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

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1 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 aspects of the litigation process 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, such as procedural fairness or failure to consider a relevant matter. 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

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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); Mark Aronson, Bruce Dyer and Matthew 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 Henry Burmester, 'Limitations on Federal Adjudication' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227, 228–9, 252; Peter Cane, 'Open Standing and the Role of Courts in a Democratic Society' (1999) 20 *Singapore Law Review* 23, 29; Richard B Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1667, 1670.

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.

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, which is examined in Part IV below, they raise an interesting question — why extend access to an accountability institution that cannot adequately review the decision?

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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).

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: Roger Douglas, 'Uses of Standing Rules 1980–2006' (2006) 14 *Australian Journal of Administrative Law* 22, 28.

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

9 Ibid 314 [20.34]–[20.37].

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 analyses Federal Court cases involving review of decisions made under the *EPBC Act* in order to gauge how the grounds of judicial review have been applied and to see whether 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 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. Gibbs J 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]

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10 Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave McMillan, 2003) 22–3. See also Jerry L Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in Michael W Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 115, 117–8; Colin 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: Mulgan, above n 10, 76.

12 (1980) 146 CLR 493.

13 Ibid 527 (Gibbs J). See also Mason J, 547.

14 Ibid 530–1. See also Stephen J, 'genuinely held convictions upon a topic of public concern' is insufficient for standing: at 539; Mason J, that 'a mere belief or concern' is not sufficient for standing: at 548.

15 Ibid 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

Section 487 of the *EPBC Act* extends standing 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 deal only with the latter as they have been the focus of the cases. Section 487(3) of the *EPBC Act* 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 2 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
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> (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.

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.[19]

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,[20] but it can be regarded as rationalising Federal Court case law that liberalised the special interest standing test. Environmental groups are granted standing under this liberal approach when they satisfy the court of particular matters — such as recognition by governments, the nature of their membership, and the relevance of their activities.[21] 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.[22]

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affected or they live near the particular development and have property interests affected by the decision: Michael L 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 Aronson, Dyer and Groves, above n 1, 790–1.

19 These requirements follow extensions to standing by Commonwealth environmental legislation enacted prior to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth): *Endangered Species Protection Act 1992* (Cth) s 131; *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) s 58A (inserted by *Hazardous Waste (Regulation And Exports And Imports) Amendment Act 1996* (Cth)).

20 See, 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.

21 See, 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, 512–13; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516, 552–3.

22 *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 512.

Section 487 should be understood as establishing a form of representative standing. The different types of representative standing that have been distinguished by Cane help to clarify the effect of s 487:[23]

- *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.[24]
- *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.[25] 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 the group's objects of association appear to be designed to ensure that the applicant is fit to represent the public interest in relation to the environment.[26]

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 relevant legislation 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 a resort to the courts'.[27] He said that the 1974 Act was designed to avoid this 'by making the impact statement requirement discretionary' and 'by incorporating…

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23 Peter Cane, 'Standing, Representation and the Environment' in Ian Loveland (ed), *A Special Relationship?: American Influences on Public Law in the UK* (Clarendon Press, 1995) 123, 132–3.

24 Ibid 133–40; Aronson, Dyer and Groves, above n 1, 767–71.

25 See eg, Christopher D Stone, 'Should Trees Have Standing? — Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450, 464–6; *Booth v Bosworth* [2000] FCA 1878, [5]; *Sierra Club v Morton*, 405 US 727, 744–5, 751–2 (1972) (Douglas J).

26 Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) 123, 138–9.

27 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1974, 4082 (Dr Cass).

[impact assessment] into the normal process of governmental decision making'.[28] While it is unclear why the latter would minimise resort to the courts, the overall objective was largely achieved. Writing in 1994, Munchenberg found that only eight judicial review actions had been litigated for decisions under the 1974 Act.[29] Much of the academic and judicial discussion of the Act related to whether the impact assessment system it established was enforceable[30] — a question that continued to be raised up to the late 1990s when the 1974 Act was superseded by the *EPBC Act*.[31]

Although it is clear that the extended standing provision in the *EPBC Act* involved a substantial change of policy — to enable review of decisions under the Act rather than restrict it — it is not clear why this was thought to be an appropriate reform. Senate Committee reports reveal that industry and environmental groups debated whether the extended standing provision was too narrow or too wide.[32] 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 that extended standing 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.[33] The government said that the extended standing provision in the Act was 'appropriately broad'.[34]

Despite the concerns raised in this debate, there has been little focus on standing in the *EPBC Act* judicial review cases. Most of the cases have been brought by environmental groups or individuals whose private interests were not affected by the decision.[35] The discussion in the cases relating to the applicants' standing has either

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28 Ibid.

29 Steven Münchenberg, 'Judicial Review and the Commonwealth Environment Protection (Impact of Proposals) Act 1974' (1994) 11 *Environmental and Planning Law Journal* 461, 462 (footnote 7).

