken research or activities in the previous two years, while industry groups said it would increase frivolous and vexatious litigation. Non-government political parties wanted an open standing provision to be included in the EPBC Act, yet their reasoning did not go beyond generalities such as enhancing transparency and accountability and there being little risk of floodgates opening.[39] The government said that the extended standing provision in the Act was 'appropriately broad'.[40]

Despite the concerns raised in this debate, there has been little focus on standing in the EPBC Act judicial review cases. Most of them have been brought by environmental groups or individuals whose private interests were not affected by the decision.[41] The discussion in the cases relating to the applicants' standing has either acknowledged that there was no issue[42] or accepted that the requirements of the Act were satisfied.[43] I have found only one case in which standing has been denied.[44] These cases indicate that s 487 of the EPBC Act has largely resolved any question about standing for environmental groups under this Act. This is significant because although the otherwise applicable special interest test has been applied in a liberal manner, it nevertheless creates uncertainty for environmental groups regarding their access to the courts. Recent environmental cases determined under legislation that has no extended standing provision show that environmental groups may still be denied standing under the special interest test.[45]

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[38] Senate Environment, Communications, Information Technology and the Arts Committee, *Environment Protection and Biodiversity Conservation Bill 1998* (1998), [11.36]-[11.41].

[39] Senate Environment, Communications, Information Technology and the Arts Committee, *Environment Protection and Biodiversity Conservation Bill 1998* (1998), 'Labor Senator's Findings', 'Minority Report of the Australian Democrats', 'Report by the Australian Greens and The Greens (WA)'.

[40] Government Report to the Senate Environment, Communications, Information Technology and the Arts on Commonwealth Environment Powers, *Response to Recommendations* (1999).

[41] The exceptions are cases brought by proponents (*Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* (2008) 162 LGERA 154; *Waratah Coal Inc v Minister for Environment, Heritage and the Arts* (2008) 173 FCR 557; *Anzbrook Pty Ltd v Minister for the Environment, Heritage and the Arts* (2010) 237 FLR 187) and a challenge by individuals with property interests that were likely to have been affected by the approved mine (*Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, 54 [202]).

[42] *Humane Society International Inc v Minister for Environment and Heritage* (2003) 126 FCR 205, 212 [27]; *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463, [23]; *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* (2008) 167 FCR 463, 465 [2]; *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, 54 [203]; *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* (2011) 179 LGERA 458, 462 [7].

[43] *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* (2007) 159 LGERA 8, 10 [2]; *Wilderness Society Inc v Turnbull* (2008) 166 FCR 154, 177 [88]; *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588 at [2]-[3].

[44] *Paterson v Minister for the Environment and Heritage* [2004] FMCA 924.

[45] See eg *Onesteel Manufacturing Pty Ltd v Whyalla Red Dust Action Group Inc* (2006) 94 SASR 357; *Animal Liberation Ltd v Department of Environment and Conservation* [2007] NSWSC 221. See also M Groves, 'Should the Administrative Law Act 1978 (Vic) Be Repealed?' [2010] 34 *Melbourne University Law Review* 452, 471.

III. ALTERNATIVE FILTERING MECHANISMS

It may be the case that although the EPBC Act extends standing for environmental groups, the concerns that are usually addressed by standing rules are merely transferred to elsewhere in the judicial review process. This was suggested by Justices Gaudron, Gummow and Kirby in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[46] when they said that standing may be dealt with according to other principles such as non-justiciability or staying proceedings on the basis of their being oppressive, vexatious or an abuse of process.[47] Their Honours also indicated that an adverse costs order would deter plaintiffs.[48] The question for extended standing under the EPBC Act that is suggested by these comments is whether the substance of traditional standing rules, that the applicant has a personal stake in the matter, has moved to other filtering mechanisms.

It is impossible to gauge the extent to which costs is a deterrent merely by surveying the published cases.[49] The task would require qualitative research of environmental groups and lawyers who practice in this area, and is beyond the focus of this article. It should nevertheless be noted that costs are often thought to be a barrier to public interest litigation.[50] The deterrent effect is likely to be exacerbated for environmental groups since there are usually two respondents in any challenge to an approval – the administrative decision-maker and the proponent. If the judicial review application is unsuccessful, which has been the result in most of the EPBC Act judicial review cases, the environmental group may have to pay each respondent's costs. This can result in costs orders of several hundred thousand dollars,[51] which makes it likely to be a major deterrent to bringing judicial review proceedings.

In my survey of judicial review challenges to decisions made under the EPBC Act I could not find any examples of summary dismissal. One likely reason for this is that the ground is hard to make out. The courts emphasise that exceptional caution is to be exercised before dismissing cases in this way.[52] There have been preliminary proceedings that are of some interest due to the possibility that they could have led to summary dismissal. The interesting aspect of these cases is that they have been determined in favour of environmental groups *because* of the public interest nature of the proceedings.[53] There is no evidence therefore of preliminary procedural

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[46] (1998) 194 CLR 247.
[47] (1998) 194 CLR 247, 263 [39].
[48] (1998) 194 CLR 247, 263 [39].
[49] I do not intend to examine in any detail the extent to which costs is a deterrent. However, it is important to note that there is a question as to whether costs *should* be a deterrent in public interest environmental litigation: see *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, 287-289 [28]-[36].
[50] Eg A Hawke, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (October 2009), 264 [15.105].
[51] K Ruddock, 'The Bowen Basin Coal Mines Case: Climate Law in the Federal Court' in T Bonahady and P Christoff (eds), *Climate Law in Australia* (Federation Press, 2007) 173, 184-185; *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588, [4]-[5].
[52] *Spencer v Commonwealth* (2010) 241 CLR 118, 140 [55] (Hayne, Crennan, Kiefel and Bell JJ); see also 131 [24] (French CJ and Gummow J).
[53] *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588, [12]-[14]; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 431-3 [18]-[29] (Black CJ and Finkelstein J).

mechanisms being used to restrict proceedings on the basis that the applicant has no personal stake in the decision.

