FEDERAL COURT OF AUSTRALIA

Huon Aquaculture Group Limited v Minister for the Environment [2018] FCA 1011

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| File number: |  |
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| Judge: | **KERR** **J** |
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| Date of judgment: | 6 July 2018 |
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| Catchwords: | **ENVIRONMENT LAW –** application for declaration that a decision of the Minister for the Environment that an action referred to him pursuant to s 69 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) was invalid – Minister determined that the proposed action was not a controlled action if carried out in accordance with specified manner provisions – declaration sought by a company that had proposed to take the relevant “action” – whether relief should be refused assuming invalidity – applicants resiling from seeking to prove that “action” had or would have a significant impact on matters of national environmental significance – principles applying to discretion to grant relief – delay – alternative relief – acquiescence – effect on other parties having ordered their affairs in reliance on the decision – application dismissed |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 12, 15B, 18, 43A, 43B, 68, 73, 74AA, 75, 76, 77, 77A, 78A, 78B, 475*Judiciary Act 1903* (Cth), s 39B*Marine Farming Planning Act 1995* (Tas), s 23  |
|  |  |
| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27*Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8; (2008) 165 FCR 211*Hunter Valley Developments Pty Ltd v Cohen* [1984] FCA 186; (1984) 3 FCR 344*Huon Aquaculture Group Limited v Secretary, Department of Primary Industries, Parks, Water and Environment* [2017] FCA 1615*Huon Aquaculture Group Limited v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* [2018] FCA 89*Jadwan Pty Ltd v Secretary, Department of Health & Aged Care* [2003] FCAFC 288; (2003) 145 FCR 1*K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309*Lansen v Minister for Environment and Heritage* [2008] FCAFC 189; (2008) 174 FCR 14*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13*Tooth & Co Ltd v Parramatta City Council* [1955] HCA 21; (1955) 97 CLR 492*Triabunna Investments Pty Ltd v Minister for the Environment and Energy* [2018] FCA 486  |
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| **Table of Corrections** |  |
|  |  |
| 9 July 2018 | At [72], the word “not” has been deleted between “would” and “be”. |
|  |  |
| 9 July 2018 | At [120], the word “and” has been deleted between “both” and “Mr”. |
|  |  |
| 9 July 2018 | At [169], “curios” has been replaced with “curious”.  |
|  |  |
| 9 July 2018 | At [274], “their respective clients” has been changed to “the Fourth and Fifth Respondents”. |

ORDERS

|  |  |
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|  | TAD 4 of 2017 |
|   |
| BETWEEN: | HUON AQUACULTURE GROUP LIMITEDFirst ApplicantHUON AQUACULTURE COMPANY PTY LTDSecond ApplicantSOUTHERN OCEAN TROUT PTY LTDThird Applicant |
| AND: | MINISTER FOR THE ENVIRONMENT (COMMONWEALTH)Third RespondentPETUNA AQUACULTURE PTY LTDFourth RespondentTASSAL OPERATIONS PTY LTD (ACN 106 324 127)Fifth Respondent |

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| JUDGE: | KERR J |
| DATE OF ORDER: | 6 JULY 2018 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The Applicants pay the Fourth and Fifth Respondents’ costs as agreed or assessed.
3. The Applicants pay the Third Respondent’s costs up to and including 27 April 2017 as agreed or assessed.
4. The Third Respondent have leave to file and serve an application to vary Order 3, together with submissions limited to 5 pages, no later than 4.00 pm on Friday 3 August 2018.
5. The Applicants have leave to file and serve responsive submissions, limited to 5 pages, no later than 4.00 pm on Friday 31 August 2018.
6. The Third Respondent have leave to file and serve reply submissions, limited to 2 pages, no later than 4.00 pm on Friday 14 September 2018.
7. The Court will determine any application made pursuant to Order 4 on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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KERR J:

##### Introduction

1. The Applicants seek a declaration that a decision made by the Commonwealth Minister for the Environment (the **Minister**) on 3 October 2012 pursuant to s 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**) that a proposed action was not a controlled action if undertaken in a particular manner, is invalid. The proposed action was, greatly compressed by way of summary, the expansion of finfish farming in Macquarie Harbour.
2. The proposed action had been referred to the Minister by Mr Kim Evans, Secretary of the Department of Primary Industries, Parks, Water and Environment (**DPIPWE**). He did so under cover of a lengthy submission dated 29 May 2012 (Ex A1 pp 2-111).
3. In that referral, Mr Evans had informed the Minister as follows:

Three separate companies have been working jointly on the proposed expansion of salmonid farming activities in Macquarie Harbour … all three of which have existing salmonid framing operations … [i]t is expected that these companies will take up the expanded lease area.

(Ex A1 p 11)

In response to a question in the referral template asking for the identity of the person proposing to take the action, Mr Evans had advised the Minister:

Given that the three individual companies are jointly involved in the proposed expansion and that DPIPWE will be actively managing both implementation of the amended MFDP [Marine Farming Development Plan], along with the adaptive management framework associated with the proposal … it was considered that one EPBC referral would be the most efficient and effective way of progressing the proposal. For this reason DPIPWE is the proponent for the action rather than each of the individual companies. It is the intent that the management approaches and mitigation measures will be applied by companies through leases and licences that the companies will hold.

(Ex A1 p 107)

1. An unusual feature of these proceedings is that the challenge to the validity of the Minister’s decision has been brought by one of the three fish farmers named by Mr Evans in the referral as having worked jointly on the proposed expansion, Huon Aquaculture Group Limited (**Huon**). Although nominally three companies are seeking relief, the two other Applicants are subsidiaries of the First Applicant Huon.
2. Huon brings these proceedings notwithstanding it later having expanded its own finfish farming operations in Macquarie Harbour in reliance on what it now asserts had been the Minister’s merely purported decision. The Minister is the Third Respondent. The other two fish farmers are the Fourth Respondent, Petuna Aquaculture Pty Ltd (**Petuna**) and the Fifth Respondent, Tassal Operations Pty Ltd (**Tassal**).
3. The Third, Fourth and Fifth Respondents each deny that the Minister’s decision was invalid.
4. The Minister does not submit that Huon has no arguable grounds for its application. The Minister however submits (and is joined in his submission by the Fourth and Fifth Respondents) that the Court should reject Huon’s entitlement to relief on established principles applying to discretionary remedies without traversing (but assuming for that purpose) the merits of Huon’s application.
5. The Respondents therefore further plead in their respective defences (although variously differently expressed) that, having regard to Huon’s delay in bringing these proceedings, its prior inconsistent conduct, and that the two other fish farmers, Petuna and Tassal (which had also relied on the validity of the Minister’s decision) would suffer financial and legal detriment if the Court were to make the declaration Huon seeks, Huon is not entitled to declaratory relief.
6. Huon submits that the Court should reject that proposition. It has adduced evidence that the motivation for Huon bringing these proceedings is that its directors believe on reasonable grounds that the expansion of salmonid aquaculture in Macquarie Harbour pursuant to the Minister’s purported decision has resulted in environmental damage in Macquarie Harbour, including but not limited to a significant reduction in dissolved oxygen levels. It submits that the Court is entitled to accept that evidence and conclude that Huon has reasonable grounds for that belief.
7. Huon submits that a declaration that the Minister’s decision was invalid would not have the draconian consequences the Respondents hypothesise of causing it and the two other fish farmers, Petuna and Tassal, to cease operating in Macquarie Harbour. Rather, it would restore the position of the three fish farmers to that which pre-existed the expansion purportedly authorised by the Minister’s decision, with much lesser consequences.
8. Having regard to the terms of the EPBC Act there is, Huon submits, no sound discretionary basis for denying the issue of a declaration. Huon contends that the Court should address the case it advances on the merits. On that basis, Huon submits it can make good its challenge pleaded at [38] of its Third Further Amended Statement of Claim. Huon contends that the Minister’s decision was invalid for reasons of uncertainty and lack of finality, as well as it not being directed to the particular persons undertaking the action, and being dependent on decisions to be made from time by time by a third party, being the Secretary of DPIPWE, the former First Respondent (see at [12]-[15] below).

###### The history of these proceedings

1. Before the Court addresses the evidence and the parties’ respective contentions, it is appropriate first to observe that this litigation has had a complex procedural background.
2. Huon initially named the Secretary of DPIPWE as the First Respondent and the Director of the Environment Protection Authority (the **EPA**) as the Second Respondent in its originating application. Huon did so on the premise that DPIPWE, rather than the individual fish farmers (itself, Petuna and Tassal) was the person taking the action that had been referred to the Minister for his decision.
3. Huon’s pleadings in that regard were later abandoned before the scheduled trial of certain separate questions which the Court had agreed to decide. One of those questions had involved the correct identity of the person taking the action.
4. Once Huon had amended its pleadings, the First and Second Respondents applied to cease to be parties. The Court gave its reasons for granting their applications in *Huon Aquaculture Group Limited v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* [2018] FCA 89.
5. In the context of the procedural background to these proceedings it is also appropriate to note that following the Court’s earlier interlocutory decision in *Huon Aquaculture Group Limited v Secretary, Department of Primary Industries, Parks, Water and Environment* [2017] FCA 1615 (***Huon No 1***), Huon further amended its pleadings by deleting its earlier contentions that the action as determined by the Minister to not be a controlled action if undertaken in a particular manner has, will have, or is likely to have a significant impact on a declared World Heritage Area and/or a listed threatened species.
6. In the aftermath of those amendments to Huon’s pleadings, there being no objection from any party, the Court determined not to proceed with a trial of the remaining separate questions. Instead, a full hearing was scheduled and a trial was conducted on all issues. The parties did not further amend their pleadings, and the Court did not consider it necessary to order revised pleadings following the First and Second Respondents ceasing to be parties. Huon’s Third Further Amended Statement of Claim and the Respondents’ several defences thereto, in so far as they refer to the First and Second Respondents, are to be comprehended as references to the Secretary of DPIPWE and the Director of the EPA respectively.
7. I now set out the background to the Minister’s decision.

##### Background

###### Description of Macquarie Harbour

1. Macquarie Harbour is on the west coast of Tasmania. Both the Harbour and those parts of it subject to existing Tasmanian regulatory control for aquaculture were described in the referral dated 29 May 2012 made by DPIPWE under its Secretary’s signature in the following terms:

… The harbour lies approximately 175 km to the north west and south west of the major Tasmanian cities of Hobart and Launceston respectively. The nearest township to the marine component is Strahan, approximately 11 km to the north of the closest proposed development on the water.

The area covered by the Macquarie Harbour [Marine Farming Development Plan] is the physical extent of the harbour outside the Tasmanian Wilderness World Heritage Area (TWWHA) and includes part of the South West Conservation Area. It consists of all that area bounded by the high water mark between lines drawn from Coal Head and Steadmans Point across the harbour to the south east and the entrance to the harbour to the north west at a line drawn between Braddon Point through Bonnet Island Light to the western shore …

The harbour itself is a large estuary where saline ocean waters mix with freshwaters predominantly from the Gordon and King Rivers and Birchs Inlet. The harbour has a shallow restricted entrance which opens into a long deep basin with depths ranging from 0 – 50 m in the centre of the harbour; an old Gordon River channel follows the southern shoreline before reaching shallow sand banks to the north west of Table Head; and shallow water at the entrance to the Gordon River and a formed delta at the mouth of the Kind River.

The natural harbour is approximately 33 km long and 9 km wide with a total surface area of 276 square km. The water column in the harbour is typically three-layered: fresh, marine, and intermediate, trending to a salt wedge structure near the two rivers. (Ex A1 p 8)

1. No party submits that that was not an accurate description of the harbour.

###### Marine farming in Macquarie Harbour was an established use prior to the passage of the EPBC Act in 1999

1. The referral also advised (Ex A1 p 25):

… [F]ish farming in Macquarie Harbour commenced prior to the EPBC in the mid 1980s, and incremental changes since then were determined unlikely to have a significant impact on MNES [matters of national environmental significance].

1. It is not contentious that each of Huon, Petuna and Tassal had individual pre-existing marine leases in Macquarie Harbour and were growing and harvesting fish before the passage of the EPBC Act. Their individual entitlements to continue fish farming in Macquarie Harbour after the passage of the EPBC Act had been “grandfathered” by s 43B of the EPBC Act:

**Actions which are lawful continuations of use of land etc.**

1. A person may take an action described in a provision of Part 3 without an approval under Part 9 for the purposes of the provision if the action is a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act.
2. However, subsection (1) does not apply to an action if:

(a) before the commencement of this Act, the action was authorised by a specific environmental authorisation; and

(b) at the time the action is taken, the specific environmental authorisation continues to be in force.

Note: In that case, section 43A applies instead.

1. For the purposes of this section, neither of the following is a continuation of a use of land, sea or seabed:

(a) an enlargement, expansion or intensification of use;

(b) either:

(i) any change in the location of where the use of the land, sea or seabed is occurring; or

(ii) any change in the nature of the activities comprising the use;

that results in a substantial increase in the impact of the use on the land, sea or seabed.

1. The actions of Huon, Petuna and Tassal respectively in connection with growing and harvesting salmon in Macquarie Harbour were a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of the EPBC Act. That use was lawful. It was authorised by and was subject to regulation under Tasmanian law. It is thus uncontentious in these proceedings that each of the then operators (Huon, Petuna and Tassal) had been entitled to continue marine farming in Macquarie Harbour beyond the coming into force of the EPBC Act subject to the qualifications imposed by s 43B(3). Those qualifications included that there be no enlargement, expansion or intensification of use.

###### The then system of regulation under Tasmanian law

1. The then applicable state legislation which regulated finfish farming was described in the referral by Mr Evans as follows:

**2.4 Context, planning framework and state/local government requirements**

…

Marine farming in Tasmanian waters is subject [to] the provisions of the *Marine Farming Planning Act 1995* (MFPA) and the *Living Marine Resources Management Act 1995* (LMRMA). Both Acts sit within the overarching Resource Management and Planning System of Tasmania (RMPS) which is made up of a suite of legislation containing the objectives of the RMPS.

The MFPA provides for the preparation of Marine Farming Development Plans, amendments to plans and reviews of plans. Plans use a zoning concept to identify areas that are suitable for marine farming activities. The plans identify the maximum area that can be allocated for a marine farming lease or leases within marine farming zones, broad categories of species that may be farmed within those lease areas and the operational constraints (called management controls) on those operations.

The objectives of the MFPA are to integrate marine farming activities with other marine users, minimise any adverse impacts, take account of land uses and take account of the community’s right to have an interest in those activities.

The MFPA prescribes statutory processes for the preparation of MFDPs, amendment and review of plans. These provisions include environmental assessments, public consultation and consideration of issues by an independent and expertise based Panel established to make recommendations to the Minister of Primary Industries and Water. The Minister is charged with the responsibility to approve or not approve plans or amendments to plans.

Fourteen MFDPs have been prepared to cover the major areas in Tasmania suited to marine farming activities.

While the MFPA provides for the occupation of State waters for marine farming activities and controls the extent of these activities the LMRMA includes provisions to licence a leaseholder to farm specific species and further impose operational constraints on activities.

The regulation of marine farming activities is therefore achieved through multiple controls:

* Statutory provisions under the MFPA and LMRMA
* Management controls contained within marine farming development plans
* Marine farming licence conditions.

The Macquarie Harbour Marine Farming Development Plan October 2005 provides for the culture of salmonids (Atlantic salmon, rainbow trout and brook trout) in 10 marine farming zones up to a maximum leasable area of 564 hectares. …

The approval of developments and operation of terrestrial components associated with marine farming is regulated primarily through the *Land Use and Planning Approvals Act 1993* (LUPAA) and the *Environmental Management and Pollution Control Act 1994* (which are both part of the RMPS). Depending on the nature and location of facilities other approvals may be required under State legislation including the following acts: *Threatened Species Protection Act 1995, Aboriginal Relics Act 1975* and the *Historic Cultural Heritage Act 1995*. In addition, activities not covered by leases and licences, occurring within reserved areas should be undertaken in accordance with the State’s Reserve Management Code of Practice. For reserves managed by the Tasmanian Parks and Wildlife Service (PWS) approvals are required under the *National Parks and Reserves Management Act 2002* to undertake certain activities. A Reserve Activity Assessment process is used by PWS to ensure any relevant activities are compliant with relevant statutes, policies and plans. In undertaking the assessment the benefits of the proposed activity (social, economic and environmental) are also identified as are any measures taken to maximise benefits to the environment and to minimise impacts upon it.

Activities associated with marine farming that may take place in areas adjacent to that covered by the MFPD may also require regulation under other State legislation, including: *Natura Conservation Act 2002:* (reservation, wildlife management), *Animal Health Act 1995* (introduction or pest species), *Weed Management Act 1999* (introduction of weeds), *Plant Quarantine Act 1997* (introduction of plant pests) *Crown Lands Act 1976* (regulation of activities on Crown Land), *Veterinary Chemicals (Control of Use) Act 1995* (safe use of chemicals, including disposal) and *Marine and Safety Authority Act 1997* and associated regulations (boat speed and safe handling).

(Ex A1 pp 21-22)

1. While extensively regulated, no party submits that the fish farmers’ prior individual actions had been the subject of a specific environmental authorisation as defined in s 43A of the EPBC Act.

###### Passage of the EPBC Act 1999

1. The EPBC Act received Royal Assent on 16 July 1999 and came into force on 16 July 2000. The EPBC Act, among other things, established a scheme that required a person proposing to take an action he or she thinks may be a controlled action (that is one that has, will have, or is likely to have a significant impact on a matter of national environmental significance as defined in Pt 3, Div 1) to refer the proposed action to the Minister (s 68).
2. It is unnecessary for the purposes of these reasons to set out the provisions of Pt 3 of the EPBC Act. It is sufficient to indicate that as relevant to these proceedings Pt 3 includes provisions relating to World Heritage properties, National Heritage places and listed threatened species and communities.
3. Given the nature of fish farming and Macquarie Harbour’s adjacency to the Tasmanian Wilderness World Heritage Area, it may be thought self-evident that any action involving the enlargement, expansion or intensification of use of Macquarie Harbour for aquaculture after the commencement of the EPBC Act was an action that had to be referred to the Minister.

###### Huon, Petuna and Tassal take the view that the expansion of fish farming in Macquarie Harbour was desirable

1. It is uncontentious that, after the coming into effect of the EPBC Act, the three operators came to share the view that their fish farming operations in Macquarie Harbour could and should be expanded. Despite the concerns Huon has since come to have regarding the pressures increased fish stocking have placed on the general health of Macquarie Harbour, at that time Huon shared the views of Petuna and Tassal that an expansion of fish farming in Macquarie Harbour could be conducted sustainably and was desirable. Huon’s counsel, Mr Galasso SC, in his opening submission accepted that Huon had “participated in the contemplation of the expansion of marine farming in Macquarie Harbour” (transcript p 8 lines 6-7).
2. Under the Tasmanian regulatory system a change of that kind required an amendment to the Macquarie Harbour Marine Farming Development Plan October 2005 (**MHMFDP**). The operators’ application for such an amendment was required to be accompanied by an Environmental Impact Statement (**EIS**) pursuant to s 23 of the *Marine Farming Planning Act 1995* (Tas) (Ex A1 p 22). Accordingly Huon, Petuna and Tassal cooperated in preparing and producing an EIS (Ex A2 pp 85-1176) to accompany draft amendments to the MHMFDP. They also were responsible for the preparation and production of an Addendum to that EIS (Ex A2 pp 1-1176). The introduction to the Executive Summary of the EIS states (Ex A2 p 106):

The Tasmanian salmonid (Atlantic salmon and rainbow trout) industry provides significant economic benefits to the State and has contributed to Tasmania’s reputation as a quality producer of fine foods. Within 20 years of the first commercial harvests, farmed salmonids have become the leading farming activity in Tasmania ahead of dairy, vegetables, poppies, pyrethrum, beef, fine wool, wine and the once iconic apple industry. In the 2010-2011 financial year the industry produced 32,328 T of salmonids with a farm gate value of $379 million. It has become a standout Tasmanian brand icon.

The industry continues to experience strong sales momentum despite the current challenging economic environment. Sales are proving resilient with sales approaching $400 million at wholesale levels. The salmon and trout farming industry currently create over 1,200 direct jobs and $150 million to the Tasmanian Gross State Product.

The purpose of this proposal is to expand existing salmon farming operations in Macquarie Harbour by 362 ha of leasable area, with a view to maximising sustainable production in the harbour. This proposal is in line with the industry’s 2010-2030 strategic plans to double total salmon production in Tasmania by 2030 and to strategically enable ongoing growth in the industry.

A Social Return on Investment (SROI) analysis has been conducted on this proposed expansion. The SROI analysis suggests that the proposed expansion will deliver, during the first five years, an additional $24.2 million in social value in areas identified by the local community.

This means that, on top of the actual capital and operating investment by the proponent and within the constraints of the models used, the combined increases in social return and Gross Regional Product could be expected to provide an additional $88.6 million in benefit to the North West region in the first five years following the start of the proposed expansion phase.

The three companies currently growing salmonids in Macquarie Harbour, Tassal Operations Pty Ltd (Tassal), Huon Aquaculture Group Pty Ltd (Huon) and Petuna Aquaculture Pty Ltd (Petuna), collectively the Proponent, are collaborating in the sustainable development of the harbour and subsequently in the development of this proposal and the accompanying EIS.

###### Tasmanian government and DPIPWE agree with Huon, Petuna and Tassal that expanded marine farming in Macquarie Harbour should be facilitated

1. Following receipt of that EIS and its Addendum, the state government amended the MHMFDP in May 2012. The amendment increased the leasable area for fish farming in Macquarie Harbour to facilitate increased production.
2. However, the planned expansion required Commonwealth approval. Section 42B(3) of the EPBC Act expressly excluded (inter alia) the expansion of an action from the exemption provided for an existing use.
3. Section 69 of the EPBC Act provides a mechanism for a state or an agency of a state with administrative responsibilities for matters for which it is responsible to refer a proposed action a party is proposing to take that requires the Minister’s decision as to whether or not it is a controlled action:

**State or Territory may refer proposal to Minister**

1. A State, self-governing Territory or agency of a State or self-governing Territory that is aware of a proposal by a person to take an action may refer the proposal to the Minister for a decision whether or not the action is a controlled action, if the State, Territory or agency has administrative responsibilities relating to the action.
2. This section does not apply in relation to a proposal by a State, self-governing Territory or agency of a State or self-governing Territory to take an action.

Note: Section 68 applies instead.

###### Proposal to expand marine farming in Macquarie Harbour referred to the Minister

1. On 29 May 2012, DPIPWE referred the proposed expansion of marine farming activity in Macquarie Harbour to the Minister for determination pursuant to the EPBC Act. The referral, together with 12 appendices, is at pp 2-354 of Ex A1.
2. A “short description” of the proposed action is set out at p 6 of Ex A1:

The proposed action is:

* The expansion of marine farming operations, that will occur consistent with the 2012 amendment to the Macquarie Harbour Marine Farming Development Plan, which will include the following activities:
* The arrangement and securing of sea pens for fish farming;
* The construction of associated water based infrastructure;
* The operation of fish farms including:
* Servicing and maintenance of sea pens and associated water and land based infrastructure;
* Feeding and managing the health, waste, processing and predators of fish in the farms;
* Transportation of fish to and from the farms across water and land.

(Footnote omitted.)

1. The referral provided a more detailed description of the proposed action (Ex A1 pp 11-20):

**Background – Expansion of Marine Farming**

The approval of the amendment to the MFDP has paved the way for the following to occur:

* change in location of existing marine farming zones and lease areas
* increase in leasable area within zones
* addition of a new zone
* changes to management controls/operations which apply to zones

**Changes to Lease Areas and Locations**

To progress expansion of salmonid farming activities in Macquarie Harbour the *Marine Farming Planning Act 1995* required an amendment to the existing Macquarie Harbour Marine Farming Development Plan October 2005. A full description of the amendment as it was initially proposed can be seen in Appendix 2 with the final amendment provided in Appendix 3. The marine farming review panel (MFRP) recommended further modifications to management controls post public consultation which, whilst not changing the intent of the management controls proposed in Appendix 2, did clarify wording around a number of issues.

The area covered by the Macquarie Harbour Marine Farming Development Plan October 2005 (DPIPWE 2005) is the physical extent of the harbour outside of the Tasmanian Wilderness World Heritage Area (TWWHA) and consists of all that area bounded by the high water mark between a line drawn from Coal Head and Steadmans Point across the harbour to the south east (being the Western Boundary of the TWWHA) and the entrance to the harbour to the west at a line drawn between Braddon Point through Bonnet Island Light to the western shore. …

The Act provides for the preparation of MFDPs that designate areas of State waters as marine farming zones and the maximum area that may be used for marine farming operations within zones. The Act also provides for provisions for operational constraints on marine farming activities.

The Macquarie Harbour MFDP prescribes 10 marine farming zones within the plan area which provide for the culture of salmonids in 564 hectares of marine farming lease area.

The amendment to the Macquarie Harbour MFDP has resulted in moving some zones to areas better suited to salmonid culture and expanding the maximum leasable area by 362 hectares to 926 hectares – this expansion includes the addition of a farming zone.

Variations to zone locations and sizes (including maximum leasable areas) has taken effect with the approval of the amendment, however new lease areas and variations to existing leases (including sizes and locations) will need to be approved consistent with the amendment. It is the intention of industry and the Planning Authority that these steps occur within quick succession. The specific changes to each zone are discussed in Appendix 1. … Table 2.1 indicates changes to locations and leasable areas.

Three separate companies have been working jointly on the proposed expansion of salmonid farming activities in Macquarie Harbour. These include Tassal Operations Pty Ltd (Tassal), Huon Aquaculture Group Pty Ltd (Huon) and Petuna Aquaculture Pty Ltd (Petuna), all three of which have existing salmonid farming operations within the MFDP area as it existed prior to the 2012 Amendment. It is expected that these companies will take up the expanded lease area. …



**Changes to Management Controls**

Section 3 of the Macquarie Harbour Marine Farming Development Plan October 2005 contains management controls to manage and mitigate negative effects that marine farm operations may have within the plan area.

The MFDP as amended has a number of existing management controls that will remain unchanged. Eleven new management controls have been inserted and 5 controls have been amended to cater for the proposed expansion. Appendix 3 illustrates the revised management controls and Appendix 4 provides context around new versus amended controls.

**The Proposed Action**

The proposed action is:

* the *expansion* of marine farming operations, that will occur consistent with the 2012 amendment to the Macquarie Harbour Marine Farming Development Plan, including the following activities:
* The arrangement and securing of sea pens for fish farming;
* The construction of associated water based infrastructure;
* The operation of fish farms including:
* Servicing and maintenance of sea pens and associated water and land based infrastructure;
* Feeding and managing the health, waste, processing and predators of fish in the farms;
* Transportation of fish to and from the farms across water and land.

The following components of each aspect of the action are described below, with specific details on activities to occur within each marine farming zone provided in Appendix 1 and Appendix 2:

**Salmon Farming Operations Consistent with the MFDP**

* Construction and Infrastructure Development
* Mooring and Grid System
* Size and Configuration of Sea Pens
* Other Infrastructure/Construction
* Operation of fish farms
* Servicing and Maintenance of Sea Pens and Associated Infrastructure
* Boat Movements
* Infrastructure Maintenance
* Feeding and Managing Health, Waste, Processing and Predators of fish in the Farms
* Fish size/stocking density
* Fish Health
* Predator Control
* Waste Management
* Environmental Management
* Transportation of fish to and from the farms across water and land

**Salmonid Farming Operations Consistent with the MFDP**

The expansion of salmon farming operations within Macquarie Harbour, consistent with the 2012 Amendment of the MFDP will include activities associated with the construction of aquatic components of marine farms and ongoing operation of both terrestrial and aquatic components of marine farms. These include:

* The construction, arrangement and securing of sea pens for fish farming;
* The construction of associated land and water based infrastructure;
* The operation of fish farms including:
* Servicing and maintenance of sea pens and associated water and existing land based infrastructure;
* Feeding and managing the health, waste, processing and predators of fish in the farms;
* Transportation of fish to and from the farms across water and land.

**Construction and Infrastructure Development**

In order to operate, the expansion of fish farms in Macquarie Harbour requires the construction and placement of new and existing infrastructure.

New mooring and grid structures are required to moor existing, and additional sea pens to. The size of these pens varies across leases, as does their configuration and locations. Additional on water structures are also required for servicing expanded farms (e.g. barges).

**Mooring and Grid system**

Each company will use their own mooring system to attached sea pens/cages to. There are currently approximately 132 cages in Macquarie Harbour across 5 leases. Planned expansion of the industry under the amendment to the MFDP will see an increase in cage numbers to approximately 211. The mooring systems to be used across zones are described in Appendices 1 and 2. Baseline surveys which establish whether there will be any impacts from mooring and grid systems are not part of this action.

**Size and configuration of Sea Pens**

The location and configuration of pens associated with the amendment of the MFDP for each company are described in Appendices 1 and 2. … There are no change[s] to Zones 7 and 8 as a result of this proposal.

**Other Infrastructure/Construction Aspects**

Additional land and water based infrastructure will be required in order to operate fish farms associated with the proposed expansion. There is likely to be a need for some improvements to land based facilities over time.

Huon aquaculture immediately require a new centralised feeding system barge, with a view to a centralised feeding system involving dedicated feed barges proposed for each zone into the future. Additional power generators will be associated with new barges.

Two additional feeding boats are also likely to be required in the next 7 years.

Tassal’s feed storage shed is inadequate to cater for current needs and is in a poor state of repair – in addition access to the site is restricted (Appendix 2).

It is estimated that traffic movements will increase from around 90 to a maximum of 228 within 5 years – to manage this impost on Strahan township, and to streamline operations an aquaculture hub away from the Strahan township has been proposed.

