SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Society for Kangaroos Inc v The Chief Executive of the Department Environment and Heritage Protection & Anor* [2015] QSC 67
PARTIES:	**AUSTRALIAN SOCIETY FOR KANGAROOS INC** (applicant) **v** **THE CHIEF EXECUTIVE OF THE DEPARTMENT ENVIRONMENT AND HERITAGE PROTECTION** (first respondent) and **MICHAEL JOYCE** (second respondent)
FILE NO:	No 7392 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application for Statutory Order of Review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	18 – 19 November 2014; Written submissions 28 November 2014, 3 December 2014 and 5 December 2014.
JUDGE:	Daubney J

ORDER:

1. (a) The application for an extension of time within which to file an application for a statutory order of review in respect of the decision to grant wildlife management permit WIMP 13463513 is refused;

(b) Otherwise, the applicant has all necessary extensions of time pursuant to s 26(1) of the *Judicial Review Act* 1991 (Qld) to file an application for a statutory order of review in respect of the decisions to grant damage mitigation permits WIMP 14211914, WIMP 13964814, WIMP 14194414 and WIMP 14160814.

2. The application for statutory orders of review is dismissed.

3. The applicant shall pay the respondents' standard costs of and incidental to the proceeding.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – GENERALLY – where the applicant seeks judicial review of five damage mitigation permits granted by the second respondent – where the damage mitigation permits were granted by the second defendant in his capacity as authorised delegate of the first defendant – where the applicant sought to have each of the damage mitigation permits quashed or set aside – where an application was filed outside the required time limits prescribed by s 26 of the *Judicial Review Act* 1991 (Qld) – whether the respondent can seek an extension of time for filing an application for a statutory order of review in regards to a particular permit - whether the decisions in granting the damage mitigation permits contravened any Act

Judicial Review Act 1991 (Qld) ss 26, 30 and 49.
Nature Conservation Act 1992 (Qld) ss 4, 5, 71, 72, 73, 74, 75, 80, 88 and 175.
Nature Conservation (Administration) Regulation 2006 (Qld) ss 12 and 25, Schedule 7.
Nature Conservation (Wildlife) Regulation 2006 (Qld) s 31, Schedule 6.
Nature Conservation (Wildlife Management) Regulation 2006 (Qld) ss 181, 182, 184 and 185.

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564, cited.
Anghel v Minister for Transport (No 2) [1995] 2 Qd R 454, cited.
Attorney-General (NSW) v Quin (1990) 170 CLR 1, considered.
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334, cited.
Sharples v Council of the Queensland Law Society Incorporated [2000] QSC 392, considered.
Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs [2012] FCA 185, cited.
Kuku Djungan Aboriginal Corporation v Christensen [1993] 2 Qd R 663, applied.
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, applied.
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, considered.

COUNSEL:	S J Keim SC and P Smith for the applicant E J Longbottom for the first and second respondents
SOLICITORS:	Couper Geysen Solicitors for the applicant Crown Law for the first and second respondents

[1] The applicant ("the Society") is a society incorporated in Victoria. Its main object is to "endeavour to represent all species of kangaroos and wallabies across Australia and internationally, and protect them from unnecessary suffering, killing, orphaning and extinction".[1]

[2] The present application concerns five (5) damage mitigation permits which were granted by the second respondent in his capacity as authorised delegate of the Chief Executive of the Department of Environment and Heritage Protection. In brief, these permits authorised the culling of specified numbers of the animals known as "agile wallabies".

[3] The application sought orders under the *Judicial Review Act* 1991 (Qld) ("*JRA*") for each of the permits to be quashed or set aside.[2]

[4] The application was, however, filed outside the time limit prescribed by s 26 of the *JRA*. The Society therefore seeks the necessary extensions of time for the filing of the application.

[5] Before turning in more detail to the facts, I will set out the relevant statutory provisions.

The legislation

[6] As at 14 October 2013, the object of the *Nature Conservation Act* 1992 (Qld) ("*NCA*") was stated in s 4 to be "the conservation of nature".

[7] By the operation of the *Nature Conservation and Other Legislation Amendment Act* (No. 2) 2013 ("the 2013 *Amending Act*"), s 4 of the *NCA* was amended from the date of assent (7 November 2013) to provide that the objects of the *NCA* are:

> "… the conservation of nature while allowing for the following:
>
> (a) the involvement of indigenous people in the management of protected areas in which they have an interest under Aboriginal tradition or Island custom;
>
> (b) the use and enjoyment of protected areas by the community;
>
> (c) the social, cultural and commercial use of protected areas in a way consistent with the natural and cultural and other values of the areas."

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1 Society's mission statement (20 December 2010), Affidavit of Nicole Sutterby (sworn 5 August 2014), Exhibit E.

2 Amended Application for a Statutory Order of Review (filed 18 September 2014).

[8] Section 5 of the *NCA* provides that this object is to be achieved "by an integrated and comprehensive conservation strategy for the whole of the State" that involves a number of things including:

> "(d) Protection of native wildlife and its habitat
>
> - the protection of the biological diversity of native wildlife and its habitat by –
>
> (i) the dedication and declaration of protected areas; and
>
> (ii) prescribing protected and prohibited wildlife; and
>
> (iii) the management of wildlife in accordance with –
>
> (A) the management principles; and
>
> (B) the declared management intent; and
>
> (C) any conservation plan;
>
> for the wildlife; and
>
> (iv) entering into conservation agreements; …"

[9] Section 71 of the *NCA* provides that the classes of wildlife to which the *NCA* applies includes "protected wildlife that is … least concern wildlife."[3] Sections 71 – 75 set out a number of management principles relating to the various classes of wildlife.

[10] Section 80(1) of the *NCA* allows a regulation to "prescribe native wildlife as least concern wildlife if the wildlife is common or abundant and is likely to survive in the wild".

[11] By s 88 of the *NCA*, penal sanctions are imposed for, amongst other things, the unauthorised taking of a protected animal.

[12] Section 175 of the *NCA* allows the making of regulations by the Governor-in-Council on a wide variety of matters; in particular, a regulation may be made authorising the taking of a protected animal.

[13] It was not in issue that the agile wallaby falls within the definition of "least concern wildlife".[4]

[14] Section 12(a) of the *Nature Conservation (Administration) Regulation* 2006 (Qld) ("the *Administration Regulation*") relevantly provides that the Chief Executive may, in respect of animals other than in a protected area, grant a "damage mitigation permit".[5]

[15] A damage mitigation permit falls within the definition of "wildlife authority" under the *Administration Regulation*, and is thereby a "relevant authority" for the purposes of the

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3 Section 71 (a)(v), *NCA* 1992 (Qld) (prior to the 2013 Amending Act this was s 71 (a) (vi))

4 Section 31 and Schedule 6, *Nature Conservation (Wildlife) Regulation* 2006 (Qld).

5 It is unnecessary for the present case to pursue the further definitions of protected areas.

Administration Regulation.[6] The procedure for applying for a "relevant authority" is specified in Part 2 Division 3 of the *Administration Regulation*. Section 25 of the *Administration Regulation* provides:

"25 Considering Application

(1) In considering an application for a relevant authority, the chief executive must have regard to each of the following –

(a) the impact the activities that may be carried out under the authority may have on the conservation of the cultural or natural resources of a protected area or native wildlife;

(b) the effect the grant of the authority will have on the fair and equitable access to nature, having regard to, in particular, the ecologically sustainable use of protected areas or wildlife;

(c) any contribution the applicant proposes to make to the conservation of nature;

(d) any relevant Australian or international code, instrument, protocol or standard or any relevant intergovernmental agreement;

(e) the precautionary principle;

(f) public health and safety;

(g) the public interest;

(h) for an application for a relevant authority other than a camping permit – whether the applicant is a suitable person to hold the authority, having regard to the matters mentioned in schedule 2;

(i) for an application for a relevant authority for a national park (Cape York Peninsula Aboriginal land) – the indigenous management agreement for the protected area;

(j) any recovery plan for wildlife to which the authority applies;

(k) any other matter stated in a management instrument as a matter the chief executive must have regard to when considering an application for the authority.

Notes –

1 For protected area authorities, see for example, the Protected Areas Management Regulation, sections 17, 34, 40 and 49.

2 For wildlife authorities, see for example, the Wildlife Management Regulation, sections 224, 230, 291 and 295.

(2) Without limiting subsection (1), the chief executive may have regard to anything else the chief executive considers appropriate to achieve the object of the Act.

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[6] Definition of "wildlife authority" and "relevant authority" in Schedule 7, *Administration Regulation*.

(3) In this section –

precautionary principle means the principle that, if there are threats of serious or irreversible environmental damage, lack of full scientific certainty must not be used as a reason for postponing measures to prevent threatening processes.

recovery plan –

1 A *recovery plan*, for wildlife, is a document stating what research and management is necessary to stop the decline, support the recovery, or enhance the chance of long-term survival in the wild, of the wildlife.

2 A *recovery plan* may be a recovery plan made or adopted under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth), section 269A."

[16] Damage mitigation permits are specifically dealt with in the *Nature Conservation (Wildlife Management) Regulation* 2006 (Qld) ("the *Wildlife Management Regulation*"), Chapter 3, Part 4, Division 2, Subdivision 1. It is sufficient for present purposes to refer to the version of the *Wildlife Management Regulation* which was current as at 27 September 2013.[7] Section 181 in that division provides:

"**181 Purpose of permit and div 2**

(1) The purpose of a damage mitigation permit for animals is to allow a person to do an authorised act affecting a protected animal if the animal –

(a) is causing, or may cause, damage or loss; or

(b) represents a threat to human health or wellbeing.

