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Case Note: Jacobs v Save Beeliar Wetlands (Inc)

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CASE NOTE ON *JACOB V SAVE BEELIAR WETLANDS (INC)*: MANDATORY RELEVANT CONSIDERATIONS, ADMINISTRATIVE PROCEDURES AND LEGAL UNREASONABLENESS

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ABSTRACT

Martin CJ's judgment in *Save Beeliar Wetlands v Jacob*[1] created a significant degree of uncertainty for many state departments and statutory bodies. The primary implication being that published policies were potentially mandatory relevant considerations in their administrative decision making processes. It presaged the urgent review of many such policies to avoid future challenges from similarly disgruntled parties.

The Court of Appeal of the Supreme Court of Western Australia's unanimous decision in *Jacob v Save Beeliar Wetlands (Inc)*[2] has somewhat remedied that uncertainty.

McLure P, in a judgment affirmed by both Buss and Newnes JJA, overturned Martin CJ's judgment. That judgment considered the Environmental Protection Authority's (EPA) recommendation for approval of the proposal to extend the Roe Highway through the Beeliar Wetlands. It also considered the subsequent approval by the Minister. The EPA was found to have fallen into jurisdictional error. The Chief Justice held that the EPA had failed to take into account its own published policies

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[1] *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482 (16 December 2015) ('*Save Beeliar Wetlands*').

[2] *Jacob v Save Beeliar Wetlands (Inc)* (2016) 216 LGERA 201 ('*Jacob*').

when it recommended the approval. This failure rendered the recommendation and the approval invalid, and amounted to a denial of procedural fairness.[3]

On appeal, McLure P identified three contentions that required determination. Firstly, that the EPA was obligated to consider its own policies in making its assessment and recommendation.[4] Secondly, that it was legally unreasonable that it had not, in fact, done so.[5] Finally, that it had failed to properly question the environmental acceptability of allowing the implementation of the project using offsets, given the significance of the affected areas.[6]

The Court of Appeal determined that the EPA Policies were not 'mandatory relevant considerations'.[7] Hence, the process by which the EPA had made its recommendation was not legally unreasonable;[8] the correct question had been asked and answered.[9] On that basis the Court allowed the appeal.[10]

I FACTUAL BACKGROUND

In April 2009 a proposal to extend the Roe Highway from the Kwinana Freeway to Stock Road was submitted by the Commissioner for Main Roads Western Australia to the EPA for assessment. The area within which much of the extension is situated has been designated in the Metropolitan Region Scheme since 1963.

[3] *Save Beeliar Wetlands* [2015] WASC 482 (16 December 2015) [181], [186].
[4] *Jacob* (2016) 216 LGERA 201, 213 [62].
[5] Ibid 213 [63].
[6] Ibid 217 [83].
[7] Ibid 213 [61].
[8] Ibid 216-7 [82].
[9] Ibid 218 [88].
[10] Ibid 218 [89].

The proposed path of the extension traverses several significant areas of wetland that make up the Beeliar Regional Park, and includes Conservation Category Wetlands[11]. The project is expected to result in the clearing of over 70 hectares of foraging habitat of both the Carnaby's and Red-tailed Black Cockatoos, and 2.5 hectares of nesting habitat of the Black Cockatoo. It will also fragment the remaining habitat.

The role of the EPA in environmental assessments is defined in the *Environmental Protection Act 1986* (WA) ('*EPA Act'*). Section 44 requires the EPA to provide a report to the Minister for Environment ('the Minister') regarding its assessment findings, upon receipt of which the Minister then makes the final decision regarding approval of the proposal.

In February 2003 the EPA had published Bulletin 1088[12] in which it advised the then Minister that, inter alia:

> the EPA is of the opinion that the overall impacts of construction within the road reserve, or any alignment through the Beeliar Regional Park in the vicinity of North Lake and Bibra Lake, would lead to the ecological values of the area as a whole being diminished in the long-term. Every effort should be made to avoid this.

In January 2006 the EPA published Position Statement No. 9[13] in which it defined the comprehensive decision-making process to be followed when environmental offsets are being considered. The statement enunciated a series of questions that were to be addressed in evaluating what, if any, offsets were to be recommended.

