Federal Magistrates Court of Austral

Anzbrook Pty Ltd v Minister For The Environment, Heritage And The Arts [2010] FMCA 34 (22 January 2010)

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Last Updated: 27 January 2010

FEDERAL MAGISTRATES COURT OF AUSTRALIA

ANZBROOK PTY LTD v MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS [2010] FMCA 34

ADMINISTRATIVE LAW – Application for permit under *Environment Protection and Biodiversity Conservation Act* – whether Minister took into account relevant considerations – whether procedural fairness afforded to the applicant – decision quashed and remitted for re-consideration.

Environment Protection and Biodiversity Conservation Act 1999 (Cth), ss.303BA, 303BC, 303CA, 303CC, 303CE, 303CG, 303FE
Administrative Decisions (Judicial Review) Act 1977 (Cth), s.5

Craig v The State of South Australia (1995) 184 CLR 163
Buck v Bavone [1976] HCA 24; (1976) 135 CLR 110
Pilkington (Australia) Ltd v Minister for Justice and Customs [2002] FCAFC 423; (2002) 127 FCR 92
Commissioner of State Revenue v Purdale Holdings Pty Ltd [2003] VSC 289
Kioa v West [1985] HCA 81; (1985) 159 CLR 550

Applicant:	ANZBROOK PTY LTD T/A CAIRNS MARINE AQUARIUM FISH
Respondent:	MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS
File Number:	BRG 258 of 2009
Judgment of:	Wilson FM
Hearing date:	29 October 2009
Date of Last Submission:	29 October 2009
Delivered at:	Brisbane
Delivered on:	22 January 2010

REPRESENTATION

Counsel for the Applicant:	Mr Jonsson
Solicitors for the Applicant:	Farrellys Lawyers
Counsel for the Respondent:	Ms Bowskill

Solicitors for the Respondent: Australian Government Solicitor

ORDERS

(1) The decision of the respondent made on 27 January 2009 by which he refused to grant to the applicant a permit under s.303CG *Environment Protection and Biodiversity Conservation Act 1999* be quashed;
(2) The applicant's application for the said permit be remitted to the respondent to be dealt with according to law;
(3) The respondent pay the applicant's costs of and incidental to the application to be taxed on the Federal Magistrates Court scale, unless otherwise agreed.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
CAIRNS
BRG 258 of 2009

ANZBROOK PTY LTD T/A CAIRNS MARINE AQUARIUM FISH
Applicant

And

MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS
Respondent

REASONS FOR JUDGMENT

1. On 27 January 2009, the respondent refused to grant the applicant (a wholesaler of marine animals) a permit to allow the export of eight live Freshwater Sawfish to the Dubai Aquarium and Discovery Centre. Such a permit was required to prevent the applicant committing an offence under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the Act"): s.303CC(2). The applicant seeks judicial review of that decision, pursuant to s.5 *Administrative Decisions (Judicial Review) Act 1977* (Cth).
2. The Minister's decision was made under s.303CG of the Act. In

order to understand the competing arguments of the parties, the statutory scheme that regulates the granting of permits such as that applied for needs to be understood.

3. Part 13A of Chapter 5 of the Act regulates the international movement of certain wildlife species to and from Australia. Australia is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora done at Washington on 3 March 1973 ("CITES") and the Convention on Biological Diversity done at Rio de Janeiro on 5 June 1992 (expressly defined in s. 528 of the Act).

4. By s.303CA of the Act, the respondent is obliged to establish a list of CITES species in three appendices, that include all species subject to the Conventions. Each species is allocated to an appendix. It is common ground that the Freshwater Sawfish (*Pristis microdon*) is within Appendix II to CITES.

5. Article II, subclause 2 of CITES, provides that:

> *"Appendix II shall include:*
>
> *(a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation to avoid utilization incompatible with their survival; and*
>
> *(b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control."*

6. By s.303CA(5)(c) of the Act the description of the species in an Appendix may state that the inclusion of a specimen in a particular Appendix to CITES is subject to restrictions or conditions.

7. The relevant entry in Appendix II of CITES for the subject species is:

> *"Pristis microdon (For the exclusive purpose of allowing international trade in live animals to appropriate and acceptable aquaria for primarily conservation purposes)"*

8. It was accepted in argument that this was a restriction or condition as that term is used in s.303CG(3)(d) of the Act, in reliance on which the decision was made.