30 Ibid; R J Fowler, 'The Prospects of Judicial Review in Relation to Federal Environmental Impact Statement Legislation' (1977) 11 *Melbourne University Law Review* 1; *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 546–7 (Stephen J).

31 *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).

32 Senate Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, *Environment Protection and Biodiversity Conservation Bill 1998* (1998) [11.36]–[11.41].

33 Ibid; 'Labor Senator's Findings', 'Minority Report of the Australian Democrats', 'Report by the Australian Greens and The Greens (WA)'.

34 Commonwealth Government Parliament of Australia *Report of the Senate Environment, Communications, Information Technology and the Arts on Commonwealth Environment Powers Response to Recommendations (1999*), 9.

35 The exceptions were cases brought by proponents (*Phosphate Resources Ltd v Minister for 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 be affected by a mine (*Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, 54 [202]).

acknowledged that there was no issue[36] or accepted that the requirements of the Act were satisfied.[37] I have found only one case in which standing was denied.[38] 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.[39]

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 transferred to elsewhere in the judicial review process. This was suggested by Gaudron, Gummow and Kirby JJ in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[40] 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.[41] Their Honours also indicated that an adverse costs order would deter plaintiffs.[42] The question that is suggested by such comments for extended standing under the *EPBC Act* is whether the substance of traditional standing rules, namely, 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.[43] 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

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36 *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].

37 *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 [2]–[3].

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

39 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 Matthew Groves, 'Should the *Administrative Law Act 1978* (Vic) Be Repealed?' (2010) 34 *Melbourne University Law Review* 452, 471.

40 (1998) 194 CLR 247.

41 Ibid 263 [39].

42 Ibid.

43 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, 287–9 [28]–[36].

barrier to public interest litigation.[44] 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,[45] 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 summary dismissal due to the action being frivolous or vexatious or an abuse of process is hard to make out. The courts emphasise that exceptional caution is to be exercised before dismissing cases in this way.[46] 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 were determined in favour of environmental groups *because* of the public interest nature of the proceedings.[47] There is no evidence therefore of preliminary procedural 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'.[48] While standing and non-justiciability 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[49] and their focus on individual interests.[50]

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44 See, eg, Allan Hawke, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (October 2009) 264 [15.105].

45 Kirsty Ruddock, 'The Bowen Basin Coal Mines Case: Climate Law in the Federal Court' in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (The Federation Press, 2007) 173, 184–5; *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588, [4]–[5].

46 *Spencer v Commonwealth* (2010) 241 CLR 118, 140 [55] (Hayne, Crennan, Kiefel and Bell JJ); see also 131 [24] (French CJ and Gummow J).

47 *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).

48 *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).

49 Burmester, above n 3, 252. See also Peter Cane, 'The Function of Standing Rules in Administrative Law' [1980] *Public Law* 303, 327–8; Carol Harlow, 'Public Law and Popular Justice' (2002) 65 *Modern Law Review* 1, 5.

50 Margaret Allars, 'Standing: The Role and Evolution of the Test' (1991) 20 *Federal Law Review* 83, 96.

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 into play. The first is that environmental decisions are typically polycentric, since they often involve many different persons with diverse interests.[51] However, parties rarely argue that a decision is non-justiciable on the basis of it being polycentric 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.[52]

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.'[53] 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.[54] 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 Ltd*[55] 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.[56] 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.[57] 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*, Gaudron and Gummow JJ stated that judicial review of administrative actions requires courts to make decisions regarding

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51 Andrew 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).

52 Enid Campbell and Matthew Groves, 'Polycentricity in Administrative Decision-Making' in Matthew Groves (ed), *Law and Government in Australia* (The Federation Press, 2005) 213, 239; Jeff A King, 'The Justiciability of Resource Allocation' (2007) 70 *Modern Law Review* 197.

53 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

54 *Croome v Tasmania* (1997) 191 CLR 119, 132–3 (Gaudron, McHugh and Gummow JJ), 125–7 (Brennan CJ, Dawson and Toohey JJ).

55 (2000) 200 CLR 591.

56 Ibid 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).

57 Aronson, Dyer and Groves, above n 1, 743.

the 'legal rights and duties of the parties to the review proceedings'.[58] 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.[59]

This focus on rights and duties by Gaudron and Gummow JJ reflects a narrow understanding of the matter principle[60] 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.[61] 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,[62] 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 relate directly to the applicant.[63] However this does not seem consistent with the judges' statements in *Bateman's Bay* and *Bhardwaj* (both quoted above)[64] 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[65] and there have been divisions within the High Court with regard to the matter principle.[66]

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58 (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).

59 Ibid 617 [58]; cf McHugh J, 618 [64]–[65].

60 On broad and narrow approaches to the matter principle see Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction after Griffith University v Tang' (2006) 17 *Public Law Review* 22, 33–5.

61 The consultation provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 95(2)(c), 98(1)(c)(ii), 103(1)(c)(ii) refer to inviting 'anyone' to provide comments about the proposed action.