(2) The purpose of this division is to ensure the grant of damage mitigation permits to do authorised acts affecting animals does not adversely affect the conservation of the animals.

(3) The purpose mentioned in subsection (2) is achieved by –

(a) allowing the chief executive to grant a damage mitigation permit to do an authorised act affecting an animal only in limited circumstances; and

(b) limiting the activities that a person is authorised to do under a damage mitigation permit; and

(c) regulating the activities of persons acting under a damage mitigation permit.

(4) In this section –

authorised act, affecting a protected animal, means any of the following –

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[7] The previous version was worded differently but was to similar effect.

(a) taking, keeping or using the animal;

(b) if the protected animal is a flying-fox –

(i) destroying a flying-fox roost used by the animal; or

(ii) driving away the animal from a flying-fox roost; or

(iii) disturbing the animal in a flying-fox roost."

[17] Section 182(1)(a) relevantly provides that the Chief Executive may grant a damage mitigation permit only for a least concern animal. As noted above, there was no issue in this case that the agile wallaby is a "least concern animal". Nor was there any issue about the second respondent's authority to issue damage mitigation permits as the delegate of the Chief Executive.

[18] Section 184 of the *Wildlife Management Regulation* provides:

"**184 Restriction about purposes for which permit may be granted**

(1) The chief executive may grant a damage mitigation permit only for 1 or both of the following purposes –

(a) to prevent damage or loss caused, or likely to be caused, by a protected animal;

(b) to prevent or minimise a threat, or potential threat, to human health and wellbeing caused by a protected animal.

(2) However, a conservation plan may authorise the grant of a damage mitigation permit for another purpose for animals to which the plan relates.

Note –

For problem crocodiles, see The Estuarine Crocodile Conservation Plan, section 22."

[19] Section 185(1) of the *Wildlife Management Regulation* provides:

"(1) The chief executive may grant a damage mitigation permit, other than a permit for taking a flying-fox, for damage or loss caused, or likely to be caused, by a protected animal only if the chief executive is satisfied –

(a) the animal is causing, or may cause, damage; and

(b) the landholder of the land on which the animal is causing, or may cause, damage has made a reasonable attempt to prevent or minimise the damage and the action taken has not prevented or minimised the damage; and

Examples of action that may be taken to prevent or minimise damage caused by an animal –

1 taking measures, for example, installing a fence or other enclosure, to prevent the animal from accessing the land, or property on the land, on which the animal is causing or may cause damage

2 using an audio or visual device or other thing to deter the animal from accessing the land, or property on the land, on which the animal is causing or may cause damage

(c) if the damage is not prevented or controlled –

(i) individuals may suffer significant economic loss; or

(ii) the ecological sustainability of nature is likely to be harmed; and

(d) action under the permit will not adversely affect the survival of the animal in the wild; and

(e) the proposed way of taking the animal is humane and not likely to cause unnecessary suffering to the animal."

The damage mitigation permits

[20] This proceeding concerns the following damage mitigation permits.

Permit WIMP 13463513

[21] On 26 September 2013, Wahroonga Holdings Pty Ltd applied for a damage mitigation permit in respect of agile wallabies on a property situated at Lugger Bay, Explorer Drive, South Mission Beach.[8]

[22] On 14 October 2013, the second respondent decided to issue the damage mitigation permit.[9] Permit No WIMP 13463513 was then issued to Wahroonga Holdings Pty Ltd, detailing permission to cull 500 agile wallabies on the permitted location.[10] The permit was expressed to be valid from 17 October 2013 to 16 October 2014.[11]

Permit WIMP 14211914

[23] On 24 February 2014, the Department received an application dated 19 February 2014 for a damage mitigation permit in respect of agile wallabies on a property situated at Jackey Jackey Street, South Mission Beach.[12]

[24] On 25 February 2014, the second respondent decided to issue the damage mitigation permit.[13] Permit No WIMP 14211914 was then issued, detailing permission to cull 500

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8 Affidavit of Michael Joyce (affirmed 27 October 2014), para 30, Exhibit MJ-2.
9 Affidavit of Michael Joyce (affirmed 27 October 2014), para 31.
10 Affidavit of Michael Joyce (affirmed 27 October 2014), para 34, Exhibit MJ-3 and MJ-5.
11 Affidavit of Michael Joyce (affirmed 27 October 2014), para 14.
12 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-6.
13 Affidavit of Michael Joyce (affirmed 27 October 2014), para 35.

agile wallabies on the permitted location.[14] The permit was expressed to be valid from 25 February 2014 to 26 February 2015.[15]

Permit WIMP 13964814

[25] On 8 January 2014, the Department received an application dated 7 January 2014 for a damage mitigation permit in respect of agile wallabies on properties situated at Alexander Drive, Mission Beach and Boyett Road, Mission Beach.[16]

[26] On 30 January 2014, the second respondent decided to issue the damage mitigation permit.[17] Permit No WIMP 13964814 was then issued, detailing permission to cull 100 agile wallabies on the permitted location.[18] The permit was expressed to be valid from 6 February 2014 to 5 February 2015.[19]

Permit WIMP 14194414

[27] On 19 February 2014, the Department received an application dated 18 February 2014 for a damage mitigation permit in respect of agile wallabies on a property situated at Campbell Street, Mission Beach.[20]

[28] On 21 February 2014, the second respondent decided to issue the damage mitigation permit.[21] Permit No WIMP 14194414 was then issued, detailing permission to cull 100 agile wallabies on the permitted location.[22] The permit was expressed to be valid from 21 February 2014 to 20 February 2015.[23]

Permit WIMP 14160814

[29] On 14 February 2014, the Department received an application dated 12 February 2014 for a damage mitigation permit in respect of agile wallabies on a property situated at Park Lane, South Mission Beach.[24]

[30] On 14 February 2014, the second respondent decided to issue the damage mitigation permit. Permit No WIMP 14160814 was then issued, detailing permission to cull 300 agile wallabies on the permitted location.[25] The permit was expressed to be valid from 17 February 2014 to 16 February 2015.[26]

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14 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-9.
15 Affidavit of Michael Joyce (affirmed 27 October 2014), para 14.
16 Affidavit of Michael Joyce (affirmed 27 October 2014), para 38 and Exhibit MJ-10.
17 Affidavit of Michael Joyce (affirmed 27 October 2014), para 39.
18 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-13.
19 Affidavit of Michael Joyce (affirmed 27 October 2014), para 14.
20 Affidavit of Michael Joyce (affirmed 27 October 2014), para 44 and Exhibit MJ-14.
21 Affidavit of Michael Joyce (affirmed 27 October 2014), para 45.
22 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-17.
23 Affidavit of Michael Joyce (affirmed 27 October 2014), para 14.
24 Affidavit of Michael Joyce (affirmed 27 October 2014), para 48 and Exhibit MJ-18.
25 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-19.
26 Affidavit of Michael Joyce (affirmed 27 October 2014), para 48.

Extension of time

[31] Section 26 of the *JRA* provides:

> "**26 Period within which application must be made**
>
> (1) An application to the court for a statutory order of review in relation to a decision that has been made and the terms of which were recorded in writing and set out in a document that was given to the applicant (including a decision that a person purported to make after the end of the period within which it was required to be made) must be made within –
>
> (a) the period required by subsection (2); or
>
> (b) such further time as the court (whether before or after the end of that required period) allows.
>
> (2) The period within which an application for a statutory order of review is required to be made is the period beginning on the day on which the decision is made and ending 28 days after the relevant day.
>
> (3) If –
>
> (a) there is not a period prescribed for the making of an application for a statutory order or review in relation to a particular decision; or
>
> (b) there is not a period prescribed for the making of an application by a particular person for a statutory order of review in relation to a particular decision;
>
> the court may take the following action if it is of the opinion that the application was not made within a reasonable time after the decision was made –
>
> (c) if paragraph (a) applies – refuse to consider an application for a statutory order or review in relation to the decision;
>
> (d) if paragraph (b) applies – refuse to consider an application by the person for a statutory order of review in relation to the decision.
>
> (4) In forming an opinion for the purposes of subsection (3), the Court –
>
> (a) must have regard to –
>
> (i) the time when the applicant became aware of the decision; and
>
> (ii) if subsection (3)(b) applies – the period prescribed for the making by another person of an application for a statutory order of review in relation to the decision; and

(b) may have regard to such other matters as it considers relevant.

(5) In subsection (2) –

relevant day means –

(a) if the decision includes, or is accompanied by a statement giving, the reasons for the decision – the day on which a document setting out the terms of the decision is given to the applicant; or

(b) if paragraph (a) does not apply and a written statement giving the reasons for the decision is given to the applicant (otherwise than because of a request under section 32) not later than 28 days after the day on which a document setting out the terms of the decision is given to the applicant – the day on which the statement is given; or

(c) if paragraph (a) does not apply and the applicant requests the person who made the decision to give a statement under section 32 – the day on which –

(i) the statement is given; or

(ii) the applicant is notified under section 33(2) that the applicant was not entitled to make the request; or

(iii) the applicant is notified under section 33(5) or 37 that the statement will not be given; or

(iv) the court makes an order under section 39 declaring that the applicant was not entitled to make the request; or

(d) in any other case – the day on which a document setting out the terms of the decision is given to the applicant."

[32] The present application for a statutory order of review was not filed until 11 August 2014. The Society accepted that the application was out of time, and sought an extension of time under s 26(1)(b) of the *JRA* in respect of each of the decisions to issue a damage mitigation permit. I note for completeness that the second respondent prepared a statement of reasons for each decision at the time he made that decision.