**Operation of Fish Farms**

The operation of fish farms in Macquarie Harbour requires a range of activities within the key areas listed below:

* Servicing and maintenance of sea pens and associated water and land based infrastructure;
* Feeding and managing the health, waste, processing and predators of fish in the farms;
* Transportation of fish to and from the farms across water and land.

**Servicing and Maintenance of Sea Pens and Associated Infrastructure**

Servicing of on water infrastructure involves the movement by boat of maintenance teams multiple times a day to sea pens to undertake a range of maintenance (and stock husbandry) tasks. Boat movements and maintenance tasks are described in detail below.

**Boat Movements**

Boat movements associated with marine farming activities in Macquarie Harbor can be placed into two categories; vessel movements from shore based operations to marine based operations and vessel movements within lease areas. Table 2.2 illustrates current and proposed boat movements by type.

Vessel movements from shore based operations to marine based operations consist of staff transfers to lease areas, feed transfer, net and equipment transfer, dive team movements and harvest vessels (Table 2.2). The proposed increase in movements represents an increase from 59 movements to 158 movements per week. Table 2.2 does not include movements undertaken by smaller vessels within lease areas.

Companies in Macquarie Harbour usually moor a number of vessels within the lease areas which are used to service the lease during operational hours. These vessels generally do not leave the lease area but travel between cages and mother barges.



\* Tassal uses two existing marine farming leases in Macquarie Harbour which will be serviced by the same vessels on the one trip, therefore the traffic from Strahan to the leases will not change considerably but the distance travelled by the vessels will increase.

It should also be noted that harvesting will not occur all year round and from the same lease each year, for example, Tassal will harvested for 6 months of the year from Zone 9 every second year. The figures above have included harvest vessel movements all year round. Appendix 1 contains detailed descriptions of boat movements by zone.

**Infrastructure Maintenance**

A variety of maintenance tasks are undertaken either routinely or for a specific purpose. These tasks include:

* Checking of cage nets via scuba diving
* Inspection of bird nets
* Repair of nets
* Vessel maintenance for barges
* Routine generator and other equipment maintenance
* Inspection of moorings (divers and ROV)

Off water infrastructure maintenance, including maintenance on large barges occurs either at land based sites or in specialised workshop environments in Devonport and Burnie. Boat servicing, outboard servicing etc occurs at the slip yard in Strahan. Net maintenance and construction occur at land based net areas.

Specific maintenance activities are described by zone in Appendix 1. There will be no change to activities occurring at Zone 7 and Zone 8.

**Feeding and managing the health, waste, processing and predators of fish in the farms**

The management of fish farming activities includes the management of:

* fish size and stocking densities;
* fish feeding;
* fish health;
* predator control;
* waste management;
* environmental management.

**Fish Size/Stocking Density**

It is the intention that two species will be cultivated in the expanded marine farming operations in Macquarie Harbour: rainbow trout (*Oncorhynchus mykiss*) and atlantic salmon (*Salmo salar*).

Sites would be stocked with intake fish ranging in size from 80g – 300g depending on species and company. Harvest size would range from over 4kg to 5kg.

Current estimates are that around 3.2 million smolt are used in the harbour per year – this figure is expected to increase to around 6.3 million smolt with the expansion.

The maximum stocking density of fish would increase from 15 kg/m³ to 17 kg/m³ of cage volume.

Species and stocking approaches by zone can be seen in Appendix 1.

Information regarding fish size and number, stocking density (also biomass limits on an area basis i.e. tonnes/ha) and feed volume all have links to the modelling used to determine the sustainable carrying capacity (total biomass and stocking density) of Macquarie Harbour for this development. They are also associated with the adaptive management framework that is proposed. Of these, the potential to prescribe stocking density and biomass limits have been incorporated into management controls.

**Fish Feeding**

Feeding is currently undertaken via boats using water cannons as well as by centralised feed systems with the operator either using camera feedback systems to control the feeding or, the system responding to appetite ingestion rate of the fish to feed to satiation without waste.

The feed used is commercial extruded feed and dry extruded sinking pellets sourced from both within Tasmania and interstate. There is no change to the types of feed to be used in the expansion from currently farmed area. The volumes of feed will vary depending on market expansion, smolt type, smolt size, transfer date, photoperiod regime, water temperature, fish health, and harvest profile.

Sediment monitoring is carried out during the Annual Video Surveys as required by marine farming licence conditions, as well as during routine internal environmental monitoring programs companies run. Monitoring methods follow those employed to assess seafloor condition as outlined in the Monitoring Protocols of the Fish farm licences.

Details of each company’s approach can be seen in Appendix 1.

**Fish Health**

Currently, there are no serious disease issues in Macquarie Harbour. Previously, a number of diseases have been identified in Macquarie Harbour; these have included yersiniosis, marine aeromonad disease of salmonoids (MAS) and vibriosis. In 2006, *Ichthyophonus* caused mortality in rainbow trout. In addition, Aquabirnavirus, Reovirus and a rickettsia-like organism (RLO) have also been detected.

The key component in the preventative disease program for Macquarie Harbour is vaccination against Marine Aeromonad Disease and vibriosis. Since the introduction of the vaccination process, there have been no outbreaks of these diseases. Additionally, there is mandatory health surveillance carried out by Department of Primary Industries, Parks, Water and Environment (DPIPWE) personnel within the framework of the Tasmanian Salmonid Health Surveillance Program (Tas SHSP) which is a joint Industry and Government Program.

Further, the current operators within the plan area have developed a Fish Health Management Plan (FHMP) which will provide a specific detailed strategy for the ongoing management of fish health in Macquarie Harbour (See Appendix 2). The operators have signed off on the strategies outlined in the FHMP which consists of a combination of compliance, best practice and regulation through management controls and marine farming licence conditions. The FHMP addresses detailed, standard operating practices to prevent disease from entering the harbour, to prevent spread and impact of disease in the harbour and to respond to emergency disease situations. The FHMP will be reviewed annually or more frequently if needed.

Under expanded operations there will be an associated increase in the real amount of vaccinations being administered to smolt – currently trout and salmon have one vaccination by injection and one by bath in the hatchery and this will continue.

**Chemical Usage**

Chemical use in the marine environment will be restricted to fuels and oil based lubricants associated with boats, and disinfectants, cleaning agents and antibiotics. Fuels would constitute by far the majority, by volume, of the total amount of chemicals proposed to be used. Small volumes of disinfectants are used in a variety of manners for hygiene purposes, and cleaning agents are used on harvest infrastructure following harvesting operations. Antibiotics would only be prescribed over short periods to address illness and animal welfare issues. It is not possible to forecast antibiotic use, but it is expected that antibiotic use will remain low, if not absent, due to improved husbandry practices and effective vaccines.

It is proposed that most chemical usage will continue across the expansion area proportional to the increase in biomass being farmed. Based on this, it is predicted that a 263% increase will occur in the chemical use associated with the expansion.

**Predator Control**

Australian and New Zealand Fur Seals are a potential predator of salmon and trout in marine farms. The main means of controlling seal predation will be via exclusion, by means of heavily weighted sinker ring and tensioned cage nets and above water predator nets. Net barriers may also be required above the handrails to prevent seals from jumping into the cages. There is ongoing investigation and trialling of new exclusion and deterrent technologies. Under the DPIPWE’s seal management protocols, marine farmers can apply to the Department to relocate problem seals.

Birds are also a potential problem. The means of control to be used is prevention of access to the fish or to feed pellets, by means of properly designed and supported bird nets. See Appendix 1 for further zone specific details.

**Waste Management**

Both solid and liquid wastes are produced by marine farms and are managed by different means. It is expected that there will be a net increase in most waste streams generated commensurate with an increase in stocked cage numbers. Whilst this will not be realised during the first year of the expansion, there will be a gradual staged increase over time until all sites are fully stocked, at which point a 62% increase from current levels of land-based disposal of waste will be realised. Fish mortality wastes are expected to increase by 60% from current levels (see below).

Solid wastes include fish bodies (mortalities), waste from the harvesting process (including body parts and bloodwater), wastes on nets and uneaten feed.

Mortalities are collected and buried at an approved mort lease site or mort pit. Bloodwater and solid waste from the harvest process is contained in harvest bins during the harvest and either delivered to a processing facility at Devonport or, the waste is separated with the solid component going to mort pits, and the liquid component released in to the municipal sewerage scheme through a Trade Waste Agreement with Cradle Mountain Water Authority depending on the marine farming company (Appendix 1).

Current levels of fish mortalities across the industry in Macquarie Harbour are generally around 1.97% (approx 63000 fish) of stocked numbers by live weight. It is expected that this rate would remain comparable following the expansion resulting in approx 124000 dead fish at full production. This would be an increase from current totals of around 60%.

Local government approval is required for fish waste volumes <100 tonnes to mort landfill sites. Currently three mort pits located around Strahan (Table 1.1). At full production levels this approval would be exceeded. It is not anticipated that this approved tonnage of mortality disposal would be exceeded within the first two years of the proposed amendment. Once the Council approval is exceeded the companies would need to gain Tasmanian Environmental Protection Authority approval for an alternative disposal option.

Discussions with a third party who currently render all fish mortalities from the east coast of Tasmanian have commenced to investigate ensilage options available for the collection and disposal of mortalities. The increased number of fish mortalities as a result of the proposed expansion would mean that the ensiling of this waste would be economically viable for the third party to the extent that transport costs would be off set. Initial discussions have revealed that it is likely that the third party would employ a local site Manager to ensure that the ensilage facility was run to the Environment Protection Authority approved standards.

Nets are, in general, simply hung to dry at the net processing sites. The dry bio-solids fall off the nets and are swept up and collected in bags and disposed of to landfill.

Uneaten feed is minimised through the use of underwater-video camera feedback systems and additional tools such as electronic pellet sensors. Any pellets that do fall through the cages are detected in routine video surveys, and the information is used to continuously improve feed management.

Fish faeces fall through the bottom of the fish cages and are deposited on the seabed below the cages. The cage positions are routinely fallowed to allow the biological processes in the sediment to process the organic matter, and for the sediments to recover.

All inputs into the marine environment that arise from the present amendment are to be mitigated through the adaptive management framework. This process drives the harbour Fish Farming Environmental Management Plan (FFEMP) which uses as its basis the modelling and a comprehensive regulatory and industry based monitoring program targeting both water quality and benthic parameters.

Targeted monitoring of benthic and water column parameters will be used to validate the model into the future and results for the validation will support the decision making process for fish farm stocking levels in the harbour.

At present environmental standards for substrate deposition are contained under Marine Farming Licence Conditions, Compliance with Environmental Standards. Recovery and accumulation rates are being addressed through the FFEMP using modelling and the results from the benthic part of the monitoring program and other related research will be used to inform future modelling. For remineralisation the Proponent is collaborating with Institute of Marine and Antarctic Studies (IMAS) and DHI consultants to initiate a research project to elucidate these processes in the harbour.

In terms of mitigation measures that may be implemented through farm operations year class fallowing is considered integral to any sustainable farming to allow regeneration of benthic communities and facilitate good environmental maintenance procedures for the production environment. Fallowing is assessed on a regular basis by the Proponent through the use of ROVs below the pens, both as part of the annual regulatory requirements (licence conditions) for substrate assessment and as an operational tool for assessing feed wastage and substrate impact.

In the future the fallowing period implemented will be based initially on the results of the benthic monitoring (directed through the FFEMP) as production increases. Appropriate management responses will be implemented if unacceptable changes are observed.

Liquid wastes include black and grey water from barges. Black water is either treated with an approved sewage treatment system and discharged after prescribed water quality parameters stipulated in marine farming licence conditions have been met or, it is transported to Strahan and released into the municipal sewage system. Grey water is either discharged within lease areas or released into the municipal sewage system depending on the company (Appendix 1).

**Environmental Management**

Biogeochemical and hydrological modelling has been used to determine a sustainable maximum carrying capacity of farmed salmonids in Macquarie Harbour of 35 T/ha of total lease area or subleased area held by a leaseholder, based on the planned expansion area.

The modelling that has been undertaken is considered to be contemporary. It is however acknowledged that the modelling, as with any form of predictive assessment, has limitations. To balance any potential limitations of the model a FFEMP will be implemented, which will provide an adaptive monitoring and modelling approach to track the initial predictions of the model over time and refine future modelling. See section 4 for further details. Continuing measurements of information to inform the benthic monitoring program and establishment of water quality baseline environmental data are not part of this action.

**Transportation of fish to and from the farms across water and land**

Significant increases in on and off water vehicular movements are likely to occur as a result of expansion of farming in Macquarie Harbour.

Boat movements are described in detail in Appendix 1 and represented in Table 2.2. Overall movements will increase from 59 movements to 158 movements per week.

The change in traffic movements one way into Strahan from Hobart and the North West coast by operator are outlined in Appendix 1 – these figures include passenger vehicles and small delivery/service type vehicles.

Existing farming operations are not considered to be part of the current action as fish farming in Macquarie Harbour commenced prior to the EPBCA in the mid 1980s, and incremental changes since then were determined unlikely to have a significant impact on MNES. In addition ongoing measurements associated with the benthic monitoring program and the establishment of water quality baseline environmental information are not included in the action.

(Footnotes omitted, emphasis in original.)

1. The involvement of Huon, Petuna and Tassal in requesting an amendment to the MHMFDP was identified in the referral as follows (Ex A1 p 22):

The three companies currently farming salmonids in the harbour have jointly requested an amendment to the Macquarie Harbour MFDP under section 33 of the MFPA to move and expand existing marine farming zones and leasable area and to create a new zone with leasable area. The requested amendment has resulted in an increase in leasable area of 362 hectares. Specific detains are contained in section 2.1 of this referral.

1. The Court notes that the detailed statement of the proposed action expressly excluded “[c]ontinuing measurements of information to inform the benthic monitoring program and establishment of water quality baseline environmental data” from the action (Ex A1 p 20). The reason for that is not apparent. It may be because DPIPWE had regarded those matters as within its own regulatory responsibilities rather than as a component of the action, but the documentation is silent on that.
2. As the history of this matter reveals, the way the referral had been expressed, as set out above, led the Department of Sustainability, Environment, Water, Population and Communities (the **Department**) initially to treat the action as having been referred under s 68, that is as an action proposed to be undertaken by DPIPWE itself (see below at [46]-[61]).

###### The nature of the referral mechanism

1. Subject to other provisions of the EPBC Act, including those relating to the Minister’s obligations to invite and consider comment and the Minister’s power to request further information (see s 76), none of which are contentious in these proceedings, the Minister is required, within 20 business days, to determine whether or not the proposed action is a controlled action or not: see s 75(5).
2. As was noted in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8; (2008) 165 FCR 211 by Heerey J at [22], the referral mechanism thus operates as a kind of “triage system”.
3. The Minister, in undertaking that function, is required to consider all adverse impacts the referred action has, will have, or is likely to have on the matters of national environmental significance protected by each of the provisions of Pt 3 of the EPBC Act (s 75(2)(a)). He or she is required to exclude from his or her consideration any beneficial impacts the action has, will have, or is likely to have on those matters (s 75(2)(b)).
4. The Minister is thus charged with the task of determining within a relatively short timeframe which one of the following is to apply to a referred proposed action: (a) the proposed action is not a controlled action because it would not have a significant impact on any matter of national environmental significance; (b) that the proposed action is not a controlled action because the Minister believes it will be taken in a particular manner; or (c) it is a controlled action.
5. A controlled action is required to be evaluated pursuant to one or other of the assessment processes prescribed by Pt 8 of the EPBC Act.
6. For completeness, I note that those three options do not exhaust the possible outcomes: within the same short timeframe the Minister may determine that a proposed action is clearly unacceptable (s 74B).

###### The Minister seeks further information from DPIPWE

1. I am satisfied that, upon receiving the referral, the Department understandably, but in error, proceeded initially on the basis that DPIPWE itself was proposing to take the action.
2. On 6 June 2012, after receiving the referral, on the Minister’s behalf the Department sought further information regarding the proposed action from DPIPWE (Ex A1 pp 357-358). Nothing in that correspondence suggests the Department at that stage regarded Huon, Petuna and Tassal as being (collectively) the proponent of the action. That the Department sought further information only from DPIPWE entitles the Court to draw the inference that at that time the Department was operating under the apprehension that DPIPWE was the person proposing to the action. Section 75(5) provides that the time in which the Minister is required to make a decision in respect of a referral does not run while further information is sought pursuant to subs 76(1) or (2). Those subsections “stop the clock” only if the information has been sought from “the person proposing to take the action”.
3. On 27 June 2012, DPIPWE provided additional information in response to the Minister’s request (Ex A1 pp 359-367).
4. It is apparent that that further information failed to satisfy the Department that it should advise the Minister that the action would not be a controlled action. On 5 July 2012, Mr Andrew Tankey, Acting Assistant Director of the Environment Assessments Branch emailed Ms Fionna Bourne of DPIPWE regarding “outstanding issues for the Macquarie Harbour referral” (Ex A1 pp 368-369). In his email, Mr Tankey identified that the Department still had concerns regarding issues in relation to the Maugean Skate and the Tasmanian Wilderness World Heritage Area.
5. Mr Tankey told DPIPWE that the information it had provided at that stage was inadequate. There was an absence of detail regarding commitments. He exampled that trigger levels for ammonia, nitrate and dissolved oxygen had not been provided. Mr Tankey advised DPIPWE that “Not Controlled Action – Particular Manner” outcomes “are only possible where there are specific, quantified commitments that bind the referring party to undertaking the action in a specific way”.
6. On 5 September 2012 Mr Evans responded on behalf of DPIPWE to Mr Tankey’s request of 5 July 2102 that DPIPWE provide additional information about the proposed action.
7. Mr Evan’s response contained the following statements and undertakings:

The proposed expansion of marine farming activities under the Macquarie Harbour Marine Farming Development Plan as amended will result in the relocation of 59 percent of the existing marine farming lease area that currently occurs in less than 20 metres into the central, deeper water region of the Harbour. This will effectively reduce the lease area in regions where the Maugean Skate have been identified.

In relation to benthic impacts, and their possible impact on MNES – Maugean Skate, as previously outlined, baseline environmental surveys must be undertaken by lease holders prior to the commencement of marine farming operations within any marine farming lease area. Assessment includes the collection of information on the physical, chemical and biological characteristics of sediments, current flow, bathymentry and habitat assessment. The information is used as a benchmark against which marine farming operations are monitored.

In addition to the baseline monitoring assessment, marine farm licence conditions require leaseholders to undertake annual benthic video assessments of lease areas and compliance sites located 35 metres outside lease areas (See Attachment 1 standard monitoring methods and requirements). Compliance monitoring reports are assessed against marine farming licence conditions specific to benthic impacts associated with particulate organic deposition from finfish farming operations.

All marine farming operations in Tasmanian waters have the same licence conditions relating to unacceptable benthic impacts. The licence conditions are based on extensive international and local research, with the local research particularly focusing on the effects of marine farming derived organic enrichment on sediment condition and recovery processes. The following licence conditions relating to unacceptable benthic impact are currently in all marine farming licences for operations in Macquarie Harbour. These conditions will also be included in the licences granted for the operation of the proposed expanded marine farming operations.

*There must be no significant visual, physio-chemical or biological impacts at or extending beyond 35 metres from the boundary of the Lease Area. The following impacts may be regarded as significant:*

***Visual Impacts:***

* *Presence of fish feed pellets;*
* *Presence of bacterial mats (e.g. Beggiatoa spp.);*
* *Presence of gas bubbling arising from sediment, either with or without disturbance of the sediment;*
* *Presence of numerous opportunistic polychaetes (e.g. Capitella sppp., Dovilleid spp.) on the sediment surface.*

*In the event that a significant visual impact is detected at any point 35 metres or more from the leave boundary the licence holder may be required to undertake a triggered environmental survey or other remedial activity determined by the Director.*

***Physio-chemical:***

* *Redox: A corrected redox value which differs significantly from the reference site(s) or is <O mV at a depth of 3cm within a core sample.*
* *Sulphide: A corrected sulphide level which differs significantly from the reference site(s) or is >250µM at a depth of 3cm within a core sample.*

***Biological:***

* *A 20 times increase in the total abundance of any individual taxonomic family relative to reference sites.*
* *An increase at any compliance site of greater than 50 times the total Annelid abundance at reference sites.*
* *A reduction in the number of families by 50 per cent or more relative to reference sites complete absence of fauna.*

*There must be no significant impacts within the Lease Area. The following impacts may be regarded as significant:*

***Visual impacts within Lease Area:***

* *Excessive feed dumping.*
* *Extensive bacterial mats (e.g. Beggiatoa spp.) on the sediment surface prior to restocking.*
* *Spontaneous gas bubbling from the sediment.*

lf a significant impact (as defined in the licence conditions and outlined above) is detected within or outside the lease areas, during annual compliance monitoring surveys, targeted management responses are required, in addition to possible further investigation and depositional modelling.

Targeted management responses are implemented by way of management controls outlined in the Macquarie Harbour Marine Farming Development Plan as amended, by the Secretary of the Department of Primary Industries, Parks, Water and Environment and involve one or more of the following actions:

* reduction in biomass,
* reduction in nitrogen output, or
* redistribution of biomass.

These management controls ore designed to regulate the stressor, both soluble and particulate, loads. Given that organic enrichment effects are lease specific, direction by the Secretary to reduce input is primarily focused on reducing biomass load, or redistributing biomass load within a specific marine farming lease area, including fallowing a particular pen bay or pen bays.

Where a significant impact, as defined, is observed, and specific management actions are required by the Secretary to be implemented, the leaseholder is required to undertake a follow-up benthic video assessment to m on it or benthic recovery.

The regulation of benthic impact from marine farming operations, as described above, has been in place for all marine farming operations in Tasmanian waters for the last 16 years. During this period it has been demonstrated that organic loading effect s from farming operations can be effectively managed using the environmental management framework outline above. This, together with the information regarding the distribution of Maugean Skate within Macquarie Harbour, including in close proximity to existing marine farm operations, leads the Department to the view that the expansion of marine farming activities in Macquarie Harbour will not have a significant impact on the MNES – Maugean Skate.

Tasmanian Wilderness World Heritage Area and Maugean Skate

Issues associated with water quality have the potential to impact on two MNES – the Tasmanian Wilderness World Heritage Area and the Maugean Skate. The Department has worked closely with representatives of the three companies who will be undertaking the marine farming expansion activities to develop an appropriate water quality monitoring program and water quality limits to ensure that the proposed expanded marine farming activities do not have a significant impact on these matters of MNES.

As you are aware, as part of the ongoing development of the model which was used by the State Government to assess the amendment to the Macquarie Harbour Marine Farming Development Plan, the three companies have been collecting monthly water quality data since September 2011. The model will be recalibrated during the first review cycle of the adaptive management framework, using at least 12 months of water quality data within the harbour that reflects the current extent of marine farming activities.

Marine farming licences will contain conditions that require the licence holders to undertake a water quality program to monitor changes in indicator levels relative to prescribed limits within Macquarie Harbour.

The monitoring program will involve continued assessment of the water quality indicators – ammonia, nitrate and dissolved oxygen, at 11 sites throughout the Harbour (refer Map 2 for sample locations) until mid 2013 after which the number of monitoring sites will be reviewed. In addition the marine farming licences will require quarterly reporting and interpretation of the results of the water quality monitoring program.

Water quality limits will be contained within marine farming licences, and will be based on the 80th/20th percentile values of the water quality indicators, based on the predictive biogeochemical and hydrological model outputs. The percentage values of the water quality indicators will be:

* Ammonia - 80th percentile;
* Nitrate - 80th percentile;
* Oxygen - 20th percentile.

As a precautionary measure to ensure that expansion of salmonid production in the harbour does not significantly impact on water quality, interim water quality limits have been established for the above water quality indicators. These interim limits will be in place until the first review of the adaptive management framework is completed in mid 2013, and will be included as mandatory conditions within the marine farming licences.

In mid 2013 the interim water quality limit levels will be reviewed. The approach to water quality limits after the review will be based on the 80th/20th percentile as is the case for the interim levels outlined above. The reviewed figures will be derived from a recalibrated biogeochemical and hydrological model that will be informed, amongst other things, by at least 12 months of water quality data collected from the harbour, and further predictive modelling.

The interim water quality limits and the water quality monitoring requirements contained within marine farming licences will not be updated, and additional finfish biomass above and beyond that indicated in the Secretary’s letter of 27 June 2012 will not be able to be added to the harbour until such time as the review is completed, and the marine farming licence conditions amended to reflect the outcome of the review.

The environmental condition of Macquarie Harbour has undergone a number of assessments, and in each of those assessments it has been determined that the harbour is not pristine, and has had some level of impact from past activities.

For example the Australian Natural Resource Atlas describes Macquarie Harbour as being of modified condition, and under the Conservation Significance of Tasmanian Estuaries project of my Department the harbour is classified as having low conservation significance as a result of being moderately degraded. (See Attachment 2 for further information).

In addition, if the ANZECC Classifications and Recommendations framework is used Macquarie Harbour would be described as a slightly to moderately disturbed ecosystem in which biological diversity may have been adversely affected to a relatively small but measurable degree by human activity.

The ANZECC Guidelines 2000 recommended that guidelines be developed on the basis of biological effects data, where such data is not available, or alternatively use base guidelines on the 80th and/or 20th percentiles of data from reference sites. In particular for slightly to moderately disturbed ecosystems such as Macquarie Harbour it is recommended that:

*The trigger values are derived from the 80th and/or 20th percentile values obtained from an appropriate reference system. For stressors that cause problems at high concentrations (eg. nutrients, salinity), that the 80th percentile of the reference distribution as the low-risk trigger value. For stressors that cause problems at low levels (eg. low dissolved oxygen in waterbodies), use the 20th percentile of the reference distribution as a low-risk trigger value.*

Biogeochemical and hydrological modelling has been used to consider the effects on water quality arising from the expanded salmonid farming activities. The modelling has predicted that certain parameters will be elevated with increased production. Assessment of the effects of the modelled outputs predicts that at the maximum level of modelled production there will be no significant impact on the environment and ecosystems of Macquarie Harbour, and that the expected effects fall within an ‘acceptable’ level of change.

The predictive biogeochemical and hydrological model output has been adopted for use for establishing the values of the water quality indicators because it is a specific tool that has been developed for Macquarie Harbour, taking account of the existing knowledge as it relates to the hydrodynamics of the harbour, and the existing environmental conditions, rather than applying a generic set of environmental guidelines. The model defines the limits of predicted change within acceptable ecological and toxicological levels as discussed in relevant literature and environmental guidelines. As such, the model will be used as the reference system when setting the water quality limits.

The interim limit levels for each of the water quality indicators are as follows:

|  |  |
| --- | --- |
| **Indicator** | **Limit** |
| Ammonia (at 2 metres) | 0.033 mg/L |
| Ammonia (at 20 metres) | 0.024 mg/L |
| Nitrate (at 2 metres) | 0.053 mg/L |
| Oxygen (at 2 metres) | 6.82 mg/L |

It is noted that the above limit levels for ammonia are significantly below the level of 0.460 mg/L outlined by Batley and Simpson (2009) as representing a low risk of acute or toxic effects in a slightly to moderately disturbed system. Given that nitrate is significantly less toxic than ammonia the Canadian Water Quality Guidelines: Nitrate Ion, Scientific Criteria Document (2012) recommends a long-term exposure guideline of 45 mg/L for nitrate for the protect ion of temperate marine species. The interim limit levels for nitrate proposed above is significantly less than this. Finally for oxygen, the interim limit level is well above that recommended by the US Environment Protection Authority as a safe/low risk chronic protective value. (See Attachment 3 for further information).

As with benthic impacts, the above interim water quality limit levels will be included as a mandatory condition of all marine farming licences. Specifically, marine farming licences will state that:

*The regional annual rolling median value of any of the following indicators where directly attributable to marine farming operations, must not exceed the limits specified in the following table:*

*Indicators and Limits:*

|  |  |
| --- | --- |
| **Indicator** | **Limit** |
| Ammonia (at 2 metres) | 0.033 mg/L |
| Ammonia (at 20 metres) | 0.024 mg/L |
| Nitrate (at 2 metres) | 0.053 mg/L |
| Oxygen (at 2 metres) | 6.82 mg/L |

Reporting of biomass and nitrogen inputs will also be a requirement of licence conditions, with quarterly reporting required for each marine farming lease area.

The assessment of indicators will be made on pooled results from the regional compliance monitoring stations … If the observed regional annual rolling median value for an indicator exceeds the specific limit prescribed in the marine farming licence condition, a management response will be required. Again, as with benthic impacts the management actions required by the Secretary would involve one or more of the following actions:

* reduction in biomass,
* reduction in nitrogen output, or
* redistribution of biomass.

The final point on water quality as it relates to the MNES - Maugean Skate is to note that the listing statement or the species indicates that it inhabits low-nutrient brackish water, 5-7 metres deep. Recent and historical water quality data from Macquarie Harbour suggests that the water within the harbour is not low in nutrients, for example datasets from the 1980’s (Creswell et al., 1989) and (DPIPWE 2011) and the present indicate that water in Macquarie Harbour for nitrate and ammonia exceed the ANZECC Guidelines recommended low risk trigger values for environmental protection of estuaries. This data provides evidence that would suggest that a low­ nutrient environment is not a requirement for the Maugean Skate’s survival.

The regulation of water quality parameters for marine farming operations, as described above, will ensure that a reduction in water quality arising from the expansion of marine farming activities in the harbour will be effectively managed using the environmental management framework outlined above. As a result the Department is of the view that the expansion of marine farming activities in Macquarie Harbour will not have a significant impact on water quality within the harbour nor a concomitant significant impact on the MNES – Tasmanian Wilderness World Heritage Area or the Maugean Skate.