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[11] 'CCWs [Conservation Category Wetlands] are high priority wetlands which support a high level of environmental attributes and functions ...' *Jacob v Save Beeliar Wetlands (Inc)* (2016) 216 LGERA 201, 205 [11] (McLure P).

[12] Environmental Protection Authority of Western Australia, Bulletin 1088, *Environmental values associated with the alignment of Roe Highway (Stage 8)*, February 2003.

[13] Environmental Protection Authority of Western Australia, Position Statement, *Environmental Offsets – Position Statement No. 9*, January 2006.

In September 2008 the EPA published Guidance Statement No. 19[14] which addressed the specific issue of biodiversity with respect to environmental offsets. Whilst generally consistent with the earlier Position Statement No. 9, there was an exception noted. A proposal with significant residual impact might nonetheless be allowed to implement offsets if it was deemed not to be unacceptable.

In the same month the EPA published Environmental Protection Bulletin No 1[15] which also traversed the requirements of environmental offsets with respect to biodiversity. Of particular significance, it stated that 'the EPA adopts a presumption against recommending approval of proposed projects where significant adverse environmental impacts affect 'critical' assets.'[16]

The EPA Roe Highway Extension Assessment Report[17] was delivered to the Minister in September 2013. It concluded that the project could be delivered in such a manner as to meet the EPA's required environmental objectives with the implementation of a number of conditions,[18] one of which was the establishment of appropriate offsets for 'the significant residual impacts to fauna, vegetation and wetlands (Condition 12).'[19] Importantly, in Condition 12 the EPA recommended that the power to determine the necessary requirements for a Land Acquisition and Management Plan (LAMP) and its timing, be delegated to the CEO. The minimum parameters for the LAMP were

[14] Environmental Protection Authority of Western Australia, Guidance Statement, *Guidance for the Assessment of Environmental Factors – Environmental Offsets – Biodiversity No. 19*, September 2008.
[15] Environmental Protection Authority of Western Australia, Bulletin No 1, *Environmental Offsets*, September 2008.
[16] Ibid 2.
[17] Environmental Protection Authority of Western Australia, Assessment Report, *Report and recommendations of the Environmental Protection Authority – Roe Highway Extension – Report 1489*, 3 September 2013 ('Assessment Report').
[18] Ibid vi.
[19] Ibid viii.

specified so as to at least address the losses expected to arise from the extension works.

A total of 165 appeals were lodged against the Assessment Report which included appeals from each of the applicants in *Save Beeliar Wetlands*. The Minister ultimately determined those appeals, made some amendments to the proposed conditions and published his final approval on 2 July 2015.

II THE PRIMARY CHALLENGE: SAVE BEELIAR WETLANDS (INC) V JACOB

The applicants in the primary case were Save Beeliar Wetlands (Inc), an incorporated association, and Carole de Barre. Ms de Barre was a local resident whose interests were conceded by the respondents to be directly affected by the decision under review, and therefore her standing was recognised. A determination regarding the standing of Save Beeliar Wetlands (Inc) was therefore unnecessary.

The applicants sought judicial review of the decision of the EPA to provide the Assessment Report to the Minister and therein recommend the approval of the proposal subject to specified conditions. They also sought judicial review of the Minister's subsequent conditional approval.

Martin CJ comprehensively reviewed the *EPA Act* in particular identifying the independence of the EPA from the Minister.[20] The Chief Justice also canvassed the EPA's functions[21] and powers,[22] the generation of environmental protection

[20] *Save Beeliar Wetlands* [2015] WASC 482 (16 December 2015) [16].
[21] Ibid [18].

policies,[23] the conduct of environmental impact assessments[24] and the appeals process against such assessments.[25]

It is interesting to note that the Chief Justice identified that where the Minister approves an EPA draft policy, that 'policy has the force of law as though it had been enacted as part of the [EPA] Act'.[26] Yet he concedes that 'it is not contended that any policy formulated in accordance with the provisions of this Part of the Act has any relevance to the issues in these proceedings'.[27]

A *Grounds for Review*

Martin CJ identified 'five distinct albeit related grounds'[28] of review with respect to the decision of the EPA which arise from three of the four grounds enumerated in the applicants' claim. The applicants' fourth ground challenged the validity of the Minister's ultimate approval. The Chief Justice labelled that claim 'entirely parasitic'[29] in so far as it would succeed in the event that any of the other three grounds did so. The grounds and Martin CJ's determinations regarding each are considered below.