The third alternative mechanism referred to in the *Bateman's Bay* case was that rather than dealing with issues of standing according to the standing case law, it may be appropriate to determine whether the proceedings should be dismissed because the 'right or interest of the plaintiff was insufficient to support a justiciable controversy'.[54] While standing and non-justicability are usually understood to be distinct concepts, the former relating to who is the proper applicant and the latter dealing with the type of issues that are not suited to judicial review, the High Court's suggested conflation of them in *Bateman's Bay* is likely to be due to their common basis in the separation of powers[55] and their focus on individual interests.[56]

Although non-justiciability has not been raised as an issue in the EPBC Act judicial review cases there are a number of ways in which it could come it into play. The first is that environmental decisions are typically polycentric, since they often involve many different persons with diverse interests.[57] However, this ground of non-justiciability is not often argued and academics now tend to see it as better suited to indicating the need for a restrained form of review rather than exclusion of review.[58]

The second way that non-justiciability issues could arise in EPBC Act judicial review cases is by the constitutional requirement that Federal Courts are limited by Chapter III of the Constitution to determining 'matters'. The High Court has determined that 'matter' means 'some immediate right, duty, or liability to be established by the determination of the Court'.[59] Judicial review challenges by environmental groups could engage the matter principle in at least two ways. The first relates to standing. The High Court has referred to standing as being 'subsumed within' the matter principle as the principle requires an applicant to have a 'sufficient interest' in enforcing the right, duty or liability.[60] This would create difficulties for environmental groups if 'sufficient interest' is equated with 'special interest' as applied in *Australian Conservation Foundation v Commonwealth*. However, the High Court determined in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management*

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[54] *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 263 [39] (Gaudron, Gummow and Kirby JJ). The High Court has also indicated that the ADJR Act threshold requirements may restrict particular applications even though the applicant has standing: *Griffith University v Tang* (2005) 221 CLR 99, 117 [44] (Gummow, Callinan and Heydon JJ).

[55] H Burmester, 'Limitations on Federal Adjudication' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227, 252. See also P Cane 'The Function of Standing Rules in Administrative Law' [1980] *Public Law* 303, 327-8; C Harlow 'Public Law and Popular Justice' (2002) 65 *Modern Law Review* 1, 5.

[56] M Allars, 'Standing: The Role and Evolution of the Test' (1991) 20 *Federal Law Review* 83, 96;

[57] A Edgar, 'Participation and Responsiveness in Merits Review of Polycentric Decisions: A Comparison of Development Assessment Appeals' (2010) 27 *Environmental and Planning Law Journal* 36, 40-2; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278-9 (Bowen CJ).

[58] E Campbell and M Groves, 'Polycentricity in Administrative Decision-Making' in M Groves (ed) *Law and Government in Australia* (Federation Press, 2005) 213, 239; JA King 'The Justiciability of Resource Allocation' (2007) 70 *Modern Law Review* 197.

[59] *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

[60] *Croome v Tasmania* (1997) 191 CLR 119, 132-133 (Gaudron, McHugh and Gummow JJ); see also 125-7 (Brennan CJ, Dawson and Toohey JJ)).

Ltd[61] that an open standing provision does not necessarily breach the matter principle and that there may be a justiciable controversy for the purposes of Chapter III despite the applicant having no personal right or special interest at stake.[62] The *Truth About Motorways* case is difficult to reconcile with the requirement that the applicant has a 'sufficient interest'. It may be that standing is related to the matter principle but not a critical element of it.[63] In any case, the acceptance of open standing in *Truth About Motorways* is most likely to be the reason for there being no cases dealing with the matter principle in relation to the EPBC Act.

The other way that the matter principle could be engaged is by reference to the requirement that proceedings relate to legal rights and duties. In *Minister for Immigration and Multicultural Affairs v Bhardwaj*, Justices Gaudron and Gummow stated that judicial review of administrative actions requires courts to make decisions regarding the 'legal rights and duties of the parties to the review proceedings'.[64] The judges elaborated by stating that in judicial review cases,

> the question that is ultimately decided is not whether the decision was affected by error but whether the rights of the party to whom the decision relates are determined by that decision which, they will not be, if the decision must be set aside.[65]

This focus on rights and duties by Justices Gaudron and Gummow reflects a narrow understanding of the matter principle[66] and would restrict environmental groups' ability to challenge decisions made under the EPBC Act. It is clear that the Minister and his or her delegates have *duties* in relation to their decisions and that a developer whose action has been approved has *rights* that are affected. However, the environmental group that seeks to challenge the approval will not have rights that are affected. Their status in the decision-making processes in the EPBC Act is as a member of the public who may make submissions in consultation processes.[67] A broader approach to the matter principle that extends to protecting *interests* would probably not help environmental groups. The interests recognised in public law litigation are likely to be restricted to personal interests, such as liberty, reputation, livelihood, property, and immigration and welfare eligibility,[68] rather than public interests. Such difficulties are only likely to be avoided if the legal rights and obligations examined in the proceedings do not have to inhere in or be imposed on the

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[61] (2000) 200 CLR 591.
[62] (2000) 200 CLR 591, 603 [20] (Gleeson CJ and McHugh J); 611 [44]-[45] (Gaudron J); 631 [104], 637 [120]-[122] (Gummow J); 659-60 [176]-[180] (Kirby J); 660 [183] (Hayne J); 670 [214] (Callinan J).
[63] M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 743.
[64] (2002) 209 CLR 597, 617 [57]. See also *Griffith University v Tang* (2005) 221 CLR 99, 128 [80], 130 [89] (Gummow, Callinan and Heydon JJ).
[65] (2002) 209 CLR 597, 617 [58]; cf McHugh J, 618 [64]-[65].
[66] On broad and narrow approaches to the matter principle see C Mantziaris and L McDonald, 'Federal Judicial Review Jurisdiction after Griffith University v Tang' (2006) 17 *Public Law Review* 22, 33-35.
[67] The consultation provisions of the EPBC Act, ss 95(2)(c), 98(1)(c)(ii), 103(1)(c)(ii), refer to inviting 'anyone' to provide comments about the proposed action.
[68] See M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 427; C Mantziaris and L McDonald, 'Federal Judicial Review Jurisdiction after Griffith University v Tang' (2006) 17 *Public Law Review* 22, 37; *Kioa v West* (1985) 159 CLR 550, 582 (Mason J).

applicant for judicial review.[69] However this does not seem consistent with the judges' statements in *Bhardwaj* and *Bateman's Bay* (both quoted above) or either of the broad or narrow approaches to the matter principle.

The EPBC Act judicial review cases show that non-justiciability, the matter principle and other alternative filtering mechanisms, except probably the costs deterrent, have not played a restrictive role. That should be welcomed since a narrow, restrictive approach to non-justiciability and the matter principle would raise much uncertainty. These principles are recognised to be elusive and indeterminate[70] and there have been divisions within the High Court with regard to the matter principle.[71]

IV. JUDICIAL REVIEW MODELS AND THE GROUNDS OF REVIEW

The fact that these alternative filtering mechanisms have not played a restrictive role in the EPBC Act judicial review cases answers one question suggested by the High Court's reasoning in the *Bateman's Bay* case but leaves unanswered other questions that extended standing raises. As mentioned in Part III, administrative lawyers sometimes refer to non-justiciability, particularly when based on polycentricity, as being a reason for restraint by courts rather than a reason for exclusion of review. The point has been most fully examined by Finn, who argues that non-justiciability should be abandoned and that the grounds of review and the law/merits distinction are capable of handling the issues that arise.[72] Finn's point reflects practices that are apparent in the EPBC Act judicial review cases that are examined in this part of the article. The cases show that the grounds of review have been applied in an orthodox, restrained manner – the Federal Court has so far resisted arguments for expansion.