I hope the above, together with the attached documents provides sufficient information for you to make an assessment as to whether the proposed marine farming expansion activities within Macquarie Harbour are a controlled action. …

(Ex A1 pp 381-387)

###### Department receives legal advice that referral is for an action to be undertaken by Huon, Petuna and Tassal

1. I infer that late in its consideration of the referral the Department received legal advice that, properly understood, the action would in fact be undertaken by Huon, Petuna and Tassal. The substance of that advice is referred to in a document entitled “Supporting advice from the Heritage Branches” reproduced in the departmental brief later submitted to the Minister. It contains the following (Ex A1 p 465):

The referral has been made by the Tasmanian Department of Primary Industries, Parks, Water and Environment (Heritage understands that legal advice has been obtained by EACD as to the proponent … as activities carried out under the MFDP would be undertaken by one of three aquaculture companies expected to operate under the plan: Petuna Aquaculture Pty Ltd, Huon Aquaculture Group Pty Ltd and Tassal Operations Pty Ltd.

Note that, at the request of EACD, this advice assumes an “Action” that is comprised of the operation of one or more of these three companies under the revised MFDP.

1. On 5 September 2012 (coincidentally the same day as Mr Evans had respondent to Mr Tankey’s earlier email seeking specific, quantified commitments binding on the referring party) Mr Tankey sent an email to Ms Bourne containing the following (Ex A2 pp 1179 – 1180):

Following our recent conversation on Monday I wanted to confirm our approach for this referral process that we will need to follow to progress to a statutory decision (once the adequate additional information has been received).

Our advice on evaluation of this referral, is that this referral is most appropriately considered under section 69 of our Act, whereby DPIPWE has referred the action on behalf of the operators. To ensure a legally robust decision we will need to write to the operators and ask them to provide the additional information that you are currently preparing. This formality is necessary to ensure that we meet the relevant procedural fairness requirements for administrative decision-making.

To cover off on this, we will be writing to the operators to confirm they have received the original referral which you have submitted, and also the [department’s] additional information request.

To assist us in this, can you please provide contact details (both post and email) for each of the operators? We would like to send this letter to each company as soon as possible, and we will copy you into these letters.

The subsequent step will be for us [to] have formal sign-off from the operators on the final additional information to be provided to DSEWPAC (for example, to confirm that they can and will undertake any specific commitments in this documentation). To ensure this happens as efficiently as possible, we suggest that DPIPWE coordinates the submission of the additional information through the operators. (For example, you may wish to submit the information to DSEWPAC with a cover letter signed by all parties that binds the operators to the material you have prepared).

1. In order “[t]o cover this off on this” (to use the language of that email), on 7 September 2012, Mr James Tregurtha, the Assistant Secretary of the South-Eastern Australia Environment Assessments, Environment Assessment and Compliance Division of the Department, wrote to each of the operators to inform them that a referral had been made by DPIPWE, which was “being considered in accordance with section 69 of the EPBC Act” (Ex A1 pp 370-375).
2. Mr Tregurtha’s correspondence, sent in identical terms save as to addressees, identified Huon, Petuna and Tassal as proposing to “jointly undertake the action”.
3. Each letter informed its recipient that the Department had received a referral under the EPBC Act from DPIPWE. Each letter attached the Department’s correspondence of 4 June 2102 as had been previously sent to DPIPWE requesting further information. As addressed to Huon, Mr Tregurtha’s letter was as follows:

In considering the referral, we understand that the following persons (‘the operators’) are proposing to jointly undertake the action:

1. Yourself, (Huon Aquaculture Group Pty Ltd ABN; 79 114 456 781)
2. Tassal Operations Pty Ltd; ABN 38 106 324 127; and
3. Petuna Aquaculture Pty Ltd, ABN 62 009 485 581.

 In accordance with section 73(a) of the EPBC Act you are hereby notified of the referral submitted to the Department in accordance with section 69 of the EPBC Act. If you are not proposing to undertake the action as referred, we would be grateful if you could please advise the Department as soon as possible.

***Request to provide information***

In accordance with section 75 of the EPBC Act, the Minister must decide whether the referred action is likely to have a significant impact on one or more matters protected by the EPBC Act, that is, whether the action is a ‘controlled action’ (“the controlled action decision”).

However, the referral does not provide sufficient information for the Minister to be able to determine whether or not the action is likely to have a significant impact on one or more matters protected by the EPBC Act. As such, in accordance with section 73(b) of the EPBC Act you are requested to provide the Minister with relevant information about the proposed action, to enable the Minister to make a decision with respect to section 75 of the EPBC Act. The specific information required is identified in the correspondence enclosed.

1. I infer Mr Tregurtha proceeded in that way because, the Department having received legal advice, it had become apparent to it that the requirements of s 73 of the EPBC Act had not earlier been complied with. It is also available to infer that the three companies were sent copies of the request for further information earlier made by DPIPWE and asked to provide “the specific information required” because s 76(1) of the EPBC Act provided that a request for more information in respect of a referral is to be made to the person proposing to take the action.
2. The Department received replies from each of Huon, Petuna and Tassal by 17 September 2012. Each of their replies were in materially identical terms (Ex A1 pp 376-378). That which was received from Huon was as follows:

I refer to your letter of 7 September 2012 notifying that the Department of Sustainability, Environment, Water, Population and Communities (SEWPAC) has received the above referral from the Department of Primary Industries, Parks, Water and Environment (DPIPWE), the state agency with administrative responsibilities for the proposed action, which is being considered under section 69 of the Environment Protection and Biodiversity Conservation Act 1999.

I can advise that Huon Aquaculture Group Pty Ltd (HUON) is fully aware of the referral submitted to SEWPAC by DPIPWE on 29 May 2012 and has had considerable input into the preparation of the referral.

Huon has also been forwarded subsequent correspondence from SEWPAC to DPIPWE, dated 6 June 2012 and 5 July 2012, requesting further information in relation to the proposed action. Again, Huon has had considerable input into the preparation of responses to SEWPAC’s requests.

As requested in your letter of 7 September 2012 please find attached correspondence dated 27 June 2012 and 5 September 2012 which provides further information to address SEWPAC’s requests for further information.

Please do not hesitate to contact Huon should you require further information.

1. It is apparent that none of the “operators” (Huon, Petuna and Tassal) took issue with Mr Tregurtha having referred to them as “proposing to jointly undertake the action”.
2. There is nothing in the materials before the Court to suggest the Minister sought any further information from them.

###### Department submits a Referral Decision Brief to the Minister

1. On 1 October 2012 Mr Tregurtha signed a Referral Decision Brief for the purpose of providing advice to the Minister in relation to the proposed action that had been referred to him for decision. The brief is at Ex A1 pp 431-537.
2. The brief provided to the Minister contained a “Recommended Decision” (Ex A1 pp 435 – 436):

Under section 75 of the EPBC Act you must decide whether the action that is the subject of the proposal referred is a controlled action, and which provisions of Part 3 (if any) are controlling provisions for the action. In making your decision you must consider all adverse impacts the action has, will have, or is likely to have, on the matter protected by each provision of Part 3. You must not consider any beneficial impacts the action has, will have or is likely to have on the matter protected by each provision of Part 3.

The department recommends that you decide that the proposal is not a controlled action for the purpose of the following controlling provisions, provided it is undertaken in the particular manner specified in the notice attached for your signature. The reasons for this recommendation are further detailed below in relation to the relevant protected matters.

* Listed threatened species and communities (sections 18 and 18A);
* The world heritage values of a declared World Heritage property (sections 12 and 15A);
* The heritage values of a National Heritage place (sections 15B and 15C).
1. The advice provided to the Minister specifically with respect to the Maugean Skate in that brief is set out at pp 436 – 437 of Ex A1:

*Maugean Skate (Zearaja maugeana) – Endangered*

The Maugean Skate is a medium-sized skate with a broad, slightly depressed tail, an elongated snout and spatula-like claspers. The species is grey-brown above and dark with dark-edged pores underneath. The species is restricted to two biologically unique estuarine systems in western Tasmania; the Bathurst and Macquarie Harbours. These estuaries are relatively small systems and habitat for this species is generally in shallow water (only about 10% of the harbour). The total area of occupancy for the Maugean Skate is around 100 km², with 60 km$²$in Macquarie Harbour and 40km² in Bathurst Harbour. The total population size is estimated to be approximately 1000 individuals, although this figure is uncertain. The ecology and distribution of the species is not well known, however research suggests that the species is restricted to brackish, estuarine water, 5-7 metres in depth and low in nutrients.

The department considers that the proposed action may potentially impact the species through:

* nutrient loading in the water column from fish feed and fish waste; and
* changes to the benthic environment in the immediate vicinity of each marine farming lease as a result of fish feed and fish waste accumulating on the sediment surface that may be habitat for Maugean Skate.

The department notes that fish feed is a substantial, operational expense and that the proponents have extensive controls in place to prevent its excessive use and waste. Also, fish that have died are regularly removed and stored on land in buried puts, to avoid contamination of the harbour environment.

On 17 September 2012, the proponent [sic] provided additional information about the Maugean Skate, including details of survey efforts in Macquarie Harbour. These surveys include marine farming compliance video monitoring of the seabed that have been conducted since 1997, as well as targeted gillnet surveys carried out in 2003-2004 and 2011-2012. This information states that since compliance-based underwater video assessment commenced, over 1450 spot dives and 18 kilometres of strip transects have been filmed in depths ranging from 3 to 45 metres …

 The most recent gillnet surveys for skate were undertaken for a separate research project by the Institute of Marine and Antarctic Studies which netted 63 individuals in shallow water, in close proximity to existing marine farming activities. Individuals were also netted in popular recreational fishing areas near where the King River enters Macquarie Harbour (an area which is known form historic upstream legacy mining issues and associated water quality contamination). These results indicate the presence of the skate in relatively disturbed areas.

Advice provided by the department’s Marine Division highlighted the need to quantify and minimise impacts to this species. The department considers that the additional information provides a higher level of certainty (in relation to the original referral information) regarding the likely impacts of the proposed action on this species. The information demonstrates that populations are utilising habitat in close proximity to existing marine farming activities and may be resilient to associated water quality changes and benthic impacts.

It is unlikely that the proposed activity will result in the direct mortality of individuals; rather, it may place pressure of the species by potentially reducing the amount of available habitat in the harbour, which appears to be locally confined to shallow waters. The survey data provided by the proponent suggests a level of resilience to nearby marine farming activities, potentially including changes in nutrient levels and changes in the benthic environment. The department believes that this is evidence that with appropriate controls (as per the particular manner requirements), the proposed activity is unlikely to permanently impact suitable habitat.

The idea that the species is resilient to marine farming activities is further supported by data from current marine farming activities, including instances where individuals have been caught directly underneath, or in close proximity to farming operations. It can be assumed that if individuals were sensitive to nutrient loading associated with marine farming, alternative habitat would be favoured, away from existing leases. The department considers this is unlikely to be the case, as there are records from within existing leases. Given individuals have also been caught in popular recreational fishing areas, in close proximity to the Kind River that contains many heavy metals and pollutants associated with legacy mining issues, the department believes that the species is somewhat resilient to both localised and broader water quality changes in Macquarie Harbour.

The department also notes that the proposed activity will primarily occur in waters deeper than 20 metres. The information provided by the proponent [sic], as well as independent research suggests that skate individuals are unlikely to occur in deeper waters. Extensive video monitoring undertaken in Macquarie Harbour has only identified two records in waters deeper than 20 metres, one inside and one approximately 35 metres outside a marine farming lease area.

*Conclusion*

The department recommends that the particular manner requirements at Attachment F be required to ensure that project activities do not have a significant impact on the Maugean Skate. Considering the information provided by the proponent about the presence of individuals in close proximity to existing marine farming activities, and the strict controls recommended by the department, it is very unlikely that project activities will modify, destroy, remove, isolate or decrease the availability or quality of habitat to the extent that the species is likely to decline. **Therefore the department considers that with the recommended particular manner requirements imposed, the proposed action is unlikely to significantly impact the species.**

(Emphasis in original.)

1. The advice provided to the Minister with respect to the World Heritage properties and National Heritage places is set out at pp 441 – 449 of Ex A1:

*Tasmanian Wilderness World Heritage Area*

The proposed marine farming activities are to be undertaken within close proximity to the Tasmanian Wilderness World Heritage Area, which was listed in 1982 for both its natural and cultural {indigenous) outstanding universal values. The listed area was extended in 1989 in recognition of additional natural values, extended again to include 21 adjacent formal reserves in 2010, and to include the Southwest Conservation Area (Melaleuca to Cox Bight) in July 2012.

The proposed expansion of marine farming is contained within Macquarie Harbour. The proposed project borders the Tasmanian Wilderness World Heritage Area, with the nearest proposed marine farming zone and associated lease being approximately 375 m and 520 m respectively from the World Heritage area boundary. No proposed terrestrial activities are immediately adjacent to the Tasmanian Wilderness World Heritage Area.

The National Heritage values of this property are taken to be the same as those of the World Heritage property. The values most relevant to this proposal include:

* undisturbed river systems which show particular geomorphological processes;
* ecosystems which are relatively free of introduced plant and animal species: and
* undisturbed catchments, lakes and streams.

Listed natural and cultural heritage values of the Tasmanian Wilderness World Heritage Area which have the potential to be impacted include the relatively undisturbed nature of the property (as represented by the near-natural waterways of that part of Macquarie Harbour within the World Heritage Area), the population of the Maugean Skate (an ancient taxon with Gondwanan links) and other endemic fauna, including benthic taxa and ecosystems that are almost free of introduced species.

*Potential impacts on the Tasmanian Wilderness World Heritage Area from changes to water quality*

The department notes that there is the potential that proposed activities will impact on values of the Tasmanian Wilderness World Heritage Area. Potential impacts may result from changes to water quality as a result of nutrient loading in the water column and benthic changes that may also affect threatened species habitat.

Information provided by the Tasmanian Government states that operators will develop a water quality monitoring program and establish water quality limits. Monthly water quality data has been collected since September 2011 and the model developed for the State assessment process will be recalibrated during the first review cycle of an adaptive management framework using at least 12 months of water quality data within the harbour. The department notes the importance of maintaining an adaptive framework where modelling is based on substantial baseline information (at least 12 months). These requirements are recommended in the particular manner notice at Attachment F.

Referral information states that the monitoring program will involve continued assessment of the water quality indicators ammonia, nitrate and dissolved oxygen at 11 sites throughout the harbour (including the Tasmanian Wilderness World Heritage Area). Sites will be set until mid 2013 after which specific locations will be reviewed. State marine farming licences will require quarterly reporting and interpretation of the results of the water quality monitoring program. The department considers that this proposed approach is reasonable, as it is appropriate and desirable that the model is adaptive and reviewed regularly as additional information becomes available. The department also considers that the reporting and interpretation requirements of state marine farming licences are adequate, in relation to the protection of protected matters.

Referral information confirms that water quality limits will be based on the 80th/20th percentile values of the water quality indicators based on the predictive biogeochemical and hydrological model outputs (the model developed to assess the proposed action at the State level). This process is generally in accordance with the ANZECC Guidelines 2000. The tables below describe the key water quality limits to be applied, at depths of 2 metres and 20 metres.

|  |  |  |
| --- | --- | --- |
| **Indicator** | **Percentile** | **Limit** |
| Ammonia (at 2 metres) | 80th | 0.033mg/L |
| Ammonia (at 20 metres) | 80th | 0.024mg/L |
| Nitrate | 80th | 0.024mg/L |
| Oxygen | 20th | 6.82mg/L |

The proponents state that the above limits for ammonia are significantly below the level of 0.460mg/L outlined by Batley and Simpson (2009) as representing a low risk of acute or toxic effects in a slightly to moderately disturbed system. Given that nitrate is much less toxic than ammonia, the Canadian Water Quality Guidelines: Nitrate Ion, Scientific Criteria Document (2012) recommends a long-term exposure guideline of 45mg/L for nitrate for the protection of temperate marine species. The interim nitrate levels above are much less than this. Finally, for oxygen, the interim limit level is well above that recommended by the US Environment Protection Authority as a safe/low risk chronic protective value.

Comments provided by the department's Supervising Scientist Division further support the view that the justification for setting each limit appears reasonable overall. In particular, the guidelines used appear appropriate and reasonable as to the method for setting limits. These have been based on local water quality data in Macquarie Harbour as opposed to the more general ANZECC Guidelines 2000 approach for South-East Australia. The department is therefore confident that the limits and methods outlined above are appropriate and reasonable given the risk of the proposed activities to protected matters. These requirements are recommended in the particular manner decision notice at Attachment F.

In the event that a limit identified above is breached, the proponents have confirmed that they will implement immediate corrective targeted management actions. These actions will include:

* reduction in biomass,
* reduction in nitrogen output, or
* redistribution of biomass.

The department considers the above corrective targeted management actions are appropriate to manage water quality related risks of the proposed activities to protected matters. For example, the recommended particular manner requirements at Attachment F state that:

* If the water quality monitoring program identifies that the rolling annual median value for any of the water quality indicators ammonia, nitrate and dissolved oxygen, within the compliance region, exceed the identified limit levels and that this is attributable to marine farming operations, targeted management responses must be implemented within 10 weeks of the most recent quarterly monitoring report;

Targeted management actions must be undertaken until the monitoring assessment of the water quality indicators ammonia, nitrate and dissolved oxygen identifies that the identified limit levels are not being exceeded ...

[References to other impacts not considered to require manner provisions have been deleted]

*Conclusion*

The department considers that the primary risk to the Tasmanian Wilderness World Heritage Area from the proposed action is from changes to water quality. This may occur through nutrient loading in the water column and possible benthic impacts as a result of fish feed and fish waste settling on the sediment surface. The department considers that the proposed monitoring program, adaptive modelling program, proposed trigger levels and targeted management responses appear adequate given the risk the proposed activities pose to protected matters.

The department considers that the proposed trigger levels to prevent changes to water quality are below toxic levels and have been determined using an appropriate methodology that considers both ANZECC Guidelines 2000 and other material as appropriate (such as the Environment Canada ecotoxicological-based Guidelines and information from the US Environment Protection Authority).

The department is confident that the recommended particular manner requirements will ensure that the proposed activities do not cause:

* one or more of the World Heritage values to be notably altered, modified, obscured or diminished,
* one or more of the World Heritage values to be degraded or damaged; or
* one or more of the World Heritage values to be lost.

**Considering the information discussed above, the department considers that with the recommended particular manner requirements, the proposed action is unlikely to result in a significant impact on any World Heritage value of the Tasmanian Wilderness World Heritage Area. For the same reasons, the proposed action is unlikely to result in a significant impact on any National Heritage value of the Tasmanian Wilderness World Heritage Area National Heritage Place.**

(Emphasis in original.)

##### The Minister’s decision

1. It is uncontentious that the Minister made a decision or purported to make a decision that the proposed action was not a controlled action if undertaken in a particular manner. In making his decision, the Minister signified that he had considered the information in the brief and attachments provided by the Department; that he agreed with the recommended decision; and that he accepted the reasoning in the departmental briefing package as the basis for his decision (Ex A1 p 540). Given those explicit statements, the Court is entitled to proceed on the basis that the advice provided by the Department, and the reasoning underpinning it, was adopted by the Minister.
2. Having made his decision that the action was not a controlled action because he believed that three relevant provisions of Pt 3 of the EPBC Act (World Heritage properties, National Heritage places and listed threatened species or endangered communities as set out in ss 12, 15B and 18 respectively) were not controlling provisions for the action because he believed they would be taken in a particular manner, the Minister became subject to the obligations provided for in s 77A of the EPBC Act to set out, in the notice prescribed by s 77, his component decision, identifying the provisions which otherwise would be controlling provisions and the manner in which he believed the action would be taken such that it would not be a controlled action.

##### Terms of s 77 Notice

1. The notice given pursuant to s 77 of the EPBC Act (the **s 77 Notice**) was signed by the Minister on 3 October 2012 (Ex A1 pp 541-547). It states that the proposed action, being “[t]he expansion of marine farming operations in Macquarie Harbour, on the west coast of Tasmania,” is not a controlled action “provided it is undertaken in the manner set out in this decision”.
2. The manner provisions therein were as follows:

The following measures must be taken to avoid significant impacts on:

* World Heritage properties (sections 12 and 15A);
* National Heritage places (sections 15B and 15C); and
* Listed threatened species and communities (sections 18 and 18A).

To ensure there are no significant impacts to the **Maugean Skate** or to the **Tasmanian Wilderness World Heritage Area**, the person taking the action must undertake the action in accordance with the **Macquarie Harbour Marine Farming Development Plan October 2005**. In particular, the person taking the action must undertake the following measures:

1. To ensure there are no significant impacts to the **Maugean Skate** as a result of changes to the benthic environment, the person taking the action must:

a. Take measures to prevent **substantial benthic visual**, **physio-chemical** or **biological changes** attributable to marine farming operations at, or extending beyond 35 metres from the boundary of any **lease area**;

b. Undertake a baseline environmental survey of all **new lease areas** and **compliance sites** prior to commencement of marine farming operations;

c. Undertake a **benthic video assessment** of **lease areas** and **compliance sites** in accordance with **marine farming licence conditions**;

d. If a **substantial benthic visual, physio-chemical** or **biological impact** is detected as a result **of benthic video assessment, targeted management responses** must be implemented within 10 weeks of the assessment;

e. Following any **targeted management responses** undertaken in accordance with 1(d) relating to a **substantial benthic visual impact** within a **lease area,** a follow up **benthic video assessment** must be undertaken at the **lease areas** prior to restocking;

f. Following any **targeted management responses** undertaken in accordance with 1(d) relating to a **substantial benthic visual, physio-chemica**l or **biological impact** at a **compliance site**, a follow up **benthic video assessment** must be undertaken at the **compliance site** to monitor benthic recovery within four months of the **targeted management response**; and

g. 1(e) and 1(f) must be undertaken until the **benthic video assessment** identifies that a **substantial benthic visual**, **physio-chemical** or **biological impact** is no longer occurring.

2. To ensure there are no significant impacts on the **Tasmanian Wilderness World Heritage Area** and the **Maugean Skate** as a result of water quality changes, the person taking the action must:

a. Undertake a water quality monitoring program for the assessment of the water quality indicators ammonia, nitrate and dissolved oxygen at the **monitoring sites** in accordance with **marine farming licence conditions**. Monitoring must occur at these monitoring sites on a monthly basis until 30 June 2013, when the number and location of monitoring sites will be reviewed;

b. Take measures to prevent the **rolling annual median value** of quarterly water quality indicator values for ammonia, nitrate and dissolved oxygen, as recorded within the **compliance region**, from exceeding the identified **limit levels**;

c. If the water quality monitoring program identifies that the **rolling annual median** value for any of the water quality indicators ammonia, nitrate and dissolved oxygen, within the **compliance region**, exceed the identified **limit levels** and that this is attributable to marine farming operations, **targeted management responses** must be implemented within 10 weeks of the most recent quarterly monitoring report;

d. Following any **targeted management responses** undertaken in accordance with 2(c), a follow up monitoring assessment of the water quality indicators ammonia, nitrate and dissolved oxygen must be undertaken at the **monitoring sites** to monitor water quality recovery within four months of the **targeted management response**;

e. 2(c) and 2(d) must be undertaken until the monitoring assessment of the water quality indicators ammonia, nitrate and dissolved oxygen identifies that the identified **limit levels** are not being exceeded; and

f. The total biomass held across all **lease areas** must not exceed 52.5 percent of the modelled **maximum sustainable biomass** until limit levels are reviewed in mid 2013, and must not exceed any such altered levels as may be identified thereafter by the **Tasmanian Government**.

3. To ensure there are no significant impacts on the **Tasmanian Wilderness World Heritage Area,** including as a result of changes to viewfields, the person taking the action must:

a. Undertake marine farming debris cleanup activities within Macquarie Harbour at regular intervals of every 12 months at a minimum. Marine debris cleanup activities must also occur on an as needs basis when members of the public or other stakeholders notify the person taking the action of areas, within Macquarie Harbour, requiring particular attention. These activities must be conducted in accordance with any applicable biosecurity control requirements and regulations, including relevant management guidelines relating to *Phytophthora cinnamomi* and Chytrid fungus (*Batrachochytrium dendrobatidis*), to prevent the spread of weeds or pathogens into the **Tasmanian Wilderness World Heritage Area**; and

b. Ensure that all fish cages, buoys, netting and other floating marine structures and equipment, other than that required for navigational purposes, are grey to black in colour, or as otherwise specified in the **marine fanning licence conditions**.

**Definitions**

**Benthic video assessment** must be undertaken in accordance with the video assessment specifications as prescribed in marine farming licence conditions.

**Compliance sites** means a location 35 metres outside of any **lease areas** used for monitoring purposes. At least one compliance site must be identified and monitored for each of the **lease areas**.

**Compliance region** means monitoring sites 4, 6, 8, 9 and 10 identified in Attachment 1, or any other group of sites as prescribed in marine farming licence conditions.

**Lease area** means marine farming leases granted under the provisions of the Marine Farming Planning Act (Tas) 1995 within the area defined in the **Macquarie Harbour Marine Farming Development Plan October 2005.**

**Limit levels** for water quality indicators are set at the following interim levels:

* Ammonia (at 2 metres depth) = 0.033 mg/L
* Ammonia (at 20 metres depth) = 0.024 mg/L
* Nitrate (at 2 metres depth) = 0.053 mg/L
* Oxygen (at 2 metres depth) = 6.82 mg/L

Interim limit levels will be reviewed in mid 2013. Subsequent modifications to limit levels as a result of future reviews must be prescribed in marine farming licence conditions.

**Marine farming licence conditions** means conditions prescribed in marine farming licences issued pursuant to the *Living Marine Resources Management Act (Tas) 1995* relating to lease areas.

**Macquarie Harbour Marine Farming Development Plan October 2005** means the plan approved under the *Marine Farming Planning Act (Tas) 1995* and includes Amendment No.1 to the **Macquarie Harbour Marine Farming Development Plan October 2005** and future amendments.

**Maugean Skate** means *Zearaja maugeana*, listed as endangered under the *Environment Protection and Biodiversity Conservation Act 1999.*

**Maximum sustainable biomass** is currently modelled to be 29,500 tonnes.

**Monitoring sites** means the 11 water quality monitoring sites identified in Attachment 1.

**Rolling annual median value** is the median of the quarterly values from sites within the **compliance region**, updated quarterly, or as otherwise prescribed in **marine farming licence conditions**.

**Secretary** means the Secretary of the department administering the *Marine Farming Planning Act (Tas) 1995* and the *Living Marine Resources Management Act (Tas) 1995*.

**Substantial benthic visual impact at a compliance site** may include:

* the presence of fish feed pellets on sediment surface;
* the presence of bacterial mats (e.g. *Beggiatoa spp*.) on sediment surface;
* the presence of gas bubbling arising from the sediment, either with or without disturbance of the sediment;
* the presence of numerous opportunistic polychaetes (e.g. *Capitella spp., Dorvilleid spp.*) on the sediment surface.

Or as otherwise prescribed in marine farming licence conditions.

**Substantial benthic visual impact** within a lease area may include:

* Excessive feed dumping;
* extensive bacterial mats (*e.g. Beggiatoa spp*.) on the sediment surface prior to restocking;
* spontaneous gas bubbling from the sediment.

Or as otherwise prescribed in marine farming licence conditions.

**Substantial benthic physio-chemical impact** at a compliance site may include:

* a corrected redox value which differs by more than 10 percent from the reference site(s) and baseline conditions or is < 0mV at a depth of 3 cm within a core sample;
* a corrected sulphide level which differs by more than 10 percent from the reference site(s) and baseline conditions or is >250 µM at a depth of 3 cm within a core sample.

Or as otherwise prescribed in marine farming licence conditions.

**Substantial benthic biological impact** at a compliance site may include:

* a 20 times increase in the total abundance of any individual taxonomic family relative to reference sites;
* an increase at any compliance site of greater than 50 times the total Annelid abundance at reference sites;
* a reduction in the number of families by 50% or more relative to reference sites complete absence of fauna.

Or as otherwise prescribed in marine farming licence conditions.

**Targeted management responses** may include a direction by the **Secretary** to undertake one or more of the following actions:

* reduction in biomass;
* reduction in nitrogen output;
* redistribution of biomass.

**Tasmanian Government** means the Tasmanian Agency responsible for administering and regulating the **Macquarie Harbour Marine Farming Development Plan October 2005.**

**Tasmanian Wilderness World Heritage Area** means the World Heritage listed property and National Heritage listed place.

(Emphasis in original.)

1. Pursuant to s 77(4) of the EPBC Act,a person who has been given notice of a referral decision has 28 days within which to request reasons from the Minister. The Minister must provide written reasons “as soon as practicable, and in any case within 28 days of receiving the request”. No such request was made.

##### The events that followed the Minister’s decision

###### Limits to the relevance of any facts post the date of decision

1. Mr Galasso properly eschews any reliance on the events which occurred after the date of the Minister’s decision to establish its invalidity. He accepts, and the Court proceeds on the basis that, the validity of the Minister’s decision is to be determined as at the point in time immediately after its making.
2. Mr Galasso nonetheless submits that the Court should not “determine the matter of breach by reference to the facts ex post facto, but the facts ex post facto demonstrate that the submissions we make are not hypothetical, theoretical or divorced from the real world” (transcript p 94 lines 38-44). So expressed, that proposition is uncontentious (no submission was advanced to controvert it) so long as it is firmly kept in mind that the Court is not entitled to determine the validity or otherwise of the Minister’s earlier decision through the lens of how events later unfolded. To take an obvious example: the fact, if it be the fact, that DPIPWE may not have complied with an undertaking it had given and upon which the Minister had relied does not establish that the Minister had no basis for believing that that undertaking would be met.
3. However, I accept Mr Galasso’s submission that subsequent events must be relevant to the discretionary case all of the respondents plead against Huon, not the least in relation to Huon’s reasons for delay (transcript p 94 lines 31-38). For that reason I set out a summary of those events.