1 *Could Offsets Provide Environmental Acceptability?*

The applicants claimed that the EPA was required to:

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[22] Ibid [19].
[23] Ibid [20]-[24].
[24] Ibid [25]-[31].
[25] Ibid [32]-[33].
[26] Ibid [24].
[27] Ibid [20].
[28] Ibid [106].
[29] Ibid [105].

> address, separately and discretely, the question of whether the Proposal is environmentally unacceptable irrespective of any conditions which might be attached to the implementation before addressing the question of the adequacy of any environmental offsets[30]

Martin CJ held that such separate consideration was not a requirement of the *EPA Act*, and more importantly that the power to recommend a proposal that actually required environmental offsets was expressly conferred in s 44. There were no provisions in the *EPA Act* that supported this ground of review and it was therefore disallowed.

2 *Failure to Take Account of a Mandatory Relevant Consideration*

The applicants claimed that the EPA was jurisdictionally bound to take account of its own publically proclaimed policies in the environmental assessment process. In particular, the policy that had been published in Position Statement No 9, Guidance Statement No 19 and Environmental Protection Bulletin No 1 was not considered.

Martin CJ identified this ground as potentially raising three separate important legal questions with respect to the exercise of statutory power. Firstly, would the decision-maker actually exceed jurisdiction by considering the policy? Secondly, was the decision-maker jurisdictionally bound to consider the policy? Thirdly, was the decision-maker not only required to consider the policy but also to apply it without deviation?

Martin CJ quoted Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[31] who held that '[w]hat factors a decision-maker is bound to consider in making the

[30] Ibid [109].
[31] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 ('*Peko-Wallsend*').

decision is determined by construction of the statute conferring the discretion.'[32] The Chief Justice then noted that the *EPA Act* did not expressly require that such policies be considered in exercising the powers conferred upon the EPA.[33]

Martin CJ reviewed seven Federal Court cases[34] and two Western Australian cases[35] and distilled from them that:

> a policy formulated by an administrative decision-maker is a mandatory relevant consideration in the sense that the decision-maker is required to take that policy into account as a condition of the valid exercise of his or her jurisdiction.[36]

The Chief Justice did, however, concede that there had been no precedent discovered at 'an intermediate Court of Appeal or higher which supports that general proposition.'[37]

Martin CJ then applied what he termed 'the more orthodox approach enunciated by Mason J in *Peko-Wallsend*[38] to determine whether the proposition could be 'derived by implication from the subject matter, scope and purpose of the [EPA] Act.'[39] Following a comprehensive review of the relevant sections of the *EPA Act*, in particular Part IV which deals with the conduct of an environmental assessment per se, the Chief Justice concluded that such was in fact the case and that the issue then

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[32] *Save Beeliar Wetlands* [2015] WASC 482 (16 December 2015) [128].
[33] Ibid [129].
[34] *Drake v Minister for Immigration & Ethnic Affairs (No 1)* (1979) 24 ALR 577; *Drake v Minister for Immigration & Ethnic Affairs (No 2)* (1979) 2 ALD 634 (1 January 1979); *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 17 FCR 1; *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65; *BHP Direct Reduced Iron Pty Ltd v CEO, Australian Customs Service* (1998) 55 ALD 665 (23 October 1998); *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189; *Minister for Foreign Affairs v Lee* (2014) 227 FCR 279.
[35] *Clive Elliott Jennings & Co Pty Ltd v Western Australian Planning Commission* [2002] WASCA 276 (10 October 2002); *Tah Land Pty Ltd v Western Australian Planning Commission* [2009] WASC 196 (17 July 2009).
[36] *Save Beeliar Wetlands* [2015] WASC 482 (16 December 2015) [150] (citations omitted).
[37] Ibid.
[38] Ibid [151].
[39] Ibid.

became one of fact. Had the EPA taken its own published policies into consideration?

