

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA REGISTRY**

No:VID 1112 of 2007

LAWYERS FOR FORESTS INC
Applicant

**MINISTER FOR THE ENVIRONMENT
HERITAGE AND THE ARTS**
First respondent

and

GUNNS LIMITED
Second respondent

FURTHER AMENDED APPLICATION

Filed pursuant to leave granted on 18 June 2008.

APPLICATION for an order of review under s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth).

Filed on behalf of the Applicant by

Name: Bleyer Lawyers Pty Ltd

Address for service: ~~Mezzanine~~ Level 1, 550 Lonsdale Street, Melbourne 3000

Telephone: 03 9600 4224

Facsimile: 03 9600 4225

Ref: Vanessa Bleyer

APPLICATION TO REVIEW the decision (the *decision*) of the first respondent (the *Minister*) made on 4 October 2007 under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the *Act*) to approve the taking by the second respondent (*Gunns*) of the following action (the *action*):

to construct and operate a bleached Kraft pulp mill at Bell Bay, Tasmania, and associated infrastructure (EPBC 2007/3385),

subject to the conditions set out in Annexure 1 to the decision (the *conditions*).

THE APPLICANT is a ‘person aggrieved’ within the meaning of s 487(3) of the Act.

THE GROUNDS OF THE APPLICATION are as follows:

1. The decision was not authorised by the Act because the conditions are repugnant to provisions of the Act or are otherwise outside the object and purpose for which the power to impose conditions provided in s 134 of the Act was granted.

Particulars

- (a) The Act provides a detailed scheme for regulating the process for assessing the relevant impacts within the meaning of the Act of a proposed action, the process for deciding whether to approve the proposed action, the consequences of breach of any conditions

attached to an approval and the circumstances in which the effect of an approval may be suspended, or the approval revoked.

- (b) The effect of the conditions is to establish an alternative scheme for the regulation of these matters, which:
- (i) requires the preparation by Gunns of a document to be known as the 'Environmental Impact Management Plan' (*future EIMP*);
 - (ii) provides, in particular in conditions 34, 35, 36 and 38, for the carrying out of further studies, including in respect of relevant impacts of the effluent from the pulp mill the subject of the decision (respectively, the *effluent* and the *pulp mill*);
 - (iii) provides for some standards of operation of the pulp mill to be determined by reference to the results of the further studies, which standards are to be included in the future EIMP;
 - (iv) provides inter alia in conditions 4, 5, 11, 12 and 43 for the consequence of failure to meet those standards;
 - (v) does not require compliance with the future EIMP; and
 - (vi) purports by condition 4 to qualify the decision so that the continued operation of the pulp mill in the future is subject

to the Minister's state of satisfaction that certain conditions are met.

(c) The scheme for which the conditions provide is inconsistent with the scheme for which the Act provides because:

- (i) on its proper construction, the Act provides that an approval may be suspended or revoked only in the circumstances set out in ss 144 and 145, which do not extend to the qualification of the decision made by condition 4;
- (ii) the Act provides for transparency and accountability in the assessment and approval processes, but the processes provided for by the conditions do not;
- (iii) the requirements imposed by s 136 on the Minister's approval decision do not apply to the purported qualification of the decision made by condition 4.

2. The decision was not authorised by s 133 of the Act because the Minister did not take into account the precautionary principle, as required by s 391 of the Act.

Particulars

- (a) There are threats of serious and irreversible environmental damage within the meaning of s 391(2) by reason of the effluent to be discharged into the marine environment.