[33] In *Kuku Djungan Aboriginal Corporation v Christensen*,[27] Moynihan J (as he then was) observed that an application under the *JRA* which is commenced outside the limitation period, "ought not to be entertained unless the applicant shows an acceptable explanation of the delay and that it would be fair and equitable in the circumstances to extend the time". His Honour added that such considerations extend "beyond considerations applying as between the applicant and the respondent", and include "a wider public interest", and that the same "may be said of considerations of prejudice to the respondent and others consequent on the delay in bringing the application".

[27] [1993] 2 Qd R 663 at 665.

Moynihan J then referred to authorities which "establish that the merits of the substantive application are a consideration relevant to granting an extension of time".

[34] The President of the Society, Ms Sutterby, provided an affidavit setting out the steps taken by the Society prior to the filing of the application by way of an explanation for the delay. In summary:

(a) On 25 March 2014, the applicant received advice from the Queensland Public Interest Law Clearing House Inc ("QPILCH") that QPILCH could assist in obtaining legal advice, but before it could do this it required the relevant documents, including the statements of reasons;[28]

(b) The Society had made a number of Right to Information ("RTI") requests, and, on 3 March 2014, had requested statements of reasons;[29]

(c) Immediately on receiving the RTI material, which included copies of the statements of reasons, copies were forwarded to QPILCH;[30]

(d) On 5 June 2014, QPILCH informed the Society that the case had been referred to a law firm for advice; [31]

(e) The Society contacted the law firm on 6, 9, 16 and 20 June 2014 to chase up the provision of the advice;[32]

(f) On 24 and 25 June 2014, the Society received certain advice from the law firm;[33]

(g) On 25 June and 4 July 2014, the Society contacted the barrister's animal welfare panel for advice on how to make a review application;[34]

(h) Between 4 July and 4 August 2014 the Society unsuccessfully sought *pro bono* legal representation;[35]

(i) The Society then itself prepared and filed the application without legal representation on 11 August 2014. [36]

[35] The respondents did not cavil with the explanations given as to the reasons for the delay in filing the application, but submitted that, having regard to the merits of the application, the application for extensions of time ought be refused.[37]

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[28] Affidavit of Nicole Sutterby (sworn on 5 August 2014), para 48.
[29] Affidavit of Nicole Sutterby (sworn on 5 August 2014), para 47.
[30] Affidavit of Nicole Sutterby (sworn on 5 August 2014), para 52.
[31] Affidavit of Nicole Sutterby (sworn on 5 August 2014), para 53.
[32] Affidavit of Nicole Sutterby (sworn on 5 August 2014), para 54, 55, 56 and 57.
[33] Affidavit of Nicole Sutterby (sworn on 5 August 2014), para 58 and 59.
[34] Affidavit of Nicole Sutterby (sworn on 5 August 2014), para 61 and 63.
[35] Affidavit of Nicole Sutterby (sworn on 5 August 2014), para 63.
[36] Affidavit of Nicole Sutterby (sworn on 5 August 2014), para 63.
[37] Respondents' Outline of Submissions (filed 17 November 2014), para 57.

[36] In view of the undoubted necessity to have regard to the merits of the substantive applications in determining whether or not to grant the extensions of time, it is therefore necessary to turn to those substantive merits.

[37] Before doing so, however, I should mention that there is a particular consideration impacting on whether or not an extension of time ought be granted in respect of Permit WIMP 13463513. That permit, it will be recalled, expired on 16 October 2014. This application came on for hearing on 18 November 2014. In other words, by the time the application came on for hearing, that permit had already expired. In those circumstances, counsel were requested to provide express submissions on the question of the utility in granting an extension of time for the hearing of an application in respect of a permit which, on any view, had already expired by the time the matter came on for hearing.

[38] I will return to the question of extensions of time after reviewing the merits of the substantive applications.

Background to the decisions

[39] The decisions were made by the second respondent, who is the Operations Manager for the Northern Region of Queensland for the Wildlife Branch of the Department of Environment and Heritage Protection.[38] The Northern Region extends from around Bowen, and then north to the tip of Cape York and west to the State border.[39] It includes islands in the Gulf of Carpentaria and the Torres Strait Islands.[40]

[40] The Cassowary Coast district is included in the Northern Region.[41] This region extends from Innisfail through Tully and Mission Beach down to Hinchinbrook Island in the south.[42] In an affidavit filed by the second respondent, he described the "Mission Beach area" as referring to:[43]

> " … the residential areas of Mission Beach, Wongaling Beach and South Mission Beach as well as the small rural and agricultural properties that surround each of these residential areas. Inland from the residential area and small rural and agricultural properties is a large area of forest and national park."

[41] The second respondent said that the Mission Beach area is a small part of the Cassowary Coast district.[44] He said that he was familiar with the Mission Beach area and surrounds "having worked on negotiations around the declaration of nature refuges in the area for some years prior to taking on the role of Operations Manager for the Northern Region in late 2012".[45]

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38 Affidavit of Michael Joyce (affirmed 27 October 2014), para 1.
39 Affidavit of Michael Joyce (affirmed 27 October 2014), para 5.
40 Affidavit of Michael Joyce (affirmed 27 October 2014), para 5.
41 Affidavit of Michael Joyce (affirmed 27 October 2014), para 6.
42 Affidavit of Michael Joyce (affirmed 27 October 2014), para 6.
43 Affidavit of Michael Joyce (affirmed 27 October 2014), para 7.
44 Affidavit of Michael Joyce (affirmed 27 October 2014), para 8.
45 Affidavit of Michael Joyce (affirmed 27 October 2014), para 9.

[42] As Operations Manager, the second respondent had responsibility for wildlife management over the entire Northern Region.[46] He described that as follows:[47]

> "11. The role of the Wildlife Branch of DEHP is to protect, conserve, and manage the sustainable use of Queensland's native wildlife, through the review and development of policy and legislation, education and community engagement, development of partnerships, compliance management, and operational service delivery.
>
> 12. The duties of my job include:
>
> (a) knowledge of the *Nature Conservation Act* 1992 (Qld) (**NCA**) and the principles and practices of contemporary wildlife management;
>
> (b) assisting in resolving wildlife management issues, including problematic or potentially dangerous wildlife in urban areas;
>
> (c) assessing and determining conditions regarding applications for wildlife authorities issued under the NCA approvals and other administered legislation; and
>
> (d) management of wildlife under the NCA and the regulations made under that Act."

[43] The second respondent confirmed that he was an authorised delegate of the first respondent concerning the grant of damage mitigation permits, and in particular that he was the authorised decision-maker in relation to the damage mitigation permits with which this application is concerned.[48]

[44] The second respondent said that in early to mid-2013, he was informed by departmental officers that complaints had been made by persons identifying themselves as residents of South Mission Beach about the level of agile wallaby population in and around South Mission Beach.[49]

[45] On 4 March 2013, the second respondent visited the South Mission Beach area to observe first-hand what was occurring.[50] He said:[51]

> "During the visit, I travelled around the South Mission Beach area with wildlife officers to observe the agile wallaby population and the landscape. On that occasion, I formed the view, based on my observations of the agile wallaby population at that time, that the population of agile wallabies was at a level where there was a risk that numbers might far exceeded the capacity of the environment to sustain the agile wallaby population".

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[46] Affidavit of Michael Joyce (affirmed 27 October 2014), para 10.
[47] Affidavit of Michael Joyce (affirmed 27 October 2014), para 11 and 12.
[48] Affidavit of Michael Joyce (affirmed 27 October 2014), para 13 and 14.
[49] Affidavit of Michael Joyce (affirmed 27 October 2014), para 15.
[50] Affidavit of Michael Joyce (affirmed 27 October 2014), para 16.
[51] Affidavit of Michael Joyce (affirmed 27 October 2014), para 16.

[46] As a result of that visit, and other information obtained from wildlife rangers, the second respondent said that he formed the view that he "needed to get a more detailed understanding about the population dynamics of the agile wallaby in the Mission Beach area".[52] The second respondent said:[53]

> "18. In April 2013, I asked DEHP wildlife rangers Skeen West and Sally Morris to conduct population counts in and around the Mission Beach and South Mission Beach residential areas.
>
> 19. As an adjunct to the information that was being provided to me from time to time by wildlife rangers I visited the Mission Beach area on the dates set out below.
>
> (a) Thursday 3 January 2013;
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> (b) Friday 4 March 2013;
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> (c) Wednesday 11 September 2013;
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> (d) Wednesday 9 October 2013;
>
> (e) Monday 3 February 2014;
>
> (f) Thursday 6 February 2014;
>
> (g) Wednesday and Thursday 12-13 February 2014;
>
> (h) Monday Tuesday and Wednesday 3-4-5 March 2014; and
>
> (i) Monday 23 June 2014."

[47] The second respondent said that the purpose of those visits was not for him to conduct wallaby counts, but rather to gain first-hand experience of the circumstances described in reports which were being provided to him by wildlife rangers.[54] He said that he travelled around the Mission Beach area and observed the landscape and the wildlife, including agile wallabies.[55]

[48] The second respondent also gave evidence about counts of wallabies which were conducted by the Department. He said:[56]

> "21. Since April 2013, DEHP has continued to conduct counts of the agile wallaby population in the Mission Beach area. Counts have been undertaken in different parts of the Mission Beach area from time to time, in some of the residential areas and in the agricultural zone (where the small rural and agricultural properties are situated) in the South Mission Beach area and in the Mission Beach area.
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> 22. After the initial counts, I worked with DEHP employees to develop a sampling methodology to ensure that the counts were reasonably reliable. These counts were never intended to be exhaustive however,

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52 Affidavit of Michael Joyce (affirmed 27 October 2014), para 17.
53 Affidavit of Michael Joyce (affirmed 27 October 2014), para 18 and 19.
54 Affidavit of Michael Joyce (affirmed 27 October 2014), para 20.
55 Affidavit of Michael Joyce (affirmed 27 October 2014), para 20.
56 Affidavit of Michael Joyce (affirmed 27 October 2014), para 21 and 22.