It is interesting to note that in determining this ground Martin CJ identified that the EPA's consideration of its own policies in administrative decision-making was a matter of procedural fairness. He stated that 'the requirements of procedural fairness are unlikely to be met' in the event that the EPA was not required to do so.[40]

The respondents had conceded that the evidence was uncontroversial and that the EPA had 'failed to take account of the policy enunciated in the three published policy statements upon which the applicant relies.'[41]

Martin CJ found, therefore, that this ground of review was proven and that the EPA assessment report was invalid. As a consequence the Minister's decision was also invalid. The Chief Justice directed the EPA to determine what was needed to rectify their process and provide an assessment report that was compliant with the *EPA Act*.

3 *Inadequate Reasons for the EPA's Acceptance of Offsets*

Martin CJ stated that this ground was submitted only as an alternative to the previous ground. He found that the problem with the assessment report was not that the reasons provided in it were inadequate, but that the process of assessment was inadequate. Given, however, that the previous ground was upheld there was no requirement to adjudicate on the statutory need for the EPA to provide its reasons.

[40] Ibid [186].
[41] Ibid [189].

4 *Environmental Factors Considered in Isolation?*

The applicants submitted that the EPA had assessed the impact of the key environmental factors individually and not cumulatively. The proposition was that the *EPA Act*[42] directed the EPA to evaluate a proposal 'in its entirety.'[43] This interpretation was not controversial.[44] However, Martin CJ dismissed this ground on the basis that the content of the assessment report included paragraphs wherein: (i) all residual impacts; and (ii) all of the proposed offsets; were collated. He found that the claim was therefore rebutted by the very structure of the assessment report.[45]

5 *The EPA Proposed that the Minister Empower the CEO to Permit Construction*

The applicants claimed that the inclusion of the clause empowering the CEO of the EPA to permit the commencement of construction was a 'constructive failure to exercise the jurisdiction conferred upon the EPA by Part IV of the [EPA] Act.'[46]
Martin CJ dismissed this ground on the basis that the recommendation did not alter the conditional requirements imposed upon the proponents of the proposal and did not empower the CEO to alter those requirements.

B *The Judgment*

Martin CJ dismissed four of the five grounds that he had enunciated, and upheld only the ground that the EPA had failed to take into account a mandatory relevant

[42] *EPA Act* s 44.
[43] *Save Beeliar Wetlands* [2015] WASC 482 (16 December 2015) [216].
[44] Ibid.
[45] Ibid [222].
[46] Ibid [225].

consideration. This invalidated the assessment report recommendations and therefore the Minister's decision which was predicated on that recommendation.

The decision had significant ramifications for both existing approved projects as well as future proposals, and of particular concern were those projects that proposed to utilise offsets to gain approval.[47] There was general recognition that the decision 'reinforced the critical need for decision-makers to understand their legislative obligations.'[48]

A clear implication for government departments and statutory bodies was that their policies might be considered mandatory relative considerations in any future proposal assessment. This necessitated both sides (proponents and decision-makers) to carefully consider such policies and their consequences for the project under review.[49]

III THE APPEAL: JACOB V SAVE BEELIAR WETLANDS (INC)

The State Government, not surprisingly, appealed the judgment on the ground that Martin CJ had erred in law when he determined that the EPA Policies were a mandatory relevant consideration.[50]

[47] Sally Audeyev, Lee McIntosh and Sarah De Ceglie, *Ignore EPA policies at your peril* (9 March 2016) King & Wood Mallesons, 3 <http://www.kwm.com/en/au/knowledge/insights/epa-policies-wa-supreme- court-roe-8-highway-project-20160308.>

[48] Andre Maynard, 'Environmental policies: summary of Save Beeliar Wetlands (Inc) v Jacob [2015] WASC 482' (2016) 3(1) Australian Environmental Law Digest 5, 6 <http://search.informit.com.au.ipacez.nd.edu.au/documentSummary;dn=999644404981242;res=IELHSS>.