62 See Aronson, Dyer and Groves, above n 1, 427; Mantziaris and McDonald, above n 60, 37; *Kioa v West* (1985) 159 CLR 550, 582 (Mason J); *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ), 384 (Isaacs J).

63 Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 17.

64 For the quotation of *Bateman's Bay* see the text corresponding to footnote 48 and for the quotation of the *Bhardwaj* case see the text corresponding to footnotes 58 and 59.

65 *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).

66 See Mantziaris and McDonald, above n 60, 32–5.

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.[67] Finn's point reflects practices that are apparent in the *EPBC Act* judicial review cases 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',[68] suggesting that it would be futile to extend access to courts if the courts apply 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 permits or requires a progressive approach to other aspects of the litigation process such as application of costs rules[69] and preliminary procedural requirements.[70]

The issue can be boiled down to two basic questions. Is a progressive approach to application of the grounds of review appropriate in order to match review standards with extended access to the courts? Or, is it appropriate for the courts to apply a restrained approach in order to ensure that they 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 expanding the grounds of review. The survey is necessarily small since there have been only 16 judicial review cases to September 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.[71] The other successful cases were brought by proponents whose

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67 Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239.

68 Cane, above n 3, 29.

69 *Oshlack v Richmond River Council* (1998) 193 CLR 72, 89–91 [45]–[49] (Gaudron and Gummow JJ), 113–15 [112]–[119], 122 [134] (Kirby J).

70 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 431–2 [18]–[26].

71 *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.

applications for approval were refused[72] and an aboriginal group with property interests in an area in which a mine had been approved.[73]

Environmental groups have therefore had little success in the Federal Court notwithstanding the restrictions on their access to the Court having largely been removed. This was recognised by the Hawke Review of the *EPBC Act*. In its Interim Report, the Hawke Review stated that submissions commenting on judicial review regarded it as an inadequate accountability mechanism.[74] The Interim Report quoted the submission by Lawyers for Forests:

> 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.[75]

In this section I will argue that this criticism is largely related to the Federal Court's formulation of the grounds of judicial review. In order to provide a framework 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[76] and a mechanism for allocating tasks between legal and political institutions.[77] Historically, standing rules developed on the basis of private law concepts[78] with their primary focus being to allow individuals access to courts to protect their personal and property interests.[79] 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

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72 *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.

73 *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14.

74 Hawke, above n 8, 314 [20.34].

75 Ibid 314 [20.35].

76 Peter Cane, 'Administrative Law as Regulation' in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds), *Regulating Law* (Oxford University Press, 2004) 207, 219; P P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990) 28–9; Stewart, above n 3, 1723; S M Thio, *Locus Standi and Judicial Review* (Singapore University Press, 1971) 2–5.

77 Burmester, above n 3, 252; Peter Cane and Leighton McDonald, *Principles of Administrative Law* (Oxford University Press, 2008), 190; Cass R Sunstein, 'Standing and the Privatization of Public Law' (1988) 88 *Columbia Law Review* 1432, 1469.

78 Allars, above n 50, 93–5; Cane, above n 49, 305–7; Christos Mantziaris, 'The Federal Division of Public Interest Suits by an Attorney-General' (2004) 25 *Adelaide Law Review* 211, 216–17; Sunstein, above n 77, 1434.

79 Aidan Ricketts and Nicole Rogers, 'Third Party Rights in NSW Environmental Legislation: the Backlash' (1999) 16 *Environmental and Planning Law Journal* 157, 158; Stewart, above n 3, 1723, 1723–4; Sunstein, above n 77, 1435–6.

for environmental groups to challenge administrative decisions in the courts. These models can be described as follows:[80]

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

1 Private rights and interests

The private rights and interests model provides the traditional basis for standing rules.[81] Standing tests based on this model ensure that the plaintiff has a direct stake in 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-stated view that the courts' function is to protect individual rights and interests[82] and that when such rights and interests are not directly affected, political accountability mechanisms are the appropriate fora for complaint.[83] 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.[84] 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.[85] Their objectives in bringing litigation — such as to prevent environmental impacts, raise

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80 These models are based primarily on those developed in Cane and McDonald, above n 77, 186–7. They have also been influenced by Stewart, above n 3, and Paul Craig, *Administrative Law* (Sweet and Maxwell, 6th ed, 2008) 3 and by statutory interpretation 'backgrounds' in J M Evans, H N Janisch and David J Mullan, *Administrative Law: Cases, Text, and Materials* (Emond Montgomery Publications Ltd, 4th ed, 1995) 685.

81 The history is more complex than this generalisation suggests. There is debate about whether the enforcement model has an equally strong historical claim: see Aronson, Dyer and Groves, above n 1, 781; Cass R Sunstein, 'What's Standing After *Lujan*? Of Citizen Suits, "Injuries", and Article III' (1992) 91 *Michigan Law Review* 163; Ann Woolhandler and Caleb Nelson, 'Does History Defeat Standing Doctrine?' (2004) 102 *Michigan Law Review* 689.