> simply informative. The purpose of the counts was to obtain information about the changes in numbers of wallaby population over time for the purposes of wildlife management decisions."

[49] On the basis of the information provided by departmental employees, and from his own observations, the second respondent formed an opinion that, for the purposes of wallaby management in the Mission Beach area, there was no need to develop or engage in a fully scientific survey or census.[57] He said that there was no evidence that the agile wallaby was endangered in any way;[58] on the contrary, the abundance of agile wallabies in the Mission Beach area raised concerns with the second respondent as to the capacity of the environment to sustain that population level, and consequently, the health and well-being of the agile wallabies and other animals in the Mission Beach area as well as that of the local community.[59]

[50] The second respondent referred to an agile wallaby survey conducted on 17 July 2014 by departmental officers in the nature park and reserve regions of the Mission Beach area.[60] He noted that it is not possible to conduct an actual count in all areas of the park and reserves because of inaccessibility. The second respondent said that, under the methodology adopted, it was estimated that there was, at that time, a population of 2,016 wallabies across an area of 1.2 square kilometres.

[51] The second respondent also noted that the agile wallaby population in the Mission Beach region fluctuates, depending upon season and conditions. He said that it can be inferred that the population of agile wallabies in the whole of the Cassowary Coast district is much higher than that in the Mission Beach area alone.[61]

[52] The second respondent said:[62]

> "26. The issues arising from the abundance of agile wallabies in the Mission Beach area had to be managed at the same time as the management of other wildlife, both plant and animal. The agile wallaby is a species of least concern. There are, however, a number of species in the area, including the cassowary, which are endangered, vulnerable or threatened. Techniques applied to the management of one particular species need to be considered with regard to their potential effect on other species. For example, it may not be appropriate to erect fencing to manage the agile wallaby population in places where such fencing might interfere with the passage of the cassowary through the landscape."

[53] Exhibited to the second respondent's affidavit were copies of emails, reports, memoranda and photographs that had been provided to him by his wildlife rangers,

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[57] Affidavit of Michael Joyce (affirmed 27 October 2014), para 23.
[58] Affidavit of Michael Joyce (affirmed 27 October 2014), para 23.
[59] Affidavit of Michael Joyce (affirmed 27 October 2014), para 24.
[60] Affidavit of Michael Joyce (affirmed 27 October 2014), para 25.
[61] Affidavit of Michael Joyce (affirmed 27 October 2014), para 25.
[62] Affidavit of Michael Joyce (affirmed 27 October 2014), para 26.

giving details of the results of their wallaby counts.[63] The second respondent also gave details of the experience of the wildlife officers who conducted those counts.[64] No issue was taken before me as to their qualifications and experience.

[54] The second respondent's affidavit then gave particulars of each of the applications for damage mitigation permits which led to the decisions with which the present application is concerned.[65] Copies of each of the applications were exhibited to the second respondent's affidavit, as were copies of each respective notice of decision and the statement of reasons the second respondent gave in respect of each decision.

[55] The second respondent also gave oral evidence before me. His evidence concerned the statement of reasons he had given in respect of his decision to grant Permit WIMP 13463513. In the statement of reasons,[66] the second respondent had referred specifically to s 185(1)(b) of the *Wildlife Management Regulation*, and said:[67]

> "I am satisfied the landholder of the land on which the animal is causing, or may cause, damage has made a reasonable attempt to prevent or minimise the damage and the action taken has not prevent or minimised the damage because they have described in their application various non-lethal damage mitigation methods they have used. For example; chasing them away on foot, quad bikes and in vehicles, gas gun, noise."

[56] The application form which had been lodged in respect of that damage mitigation permit did not, in fact, expressly refer to the matters recited in the statement of reasons.[68] In response to a question on the application form "What previous damage mitigation method(s) have you tried (if any) and was this successful?", the landholder simply referred generally to "control measures" which had been applied consequent upon the issuing of previous damage mitigation permits.[69]

[57] The previous permits were referred to in formal damage mitigation permit assessments which were undertaken by the Department, and which were considered by the second respondent for the purposes of this decision. In a damage mitigation permit assessment dated 20 September 2012, the following background was stated:[70]

> "The applicants have previously held DMPs for the lethal control of wallabies on the above listed property. The last permit was held in 2010/2011, for the lethal take of 300 agile wallabies.
>
> Earlier permits (2009-2010) were only issued for low numbers of wallabies, with no significant management benefit.
>
> After Cyclone Yasi no shooters were available to undertake the activities, hence numbers significantly increased. Whilst the adjacent property also

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63 Affidavit of Michael Joyce (affirmed 27 October 2014), para 27, Exhibit MJ-1.
64 Affidavit of Michael Joyce (affirmed 27 October 2014), para 28 and 29.
65 Affidavit of Michael Joyce (affirmed 27 October 2014), para 30 to 52.
66 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-3.
67 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-3.
68 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-2 and MJ-3.
69 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-2.
70 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-4.

> held a permit last year for the lethal take of wallabies, this property is for sale and is not currently managed, contributing to increased number of wallabies in the area.
>
> The property currently holds no more than 30 cattle, as the wallabies have eaten away so much of the pasture that the cattle do not have enough feed."

[58] This assessment further noted that, due to the size of the property and the presence of only one caretaker, the only methods that had been used to deter wildlife had been maintenance of the fence line, but this only did "so much" because the wallabies were able to jump the fence or push under it. It was noted that "scare shooting" was not used due to complaints from neighbours. The officer who prepared the report referred to discussing with the landowner's representative the prospect of contacting land care groups for the possibility of funding to assist with fencing. They also discussed why methods other than lethal methods had not been employed, the assessment noted: "Lethal take is the most effective means of control based on the volume of animals in the area. Bird frite is difficult to use due to the proximity of residences and complaints from them; especially when combined with lethal shooting. Daily fence maintenance is not a practical option".[71]

[59] The assessment contained further references to the possibility of investigating fencing, and a damage mitigation permit issued consequent upon that 2012 assessment contained a special condition requiring the permit holder to "demonstrate research into wallaby-proof fencing along the first section of the western boundary fence" while continuing with other non-lethal mitigation measures.[72]

[60] A further damage mitigation permit assessment was conducted in April 2013. This noted that "high fences with dog mesh have been installed but animals still jump over or dig under the fence".[73]

[61] In respect of the statement of reasons with which this application is concerned, the second respondent gave evidence as to the basis for his findings in the statement of reasons concerning non-lethal mitigation methods. He referred to the fact that it is standard practice for landholders to use vehicles and quad bikes as non-lethal means to move wallabies out of areas. He also referred to his understanding that Wahroonga Holdings owned and had used a gas gun, but this had resulted in complaints from neighbours. The second respondent referred to the fact that Wahroonga Holdings had been a permit holder for a number of years, that there had been a number of assessments throughout that period of time, and that he had had discussions with his rangers and wildlife officers, and with representatives of Wahroonga Holdings, in relation to the situation. When specifically asked about the basis upon which he had made the finding, the second respondent gave the following evidence:[74]

> "And can I ask you to identify what was the basis upon which you made that particular finding?--- Again, that is something that they had shown throughout the period of their permit: that they had made attempts to build

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71 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-4.
72 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-4.
73 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-4.
74 Transcript, Tuesday 18 November 2014, page 1-45.

> wallaby-proof fencing; they had made attempts to move the macropods on. They had worked quite diligently with the Department in trying to find other methods, and they had shown throughout that period that not – when they issued them a permit for X amount of animals, they didn't often use all of those animals. So they were obviously using the non-lethal methods and using lethal methods as a last resort. They proved that to us over time.
>
> And when you say the period of the permit, what permit or what period are you referring to?--- I believe they've been holding a permit since something like 2006 or 2003 from memory. It's in my affidavit. I can't remember the exact date, but it's been a long time."

[62] In cross-examination, the second respondent confirmed that his reference to the fact that Wahroonga Holdings had often taken less animals, and the decreases and increases in numbers of animals taken, was a reference to the history of animals taken over the approximately ten years of permits which had been granted to Wahroonga Holdings.[75]

The statements of reasons

[63] The statement of reasons for each of the subject decisions followed an identical format. It is sufficient for the purposes of exemplification to refer to the statement of reasons given in respect of the decision made on 14 October 2013 to grant the damage mitigation permit WIMP 13463513.[76]

[64] The statement of reasons commenced by referring to the relevant application, and then made reference to what was described as the "relevant legislation", namely the *Wildlife Management Regulatio*n and the *Administration Regulation*. Particular reference was made to the provisions of ss 182, 184 and 185 of the *Wildlife Management Regulation*, and s 25 of the *Administration Regulation*.

[65] The reasons for decision then set out the "material on which the findings of fact were made".[77] In the case of the Wahroonga Holdings permit, this was stated to be: [78]

> "• Nature Conservation Act 1992 and the *Wildlife Management Regulation* and the *Administration Regulation* 2006;
>
> • Damage mitigation permit application submitted 15 August 2013;
>
> • Information from site visit conducted on 28/08/2013: assessment form, photographs".

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[75] Transcript, Tuesday 18 November 2014, page 1-48.
[76] Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-3.
[77] Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-3.
[78] Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-3.