- (b) The Minister used the lack of full scientific certainty to postpone a measure to prevent degradation of the environment within the meaning of s 391(2) by:
- (i) postponing assessment of relevant impacts of the effluent until after the decision; and
 - (ii) in the meantime, by conditions 32 and 42, imposing maximum limits for dioxin and furan concentrations that are not related to any, or any proper, measures for adequate environmental protection, either at all or in respect of the relevant marine environment, for the reasons set out in sub-paragraphs (c) to (f).
- (c) The substantive obligations in respect of the effluent imposed by the conditions independently of the future EIMP (*stand-alone substantive obligations*) are those imposed by conditions 31, 32 and 42.
- (d) Condition 31 establishes a maximum daily volume of wastewater effluent to be discharged, which is the volume that Gunns estimated would in fact be discharged by the pulp mill. The maximum volume is not related to any measure, or any proper measure, for adequate protection of the relevant marine environment.
- (e) Condition 32 provides that the pulp mill must not operate if the monthly average effluent concentrations of certain substances

exceed specified limits. The maximum limit set for dioxins and furans reflects Gunns' estimate of what that concentration would be and is not related to any measure, or any proper measure, for adequate protection of the relevant marine environment.

- (f) Condition 42 provides that the maximum limit of concentration of dioxins and furans in the benthic sediments in any location within Commonwealth marine waters is 850pg TEQ/kg. This measure is the Canadian Sediment Quality Guideline (the *Canadian Guideline*) for fresh water and does not take into account any of the particular characteristics of the relevant Commonwealth marine environment. This measure is not related to any measure, or any proper measure, for adequate protection of the relevant marine environment.
3. The decision was not authorised because, on its proper construction, the Act does not authorise the Minister to approve under s 133 the taking of a controlled action unless he believes on reasonable grounds that he has enough information to make an informed decision.

Particulars

- (a) At the time of the decision, the Minister did not believe that he had enough information, independently of the conditions proposed to be imposed, to make an informed decision whether or not to approve the action for the purposes of controlling provisions 23 and 24A.

- (b) Conditions 34, 35, 36, 38 and 40 were imposed in order to obtain the information which the Minister required in order to make an informed decision as required by the Act.
4. The decision was not authorised by the Act because, on the proper construction of s 132, the Act requires the Minister to seek further information before deciding whether or not to approve a controlled action unless he believes on reasonable grounds that he already has enough information to make an informed decision. The Minister made the decision without seeking such further information when he did not believe that he had enough information to make an informed decision, independently of the conditions proposed to be imposed.

Particulars

The applicant refers to and repeats the particulars to paragraph 3.

5. The decision was not authorised by the Act because the Minister made the decision when the assessment of the relevant impacts of the action was not complete. Information about those impacts available within the meaning of ss 144 and 145 had not been assessed prior to the making of the decision, so that the decision was not informed as required by the Act as to those impacts.

Particulars

- (a) The text and structure of Chapter 4 of the Act reveal the clear legislative purpose that the assessment of relevant impacts must

occur before any decision under s 133 can be made, and that such assessment of relevant impacts is not complete when information about the impacts available within the meaning of ss 144 and 145 has not been considered.

(b) The assessment of relevant impacts was not complete when the decision was made because the information to be sought pursuant to conditions 34, 35, 36, 38 and 40 was available within the meaning of ss 144 and 145 but was not obtained and assessed.

6. Further or alternatively, the decision was an improper exercise of power because it was so unreasonable that no reasonable person could have so exercised the power.

Particulars

- (a) The Minister found that the ~~relevant~~ Commonwealth marine environment has never previously been exposed to effluents of the sort to be discharged by the pulp mill;
- (b) The Minister found that dioxins and furans were particularly important for consideration of possible impacts on the Commonwealth marine environment;
- (c) The Minister found that there was uncertainty about the modelling carried out by Gunns to assess the spatial and temporal dispersion of the pollutant plume, carrying pollutants including dioxins and furans

to be discharged by the pulp mill, into the Commonwealth marine environment;