This raises an interesting question as to whether the concerns that underlie standing and non-justiciability should be transferred to restraint in the application of the grounds of review. On the one hand, Cane has pointed out that it would be doubtful whether a system with extended standing but restrictive review grounds would be 'honest or desirable',[73] suggesting that it would be futile to extend access to courts if the courts applied restricted standards to test the decision under review. On the other hand, extended standing provisions may be interpreted as a contextual factor that indicates that a progressive and intensive application of the grounds of review is appropriate. This approach to applying the grounds of review would be consistent with cases that have recognised that extended standing requires a progressive

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[69] M Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 Federal Law Review 1, 17.
[70] *Thomas v Mowbray* (2007) 233 CLR 307, 354 [105] (Gummow and Crennan JJ); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 638 [127] (Kirby J). See also *Hicks v Ruddock* (2007) 156 FCR 574, 600 [93] (Tamberlin J).
[71] See C Mantziaris and L McDonald, 'Federal Judicial Review Jurisdiction after Griffith University v Tang' (2006) 17 *Public Law Review* 22, 32-35.
[72] C Finn 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239.
[73] P Cane, 'Open Standing and the Role of Courts in a Democratic Society' (1999) 20 *Singapore Law Review* 23, 29.

approach to other aspects of the litigation process such as application of costs rules[74] and preliminary procedural requirements.[75]

The issue can be boiled down to two basic questions. Is a progressive approach appropriate in order to match review standards with extended access to the courts? Or, is it appropriate for the Federal Court to apply a restrained approach to the grounds of review in order to ensure that courts are not dragged into political disputes that would otherwise be excluded by standing or non-justiciability?

My review of the EPBC Act judicial review cases shows that the Federal Court has resisted extending the grounds of review. The survey is necessarily small since there have been only 16 judicial review cases to June 2011. Yet the cases are significant as they are the initial cases dealing with the EPBC Act and are likely to set out the general principles for review of these decisions which will be effective in the long term. The quantitative data helps to reveal the overall picture of the case law. While four of the 16 cases were successful only one of the successful cases was brought by a public interest applicant.[76] The other successful cases were brought by proponents whose applications for approval were refused[77] and an aboriginal group with property interests in an area in which a mine had been approved.[78]

Environmental groups have therefore had little success in the Federal Court notwithstanding the restrictions on their access to the Court being largely removed. This was recognised in the Hawke Review of the EPBC Act. In its Interim Report, the Hawke Review stated that the submissions commenting on judicial review regarded it as an inadequate accountability mechanism.[79] The Interim Report quoted Lawyers for Forests' submission:

> The accountability provided by allowing judicial review under the Act is useful in the sense of ensuring that decisions under the Act are made in accordance with the law. However, the fact is (sic) that this accountability is limited only to whether the decision is formally and procedurally correct admits the possibility that the wrong bases may underlie decisions without being subject to challenge. Judicial review does not require the Minister to make the best decision in the situation, or even to make a good or sensible decision.[80]

In this section I will argue that this lack of success is largely related to the Federal Court's formulation of the grounds of judicial review. In order to provide a framework

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[74] *Oshlack v Richmond River Council* (1998) 193 CLR 72, 89-91 [45]-[49] (Gaudron and Gummow JJ); 113-5 [112]-[119], 122 [134] (Kirby J).
[75] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 431-2 [18]-[26].
[76] *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.
[77] *Phosphate Resources Ltd v Minister for Environment, Heritage and Arts (No 2)* (2008) 162 LGERA 154; *Anzbrook Pty Ltd v Minister for the Environment, Heritage and the Arts* (2010) 237 FLR 187.
[78] *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14.
[79] A Hawke, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Interim Report* (June 2009), 314 [20.34].
[80] A Hawke, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Interim Report* (June 2009), 314 [20.35].

for examining these cases, it is worthwhile briefly looking into the relationship between standing principles and the function of judicial review.

A. Judicial review models

Administrative law academics often refer to standing rules as being an indicator of the function of judicial review[81] and a mechanism for allocating tasks between legal and political institutions.[82] Historically, standing rules have developed within the framework of private law concepts[83] with their primary focus being to allow individuals access to courts to protect their personal and property interests.[84] The liberalisation of standing rules means that personal and property interests are no longer the limits of standing rules but once we get beyond these restrictions, things become uncertain. Three different models can be seen within the various rules of standing each providing different scope for environmental groups to challenge administrative decisions in the courts. These models can be described as follows:[85]

- the private rights and interests model,
- the enforcement model,
- the public participation model.

1. Private rights and interests

The private rights and interests model provides the traditional basis for standing rules.[86] Standing tests based on this model ensure that the plaintiff has a direct stake in

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[81] P Cane, 'Administrative Law as Regulation' in C Parker, C Scott, N Lacey and J Braithwaite (eds), *Regulating Law* (Oxford University Press, 2004) 207, 219; PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990), 28-29; R Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669, 1723; SM Thio, *Locus Standi and Judicial Review* (Singapore University Press, 1971), 2-5.

[82] H Burmester, 'Limitations on Federal Adjudication' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227, 252; P Cane and L McDonald, *Principles of Administrative Law* (Oxford University Press, 2008), 190; C Sunstein, 'Standing and the Privitization of Public Law' (1988) 88 *Columbia Law Review* 1432, 1469.

[83] M Allars 'Standing: The Role and Evolution of the Test' (1991) 20 *Federal Law Review* 83, 93-95; P Cane 'The Function of Standing Rules in Administrative Law' [1980] *Public Law* 303, 305-307; C Mantziaris 'The Federal Division of Public Interest Suits by an Attorney-General' (2004) 25 *Adelaide Law Review* 211, 216-7; C Sunstein, 'Standing and the Privitization of Public Law' (1988) 88 *Columbia Law Review* 1432, 1434.

[84] A Ricketts and N Rogers 'Third Party Rights in NSW Environmental Legislation: the Backlash' (1999) 16 *Environmental and Planning Law Journal* 157, 158; R Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669, 1723-4; Sunstein C, 'Standing and the Privitization of Public Law' (1988) 88 *Columbia Law Review* 1432, 1435-6.

[85] These models are based primarily on those developed in P Cane and L McDonald, *Principles of Administrative Law* (Oxford University Press, 2008), 186-7. They have also been influenced by R Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669, and P Craig, *Administrative Law* (Sweet and Maxwell, 6th ed, 2008), 3 and by statutory interpretation 'backgrounds' in JM Evans, HN Janisch and DJ Mullan, *Administrative Law: Cases, Text, and Materials* (Emond Montgomery Publications Ltd, 4th ed, 1995), 685.