[66] In his affidavit, the second respondent volunteered that the reference to, "Information from site visit conducted on 28/08/2013",[79] was erroneous, and should have been a reference to certain damage mitigation permit assessments, namely: [80]

(a) damage mitigation permit assessment prepared by Karen Dabinett and Skeen West dated 20 September 2012; and

(b) damage mitigation permit assessment prepared by Ted Pearce dated 3 April 2013.

[67] No issue was taken on behalf of the Society in relation to the correction of that error by the second respondent.

[68] The statement of reasons then set out "findings of fact" as follows:[81]

"**Findings of fact**

I assessed the application against the requirements of the Nature Conservation legislation and made the following findings of fact: Conditions are included in the findings of fact.

Legislative requirement	**Finding**
Section 182 of the Wildlife Management Regulation	Agile Wallaby *Macropus agilis* is classed as least concern species by virtue of Schedule 6 of the *Nature Conservation (Wildlife) Regulation 2006.*
Section 185(1)(a) of the Wildlife Management Regulation	I am satisfied that the animal is causing, or may cause damage because the applicant has provided monetary loss statement on the DMP application form. Photographic evidence demonstrating the number animals and extent of damage experienced have been provided.
Section 185(1)(b)	I am satisfied the landholder of the land on which the animal is causing, or may cause, damage has made a reasonable attempt to prevent or minimise the damage and the action taken has not prevent or minimised the damage because they have described in their application various non-lethal damage mitigation methods they have used. For example: chasing them away on foot, quad bikes and in vehicles, gas gun, noise.
Section 185(1)(c)	I am satisfied that if the damage is not prevented or controlled individuals may suffer significant economic loss because of the damage described in question 5 and 6 of the

[79] Affidavit of Michael Joyce (affirmed 27 October 2014), para 32.
[80] Affidavit of Michael Joyce (affirmed 27 October 2014), para 32.
[81] Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-3.

	DMP application submitted and also demonstrated through attached photographic evidence.
Section 185(1)(d)	I am satisfied that action under the permit will not adversely affect the survival of the animal in the wild because the macropods to be taken under this permit are classified as Least Concern under the *Nature Conservation (Wildlife) Regulation 2006*.
Section 185(1)(e)	I am satisfied that the proposed way of taking the animal is humane and not likely to cause unnecessary suffering to the animal because the shooting will be conducted by a licensed firearm holder. I have conditioned this permit that macropods must be taken in a humane way as specified in the National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Non-commercial purposes, approved by the Natural Resource Management Ministerial Council.

I have considered matters under Section 25(1)(a-h) and (2) of the *Administration Regulation*.

As a result I have made the following conditions applicable to this permit in regard to public health, safety and interest:

Macropods:
Macropods must be taken in a humane way as specified in the National Code of Practice for the Humane Shooting of Kangaroos and Wallabies for Non-commercial Purposes, approved by the Natural Resource Management Ministerial Council.

Additional information:
1. Neighbours, Police and the relevant Local Authority should be notified prior to commencement of operations.
2. Non-lethal deterrent methods are to be used in conjunction with this permit.
3. Taking can occur only within the boundaries of the landholder's property.
4. Carcasses to be disposed of in an appropriate manner.

Any Authorised person operating under this permit must have a copy of this permit endorsed by the Permit Holder available for inspection while carrying out the activities. The endorsement must include the authorised person's name, date of birth and residential address and be endorsed with the Permit Holders signature

Important notes:
A Return of operations form must be sent to EHP within 10 business days after each 3 month period, and you must keep a copy for your records. If the Return of operations on the approved form is not submitted a penalty

> may be given. The approved form should be downloaded via the following EHP website link: http://www.ehp.qld.gov.au/licences-permits/plants-animals/return_of_operations.html"

[69] The statement of reasons then concluded:[82]

> "**Reasons for making the decision**
>
> I was satisfied of all the matters set out in section 185 of the Wildlife Management Regulation have been met and accordingly I was able to grant a DMP. I decided to grant a DMP because:
>
> - Severe economic loss due to macropod damage
> - Take will not effect conservation of the species
> - The take of the animal is humane
> - A reasonable attempt has been made to move the macropods on by non-lethal methods. This process will continue to occur with lethal take as the last option."

[70] As I have said, each of the statements of reasons followed a similar format. Clearly enough, the particulars in each differed according to the application being considered.

[71] When considering each of the statements of reasons, I am mindful of the proposition that a decision-maker's reasons "are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed".[83] As will be seen, no challenge was made in the present case with respect to the form of, or means of expression within, each of the statements of reasons. It is therefore not necessary for me to consider or make further comment on the adequacy of each of the statements of reasons.

The grounds for judicial review

[72] It is convenient to group the grounds for judicial review stated in the Amended Application for a Statutory Order of Review according to subject matter, this being the approach adopted by the parties in argument.

[73] It is also appropriate, at this juncture, to recall that "judicial review judgments abound with assertions that the court's job is not to determine the case on its merits (which they could do if they were hearing a *de novo* appeal), but to review only for contravention of an Act, breach of natural justice or other illegality".[84] The distinction was succinctly stated by Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:[85]

> "The limited role of the Court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the

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[82] Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-3.
[83] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; (citation omitted).
[84] Aronsen, Dyer, Groves "Judicial Review of Administrative Action" (5th ed) at [3.300].
[85] (1986) 162 CLR 24 at 40-41; (citation omitted).

> Court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned."

[74] The role of the Court on an application such as the present was described by Brennan J (as he then was) in *Attorney-General (NSW) v Quin*:[86]

> "The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the Court avoids administrative injustice or error, so be it; but the Court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

Wallaby-proof fencing

[75] A significant part of the Society's argument in the hearing before me related to wallaby-proof fencing in the context of contending that:

(a) each decision to grant a damage mitigation permit was unreasonable in that "the second respondent made the finding that the respective landholder/applicant had made a reasonable but unsuccessful attempt to prevent or minimise damage purportedly occurring as the result of the presence in large numbers of Agile Wallabies, in circumstances where the landholder/applicant, in each case, had not attempted to make use of any form of wallaby-proof fencing to prevent wallabies from accessing the property" (Ground 6), and/or

(b) in making each decision, the second respondent made a finding that the respective landholder/applicant had made a reasonable but unsuccessful attempt to prevent or minimise damage purportedly occurring as a result of the presence in large numbers of agile wallabies but failed "to take into account that the landholder/applicant, in each case had not attempted to make use of any form of wallaby-proof fencing to prevent wallabies from accessing the property" (Ground 7).

[76] In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[87] Mason J identified a number of propositions which had been established by decided cases concerning a ground of review that a relevant consideration had not been taken into account. Those propositions included:

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[86] (1990) 170 CLR 1 at 35-36.
[87] (1986) 162 CLR 24 at 39.

(a) "the ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration" which the decision-maker is "**bound** to take into account in making that decision";[88]

(b) the "factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion".[89] In that regard, his Honour said:[90]

> "If the statute expressly states the considerations to be taken into account, it will often be necessary for the Court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except insofar as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard … . By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the Court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act".

(c) "Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the Court setting aside the impugned decision and ordering that the discretion be re-exercised according to law".[91]

[77] Mason J then referred to the limited role of the Court on an application for judicial review, which I have quoted above, and said:[92]

> "It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the Court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power…".

[78] The statutory provision on which the Society relied in advancing these grounds was s 185(1)(b) of the *Wildlife Management Regulation*. That section required that the decision-maker be satisfied that:

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88 At 39; (citation omitted).
89 At 39.
90 At 39 – 40; (citation omitted).
91 At 40.
92 At 41; (citation omitted).

> (b) "the landholder of the land on which the animal is causing, or may cause, damage has made a reasonable attempt to prevent or minimise the damage and the action taken has not prevented or minimised the damage; and
>
> *Examples of action that may be taken to prevent or minimise damage caused by an animal –*
>
> 1 taking measures, for example, installing a fence or other enclosure, to prevent the animal from accessing the land, or property on the land, on which the animal is causing or may cause damage
>
> 2 using an audio or visual device or other thing to deter the animal from accessing the land, or property on the land, on which the animal is causing or may cause damage"

[79] Counsel for the Society focused much attention on the reference to fencing in the first of the examples given under s 185(1)((b), and argued that:

(a) "wallaby-proof fencing is a reasonable and effective damage mitigation method routinely employed by primary producers and landholders throughout Australia",[93] and that this "is information which any reasonable decision-maker ought to consider when issuing a permit for culling of wallabies",[94] and

(b) "wallaby-proof fencing should be sufficient to protect the properties" and it "can be readily achieved, and has proven efficacious in keeping wallabies out of such properties in the past".[95]

[80] In attempting to make good these arguments, the Society sought to lead evidence about the nature, availability, cost and use of wallaby-proof fencing. That was all evidence which was not before the second respondent when he made the decisions. Whilst it can be accepted that new evidence (i.e. evidence which was not before the decision-maker) may be received in a judicial review proceeding where the evidence is relevant to establishing a ground of review challenging the decision-making process,[96] it seems to me, for the reasons which follow, that the new material sought to be introduced by the Society went not to challenging the decision-making process but rather went to challenging the merits of the second respondent's decisions. On that basis, the new evidence should be excluded.

[81] As I have said, the Society's arguments to impugn the decisions under these grounds focused on the reference to fencing in the first example under s 185(1)(b). A plain reading of s 185(1)(b), however, reveals that about which the decision-maker must be satisfied – it is directed in general terms to whether the landholder "has made a reasonable attempt to prevent or minimise the damage and the action taken has not prevented or minimised the damage". The example which refers to fencing is precisely that – an example. It is in no way prescriptive. It does not require that in every case in which a decision-maker is considering s 185(1)(b) the decision-maker is bound to turn

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93 Applicant's Outline of Argument (filed 4 November 2014), para 61.
94 Applicant's Outline of Argument (filed 4 November 2014), para 61.
95 Applicant's Outline of Argument (filed 4 November 2014), para 63.
96 *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* [2012] FCA 185 at [32].

his or her mind to fencing, or the absence of fencing. Nor does it automatically invalidate a decision under s 185(1)(b) if there is no reference in the decision to fencing.