Huon, Petuna and Tassal confirm that they will undertake the action in accordance with the manner provisions and commence expanding their fish farming operations

1. On 3 October 2012 the Minister wrote to each of Huon, Petuna and Tassal to advise them of his decision (Ex A1 pp 548-560). He sought their confirmation that the action would be undertaken in the manner set out in “the enclosed decision”. I infer that to be a reference to the s 77 Notice. He sought their undertaking that they would report within three months on their progress in implementing the measures. He advised that his Department had an active audit program to ensure there was a high degree of compliance with decisions made in relation to such proposals.
2. On 17 October 2012 Mr Peter Bender, Managing Director of Huon, replied to the Minister’s letter advising that “Huon Aquaculture Company wishes to confirm that the action will be undertaken in the manner set out in the enclosed decision as requested in that correspondence”. It is uncontentious that each of Petuna and Tassal did likewise.
3. The three operators each then took steps to expand their fish farming operations in Macquarie Harbour pursuant to the decision.
4. However, the evidence before the Court establishes that rather than taking that action jointly, differences as to how the decision should be given effect to soon thereafter emerged as between them.

Mid 2013 passes without new biomass limits being identified and set by the Tasmanian Government

1. The Minister’s referred to the total biomass limit for Macquarie Harbour in manner provision 2(f) as follows:

The total biomass held across all lease areas must not exceed 52.5 percent of the modelled maximum sustainable biomass until limit levels are reviewed in mid 2013, and must not exceed any such altered levels as may be identified thereafter by the Tasmanian Government.

(Emphasis omitted.)

1. It is uncontentious that a new total biomass limit was neither identified nor set until 9 October 2015 (evidence of Linda Sams, transcript p 302 line 40 – p 303 line 10).

Conflict arises regarding review

1. Whether a review for the purpose of setting a new total biomass limit was ever completed became the subject of conflict between the companies. In that regard, evidence in these proceedings was adduced by three witnesses: Mr Peter and Ms Frances Bender for Huon, and Ms Linda Sams for Tassal.
2. What is not in dispute is that in October 2013 the three operators jointly prepared a report titled “Review of the Macquarie Harbour Amendment Management Framework & Processes, Industry Report, Model Calibration Validation and Trigger Limit Review” which was then provided to DPIPWE (Ex A3 pp 38-65) (**Industry Report**). The Executive Summary of that document includes the following (Ex A3 p 43):

… [I]ndustry recommends that the current interim triggers be adopted as the confirmed triggers for Macquarie Harbour.

1. However, although senior employees of Huon had been engaged in the preparation and approval of that document, Huon did not accept that the review process was complete at that point. Huon took the position that the review envisioned by manner provision 2(f) of the s 77 Notice was required to be signed off on by its “Steering Committee”, which included the Chief Executive Officers of each of Huon, Tassal and Petuna. Ms Bender (one of Huon’s directors) gave evidence that the review had been circulated in draft form only (transcript p 146 lines 19-20).
2. Ms Bender’s evidence was that the review of the biomass limit had “been paused” prior to the Industry Report being submitted to the Steering Committee for sign off after it had become known that the dissolved oxygen levels in the harbour were trending down. Ms Bender’s evidence was that a “Dissolved Oxygen Working Group” had been established to advise the operators (transcript p 145 lines 15-16; p 146 lines 18-46).
3. Mr Peter Bender is and was at all material times not only a director but also the Chief Executive Officer of Huon. He was cross-examined by Mr McElwaine SC regarding the conclusions of the Industry Report as appeared under the heading “Review of Trigger Limits” (Ex A3 p 62). Mr Bender conceded he had concurred with the Industry Report’s conclusions and the recommendations on the following page as at the time of its preparation. However, Mr Bender maintained that the Industry Report had been submitted in draft form only (transcript p 220 line 31 – p 224 line 36). It had never been submitted to the Steering Committee for adoption.
4. Ms Linda Sams, Head of Sustainability for Tassal, gave evidence that Tassal’s understanding had differed from that of Mr and Ms Bender. In her affidavit (Ex T6), Ms Sams deposed as follows:

16. In October 2013, Dr Main, on behalf of the TSGA submitted to DPIPWE a report, jointly prepared by Tassal, Huon and Petuna titled: ‘*Review of the Macquarie Harbour Amendments Management Framework & Processes, Industry Report, Model Calibration Validation and Trigger Limit Review*’ (the Review Report). A true copy of the email from Dr Main, which attaches the Review Report, is at annexure “FRB-2” of the Affidavit of Frances Bender made on 15 November 2017.

17. In order to compile the Review Report, various meetings were held between, and correspondence passed, from persons appointed by each of Tassal, Petuna and Huon. I was the responsible and appointed representative of Tassal. Mr David Whyte and Mr Dom O’Brien were the appointed representatives of Huon. Mr Lance Searle was the appointed representative of Petuna. Each of us collaborated with Dr Main.

18. We met on many occasions, we exchanged information and we ultimately settled upon and agreed with the content of the Review Report. I was not advised at any stage during the process which led to the production of the Review Report by either Mr Whyte or Mr O’Brien, that its content or methodology was not approved of by Huon.

19. Individuals from each Huon, Petuna and Tassal had input to the drafting of the Review Report, and were responsible for authorship of aspects of it. It was a collaborative process.

20. Shortly before finalisation of the Review Report I attended a meeting at the offices of DPIPWE in Hobart on 3 September 2013. The purpose of the meeting was to present the findings of the Review Group and to seek input from DPIPWE before submission of the final report. The meeting was held at Level 3, 1 Franklin Wharf Hobart. I recall that the following persons, at least, were present:

* David Whyte and/or Dom O’Brien from Huon;
* Lance Searle from Petuna;
* Myself;
* Adam Main, TSGA;
* Fionna Bourne, DPIPWE

21. The industry representatives presented an agreed powerpoint document titled: *‘MH Recalibration’* prepared by two firms, Aquadynamic Solutions and DHI. I attach at ‘5’ an extract from that document comprising the executive summary, outline and introduction.

22. A subsequent meeting was held on 16 September 2013, again at the offices of DPIPWE, to discuss the final draft of the Review Report. Mr Whyte and/or Mr O’Brien attended from Huon, and I attended. There were other attendees, whom I do not precisely recall. The outcome of this meeting was that final agreement was reached as to the terms of the Review Report and that Dr Main would then submit it to DPIPWE.

1. Ms Sams gave evidence during examination-in-chief that “[i]t was a final version that was distributed on 14 February 2013” (transcript p 296 lines 15-16).
2. In cross-examination, Mr Galasso asked Ms Sams about the steps that had been required for the completion of the review:

[MR GALASSO:] … [T]his document [Ex T5] was set up for the purposes of the very thing that determination 2(f) was contemplating, wasn’t it?---It was part of what it was set up for, yes.

Yes. The scope, on the same page, has a table formed with five numbered boxes. See that?---Yes.

The project is complete when all of the steps is completed; correct?---Yes.

The review report, at best, was step 3; correct?---Yes.

Step 4 review biomass. And tell me what the acronym means. Total - - - ?---Total permissible dissolved nitrogen output.

That was never completed, was it?---No, not for this project.

Did Graham Wood or Tony Thomas sign off on it?---No.

“Review the project and develop future management strategy statement”. Was that ever done?---I suppose at later dates we were given biomass determinations.

But not when Tassal went and started importing additional smolt into the harbour on the back of its construction of what the review did, was it?---No. It wasn’t done under this process.

…

And I mentioned at the outset that you were a member of the steering committee and you were also a member of the project team?---Yes.

The steering committee also comprised of the Chief Executive Officers of each of Huon, Tassal and Petuna; correct?---Yes. That’s correct.

And one of them, Mr Bender, gave evidence yesterday?---Yes.

Any you will recall yesterday he gave evidence about the need to sign off on the matter?—On the – which matter?

Well, what did you understand him to be giving evidence concerning a sign-off?---He was giving evidence regarding the sign-off of the water quality review.

All right. That’s as you understood it?---That’s as I understood his evidence, yes.

Okay. Can you go to – and we established before the morning tea adjournment that this whole document was about what it’s labelled, the review of the management framework and processes; correct?---Correct.

And as his Honour sees in page 4 under the hearing Stakeholder Management and Communication, the very last sentence;

*Completion of the project will require a final briefing to the project sponsor and the steering committee.*

…

That never occurred, did it?---No, not for the project, no.

No. And Mr Bender and your CEO, Mark Ryan, and Mr Porter, the then CEO of Petuna, were members of the steering committee?---Yes.

…

And you will recall earlier we looked at box 4, that is the review of biomass and TPDNO levels by either Graham Woods or Tony Thomas. That step was on page 1 and it’s also on page 7 in the appendix. That was not done at any time before Tassal increased its biomass within the harbour, was it?---No, that step was – I’m not aware of that step being done.

(transcript p 311 line 1 - p 314 line 14)

Tassal proceeds on the basis that the limit on total biomass to be held across all leases had ‘fallen away’ because the Tasmanian Government had not identified any altered level after it had been provided with the Industry Report

1. For the purpose of these reasons, it is unnecessary for the Court to make findings about whether Huon or Tassal was correct regarding the status of the Industry Report. It is sufficient to record that thereafter, Tassal proceeded unilaterally on the basis that the review envisioned by manner provision 2(f) had been completed. On that understanding, DPIPWE not having thereafter set any revised total biomass limit, Tassal reasoned and acted on the premise of its reasoning, that it was entitled to conduct its marine farming operations in the lease areas it held in Macquarie Harbour on the basis that the total biomass limit referred to in manner provision 2(f) in the s 77 Notice had expired.
2. In her affidavit Ms Sams deposed as follows (Ex T6):

23. … My state of mind was that the 52.5% cap was not in place for the 2014 year because it had been interim until the Commonwealth conditions were met. My state of mind at the time was that the biomass cap was no longer relevant because of the work done, the recommendations and conclusions of the Review Report submitted in October 2013. But that is why, in the next dot point, the minutes record that the AMAMG could not reach consensus on an approach to mitigate the predicted breach of the 52.5% restriction, due to my view that it was not in place and the point which I made was that the whole harbour would be above 52.5%, not Tassal alone. That is because it was a whole of harbour interim biomass cap.

1. Ms Sams gave evidence that Tassal had understood and applied that manner provision on the premise that the 52.5% biomass limit referred to by the Minister in that provision had “fallen away” as from the time the Industry Report had been submitted to DPIPWE (transcript p 311 lines 10-13). She accepted that Petuna and Huon had not shared that view.
2. During cross-examination, Ms Sams gave the following evidence:

[MS SAMS:]…[T]he other two companies, Huon and Petuna, were putting additional fish in. Tassal had always been very transparent from the beginning of the process that we were going to use 100 per cent of our lease from the beginning because we had the smolt capacity and we had the capital capacity. That was always very transparent. It was very transparent to the government as well. I merely stated a fact because I didn’t agree with the interpretation of the other two companies on the – of their interpretation of the decision and at that time they were under the impression that each company was to have 52.5 per cent and I said no, it’s a whole of harbour percentage - - -

Yes? - - - and as we proceed as we’ve all discussed for many months and years in that matter, that we would start to go over 52.5 per cent and I said and in fact, it has fallen away because we’ve met our obligations under the decision.

And when you asserted that it had fallen away, this is in 2013?---Yes.

The other two corporations disagreed with you, didn’t they?---They did.

They said, “No, the 52.5 per cent is still in place”?---That’s what they said.

Yes?---Yes. They wanted it to be in place.

(transcript p 304 line 46 – p 305 line 19)

Tassal unilaterally increases its smolt input to 100% of its allocated quota

1. Tassal was sufficiently well resourced to be able to increase its smolt input to 100% of its allocated quota. Having formed the view that the interim biomass limit had ceased to apply, Tassal took advantage of that opportunity to do so (transcript pp 304-305).
2. Ms Sams did not dispute that Tassal’s action in that regard had the consequence that the other operators could not take up a proportionate increase in their allocated quotas if the total biomass in Macquarie Harbour was not to exceed what, on the other operators’ view, remained the total biomass limit provided for by manner provision 2(f) as was binding unless and until altered by the Tasmanian government.
3. Ms Sams however denied that Tassal’s conduct in rapidly increasing the stocking levels of its leases had been inconsistent with the statement Tassal had joined with the other companies in making in their joint EIS (Ex A2 p 121):

The basis for the sustainable management of the industry in the harbour is to be provided through rigorous monitoring, firstly for harbour-wide effects and secondly for between and within fish farm effects. This acknowledges that there will be a gradual increase in overall production in the harbour and that the presently modelled maximum or final model scenario will not be reached within the first five years of operation of the new lease areas. The results obtained from the monitoring have been and will continue to be the basis for modelling the effects of farming operations on both the harbour-wide and fish farm scales and will enable comparison to future “trigger levels” which in turn will be based on the best possible science available at the time.

1. Ms Sams’ evidence in that regard was that the regulators would have been looking at the “whole harbour gradual increase because they had everybody’s information … and we were only one of three” (transcript p 321 lines 30-31). By way of clarification, counsel for Tassal, Mr McElwaine later submitted as follows:

Now, that begs the question, what was the presently modelled maximum? Well, we all know that was 29,000 tonnes. That comes out of the EIS, that’s the modelling. But then we apply that to the lease areas. We find these figures in Ms Sams’ affidavit. Under the amendments Petuna acquires 416 hectares, Tassal 280 and Huon 230. So as a percentage of the whole Tassal is 30.24 per cent of the entire area.

Thus, if Tassal increases to 100 per cent – now, 100 per cent is 35 tonnes per hectare, one sees that at appeal book page 19 – if it went to 100 per cent on day one, and the others didn’t follow suit until years after the event – I will take your Honour to the evidence about this – then that statement is perfectly correct. There is nothing misleading in that statement. Because on a whole of harbour analysis the 29,000 maximum modelled figure will not be reached unless and until Petuna and Huon stock to the maximum tonnage of 35 tonnes per hectare. So one operator doing it over 280 hectares is not the equivalent of – sorry, is not inconsistent with the proposition that the presently modelled maximum will not be reached within the first five years.

(transcript p 453 line 43 – p 454 line 10)

1. Mr McElwaine further drew the Court’s attention to pp 255 and 260 of the EIS to indicate that Tassal had made plain to DPIPWE and the Minister its specific intention to increase production as soon as it could. In particular, Mr McElwaine noted the description of Tassal in the context of its proposed use of Zone 9 (at p 255):

Tassal wishes to grow its business in a sustainable manner that aligns with the whole of industry growth strategy. Macquarie Harbour is a desirable region to grow salmon and [it] has the capacity to support additional lease areas …

Tassal has the deep economic and sustainable capability which the EDP is seeking. Tassal has a strong and robust balance sheet and is committed to continuing to contribute to the future and prosperity of the State…

…Tassal has the infrastructure, human resources and financial resources to immediately develop a new site in Macquarie Harbour.

Huon and Petuna request DPIPWE to immediately impose a total biomass limit

1. I find that Tassal’s conduct came as a surprise to the other two operators. On 20 August 2014 Huon and Petuna made a joint representation to DPIPWE. They expressed concern that there was an urgent need to enforce biomass limits to protect the health of the harbour. They wrote as follows (Ex A3 pp 77-80):

The purpose of this letter is to:

(a) outline our concerns in relation to certain environmental and fish health indicators in Macquarie Harbour;

(b) notify you that we believe that Tassal Operations Pty Ltd (Tassal) has stocked its marine farm leases in Macquarie Harbour to a level that has the potential to create significant environmental harm and negatively impact fish health; and

(c) request that the Department directly regulates the maximum carrying capacity of fish within each marine farm lease in Macquarie Harbour by updating the marine farm license conditions applicable to Tassal, Huon Aquaculture Group Pty Ltd (Huon) and Petuna Pty Ltd (Petuna).

1 **Salmon industry**

The Tasmanian salmonid industry is now worth in excess of half a billion dollars annually and is Australia’s biggest fish species by value and volume.

Our industry has the potential to keep growing sustainably to meet demand, reaching a billion dollars annually within a reasonably short time frame.

Huon and Petuna represent more than 50% of salmonid production in Tasmania and in Macquarie Harbour hold almost 70% of the leasable area.

All of this is put in jeopardy if we do not farm sustainably.

**2 Current regulation of activities within Macquarie Harbour**

Currently, Huon, Petuna and Tassal undertake fish farming activities in Macquarie Harbour. In doing so, each company is required to undertake its activities in accordance with:

(a) the marine farm licence conditions issued by the Department of Primary Industries, Parks, Water and Environment (Department) in accordance with the *Living Marine Resources Management Act* 1995 (Tas) (Marine Farm Licence);

(b) referral decision EPBC 2012/6406 issued to Huon, Petuna and Tassal in accordance with the *Environment Protection and Biodiversity Act* 1999 (Cth) (EPBC Decision); and

(c) the Area Management Agreement dated December 2012 between Tassal, Huon and Petuna (AMA).

Macquarie Harbour is an enclosed body of water with a small outlet to the sea. The turnover of new water coming into Macquarie Harbour is limited compared to more exposed marine sites.

As a result, there has always been a fundamental understanding that Huon, Petuna and Tassal are effectively farming fish on a single site within Macquarie Harbour due to the enclosed nature of the water body and the proximity of leases between companies.

The AMA was entered into to provide Government the confidence that the three companies established agreed principles for sustainable production and a process for considered expansion in Macquarie Harbour.

In addition to this, section 2(f) of the EPBC Decision states that due to environmental concerns:

*“The total biomass held across all lease areas must not exceed 52.5 percent of the* ***modelled maximum sustainable biomass*** *until limit levels are reviewed in mid 2013, and must not exceed any such altered levels as may be identified thereafter by the Tasmanian Government”*

The maximum sustainable biomass is defined under the EPBC Decision as 29,500 tonnes but the companies are currently collectively restricted by section 2(f) of the EPBC Decision to 52.5% of this number, being 15,488 tonnes (Current Maximum Capacity).

It was the expectation that each company’s proportion of the Current Maximum Capacity would be reflected in each company’s Marine Farm License - this was to be determined on the basis of each company’s proportion of the total leasable area in Macquarie Harbour. If this is allocated on a collective basis it makes it very difficult to effectively control. It is only workable if each company is allocated 52.5% under licence conditions with the ability to formally trade unused biomass, as suggested by Wes Ford. This enables all companies to manage their own biomass with certainty that the collective biomass will not be exceeded without prior knowledge of other Parties forecast biomass growth.

Under this formulation, the maximum carrying capacity applicable to each company would be as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Party** | **Total Leasable Area (hectares)** | **Percentage of Total Leasable Area** | **Current Maximum Capacity across harbour (tonnes)** | **Maximum carrying capacity for each company (tonnes)** |
| Huon | 230 | 24.9% | 15,487.50 | 3,856.4 |
| Petuna | 414 | 44.8% | 15,487.50 | 6,938.4 |
| Tassal | 280 | 30.3% | 15,487.50 | 4,692.7 |
| Total | 924 | 100% | 15,487.50 | 15,487.50 |

To date, the individual Marine Farm Licences have not been amended by the Department to reflect the above maximum carrying capacity for each company.

We are writing to request that the Department urgently amend each Marine Farm Licence to reflect the above allocations – this is to ensure that the EPBC Decision limits are enforced and each aquaculture industry participant is aware of relevant individual limits to ensure production remains at sustainable levels.

**3 Macquarie Harbour**

Growth of the aquaculture industry in Macquarie Harbour has been predicated on ongoing monitoring and adaptive management pursuant to an initial comprehensive Environmental Impact Statement (EIS).

Over the last few years we have observed a number of changes occurring in the Macquarie Harbour environment, not least of which is a sustained downward trend in dissolved oxygen levels at depth.

The EIS and EPBC Decision highlighted concerns that if too many fish are grown in Macquarie Harbour, salmonid farming may upset the ecological balance.

This could lead to even lower oxygen conditions and thus create a poor environment in which to grow fish.

In response to these concerns the aquaculture industry established a working group and commissioned a study by CSIRO and IMAS to investigate the possible contributing factors involved.

A draft report of this study has been completed and will be finalised soon.

Regardless of attribution, the conditions currently experienced are not conducive to good fish health. Both Huon and Petuna believe that increasing farmed fish numbers in these circumstances would be irresponsible.

Until both the Tasmanian Government and the industry better understand the reason for this disturbing development, it is our firm belief that we should take a responsible approach and self-regulate such that no production above the Current Maximum Capacity should be permitted in Macquarie Harbour.

The consequences of any increase could be catastrophic and extremely difficult to remediate.

**4 Tassal activities**

On 13 August 2014, a motion was passed at the Tasmanian Salmon Growers Association (TSGA) Board Meeting agreeing to maintain the current 52.5% EPBC limit on production in Macquarie Harbour.

Notwithstanding this motion, it is our understanding that the total production level in Macquarie Harbour may exceed the Current Maximum Capacity within the next couple of months.

This understanding is based on statements made by Tassal at a TSGA technical committee meeting on 12 August 2014.

At that meeting, Tassal representatives stated that Tassal had already stocked sufficient fish in Macquarie Harbour to reach 100% of Tassal’s proportion of the modelled maximum sustainable biomass despite the existence of the 52.5% Current Maximum Capacity limit.

This admission is very disturbing and preempts the Departments [sic] review of the Current Maximum Capacity and has the potential to create significant environmental harm and to place substantial commercial risk on Huon and Petuna.

**5 Huon and Petuna’s position**

Huon and Petuna are both grateful for and reliant on the support of the Tasmanian Government to facilitate the sustainable growth of the Industry.

We also understand that recent mine closures on Tasmania’s west coast have placed considerable strain on the region’s employment.

However, as responsible and sustainable operators and employers in the region we could not support further expansion of the industry in Macquarie Harbour until such time as there is confidence that existing salmonid farming does not upset the ecological balance nor risk existing employment through industry contraction or collapse.

We respectfully request that you consider the key points raised in this letter and move swiftly to ensure the safety of the industry by directly enforcing the Current Maximum Capacity by including specific conditions in each Marine Farm Licence within Macquarie Harbour.

A failure to do so has the potential to risk the ongoing sustainability of Macquarie Harbour, regional employment, the reputation of Tasmanian salmon farming and the clean green image of Tasmania generally.

Your written response outlining the Department’s position on this critical issue is sought within 7 days of receipt of this letter as the potential for a catastrophic event in Macquarie Harbour increases as we approach the spring and summer seasons.

(Emphasis in original.)

Huon seeks legal advice and threatens legal action

1. Huon also sought and received legal advice. Ms Bender deposed as follows (Ex A3 pp 14-15):

63. As early as September 2014, Huon had considered whether legal remedies were available to it to enforce what we understood was required by the Decision, as we considered that the review as set out in section 2(f) of the Decision had not taken place. As can be seen from the annexures provided, Huon was receiving a wide range of conflicting information regarding the status of the review between December 2013 and August 2014. Huon was, and still is confused, as to what is required by the review set out in the Decision and who is responsible for it. Huon has not had any formal notification that the review has taken place or received documents in support of that view except for a reference to its occurrence in the letter from Ms Mosely of 26 September 2013 (at FRB11).

64. Similarly, the continuous and short-term cycles of draft biomass decisions, final biomass decisions, submissions from Huon to both the State and Federal Governments, alongside the frequent research updates, has made it difficult for Huon to form a position about whether legal remedy should be sought, as the next decision or research has always been anticipated.

1. In cross-examination Mr McElwaine referred Mr Bender to a letter sent to DPIPWE on Huon’s behalf by its solicitors, Page Seager, on 11 September 2014 (Ex A3 pp 88-92). At p 4 of that letter the following was stated:

We hold instructions to take whatever steps are necessary to protect our client’s interests. Those available steps would appear to us to include:

1. a judicial review of the Tasmanian Government’s (DPIPWE) decision to increase the limit beyond 52.5%. In that process Huon will be seeking discovery of all documents that the government based its decision upon and any other documents which influenced that decision;
2. review of the Minister’s Decision of 3 October 2012 to remove the power of the Tasmanian Government (DPIPWE) to vary the biomass due to the inability of the government to exercise its powers in accordance with a proper scientific approach;
3. review of the Minister’s Decision on the basis that the increase of the limit beyond 52.5% has converted the activity into a controlled activity and a permit must be issued; and
4. recovering any damages suffered by Huon in consequence of the negative impacts of the increase of the biomass levels in the Macquarie Harbour and any reduction in Huon’s biomass allocation that might be caused by the SBD [sustainable biomass decision].
5. Mr Bender conceded he had been aware in September 2014 that one of the options available to Huon was for it to apply for judicial review of the “government’s decision” (transcript p 232 lines 26-28). Mr Bender accepted that Huon had taken none of the steps it had then threatened until some three years later when it commenced two proceedings in the Federal Court (of which this is one) and in the Supreme Court of Tasmania in 2017 (transcript p 232 line 36 – p 233 line 21).

DPIPWE advises Huon and Petuna that it considers the biomass limit provided for in manner provision 2(f) has lapsed

1. On 27 September 2014 the Acting Secretary of DPIPWE replied to Huon and Petuna’s letter of 20 August 2014 in the following terms (Ex A3 pp 98-99):

I am writing to you, in my capacity as Acting Secretary, regarding the joint request by Huon Aquaculture Group (Huon) and Petuna Aquaculture Pty Ltd, dated 20 August 2014, that the Secretary immediately impose a biomass limit in Macquarie Harbour of 15,487 tonnes.

I have decided not to implement a biomass limit immediately, but will be introducing a biomass limit in March 2015…

In coming to my decision I note the biomass limit set as part of the Non [sic] Controlled Action Particular Manner (NCAPM) determination made by the then Minister for the Environment, the Hon Tony Burke MP, lapsed on 18 October 2013. This view is based on the fact that the Tasmanian Salmonid Growers Association provided a review report to the Department [I infer the Industry Report], on behalf of the three companies. The Commonwealth Department of the Environment has been advised that the review has been undertaken and the biomass limit has lapsed.

1. It is uncontentious that DPIPWE did not impose an altered total biomass limit until 9 October 2015.

Huon alerts the Commonwealth to its concerns

1. Ms Jane Gallichan, Corporate Affairs Manager for Huon, deposed as follows (Ex A8):

2. On 30 September 2013 [sic – 2014] I sent an email to Senator Simon Birmingham, Parliamentary Secretary to the Commonwealth Minister for the Environment (Senator Birmingham). My contact details including my mobile number appear in the email. I have instructed my solicitors to redact from the copy of the email and attachments, the telephone and facsimile numbers and the parts of the attachments that are commercial in confidence. A true copy of the redacted email and attachments is annexed and marked “JG-1”. In the briefing note it is stated that:

(a) Huon and Petuna wish to meet with the Federal Minister for the Environment to discuss the possibility of the Federal government’s direct involvement in this matter; and

(b) Huon has lost confidence in the Tasmanian Department of Primary Industries, Water and Environment’s (DPIPWE) desire to enforce the objectives of the various management controls that have been put in place including DPIPWE’s delegated powers to review biomass level is.

3. My meeting with Senator Birmingham, together with Mr Mark Porter (Petuna Chief Executive Officer) and Tim Hess (of Petuna), took place in Canberra on 2 October 2014.

1. The briefing note as Ms Gallichan attached to that email is as follows (Ex A8 pp 108-113):

**1. Introduction**

This document has been prepared to provide a background and briefing to the Minister for the Environment.

Huon Aquaculture Co. Pty Ltd (Huon) has requested the meeting because it is concerned about the manner in which the environmental controls put in place by the Federal Government in 2012 concerning the Macquarie Harbour are being applied by the Tasmanian State Government.

Ultimately Huon wishes the Federal Government to ensure that the environmental controls are applied to the aquaculture industry operating in Macquarie Harbour as Huon is alarmed by the possible consequences should industry operate outside of those parameters.

The document only provides a summary of the relevant events. It does not set out all relevant information or provide all relevant documentation. It is expected that this can later be provided where it becomes necessary.

**2. Background**

**2.1 Macquarie Harbour**

Macquarie Harbour (MH) is an expanse of water located on the west coast of Tasmania near Strahan.

The area is used for salmon and trout farming by Huon, Petuna Aquaculture Pty Ltd (Petuna) and Tassal Operations Pty Ltd (Tassal).

MH is recognised by industry and government as a sensitive area for aquaculture practices and measures have been put into place to manage and control the activities within the area.

**2.2 Management of Macquarie Harbour**

Relevant to the current issues experienced in MH are a number of management controls which regulate the activity of industry within the harbour.

The aquaculture industry operating within MH area intended to expand the undertaking, and as a result of the sensitive nature of MH and its proximity to the Tasmanian World Heritage Area, It was necessary for a determination to be made about whether the expansion had a possible effect of causing degradation or serious or irreversible environmental damage. On 25 May 2012 a referral was submitted under the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act) for the purpose of that determination.

On 3 October 2012 the Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP determined that the proposed expansion was not a controlled action provided that it was undertaken in the manner set out in the decision (Non Controlled Activity Particular Manner (NCAPM)). A copy is attached as D1 NCAPM.

Measure 2(f) of the NCAPM required that:

*“The total biomass held across all lease areas must not exceed 52.5 percent of the modelled maximum sustainable biomass until limit levels are reviewed in mid 2013, and must not exceed any such altered levels as may be identified by the Tasmanian Government.”*

The maximum sustainable biomass was at the time of the decision (and remains) modelled at 29,500 tonnes.

It is important to note that at the time the measures set out in the NCAPM were put in place industry was not certain as to the environmental parameters within which a sustainable aquaculture industry could operate due to the unique features of MH. As such an adaptive management approach was to be adopted by industry and regulated by the Tasmanian Government (primarily through Department of Primary Industry, Parks, Water and Environment (DPIPWE)) so that continual monitoring of industry activities and its effect on the environment could be carried out and biomass levels could accordingly be adapted to the information obtained from the monitoring.