[86] The history is more complex than this generalisation suggests. There is debate about whether the enforcement model has an equally strong historical claim: see M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 781; C Sunstein, 'What's

the litigation due to their rights or personal interests being affected by the decision they seek to challenge. This approach to standing reflects a commonly-held view that the courts' function is to protect individual rights and interests[87] and that when such rights and interests are not directly affected, political accountability mechanisms are the appropriate fora for complaint.[88] The private rights and interests approach should therefore be understood to make standing rules a means for achieving the separation of powers – a principle which is now often thought to be the primary influence on the nature and scope of Australian administrative law.[89] This raises a significant question. If the separation of powers is reflected in the grounds of review in a similar manner to the way it underpins traditional standing rules, then extended standing may facilitate access to the courts for public interest-based applicants but the basis of their challenge is likely to be beyond the scope of judicial review.

Of course, environmental groups have difficulties with the private rights and interests model since their concerns are largely outside of its parameters. The interests that they seek to advance are commonly referred to as public interests.[90] Their objectives in bringing litigation – such as to prevent environmental impacts, to raise issues for legislative attention, and to improve decision-making processes[91] – reflect public rather than private concerns, such as protecting property and financial interests.

2. *Enforcement model*

The primary alternative to the first model is the enforcement model that emphasises that the court's role is to enforce the law by ensuring that governmental institutions operate within legal boundaries.[92] The model's primary significance is that it allows broader scope for standing. Standing rules based on this model either permit open standing, subject to exceptions such as contrary legislative intention or interference

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Standing After *Lujan*? Of Citizen Suits, 'Injuries', and Article III' (1992) 91 *Michigan Law Review* 163; A Woolhandler and C Nelson, 'Does History Defeat Standing Doctrine?' (2004) 102 *Michigan Law Review* 689.

[87] Eg F Brennan, *National Human Rights Consultation Report* (September 2009) at 366; P Cane 'The Function of Standing Rules in Administrative Law' [1980] *Public Law* 303, 327; C Finn 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239, 249; M Taggart, 'Australian Exceptionalism' (2008) 36 *Federal Law Review* 1 at 13; HWR Wade and C Forsyth, *Administrative Law* (Oxford University Press, 9th ed, 2004), 5.

[88] C Harlow 'Public Law and Popular Justice' (2002) 65 Modern Law Review 1, 5.

[89] M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 169; P Cane and L McDonald, *Principles of Administrative Law* (Oxford University Press, 2008), 50-1; Sir A Mason, 'Mike Taggart and Australian Exceptionalism' in D Dyzenhaus, M Hunt, G Huscroft, *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 179, 180.

[90] Eg C Harlow 'Public Law and Popular Justice' (2002) 65 Modern Law Review 1, 5; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 428 [2]; *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, 287 [24].

[91] See C McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 356; BJ Preston, 'The Role of Public Interest Environmental Litigation' (2006) 23 *Environmental and Planning Law Journal* 337; JL Sax, *Defending the Environment: A Strategy for Citizen Action* (Alfred A Knopf, 1971).

[92] P Cane and L McDonald, *Principles of Administrative Law* (Oxford University Press, 2008), 186-7.

with another person's rights,[93] or establish a test that focuses on the applicant's qualifications and capacity to litigate the matter.[94] Either way the tests are not focused on the applicant's rights and interests being harmed by the decision.

The enforcement model is often associated with the rule of law.[95] For example, the Australian Law Reform Commission stated in its 1996 report on standing that 'the rule of law is served if unlawful decisions or conduct are challenged and overturned by the courts, regardless of the nature of the challenger's interest'.[96] The enforcement model is understood to establish a particular role for the courts – one that moves from the courts protecting private rights and interests to confining administrators to the limits of their powers.[97]

The enforcement model looks like it would help environmental groups bring proceedings to enforce environmental laws.[98] However, enforcing environmental laws raises other issues. First, environmental legislation often grants broad discretionary powers to administrators. If the limits of such powers are vague then there may be little in the way of limitations in the legislation for environmental groups to enforce. Secondly, the enforcement model says little about the grounds of review beyond recognising them as relating to the lawfulness of a decision.[99] If the traditional limits of the grounds of review are applied in a strict manner then extended access to the courts is unlikely to help environmental groups achieve their objectives utilising judicial review.

3. Participation model

The third model also involves a broader approach to standing but it differs from the enforcement model due to its particular emphasis on public participation.[100] The expansion of standing rules under this model is linked to a revised function for

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[93] Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996), [5.24]-[5.25]; E Fisher and J Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' (1997) 71 *Australian Law Journal* 370, 383.

[94] Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985), 138; P Cane and L McDonald, *Principles of Administrative Law* (Oxford University Press, 2008), 187.

[95] P Cane and L McDonald, *Principles of Administrative Law* (Oxford University Press, 2008), 187-188.

[96] Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996), [4.32]. See also *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644 (Lord Diplock).

[97] Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985), 81.

[98] That may depend on the breadth of any exceptions to the standing test. If interference with a person's rights is defined broadly then environmental groups standing may be affected due to interference with the proponent's approval: see discussion in Part II.

[99] Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996), [2.30].

[100] The primary Australian case that is thought to reflect the participation model is *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520 in which the Federal Court recognised that participation in administrative proceedings could support standing in judicial review proceedings. Although this looks like it would support standing for environmental groups who participate in environmental decision-making processes, there is authority against it (*Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 531-2; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 512).

judicial review – to ensure fair representation of a wide range of interested persons and groups in administrative decision-making processes.[101] Its distinguishing feature is that the grounds of review – in particular the grounds relating to participation in decision-making processes (such as procedural fairness and breach of statutory procedural requirements) and rationality (such as failure to consider relevant considerations) – expand in line with the extension of standing.[102] That is, extended access to the courts is matched by a broader approach to the standards by which administrative decisions are examined.

While empirical research into ADJR Act cases shows that procedural fairness and the considerations grounds are two of the most commonly raised grounds of review,[103] and it is also clear that these grounds have expanded in recent decades,[104] it is doubtful whether they have expanded to reflect the participation model of judicial review. The landmark High Court cases, such as *Kioa v West*,[105] *Annetts v McCann*,[106] and *Minister for Aboriginal Affairs v Peko-Wallsend*,[107] all supported participation by individuals with personal, rather than public, interests in administrative decision-making processes.

The participation model is controversial as it requires a new role for the courts – not merely enforcing express and implied statutory conditions of decision-making powers but also ensuring appropriate participation by interest groups. In his influential article 'The Reformation of American Administrative Law', Stewart referred to the new function of administrative law as involving a 'surrogate political process'.[108] If this is right the participation model is highly unlikely to set root in Australian administrative law due to the influence of the separation of powers on the scope and application of the grounds of review. Since environmental groups commonly argue the process and rationality grounds, the difference between the first two models and the participation model becomes highly significant for judicial review of environmental decisions.