9. By s.303BA(1)(a) of the Act it is stated that one of the objects of Part 13A of the Act is to ensure that Australia complies with its

obligations under CITES and the Biodiversity Convention.

10. Article IV of CITES deals with the regulation of trade in species included in Appendix II. It states:

> *"1. All trade in specimen of species including Appendix II shall be in accordance with the provisions of this Article.*
> *2. The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:*
>
> *(a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;*
> *(b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; and*
> *(c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment."*

11. "Trade" is defined in s.303BC of the Act to have the ordinary meaning of that expression. "Trade" is defined in CITES, at Article I(c) to mean "export, re-export, import and introduction from the sea".

12. Article XI of CITES provides:

> *"1. The Secretariat shall call a meeting of the Conference of the Parties not later than tow years after the entry into force of the present Convention.*
> *2. Thereafter the Secretariat shall convene regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time on the written request of at least one-third of the Parties.*
> *3. At meetings, whether regular or extraordinary, the Parties shall review the implementation of the present Convention and may:*
>
> *(a) make such provision as may be necessary to enable the Secretariat to carry out its duties, and adopt financial provisions;*

(b) consider and adopt amendments to Appendices I and II in accordance with Article XV;

(c) review the progress made towards the restoration and conservation of the species included in Appendices I, II and III;

(d) receive and consider any reports presented by the Secretariat or by any Party; and

(e) where appropriate, make recommendations for improving the effectiveness of the present Convention.

4. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 2 of this Article.

5. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

6. The United Nations, its Specialized Agencies and the International Atomic Energy Agency, as well as any State not a Party to the present Convention, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

7. Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object:

(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located. Once admitted, these observers shall have the right to participate but not to vote."

13. In compliance with its international obligations, a list was established in accordance with s.303CA(1), and the Freshwater Sawfish was added to it on 12 September 2007. The list contains the same notation as set out at paragraph [7] above. It is consistent with CITES: s.303CA(8) of the Act.
14. The applicant applied for a permit under s.303CE of the Act on 16

October 2008. Further information was requested by the respondent, and provided by the applicant. In particular, by letter dated 19 November 2008 the applicant submitted further material in support of its contention that the international trade was for primarily conservation purposes.

15. On 27 January 2009, the first respondent made the decision complained of. The relevant part of the letter containing the decision states:

> *"I consider that it is questionable whether the aquarium in Dubai can be considered "appropriate and acceptable" as required by the CITES annotation. I consider that the aquarium is too closely associated with a shopping mall and the enterprise is primarily commercial and designed to attract customers to the mall. Although I appreciate that the aquarium is open to the general public and is likely to attract many visitors, I do not believe that display in this aquarium can be considered to be for "primarily conservation purposes".*

16. A Statement of Reasons was requested and provided. It is to be found at exhibit LVS5 to the affidavit of Lyle Victor Squire filed 2 October 2009, at pages 90 and 91 of the exhibit bundle. I will return to the content of the Statement of Reasons in due course.

17. The decision of the respondent to decline the application for a permit was made under s.303CG of the Act. The focus of argument was on s.303CG(3)(d) of the Act, as it is evident from the Statement of Reasons that subsection was the basis of the respondent's decision. It provides:

> *"The Minister must not issue a permit unless the Minister is satisfied that:*
>
> > *(d) if any restriction or condition is applicable to the specimen under a notation in the list refereed to in section 303CA – that restriction has been, or is likely to be, complied with"*

18. The respondent correctly submits that the respondent is given a discretion whether or not to issue a permit. The respondent draws attention to the fact that the decision-maker has to have a state of satisfaction before he can exercise the discretion otherwise vested in him to issue a permit, and submits that merits review of the state of satisfaction is not permissible. I do not need to deal further with that

submission because the applicant argued that there had been 'jurisdictional error' in this case, and did not seek to argue the matter on the facts.

19. A general description of what constitutes jurisdictional error is to be found in the decision of Brennan, Toohey and McHugh JJ in *Craig v The State of South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 179:

> *"If ... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."*

20. In *Buck v Bavone* [1976] HCA 24; (1976) 135 CLR 110 at 118-9 Gibbs J said:

> *"Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached."*

21. It may therefore be accepted that the respondent's state of satisfaction can be reviewed by the Court if one of the circumstances identified by Gibbs J is made out.