82 See, eg, Frank Brennan, *National Human Rights Consultation Report* (September 2009) 366; Cane, above n 49, 327; Finn, above n 67, 249; Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1, 13; H W R Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 9th ed, 2004) 5.

83 Harlow, above n 49, 5.

84 Aronson, Dyer and Groves, above n 1, 169; Cane and McDonald, above n 77, 50–1; Sir Anthony Mason, 'Mike Taggart and Australian Exceptionalism' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 179, 180.

85 See, eg, Harlow, above n 49, 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].

issues for legislative attention, and improve decision-making processes[86] — 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.[87] 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 with another person's rights,[88] or establish a test that focuses on the applicant's qualifications and capacity to litigate the matter.[89] 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.[90] 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'.[91] 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.[92]

The enforcement model looks like it would help environmental groups bring proceedings to enforce environmental laws; 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 legal conditions for environmental groups to enforce. Secondly, the enforcement model treats the grounds of review as relating to the lawfulness of a decision.[93] However, 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.

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

87 Cane and McDonald, above n 77, 186–7.

88 Australian Law Reform Commission, *Beyond the Doorkeeper: Standing to Sue for Public Remedies*, Report No 78 (1996) [5.24]–[5.25]; Elizabeth C Fisher and Jeremy Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' (1997) 71 *The Australian Law Journal* 370, 383.

89 Australian Law Reform Commission (1985), above n 26, 138; Cane and McDonald, above n 77, 187.

90 Cane and McDonald, above n 77, 187–8.

91 Australian Law Reform Commission, above n 88, [4.32]. See also *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644 (Lord Diplock).

92 Australian Law Reform Commission (1985), above n 26, 81.

93 Australian Law Reform Commission (1996), above n 88, [2.30].

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.[94] The expansion of standing rules under this model is linked to a revised function for judicial review — to ensure fair representation of a wide range of interested persons and groups in administrative decision-making processes.[95] Its distinguishing feature is that the grounds of review — in particular the grounds relating to participation in decision-making processes (such as denial of procedural fairness and breach of statutory procedural requirements) and rationality (such as failure to consider relevant matters) — expand in line with the extension of standing.[96] 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,[97] and it is also clear that these grounds have expanded in recent decades,[98] 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*,[99] *Annetts v McCann*,[100] and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[101] 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'.[102] If this is right the participation model is highly unlikely to take 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

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94 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).

95 Stewart, above n 3, 1670.

96 Stewart, above n 3, 1748–52, 1756–60.

97 Robin Creyke and John McMillan, 'Judicial Review Outcomes — An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82, 96.

98 See, eg, Aronson, Dyer and Groves, above n 1, 415–18; John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335, 355–65.

99 (1985) 159 CLR 550.

100 (1990) 170 CLR 596.

101 (1986) 162 CLR 24.

102 Stewart, above n 3, 1670.

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 application of the grounds of review in the *EPBC Act* judicial review cases, 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 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)[103]	• 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 (s 133)	• 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

The grounds of judicial review are commonly divided into three categories. While various labels are used by authors, I will use the headings 'legality', 'process grounds', and 'rationality'. The legality category to be discussed in this part of the article requires a brief explanation. I will include within it the 'error of law' ground in the *ADJR Act*,[104]

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103 If the action requires approval, there are six possible assessment processes ranging from assessment on information already provided by the proponent to an inquiry.

104 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(f).

misinterpretation of legislation and breaches of statutory requirements.[105] These grounds provide applicants with good chances of success. Creyke and McMillan found this to be the case in their empirical studies of *ADJR Act* cases,[106] at least with regard to the error of law ground, and it is also apparent in the *EPBC Act* judicial review cases. The one success by an environmental group involved the crucial term 'impact' being interpreted more broadly by the Federal Court than the Minister,[107] and two of the other successful cases were under the label of breach of statutory requirements.[108] The only other successful case was determined according to the failure to consider a relevant matter ground of review,[109] which I have included under the heading of rationality.

The legality grounds of review 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[110] 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[111] 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'.[112] 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.[113] 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

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105 I have included 'breach of statutory *procedures*' under 'process grounds' rather than 'legality'. This follows Cane and McDonald above n 77, 147–8 and the initial classification of the grounds of review into three categories by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 411.

106 Creyke and McMillan, above n 97, 96–7.

107 *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.

108 *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].

109 *Anzbrook Pty Ltd v Minister for the Environment, Heritage and the Arts* (2010) 237 FLR 187, 195 [54].

110 Fisher and Kirk, above n 88, 374.

111 *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* (2008) 166 FCR 54, 60 [25]-[26].

112 Administrative Review Council, 'The Scope of Judicial Review' (Report No 47, April 2006) 22–5.

113 *Kioa v West* (1985) 159 CLR 550, 584–5 (Mason J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J); Aronson, Dyer and Groves, above n 1, 283, 455.