B. EPBC Act overview

While the following discussion focuses on administrative law issues relating to the application of the grounds of review, a brief explanation is required of the structure of the EPBC Act and the three-staged decision-making process which it establishes. The EPBC Act is very complex legislation and the following table is a general depiction of

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[101] R Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669, 1670.
[102] R Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669, 1748-52, 1756-60.
[103] R Creyke and J McMillan, 'Judicial Review Outcomes – An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82, 96.
[104] See eg M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 415-418; J McMillan 'Judicial Restraint and Activism in Administrative Law' (2002) 30 Federal Law Review 335, 355-365.
[105] (1985) 159 CLR 550.
[106] (1990) 170 CLR 596.
[107] (1986) 162 CLR 24.
[108] R Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669, 1670.

its primary provisions. It is intended to show enough of its features to discuss the salient aspects of the cases.

Stage	Decision	Considerations
1	Whether the proposed action requires approval (s 75)	• Likely significant impact on an environmental matter protected by the EPBC Act (eg listed threatened and migratory species, wetlands recognised in international conventions, declared world heritage properties, etc) • Precautionary principle • Public comments
2	Which assessment process should be utilised (s 87)[109]	• Information provided by the proponent • Information relating to the likely impacts • Matters prescribed by regulations and guidelines
3	Whether the proposed action should be approved (s133)	• Environmental matters protected by the EPBC Act • Economic and social matters • Principles of ecologically sustainable development • Precautionary principle • Departmental report and other documentation • Applicant's environmental history • Australia's obligations under international conventions and agreements

C. Legality

In their empirical studies of ADJR Act cases, Creyke and McMillan found that the legality grounds of review, under which I will include error of law, misinterpretation of legislation and breach of statutory requirements, are the most frequently argued grounds and have a relatively good chance of success.[110] This is also apparent in the EPBC Act judicial review cases since three of the four successful cases were determined under this category. The one success by an environmental group involved the crucial term 'impact' being interpreted more broadly by the Federal Court than the

[109] If the action requires approval, there are six possible assessment processes ranging from assessment on information already provided by the proponent to an inquiry.
[110] R Creyke and J McMillan, 'Judicial Review Outcomes – An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82, 96-7.

Minister,[111] and two of the other successful cases were under the label of breach of statutory requirements.[112]

Grounds in this category are therefore likely to provide environmental groups with their best prospects for challenging decisions. This is consistent with the enforcement model of judicial review. Standing is extended to facilitate proceedings that will ensure that decision-makers act lawfully[113] and lawfulness is most clearly attributed to correct application of statutory requirements. Extending standing under the enforcement model broadens the range of persons who can bring proceedings to ensure, at the least, that provisions of legislation are correctly interpreted and not breached.

However, this may not amount to much in the context of the EPBC Act. The Act has features, such as subjective preconditions and broad decision-making powers, which limit the effectiveness of judicial review. The Administrative Review Council has referred to these as ways that legislation can be framed to 'minimise the prospect of a successful challenge'.[114] The consequence of this design of the EPBC Act is that there is little express law to be enforced by the courts through applicants utilising the extended standing provisions. Environmental groups therefore often resort to the process and rationality grounds of review in their challenges to decisions made under the Act – grounds of review which commonly involve reference to implications and contextual factors.[115] The EPBC Act judicial review cases are significant for the environmental groups' lack of success. I will argue that this is due to the concerns that underlie standing and non-justiciability – that is, broadly, separation of powers concerns – that influence the formulation and application of the process and rationality grounds of review.

D. Process grounds

There are two process grounds that are relevant to decisions made under the EPBC Act – procedural fairness and breach of statutory procedures.[116] Both have difficulties – procedural fairness because environmental groups are unlikely to have rights or interests that support the implication threshold and breach of statutory procedures because procedural provisions may be regarded by courts as being directory requirements that if breached do not result in the decision being held invalid.[117] The extended standing provision raises a question as to whether environmental groups and

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[111] *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.
[112] *Phosphate Resources Ltd v Minister for Environment, Heritage and Arts (No 2)* (2008) 162 LGERA 154, 208-9 [173]; *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, 26-32 [32]-[74].
[113] E Fisher and J Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' (1997) 71 *Australian Law Journal* 370, 374.
[114] Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006), 22-5.
[115] *Kioa v West* (1985) 159 CLR 550, 584-585 (Mason J); *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 39-40 (Mason J); M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 283, 455.
[116] *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(1)(a)-(b).
[117] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 389 [92]; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627, 640 [36].

other objectors can use the courts to ensure that reasonable opportunities are given to them to be heard. That question was answered in *Wilderness Society Inc v Turnbull*:[118] procedural fairness does not apply to environmental groups and there is very little scope for challenging the adequacy of any consultation for stages two and three of the assessment process.

Stage two of the EPBC Act assessment process involves a decision by the Minister to choose between six assessment procedures. These procedures differ in relation to the information to be considered, the consultation requirements, and timeframes. In the *Wilderness Society* case, which related to the controversial Gunns Pulp Mill in northern Tasmania, the Minister chose an assessment procedure which included a discretionary consultation timeframe. He decided on a 20-day period for the public to make comments. The applicant challenged the decision on the ground that selecting a 20-day period was a denial of procedural fairness[119] as it did not give them a reasonable opportunity to comment.[120] The Full Court of the Federal Court rejected this challenge.[121] Justices Branson and Finn, who gave the primary judgment on the issue, stated that the consultation provisions required that an opportunity to comment is given and that this opportunity is not 'illusory', 'wholly unreasonable', or 'tainted with illegality'.[122] Although their Honours did not exclude review on process grounds, this reasoning makes clear that participation entitlements in consultation processes would be supervised by the courts only for serious and unusual actions.

Justices Branson and Finn's judgment also included discussion of the incompatibility of procedural fairness with the decision at stage 3 as to whether an action should be approved. Their Honours stated that this decision would not affect the environmental group 'in respect of any tangible right, interest or expectation of a character which the duty of procedural fairness is designed to protect'.[123] They also distinguished procedural fairness from public consultation by indicating that the former is limited to persons who 'might be affected directly and adversely in their rights, interests and legitimate expectations' by the Minister's approval of the proposed action while the latter allows 'any person' to make a comment on the proposed action.[124] According to this reasoning, procedural fairness and public consultation are fundamentally different – participation by environmental groups comes within the concept of consultation but not procedural fairness.