[49] Audeyev, McIntosh and De Ceglie, above n 47, 2.

[50] *Jacob* (2016) 216 LGERA 201.

The respondent, Save Beeliar Wetlands (Inc), argued to have Martin CJ's decision upheld on three grounds, two of which had not been raised in the primary case. Somewhat unexpectedly, the Government elected not to object to the inclusion of the new claims.The Court's findings on the respondent's three grounds of appeal shall be considered prior to the discussion of the final appeal judgment.

A *The Respondent's Grounds*

The respondent argued that there were three additional grounds upon which to uphold Martin CJ's judgment that the EPA Assessment Report was invalid.

1 *2002 Administrative Procedures*

The respondent claimed that the *Environmental Impact Assessment (Part IV Division 1) Administrative Procedures 2002* (WA) (the Administrative Procedures) required that the EPA must consider its published policies when conducting environmental assessments. This requirement was said to arise pursuant to Clause 9.4.1(j) wherein it is stated that:

> The EPA may consider information from one or more of the following sources in assessing the proposal –
>
> …
>
> (j) relevant environmental policies, standards and criteria;[51]

The Court found, based upon the principles of statutory interpretation, that the policies were a 'permissive relevant consideration.'[52] The clearly expressed intention that the EPA may, not must, consider relevant environmental policies precludes such a requirement being a mandatory relevant consideration.

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[51] *Environmental Impact Assessment (Part IV Division 1) Administrative Procedures 2002* (WA) s 9(4)(1); quoted in *Jacob* (2016) 216 LGERA 201, 210 [43].
[52] *Jacob* (2016) 216 LGERA 201, 213 [62].

2 *Legal Unreasonableness*

The respondents claimed that the EPA's decision-making process was legally unreasonable, and constituted jurisdictional error.[53] They citied both *Minister for Immigration and Citizenship v Li*[54] (*Li*) and *Minister for Immigration and Border Protection v Eden.*[55]

The Court cited *Li* and stated that 'legal reasonableness provides the boundaries of the area within which the decision-maker has a genuinely free discretion (citations omitted)'[56] and that such boundaries were to be ascertained by reference to 'the scope, subject matter and purpose of the statutory discretionary power (citations omitted).'[57]

The Court interpreted the respondent's claim to mean that '"without a reason" [the EPA] did not have regard to its Policies.'[58] However the Court, having already determined that such consideration was permissive, found that '[t]here can be no obligation to give an explanation about why it did not take into account something it was not obliged to.'[59]

The respondent had further argued that the Policies contained two presumptions against the approval of proposals where there would be 'a significant residual impact

[53] Ibid 213-4 [64].
[54] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
[55] *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158.
[56] *Jacob* (2016) 216 LGERA 201, 214 [68].
[57] Ibid.
[58] *Jacob* (2016) 216 LGERA 201, 215 [70].
[59] Ibid.

on critical assets (citations omitted)' and where such impacts were 'being counterbalanced by offsets (citations omitted).'[60]

The Court found that whether or not the EPA adhered to its Policies, it had followed a 'staged process'[61] to reach its conclusion and recommend approval of the proposal. This it had done in accordance with the Administrative Procedures, including approval of the proponent's Environmental Scoping Document and the Public Environmental Review. The Court held that the unreasonableness claim had not been established and was therefore dismissed.

3 *Failure to Ask the Required Question*

The respondents claimed that the question that the EPA should have asked was whether the proposal 'ought not to be implemented at all.'[62] They asserted that this question arose due to the critical nature of the environmental assets in question and that it should be resolved prior to any consideration of the use of offsets.

The primary judge had dismissed this claim on the basis of statutory construction. He found that the existence of the power to conditionally approve a proposal with attendant requirements for the utilisation of environmental offsets, necessarily inferred that there would be:

> a class of proposals in respect of which the issue of environmental acceptability is inextricably tied up with issues with respect to the conditions and procedures which can and should be attached to implementation of the proposal.[63]

[60] Ibid [73].
[61] Ibid 216-7 [82].
[62] Ibid 217 [83].
[63] Ibid [84].