[82] In my view it cannot, on a proper construction of s 185(1)(b), be said that wallaby-proof fencing was a matter which the decision-maker was **bound** to take into account. What the section required was that the decision-maker be satisfied that the landholder "had made a reasonable attempt to prevent or minimise the damage and the action taken has not prevented or minimised the damage". The fact that fencing was mentioned in one of the examples did not give rise to an implication that fencing was a matter which the decision-maker was bound to take into account for the purposes of being satisfied under s 185(1)(b).

[83] It was not in issue before me that, in making each of the decisions, the second respondent in fact considered, and found, that each landholder had made a reasonable attempt to minimise the damage the wallabies were causing, or may cause, and that the action taken had not prevented that damage. In making each decision, the second respondent relied, amongst other things, on the damage mitigation assessments, which set out attempts taken by the relevant landholders to prevent or minimise damage.

[84] Counsel for the Society, both in their written submissions and in argument before me, undertook a detailed critique of each of the findings made by the second respondent for the purpose of being satisfied under s 185(1)(b). Criticism was levelled at such references as there were to fencing in respect of individual decisions, and it was generally contended that there was an absence of reference to, or consideration of, wallaby-proof fencing even where that had been mentioned under previous permits (as was the case, for example, with WIMP 13463513).

[85] All of this, however, was nothing more than an attempt to have the Court review the merits of this aspect of each of the decisions by contending, in effect, that the second respondent was bound to refuse an application for a damage mitigation permit unless the relevant landholder had made use of wallaby-proof fencing. I am satisfied that, in respect of each of the decisions, the exercise of the discretion under s 185(1)(b) was within the proper parameters of the exercise of the discretion. The arguments advanced on behalf of the Society seek to go beyond that and have the Court exercise a discretion which the legislature vested in the decision-maker.

[86] In my view, the Society has not made out either Ground 6 or Ground 7 in respect of any of the impugned decisions.

The number of wallabies

[87] The following arguments were advanced by the Society concerning the total number of wallabies permitted to be taken under the respective damage mitigation permits:

(a) Each decision was unreasonable because the second respondent knew that "the combined numbers in the permits would bring the numbers of Agile Wallabies in the Mission Beach area subject to be killed pursuant to current permits to 1,560

animals which far exceeded the animals that had been observed as present in the area pursuant to the surveys on which the second respondent relied" (Ground 1A);

(b) The second respondent failed to take into account "the circumstance that the combined numbers in the permits would bring the numbers of Agile Wallabies in the Mission Beach area subject to be killed pursuant to current permits to 1,560 animals which far exceeded the animals that had been observed as present in the area pursuant to the surveys on which the second respondent relied" (Ground 1B);

(c) The second respondent failed to take into account "the precautionary principle to the extent that it was raised by the circumstance that the combined numbers in the permits would bring the numbers of Agile Wallabies in the Mission Beach area subject to be killed pursuant to current permits to 1,560 animals which far exceeded the animals that had been observed as present in the area pursuant to the surveys on which the second respondent relied" (Ground 1C).

[88] Section 185(1)(d) of the *Wildlife Management Regulation* required that the decision-maker be satisfied that "action under the permit will not adversely affect the survival of the animal in the wild".

[89] Section 25(1)(a) of the *Administration Regulation* imposed an obligation on the second respondent to consider the "precautionary principle", the terms of which are set out above in [15].

[90] In attempting to advance these grounds, the Society sought to lead new evidence, i.e. evidence which had not been before the decision-maker. That was evidence from a variety of individuals as to the wallaby counts they had undertaken at various times on various properties in the Mission Beach area, as well as expert opinion evidence on the accepted scientific methods for maintaining populations of protected native species. For the reasons which follow, I consider that this new evidence did not go to challenging the decision-making process, but was directed to challenging the merits of the second respondent's decisions. Accordingly, that new evidence should be excluded.

[91] The Society's submissions referred to the various surveys which had been undertaken by departmental officers:[97]

> "37. When the decisions were made, the decision maker was in possession of the following surveys of Agile Wallabies by the Department of Environment and Heritage Protection Wildlife Ranger:
>
> a. 20 September 2012 in the South Mission Beach area – numbers counted not identified;[98]
>
> b. 12 April 2013 in the South Mission Beach area – approximately 400 animals counted. No particular method was used for this count.[99]

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97 Applicant's Outline of Argument (filed 4 November 2014), para 37.
98 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-1at page 1 and MJ-22(a).
99 Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-1 at page 1 and MJ-22(b).

c. 23 April 2013 in the South Mission Beach area – approximately 1200 animals counted. A methodology for counting and estimating the numbers was used.[100]

d. 15 January 2014 in the South Mission, Wongaling and Mission Beach area – approximately 655 animals counted across all three areas. 520 animals were counted in the South Mission Beach area, and 20 at Wongaling Beach and 115 at Mission Beach (these latter two will be referred to later in these submissions collectively as North Mission Beach).[101]

e. 3 February 2014 in the South Mission Beach area – approximately 950 animals counted.[102]

f. 12 February 2014 prepared for assessment of WIMP 14160814.[103] The estimate was between 600 to 1200 wallabies currently living in the residential area of South Mission Beach. Approximately 500 of these were on the land the subject of WIMP 14160814.[104] Unlike previous counts, no breakdown of areas or explanation of the count was provided other than a 'total' which included the estimated 500 on the Park Lane property, such count not being supported by photographic evidence.[105] This survey therefore represented an apparent departure from the 'sampling methodology' implemented by the second respondent.[106]"

[92] The argument advanced by the Society in respect of Grounds 1A and 1B was as follows (omitting references to evidence):[107]

> "38. The failure by the decision maker to 'develop or engage in a fully scientific survey' was unreasonable in the circumstances where, by his own evidence, the changes in the wallaby population was information that was necessary for the purposes of wildlife management decisions and the 'abundance' of wallabies in the area was such as to raise concerns and arguably warrant explanation. In his role as operations manager for the government department charged with the protection of the wallabies, the decision maker ought to have had regard to scientific expertise in formulating a control or management plan which considered factors such as 'meta-populations' (where sub-populations rely on each other to maintain persistence) and the need for a management plan with measurable objectives and criteria that would result in the least loss to the protected wildlife species."

[93] This argument cannot be accepted for a number of reasons.

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[100] Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-1 at page 1.
[101] Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-1 at page 17 and MJ-20 at page 168.
[102] Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-1 at page 19.
[103] Affidavit of Michael Joyce (affirmed 27 October 2014), para 50 and Exhibit MJ-20 at page 168.
[104] The assessment officer concluded that there were approximately 500 animals on the subject land from the previous population counts conducted.
[105] Affidavit of Michael Joyce (affirmed 27 October 2014), Exhibit MJ-21 and MJ-1 at page 19.
[106] Affidavit of Michael Joyce (affirmed 27 October 2014), para 22.
[107] Applicant's Outline of Argument (filed 4 November 2014), para 38.

[94] First, it is clear as a matter of fact that, with two exceptions, each of the second respondent's decisions accorded with the recommendations made in the respective damage mitigation permit assessments. The two exceptions were in respect of WIMP 14194414 and WIMP 14211914 – in each of these, the permit was for fewer wallabies than recommended in the relevant assessment.

[95] Secondly, I accept the respondents' argument that the Society's contention seeks to elevate the surveys to a status which they did not, in fact, have. The second respondent confirmed in his evidence that the surveys were never intended to be exhaustive counts of the agile wallaby population in the Mission Beach area, but were counts periodically undertaken in different parts of the Mission Beach area for the purpose of providing information about the changes in agile wallaby population over time for wildlife management decisions.

[96] Thirdly, and fundamentally, it is necessary to recall that the matter which the decision-maker was **bound** to consider, and of which he needed to be satisfied, was whether the culling proposed under each permit would "affect the survival of the animal in the wild" – s 185(1)(d) of the *Wildlife Management Regulation*. On the basis of the evidence before him, as noted above at [49], the second respondent considered that not only was there no evidence that the agile wallaby was endangered in any way, the second respondent had concerns about the abundance of the wallabies and the capacity of the environment to sustain that level. The Society's present contentions clearly amount to nothing more than an attempt to have the Court review the merits of the second respondent's decision under s 185(1)(d).

[97] As to Ground 1C, the invocation of the "precautionary principle" mentioned in s 25(3) of the *Administration Regulation* is misplaced. That principle is defined for the purposes of this legislation as "the principle that, if there are threats of serious or irreversible environmental damage, lack of full scientific certainty must not be used as a reason for postponing measures to prevent threatening processes".

[98] In the present case, on the evidence before the second respondent, there was no threat of serious or irreversible environmental damage upon the issuing of these damage mitigation permits. The pre-condition for the application of this statutory articulation of the precautionary principle was not fulfilled, and there was no occasion for the principle to be considered by the second respondent.

[99] The Society has not made Grounds 1A, 1B or 1C.

Declining numbers of wallabies

[100] The next group of arguments turned on an assertion that, at the time the decisions were made, the population of agile wallabies in the Mission Beach area had declined from more than 1,300 animals to 400. It was contended that:

(a) with this knowledge of the decline in numbers, each decision was unreasonable (Ground 2);

(b) the decision-maker failed to take account of this decline in numbers as a relevant consideration (Ground 3);

(c) in these circumstances, the decision-maker failed to have regard to the "precautionary principle" (Ground 4).