It seems at least questionable whether the procedural fairness implication principle must be limited in this way in its application to environmental groups when the Act includes an extended standing provision. It seems to be a short step to recognise that environmental groups which meet the requirements of the standing provision, by having particular experience and expertise in protection of the environment, also have an interest in the decision that satisfies the procedural fairness threshold requirement. Their recognition by the extended standing provision suggests that the legislature intended to differentiate them from the public at large, thereby indicating that they

[118] (2007) 166 FCR 154.
[119] (2007) 166 FCR 154, 167 [55].
[120] (2007) 166 FCR 154, 173 [73], 178 [88].
[121] (2007) 166 FCR 154, 175 [80] (Branson and Finn JJ); 178 [94] (Tamberlin J).
[122] (2007) 166 FCR 154, 177 [86] (Branson and Finn JJ).
[123] (2007) 166 FCR 154, 178 [88].
[124] (2007) 166 FCR 154, 176 [82].

satisfy the procedural fairness implication threshold.[125] More practically, environmental groups could be regarded as suited to presenting information on the particular environmental impacts and suggesting appropriate assessment techniques.

However, what seems to be a short step is actually quite substantial when opposing factors are considered. First, Australian courts have not treated an applicant's satisfaction of standing requirements as a contextual factor that affects the procedural fairness threshold requirements. The courts have on numerous occasions referred to standing and procedural fairness as separate legal questions with different lines of authority.[126] This point tends to arise in environmental cases where the decision has a public interest focus. It suggests that the courts are strongly opposed to imposing procedural fairness obligations on administrators in relation to individuals and groups with public interests and that more than extended standing is required to change that position.

Secondly, there are real difficulties with interpreting the EPBC Act as expanding procedural fairness by reference to extended standing. One reason for this is that the Act makes the particular consultation requirements largely a matter of Ministerial discretion.[127] Intervention by a court could involve it substituting its judgment on what the appropriate consultation requirements should be. A second reason is that the Act limits procedural fairness to the proponent of the development only.[128] Extension of procedural fairness to environmental groups based on an implication drawn from the extended standing provision would therefore contradict express provisions of the Act and could lead to substituting judgment in relation to discretionary powers.

Thirdly, even if these difficulties under the EPBC Act did not arise there would be a concern that for any particular proposed action there could be many individuals and environmental groups with experience and expertise in protection of the environment that would satisfy the standing provision and by extension the procedural fairness threshold. Extending procedural fairness requirements to them could have substantial time and resources consequences for administrators. Courts are likely to avoid imposing procedural fairness requirements on decision-makers when they will have such effects.[129]

The *Wilderness Society* case therefore reveals the limits of procedural fairness that significantly reduces the utility of judicial review for environmental groups.[130] While there seems to be scope to argue for expanding those limits based on the extension of standing, the current threshold requirements for procedural fairness are an orthodox

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[125] See GJ Craven, 'Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing' (1988) 16 *Melbourne University Law Review* 569, 583-4, 593.
[126] Eg *Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537, 568; *Rivers SOS Inc v Minister for Planning* (2009) 178 LGERA 347, 385 [162]. See also *Griffith University v Tang* (2005) 221 CLR 99, 118 [45] (Gummow, Callinan and Heydon JJ).
[127] EPBC Act ss 87, 95, 98, 103, 131A.
[128] EPBC Act ss 131AA.
[129] See DJ Galligan, *Due Process and Fair Procedure*s (Clarendon Press, 1996), 340-1.
[130] Interestingly, the Wilderness Society lodged a submission to the Hawke Review of the EPBC Act arguing that consultation periods included in the Act should be increased since the Federal Court had determined that environmental groups have no right to procedural fairness: A Hawke, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Interim Report* (June 2009), 314 [20.36].

position that is unlikely to change. The *Wilderness Society* case also indicates that the process aspects of the participation model, which sees judicial review as a mechanism for ensuring the fair representation of a wide range of interested persons and groups in administrative decision-making processes, are beyond the scope of Australian judicial review. While standing is extended in a way that means that an individual's or group's personal rights and interests do not need to be affected to gain access to the courts, an affected personal right or interest is required in relation to procedural fairness.

E. Rationality grounds

The failure to consider relevant matters ground of review was argued in nearly all of the cases.[131] The common use of this ground by applicants has also been recognised in studies of ADJR Act cases.[132] Yet submissions made to the Hawke Review of the EPBC Act indicate that environmental groups regard rationality grounds as ineffective. For example, the Wilderness Society's submission to the Hawke Review stated that,

> as long as the reasons for a decision are carefully written so that they tick all boxes and are not irrational, decisions are very difficult to challenge – even where they may lead to major environmental damage.[133]

The reference in this submission to the courts ensuring that all the boxes are ticked reflects an orthodox approach to the relevant considerations ground of review: some consideration of a relevant factor is enough to satisfy the ground – adequate consideration is not required.[134] This is consistent with Justice Mason's statement in *Minister for Aboriginal Affairs v Peko-Wallsend* that the weight to be given to a relevant consideration is generally for the administrator to determine and the preferable ground of review for such challenges is *Wednesbury* unreasonableness.[135] Yet the relevant considerations ground is also sometimes expanded to require adequate consideration without resort to the *Wednesbury* standard. In such cases courts require that 'proper, genuine and realistic consideration' is given to a matter,[136] that the particular consideration is the 'focal point and fundamental element' of the decision,[137] or that the administrator undertakes an 'active intellectual process' when considering the factor.[138]

In this section I argue that the tick-a-box approach accurately describes the EPBC Act cases and that extensions to the ground have not been accepted by the Federal Court

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[131] Fourteen of the 16 cases.
[132] R Creyke and J McMillan, 'Judicial Review Outcomes – An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82, 96-97. See also M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 281-2.
[133] A Hawke, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Interim Report* (June 2009), 314 [20.34].
[134] M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 288.
[135] (1986) 162 CLR 24, 41.
[136] *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291; [1987] FCA 457, [25]-[26], [43] (Gummow J).
[137] *Zhang v Canterbury City Council* (2001) 51 NSWLR 589, 602-3 [71]-[77] (Spigelman CJ).
[138] *Tickner v Chapman* (1995) 57 FCR 451, 462 (Black CJ).

in this context. Moreover, the Court's reliance on the tick-a-box approach seriously inhibits environmental groups from advancing their primary interests using the rationality grounds of review.

Environmental groups commonly argue that the principles of ecologically sustainable development ('ESD'), and in particular the precautionary principle, were either not taken into account or not properly taken into account.[139] The EPBC Act implements ESD and the precautionary principle in a relatively strong manner. Ecologically sustainable development is an object of the Act and the precautionary principle is a mandatory consideration for the decisions at stages one and three.[140] The precautionary principle is a process for assessing the likely environmental impacts of a proposed development when there is a risk of serious environmental harm but the science regarding such harm is uncertain. It changes the assessment standard when its thresholds of serious harm and scientific uncertainty are established. Whereas environmental impact assessment generally requires determining whether likely impacts are *acceptable*,[141] the precautionary principle requires that measures to *prevent* the threatened impact should be imposed.