22. The relevant restriction or condition is that set out at paragraph [7] above. Therefore, before he had the discretion to issue a permit the respondent had to have the requisite state of satisfaction that the restriction or condition was likely to be complied with.
23. As counsel for the applicant submitted the relevant restriction or condition contained three relevant components. There had to be:

International trade

To an appropriate and acceptable aquarium

For primarily conservation purposes.

24. Although the grounds of review set out in the Application are more elaborately drafted, in essence the applicant argues that the respondent erred in law in two ways in reaching his state of satisfaction:

First, the respondent directed his mind to whether the "display" of the species was to be primarily for conservation purposes, whereas he should have considered whether the "trade" was primarily for conservation purposes;

Secondly, the respondent applied the wrong test in reaching his degree of satisfaction as to whether the recipient aquarium was appropriate and acceptable.

25. The applicant also relies on a breach of the rules of natural justice, which I will deal with after determining the question of whether the respondent misdirected himself by making the wrong inquiry, or by not making an inquiry that he was required to make before reaching a state of satisfaction.
26. In my view, there is a third question that arises, adverted to by the applicant at paragraph 29, and at footnote 26 of its submissions. It is whether the respondent in fact properly considered a relevant consideration, or whether he impermissibly conflated two of the inquiries that he was required to make.
27. In my view, the distinction drawn by the applicant between 'trade' and 'display' is a literally correct one, but in this case it is a distinction without a difference, because the 'display' was the purpose of the 'trade'. The language of the respondent both in his letter of 27 January and in the Statement of Reasons is loose, and arguably gave rise to the concern held by the applicant that the he had not properly considered one of the essential components of the restriction or condition applicable to the species in question.

28. The respondent was undoubtedly required to consider whether the 'trade' in the species otherwise satisfied the requirements of the condition. In this case, the application was for an export permit to permit non-commercial exhibition. In the application made by the applicant for the permit was included a document "Supplementary Form C: Non-Commercial – Exhibition" that made this clear.
29. The notion of trade encompasses more than one party. It would be fallacious to look at the purpose of trade only from the exporter's perspective. When one looks at the trade in this case, it was from the applicant (relevantly, an exporter of wildlife species) to the operator of the Dubai Aquarium and Discovery Centre for display. Part of the trade was its intended purpose. Different considerations would arise if the importer used the species for a purpose different to that intended by the exporter, but that is not this case. Here, the respondent has acted on the assumption that the species would be displayed as the applicant submitted.
30. In my view, the respondent did not err in the first respect alleged by the applicant.
31. Although the respondent in its submissions correctly points out at paragraphs 22, 23 and 24 of its written outline that the Minister also has to be satisfied about the 'exhibition' in accordance with s.303CG(3)(e), in conjunction with s.303FE of the Act, the respondent has not dealt with that in his decision because of his non-satisfaction of the matter contemplated by s.303CG(3)(d) of the Act. In those circumstances, it would be preferable for the Court not to state any conclusions about those matters unless and until they arise.
32. The success of the applicant's second argument depends essentially on what use, if any, the respondent should have made of the definition of the term 'appropriate and acceptable destinations' agreed at the eleventh meeting of the Conference of the Parties held in April 2000. The text of the document is set out in full at paragraph 39 of the applicant's submissions. Relevantly, it provided:

> *"NOTING that the term 'appropriate and acceptable destinations' is yet to be fully defined;*
> *NOTING FURTHER that the Parties have not indicated whether the determination that destinations are 'appropriate and acceptable' was to be made by the exporting or the importing country;*

RECOGNIZING that there are annotations currently existing that refer to live animals, and that similar annotations may be adopted in future;
NOTING FURTHER that appropriate and acceptable destinations for live animals should be those that ensure that the animals are humanely treated;
THE CONFERENCE OF THE PARTIES TO THE CONVENTION
AGREES that, where the term 'appropriate and acceptable destinations' appears in an annotation to the listing of a species in Appendix II of the Convention with reference to the export of or international trade in live animals, this term shall be defined to mean destination where the Scientific Authority of the State of Import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it."