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.[114] Both have difficulties — denial of 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 are susceptible to a finding that breach does not result in invalidity.[115] There are examples of breach of procedural provisions not leading to invalidity in the *EPBC Act* judicial review cases,[116] however I will not examine them in this article as they deal with technical matters that have no general significance for judicial review proceedings brought by environmental groups. I will focus instead on the relationship between the consultation provisions of the *EPBC Act* and procedural fairness as examined by the Full Court of the Federal Court in *Wilderness Society Inc v Turnbull*.[117]

The issue in the *Wilderness Society* case related to the consultation process for the controversial Gunns Pulp Mill in northern Tasmania. The consultation process under the *EPBC Act* requires a decision by the Minister to choose between six assessment procedures (stage two). These procedures differ in relation to the information to be considered, the consultation requirements, and timeframes. In the *Wilderness Society* case 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 argued that the statutory provisions were supplemented with procedural fairness requirements. It claimed that the Minister's choice of a 20-day period involved a denial of procedural fairness[118] as it did not give them a reasonable opportunity to comment.[119] The Full Court of the Federal Court rejected this challenge.[120] Branson and Finn JJ, who gave the primary judgment on the issue, determined that the assessment procedures were not a form of statutory procedural fairness because they were not aimed at avoiding practical injustice to persons who were likely to be adversely affected by a decision made under the Act.[121] The provisions were said to serve public purposes designed to enhance public participation, transparency and accountability.[122] Moreover, their Honours also

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114 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(a)–(b).

115 *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].

116 *Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources* (2007) 158 LGERA 134, 151 [77] (failure to publish a notice in compliance with regulations); *Waratah Coal Inc v Minister for Environment, Heritage and the Arts* (2008) 173 FCR 557, 566 [26], 571 [43] (failure to comply with a time limit in the Act).

117 (2007) 166 FCR 154.

118 Ibid 167 [55].

119 Ibid 173 [73], 178 [88].

120 Ibid 175 [80] (Branson and Finn JJ); 178 [94] (Tamberlin J).

121 Ibid 175 [82] (Branson and Finn JJ). See also Aronson, Dyer and Groves, above n 1, 472.

122 Ibid 175 [82] (Branson and Finn JJ).

concluded that the consultation provisions could not have 'procedural fairness notions engrafted upon them'.[123]

The question then turned to the obligations imposed by the consultation provisions. Branson and Finn JJ stated that they required that an opportunity to comment is given and that this opportunity 'is not illusory or wholly unreasonable, and is not otherwise tainted with illegality'.[124] Their Honours therefore interpreted the provisions in a way that would make it very hard for environmental groups to argue that they had been breached, even if the Minister had chosen a consultation process with minimal participation entitlements.

While the applicant's argument was decided by the Federal Court on the basis explained in the previous two paragraphs, Branson and Finn JJ made a further point regarding procedural fairness. Their Honours stated that the applicant clearly had standing under the Act, and the right to provide comments about the proposed development, but it was 'greatly to be doubted that it was entitled to complain of denial of procedural fairness'.[125] This was because a decision to approve a development 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'.[126] While this appears to be an uncontroversial reference to procedural fairness orthodoxy, it also highlights that, in the absence of an extension of basic principles, environmental groups are generally excluded from bringing procedural fairness claims. Such groups seek to participate on a public interest basis — to raise concerns about likely impacts on the environment rather than the impacts of a decision on their personal interests.

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 *EPBC 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 satisfy the procedural fairness implication threshold.[127] More practically, environmental groups could be regarded as suited to presenting information on the particular environmental impacts and to 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 procedural fairness threshold requirements. The courts have on numerous occasions referred to standing and procedural fairness as separate legal questions with different lines of

123 Ibid 175 [82] (Branson and Finn JJ).
124 Ibid 177 [86] (Branson and Finn JJ).
125 Ibid 177-8 [88] (Branson and Finn JJ).
126 Ibid.
127 See G J Craven, 'Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing' (1988) 16 *Melbourne University Law Review* 569, 583–4, 593.

authority.[128] This suggests that the courts are strongly opposed to imposing procedural fairness obligations on administrators in relation to individuals and groups with no right or interest that is affected by the decision 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.[129] 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.[130] 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. Courts are likely to avoid imposing procedural fairness requirements on decision-makers in these circumstances due to concerns such as the difficulty of identifying individuals and groups to notify and be given an opportunity to be heard, and the risk of increasing the adversarial character of administrative processes if such obligations are imposed on a decision-maker.[131]

The *Wilderness Society* case therefore reveals the limits of procedural fairness that significantly reduces the utility of judicial review for environmental groups.[132] 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 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 in relation to procedural fairness. 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.

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128 See, 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).

129 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 87, 95, 98, 103, 131A.

130 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 131AA.