The issue raised by environmental groups is whether ESD and the precautionary principle are enforceable – that is, will courts ensure that they are properly applied in decisions made under the Act? The Federal Court's orthodox, restrained approach to the relevant considerations ground, to be discussed in more detail below, has meant that the ESD principles are enforced in a restricted manner. This was the view expressed by the Hawke Review in its final report. It stated that the ESD and precautionary principle sections of the EPBC Act 'have been interpreted by the courts to amount to a fairly minimal obligation' and recommended that the Act be amended to elevate the principles to a 'more substantive obligation'.[142] The three cases referred to by the Hawke Review indicate why it came to this conclusion. Each of the cases involved a challenge to a decision to approve an action – the decision at stage three of the decision-making process.

The applicant in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts*[143] argued that the Minister did not take into account the principles of ESD in a manner that was required by the Act. The Minister's statement of reasons separately set out his findings in relation to the different matters of national environmental significance that were relevant in the case – threatened species, wetlands, listed migratory species and impacts on Commonwealth land – and in a final section stated that he took into account the principles of ESD and the precautionary principle when deciding to approve the proposed action.[144] The environmental group argued that this

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[139] *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2009) 165 LGERA 203, 217 [29]; *Lansen v Minister for Environment and Heritage* (2008) 102 ALD 558, 595 [180]; *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463, 479 [92], 492 [124]; *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510, 521 [53].
[140] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 3, 3A, 136(2), 391.
[141] See C Wood, *Environmental Impact Assessment: A Comparative Review* (Prentice Hall, 1995), 1, 212.
[142] A Hawke, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (October 2009), 233 [13.29]-[13.30].
[143] (2008) 167 FCR 463.
[144] (2008) 167 FCR 463, 476 [52].

was not a proper application of the ESD principles. It argued that the ESD principles had to be considered individually for each of the environmental matters protected by the EPBC Act[145] and that it was not sufficient for the Minister merely to state in his reasons that he had taken them into account.[146] Justice North rejected the challenge and stated that the Minister's consideration of the ESD principles in a 'global' manner was sufficient to comply with his obligation to take them into account.[147]

This aspect of the *Blue Wedges* case can be understood to make the ESD principles a 'minimal obligation' because they are easily satisfied – a mere reference in a concluding paragraph of the statement of reasons would seem to be sufficient consideration. There is no requirement for the Minister to explain how the individual principles were applied in the assessment of impacts on the specific environmental matters protected by the Act.

In *Lansen v Minister for Environment and Heritage*[148] the applicant argued that the Minister did not properly apply the precautionary principle in relation to impacts of a mine on a threatened species of fish in a nearby river. Although the Minister had referred to the precautionary principle in his statement of reasons, the applicant contended that lack of discussion of scientific surveys in relation to the particular environmental impact showed that it had not been considered.[149] Justice Mansfield stated that a mere assertion by the Minister that the precautionary principle had been considered would not be sufficient: however he concluded that conditions requiring the proponent to monitor the impacts on the threatened species demonstrated that it had been taken into account.[150]

The *Lansen* case can be regarded as imposing a minimal obligation in relation to ESD because it is doubtful whether monitoring conditions are 'precautionary' in the sense used in the precautionary principle. The precautionary principle states that measures should be taken to 'prevent degradation' where there are threats of serious or irreversible environmental damage.[151] The concern that the *Lansen* case raises is that if there are threats that trigger the principle, monitoring conditions are unlikely to *prevent* environmental degradation – they may merely facilitate action to be taken when environmental damage has occurred. Therefore, while the Minister referred to the precautionary principle there are reasons to doubt that it was applied according to its proper meaning and purpose.

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[145] (2008) 167 FCR 463, 479-80 [72]-[74].
[146] (2008) 167 FCR 463, 480 [75]. The applicant's argument was made more complex by its reference to ESD principles being applicable to social impacts. Justice North concluded that the ESD principles apply to environmental impacts only: (2008) 167 FCR 463, 480-481 [77].
[147] (2008) 167 FCR 463, 481 [78].
[148] (2008) 102 ALD 558. This case was reversed on appeal to the Full Court of the Federal Court. However, the aspect of the case discussed here was not dealt with by the Full Court: (2008) 174 FCR 14, 18 [2].
[149] (2008) 102 ALD 558, 596 [182]-[184].
[150] (2008) 102 ALD 558, 596 [182], [184]-[187].
[151] EPBC Act, s 391(2).

The Minister's statement of reasons for the approval in *Lawyers for Forests v Minister for Environment, Heritage and the Arts*[152] again referred to the precautionary principle and said that it was relevant to conditions that required monitoring of particular impacts and actions to be taken when threshold levels of pollutants were reached.[153] The applicant argued that the monitoring conditions were not preventative measures – the threshold levels were either not measures to protect the environment or had not been finalised prior to the approval being granted.[154] It based its argument on a strand of the rationality grounds – that the consideration given to the precautionary principle was not 'proper, genuine or realistic'.[155] Justice Tracey rejected the applicant's argument. He criticised the applicant's use of the proper, genuine or realistic formula[156] and stated that the applicant's submissions were a 'thinly veiled attack on the merits of the Minister's decision'.[157] Justice Tracey stated that ESD and the precautionary principle are to be considered along with other considerations for the decision at stage three, which also includes social and economic matters as mandatory considerations,[158] and the weight to be given to the precautionary principle is a matter for the Minister.[159] He stated that the Court would intervene if no more than 'lip service' has been given to a consideration while recognising that this was likely to occur only in 'rare cases'.[160]

Whereas the Minister in each of these cases referred to ESD and/or the precautionary principle in his statement of reasons there were indications that it had not been applied properly yet the court would not intervene. This raises the question of how large a step it would be for the courts to insist that it is applied properly.

It could be argued that it would be a short step if the ESD principles were enforced only to the assessment of impact on the particular matters of environmental significance. This would require understanding the approval decision as having two steps – the first involving the assessment of impacts on matters of national environmental significance protected by the Act and the second relating to balancing the findings made at step one with other relevant considerations. The point would be that ESD principles arise for the first step and that no question of the weight given to them arises at this stage – the principles would merely structure the impact assessment. When the environmental assessment has been completed, the second step would involve balancing the findings relating to the environmental impacts with economic and social matters, and any other relevant considerations, to come to the final decision.