The monitoring and review processes required to carry out the adaptive management approach were established in the Macquarie Harbour Marine Farming Development Plan (October 2005) (attached as D2 MFDP) and were further extended in an Area Management Agreement dated December 2012 (attached as D3 AMA) which was entered into between Huon, Petuna and Tassal. The AMA required the parties to create a Macquarie Harbour Fish Health Management Plan which is included as schedule 1 to the AMA and which attempts to control the negative impacts of the activities on the MH and the fish.

**2.3 Review of the Biomass Level under the NCAPM**

As part of the adaptive management process and in accordance with measure 2(f) of the NCAPM, a project was established to review the MH management processes with specific regard to environmental and fish health concerns. The biomass limit set out under NCAPM (i.e. 52.5% of 29,500 tonnes) formed part of the project’s consideration and review. The project steering committee included representatives of each Huon, Petuna, Tassal, other industry representatives as well as DPIPWE which was responsible under the NCAPM to review the biomass limit.

Information from the monitoring activities carried out as part of the adaptive management procedures as well as information provided by other agencies identified changes to dissolved oxygen saturation levels as well as other changes which caused concern to industry. Dissolved oxygen levels are known to play a vital role to the health of fish and the environment in the harbor however the cause or causes of those changes were not known.

Because of those concerning developments in the MH (which included dissolved oxygen levels) it was determined that further investigation was required to be carried out specifically in relation to dissolved oxygen before any adaptation to management practices could be made. As a result, the review of the biomass limit was specifically put on hold in late 2013 so that further information could be gathered. A group was established to investigate the concerns surrounding the dissolved oxygen levels (known as the “MH DO Working Group”).

The review has not been finalized.

**3. Present Developments**

**3.1 Environmental and Fish Health Concerns**

The issues regarding fish health and specifically dissolved oxygen continue to remain concerning.

The MH DO Working Group has not made any determinations about the cause of the levels of dissolved oxygen and it continues to show signs of deterioration.

Huon[’s] concern was exacerbated by advice received from Tassal on 13 August 2014 that it had stocked its leases above the 52.5% limit - in fact the advice was that Tassal had already stocked sufficient fish in Macquarie Harbour to reach 100% of the modelled [sic] maximum sustainable biomass. This was previously known only to DPIPWE and Tassal as each of Tassal, Huon and Petuna report their stocking levels directly to DPIPWE.

Because of these concerns, on 19 August 2014 Huon and Petuna wrote to DPIPWE:

1. Outlining the basis for its concerns; and

2. Requested DPIPWE enforce the biomass limit set out in the NCAPM.

A copy of that letter is attached as D4 Letter from Houn and Petuna to DPIPWE dated 29 August 2014.

Effectively what Huon and Petuna wanted was for DPIPWE to ensure that the biomass levels set by the Federal Government under the NCAPM were enforced.

**3.2 Response by DPIPWE**

A number of meetings were conducted between Huon, Petuna, DPIPWE and the Tasmanian State Government as a result of the joint letter. As discussions evolved, DPIPWE advised that it was considering increasing the biomass levels to approximately 66%-70% and that a decision concerning the biomass limit would be provided on 12 September 2014.

The increase of the biomass levels to approximately 66%-70% would have precisely matched the levels of stocking that had been separately notified to DPIPWE by Huon, Petuna and Tassal. There was no scientific basis at all for reaching this percentage; it was simply intended to accommodate the stocking levels of industry.

On 11 September 2014 lawyers for Huon and Petuna separately wrote to DPIPWE expressing their concerns with the process adopted by DPIPWE. Copies of those letters are attached as D5 Letter from Page Seager and D6 Letter from Cam Jones and Associates.

On 26 September 2014 DPIPWE provided a letter in which it advised that:

1. No biomass limit under the NCAPM was in place;

2. It would not be implementing any ‘biomass limit immediately’ but will be introducing a limit in March 2015; and

3. under Management Control 3.0.1 of the Macquarie Harbour Marine Farming Development Plan that no further 2014 year class smolt were to be placed in the Macquarie Harbour.

A copy of that letter is attached as D7 DPIPWE Letter dated 26 Sep 2014. The letter is undated but was sent at 5:10pm on 26 September 2014.

At approximately 9:00pm on 26 September 2014, DPIPWE contacted Huon and advised it that the notification to prevent 2014 year class smolt to be placed in MH was revoked as Tassal was intending to place further smolt into MH and it was considered that without revoking the notification Tassal would be unduly effected as the smolt were already ‘in transit’.

On 29 September 2014 DPIPWE provided a further letter to Huon:

1. confirming the revocation of the notification preventing any further 2014 year class smolt being placed in MH;

2. asserting that the approximately 500,000 smolt that were to be· placed in the MH “*will not be a significant contributor to the total biomass in January 2015*”;

3. raised the future possibility of culling fish.

**3.3 Current Stocking Levels**

The letter from DPIPWE makes no reference to any biomass limit operating within MH area and hence it is necessary to consider the current stocking of the harbour to understand the effect of the decision by DPIPWE.

Because DPIPWE is the only entity which has been provided the stocking levels of each company, Huon is unable to definitely state the current stocking levels of MH. However, from information received Huon understands the current levels in MH to be:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Company | Hectare split | EIS total | Proportion of Ha used 14-15 | Sal 13 +14 Summer peak 2014-15 | Proportion of Ha used 15-16 | Sal 14 +15 Summer peak 2015-16 |
| Petuna | 45% | 13,275 | 30.0% | 3,982 | 52.5% | 6,969.15 |
| Huon | 25% | 7,375 | 52.5% | 3,872 | 52.5% | 3,871.75 |
| Tassal | 30% | 8,850 | 125.9% | 11,146 | 144% | 12,738.15 |
| Tonnes |  | 24,499 |  | 19,000 |  | 23,579 |

As can be seen from the above table, the fish currently assumed to be already in MH coupled with planned entries in 2015 will produce a biomass well in excess of the 19,000 tonne ruling received on 26th September 2014. This will mean that a cull of 2014-entry fish and a reduction of planned 2015-planned entry fish would have to be undertaken as a consequence of Tassal’s overstocking in 2014. In addition, if the smolts introduced after the ruling by state gov was rescinded are not in the estimates in the table then these would add an additional 2000 tonnes to the peak for summer 2015-16.

What was set by the biomass limit by the NCAPM will therefore be exceeded significantly.

**4. Huon’s Continuing Concerns**

**4.1 Scientific Concerns of Fish Health and the Macquarie Harbour**

Huon remains extremely concerned for the health of fish and the environment in the Macquarie Harbour.

At present there is no scientific evidence which currently exists which provides any possible basis for reaching a conclusion that to exceed the biomass limit set in the NCAPM will not cause harm to the environment and to fish health.

Indeed, the present scientific information points to the emergence of warning signs that the maximum sustainable biomass level s may have already been reached.

An increase to biomass levels beyond the sustainable limit risks a catastrophic collapse of the environmental conditions in the harbour which will have catastrophic impacts upon Macquarie Harbour, the Tasmanian aquaculture industry and the Tasmanian Wilderness World Heritage Area all of which the NCAPM was designed to protect.

…

In addition, advice provided by Hamish Rogers (renowned international expert on fish health) to Huon Aquaculture in relation to fish health in MH was provided to DPIPWE on 23 September and is attached (D9 Hamish Rogers Advice).

4.2 Huon’s Response to DPIPWE’S Letter Dated 26 September 2014

DPIPWE’s responses have done nothing to allay Huon’s concerns in relation to fish health and indeed have caused it greater concern in the manner that it is now being regulated.

There is simply no scientific evidence which demonstrates that allowing the biomass limit set by the NCAPM to be exceeded will not pose any environmental or fish health threats.

It is imperative that in the circumstances, that the biomass limit continue until it is able to be shown through an adaptive process that an increase is safe and sustainable.

DPIPWE’s management of the issue appears to suggest that it is prepared to allow a single industry participant to act in a manner which is beneficial to itself even where that conflicts with scientific concerns.

From a fish health or an environmental objective, the decision to not set any biomass limit at all until March 2015 Is impossible to reconcile with the decision to make an order preventing any further 2014 class smolt being introduced to MH. There is no scientific basis showing this level to be safe.

The decision to then remove this notification preventing any further 2014 class smolt being introduced into the MH is again unsupported by any scientific basis and is simply directly responsive to one industry participant's commercial interests.

DPIPWE has also asserted that the NCAPM biomass limit has already been reviewed and as such has ‘lapsed’. This is disputed by Huon.

No review has in fact been determined. Attached is an email from Huon and Petuna to DPIPWE (D9 Email to DPIPWE from Huon and Petuna) setting out the relevant factual matters concerning the review. DPIPWE’s assertion that a review had occurred in October 2013 had never previously been asserted until last week. This has been dealt with further at paragraph 2.3 demonstrating that the review had been put on hold until the MH DO Working Group reported on the matter (which it has not yet done).

In any event and whatever the status of the review, the NCAPM is clear that the biomass limit does not simply ‘lapse’ on review but is instead required to be reviewed so that it can be revised. This is clear from the wording of measure 2(f) which requires the total biomass to not exceed ‘*any such altered levels as may be identified thereafter by the Tasmanian Government*’.

It is perhaps even more concerning that DPIPWE is of the view that there is no biomass limit in place yet has not:

1. implemented a biomass limit which it is empowered to do and is clearly required to do under measure 2(f) of the NCAPM; and

2. taken any other step to prevent the continued stocking of the MH.

**5. Federal Government Involvement**

**5.1 Meeting**

The Federal Government has a continued interest in the Macquarie Harbour fishing activities area given the EPBC Act and MH’s status as a World Heritage Area.

Huon and Petuna wish to meet with the Federal Minister for the Environment to discuss the possibility of the government's direct involvement in this matter.

Huon has lost confidence in DPIPWE’s desire to enforce the objectives of the various management controls that have been put in place concerning MH including DPIPWE’s delegated powers under the NCAPM to review biomass levels.

Ultimately what Huon wishes is for a safe biomass limit to be enforced in MH.

Without further scientific evidence the biomass limit established by the NCAPM must continue to apply.

It is this limit that Huon wishes to be enforced. Options available to do so would appear to be:

1. the Minister for the Environment exercising powers under the EPBC Act or the powers delegated to DPIPWE under NCAPM to establish the biomass limit and enforce that limit; or

2. reconsidering whether the increased biomass limit has now converted what was previously not a controlled activity into one which is now required to be controlled.

Huon would consider any other available options which would see the biomass limit enforced in the Macquarie Harbour.

(Emphasis omitted.)

Commonwealth declines to become involved: State is the regulator

1. Huon’s representatives met with Senator Birmingham in Canberra on 2 October 2014, together with Mr Mark Porter and Mr Tim Hess (both of Petuna). With respect to that meeting, Ms Gallichan deposed as follows (Ex A9):

2. I refer to the Primary affidavit affirmed on 15 November 2017 at paragraph 3 in relation to the meeting with Senator Birmingham, together with Mark Porter (then CEO of Petuna) and Tim Hess (of Petuna) in Canberra on 2 October 2014. My recollection of the meeting was that Mark Porter:

(a) led the discussion with the Senator and stepped through the concerns of both companies. Specifically, that Huon and Petuna represented around 70% of the lease space in Macquarie Harbour and around 50% of production and both companies were extremely worried that State Government decision making, and specifically in relation to increasing biomass levels, was contrary to the views of both companies;

(b) expressed that this view was based on environmental conditions and in particular dissolved oxygen levels and that neither company could understand why the State Government continued to increase the biomass limits; and

(c) asked the Senator if there was anything the Federal Government could do either formally or informally.

3. My recollection of the response from Senator Birmingham was that he said words to the effect that;

(a) he did not wish to become involved as it was an issue better resolved at the State level and that he said that the State is the regulator and the State would not want them stepping in; and

(b) that that [sic] there would be potential impacts on the industry’s ability to grow in the future should the Federal Government need to step in. I understood this to mean in relation to Macquarie Harbour.

Huon neither applies for a declaration as to the construction of manner provision 2(f) nor seeks reconsideration of referral decision pursuant to s 78A EPBC

1. Mr Gunson SC (for Petuna) submits it had been open at that time for Huon to have exercised its statutory right to seek reconsideration of the referral decision pursuant to s 78A of the EPBC Act.
2. Mr Gunson submits that such an application could have been made by Huon on the basis that the asserted “falling away” of the total biomass limit across all lease areas was a substantial change in circumstances not foreseen at the time of the decision that related to the impacts of the action.
3. Mr McElwaine submits that alternatively, it had been open at that time for Huon to seek a declaration regarding the construction of manner requirement 2(f) (transcript p 462 lines 27-30). In that regard, the Court notes that Huon had made representations to the Commonwealth, including, as set out at [104] above, a briefing note provided to Senator Birmingham that contained the statement:

In any event and whatever the status of the review, the NCAPM is clear that the biomass limit does not simply ‘lapse’ on review but is instead required to be reviewed so that it can be revised. This is clear from the wording of measure 2(f) which requires the total biomass to not exceed ‘*any such altered levels as may be identified thereafter by the Tasmanian Governmen*t’.

1. It is uncontentious that Huon took neither of those steps.

Huon continues to press its concerns

1. By way of explanation of not having commenced any legal proceedings until 1997, Mr Bender gave evidence that Huon had “kept working with the government to try and resolve it” (transcript p 232 lines 1-2). Mr Bender gave the following evidence:

[T]his has been quite unusual for us to take legal proceedings. We don’t do it normally. This is such a major issue that we decided we had to do this.

(transcript p 233 lines 8-26)

1. The Court accepts that Huon continued to press its concerns. There are many examples of it doing so in the documents submitted as attachments to Mr and Ms Bender’s several affidavits. It would be otiose to refer to them all. A few will suffice.
2. On 8 September 2014, Mr Bender emailed the Tasmanian Premier and Deputy Premier in the following terms (Ex A3 pp 85-86):

Dear Premier Hodgman and Deputy Premier Rockliff,

As outlined in my correspondence of 20 August 2014, Huon Aquaculture Group Pty Ltd (Huon) remains concerned for the potential significant environmental harm and negative fish health impacts in Macquarie Harbour …

1. On 11 September 2014, Page Seager wrote to Mr John Whittington and Mr Wes Ford (the Secretary and Deputy Secretary of DPIPWE respectively) on Huon’s behalf (Ex A3 pp 89-92). Relevantly, that letter stated:

Our client is extremely concerned by representations made by DPIPWE to the effect that it is considering increasing the biomass levels above 52.5% of the maximum sustainable biomass. Our client is extremely concerned by representations made by DPIPWE to the effect that it is considering increasing the biomass levels above 52.5% of the maximum sustainable biomass. Its concerns arise because:

1 There is no scientific evidence which currently exists which provides any possible basis for reaching a conclusion that increasing the biomass level *will not cause degradation or serious or irreversible environmental damage* to the environment;

2 The scientific evidence which does in fact exist points to the emergence of warning signs that the maximum sustainable biomass levels may have already been reached;

3 An increase to biomass levels beyond the sustainable limit risks a collapse of the environmental conditions in the harbour which will have catastrophic impacts upon the Macquarie Harbour, the Tasmanian aquaculture industry and the Tasmanian Wilderness World Heritage Area all of which the Minister’s Decision was designed to protect …

1. On 16 March 2016, Mr Bender wrote to Mr Whittington as follows (Ex A4 pp 30-32):

I am writing in response to your letter of 24 February 2016 regarding your impending decision on biomass limits in Macquarie Harbour (MH).

Huon maintains the strong view that a lower biomass cap that is consistent with the Commonwealth Minister for Sustainability, Environment, Water, Population and Communities decision under sections 75 and 77A of the Environmental Protection and Pollution Control Act 1999 (EPBC Act) dated 12 October 2012 in respect to the Marine Farming Expansion in Macquarie Harbour, whereby the Minister decided that the proposed action was not a controlled action and set a maximum biomass cap of 52.5% of the modelled maximum sustainable biomass of 29,500 tonnes (or 15,488 tonnes) set by measure 2(f), would be more prudent until there is sufficient confidence that the environment can safely support the biomass level and reduce the risk of a mass mortality event.

Huon believes that, based on the findings of recent research studies (as enclosed with this commercial-in-confidence briefing note), the Harbour, and potentially the World Heritage Area, is at environmental risk and the potential for a mass mortality event continues to increase.

1. At [79]-[80] of Ms Bender’s affidavit of 15 November 2017 (Ex A3), she deposed as follows:

79. Huon has consistently raised the issue of the declining DO [dissolved oxygen] since 2014 and has, in its view, exhausted attempts to convince the State to set biomass levels that will allow sustainable farming to continue in MH. Following the January Determination. And in the context of the IMAS Report, Huon lost confidence in the State’s ability to set a biomass that would allow sustainable farming to continue in MH.

80. Huon has consistently sought advice from both State and Federal Governments around clarifying the fulfilment of section 2(f) of the Decision, Huon has never wavered in its view that a review as it understood was required before a decision could be made to increase biomass above 15,488 tonnes, has not taken place under the terms of the Decision. Huon believed that the Decision contemplates a review of compliance with the limits, calibration of the model that was set out in the EIS to see if the modelling in the EIS was right and a review of whether the limits and measures in the decision were appropriate.

1. Ms Bender was not cross-examined on that statement.

DPIPWE increases permissible total biomass inequitably on Huon’s assessment

1. When DPIPWE finally did set a revised total biomass limit in October 2015, Huon remained aggrieved. In respect of individual operators’ shares of that total, DPIPWE had taken into account the fact that Tassal had already expanded its production.
2. Mr McElwaine asked Ms Bender, during cross-examination, whether Huon had considered the then proposed biomass determination to be fair and equitable, to which Ms Bender answered that it was not (transcript p 147 lines 1-2). Mr McElwaine then asked:

As at 24 April 2015, Huon took the view that government decisions subsequent to the minister’s decision were unfairly advantaging Tassal. Do you accept that?---I do.

(transcript p 150 lines 1-3)

1. Mr Bender was also asked by Mr McElwaine during cross-examination whether Huon considered the biomass allocation to be disproportionate. Mr Bender said that it had, because Tassal had increased its fish to 100% “before anyone knew” (transcript p 247 lines 42-44).
2. The evidence of both Mr Peter and Ms Frances Bender entitles the Court to find that Huon had regarded DPIPWE’s apportionment of the total biomass as between the operators to have been unjust.

Huon finally commences legal action

1. Page Seager sent a letter to the Compliance and Enforcement Branch of the Environment Assessment and Compliance Division of the Department on behalf of Huon on 30 November 2016 (Ex A3 pp 627-631):

Given the deteriorating environmental conditions in MH, and prolonged absence of appropriate action by both the Tasmanian Department of Primary Industries, Parks, Water and Environment (DPIPWE) and the Tasmanian Environment Protection Authority (EPA), Huon feels compelled to request that you take urgent enforcement action against DPIPWE….

Huon has, on numerous occasions, requested confirmation from DPIPWE that appropriate remedial action be undertaken to ensure compliance with the conditions imposed by the Minister’s Determination. Huon is unable to meet the conditions under the Minister’s Determination in the absence of a concerted effort on the part of all operators and appropriate management by DPIPWE.

Huon would welcome the opportunity to provide the independent scientific evidence and reports compiled over several years from our operations at MH. Huon will also make its experts available to the Commonwealth Department of Environment to present the information.

Given Huon’s concerns that it cannot comply with the Minister’s Determination unless there is proper management by DPIPWE, Huon also reserves its right to seek declarations and injunctions with respect to the Minister’s Determination in the Federal Court.

Please acknowledge receipt of this correspondence and advise of your intended course of action within 7 days.

1. Huon filed its originating application in this Court on 6 February 2017. As noted, the interlocutory stages of this proceeding have been more than usually complex – Huon now relies on a Third Further Amended Originating Application and a Third Further Amended Statement of Claim.

State regulator subsequently proposes a significant decrease in total biomass – if implemented it will bring stocking levels back to approximate those which existed prior to expansion

1. On 5 March 2018, shortly before the hearing of this matter, Huon, Petuna and Tassal were each advised of a draft biomass determination for the period 1 June 2018 to 31 May 2020. It is an annexure to the affidavit of Mr Bender sworn on 15 March 2018 (Ex A6):

Following my email of 4 January 2018, and your respective responses, regarding the biomass and feed input data for the 2017 year class fish in Macquarie Harbour, I can now provide you with my draft biomass determination for the period from 1 June 2018 until 31 May 2020.

The projected biomass for the YC2017, peaks in December 2018 at around 7,700 tonnes, and will be approximately 7,500 tonnes in both November and January. As a result of these biomass projections I see no need to make a biomass decision for the summer of 2018/19 that reduces the biomass below this level.

In considering the range of approaches to setting the biomass limit for the Harbour I have concluded that there are two strategies that need to be considered: the first being to set a total peak biomass for a point in time (November to January); the second being to set a biomass for each year class of fish that go into the Harbour, for the peak summer period. I believe that it is appropriate to move to a decision-making framework that sets the biomass for a single year class. This approach provides greater flexibility for management options and provides greater certainty for planning of each year class, meaning one year class is not dependent on the next or previous year class decisions.

On this basis, I propose setting the biomass limit for the YC2017 and the YC2018 at 8,000 tonnes for each year class, with the peak period being November 2018 - January 2019 and November 2019- January 2020 respectively. This will mean the total biomass in December 2018 will be around 9,000 tonnes and could be slightly higher, at around 9,500 tonnes, in December 2019, depending on fish growth and mortality.

The YC2017 is apportioned on the basis that the Franklin lease area is not included in the calculation of lease area, with the 805.89 hectares allocated as per the table below.

|  |  |  |  |
| --- | --- | --- | --- |
| **Lease area** | **Ha** | **%** | **Max. Permissible Biomass (T/Ha)** |
| Petuna | 415.95 | 51.61 | 9.93 |
| Huon | 229.96 | 28.53 | 9.93 |
| Tassal | 159.98 | 19.85 | 9.93 |
| **Total** | **805.89** |  |  |

The YC2018 will be apportioned on the basis of the full 925.88 hectares allocated as per the table below.

|  |  |  |  |
| --- | --- | --- | --- |
| **Lease area** | **Ha** | **%** | **Max. Permissible Biomass (T/Ha)** |
| Petuna | 415.95 | 44.92 | 8.64 |
| Huon | 229.96 | 24.84 | 8.64 |
| Tassal | 279.97 | 30.24 | 8.64 |
| **Total** | **925.88** |  |  |

 The ability of each company to stock their respective leases, and therefore utilise their biomass allocation, will be dependent on the capacity of each lease to be re-stocked in accordance with benthic compliance requirements. A limit on the specific number of small authorised to go into the Harbour may need to be determined with each company when proposed stocking plans are submitted, depending on the number of pens bays available and planned fallowing.

I am yet to determine whether or not the use of waste capture systems will be a factor in allowing leases or pen bays to be stocked. I will not be allowing any additional biomass based on the use of waste capture systems.

**Lines of evidence to support the draft determination.**

It is my intent to provide a more detailed statement of reasons to support the biomass determination when it is finalised. In summary, however, my current view on the environmental status of the Harbour is as follows:

IMAS Technical Reports under FRDC 2016/067 continue to provide important information on the Macquarie Harbour environment. The February 2018 draft progress report indicates that while the benthic community in the harbour was showing signs of recovery in May 2017, the return to very low oxygen levels in spring 2017 has seen a subsequent decline. Monitoring results suggest that until dissolved oxygen levels recover and stabilise over the longer term it will be difficult to see a sustained benthic recovery. However, the results do suggest that if dissolved oxygen recharge is sustained, there is a large reservoir of fauna in unaffected, shallower regions that may quickly recruit based on May 2017 observations. Of ongoing concern are the midwater dissolved oxygen levels which appear to be generally lower across a range of depths, with dissolved oxygen levels at shallower depths (5- 15m) declining significantly in the weeks prior to the onset of the oxygen recharge in late October 2017.

In relation to *Beggiatoa*, there are some early signs of recovery based on the IMAS data for October 2017. This trend is supported by four monthly benthic compliance survey results required by the EPA. The May 2017 and September 2017 benthic surveys show that the 35 metre compliance points for nine of the ten Macquarie Harbour leases, were compliant. This was an improvement from 5 non­compliant leases in January 2017 and 4 non-compliant leases in September 2016. The January 2018 visual survey results are not yet finalised. At this stage, however, the distribution of *Beggiatoa* and the potential for increased extent in the Harbour remains a concern.

Subsequent discussion with IMAS regarding preliminary benthic in-fauna results from the January 2018 benthic survey indicate that since May 2017 there has been a decline through October 2017 and January 2018 surveys which is likely to be indicative of the effects of the low bottom water dissolved oxygen concentrations.

Preliminary results from the January 2018 in-fauna survey by IMAS show a reduction in species diversity and abundance since the October 2017 survey at some locations. This information has been provided in a verbal briefing from IMAS staff. The Franklin lease (266) is, however, in better condition than in the October 2016 survey. At this stage, I expect to include the Franklin lease area in YC2018 biomass determinations. However, my decision regarding the availability of this lease for stocking with YC2018 fish will be a separate process from the biomass determination for the Harbour and will occur following consideration of the information provided by Tassal as part of the re-stocking survey.

Given the relatively low level of the biomass remaining for 2018 and the issues raised above, it is prudent to adopt a biomass for the 2019/20 peak period that further supports recovery in the Harbour. Hence my intent is to set the biomass for the 2018 year class to be 8,000 tonnes for the period November 2019 to January 2020.

While I am aware of recent fish mortality issues associated with the presence of Pilchard Orthomyxovirus in the Harbour, my biomass determination is based on environmental, rather than biosecurity, drivers.

Should you wish to make submissions on matters raised in this letter you may do so before 23 March 2018. Depending on further work required following any submissions, I expect to be able to finalise my determinations by 15 April 2018.

1. Ms Bender’s evidence was that environmental conditions and disease issues had reduced existing stock levels in Macquarie Harbour to about 9,000 tonnes jointly. She pointedly observed, “[m]other nature has sorted it out for us” (transcript p 171 lines 29-44).
2. Her evidence was that the draft determination confirmed that the current total biomass in Macquarie Harbour, because of fish mortality, had reverted to approximately the same as the pre-expansion level, being around 9,000 tonnes (transcript p 173 lines 20-24). I understand her evidence to be that the levels proposed in the draft determination would maintain that reduced level into the future until 31 May 2020.

##### Huon’s pleadings

1. It is unnecessary to set out the introductory parts of Huon’s pleadings. They refer in brief and uncontentious terms to elements of the background which I have earlier set out.
2. At [26] Huon refers to and lists as follows “15 requirements” as having been imposed by the Minister to ensure that the action would not cause significant impact to the Maugean Skate and the Tasmanian World Heritage areas, including the following:

26 Pursuant to the Decision, 15 requirements were imposed to ensure that the Action would not cause significant impact to the Maugean Skate and the Tasmanian Wilderness World Heritage Area, these requirements included the following (requirements):

(a) Requirement 1a, which provides that the ‘person taking the action’ must:

*Take measures to prevent substantial benthic visual, physio-chemical or biological changes attributable to marine farming operations at, or extending beyond 35 metres from the boundary of any lease area* (**Requirement 1a**).

(b) Requirement 1d, which provides, with respect to the ‘person taking the action’, that:

*If a substantial benthic visual, physio-chemical or biological impact is detected as a result of benthic video assessment, targeted management responses must be implemented within 10 weeks of the assessment* (**Requirement 1d**).

(c) Requirement 2a, which provides that the ‘person taking the action’ must:

*Undertake a water quality monitoring program for the assessment of the water quality indicators ammonia, nitrate and dissolved oxygen at the monitoring sites in accordance with marine farming licence conditions. Monitoring must occur at these monitoring sites on a monthly basis until 30 June 2013, when the number and location of monitoring sites will be reviewed* (**Requirement 2a**).

(d) Requirement 2b, which provides that the ‘person taking the action’ must:

*Take measures to prevent the rolling annual median value of quarterly water quality indicator values for ammonia, nitrate and dissolved oxygen, as recorded within the compliance region, from exceeding the identified limit levels* (**Requirement 2b**).

(e) Requirement 2c, which provides, with respect to the ‘person taking the action’, that:

*If the water quality monitoring program identifies that the rolling annual median value for any of the water quality indicators ammonia, nitrate and dissolved oxygen, within the compliance region, exceed the identified limit levels and that this is attributable to marine farming operators, targeted management responses must be implemented within 10 weeks of the most recent quarterly monitoring report* (**Requirement 2c**).

(f) Requirement 2(f), which provides, with respect to the ‘person taking the action’, that:

*The total biomass held across all lease areas must not exceed 52.5 percent of the modelled maximum sustainable biomass until limit levels are reviewed in mid 2013, and must not exceed any such altered levels as may be identified by the Tasmanian Government* (**Requirement 2f**).

(g) In the definitions part of the notice of the Decision (**Definitions**), the Limit level for water quality indicators are set at the following interim levels:

(i) *Ammonia (at 2 metres depth) = 0.033 mg/l*

(ii) *Ammonia (at 20 metres depth) = 0.024 mg/l*

(iii) *Nitrate (at 2 metres depth) = 0.053 mg/l*

(iv) *Oxygen (at 2 metres depth) = 6.82 mg/l*

*Interim limit levels will be reviewed in mid 2013. Subsequent modifications to limit levels as a result of future reviews must be prescribed in marine farming licence conditions.*

(h) In the Definitions, the **Compliance Region** is defined as “*monitoring sites 4, 6, 8, 9 and 10 identified in Attachment 1, or any other group of sites as prescribed in marine farming licence conditions*”.

(i) In the Definitions, **Targeted Management Responses** is defined to include a direction by the Secretary of the department administering the MFPA and LMRMA to undertake one or more of the following actions:

(i) Reduction in biomass;

(ii) Reduction in nitrogen output;

(iii) Redistribution of biomass.