131 Campbell and Groves, above n 52, 233–4. See also Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 105.

132 Interestingly, the Wilderness Society lodged a submission to the Hawke Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) 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: Hawke, above n 8, 314 [20.36].

E Rationality grounds

The failure to consider relevant matters ground of review is typically discussed under the heading of 'rationality'[133] or 'reasoning process'.[134] It was argued in nearly all of the *EPBC Act* judicial review cases,[135] which is consistent with studies of *ADJR Act* cases.[136] Yet environmental groups have referred to the rationality grounds as being 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.[137]

This quotation raises the questions that are examined in this section.

- What is tick-a-box review and what problems does it raise for environmental groups?
- Is 'tick-a-box' a fair description of the *EPBC Act* judicial review cases?
- Why limit the rationality grounds to tick-a-box review in this context?

1 What is tick-a-box review and what problems does it raise for environmental groups?

The Wilderness Society's reference to ticking all the boxes in the above quote can be understood as a criticism of the orthodox approach to the relevant considerations ground of review: some consideration of a relevant matter is enough to satisfy the ground — *adequate* consideration is not required.[138] This is consistent with Mason J's statement in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* 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.[139] The orthodox approach can be contrasted with the scope of review for rationality under the participation model. In his classical explanation of that model, Stewart refers to courts requiring administrators 'give *adequate* consideration to all affected interests' and particularly to the interests of 'beneficiaries' of the 'administrative scheme',[140] in our context the environment represented by environmental groups. The participation model therefore expands review according to the relevant considerations ground beyond the boundary that is established for the Australian orthodox approach.

The primary problem with the orthodox approach for environmental groups is that it restricts challenges that argue that there has been a failure to consider the principles of ecologically sustainable development ('ESD') and the precautionary principle. These principles are the primary norms of modern environmental law[141] and are commonly

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133 Aronson, Dyer, Groves, n 1, 281.
134 Cane and McDonald, above n 77, 149.
135 Fourteen of the 16 cases.
136 Creyke and McMillan, above n 97, 96–7. See also Aronson, Dyer and Groves, above n 1, 281–2.
137 Hawke, above n 8, 314 [20.34].
138 Aronson, Dyer and Groves, above n 1, 288.
139 (1986) 162 CLR 24, 41.
140 Stewart, above n 3, 1758 (emphasis added).
141 Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010), 199.

relied on by environmental groups in the *EPBC Act* judicial review cases.[142] The ESD principles relate to matters such as intergenerational equity, conservation of biological diversity and ecological integrity.[143] They are included as objects of the *EPBC Act* and are listed as relevant considerations for the decision at stage three relating to the grant or refusal of approval.[144] The Act also makes clear that the ESD principles are a mandatory consideration — the Minister 'must take into account ... the principles of ecologically sustainable development'.[145] The precautionary principle requires that measures are taken to prevent environmental degradation, rather than merely mitigate such impacts, when there is a risk of serious environmental harm but the science regarding the harm is uncertain.[146] It is one of the ESD principles and is also separately referred to as a mandatory consideration for the decisions at stages one and three.[147]

The orthodox approach to the relevant considerations ground restricts environmental groups' ability to enforce ESD and the precautionary principle. Some reference to ESD and the precautionary principle in the Minister's reasons for decision will be enough to satisfy the ground. This is apparent in the *EPBC Act* cases in which environmental groups argued that the ESD principles were either not taken into account or not properly taken into account.[148]

2 Is 'tick-a-box' a fair description of the cases?

There are three cases that show that the Federal Court has employed the orthodox approach to the relevant considerations ground in applications to enforce ESD principles. The Hawke Review said of the Federal Court's interpretation of the relevant *EPBC Act* provisions in these cases that they 'amount to a fairly minimal obligation'.[149] The Hawke Review's conclusion suggests that the Federal Court has resisted examining decisions for whether ESD has been considered in an adequate manner. 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*[150] 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

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142 See *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].

143 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A.

144 Ibid ss 3, 3A, 136.

145 Ibid s 136(2)(a).

146 Ibid s 391.

147 Ibid.

148 *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].

149 Hawke, above n 44, 233 [13.29]–[13.30].

150 (2008) 167 FCR 463.

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.[151] The environmental group argued that this 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*[152] and that it was not sufficient for the Minister merely to state in his reasons that he had taken them into account.[153] North J 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.[154]

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*[155] 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. The applicant argued that although the Minister had referred to the precautionary principle in his statement of reasons it was not properly considered because there was lack of discussion of scientific surveys in relation to the particular environmental impact.[156] Mansfield J 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.[157]

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'.[158] The concern that the *Lansen* case raises is that if there are threats that trigger the precautionary principle, monitoring conditions are unlikely to be a measure that *prevents* 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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151 Ibid 476 [52].
152 Ibid 479–80 [72]–[74].
153 Ibid 480 [75]. The applicant's argument was made more complex by its reference to ESD principles being applicable to social impacts. North J concluded that the ESD principles apply to environmental impacts only: (2008) 167 FCR 463, 480–81 [77].
154 Ibid 481 [78].
155 (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].
156 Ibid 596 [182]–[184].
157 Ibid 596 [182], [184]–[187].
158 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 391(2).