- (d) The Minister relevantly found that further assessment should be carried out as to the toxicity of effluent samples to be obtained from overseas pulp mills using technologies similar to that proposed and additional modelling to determine the fate of the effluent ~~after discharge into the marine environment.~~
- (e) The only stand-alone substantive obligations (as defined in Particular 2(e) above) imposed on Gunns with respect to the discharge of dioxins and furans including deposition into the benthic sediments in the Commonwealth marine environment depend on maximum permissible volumes and concentrations of dioxins and furans that are not measures for adequate environmental protection, either at all or in respect of the ~~relevant~~ Commonwealth marine environment;
- (f) Any breach of a maximum limit in Condition 32 that has been varied by or in the EIMP is not a breach of a condition of the decision;
- (g) The decision does not provide for the maximum limits contained in Conditions 31 and 42 or the trigger levels contained in Condition 32 to be varied following further assessment;

(h) Despite the matters set out in sub-paragraphs (a) to (g) above, the Minister approved the action.

7. Further or alternatively, the decision was an improper exercise of power because the result of the exercise of the power is uncertain.

Particulars

(a) It is not certain whether the maximum limits contained in Conditions 31 and 42 or the trigger levels contained in Condition 32 are able to be varied in or by the EIMP;

(b) The result of a breach of a maximum limit in the EIMP is not certain and, in particular, it is not certain whether the breach of a maximum limit in the EIMP could result in suspension or revocation of the approval.

8. -

9. The imposition of Condition 42 was not authorised by s 134 because it was an irrational or capricious exercise of the power given by s 134.

Particulars

(a) The Canadian Guideline was adopted as a measure to prevent degradation of the Commonwealth marine environment.

(b) The maximum limit of dioxins and furans in the benthic sediments which will prevent degradation of, protect, or mitigate damage to the Commonwealth marine environment depends on the level of organic carbon in the sediments.

(c) The Canadian Guideline was included in Condition 42 without being normalised for the level of organic carbon in the benthic sediments in the Commonwealth marine environment.

(d) The decision does not provide for the maximum limit in Condition 42 to be varied following further assessment.

(e) There was no rational basis for being satisfied that Condition 42 was necessary or convenient to prevent degradation of, protect, or mitigate damage to the Commonwealth marine environment.

AND THE APPLICANT CLAIMS:

- A. A declaration that the decision was invalid and of no effect.
- B. An order setting aside the decision.
- C. An order prohibiting the taking of any further steps to take the action.
- D. Costs.
- E. Such further or other relief as the Court considers just.

Dated **~~4 June~~ 18 June 2008**

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Bleyer Lawyers Pty Ltd
Solicitors for the Applicant

NOTICE TO THE RESPONDENTS

To: the First Respondent of Parliament House Canberra I the Australian Capital Territory, c/ Australian Government Department of the Environment and Water Resources, John Gorton Building, King Edward Terrace, Parkes in the Australian Capital Territory;

And to: the Second Respondent of 78 Lindsay Street, Launceston, in the State of Tasmania:

This application has been set down for the time and place stated below. If you or your legal representative do not attend the Court at that time, the application may be dealt with and judgment may be given, or an order made, in your absence. As soon after the time mentioned as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard;
- (b) directions may be given for the further conduct of the proceeding;
- (c) any application for interlocutory relief may be heard.

Before any attendance at that time you must file an appearance in the Registry.

Time and date of hearing:

Place: Federal Court of Australia, Owen Dixon Commonwealth Law Courts Building, 305 William Street, Melbourne, Victoria.

The time by which this application is to be served had been abridged by the Court to

Dated:

(Registrar)

This application is filed by Bleyer Lawyers Pty Ltd for Lawyers for Forests Inc.

The applicant's address is 17 Tennyson Street, Ellwood in the State of Victoria.

The applicant's address for service is:

Bleyer Lawyers Pty Ltd
~~Mezzanine~~ Level 1, 550 Lonsdale Street
MELBOURNE VIC 3000

The applicant's solicitors are:

Bleyer Lawyers Pty Ltd
~~Mezzanine~~ Level 1, 550 Lonsdale Street
MELBOURNE VIC 3000

Ph: 03 9600 4224

Fx: 03 9600 4225

Em: vanessa@bleyerlawyers.com.au