

**Humane Society International Inc v Minister for the Environment  
and Heritage [2003] FCA 6**

Decision under EPBC Act 1999

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## Introduction

On 12 February 2003, the Federal Court handed down its decision in *Humane Society International Inc v Minister for the Environment and Heritage* [2003] FCA 64. The case concerned the validity of agreements made between the Commonwealth, Victoria, New South Wales and Queensland concerning culling grey-headed flying-foxes and spectacled flying-foxes and the Administrative Guidelines on Significance that were issued in relation to these species (ie. the *Administrative Guidelines on Significance: Supplement for the Grey-headed Flying-fox* and the *Administrative Guidelines on Significance: Supplement for the Spectacled Flying-fox* (the "Guidelines")). Both spectacled and grey-headed flying-foxes are listed as vulnerable under the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth) (the "EPBC Act").

In an attempt to devise a national approach to managing grey-headed and spectacled flying-foxes, the Commonwealth reached agreement with Victoria, New South Wales and Queensland that the total number of grey-headed flying foxes and spectacled flying-foxes authorised to be killed in accordance with State licences and permits would not exceed 1.5% of the agreed national population estimate for these species. The Commonwealth is currently of the opinion this level of culling is unlikely to prejudice the long-term survival or recovery of these species.

On the basis of the agreements with these States, the Commonwealth issued the Guidelines. The Guidelines provide that people who kill grey-headed flying-foxes and spectacled flying-foxes in accordance with a valid State licence or permit do not have to make a referral under the EPBC Act. This statement was based on the notion that because the total level of authorised culling is not likely to prejudice the long-term survival or recovery of these species, the actions of individual permit/licence holders are not likely to have a significant impact on these species. As the *Administrative Guidelines on Significance: Supplement for the Grey-headed Flying-fox* state (at p.5):

*"Therefore, under this agreement, if you have a valid State permit or licence to shoot a specific number of Grey-headed Flying-foxes you do not need to make a referral under the EPBC Act. Provided you do not kill more than the number of Grey-headed Flying-foxes on your permit, your action would not have a significant impact on the species."*

## Nature of the Proceedings

Humane Society International ("HSI") sought orders in the Federal Court:

- (a) setting aside the agreements or the Minister's decision to enter into the agreements; and
- (b) directing the Minister to exercise his statutory powers under the EPBC Act in accordance with the law and without reference to the agreements or the Guidelines (ie an order of mandamus).

HSI also sought a declaration to the effect that the agreements and statements in the Guidelines were of no legal force.

These orders and declarations were sought under:

- (a) the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (the “ADJR Act”); and
- (b) s.39B of the *Judiciary Act 1903* (Cwlth) and ss.21 and 23 of the *Federal Court of Australia Act 1976* (Cwlth).

The Commonwealth did not challenge HSI’s standing to bring the proceedings.

### **Applications under the ADJR Act**

HSI identified three grounds for judicial review under ss.5 and 6 of the ADJR Act:

- (a) that the procedures that were required to be observed in relation to the making of the decisions or taking of actions were not observed;
- (b) that the Minister’s decisions, conduct and actions were not authorised by the Act under which they were purported to be made; and
- (c) that the Minister’s decisions, conduct and actions were otherwise contrary to the law (on the grounds the Minister had unlawfully fettered the exercise of his powers and performance of this duties under the Act).

Justice Kiefel dismissed the applications under the ADJR Act on the grounds there had not been a “decision” for the purposes of section 5 of the ADJR Act and that the Minister had not engaged in any relevant “conduct” for the purposes of section 6 of the ADJR Act.

### **Applications under Judiciary Act 1903 and the Federal Court of Australia Act 1976**

Section 39B(1) of the *Judiciary Act 1903* provides:

*“...the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth”.*

HSI identified three grounds upon which to challenge the Minister’s conduct and decisions in relation to the agreements and Guidelines under the Judiciary Act 1903:

- (a) the statement that permit/licence holders do not need to make a referral constituted a refusal to exercise a statutory duty under the EPBC Act;
- (b) the policy that killing spectacled and grey-headed flying-foxes in accordance with a valid State permit/licence was not likely to have a significant impact on these species would be applied without regard to the circumstances of each particular case (ie it is an unlawful fetter on a statutory discretion);
- (c) the policy that people killing spectacled and grey-headed flying-foxes in accordance with a valid State permit/licence do not have to make a referral purports to be an exemption from the relevant provisions of the EPBC Act, which the Minister is not authorised to give except in accordance with the means provided for in the Act.

#### *Refusal to exercise a statutory duty*

Justice Kiefel held that the relevant statutory duty in relation to this issue was to consider individual referrals and determine whether they are controlled actions (ie whether they are likely to have a significant impact on a matter protected under Part 3). Justice Kiefel held that in issuing the statement that permit/licence holders don’t have to make a referral, the Minister had not refused to undertake the duty to consider referrals and determine whether they are controlled actions.

*Unlawful fetter of a statutory discretion*

With regard to the argument that the policy unlawfully fetters a statutory discretion, Justice Kiefel held that while the policy provides a strong indication that the Minister will not find the actions of permit/licence holders to be controlled actions, it was not expressed to operate as a bar to the consideration of all relevant matters. Therefore, it does not operate as an unlawful fetter on the exercise of a statutory discretion.

*Purported exemption that was not authorised under the Act*

The final issue was whether the policy purported to provide an exemption to permit/licence holders which was not authorised under the Act. The Commonwealth argued that the Minister had not exercised any statutory power to exempt actions from the operation of the EPBC Act. Rather, it contended that all the Minister had done is provide advice to permit/licence holders about their obligations concerning referrals.

Justice Kiefel held that the Guidelines went beyond merely providing advice to permit/licence holders. She held the relevant statements in the Guidelines purported to exempt permit/licence holders from their statutory obligations and that these statements were not authorised by the Act. Interestingly, although the declarations sought would not have any impact on the legal rights or obligations of HSI, Justice Kiefel held there was a “matter” for the purposes of the *Judiciary Act 1903*.

On this basis, Justice Kiefel issued a declaration that the purported exemption from the operation of the EPBC Act that was contained in the Guidelines was not authorised under the Act. Justice Kiefel suggested that if the Minister published a retraction of the relevant statements in the Guidelines with a suitable explanation, she would vacate the declaration.