In the third case, *Lawyers for Forests v Minister for Environment, Heritage and the Arts*,[159] the Minister 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.[160] However, the applicant argued that the monitoring conditions were not preventive measures — the threshold levels were either not measures to protect the environment or had not been finalised prior to the approval being granted.[161] It based its argument on an expanded version of the relevant considerations ground of review — that the consideration of the precautionary principle was not 'proper, genuine or realistic'.[162] Tracey J rejected the applicant's argument. He criticised the applicant's use of the 'proper, genuine or realistic' formula[163] and stated that the applicant's submissions were a 'thinly veiled attack on the merits of the Minister's decision'.[164] Tracey J 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,[165] and the weight to be given to the precautionary principle is a matter for the Minister.[166] 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'.[167]

In each of these cases the Minister referred to ESD and/or the precautionary principle in his statement of reasons, yet there were also indications that it had not been applied properly. The Federal Court's dismissal of the environmental groups' challenges can be understood as relying on the traditional limits of the relevant considerations grounds, which require some, but not adequate, consideration of a particular matter. However the relevant considerations ground is sometimes expanded to require adequate consideration. In such cases courts require that 'proper, genuine and realistic consideration' is given to a matter,[168] that the administrator undertakes an 'active intellectual process',[169] or that the particular consideration is the 'focal point and fundamental element' of the decision.[170]

The 'proper, genuine and realistic consideration' terminology has been criticised for being vague and for facilitating intrusion into the merits of an administrative decision.[171] Yet it is resilient[172] and has not been expressly rejected by the High Court.

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159 (2009) 165 LGERA 203. Note that the issues relating to the precautionary principle were not pressed in an unsuccessful 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].

160 (2009) 165 LGERA 203, 218 [29], 220 [39].

161 Ibid 218 [29].

162 Ibid.

163 Ibid 219 [37].

164 Ibid 220 [40].

165 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(1).

166 (2009) 165 LGERA 203, 219 [36].

167 Ibid 220 [38].

168 *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292; [1987] FCA 457, [25]–[26], [43] (Gummow J).

169 *Tickner v Chapman* (1995) 57 FCR 451, 462 (Black CJ).

170 *Zhang v Canterbury City Council* (2001) 51 NSWLR 589, 602–3 [71]–[77] (Spigelman CJ).

171 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426, 442 [65]; *Bruce v Cole* (1998) 45 NSWLR 163, 186 (Spigelman CJ); McMillan, above n 98, 361–5.

A unanimous judgment of the High Court seemed to accept it in *Minister for Immigration and Citizenship v SZJSS* [173] while also acknowledging the criticism that it encourages 'a slide into… merits review'[174] and confirming that weighing particular matters is generally for the decision-maker.[175] The best way to understand the *SZJSS* case may therefore be to see the High Court as accepting adequate consideration, according to the proper, genuine and realistic formula at least, but with reservations.[176]

While Australian courts have in some cases taken the step to ensure that adequate consideration is given to a relevant matter, the *EPBC Act* judicial review cases show that this has not been the case with regard to the Minister's consideration of ESD and the precautionary principle. Adequate consideration was expressly rejected in *Lawyer's for Forests* and implicitly rejected in the *Blue Wedges* and *Lansen* cases. This answers one of the questions addressed in this article. Extended standing has not led to a progressive approach to the relevant considerations ground of review that requires adequate consideration of a particular matter — the cases show there has been firm reliance on orthodox limits.

3 Why limit the rationality grounds to tick-a-box review in this context?

There was limited discussion in the cases as to why the orthodox limits were necessary and why adequate consideration is beyond the scope of review. However, an examination of the nature of the Minister's decision at stage three, which was the decision challenged in each of the cases, and the characteristics of ESD and the precautionary principle reveal why a restrained approach would be relied on rather than a progressive approach. Both have features that Australian courts would recognise as indicating that a restrained approach to application of the relevant considerations ground of review is appropriate.

First, the Minister's decision at stage three has polycentric characteristics. Section 136 of the *EPBC Act* requires the Minister to consider environmental impacts, and economic and social matters. These considerations reflect the different interests in *EPBC Act* decisions and judicial review cases. The developer will be concerned with its own economic interests, environmental groups represent the public interest in relation to the environment, and the Minister, as well as being the decision-maker, will have an interest in the effect of the development on employment and the national economy, as developments assessed under the *EPBC Act* are often large scale — for example mines,[177] pulp mills,[178] dams,[179] and port facilities.[180] The Minister's decision to grant

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172 McMillan, above n 98, 363. See also references to these principles in recent decisions of the Full Court of the Federal Court: *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* (2011) 180 LGERA 99, 112 [44]; *Khan v Minister for Immigration and Citizenship* (2011) 192 FCR 173, 193 [75] (Flick J); *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248, 270–271 [57]–[62].