(j) The Definitions state that **Substantial Benthic Visual Impact** within a lease area may include:

(i) Excessive feed dumping;

(ii) Extensive bacterial mats (e.g. Beggiatoa spp.) on the sediment surface prior to restocking;

(iii) Spontaneous gas bubbling from the sediment.

Or as otherwise prescribed in marine farming licence conditions.

(k) In the Definitions **Tasmanian Government** is defined in the notice of the Decision as “the Tasmanian Agency responsible for administering and regulating the [Marine Plan]”.

1. It is uncontentious that the “requirements” as pleaded refer to the particular manner provisions stated in the Minister’s s 77 Notice.
2. Paragraph 38 then pleads:

~~In the alternative to paragraphs 21, 22, and 25, t~~The Applicant repeats paragraph 5-7 and states that if the Action, for the purposes of the Decision, is the marine farming as undertaken by the Marine Farmers alone, the Decision is invalid on the basis that the Decision was not authorised by ss 75, 77 and 77A of the Act, in that it was made on the basis of the Minister believing that the Action would be taken in a particular manner, and:

(a) the Decision was based upon, and the notice of the Decision contains, conditions that are uncertain.

**PARTICULARS**

~~(i) It is unclear who the ‘person taking the action’ is pursuant to the Decision and therefore who is required to comply with the conditions.~~

(ii) Condition 1(a) requires that “measures” are taken but does specify what those measures are.

(iii) Condition 2(b) requires that “measures” are taken but does specify what those measures are.

(b) the Decision was based upon, and the notice of the Decision contains, conditions that are uncertain and lack finality.

**PARTICULARS**

(i) Insofar as conditions 1(a) and (d) and 2(b) and (c) afford “the person taking the action” the ability to determine for himself or herself conditions for the undertaking of the action, the Decision is uncertain.

(ii) Conditions 2(a), 2(b), 2(c) and 2(f) lack finality in that, in accordance with the Definitions, the following matters must be reviewed and re-determined:

(A) Monitoring sites

(B) Limit levels

(C) Total biomass

(iii) Conditions 1(d) and 2(c) require that targeted management measures must be undertaken, which in accordance with the Definitions includes decisions and actions to be taken by the First and/or Second Respondents.

(c) the Decision was based upon, and the notice of the Decision contains, conditions that are not directed to the manner in which a particular person will take the Action, but rather to the aggregate effects of the activities of all of the Marine Farmers.

**PARTICULARS**

(i) Condition 1(a) requires that measures are taken to prevent the impacts referred to arising from “marine farming operations”, be taken across all leases.

(ii) Condition 2(b) requires that measures to ensure that the rolling annual median value does not exceed the limit levels which requires that measures are taken across all leases.

(d) the Decision was based upon, and the notice of the Decision contains, conditions that the substantive content of which will depend on decisions to be made from time to time by the First Respondent.

**PARTICULARS**

(i) Condition 1(d) requires that targeted management measures must be undertaken, which in accordance with the Definitions includes decisions and action to be taken by the First and/or Second Respondents.

(ii) Condition 2(a) requires that the number and location of monitoring sites be reviewed in mid 2013 but does not specify how this review will occur.

(iii) Conditions 2(b), 2(c) and 2(f) require, in accordance with the Definitions, ~~that~~ the following matters ~~must~~ be reviewed and re-determined by the First and/or Second Respondent:

(A) Limit levels

(B) Total biomass

(e) the Decision is an unreasonable exercise of the power conferred in ss.75, 77 and 77A of the Act in that it is outside the scope, purpose and objectives of the Act.

**PARTICULARS**

(i) The purpose of the Decision is to set out the manner in which an action must be taken that will ensure that the action will not have, and is not likely to have, an adverse impact on the matters to be protected under the Act.

(ii) The notice of the Decision contains conditions 2(b), 2(c) and 2(f) which are subject to review and re-determination based on unspecified criteria and an unspecified process.

1. The Court has earlier noted that Huon no longer pleads that any person other than the “Marine Farmers alone” had proposed to undertake the action that had been referred to the Minister for his decision.
2. The Court infers that what Huon had pleaded as “15 requirements” (at [26]) are what Huon refers to in its pleading at [38] as “conditions”.
3. Huon thus pleads, inter alia, that the Minister’s decision was based upon, and the s 77 Notice contains, conditions that are variously criticised as uncertain, lacking finality, not directed to the manner in which a particular person will take the action, and the substantive content of which depend on decisions to be made from time to time by a third party.
4. Huon submits for those reasons the s 77 Notice was defective. The manner requirements it set out were inadequate to give effect to the statutory obligations the Minister was subject to by reasons of s 75 and s 77A of the EPBC Act.
5. In response, Mr Kennett SC on behalf of the Minister observes that s 77 of the EPBC Act is not the source of the Minister’s power to determine that a proposed action is not a controlled action if undertaken in a particular manner. I accept that submission: see *Triabunna Investments Pty Ltd v Minister for the Environment and Energy* [2018] FCA 486 at [59]-[62] and [72]. A notice issued pursuant to s 77 of the EPBC Act creates a “factum” in respect of which significant consequences are attached. An individual or company taking an action inconsistently with a manner specified in that notice is liable for a civil penalty. Notwithstanding those legal and practical consequences, as a matter of law, the notice is distinct from, and consequential to, the Minister’s decision.
6. However, in the Court’s opinion, nothing of consequence turns on that distinction in the present case.
7. A notice issued pursuant to s 77 of the EPBC Act ordinarily can be expected to accurately reflect the Minister’s belief as to the particular manner(s) in which the action will be taken. It is the Minister’s statutory duty to ensure it does.
8. The Minister stated in his s 77 Notice that the action is not a controlled action “provided it is undertaken in the manner set out in this decision”. The Minister’s own language indicates that he saw no distinction between the terms of the notice and the content of his decision. Moreover, in his letter to Huon, Petuna and Tassal seeking confirmation from each of them that they were prepared to take the action in the manner he had determined, the Minister referred to the s 77 Notice as his decision. In the absence of any evidence, or submission on the Minister’s behalf, that the Minister’s belief was inaccurately expressed, the Court is entitled to proceed on the basis that the s 77 Notice correctly reduced to writing the manner in which the Minister believed the action was to be taken such that it would not have an adverse impact on a matter protected by an otherwise controlling provision.
9. I accept Mr Galasso’s submission that the terms of that notice can be relied upon as cogent evidence of the Minister’s decision. The Court is entitled to have regard to its terms in determining whether or not the Minister’s decision was made according to law.
10. All Respondents submit that a manner requirement is not to be equated to a “condition”. However it is not suggested by any Respondent that Huon’s pleadings insufficiently disclose the grounds upon which Huon relies to assert the invalidity of the Minister’s decision.

##### Should relief be refused at the threshold?

###### The Minister’s submissions

1. The Minister submits that the Court should consider the appropriateness of granting discretionary relief prior to considering the validity of the impugned decision. The parties’ written submissions with respect to that contention are set out below. Their occasional discontinuity arises because the parties’ submissions were initially advanced in response to one of the separate questions (Question 7) later substituted for a full hearing after Huon had abandoned its case that DPIPWE was the person taking the action.
2. The Minister’s written submissions are as follows:

**REGARDLESS OF WHETHER ERROR IS SHOWN, RELIEF SHOULD BE REFUSED**

5. Huon seeks only declaratory relief. Although equitable defences such as laches do not apply to a claim for a declaration, the discretionary nature of the relief is well established.

6. In the present case, it is appropriate to consider at the threshold whether the conduct of Huon should lead to the discretionary refusal of relief, and to decline to answer the other preliminary questions if that issue is resolved adversely to Huon. That is so because of the unsatisfactory situation that would arise if the Court were to state in a formal answer that the Minister’s decision is “invalid”, but then decide not to reflect that conclusion in any order authoritatively establishing the decision’s lack of legal effect. Complicated questions would then arise as to the lawfulness of past and future conduct of Huon and the fourth and fifth respondents (Petuna and Tassal), as well as whether or not the Minister is empowered or obliged to make a fresh decision on the proposed action referred to his predecessor more than five years ago. If such questions were resolved by the proposition that the parties were bound by the Court’s answer, then the answer itself would achieve the practical effect of a declaration, thereby setting at naught the discretion to refuse relief.

7. Question 7 should therefore be addressed first, on the assumption that question 5 would be answered “yes”. If question 7 is considered on that basis and answered “no”, the other preliminary questions should not be answered.

8. There is authority that excessive delay may constitute a basis for the refusal of declaratory relief. That must, with respect, be correct at least where (as here) a declaration is sought as a form of de facto certiorari, or as an alternative to constitutional writ relief, which can clearly be refused for excessive delay.

9. The delay here is manifestly of an order that, in the absence of a compelling explanation, would justify the refusal of relief.4 Moreover, even if Huon’s delay of more than five years can be explained on some basis other than dilatoriness on their part, there remain three considerations which point inexorably towards refusal of relief.

10. First, while it is not the subject of evidence, it can hardly be controversial that Petuna and Tassal have ordered their affairs on the basis of the decision over a lengthy period, including by expending money to expand their operations in accordance with the Amended Development Plan. They would manifestly suffer detriment if required, instantly, to reduce the scope of those operations.

11. Secondly, and relatedly, the grant of a declaration would mean that each of Huon, Tassal and Petuna (together, the Marine Farmers) was prima facie in breach of, at least, s 74AA of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) for their conduct in marine farming in accordance with the expansion. Section 74AA makes it an offence for a person to take an action that has been referred to the Minister under s 69 of the EPBC Act until the referral has been dealt with. A declaration of invalidity now would potentially render the past 5 years of marine farming illegal and potentially subject to criminal sanction. Further, to mitigate the risk of continued criminal liability, the Marine Farmers may have to take action to stop their commercial activity pending a new decision. The potential for very significant adverse effects for the Marine Farmers and third parties is obvious.

12. Thirdly, the relief now sought by Huon in relation to the decision is manifestly inconsistent with its conduct leading to the making of the decision. Huon was one of three companies “working jointly” on the proposed expansion of salmonid farming in the lead-up to the referral (AB 11) and “jointly involved” in the proposed expansion (AB 107). To that end, Huon, Petuna and Tassal were jointly the “proponent” of the proposed amendments to the Management Plan referred to in more detail below (AB 11; cf 256). In response to a direct inquiry from the Minister’s Department (AB 372), Huon affirmed on 10 September 2012 that it was aware of the referral and had had “considerable input” into its preparation: AB 377. It received a copy of the proposed “particular manner” requirements on 25 September 2012 (AB 422). Huon also confirmed that it would undertake the action in the manner set out in the Notice (AB 554).

13. In these circumstances, to the extent that it has a discretion, the Court should not allow its processes to be used by Huon to invalidate the decision.

 (Footnotes omitted.)

1. The Minister’s supplementary submissions later filed with respect to this issue are as follows:

2. In summary, the Minister submits that the Court should, as a matter of discretion, refuse to make the declaration sought by Huon and should do so without making any determination as to the substance of the grounds of review.

**B. DISCRETION TO REFUSE RELIEF**

3. The Court has an undoubted discretion to refuse to grant the declaratory relief sought by Huon. The circumstances of this proceeding present a very strong case against the grant of relief.

4. Huon accepts that the validity or invalidity of the decision made by the Minister on 3 October 2012 (Decision) was ascertainable at the time it was made and cannot be affected by subsequent events. That Huon delayed for approximately four years and four months before commencing proceedings challenging the validity of the Decision weighs heavily against the grant of relief. Moreover, contrary to Huon’s submissions, this is not a case of mere delay. Huon’s conduct before and after the making of the Decision has been wholly inconsistent with the relief it now seeks. In addition to the matters referred to in the Minister’s Submissions:

(a) Huon provided a three month progress report to the Minister, informing him that “considerable progress had been made to fulfil the requirements of your decision” (including by “monthly water quality monitoring for assessment of water quality indicators” and “[c]ontinued dialogue” with the Tasmanian DPIPWE “to facilitate a process to review ... interim limit levels for water quality indic[a]tors in June 2013”); and

(b) it took the benefit of the Decision by expanding its marine farming operations in Macquarie Harbour in the year following the Decision.

5. Huon submits that it did not delay but instead raised its concerns regarding the notice and the environmental health of Macquarie Harbour to the Minister and the Tasmanian authorities. Huon’s evidence shows only limited engagement with the Commonwealth. In any event, Huon’s engagement with the Commonwealth and the Tasmanian authorities was predicated on the assumption that the Decision was valid and was directed to its concerns about compliance with the particular manner described in the notice and its dissatisfaction with the biomass limit determinations made by the Tasmanian authorities. Huon’s conduct therefore does not explain its delay. On the contrary, it reinforces the point that Huon's conduct has been inconsistent with the relief it now seeks.

6. In addition, Huon’s delay has the potential to give rise to significant prejudice to Petuna and Tassal. Huon accepts that a declaration of invalidity would have adverse economic consequences for Petuna and Tassal, but submits that the impact would be lessened because, under s 43B of the EPBC Act, the marine farmers can continue farming while a new decision is pending. On the contrary, s 74AA of the EPBC Act makes it an offence for a person to take an action that has been referred to the Minister under s 69 until the referral has been dealt with. Further, the action that was referred included varying the locations and areas of the existing marine farming zones. Thus, even if the marine farmers could quickly reduce the scale of their operations to pre-2012 levels, it cannot be assumed that that would avoid continued non-compliance with s 74AA or be protected by s 43B. A declaration of invalidity would at the least result in a period of regulatory uncertainty and a reduction in operations may have economic consequences for Petuna and Tassal.

7. The discretion to refuse relief is not be exercised lightly, having regard to the public interest in ensuring that officers of the Commonwealth exercise their executive powers in accordance with the law, including in the context of the protection of the environment. However, for the reasons stated in the Minister’s Submissions, and in light of the force of the considerations weighing against relief, it would be appropriate for the Court to address the issue of discretion first and, if it determines that relief should not be granted, not to make any determination of the substance of Huon's grounds of review.

 (Footnotes omitted.)

###### Petuna’s submissions

1. Petuna’s initial written submissions with respect to the issue of relief were as follows:

46. Relief of the kind sought by the applicants is discretionary and should not be made lightly …

48. In broad terms, however, the Courts recognise that even where error is established, it can be refused where:

a. a party has acquiesced in a course of conduct in the sense of calculated (that is, deliberate and informed) inaction by a person, or standing by encouraging another to reasonably believe the omissions were accepted or not opposed [citing *Byrnes v Kendle* (2011) 243 CLR 253, [79] per Gummow and Hayne JJ]. That conduct will be aggravated where the relief sought would give rise to a serious and unfair prejudice to a third party [citing *Orr v Ford* (1989) 167 CLR 316 per Deane J at 341].

b. it would produce unwarranted prejudice to the interests of a party relying on the administrative decision;

c. a party has a statutory appeal process available that it has not used. It has been accepted at least since the decision of the High Court in *Tooth & Co Ltd & Anor v The Council of the City of Parramatta* [(1955) 97 CLR 492] that the existence of a statutory right of appeal is relevant to the question of whether relief in the nature of the prerogative writs should be granted. It is not suggested in this case that the existence of s78 of the EPBC Act is intended to exclude judicial review, it is nonetheless relevant as a matter of discretion that a concern over certainty could have been raised and dealt with in an expeditious and effective manner that would not lead to the uncertainty and unfairness that the present case would involve.

49. In this case, each of these matters militate against the discretionary issue of relief:

a. the applicants were aware of the beliefs of the Minister that were ultimately set out in the Decision. They were specifically asked whether they could comply with those conditions, and gave assurances that they could.

b. the applicants conducted their (presumably profitable) business under the protection of the Determination for five years. Their delay in bringing the proceedings is both inexplicable and disentitling.

c. other marine farming operators (including the fourth respondent) have relied in good faith on the Decision, and have therefore not taken other steps available to them to ensure clarity of the regulatory position. The prejudice to them is a powerful factor against the grant of relief.

50. It is difficult to envisage an example of conduct that could be more inconsistent with relief being granted.

51. The first applicant not only failed to raise the issue for five years (during which time each of the parties to this litigation have proceeded to act on the basis of a valid determination) it consented to the determination, and acknowledged that it could conduct its proposed expanded marine farming activities within the confines of the Decision.

52. In the circumstances, relief should be refused, even if some error is identified.

(Footnotes omitted.)

1. Petuna’s supplementary written submissions later filed were as follows:

**Discretionary Factors**

14. The applicants have failed to identify an adequate explanation for its delay in bringing the present proceedings. Indeed, the material relied on proffered in their evidence highlights that there was no new or intervening fact that occurred between 2013 and the time that they elected to commence the present proceedings. All of the matters which they now complain of were known to them in 2013. Despite that fact, the applicants:

a. continued to take the benefit of the Decision, presumably on the basis that they were complying with all necessary regulatory obligations; and

b. were aware of all of the facts and matters necessary to commence proceedings, but decided not to do so, presumably because of their own strategic and commercial interests.

15. The applicants’ assertion that the economic interests of all three parties are of a similar character is made in the absence of any evidence to support that assertion. Moreover, it is inconsistent with the evidence that the fourth respondent’s substantial salmon farming interests are concentrated on Macquarie Harbour in a way that the applicants’ are not.

16. In any event, the mere fact that the applicants themselves may suffer financial detriment that it chooses to sustain is fundamentally different from the position of the fourth and fifth respondents. They have each incurred significant capital expenditure in developing and sustaining operations in Macquarie Harbour over a period of many years, and would suffer significant detriment if the basis upon which that had been carried out were undermined. The detriment would flow to the broader west coast community if significant job losses occurred if the applicants, the fourth respondent and the fifth respondent were forced to curtail or stop their aquaculture activities in Macquarie Harbour.

17. The applicants seek to balance the devastating economic consequences of any declaration of invalidity against environmental harm which it has not adduced evidence to support. In the circumstances, the discretionary factors weigh heavily against the grant of relief, even if an error is identified.

1. Petuna’s closing written submissions were as follows:

**THE PURPOSE OF THE PROCEEDINGS**

26. The evidence of the two guiding minds of the Applicant makes clear that the true purpose of this proceeding is not to highlight any relevant uncertainty, but instead because Huon disagrees with the effect and implementation of the Decision.

27. The evidence of Mr Bender was in this respect frank, he agreed agreeing that his company’s objective is to have the biomass revisited. He agreed with the proposition that:

... you commenced this proceeding because you took the view, I suggest to you that, having failed in all of your attempts over that period of time to have the regulator accept your version of how biomass should be calculated, you had failed, and you resorted to what you considered to be the only other option, that is, challenge the whole decision?

28. It appears plain that Huon hoped that the biomass would remain at a particular level for a particular time, and that Huon’s true complaint is that it does not agree with the merits of the State Government's management.

**DELAY IN COMMENCEMENT OF THE PROCEEDING AND OTHER DISCRETIONARY MATTERS**

29. There can be no doubt that the Applicant failed to bring the proceedings within a reasonable time. Petuna submits that the Applicant has failed to establish a reason or justification for the delay.

*The conduct of the Applicant*

30. The evidence amply demonstrated the delay in bringing the proceeding. It is the clear evidence of Mr Bender that he knew in September 2014 that one of the options available to the company was to apply for judicial review of the Government decision. It decided not to take any step-in relation to that option in 2014, 2015, or 2016. It continued to take the benefit of the Decision over that period.

31. A further issue that has clearly arisen in the course of the evidence is that an adaptive management approach to the regulation of the Harbour was sought and obtained by Huon.

32. Huon's conduct in bringing this proceeding smacks of approbation and reprobation: it sought and obtained a decision that gave it significant financial benefit and gave the flexibility that Huon sought.

*The impact of the delay*

33. It is no answer to the Applicant’s delay to say that Petuna has made profit from its Macquarie Harbour operations since 2012. On the contrary, had the Applicant raised its complaint in a timely way (i.e. within 60 - 90 days of the Decision):

a. no stock would have been introduced into Macquarie Harbour by that time. No stock was introduced until August 2013;

b. each of the farmers would have had the opportunity to rectify any issues prior to the expenditure of significant amounts on capital expenditure;

c. staff engagements could have been properly managed; and

d. the introduction of stock into Macquarie Harbour could have proceeded in an orderly way, without the need for culling stock.

34. Separately, it can hardly be controverted that each of the marine farmers have changed their position dramatically in reliance upon the Determination and its effect. That change in position (in good faith) means that the effect now of a declaration of invalidity would be to jeopardise the viability of Petuna as a going concern.

35. The method employed by the Applicant to seek a declaration in this manner and at this time applies a guillotine to the conduct of fishing operations in Macquarie Harbour. It does not provide for a downward trend, or responsive management. On the contrary, the mechanism actually set out in the legislation to respond to a change in circumstances is s 78 – which permits a reconsideration while the activities are being undertaken.

36. The Applicant has repeated alluded to, and failed to address, the impact of s 78.

37. Ultimately, the effect of a Declaration from this Court is made, tonnes of salmon will been killed, scores of workers retrenched, and the viability of Petuna dramatically undermined. Those effects would not have been the consequence of a determination of invalidity had it been made within a reasonable time after the determination.

38. That proposition is bad in law. As it stands, Petuna’s entitlement to undertake fishing is dependent upon the existence of leases and licences. Those leases and licenses are not pre-existing authorisations under the EPBC Act, because they were enacted.

(Footnotes omitted.)

###### Tassal’s submissions

1. Tassal’s primary submissions with respect to this issue were as follows:

6.1 The claim for relief is now confined to a declaration of invalidity of the decision pursuant to s.21 of the Federal Court of Australia Act 1976 and a consequential order that it be quashed pursuant to s.23 [the Court observes that the relief sought was later confined to a declaration]. In each case the grant of relief is discretionary.

6.2 Without any supporting evidence, the applicants assert that it was not until receipt of the Referral Brief that they first appreciated the Minister treated the referral as having been made by the Secretary pursuant to s.69 of the Act and in consequence determined to abandon the identified paragraphs of the claim.

6.3 It is not accepted that the applicants were not aware of this fact before this litigation was commenced. The applicants fail to draw attention to other documents in the Referral Brief. On 7 September 2012 the Commonwealth corresponded with the first applicant. It advised receipt of a referral pursuant to s.69, gave notice of that fact pursuant to s.73(a) and made a request for information pursuant to s.75. The first applicant responded on 10 September 2012. Inter alia, it advised that it was aware of, and had considerable input into, the preparation of the referral pursuant to s.69.

6.4 Each of the applicants took advantage of the Minister’s decision of 3 October 2012 in that they undertook marine farming pursuant to each of their leases and in accordance with the amendments to the marine farming plan which they seek to impugn in this proceeding. It would seem likely that each applicant has generated profit, over a considerable period of time, in consequence of the continued conduct of marine farming in accordance with the marine farming plan as amended.

6.5 Despite these facts, the applicants commenced this proceeding on 17 March 2017 and asserted that the first and second respondents, as the persons taking the action, failed in various ways to comply with the Minister’s decision. Each iteration of the statement of claim, commencing with the document dated 6 February 2017 and concluding with the version dated 1 September 2017, pleaded that the first or second respondents were the persons responsible for taking the action and thereby contravened the decision by the grant of new leases and licences.

6.6 The applicants further contended that the action as referred has, will or is likely to have, a significant impact on the declared values of the World Heritage Area and on the relevantly listed threatened species. Consequential relief, in the form of injunctions and declarations was sought. It hardly needs to be observed that the applicants alleged serious breaches of the Act with attendant criminal and civil consequences.

6.7 Prima facie it would appear the applicants instructed the commencement of this proceeding contrary to their knowledge and sought to impugn a referral process they agreed to and took economic advantage of.

6.8 The applicants have not provided an explanation for their significant delay in commencing this proceeding. They have not explained why serious allegations were pleaded against the first and second respondents contrary to the knowledge which they had. It is incumbent upon the applicants to now provide a full, frank and complete explanation to this Court.

6.9 Moreover, there are many other relevant discretionary factors. If this Court declares the decision invalid and/or sets it aside, then any person who undertakes the action of marine farming in Macquarie Harbour, and pursuant to the amended marine farming plan, may be in breach of the Act. If the decision is set aside, it will fall to the Minister to exercise the statutory power according to law. The referral will remain undetermined for a period of time. It is an offence for a person to undertake action during the referral period.

6.10 The second intervener, conformably with the agreed position at the directions hearing on 27 September 2017, will place evidence before this Court at a trial which is relevant to the exercise of the discretion. Broadly the evidence will address the following matters:

(a) The capital expenditure to date, in good faith, in reliance upon the validity of the decision;

(b) The economic consequences of setting the decision aside, not only for the second intervener but also for innocent third parties (such as employees and contractors); and

(c) The impracticability of immediately ceasing marine farming operations in Macquarie Harbour.

6.11 This evidence will be detailed. It is not appropriate for this Court to make the necessary findings of fact as a component of the determination of the remaining preliminary question.

(Footnotes omitted.)

###### Huon’s submissions

1. Huon’s primary written submissions with respect to this issue were as follows:

**E.5 Question 7 - entitlement to relief**

57 It is submitted that, notwithstanding the delay (of some four years duration) in commencing this proceeding, the Applicants should not be denied the declaratory relief sought in paragraph 1, and the orders (in effect for certioriari [sic] and mandamus) sought in paragraphs 5 and 6 of the Second Further Amended Originating Application. Huon will await the written submissions of the respondents on entitlement to relief and intends to reply to any substantive matters that are advanced by them in that regard. If necessary, Huon will apply for leave to supplement the material before the Court with relevant documents including correspondence in relation to controls on the expansion of marine farming in Macquarie Harbour.

(Footnotes omitted.)

1. Huon’s reply submissions with respect to this issue were as follows:

**(f) the criminal exposure issue**

18. The grant of a declaration would not give rise to criminal liability for past action, for either of two reasons. Taking s 74AA(1)(g) of the EPBC Act as illustrative of the issues, the applicable criterion for engaging potential criminal liability is that there is “no decision … in operation” at the time of relevant action. It is is [sic] submitted in the context of criminal liability under this provision, the Courts would adopt a factual, and not a theoretical, interpretation of the reference to the decision being in operation. The question of whether invalidity has the consequence that the relevant decision is to be regarded as no decision at all is a matter of statutory construction on a case by case basis, and it would be sufficient to avoid the operation of s 74AA(1)(g) that the Minister’s decision existed as a matter of fact. In any event, it appears that the defence for mistake of fact under section 9.1 or 9.2 of Chapter 2 of the Criminal Code would be available, on the basis that the relevant mistake of fact here would be the assumption that the decision was valid.

**(g) the reconsideration issue**

19. We repeat paragraph 12, above. Further, Huon intends to adduce affidavit material that the review of water quality limit levels has not occurred, and that biomass limits have been subject to significant uncertainty, including evidence of its approach to the Commonwealth Minister (at that time, Senator the Hon Simon Birmingham) by email on 30 September 2014 enclosing a briefing dated 28 September 2014 and its attachments, and at a meeting on 2 October 2014. Huon thereby raised its concerns with the manner in which the action was being taken, and in particular with the State’s Department’s view that there was no biomass limit in place under clause 2(f), its loss of confidence in the State Department’s desire to “enforce the objectives of the various management controls that have been put in place” including its powers to review biomass levels, and sought enforcement of a safe biomass limit, proposing options including:

*1. the Minister for the Environment exercising powers under the EPBC Act … to establish the biomass limit and enforce that limit; or*

*2. reconsidering whether the increased biomass limit has now converted what was previously not a controlled activity into one which is now required to be controlled …”.*

20. In substance, although not all of the manner and form requirements imposed by regulation 4AA.01 under s 68A [sic: s 78A] of the EPBC Act may have been observed (reg 4AA.1(2)(a) was not specifically addressed), this was sufficient conduct by Huon to negate the criticisms that have been made in PS [41] and [48](c) and TS [3.24].

**(h) the acquiescence/delay issues**

21. Paragraph 19 above is repeated. The affidavit material Huon intends to adduce will address these issues in detail. Declaratory relief should not lightly be refused. To do so would leave an invalid decision to stand. In respect of the arguments put against Huon being granted relief if question 5 is answered “yes”, Huon will seek leave at the hearing to rely on an affidavit of Frances Robyn Bender, Executive Director of Huon, to be served next week. The affidavit will establish that Huon has since July 2014 repeatedly raised its concerns regarding the notice and its concerns regarding the environmental health of Macquarie Harbour to the Commonwealth Minister and the State Secretary. Huon has been pursuing political and administrative strategies to overcome the lacuna in the notice caused by the Commonwealth Minister’s failure to particularise the permitted water quality impacts and permitted biomass limit from mid-2013, and treated the institution of court proceedings as a last resort. Huon has not idly sat by. To the extent that there has been delay, Huon submits:

(a) delay is not a sufficient reason alone to refuse discretionary relief;

(b) an objective of the EPBC Act is to protect the environment, especially matters of national environmental significance: s 3(1)(a). Granting a declaration would promote this object of the EPBC Act and promote a matter of public interest beyond the commercial interests of Huon and other salmon famers; and

(c) there is no other available course under the EPBC to have the notice revoked where the action has been taken. Section 78(3) EPBC precludes the Minister from revoking the component decision in circumstances where the action has been taken.

**(j) the third party prejudice issues**

22. While a comprehensive response to claims of adverse economic impact on Tassal and Petuna must await the evidence they foreshadow, there is no doubt that the curtailment of acquaculture [sic] operations upon the grant of a declaration, pending a further decision by the Commonwealth Minister, would have adverse economic impacts on them and might have adverse flow-on consequences for others such as certain local employees or contractors. The affidavit material Huon intends to adduce on discretionary matters will address the environmental damage occurring in Macquarie Harbour, including by reference to an up to date report on dissolved oxygen levels. There is no doubt that prejudice to third parties must be weihged [sic] in the decision as to whether to grant relief, but the protective objectives of the EPBC Act must also be weighed, and it is submitted that on balance a grant of relief is justified. There may be means available to the Court of ameliorating third party prejudice, such as an appropriate adjournment prior to the making of orders to facilitate the preparation of an up-to-date referral, with a view to minimising processing time while the matter is reconsidered by the Commonwealth Minister.