33. Article XI of CITES expressly contemplated conferences of the parties.
34. The respondent correctly submits that the phrase 'appropriate and acceptable aquaria' is not defined in CITES, nor in the conference resolution. The applicant submits that, having regard to the latitude that can be given to the interpretation of international instruments, the phrase used in relation to Freshwater Swordfish of "appropriate and acceptable aquaria" should be accorded the same meaning as "appropriate and acceptable destinations". The case relied on by the applicant, *Pilkington (Australia) Ltd v Minister for Justice and Customs* [2002] FCAFC 423; (2002) 127 FCR 92 at [25] – [26] is not on point because neither of the phrases are defined in the Act.
35. Section 303CN(1) of the Act provides:
    (1) In making a decision under this Part in relation to a CITES specimen, the Minister may have regard to a relevant resolution of the Conference of the parties under Article XI of CITES.
36. The respondent submits that the effect of this section is plainly that the Minister may, but is not obliged to, have regard to the terms of the resolution. So much may be accepted: *Commissioner of State Revenue v Purdale Holdings Pty Ltd* [2003] VSC 289 at [18].
37. Rather, the question is whether, in considering the matter in respect of which he was required to be satisfied under s.303CG(3)(d) the

Minister ought to have had regard to the resolution. It is not apparent if the respondent did have regard to the terms of the resolution. The fact that it is not referred to in the Statement of Reasons suggests that he did not.

38. As will shortly be discussed, the respondent was required to turn his mind to two distinct questions (cf. respondent's submissions paragraph 49):

Was the Dubai Aquarium and Discovery Centre an appropriate and acceptable aquarium; and

Is the trade (incorporating the intended display) for primarily conservation purposes.

39. In asking himself the first question, by what standard did the respondent judge the appropriateness or acceptability of the aquarium in which the swordfish were to be displayed? In my view, the applicant's argument should be accepted; that is, the respondent should have sought the opinion of the Scientific Authority of the State of import as to whether the aquarium was suitably equipped to house and care for the swordfish.

40. The Conventions, read sensibly, make the applicant's argument is an attractive one. After all, the 'aquaria' is the 'destination' where sea life is concerned.

41. I do not consider that anything turns on the fact that the conference resolution was made at a time that the southern white rhinoceros was being discussed, because the terms of the conference resolution clearly contemplates the inclusion of other species in the future, and was not species specific.

42. Perhaps of more relevance on the question of construction is the Notification to the Parties dated 26 July 2007, in which the Freshwater Swordfish was included in Appendix II to CITES. In that same notification by subparagraph (h) amendments were made to the annotation for *Loxodonta Africana* including subparagraph (b):

> *"trade in live animals to appropriate and acceptable destinations, as defined in Resolution Conf. 11.20, . . ."*

43. The respondent points to the distinction between the inclusion of Freshwater Swordfish, where no reference was made to Resolution Conf. 11.20, and the later amendment in the same document that did. It follows, so it was submitted, that it was not intended that the meaning of 'appropriate and acceptable destination' be the same as

'appropriate and acceptable aquaria'. That submission presumes a standard of drafting that whilst desirable, may be unattainable.

44. The other reason advanced by the respondent as to why the opinion of the importing State as to the adequacy or appropriateness of the aquarium is not relevant does not withstand scrutiny. There is no necessary inconsistency between Article IV paragraph 2 of CITES and the conference resolution. Both can be fulfilled. They are directed to quite different enquiries. Indeed Article IV paragraph 2 of CITES does not oblige the State of export to make any enquiries about the appropriateness of the receiving facility. Yet the respondent has to be satisfied that it is an appropriate and suitable aquarium.

45. In fact it makes sense for the appropriate Scientific Authority of the State of import to make a determination whether the receiving facility is suitably equipped to house and care for the specimens. It will have first hand access to the facility. Any decision made by the State of export about the adequacy of the facility must necessarily depend either on acceptance of the evidence submitted by an applicant, or from enquiries made in the State of import.

46. Further, it makes little sense, in the overall scheme of the Convention and what is sought to be achieved, for a distinction to be drawn between species that go the 'destinations', and those that go to 'aquaria', particularly where both receiving facilities have to be 'appropriate and acceptable'.

47. It also makes sense that the relevant decision maker in the State of export would want to know that the Scientific Authority of the State of import, another party to the Convention, is satisfied that the destination for the threatened species is 'appropriate and acceptable'.

48. I conclude that the difference in language used in the Notification to the Parties dated 26 July 2007 does not detract from the submission made by the applicant that the component in the condition 'appropriate and acceptable aquaria' is to be assessed by the proposed State of import.

49. I have highlighted the two questions that had to be decided by the respondent before he could have arrived at the state of satisfaction called for by s.303CG(3)(d) of the Act.