The Court also rejected this claim on the basis that this was, in fact, the wrong question to ask; and that it was based upon an incorrect belief that the Assessment Report assumed that the project would be implemented. The Court held that the correct question was 'whether the significant residual adverse impacts on critical assets are so significant as to be environmentally unacceptable'.[64] It found that this question had been answered and that the concern regarding the purported presumption in the Assessment Report was unfounded when the entire approval process was considered.

C *The Judgment*

The Court reviewed in detail the reasoning of Martin CJ that the EPA was required to consider its own published policies in order for it to exercise its jurisdiction validly in recommending approval of a proposal to the Minister. It held that the 'express provisions of the EPA Act leave no room for an implication that the Policies, or any of them, are mandatory relevant considerations'[65] in that process.

First and foremost the *EPA Act* expressly defines Approved Policies as relevant considerations in Part III. Such policies are developed through a lengthy and complex process and are finally approved by the Minister. The policies in question in this case were not policies promulgated through that process but by the EPA itself. The Court held that it was 'inconceivable that the legislature intended the EPA to have the power to make its own policies on the same matters'[66] and to be required to take them into consideration when assessing a proposal under s 44 of the *EPA Act*.

Secondly, the EPA is established as an independent expert body which has the role of conducting environmental assessments of proposals as defined in the *EPA Act* and

[64] Ibid 218 [88].
[65] Ibid 212 [54].
[66] Ibid 212 [56].

s 44 in particular. This necessarily implies that the EPA is conducting 'an evaluative and advisory function, not exercising a discretionary power.'[67]

Thirdly, the EPA is largely unfettered in determining the parameters and procedures for any environmental review subject to compliance with the *EPA Act* and any relevant Ministerial direction given in accordance with s 43. Other matters which are contra indicators to a requirement that the EPA's own policies are mandatory relevant considerations include the 'inevitable delays, costs, prejudice and inconvenience'[68] that would arise. There is also the fact that the *EPA Act* specifies the matters that must be considered as mandatory relevant considerations, among which its policies are not listed.

Ultimately the Court held that the policies were permissive relevant considerations and not mandatory relevant considerations.

IV CONCLUSION

The judgment of the Court of Appeal of the Supreme Court of Western Australia in *Jacob* has confirmed that the EPA is not mandatorily required to consider certain of its published policies when making environmental assessment decisions under the *EPA Act*.[69] This judgment applies specifically to the EPA and the administrative procedures that it effects in conducting its assessments.

[67] Ibid 213 [59].
[68] Ibid [57].
[69] Marshall McKenna, Guy Greer and Claudia Henfry, *The Roe 8 Saga: The Government Succeeds on Appeal* (18 July 2016) Gilbert + Tobin Lawyers <https://www.gtlaw.com.au/?q=roe-8-saga-government-succeeds-appeal>.

The decision does not abrogate the need for the EPA to act in accordance with policies approved under the *EPA Act.*[70] Similarly, other government department or statutory body decision-makers must be aware of and act in accordance with any respective legislated policies.

One positive outcome of this dispute has been that the Government has conducted a comprehensive review of the way the EPA carries out its functions.[71] This review[72] is likely to have been replicated in other government departments and statutory bodies in order to preclude a repeat of the lengthy challenge that the Roe 8 project became.

It should be noted that the respondents were refused special leave to appeal to the High Court because the Court concluded that there were 'insufficient prospects' of success.[73]

[70] Ibid.
[71] Peter Lochore, 'Court of Appeal overturns Save Beeliar' on Peter Lochore, *The Blog* (15 July 2016) <https://www.peterlochore.com.au/2016/07/court-appeal-overturns-save-beeliar/>.
[72] Environmental Protection Authority, *Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments under the Environmental Protection Act 1986 (WA)* (17 May 2016) The Government of Western Australia <http://www.epa.wa.gov.au/AbouttheEPA/abouttheEPA/Documents/EPA%20Legal%20and%20Governance%20Review%20-%20Final%20Report%20-%20Quinlan%20et%20al-170516.pdf>.
[73] Transcript of Proceedings, *Save Beeliar Wetlands (Inc) v Jacob* [2016] HCATrans 313 (16 December 2016).