23. Huon seeks leave to make further submissions in reply on relief after any further evidence has been filed by the Respondents addressing question 7.

(Footnotes omitted.)

1. Huon’s supplementary written submissions advanced the following:

**Paragraph 40 – Discretionary Relief**

21. Full submissions will be provided at the close of evidence at the hearing of this matter with respect to paragraph 40 of the TFASOC [made orally]. That notwithstanding, these submissions identify elements relevant to the exercise of the discretion, in addition to those provided in the First Submissions and the Reply Submissions.

22. If the declaration sought by Huon is granted, the consequence is that the referral will (technically, and legally) revert to being before the Commonwealth Minister for determination. There will be uncertainty around the status of marine farming only for that period of time until the referral is the subject of a new decision under s 77.

**Economic Impact**

23. In considering the evidence that will be adduced as to potential economic impact the Court needs to distinguish the asserted potential impact caused by the lack of an applicable decision under the EPBC Act while a new decision is pending, with the asserted potential impact from a new decision under the EPBC Act.

24. A new decision under the EPBC Act cannot be a relevant factor in the exercise of the discretion, for a number of reasons including:

(a) the outcome of new decision under the EPBC Act cannot be known;

(b) the Decision itself was premised on an adaptive management framework to achieve prevention of significant impact on the protected matters through increasing or decreasing stocking density in response to detection of impacts, which in Huon’s submission means, had the Decision been able to achieve this intent, then any reduction or cessation should have occurred under the mechanisms in the Decision;

(c) pursuant to the Decision the marine farmers are subject to the exercise of the power of the State to require a reduction or cessation of marine farming through the setting of biomass pursuant to 2f of the Decision or under the Marine Plan management controls.

25. If it is asserted that the outcome of the new decision under the EPBC Act will significantly impact the stocking density of marine farming in MH by way of more stringent protection for the environment, then this is a factor that weighs in favour of the exercise of the discretion. That is because the object of the EPBC Act is the protection of the environment.

26. Insofar as any asserted economic impact caused by the lack of a decision pursuant to s 77 of the EBPC Act, the Court will need to be satisfied that there is loss caused and the amount of that loss. What is also relevant however are profits derived in reliance upon the impugned decision.

27. It is acknowledged that all the marine farmers have made capital investments and all marine farmers have made significant profits from marine farming. Any loss asserted based on capital investments would need to be established as arising out of the circumstances created by the referral reverting to the pre-decision stage.

28. If economic impact is asserted as associated with the loss of revenue from existing fish stock in MH then the number of lost stock and value of that lost stock will need to be established. Any such evidence would need to factor in, as submitted above, that there is no certainty with respect to future stocking density allowance in the Decision or the State statutory framework.

29. Furthermore, given the referral specifically excluded the pre-expansion marine farming from the action, and that the EPBC Act provides broad protection for the continuation of an action that occurred prior to the EPBC Act coming into existence, it does not necessarily follow that marine farming will need to cease (or necessarily reduce) whilst a new decision is pending.

**Conduct of the Parties**

30. Whilst Huon submits that the evidence will establish that there is an explanation for the alleged delay in bringing proceedings, all the marine farmers have benefitted from the undertaking of farming since the Decision in 2012. Equally all the marine farmers have had access to the same information regarding the Decision and the environmental conditions of MH. One of the respondents was also, arguably, initially partisan with Huon’s position. This is not a case of balancing competing commercial interests or one in which the Applicant will obtain a private benefit, but this is a unique situation in that Huon too will suffer the consequences of the declaration, together with the Second and Third Respondents.

**Criminal Sanction**

31. It is submitted that the Decision only operates as a protection against criminal sanction if the person taking the action is able to show that they are taking the action in accordance with the particular manner, which Huon submits, given the lack of specification of the manner as set out in these submissions, is not possible to establish. It is highly unlikely that, in any case, there will be a prosecution in consequence of a declaration of invalidity operating ab initio. The point was appropriately addressed by the Full Court of this Court in *Lansen v Minister for Environment and Heritage* [(2008) 174 FCR 14 at [190]-[191]].

**Statutory Context**

32. It is submitted that, as set out in the First Submissions and Reply Submissions, even if the Court is satisfied that the evidence establishes that there are factors weighing against the exercise of the discretion, the public purpose of ensuring that the purpose of the EPBC Act, being to protect the environment, is furthered is the most significant factor in this case and one which deserves paramount importance. That purpose, properly applied, serves to modify what might conventionally be taken to be factors relevant to the exercise of discretion in light of the nature and purpose of the Act under which the Decision was made.

(Footnotes omitted.)

##### Findings relevant to discretion

1. The Court dealt with evidential issues associated with the Respondents’ objections to a considerable corpus of materials proposed to be adduced by Huon in these proceedings in its interlocutory decision: *Huon No 1*. The objections the Court ruled on were that those materials included inadmissible expressions of expert opinion. I incorporate my interlocutory reasons by reference.
2. I rejected the Respondents’ objections in part. I held that Huon was entitled to rely on the materials to which objection had been taken as relevant to Huon’s subjective opinions and concerns and to establish that Huon had a reasonable basis for holding those opinions and concerns.

###### Huon’s directors have a reasonable basis for their subjective opinions and concerns

1. The Court accepts that Huon has consistently raised concerns regarding declining levels of dissolved oxygen since 2014. The evidence is all one way that Huon has repeatedly raised that concern with both state and federal government agencies.
2. It was not put to any of Huon’s witnesses during the hearing that they did not have such a concern or that they lacked reasonable grounds for believing that the expansion of marine aquaculture in Macquarie Harbour had been responsible for, inter alia, reduced dissolved oxygen levels.
3. The Court has no reason to doubt the truthfulness of the evidence given by Mr and Ms Bender that, as the controlling minds of Huon, they each hold the belief that the increased intensity of fish farming in Macquarie Harbour has been responsible for a deterioration in its water quality. I accept that Huon has adduced sufficient evidence to establish affirmatively that its directors not only hold that belief but they have a reasonable basis for it. The evidence Huon has adduced includes a “Statement of Reasons” for a May 2017 biomass determination made by the Director of the EPA, which contains the following:

Current research tells us that fish farming has some part in contributing to the low dissolved oxygen seen in the bottom waters of the quarry harbour, but to what extent is currently unknown.

(Ex A3 p 741)

1. However, accepting that a person genuinely holds a belief on reasonable grounds is distinct from accepting that that person has established the existence of the fact of the truth of their belief.

###### Huon abandoned its claim that the action undertaken by marine farmers has had or will have significant impacts on matters of national environmental significance

1. While Huon was successful to the degree referred to at [151] above, in my rulings on the evidence I rejected that Huon was entitled to rely on the content of those annexures to prove that environmental conditions in Macquarie Harbour had in fact deteriorated because of the increased intensity of fish farming.
2. Save as referred to at [152] above, those reports are not in evidence for the purposes of establishing that there is in fact a public interest in the grant of relief.
3. Huon’s Third Further Amended Statement of Claim removed its former pleadings at [34] and [35] that “the Action [the expansion of marine farming operations] has, will or is likely to have a significant impact” on the natural values of a declared World Heritage Area and a listed threated species respectively. Huon did not file any reply to the Respondents’ respective defences as might have repleaded that proposition.
4. My ruling acknowledged that Huon would be entitled to rely on the raw data regarding dissolved oxygen levels as reported in those documents.
5. However Mr Costello, then appearing for the Minister, quite properly submitted:

[T]he position of the Commonwealth is that it does not rule out the marine farming may have an effect on dissolved oxygen levels. But it does not accept that marine farming necessarily has an effect. Its position has always been that that is a matter that requires investigation. Similarly we do not accept that an effect on dissolved oxygen levels is tantamount to environmental harm.

(21 December 2017, transcript p 63 line 43 – p 64 line 2)

1. Huon has called no expert evidence to enable the Court to draw inferences necessary for it to make a finding linking the raw data regarding dissolved oxygen to the increased intensity of fish farming consequential upon the Minister’s decision or that that has been responsible for environmental harm to either the World Heritage Area or threatened species.

###### To what degree, if any, would a declaration of invalidity adversely affect the interests of Petuna, Tassal and third parties?

1. Huon’s written submissions accept that the curtailment of aquaculture operations upon the grant of a declaration, pending a further decision by the Commonwealth Minister, would have adverse economic impacts on Petuna and Tassal and that it might have adverse flow-on consequences for others such as certain local employees or contractors.
2. However Mr Galasso submits that as the referral specifically excluded the pre-expansion marine farming from the action, and that the EPBC Act provides broad protection for the continuation of an action that occurred prior to the EPBC Act coming into existence, it does not necessarily follow that marine farming will need to cease (or necessarily reduce) whilst a new decision is pending.
3. I should address those propositions sequentially.

###### Consequences of ceasing marine aquaculture in Macquarie Harbour likely to be significant for Tassal and potentially catastrophic for Petuna

1. In the lead up to the hearing, as part of mutual skirmishes, Huon advanced a flurry of objections regarding the admissibility and confidentiality of evidence relevant to proof of the quantum of loss that Petuna and Tassal would suffer if a declaration were made. In the end, however, common sense prevailed.
2. As a result, Huon does not dispute that if the consequence of the Court making the declaration it seeks were to be that Petuna and Tassal’s operations in Macquarie Harbour would be required to cease, that would occasion great economic detriment to both companies and many of their local employees.
3. The Court finds that those consequences would not be equally experienced. They would be significantly adverse for Tassal but potentially catastrophic for Petuna. Unlike Tassal and Huon, which are more geographically diversified, Petuna relies almost exclusively on marine farming in Macquarie Harbour to generate its revenue. Other than in Macquarie Harbour, Petuna has only one small fish farming lease in Tasmania.

###### Court rejects it is entitled to find that marine farming could be resumed on a business as usual basis after only a short delay

1. The first submission Huon advances has an implicit rather than express qualification: that any consequences would be limited to a short period “pending a further decision by the Commonwealth Minister”.
2. It is perhaps ironic that a submission that a quick fix would be forthcoming is pressed on behalf of a party which, until recently, had pleaded and sought to prove that that the expansion of fish farming in Macquarie Harbour has, will have, or is likely to have a significant impact on both the World Heritage Area and a listed threatened species. It is a curious position for Huon to have taken given that the Court has been asked to proceed on the basis that Huon still has those concerns.
3. Mr Kennett addressed the hypothesis that the Court could assume the consequences would be limited in oral submissions as follows:

We don’t know whether the referral would be withdrawn or remain pressed. We know that the EIS is now a number of years old. We know that there has been a considerable body of experience about the environment in Macquarie Harbour built up in that time, some of which your Honour has heard about. We apprehend that the Minister at the very least would be likely to feel the need to seek

further information, and it’s – it would be very hard to predict what that information would show or what the Minister might do with it. There are a number of possible ways it might go, as your Honour indicated, legally, and given the passage of time and the water that has passed under the bridge – I didn’t quite get to a fish metaphor, but I’m going to try – there’s just no knowing where things might go if the matter is sent back.

(transcript p 360 line 42 – p 361 line 7)

1. I accept Mr Kennett’s submission.
2. The Court has yet to address Huon’s premise that the three companies’ pre-existing use entitlements would revive, but unless that is so, the notion that business as usual would be capable of quickly being resumed is implausible. I reject that it is open to the Court to proceed on a basis other than that there would be at least a significant likelihood that, after having sought further information and having regard to the precautionary principle to which he would be subject, the Minister would make a decision that the action was a controlled action.
3. Mr Kennett correctly points out that the data and information before the Minister dates from some considerable time ago. Having regard to the events that have since occurred, it is difficult to conceive how the Minister could form a belief that he or she is entitled to rely on the background undertakings given by Mr Evans on behalf of DPIPWE in 2012 – given that one of the most critical of those undertakings in relation to the maintenance of the total biomass limit (see below at [224]), on the evidence before the Court, would appear to have been dishonoured. I have already noted the position of the Commonwealth in these proceedings that the Minister does not rule out that marine farming may have an effect on dissolved oxygen levels in Macquarie Harbour.
4. Given the statement “preliminary results from the January 2018 in-fauna survey by IMAS show a reduction in species diversity and abundance since the October 2017 survey at some locations” that appears in the EPA’s recent draft biomass determination (Ex A6 p 6), the Court concludes that it is more likely than not that the Minister would be unable to form a belief on the materials before him that the action was not a controlled action. It must be borne in mind that the Minister’s decision would be subject to review pursuant to the ADJR Act. The Minister’s decision could not be taken on a whim.
5. Assuming the Minister were to decide that the proposed action was a controlled action, the referred action would be required to be assessed under one of the methods prescribed for in Pt 8 of the EPBC Act. The Court can only speculate as to the outcome of such a process. However, on the case earlier advanced by Huon, it is not inconceivable that the proposed action might be refused, or alternatively conditions imposed that would render salmonid production in Macquarie Harbour uneconomic.
6. In any event, the Court is entitled to proceed on the basis that the processes available to assess a controlled action are often protracted. The selection of the process is a matter for the Minister. Whatever process was selected, all activities associated with the expansion as referred would be prohibited during the assessment period. Continuing them would attract criminal penalties (s 74AA).
7. Given that the proposed action to expand marine farming as originally referred included the operation of fish farms and included the feeding and transportation of fish, any attempt to disaggregate those activities from those not subject to the referral so that the former are refrained from would be, at best, complex and highly disruptive. There might be no practical way to disaggregate them. Pending a decision on the referred action, the strict application of s 74AA might require all of the fish to be euthanized and operations shut down.
8. The Court recognises, as Mr Galasso submits, that the Department and other enforcement agencies might be expected to exercise restraint: *Lansen v Minister for Environment and Heritage* [2008] FCAFC 189; (2008) 174 FCR 14 (***Lansen***) at [190]-[191]. However, interested parties (defined to include organisations whose purposes include the protection of the environment) utilising the open standing provisions provided for by s 475 of the EPBC Act to apply for an injunction might well not.
9. The above discussion has proceeded on Mr Galasso’s premise that disaggregation would only present practical difficulties, however but the Court is not persuaded of that assumption.

###### Section 43B argument

1. Mr Galasso submits that each of the operators’ pre-existing entitlements under s 43B of the EPBC Act would revive assuming the Minister’s decision has to be remade. On that premise, Mr Galasso submits that, irrespective of the Minister’s disposition of the referred action to expand marine farming in Macquarie Harbour, it does not follow that marine farming will need to cease (or necessarily reduce) in Macquarie Harbour whilst a new decision is pending.
2. Section 43B of the EPBC Act is as follows:

**Actions which are lawful continuations of use of land etc.**

1. A person may take an action described in a provision of Part 3 without an approval under Part 9 for the purposes of the provision if the action is a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act.
2. However, subsection (1) does not apply to an action if:

(a) before the commencement of this Act, the action was authorised by a specific environmental authorisation; and

(b) at the time the action is taken, the specific environmental authorisation continues to be in force.

Note: In that case, section 43A applies instead.

1. For the purposes of this section, neither of the following is a continuation of a use of land, sea or seabed:

(a) an enlargement, expansion or intensification of use;

(b) either:

(i) any change in the location of where the use of the land, sea or seabed is occurring; or

(ii) any change in the nature of the activities comprising the use;

that results in a substantial increase in the impact of the use on the land, sea or seabed.

1. Mr Galasso’s contention faces two difficulties: the first a threshold question of law, the second a question of fact and law in respect of which Huon has not adduced the evidence to establish its contention.
2. The threshold question of law is if at a particular point of time, by reason of s 43B(3), an action is not a continuation of the use of land, sea or seabed by reason of the enlargement, expansion or intensification of the use, can a later repudiation of the enlargement, expansion or intensification revive a person’s entitlement to take an action without approval?
3. The Court was referred to no authority on the question. As a matter of statutory interpretation, the Court is enjoined by authority to apply the text of the provision understood in the context of the Act read as a whole: see *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309 at 315 per Mason J; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]-[71]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.
4. In the Court’s opinion, a plain reading of the text of s 43B supplies the answer: the section does not apply to an action which is not a continuation of a use. If, by reason of s 43B(3)(a), an action does not have that character because there has been an enlargement, expansion or intensification, a later repudiation of an enlargement, expansion or intensification does not restore the original position. Once continuity of use for an action has been broken, for that reason, the protection is lost.
5. The text of s 43B operates on the **fact** that there has been a lawful continuation of a pre-existing use that the person taking that action has not enlarged, expanded or intensified. An enlargement, expansion or intensification of the action takes the action as a whole outside of the definition of an action which does not require an approval.
6. For the purposes of s 43B there is not both a protected use action and a distinct second action of enlargement, expansion or intensification such that the second stands outside the first. There is only one action which, if it is enlarged, expanded or intensified, no longer is an action for which approval is not required.
7. Such a literal construction is not inconsistent with the provision read in its context as part of the Act as a whole. The objects of the EPBC Act as stated in s 3 commence with the statement that the objects of the EPBC Act are “to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance”. The EPBC Act provides a comprehensive regime for that purpose, binding not only private persons but the Crown in all its capacities. In that statutory context, and having regard to the objects of the EPBC Act, it would be consistent with the overarching objects to construe a provision protecting pre-existing user rights from the requirement to seek approval for an action as having ceased to have any application once the action has been enlarged, expanded or intensified.
8. It is uncontentious that Huon, Petuna and Tassal have all enlarged and expanded their marine farming operations following the Minister’s decision or purported decision. The Court is not persuaded by Mr Galasso’s submission that s 43B would permit them individually to repudiate that expansion so as to revive their former rights.
9. As the Court would construe s 43B(3)(a) on the case Huon advances, each of Huon, Petuna and Tassal’s earlier prior use entitlements were extinguished when those companies expanded their marine farming operations if the Minister’s decision was purportedly and invalidly, rather than lawfully, made. That Huon, Petuna and Tassal originally relied upon the Minister’s decision as a lawful basis to authorise that expansion is of no consequence. The critical circumstance of expansion is one of fact. As a result, s 43B(3)(a) is to be given effect consistently with the reasoning of the plurality of this Court (Gray and Downes JJ) in *Jadwan Pty Ltd v Secretary, Department of Health & Aged Care* [2003] FCAFC 288; (2003) 145 FCR 1 at [52]-[59].
10. The second difficulty, if I am wrong in that reasoning, is that the Court has no sound basis to identify whether it would be: (a) possible; or (b) economically feasible for Huon, Petuna and Tassal to restore their respective positions to that which pre-existed the expansion.
11. Mr Galasso points to what is in effect a double negative in the text of s 43B(3)(b)(i) and (ii) to urge a construction of those provisions such that an existing use can be changed in its location and the nature of its activities so long as such a change does not involve a substantial increase in the impact of the use on the land, sea or seabed. That much may be accepted.
12. However it is uncontentious that, in compliance or purported compliance with the Minister’s Decision, almost all of Huon, Petuna and Tassal’s lease sites in Macquarie Harbour not only were increased in size but also their locations were altered. Mr Galasso’s submission that the difficulties in the way of the marine farmers reverting to the pre-expansion status quo would be small is advanced in the abstract, save for the proposition that on the basis of Ex A6 the Court should be satisfied that the total biomass limits likely to be set by the Tasmanian regulator in coming years will be reduced to that which approximates pre-expansion levels.
13. Huon has adduced no evidence as to what would need to be done, whether it could be done, and if so, at what cost, to restore Huon and Petuna’s position to that which existed prior to those companies having taken advantage of their opportunity to expand.

###### Minister likely to require referral of larger action

1. Moreover, assuming I am correct in holding that s 43B would not permit Huon, Petuna and Tassal to revive their pre-expansion entitlement to take an action without approval, if the Court were to make a declaration as Huon has sought, there would be no action the marine farmers could take that is exempt from the operation of the EPBC Act. Each of Huon, Petuna and Tassal would need to consider whether they were obliged to also refer the balance of that action (which hitherto did not require approval) to the Minister pursuant to s 68 of the EPBC Act
2. Whether or not they would regard themselves as obliged to self-refer, the Minister would be entitled and could be expected, pursuant to s 74A of the EPBC Act, to request them as the proponents of an action (being the expansion of marine farming) to refer for his decision the entirety of the larger action in respect of which the expansion is merely a component.

##### Consideration

###### Discretion to refuse relief

1. The Minister submits that the discretionary nature of the relief is well established. Mr Galasso does not contest that proposition. The Court accepts the Minister’s submission.
2. The Court has concluded by reason of Huon’s delay, and more critically its failure to adequately explain its delay, coupled with Huon’s acquiescence in the Minister’s decision and its having taken advantage of it, that it would be inequitable for the Court to make a declaration which would have significant detrimental consequences for Petuna and Tassal which have acted in reliance on the validity of the decision it seeks to impugn.
3. The Court finds that Huon had, and knew it had available to it, the opportunity to have its concerns addressed when the circumstances it asserts evidenced the invalidity of the decision it now complains of first arose some years ago. It did not take advantage of that opportunity.
4. The Court is satisfied that while Huon pleads and presses the submission that manner provisions such as it gives particulars of in [38(a)] of its pleadings are void for uncertainty, the evidence of Ms Bender, under cross-examination by Mr McElwaine, entitles the Court to find that Huon itself understood what was required of it by those terms as defined. Ms Bender accepted it was “bread and butter stuff for a marine farmer” (transcript p 128 line 34). Ms Bender’s evidence was that Huon and the other operators had had no difficulty understanding the requirements (transcript p 126 line 24 – p 133 line 20). I infer that, whilst expressed in technical language, the manner provisions were not perceived by Huon as ambiguous. That, of course, is not dispositive of the grounds Huon advances in its application for review. These reasons proceed on the basis that those grounds can be established. However, it is material to the discretion that the Court must exercise in that it is clear evidence that neither Huon, nor, on the evidence of Ms Bender, either of the other operators, had any difficulty in applying those manner provisions.
5. The Court accepts that, balanced against those factors, Huon has brought these proceedings in the belief that the conduct it, Petuna and Tassal collectively participated in has caused and is causing environmental harm to Macquarie Harbour. The Court acknowledges that Huon advances these proceedings as vindicating the public purposes of the EPBC Act. However the factual foundations for the Court to find those public purposes have been or would actually be endangered by that action have not been laid. Prior to trial Huon abandoned its pleadings asserting the fact of that damage and has eschewed any attempt to prove its actual existence.
6. Furthermore, the way Huon has responded to the arguments advanced against it by the Respondents in relation to discretion, viz that marine farming will not need to cease (or necessarily reduce) in Macquarie Harbour whilst a new decision is pending, appears to the Court to be inconsistent with the Court proceeding on the basis that a declaration is necessary to prevent the action causing significant environmental harm.
7. At the threshold, I reject Mr Galasso’s submission that it is a sufficient answer to the detriment Petuna and Tassal will suffer for Huon to observe that Huon will be similarly affected. One is a consequence of choice, the other of imposition. In any event, any costs would not be evenly distributed; because of where its leases are sited the burden would fall disproportionately on Petuna.
8. The Court has been persuaded that it is proper for it to accept the submission initially advanced by the Minister and later joined in by Petuna and Tassal that the relief sought by Huon should be refused on discretionary grounds. The Court accepts Mr Kennett’s submission that the discretion is to be exercised on conventional grounds. I accept his submission that the Court’s “frame of reference in the discretionary sphere is the proper administration of justice, which is different from that which the Minister had to apply” (transcript p 354 lines 10-15). That is not to discount in any way the priority that the Minister was obliged to give to the protection of matters of national environmental significance: it is simply to acknowledge, as Mr Kennett submitted, that “the Court is not the Minister and the Minister is not the Court” (transcript p 353 lines 1-2).
9. The Court sets out in some greater detail its consideration of the factors referred to in summary above.

###### Delay and the availability of alternative relief

1. The Minister’s written submissions contend that Huon’s delay in bringing these proceedings is four years and four months. The Minister notes that the validity or invalidity of his decision was ascertainable at the time it was made and cannot be affected by subsequent events.
2. That proposition is sound, but I reject that the length of delay is of itself a sufficient basis for refusing relief on discretionary grounds. As Mr Kennett accepted in oral argument (conceding the point made by Mr Galasso), it is not so much the delay as the adequacy or otherwise of the explanation for delay which is the real issue (transcript p 351 lines 14-15).
3. The explanation that Huon offers is that it was not until a time after mid 2013 when it became aware of the now asserted shortcomings of the Minister’s decision. I am prepared to accept that until Huon became aware of Tassal’s decision to increase the smolt in its leases in Macquarie Harbour to 100% of its allocated quota on the premise that the interim biomass limit established by manner provision 2(f) had ceased to apply as referred to at [92] above, Huon had had no occasion to give consideration to the validity of the terms of the Minister’s decision. Huon had simply been taking advantage of the opportunity it had sought to expand its marine farming leases. It had reported at the three month stage to the Minister that it was doing so in compliance with the manner the Minister had determined.
4. I am satisfied that Huon’s delay to that point is explicable on the basis that Huon was then under the same misapprehension as the Department initially had been that the “action” was being taken by DPIPWE. In those circumstances I would not accept that there was an inadequate explanation for Huon’s delay.
5. However from September 2014 onwards I am satisfied that Huon has advanced no acceptable explanation for its further delay. Ms Bender gave evidence that as from early September 2014 Huon had sought legal advice as to what steps it might take.
6. It will be recalled that on 11 September 2014 Page Seager, Huon’s solicitors, had advised DPIPWE that:

We hold instructions to take whatever steps are necessary to protect our client’s interests. Those available steps would appear to us to include:

1. a judicial review of the Tasmanian Government’s (DPIPWE) decision to increase the limit beyond 52.5%. In that process Huon will be seeking discovery of all documents that the government based its decision upon and any other documents which influenced that decision;
2. review of the Minister’s Decision of 3 October 2012 to remove the power of the Tasmanian Government (DPIPWE) to vary the biomass due to the inability of the government to exercise its powers in accordance with a proper scientific approach;
3. review of the Minister’s Decision on the basis that the increase of the limit beyond 52.5% has converted the activity into a controlled activity and a permit must be issued; and
4. recovering any damages suffered by Huon in consequence of the negative impacts of the increase of the biomass levels in the Macquarie Harbour and any reduction in Huon’s biomass allocation that might be caused by the SBD.
5. While it can be accepted that the terms of points 2 and 3 of that letter do not precisely replicate the criticisms of the Minister’s decision advanced in these proceedings, the terms of that letter reveal that Huon had received legal advice that it was open to it to seek judicial review of the Minister’s decision, including specifically in respect of the operation of manner provision 2(f) as it applied to the setting of a total biomass limit.
6. Huon did not initiate any of the proceedings foreshadowed by its solicitors.
7. Nor did Huon, as Mr McElwaine submits Huon might have, and the Court accepts was open for it to have done, seek a declaration as to the proper construction of manner provision 2(f).
8. It may be accepted that Huon did make representations to the Commonwealth regarding that question. For that purpose, it sought and obtained a meeting with the Parliamentary Secretary, Senator Birmingham. It made the representations to him and received the response from him that are referred to at [103]-[105] above. Huon was effectively brushed off.
9. Huon’s written submissions contend that the representations it made were sufficient conduct on Huon’s part to negate the criticism made of it by Mr Gunson that it had failed to use the express mechanism provided for by s 78A of the EPBC Act to request a reconsideration of the Minister’s decision on the basis that there had been an unanticipated change in circumstances. I do not accept that submission.
10. The terms of s 78A of the EPBC Act are as follows:

**Request for reconsideration of decision by person other than State or Territory Minister**

(1) A person (other than a Minister of a State or self-governing Territory) may request the Minister to reconsider a decision made under subsection 75(1) about an action on the basis of a matter referred to in any of paragraphs 78(1)(a) to (ca).

Note: Section 79 deals with requests for reconsideration by a Minister of a State or self-governing Territory.

(2) A request under subsection (1) must:

(a) be in writing; and

(b) set out the basis on which the person thinks the decision should be reconsidered; and

(c) if the regulations specify other requirements for requests under subsection (1)--comply with those requirements.

(3) If a request is made under subsection (1) in relation to a decision that an action is a controlled action, or that particular provisions are controlling provisions for an action, then:

(a) if the request is made by the designated proponent of the action--Part 8 ceases to apply in relation to the action until the Minister makes a decision in relation to the request; but

(b) if the request is made by another person--the application of Part 8 in relation to the action is not affected by the making of the request (subject to the outcome of the reconsideration).

(4) If:

(a) because of paragraph (3)(a), Part 8 has ceased to apply in relation to an action; and

(b) the Minister confirms the decision that is the subject of the request under subsection (1);

then:

(c) the application of Part 8 in relation to the action resumes (as does any assessment process under that Part that had previously commenced in relation to the action); and

(d) for the purposes of the resumed application of Part 8, a day is not to be counted as a business day if it is:

(i) on or after the day the Minister received the request; and

(ii) on or before the day the Minister confirms the decision.