[101] The premise on which these contentions is based, i.e. "the population of agile wallabies in the Mission Beach area had, at the time of issuing the permits, declined from over 1,300 animals to 400 animals" is simply not borne out by the evidence.

[102] The assertion is derived from certain statements made by the second respondent at a Council Stakeholders meeting on 6 February 2014.[108] The second respondent gave evidence about his statements, and the basis for his statements, in an affidavit and a supplementary affidavit filed in this proceeding.[109] He was not challenged on any of that evidence when cross-examined, and there is no reason why his evidence ought not be accepted.

[103] The substance of the second respondent's evidence was that he had made a statement at the meeting that the number of agile wallabies had reduced from about 1,300 to about 400, but said that this statement "was in reference only to the residential area of South Mission Beach".[110]

[104] In his supplementary affidavit, the second respondent explained:[111]

> "(a) At the time of the meeting on 6 February 2014 (**the meeting**), no damage mitigation permits had been issued in respect of the South Mission Beach residential area. When I refer to the South Mission Beach residential area, I am referring to that part of South Mission Beach that consists of small residential blocks with houses or vacant house blocks aligned with suburban streets. This area is clearly visible in the image that appears on page 5 of Exhibit MJ1 to my earlier affidavit;
>
> (b) The population estimate of 400 that I gave at the meeting was based upon the number of agile wallabies I saw while driving through the streets of the South Mission Beach residential area on around 6 February 2014. I did not go onto any properties while conducting that count. Instead, I extrapolated the number of agile wallabies I counted while driving through the streets to arrive at an estimate of the population across the South Mission Beach residential area (**the population estimate**);
>
> (c) On 14 February 2014, I decided to grant Damage Mitigation Permit WIMP 14160814. The relevant property abuts a large nature reserve and a corridor of vegetation leading inland to the forest, but, because

[108] Affidavit of Michael Joyce (affirmed 27 October 2014), page 12.
[109] Affidavit of Michael Joyce (affirmed 27 October 2014) and Affidavit of Michael Joyce (affirmed 3 November 2014) (Supplementary Affidavit).
[110] Affidavit of Michael Joyce (affirmed 27 October 2014), para 55.
[111] Affidavit of Michael Joyce (affirmed 3 November 2014), para 4.

of its proximity to other residential blocks, could be considered to be within the South Mission Beach residential area. I did not rely on the population estimate in the assessment of that damage mitigation permit application because of the relative imprecision in how I arrived at that estimate. Instead, I relied on the material referred to in paragraph 50 of my earlier affidavit;

(d) No other damage mitigation permit referred to in my earlier affidavit is within the South Mission Beach residential area. To be clear, I do not consider the damage mitigation permits referred to in subparagraphs 14(a) and 14(b) of my earlier affidavit (WIMP 13463513 and 14211914) to be situated in the South Mission Beach residential area."

[105] On that uncontroverted evidence, the only decision which conceivably could have been affected by this issue was the decision to grant WIMP 14160814, which authorised the culling of 300 wallabies over a 12 month period. It is clear from the statement of reasons for that decision, however, that the second respondent did consider whether action under the proposed permit would adversely affect the survival of the agile wallaby in the wild, and concluded that it would not. It is also clear that this decision was founded on the relevant damage mitigation permit assessment and population counts which had been conducted on the actual property. Those specific population counts revealed significantly more wallabies on the property (500 on the property, as per field population counts on 3 February 2014 and 14 February 2014, and an unknown number in an adjacent nature reserve) than revealed in the second respondent's obviously imprecise "population estimate" across the South Mission Beach area.

[106] No proper basis has been shown for suggesting that the second respondent erred in relying on the empirical data rather than having regard to his "population estimate". Nor was there anything in connection with the grant of WIMP 14160814 to suggest a threat of "serious or irreversible environmental damage", and accordingly there was no need for resort to the "precautionary principle".

[107] None of Grounds 2, 3 or 4 have been made out.

Acting under direction

[108] By Ground 5, the Society asserted that, when making each of the decisions, the second respondent had "acted at the direction of either the Minister for Natural Resources and Mines or the Minister for the Environment".

[109] In advancing this assertion, the Society referred to statements allegedly made at the Council Stakeholders meeting by the Minister for Natural Resources and Mines to the effect that "permits were available for those who wanted them" and that he would work with the Minister for the Environment to ensure the permits were issued.[112]

[112] Applicant's Outline of Argument (filed 4 November 2014), para 55,

[110] The Society had no direct evidence to substantiate the assertion that the second respondent had acted under ministerial direction, but argued that it could be "inferred that the decision maker was influenced by the Minister's expectations rather than acting on the criteria set out in the *Regulation*".[113]

[111] The Society also referred to and relied on:

(a) A Director-General's briefing note dated 28 January 2014 which foreshadowed the economic and political reasons for the Minister's involvement in the issue of damage mitigation permits,[114] and

(b) A Minister's press release dated 26 February 2014 in relation to the Stakeholders meeting and the Mission Beach Wallaby issue.[115]

[112] There was no evidence that the second respondent knew of the Director-General's briefing note. The press release post-dated all of the decisions, and obviously could not have been taken into account.

[113] Importantly, as was properly conceded by counsel for the Society, this serious assertion was not put to the second respondent when he was cross-examined.

[114] The second respondent's evidence clearly articulates the material on which he relied in making each decision, and exhibits each statement of reasons, which includes recitation of the matters he took into account.

[115] I accept the respondents' submission that the material evidences that the second respondent made an independent assessment of the merits of each application. There is simply no proper basis for an inference that he was influenced in that regard by either Minister.

[116] Ground 5 has not been made out.

Tourism

[117] By Ground 8, the Society asserted that the second respondent failed to consider "the impact the grant of the permits would have on the fair and equitable access to nature that the tourism operators, tourists, and local residents would lose as a result of the removal of the agile wallaby population from the Mission Beach area".

[118] In support of this argument, the Society sought to lead new evidence to the effect that tourists come to the Mission Beach area to see agile wallabies. That evidence was not before the decision-maker and, for the reasons which follow, ought be excluded.

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[113] Applicant's Outline of Argument (filed 4 November 2014), para 57.
[114] Applicant's Outline of Argument (filed 4 November 2014), para 54.
[115] Applicant's Outline of Argument (filed 4 November 2014), para 56.

[119] The apex of the Society's argument on this point was the assertion that "tourists come to Mission Beach to see agile wallabies".[116] Even if that statement were true, and supported by admissible evidence, it does not support an argument that the second respondent erred in the decision-making process. By s 25(1)(b) of the *Administration Regulation*, the second respondent was required to have regard to "the effect the grant of the authority will have on the fair and equitable access to nature, having regard to, in particular, the ecologically sustainable use of protected areas of wildlife". It is clear on the face of each of the statements of reasons that the second respondent had regard to s 25(1)(b). It is, in my view, equally clear that this argument is nothing more than an attempt to undertake a review of the merits of the second respondent's consideration under s 25(1)(b) by some general and unparticularised invocation of the curiosity of tourists.

[120] Ground 8 has not been made out.

Cattle grazing

[121] In respect of two particular permits (WIMP 13463513 and WIMP 14211914), the Society contended that the second respondent failed "to take into account that the property … had not been used for a considerable period for the grazing of cattle and was currently proposed to be used as a location for residential subdivision" (Ground 9).

[122] To make out this ground, the Society sought to lead new evidence which had not been before the second respondent. The evidence went particularly to the relevant local government planning scheme in an attempt to make good the propositions that:

(a) under the relevant planning schemes, grazing and other agricultural uses required a planning approval;[117]

(b) when the decision for WIMP 13463513 was made, the land was subject to a planning approval for residential purposes, which evidenced that grazing on that land had been abandoned;[118] and

(c) both sites have not been used for cattle grazing for at least ten years.[119]

[123] None of this evidence was before the decision-maker, and it should not be admitted on the present hearing.

[124] It is clear on the material, particularly the relevant statements of reasons, that the second respondent, as he was required to, considered the economic loss which the relevant landholders would suffer if the damage was not prevented or controlled. The present argument seeks to review the merits of the conclusions reached by the decision-maker for each decision, and seeks to do so by reference to evidence not before the decision-

[116] Applicant's Outline of Argument (filed 4 November 2014), para 65.
[117] Applicant's Outline of Argument (filed 4 November 2014), para 70.
[118] Applicant's Outline of Argument (filed 4 November 2014), para 71.
[119] Applicant's Outline of Argument (filed 4 November 2014), para 67.

maker. As is clear from the authorities to which I have referred above, it is not for this Court on an application such as this to engage in a merits review.

[125] Ground 9 has not been made out by the Society.

Conclusion on the extensions of time

[126] It is clear from the foregoing that I consider that there are no merits to the substantive application. For the reasons stated previously, that is a relevant consideration in respect of the applications to extend the time for filing the application for a statutory order of review.

[127] Whilst the respondents did not take issue with the explanations given for the delay in filing, it seems to me that the application for an extension of time in respect of WIMP 13463513 needs to be treated separately because, as explained above, by the time the matter came on for hearing that permit had already expired.