According to such a two-stepped approach, the Minister would have to give 'proper, genuine or realistic' consideration to the precautionary principle, or any other of the ESD principles, at the first step only and separately to the balancing exercise at the

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[152] (2009) 165 LGERA 203. Note that the issues relating to the precautionary principle were not pressed in an appeal of this case to the Full Court of the Federal Court: *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts* (2009) 178 FCR 385, 397 [46].
[153] (2009) 165 LGERA 203, 218 [29], 220 [39].
[154] (2009) 165 LGERA 203, 218 [29].
[155] (2009) 165 LGERA 203, 218 [29].
[156] (2009) 165 LGERA 203, 219 [37].
[157] (2009) 165 LGERA 203, 220 [40].
[158] EPBC Act, s 136(1).
[159] (2009) 165 LGERA 203, 219 [36].
[160] (2009) 165 LGERA 203, 220 [38].

second step. The major concern with the proper, genuine and realistic formula[161] would therefore be neutralised as questions of weight would be avoided and the ESD principles would be enforced. Moreover, it would be appropriate for such challenges to be brought by environmental groups as their expertise and experience in environment protection is recognised by the extended standing provision in the Act.

However, application of the ESD principles cannot be neatly divided into two stages in this way. The principles are not only relevant to the assessment of particular environmental impacts, they also affect the balancing of different factors when coming to the final conclusion. This is recognised by s 3A of the EPBC Act which states as the first principle of ESD that 'decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations'. Along similar lines, Bates states that 'ESD *is* the balance between (or rather integration of) development and environmental imperatives' and that it requires 'integrating economic and environmental factors'.[162] This is also true of the precautionary principle. The preventative measures that may be required by proper application of the precautionary principle are likely to have economic consequences affecting the viability of the development, which in turn may jeopardise local employment opportunities that would otherwise be gained. The courts' enforcement of ESD principles by requiring their proper consideration would therefore impose on the balance that is struck by the Minister between environmental, social and economic considerations.

If application of ESD principles cannot be separated from the balancing exercise undertaken by the Minister, then substantive enforcement of them will be a step too far by the courts. On the other hand, the formalist tick-a-box approach allows the courts to ensure that the ESD principles are considered, at least to some extent, but restrains them from forcing the Minister to strike the balance between environmental, social and economic considerations in a particular manner. In this way, the tick-a-box approach to the ESD principles facilitates low-level judicial scrutiny that leaves to the decision-maker the balancing of competing public interest factors.

But even if it were possible to avoid the issues relating to weight given to the considerations there is another reason to doubt the appropriateness of the courts enforcing ESD principles in a substantive manner. This is that it should be regarded as being beyond the court's capacity to examine decisions with regard to whether they are, for example, sufficiently 'precautionary' and 'preventative'. If environmental groups could use the courts to hold the Minister accountable for his or her application of the precautionary principle, judges would be required to determine whether particular measures, such as the monitoring conditions imposed in the *Lansen* and *Lawyers for Forests* cases, will operate to prevent environmental degradation. This is a matter of judgment that should be based on specific experience and expertise in environmental management and is realistically beyond the scope of generalist judges to determine. Again, the tick-a-box approach to enforcing ESD principles is an appropriate response as it allows the courts to avoid having to decide such questions.

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[161] *Minister for Immigration and Citizenship v SZJSS* (2010) 85 ALJR 306, 313 [32]-[34].
[162] G Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010), 215 (emphasis in original); *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, 287 [23].

If the above analysis of the Federal Court's ESD cases is right, it indicates that environmental groups may have gained access to the courts, and their primary interest in sustainable development may have been included in Commonwealth environmental legislation, but their ability to ensure that decisions are made in an environmentally sustainable manner is largely beyond the scope of review. It would require judges to look into the balancing of public interest considerations and have expertise in environmental management that is beyond their proper field.

V. CONCLUSIONS

My general conclusion is that while non-justiciability, the matter principle and other alternative filtering mechanisms (except probably the costs deterrent) have not played the restrictive role that would usually be played by standing rules that require a special interest to be affected, the work that would usually be done by such standing rules is largely carried out by limitations inherent in the grounds of review. Extended standing has not facilitated an expanded form of judicial review that also aims to ensure fair representation of interest groups in administrative processes in accordance with the participation model. Since the extended standing provision in the EPBC Act has been included to grant standing to persons and groups who do not have a personal interest at stake, the provision seems to be based on the enforcement model. However, reliance on the enforcement model in the context of review of decisions made under environmental legislation, in particular the EPBC Act, has significant limitations. It may facilitate proceedings to enforce particular legislative provisions but other commonly-argued grounds of review will have little effectiveness for environmental groups.

The cases suggest that environmental decisions have 'political' characteristics which indicate that a restrained approach to judicial review is appropriate. The political characteristics are that decisions are made according to consultative processes similar to those used for making subordinate legislation and require balancing social, economic and environmental considerations – factors that make clear that they are public interest-based decisions. Moreover, the final decision is generally made by the Minister for the Environment,[163] a politician, and this is likely to be recognised as meaning that the public interest assessments are primarily a matter of political responsibility.[164] Although these factors do not exclude judicial review they are likely to be seen as indicators that a restrained form of review is appropriate or at least that the grounds of review should not be extended.

But not only do environmental decisions have public interest characteristics, so do the challenges brought by environmental groups. Their usual objective is that environmental considerations are properly balanced with social and economic

[163] Section 515(1) of the EPBC Act provides that the Minister may delegate any of his or her powers and functions under the Act. It seems that while stage one decisions may be delegated to an official the final decision made at stage 3 is not. All of the cases involving challenges to stage 3 decisions involved decisions made by the Minister rather than a delegate.

[164] See *South Australia v O'Shea* (1987) 163 CLR 378, 411 (Brennan J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 42 (Mason CJ).

considerations.[165] Their interests are therefore beyond the scope of the rationality grounds of review. The public interest basis of the challenge also means that the applicant lacks a personal right or interest that is affected by the decision which effectively excludes challenges on the basis of procedural fairness. The rights and interests restrictions that underlie traditional standing rules therefore also operate within commonly-argued grounds of review in a way that inhibits public-interest based claims.

The result is that while the EPBC Act facilitates challenges by environmental groups other factors come into play to substantially reduce the effectiveness of judicial review as an accountability mechanism.[166] The EPBC Act has reformed the 'to whom' accountability question in a context in which the 'for what' question, the standards by which the administrative decision is tested, are restricted. This tells us that any reforms to accountability mechanisms should be based on a holistic understanding. Dealing with particular elements on their own, in this case standing, is unlikely to result in significant change.

[165] Eg *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, 286-7 [21]-[27], 289 [36]; *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, 205-6.

[166] Of course, a possible solution is to amend the EPBC Act to allow for merits appeals for one or more of the decisions made in the assessment process as recommended by the Hawke Review: A Hawke, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (October 2009), 259 [15.61]. The recommendation and the reasoning that led to it is significant and interesting but examination of it is beyond the scope of this article.