1. Section 78(1)(a) to (ca) referred to in s 78A is as follows:

**Reconsideration of decision**

Limited power to vary or substitute decisions

(1) The Minister may revoke a decision (the first decision) made under subsection 75(1) about an action and substitute a new decision under that subsection for the first decision, but only if:

(a) the Minister is satisfied that the revocation and substitution is warranted by the availability of substantial new information about the impacts that the action:

(i) has or will have; or

(ii) is likely to have;

on a matter protected by a provision of Part 3; or

(aa) the Minister is satisfied that the revocation and substitution is warranted by a substantial change in circumstances that was not foreseen at the time of the first decision and relates to the impacts that the action:

(i) has or will have; or

(ii) is likely to have;

on a matter protected by a provision of Part 3; or

(b) the following requirements are met:

(i) the first decision was that the action was not a controlled action because the Minister believed the action would be taken in the manner identified under subsection 77A(1) in the notice given under section 77;

(ii) the Minister is satisfied that the action is not being, or will not be, taken in the manner identified; or

(ba) the following requirements are met:

(i) the first decision was that the action was not a controlled action because of a provision of a bilateral agreement and a management arrangement or an authorisation process that is a bilaterally accredited management arrangement or a bilaterally accredited authorisation process for the purposes of the agreement;

(ii) the provision of the agreement no longer operates in relation to the action, or the management arrangement or authorisation process is no longer in force under, or set out in, a law of a State or a self-governing Territory identified in or under the agreement; or

(c) the following requirements are met:

(i) the first decision was that the action was not a controlled action because of a declaration under section 33 and a management arrangement or an authorisation process that is an accredited management arrangement or an accredited authorisation process for the purposes of the declaration;

(ii) the declaration no longer operates in relation to the action, or the management arrangement or authorisation process is no longer in operation under, or set out in, a law of the Commonwealth identified in or under the declaration; or

(ca) the following requirements are met:

(i) the first decision was that the action was not a controlled action because of a declaration under section 37A and a bioregional plan to which the declaration relates;

(ii) the declaration no longer operates in relation to the action, or the bioregional plan is no longer in force; or

(d) the Minister is requested under section 79 to reconsider the decision.

Note 1: Subsection 75(1) provides for decisions about whether an action is a controlled action and what the controlling provisions for the action are.

Note 2: A person (other than a Minister of a State or self-governing Territory) may request the Minister to reconsider a decision made under subsection 75(1) about an action on the basis of a matter referred to in any of paragraphs 78(1)(a) to (ca). See section 78A.

Note 3: If the Minister decides to revoke a decision under subsection (1) and substitute a new decision for it, the Minister is not required to carry out the processes referred to in sections 73 and 74 again before making the new decision.

1. In oral submissions Mr Gunson addressed the Court on the right to request a reconsideration under s 78A of the EPBC Act as follows:

We [Petuna] embrace the submission made by Mr Kennett that the constraints in subsection (3) [of s 78] relate to an action that has been completed in the sense of is now historical. If it is interpreted to encompass an action that is continuing, it effectively neuters the section. And given the precautionary approach to decision-making made in section 75(1), and the fact that it is not – or that it is a decision made in the absence of a full part 8 assessment, the construction of 78 that allows the minister a flexibility to potentially correct mistakes that may have occurred in the section 75(1) process, ought to be preferred to one that unduly constrains the section.

(transcript p 430 lines 16 – 23)

…

…[I]in this instance, your Honour, although the decision that the action was not a controlled action has the effect of moving it outside the EPBC Act system, for want of a better phrase, if on the ground things change, the minister can potentially bring it back in. Now, it might be that the minister brings it back in, has a look at it and considers it remains not a controlled action or might form the view that the manner – or he might in discussions with the proponent form a belief that it will be undertaken in a particular manner which may alleviate the minister’s concerns, or it may be that a decision is made that in fact is it is a controlled action, in which case it goes off to part 8. There was a matter that your Honour raised with Mr Kennett which was in response to Mr Galasso’s submission that the applicant had attempted to engage the Commonwealth in relation to this, however were fobbed off back to the State. The answer to that question or issue, your Honour, is found in section 78A.

HIS HONOUR: Yes. So you refer me to section 78A, is to say that was a mechanism of relief available. An alternative mechanism of relief available to the applicant in these proceedings.

MR GUNSON: Yes.

HIS HONOUR: Other than bringing these proceedings. And whilst I – I’m not sure whether your submission is going to this effect, but as a matter of discretion one of the considerations that is usually taken into account is the availability of other relief.

MR GUNSON: Yes. I draw the provision to your Honour’s attention for two reasons: firstly, as part of that submission which we have made, that no application for reconsideration was ever made and that’s what they should have done, which would of course be a merits-based or factual reconsideration by the minister. But the second reason that we draw it to your Honour’s attention is that there was a submission made by Mr Galasso to the effect that Huon tried to engage with the Commonwealth and were fobbed off. Our response to that submission is that, yes, they may have tried to have a meeting with the environment – with the minister, they may have discussed matters with Commonwealth officials, they never made an application in the form required by section 78A to invoke the reconsideration provisions. So it’s not an answer to say we tried to engage with the Commonwealth. The fact is, they never made the application in a form required by the Act to invoke that process.

(transcript p 430 line 40 – p 431 line 29)

I accept Mr Gunson’s submission.

1. No party suggests s 78(3)(a) applies. The Court accepts it does not. The wording of that subsection is apt only to apply to an approval given after one or other of the processes provided for in Pt 8 of the EPBC Act have been undertaken.
2. For the reasons Mr Gunson and Mr Kennett advanced, the Court also rejects Mr Galasso’s submission that s 78(3)(b) applied such that it would have prevented the Minister revoking his earlier approval. Such a construction is implausible: it would neuter the substantive provision. Moreover as a matter of pure text such a construction is inconsistent with the language in which the prohibition is expressed. Section 78(3) prohibits the Minister revoking a decision “**after** … the action is taken”. Thus for so long as an action is ongoing, the prohibition has no application.
3. In this matter, the short description of the “action” (the subject of the Minister’s decision) encompassed not only the construction of sea pens but also the ongoing operation of marine farming. The action was still ongoing in mid 2014. It has remained ongoing to the present.
4. I am satisfied that as at the end of September 2014 it was open to Huon to have requested that the Minister reconsider the decision. There was a proper foundation for Huon to have done so on the basis that there had been a substantial change in circumstances relating to the impact of the action that was not foreseen at the time of that decision (s 78(1)(aa)).
5. Amongst the substantial unforeseen change(s) in circumstances that Huon might have adverted to were: (a) the failure of the review process for the setting of a new total biomass limit; (b) the failure of the Tasmanian Government to set a revised total biomass limit such that the interim limit set by manner provision 2(f) had been permitted to lapse; and (c) that the marine farmers named in the decision were no longer jointly undertaking the action (that understanding had been expressed in the formal letter sent to Huon by the Department on 7 September 2012).
6. In respect of the second of those potentially asserted changes in circumstances being relevantly unforeseen, the Court observes that after Huon had been advised by Mr Tregurtha of DPIPWE’s referral of the proposed action, Mr Bender had replied on 10 September 2012 that Huon had had considerable input into the preparation of DPIPWE’s responses to, inter alia, the Minister’s request of 5 July 2012 for further information. Mr Bender’s letter attached a copy of Mr Evans’ letter of 5 September 2012 (see above at [59]). On that basis, the Court is entitled to infer that Huon was aware of the substance of DPIPWE’s response which had included:

The interim water quality limits and the water quality monitoring requirements contained within marine farming licences will not be updated, and additional finfish biomass above and beyond that indicated in the Secretary’s letter of 27 June 2012 will not be able to be added to the harbour until such time as the review has been completed, and the marine farming licence conditions amended to reflect the outcome of the review.

(Ex A1 p 384)

1. I note that, although sharing Mr Gunson’s premise that s 78(3) would have not precluded Huon then seeking reconsideration of the decision, Mr Kennett refrained on the Minister’s part from pressing a submission regarding s 78A in relation to the Court’s exercise of discretion:

I think it may be part of Petuna’s case. It isn’t part of ours, largely because [a review pursuant to s 78A] is another look at the decision by the person who made it.

(transcript p 44 lines 27-31)

1. The Court possibly misapprehends Mr Kennett’s reservations. However, in so far as the Minster’s submission might be thought to imply that it would be an error for the Court to take into account Huon’s failure to pursue that mechanism as relevant to the Court’s exercise of discretion, the Court does not accept that proposition.
2. Such an application by Huon would be premised necessarily on a substantial change in the circumstances not foreseen at the time of the first decision having arisen. Accordingly, the issue for decision by the Minister would not have been the same. The EPBC Act expressly provides for a reconsideration application in such circumstances and invests the responsibility for determining the outcome in the Minister. It is a formal process subject to scrutiny. Section 78B requires, inter alia, publishing the request on the internet and inviting comment (s 78B(6)). The application would have had to be notified to the other two companies (s 78B(2)). The Minister’s decision would have had to be provided in writing and reasons could have been required (s 78C). The decision would have been reviewable pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**). Such a statutory process is not to be equated with it being merely “another look at the decision by the person who made it”.
3. Further, in so far as Mr Kennett might be understood as concerned that issues of apprehended bias or pre-judgment would have existed such that Huon might reasonably have feared that an independent mind might not have been brought to any reconsideration, it may be accepted that that issue required determination by the same “Minister”. However in the relevant statutory context that is a reference to the person commissioned from time to time to hold that office. It is not a reference to the individual who made the original decision. It is uncontentious that the Hon Tony Burke MP who had made the original decision by that time no longer held that office. As a practical matter, the question of reconsideration would have been for decision by a different person.
4. For those reasons the Court accepts Mr Gunson’s submission that Huon’s failure to take that step is a factor the Court is entitled to take into account in the Court’s exercise of discretion:

MR GUNSON: It’s a section that hasn’t been mentioned very much in this case, but in our submission is a vital provision, because it demonstrates that contrary to the picture that the applicant would seek to paint, the decision that an action is not a controlled action is not set in stone. It can be reviewed, it can be reconsidered. And that is extraordinarily important in our submission to issues of discretion. And permits the subject matter experts to consider the merits of the decision as opposed to relying on judicial review.

(transcript p 432 lines 41-47)

1. I am satisfied that the availability of that statutory mechanism is relevant both in relation to Huon’s delay and its failure to pursue alternative relief. It is established by *Tooth & Co Ltd v Parramatta City Council* [1955] HCA 21; (1955) 97 CLR 492 that the availability of alternative relief is relevant to the issue of mandamus (now a constitutional writ in the nature of mandamus). By analogy, the availability of a review under the EPBC Act must be relevant to the declaratory relief sought in these proceedings. A Commonwealth minister is equally required to (and can be expected to) submit to the terms of a declaration made in a proceeding in which he or she is a party as if an order in the nature of mandamus is made.

###### Huon has provided no satisfactory explanation for its delay

1. The evidence given by Mr and Ms Bender in these proceedings was that Huon had been principally motivated by concern regarding threatened environmental harm to Macquarie Harbour when it consulted its legal advisors in early September 2014.
2. The Court is satisfied that Mr and Ms Bender were each honest witnesses. Neither disputed that Huon, like Petuna and Tassal, had made substantial profits from its leases in Macquarie Harbour as a result of the expansion of marine farming to the present. In cross-examination, Mr Bender acknowledged that when Huon had sought legal advice in 2014 it had been aggrieved by Tassal’s conduct in having moved unilaterally to increase the stocking of its leases to 100% of its quota and that Huon believed DPIPWE was poised to treat it and Petuna unfairly by permitting Tassal to lock in the advantage it had thereby secured: see above at [117]-[120]. However, both Mr and Ms Bender were unshaken in cross-examination that Huon’s principal motivation in seeking legal advice in 2004 and in bringing these proceedings was concern for the health of the harbour.
3. Nevertheless, having sought legal advice, Huon took no action at the time when the contentious events that triggered their doing so had arisen other than to make representations as exampled above at [101]-[105] and [111]-[116].
4. Although Huon had been by alerted by its legal advisors that it had a right to seek judicial review of the Minister’s decision, Huon’s representations to Senator Birmingham were differently premised: it contended that the decision had been validly made but was being improperly implemented by DPIPWE.
5. I therefore accept the Minister’s submission that Huon’s representations were directed to its concerns about compliance with the particular manner described in the s 77 Notice and its dissatisfaction with the biomass limit determinations made by the Tasmanian authorities. Huon’s conduct therefore does not explain its delay. On the contrary, it reinforces the point that Huon’s conduct has been inconsistent with the relief it now seeks (as asserted at [5] of the Commonwealth’s supplementary written submissions).
6. Mr Bender’s evidence was that Huon had not taken legal proceedings because it had kept working with the government to try and resolve the issues.

###### Implausible that Huon expected its subsequent representations to bring about the changes it believed necessary

1. The Court does not qualify its acceptance of Huon’s primary motivation for taking these proceedings was as Mr and Ms Bender gave evidence. However that provides no explanation as to why, after Huon had threatened to take legal action, it persisted with “working with the government” for approximately three years before taking that step.
2. Huon was told on 29 September 2014 that DPIPWE intended to proceed on the basis that the biomass limit set by manner provision 2(f) had lapsed on 18 October 2013. Three days later Huon was told by the Commonwealth Parliamentary Secretary that he did not wish to become involved; it was an issue better resolved at the state level.
3. It is implausible that after those events Huon had any actual expectation that further similar representations would yield the result it was pressing for.
4. Neither Mr nor Ms Bender, nor any other witness for Huon, pointed to any reason why the Court should find that Huon had any hope, let alone a positive belief, that such representations might be heeded. Notwithstanding, Huon continued to press fruitlessly for one or both of the Commonwealth and Tasmanian regulators to intervene (a) to place a reduced overall total biomass limit on the harbour; and (b) redistribute that biomass limit equitably (as Huon perceived it) as between the three companies.
5. Huon’s pursuit of what by then it must have known to be an improbable outcome does not explain its delay in commencing judicial review proceedings.
6. Moreover, not only did Huon not seek judicial review of the Minister’s decision (as Huon had been explicitly advised by its solicitors it could have then taken), it did not make an application for a declaration as to the construction of manner provision 2(f) (as Mr McElwaine correctly observed would then have been available to Huon), nor did it seek review of the Minister’s decision by way of an application pursuant to s 78A of the EPBC Act (which was, as the Court has concluded, an alternative course open for Huon to have pursued).
7. Ordinarily a party contesting the validity of an administrative decision has 28 days (which can be extended by the Court) to bring proceedings pursuant to the ADJR Act. There are also time limits (which also can be extended) prescribed for the alternative of seeking one or other of the constitutional writs. As Wilcox J noted in *Hunter Valley Developments Pty Ltd v Cohen* [1984] FCA 186; (1984) 3 FCR 344 at 348-350, in applying the relevant principles that influence whether or not a court should grant an extension of time in cases involving public administration, the public interest may well dictate refusal of an extension even after only a short delay. All such limitation periods expired long ago.
8. Mr Kennett properly acknowledges that there is no prescribed limitation period for declaratory relief pursuant to s 39B of the *Judiciary Act 1903* (Cth) but submits that there is a well-recognised public interest in finality. I accept that submission.

###### Acquiesce and taking advantage of the decision

1. I reject that that the Court should find that Huon acquiesced in a course of conduct in the sense of calculated (that is, deliberate and informed) inaction by a person, or standing by encouraging another to reasonably believe the omissions were accepted or not opposed.
2. However it is incontestable that Huon was one of the original sponsors of the proposal that marine farming in Macquarie Harbour be permitted to expand. It worked jointly with Petuna and Tassal to prepare an EIS for that purpose and put forward that proposal to DPIPWE. The MHMFDP was amended to permit that to occur. It was at their joint instigation that that proposal was then referred on their behalf to the Minister for decision.
3. Huon expressly accepted the terms of the Minister’s decision that the proposed action was not a controlled action provided it was undertaken in the manner the Minister set out in his s 77 Notice. Huon was specifically asked whether it could comply with the manner provisions, and gave the Minister its assurance that it could.
4. Notwithstanding Huon’s concern for the environment and its threats to take legal action in 2014, Huon continued to take economic advantage of that decision to make substantial additional profits until it commenced these proceedings.
5. On behalf of Petuna Mr Gunson submits (at [14] of his written submissions) that Huon:

a. continued to take the benefit of the Decision, presumably on the basis that they were complying with all necessary regulatory obligations; and

b. were aware of all of the facts and matters necessary to commence proceedings, but decided not to do so, presumably because of their own strategic and commercial interests.

1. The Court accepts Mr Gunson’s propositions to have been established. As to the first limb, there is no evidence of Huon ever asserting that it had been unable to comply with the Minister’s decision prior to it writing to the Commonwealth on 30 November 2016 to foreshadow these proceedings. That had been the first time Huon expressed any concern that it could not comply with the Minister’s decision. Prior to that point, Huon had asserted that it had been concerned that Tassal’s conduct was non-compliant.
2. As to the second limb, the Court has concluded at [241] that Huon has advanced no plausible explanation of why it delayed beyond September 2014 taking any action which might have put the concern the Court has accepted its directors had regarding environmental damage to the fore.
3. In the absence of an alternative explanation the Court infers that the reason for Huon’s years of delay was that its directors, while primarily concerned about the consequences to the environment, hesitated to risk the consequences for Huon’s commercial interests that might arise (see [161]-[190] above) were it to successfully challenge the validity of the Minister’s decision in judicial review proceedings. It continued to press the regulators to find a solution on its terms without risking its commercial interests.
4. Huon had been making, and continued to make, substantial profits from the exploitation of the harbour on the back of the approval it knew it could, but chose not to, impugn.
5. Mr and Ms Bender did not dispute that Huon had been conscious of its commercial interests in later bringing these proceedings. It is implausible that Huon was not also earlier conscious of those interests. As was the case in *Hamlet*, Huon’s resolve was followed by indecision and inaction. Huon knew it had cause to act as from September 2014. It knew it had legal entitlement to do so. Yet it did nothing to force the issue.
6. I accept Mr Gunson’s characterisation of Huon’s conduct as smacking of approbation and reprobation: Huon sought and obtained a decision that gave it, together with Petuna and Tassal, significant financial benefit on terms they had jointly sought. Huon thereafter took commercial advantage of the same decision it now seeks to impugn. It continued to take commercial advantage of that decision long after it had become aware of all of the facts and matters necessary to commence proceedings.

###### Detriment likely to be experienced by third parties that have ordered their affairs in reliance on the validity of the decision Huon seeks to impugn

1. The Court is satisfied that in 2012 each of the marine farmers altered their positions in good faith in reliance upon the Minister’s decision (or purported decision) that the action that had been referred to him was not a controlled action if undertaken in the manner he later specified in his s 77 Notice. All three companies acted in reliance on the validity of the decision Huon now seeks to impugn. Each of Huon, Petuna and Tassal made significant investments after they had been given approval to expand their operations in Macquarie Harbour.
2. Huon does not dispute that if the consequence of this Court granting the declaration it seeks will be to require marine farming operations in Macquarie Harbour to cease permanently or for a protracted period, that each of Petuna and Tassal would suffer significant adverse economic detriment. The Court has noted that those impacts would disproportionately disadvantage Petuna because its marine farming leases are, save for one exception, exclusively within Macquarie Harbour. Those adverse consequences can reasonably be anticipated to spread to Petuna and Tassal’s local employees and contractors.
3. However, Mr Galasso submits that because the referral specifically excluded the pre-expansion marine farming from the action, and that the EPBC Act provides broad protection for the continuation of an action that occurred prior to the EPBC Act coming into existence, it does not necessarily follow that marine farming will need to cease (or necessarily reduce) whilst a new decision is pending.
4. By contrast, the Minister submits (at [6] of his supplementary submissions):

Huon’s delay has the potential to give rise to significant prejudice to Petuna and Tassal. Huon accepts that a declaration of invalidity would have adverse economic consequences for Petuna and Tassal, but submits that the impact would be lessened because, under s 43B of the EPBC Act, the marine farmers can continue farming while a new decision is pending. On the contrary, s 74AA of the EPBC Act makes it an offence for a person to take an action that has been referred to the Minister under s 69 until the referral has been dealt with. Further, the action that was referred included varying the locations and areas of the existing marine farming zones. Thus, even if the marine farmers could quickly reduce the scale of their operations to pre-2012 levels, it cannot be assumed that that would avoid continued non-compliance with s 74AA or be protected by s 43B. A declaration of invalidity would at the least result in a period of regulatory uncertainty and a reduction in operations may have economic consequences for Petuna and Tassal.

1. While no criticism can be made of Mr Kennett’s submission, the analysis the Court has earlier undertaken suggests the Minister significantly understates rather than overstates the likely adverse consequences Petuna and Tassal would be exposed to were this Court were to make the declaration Huon seeks.
2. For the reasons set out at [162]-[179] and [180]-[194], the Court has concluded (a) that it is not open to the Court to find that marine farming would be likely to be authorised to resume on a business as usual basis after only a short delay; and (b) that Petuna and Tassal would not be entitled to revive their respective previous existing user entitlements.
3. The Court finds that Petuna and Tassal, in good faith, ordered their affairs on the basis of what was originally the view shared by Huon regarding the validity of the Minister’s decision. They would be greatly adversely affected were the Court to make the declaration Huon now seeks.
4. The proper construction of manner provision 2(f) stands independently of that conclusion. The circumstances in which it became contentious occurred later in time. The position taken by Tassal in that regard and the application of the manner provision by DPIPWE may well have been, as Huon believes, unfair and legally unsound. However Huon had the opportunity to seek a declaration as to its proper construction when that issue arose and became contentious but did not.

###### Inconsistency of Huon’s position regarding environmental consequences

1. The Court has already acknowledged it accepts that Huon advances these proceedings to vindicate the public purposes of the EPBC Act. That is a factor in favour of exercising its discretion to make a declaration. Those purposes are, in summary, to protect matters of national environmental significance.
2. In Huon’s written submissions Mr Galasso put the proposition thus (at [32]):

…[E]ven if the Court is satisfied that the evidence establishes that there are factors weighing against the exercise of the discretion, the public purpose of ensuring that the purpose of the EPBC Act, being to protect the environment, is furthered is the most significant factor in this case and one which deserves paramount importance. That purpose, properly applied, serves to modify what might conventionally be taken to be factors relevant to the exercise of discretion in light of the nature and purpose of the Act under which the Decision was made.

1. However, not only has Huon abandoned seeking to prove the fact of past, present or future environmental damage but Mr Galasso, on its behalf, now submits that, having regard to the operation of s 43B of the EPBC Act, if the Court does grant an injunction it will not necessarily follow that marine farming will need to cease (or necessarily reduce) whilst a new decision is pending.
2. The Court has not accepted that submission.
3. But assuming the Court is in error in that regard, Mr Galasso’s response to the case made against Huon that the other operators will suffer significant detriment is that they will be able to continue their marine farming operations in Macquarie Harbour largely unaffected, notwithstanding the Court making the declaration Huon seeks. The intensity of marine farming may not even necessarily need to be reduced.
4. Mr Galasso’s submission is advanced on the basis that the draft biomass for Macquarie Harbour determined by the Tasmanian regulator (now the EPA) for 1 June 2018 to 31 May 2020 (see at [123] above) approximates the biomass in the harbour before the expansion (see at [125] above).
5. However if the required foundation for that submission is that the Court is entitled to find that the state regulator now intends to, and will, reduce the total biomass limit in Macquarie Harbour to no more than the (collective) level which each of Huon, Petuna and Tassal are (individually but in aggregate) already entitled to exploit by reason of their pre-EPBC Act protected user rights, that must cut both ways. As a factual proposition, it removes much of the reason Mr Galasso submits to be of paramount importance for the Court to find the balance of discretionary factors is in favour of making the declaration Huon seeks.
6. Huon’s case ceases to be that its directors believe (albeit without pleadings or evidence to support a finding) that, but for the making of a declaration, significant environmental harm will occur.
7. Huon’s position shrinks to asking the Court to accept and proceed on the basis that, notwithstanding any declaration, the existing operators will be entitled to, and will, continue their fish farming activities at pre-expansion levels without any approval from the Minister, notwithstanding the harm that that intensity of aquaculture might entail for any matters of national environmental significance. That is a less persuasive factor in favour of exercising the Court’s discretion in Huon’s favour.

###### Exposure to risk of prosecution

1. For completeness the Court should record that, having regard to the Full Court’s reasoning in *Lansen*, it places no weight in the exercise of its discretion on the submissions made by Mr Kennett, Mr Gunson and Mr McElwaine that the Fourth and Fifth Respondents would be exposed to the risk of criminal prosecution for their past conduct were the Court to make a declaration of invalidity.

###### Conclusion with respect to the Court’s exercise of discretion

1. The Court is persuaded that it is proper for it to accept the submission advanced by the Minister and joined in by Petuna and Tassal that the relief sought by Huon (a declaration that the decision of the First Respondent made on 3 October 2012 that the action referred to him was not a controlled action for the purposes of the EPBC Act provided it is undertaken in the manner set out in the s 77 Notice) must be refused on discretionary grounds even on the assumption that Huon might succeed on the grounds it has advanced (see submission at [141] point 7). Even on that assumption, the cumulative weight of the factors discussed above in favour of refusing relief, in the specific facts of this case, significantly outweigh the reasons to the contrary. They collectively justify the Court exercising its discretion to refuse Huon the relief it seeks.

###### The *Hardiman* principle

1. The Court has come to that conclusion notwithstanding the question posed by Mr Galasso as to whether the submissions advanced by the Minister fell within the *Hardiman* principle.
2. In *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13 (***Hardiman***) at 35-36 the High Court of Australia (Gibbs, Stephen, Mason, Aickin and Wilson JJ) unanimously took issue with the role played by the then Australian Broadcasting Tribunal in proceedings in which prerogative writs were being sought against it. The court stated:

In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this Court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this Court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal.

1. Mr Galasso questioned whether, in advancing submissions that relief should be refused on discretionary grounds and taking an active positon effectively in support of Petuna and Tassal, the Minister was acting inconsistently with the High Court’s disapprobation of a regulator taking other than a neutral and facilitative role.
2. On behalf of the Minister, Mr Kennett indicated that that question had been thought about. The Minister did not dispute that Huon had arguable grounds for contending the decision was invalid. The Minister had taken a neutral position on that question – he had made no submissions one way or the other. The Minister did not intend to descend into the factual fray between the operators.
3. However the Minister was entitled to be heard on whether the Court should exercise its discretion to grant relief. The Minister had an interest in the efficient operation of the Act he administered, including the finality and reliability of decisions. A decision challenged more than four years after it was made was one that excited concern in that respect.
4. Mr Kennett further submitted that the *Hardiman* principle was really directed to tribunals and bodies which had to adjudicate what are, in effect, *inter partes* disputes, not a Minister dealing with an application of this kind (transcript p 349 lines 17-23).
5. The Minister taking the position he did with respect to discretion would not give rise to difficulties if the Court ultimately made the declaration Huon sought:

MR KENNETT: Were it remitted, it would be – and if the existing referral is persisted with, it has three proponents, all of whom are in the room, and all of whom are equally proponents. Anything bad we might say about Huon wouldn’t give rise to any concern, we would say, about the Minister’s ability to deal with that.

(transcript p 349 lines 26-29)

1. Be that as it may, the law is clear that the Minister is not prohibited by the *Hardiman* principle, assuming it applies, from taking the course pursued in these proceedings. Any disapprobation, if warranted, is to be expressed in the costs orders made by the Court rather than by the Court declining to have regard to the propositions advanced by Mr Kennett on the Minister’s behalf. In any event, the Minister’s submissions were later adopted by Petuna and Tassal. There is no basis for the Court to do other than address them on their merits.

###### Relevance of relief not sought

1. The Court has also come to its conclusions notwithstanding it being aware that s 475 of the EPBC Act provides the capacity for an “interested person” to apply to the Federal Court for an injunction in respect of conduct that constitutes an offence or other contravention of the EPBC Act. Two responses may be made in respect of that provision.
2. First, assuming that an injunction might have been an available remedy for Huon to have sought where its own conduct (as one of three marine farmers in Macquarie Harbour) would necessarily be a component of the relevant offence or contravention, it might be thought that a judicial order is not required for a person to cease their own conduct. Moreover, Huon sought no such order.
3. Second, nothing the Court states in these reasons relating to why it has exercised its discretion has relevance to that quite differently expressed statutory provision. The Court’s conclusions are confined to the particular relief sought by Huon in the specific matrix of factual and legal circumstances in which its application has been advanced. The Court’s decision creates no *res judicata* or estoppel that would apply to an application brought under s 475 assuming the circumstances provided for in that provision of the EPBC Act can be established.

##### Disposition and costs

1. For the above reasons the Court dismisses the application brought by Huon.
2. The Applicants are to pay the Fourth and Fifth Respondents’ (Petuna and Tassal) costs as agreed or assessed.
3. Mr Galasso having raised the *Hardiman* principle, the Court is persuaded it ought not to make an immediately operating identical order for costs in favour of the Minister in the absence of submissions.
4. I should make clear that until Mr Galasso raised the *Hardiman* question during the hearing, the Court gave no attention to whether the Minister’s taking that approach should be questioned.
5. I make no criticism of Mr Kennett or previous counsel for the Minister, who at all stages have acted entirely consistently with their duties to the Court.
6. Neither the Minister nor Huon have had the opportunity to be heard in relation to whether the Court should apply the *Hardiman* principle in relation to costs. The very limited research I have undertaken suggests the scope and application of the *Hardiman* principle is contentious.
7. For that reason I would make an order that Huon pay the Minister’s costs as agreed or assessed up to and including 27 April 2017, when Petuna and Tassal were joined to these proceedings. At that point, if I understand Mr Galasso’s submission correctly, those parties became appropriate contradictors and the Minister should have become a submitting party.
8. I will give leave to the Minister to file and serve, within 28 days of the publication of these reasons, an application to vary the costs order the Court has made supported by submissions limited to 5 pages. I would give leave to Huon to file and serve, within a further 28 days, responsive submissions limited to 5 pages and to the Minister, within a further 14 days, to file and serve any reply submissions limited to 2 pages. The Court will determine any application so made on the papers. It will of course be open to the respective parties to settle the costs issue on agreed terms, without recourse to that procedure.

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| I certify that the preceding two hundred and ninety-four (294) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kerr. |

Associate:

Dated: 6 July 2018