[128] As a consequence of the request for further submissions from the parties (see [37] above), counsel for the Society put on written submissions in which they expressly conceded that there was little utility in quashing and setting aside the decision to grant WIMP 13463513 in circumstances where that permit had already expired. As a consequence, the Society, in its counsel's submissions, sought for the first time "an alternative remedy, namely a declaration to the effect that the decision maker failed to take into account a relevant consideration, namely, the extent, if any, to which wallaby proof fencing had been utilised in order to reduce or minimise the damage being caused by the protected animals".[120]

[129] Counsel for the Society recited, in a summary way, the arguments which had been advanced concerning wallaby-proof fencing, and also referred to the number of similar permits previously granted in respect of this property. It was submitted that it is reasonable to anticipate that further applications will be made in the future and that "the applicant, the respondents and the landholder … would all benefit from the guidance of declaratory relief".[121]

[130] Counsel for the Society properly acknowledged the proposition that the Court's discretionary power to grant declaratory relief "must be directed to the determination of legal controversies and not to answer abstract hypothetical questions",[122] but submitted:[123]

> "21. The present case involves no mere hypothetical question. At all times, there has been controversy as to the power of the respondent to grant the permit in the absence of a proper consideration of use of wallaby

[120] Applicant's Submissions Concerning WIMP 134635 - Wahroonga Holdings' Permit (Supplementary Submissions), para 2.
[121] Applicant's Submissions Concerning WIMP 134635 - Wahroonga Holdings' Permit (Supplementary Submissions), para 9.
[122] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582.
[123] Applicant's Submissions Concerning WIMP 134635 - Wahroonga Holdings' Permit (Supplementary Submissions), para 21.

> proof fencing to prevent or minimise the damage caused by the wallabies. While the permit has now expired and an order to set aside the permit may have no obvious benefit, the granting of a declaration has practical consequences for both the respondent when assessing and deciding future applications for the same or similar properties and for the applicant in carrying out its purpose of protecting Australia's native macropods[124] and for the future landholder applicants for permits."

[131] None of these submissions can, in my view, be accepted.

[132] These proceedings seek relief under the *JRA*. Section 30(1)(c) of the *JRA* empowers the Court to make "an order declaring the rights of the parties in relation to any matter to which the decision relates".

[133] The matter to which the decision relevantly related was, for present purposes, the consideration under s 185(1)(b) of the *Wildlife Management Regulation* as to whether the landholder had "made a reasonable attempt to prevent or minimise the damage and the action taken has not prevented or minimised the damage".

[134] The inquiry which the Society would now have the Court undertake for the purposes of the newly-advertised request for a declaration is fundamentally different from the relief previously sought. The relief now sought would purport to have the effect of a binding determination by the Court as to the "extent [to which] the landholder had made efforts to utilise wallaby proof fencing to prevent or reduce damage".[125]

[135] Apart from the fact that this relief had never previously been sought, there are a number of reasons why I would not allow the matter to proceed further in this way:

(a) Pursuit of the new alternative relief would necessarily require the Court to inquire into, and make findings about, the actual extent of wallaby-proof fencing installed by the landholder. Whilst these matters were adverted to in the evidence, this question was not the subject of specific factual inquiry during the trial. There is clearly a body of evidence on this factual issue which was not led in the trial, e.g. evidence from the landholder itself.

(b) Further, and in any event, making this new declaration would involve findings against the landholder in circumstances where the landholder is not a party to this proceeding. Moreover, as noted above, it was submitted for the Society that one of the justifications for seeking this relief is that it would benefit "the applicant,

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[124] The purposes of ASK as set out in ASK's Association Rules are the care, conservation and protection of Australia's native macropods, including kangaroos wallabies, through continued advocacy, support for legitimate and unbiased research about Australia's macropods, raising community awareness about Australia's macropods, and commitment to the preservation of the environment and natural ecosystems. See Paragraphs 4 & 5 and Exhibit NS1 – Affidavit of Nicole Sutterby (affirmed on 17 September 2014).

[125] Applicant's Submissions Concerning WIMP 134635 - Wahroonga Holdings' Permit (Supplementary Submissions), para 2.

the respondents and the landholder".[126] If, as the Society submits, the declaration would have practical consequences for deciding future applications by the landholder, that party should at the very least have been given the opportunity to seek to be joined as a party to the proceeding.[127]

(c) In any event, what is sought under the proposed declaration is, at best, an advisory opinion which would be based on facts which have not been properly litigated. It could not "amount to a binding decision raising a *res judicata*" between the parties to this proceeding.[128]

[136] I would therefore not permit the Society to pursue this latest claim for declaratory relief.

[137] In light of counsel's proper concession that the proceeding in respect of WIMP 13463513 otherwise lacks utility, there is equally no utility in giving an extension of time for the filing of an application for a statutory order of review in respect of the decision to grant that particular permit.

[138] I should note that even if this extension of time had been granted, for the reasons set out above the substantive application concerning WIMP 13463513 would have been refused.

[139] In respect of the decisions to grant the other permits, however, and in view of the fact that the matter was necessarily fully argued before me, I would be inclined to grant the necessary extensions of time.

Costs

[140] In its amended application for a statutory order of review, the Society sought an order "that the applicant is to bear only its own costs of the proceeding".[129] In that regard, s 49(1)(e) of the *JRA* relevantly provides that the Court may make an order "that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding".

[141] By s 49(2) of the *JRA*, the Court is required, when considering such a costs application, to have regard to:

(a) the financial resources of the Society;

(b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the Society, and

(c) whether the proceeding discloses a reasonable basis for the review application.

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[126] Applicant's Submissions Concerning WIMP 134635 - Wahroonga Holdings' Permit (Supplementary Submissions), para 9.
[127] Section 28, *Judicial Review Act* 1991 (Qld).
[128] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [48].
[129] Amended Application for a Statutory Order of Review (filed 18 September 2014), Order being sought [8].

[142] In relation to the first of those considerations, it was not in issue that the Society has limited financial resources. The Society is a not for profit organisation, run by volunteers with limited financial resources, and had a bank balance of some $4,000 in August 2013. The Society is not, however, without support. Its legal adviser filed an affidavit in which reference was made to the Society spending more than $10,000 on a legal matter in the ACT in 2012 which "usurped" accrued donations, and the fact that an email had recently been sent to the Society's supporters in relation to the present application and the costs required to fund the present application.[130] It was deposed that "collectively from members and supporters an amount of almost $5,000 was raised, which together with the amount from [the Society's] main donor … brought their bank balance to $10,000".[131] It was said that this sum has since been paid out in legal fees, and the Society continues to accrue further legal fees.

[143] As to the third consideration, it is clear, from my assessment of the merits of the case above, that I consider that the proceeding did not disclose a reasonable basis for the application for a statutory order or review.

[144] As to whether this proceeding involved an issue that affects, or may affect, the public interest, it is to be noted that s 49(2)(b) seems to be directed to proceedings in which it is the public interest, rather than any private right of an applicant, that is sought to be vindicated by the application.[132] In *Sharples v Council of the Queensland Law Society Incorporated*, Mullins J said: [133]

> "There is always a public interest in seeing that statutory obligations of a statutory body are fulfilled and that the personal rights of any party affected by the performance of that statutory obligation are observed. By the very nature of what is a decision to which the Act applies, every review application will involve an element of public interest. It is apparent from the observations made in the judgments in the Court of Appeal to which I have referred relating to section 49 of the [*JRA*] that there will usually be some broader public interest involved in the particular application to justify a special costs order than the usual public interest which must be present in every application from the mere fact that the Act applies to the decision under review."

[145] In arguing that this application did involve the necessary public interest, the Society pointed to the statutory objects of the *NCA*, which include the protection of native wildlife and its habitat, and argued:[134]

> "The application seeks to review what are said to be invalid permits to kill protected native wildlife. It is clearly in the public interest, as envisaged by the object of the [*Nature Conservation Act*] that protected Australian wildlife are not culled without strict application of the statutory safeguards and restrictions."

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[130] Affidavit of Tracey Jackson (affirmed 22 October 2014).
[131] Affidavit of Tracey Jackson (affirmed 22 October 2014), para 13.
[132] *Anghel v Minister for Transport (No 2)* [1995] 2 Qd R 454, per McPherson JA at 460.
[133] *Sharples v Council of the Queensland Law Society Incorporated* [2000] QSC 392 at 30
[134] Applicant's Outline of Argument (filed 4 November 2014), para 28

[146] That submission, it seems to me, amounts to nothing more than a submission that the application was brought in the general public interest of seeing that the statutory obligations were fulfilled and the statutory objectives of the *NCA* were observed. This was not, for example, presented as a test case or one which sought a ruling on some point of general practice or public importance. Nor, for that matter, did it concern the preservation of endangered fauna, given the status of the agile wallaby as a "least concern animal" under the *Wildlife Management Regulation*.

[147] In short, whilst this application, as does every application under the *JRA*, involved elements of public interest, it did not, in my opinion, have the broader public interest element which would excite consideration under s 49(2) of the *JRA*.

[148] Accordingly, I am not persuaded that this is a case in which a special costs order under s 49 of the *JRA* is warranted. The Society pursued its lawful entitlement to mount this application. It persisted with part of that application, even in the face of a concession by its own counsel that there was no utility in respect of that part of the application. It has not been successful on the application. There is no reason why costs should not then follow the event.

Conclusion

[149] There will be the following orders:

1. (a) The application for an extension of time within which to file an application for a statutory order of review in respect of the decision to grant wildlife management permit WIMP 13463513 is refused;

   (b) Otherwise, the applicant has all necessary extensions of time pursuant to s 26(1) of the *Judicial Review Act* 1991 to file an application for a statutory order of review in respect of the decisions to grant damage mitigation permits WIMP 14211914, WIMP 13964814, WIMP 14194414 and WIMP 14160814.

2. The application for statutory orders of review is dismissed.

3. The applicant shall pay the respondents' standard costs of and incidental to the proceeding.