173 (2010) 243 CLR 164, 175 [29]. At least in the context of a tribunal's consideration of evidence given by an applicant.

174 Ibid 176 [30], quoting Basten JA in *Swift v SAS Trustee Corporation* [2010] NSWCA 182, [45].

175 Ibid 176-7 [33]–[34].

176 The Full Court of the Federal Court treated the High Court's decision in *SZJSS* in this way in *Reece v Webber* (2011) 192 FCR 254, 277–8 [67]–[70].

177 See, eg, *Lansen v Minister for Environment and Heritage* (2008) 102 ALD 558; *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* (2008) 166 FCR 54;

or refuse approval under the *EPBC Act* is therefore polycentric — it involves numerous interested persons and consideration of fluid, or interacting, public interest factors.[181] The subject matter of the decision therefore borders on being non-justiciable according to Bowen CJ's reasoning in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*[182] and is likely to lead a court to taking a restrained approach to applying the grounds of judicial review.

Secondly, ESD and the precautionary principle have characteristics that are very likely to be regarded as taking the court into the merits of the Minister's decision if enforced in a substantive manner. This is because ESD and the precautionary principle affect not just the assessment of particular environmental impacts but also the balancing of environmental, social and economic considerations when determining whether to grant or refuse approval. 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, the leading Australian environmental law text by 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'.[183] This emphasis on striking a proper balance between such considerations makes sense as an administrative principle to guide decision-making. However, as a legal principle to be enforced by courts through the relevant considerations ground of review it is problematic. The weight that is given to relevant considerations is generally regarded as within the merits of the decision.[184] The courts will seek to avoid supervising the way that the balance between environmental, social and economic considerations is struck.

The precautionary principle has a similar effect. The preventive measures that may be required by the precautionary principle are likely to increase the cost of the development, which could affect its viability and, in turn, jeopardise employment opportunities and benefits to the national economy that would otherwise be gained.

It is most likely therefore that if courts required adequate consideration of ESD and the precautionary principle they would impose on the balance that is struck by the Minister between public interest considerations. This is usually regarded as within the merits of the decision rather than a legal matter for the courts. The formalist tick-a-box approach, on the other hand, enables the courts to ensure that ESD and the precautionary principles are considered, at least to some extent, but stops short of supervising the way that the Minister balances environmental, social and economic

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Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage (2006) 232 ALR 510.

178 See, eg, *Lawyers for Forests v Minister for Environment, Heritage and the Arts* (2009) 165 LGERA 203; *Wilderness Society Inc v Turnbull* (2007) 166 FCR 154.

179 *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.

180 *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463.

181 Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 397.

182 (1987) 15 FCR 274, 278–9.

183 Bates, above n 141, 215 (emphasis in original); *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, 287 [23].

184 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J); *Minister for Immigration and Citizenship v SZJSS* (2010) 85 ALJR 306, 313 [32]–[34].

considerations. In other words, the tick-a-box approach facilitates low-intensity judicial scrutiny that leaves to the decision-maker the balancing of relevant factors.

The result for environmental groups however is that their interest in sustainable development has been included in Commonwealth environmental legislation, and they have gained access to the courts according to the extended standing provision, but their ability to ensure that decisions are made in an environmentally sustainable manner is largely beyond the scope of judicial review. This is consistent with the enforcement model which focuses on standing but not the limitations in the grounds of review. While according to Stewart, the participation model extends in the United States to the courts reviewing decisions for whether 'adequate regard to each of the competing interests' has resulted in their 'due accommodation',[185] the *EPBC Act* cases show that this is a step too far for Australian courts.

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 carried out by standing rules that require a special interest to be affected, the work of traditional 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 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,[186] a politician, and this is likely to be recognised as meaning that the public interest assessments are primarily a matter of political responsibility.[187] 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 expanded.

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185 Stewart, above n 3, 1757.

186 Section 515(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) 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 three is not. All of the cases relating to challenges to stage three decisions involved decisions made by the Minister rather than a delegate.

187 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).

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 considerations[188] — an objective that is beyond the scope of the rationality grounds of review. Environmental interest groups also typically lack a personal right or interest that is affected by the decision which excludes them from arguing their case on the ground of procedural unfairness. The result is that while the *EPBC Act* facilitates challenges by environmental groups other factors come into play to restrict the effectiveness of judicial review as an accountability mechanism.[189] The *EPBC Act* has reformed the 'to whom' accountability question in a context in which the 'for what' question, the standards by which administrative decisions are tested, are restricted. This tells us that 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.

188 See, 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.

189 Of course, a possible solution is to amend the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to allow for merits appeals for one or more of the decisions made in the assessment process as recommended by the Hawke Review: Hawke, above n 44, 259 [15.61]. The recommendation and the reasoning that led to it are significant and interesting but their examination is beyond the scope of this article.