50. The Statement of Reasons requires a conclusion that the respondent did not perform his task according to law.

51. I turn to the third matter identified above. The last paragraph of the letter in which the decision was communicated to the applicant strongly suggests that the respondent has conflated the two matters about which he was required to be satisfied. He seems to have concluded that the Dubai Aquarium and Discovery Centre was not an appropriate and acceptable aquarium **because** the display in that aquarium was not likely to be for primarily conservation purposes. Rather, the respondent should have separately answered the two questions set out at paragraph [38] of these reasons.
52. That the respondent has so erred is made explicit at paragraph 8 of the Statement of Reasons. There was no consideration of whether the receiving aquarium was an appropriate and acceptable facility to house the swordfish. The purpose of the display was not relevant to this enquiry. Rather, the respondent was required to separately consider the facility itself, and its suitability as a separate enquiry. He did not do so.
53. The respondent was not satisfied that the display of the specimens (being the purpose of the trade proposed by the applicant) was likely to be for primarily conservation processes. To successfully satisfy the Minister that the condition or restriction applicable to the species concerned was likely to be complied with (that being the relevant enquiry for s.303CG(3)(d) of the Act), the applicant needed to show that both questions ought to have been answered in its favour. If the second question was answered in the negative, and no error can be demonstrated in the Minister's reasons for so concluding, then the question arises as to whether the decision should be set aside, even though it has been demonstrated that there was error in the consideration of the first question.
54. Much of the jurisprudence of administrative law is concerned with the process by which a decision is made. As earlier stated, merits review is not permitted in this sort of case. I am satisfied that the decision making process undertaken by the respondent was flawed, in that he failed to consider a relevant matter. In those circumstances, although the applicant's victory may be a Pyrrhic one, the application for an export permit ought to be considered by the respondent according to law. The decision of 27 January 2009 must be quashed.
55. In so deciding I am also conscious that the respondent does not

appear to have given any consideration to the matters set out in Article IV, subclause 2 of CITES, nor was it strictly necessary for him at the time the decision was made to go on to consider s.303CG(3)(e) of the Act.

56. It is strictly unnecessary to consider the other argument relied upon by the applicant, namely that it was not afforded natural justice, but I should do so in the case the matter is the subject of an appeal. I will state my conclusions briefly.

57. The argument depends on the contents of a briefing note provided to the respondent prior to the making of the relevant decision, the contents of which were not communicated to the applicant for its consideration.

58. Paragraph 4 of the Statement of Reasons makes it clear that the respondent relied on the briefing note in making his decision. The briefing note is at pages 111 – 114 of exhibit LSV9 to the affidavit of Mr Squire, previously referenced.

59. The Assistant Secretary of the Department recommended approval of the permit but drew a number of matters to the respondent's attention. Including those was the statement that:

> *"The species has not been successfully bred in captivity, so the only conservation benefit is an intangible one."*

60. In the Statement of Reasons, at paragraph 9, it is apparent that the Minister relied on this information in making his decision.

61. In *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 at 587 Mason J explained that if a decision maker intends to reject an application on the basis of information obtained from another source which has not been dealt with by an applicant in his application, that may constitute procedural unfairness.

62. However, as the respondent submits, it was within the applicant's province to put such material and evidence before the Minister as it thought appropriate to persuade him of the conservation benefits of the proposed trade. The applicant submitted considerable documentation to the respondent on that topic.

63. It is not apparent, from the evidence put before this Court that the respondent has relied on any evidence obtained from a source other than the applicant. If the information came from a source other than the applicant, then it should have been to the applicant for comment. However, the applicant has not demonstrated that this information

came from any source other than the applicant itself.

64. The respondent was not required to advise the applicant in advance of his reasoning process or of his construction of the legislation and CITES requirements.
65. The briefing note would only have to be given to the applicant (or, more properly the evidence proposed to be relied on) if it contained material that came from another source, and upon which the respondent proposed to rely in rejecting the application.
66. It has not been demonstrated that there was a lack of procedural fairness in this case.
67. There will be orders as set out at the commencement of these reasons.

I certify that the preceding 67 Error! Style not defined.!Syntax Error, !Error! Style not defined.Error! Style not defined.!Syntax Error, !**sixty-sevensixty-seven (67) paragraphs are a true copy of the reasons for judgment of Wilson FM**

Associate: Lynnette Chin

Date: 22 January 2010