

FOREST PRACTICES TRIBUNAL

PRIVATE TIMBER RESERVE - APPLICATION NO. CUB/1003

BETWEEN

Meander Valley Council

Appellant

AND

GM & EA Cubit and
The Forest Practices Board and
Private Forests Tasmania and D & D Smith

Respondents

This was an appeal against approval of Private Timber Reserve No. 1003 - GM & EA Cubit - The Needles - UPI No. 1750.

The hearing was held at Launceston on the 19th of July 1999.

S McElwaine of Counsel appeared on behalf of the appellant.

R Pearce of Counsel appeared on behalf of the respondents GM & EA Cubit and Private Forests Tasmania.

K Geason of Counsel appeared on behalf of the respondents Forest Practices Board.

DECISION

Application for a private timber reserve, No. CUB/1003, was made on the 25th of February 1998.

The Meander Valley Council gave notice of an objection to the declaration of the private timber reserve, upon the following ground:

“(e) It would not be in the public interest to grant the application.

A private timber reserve removes the land from Council’s consideration in the public interest with respect to all forestry operations. ‘THP’ is not sufficient.”

D & D Smith, by facsimile of the 11th of May 1998, forwarded a letter of “formal objection” to the proposed private timber reserve. The provisions of the Forest Practices Act 1985 (“the Act”), at all material times in 1998, allowed objection to be made by a “prescribed person”. A “prescribed person” included a local authority exercising jurisdiction over the land concerned, a State authority, or a person having a legal or equitable interest in the land or the timber on the land to which the application related. It was only by Act No. 48 of 1998, coming into effect on the 18th of December 1998, that the definition of “prescribed person” was amended by the addition of sub paragraph 7(4)(d) to include:

“A person who is the owner of land that adjoins, or is within 100 metres of, the boundary of the proposed private timber reserve.”

Further, Section 7(1) of the Act required that any objection be lodged with the Forest Practices Board, at any time before the expiration of the period referred to in the notice relating to the application, published pursuant to Section 6 of the Act. The evidence was and the Tribunal finds that the notice provided for objections to be lodged with Private Forests Tasmania, by Monday April the 27th 1998. There was no provision in the Act allowing an extension of that time to be granted, retrospectively or otherwise.

Sub section 7(2) precluded the Forest Practices Board from taking an objection into account if it was not lodged within the above time. The notice of objection lodged by D & D Smith was therefore not a valid notice, and could not be taken into account by the Forest Practices Board in determining whether to grant the application.

The Forest Practices Board granted the application, and an appeal was lodged by the appellant. No grounds were stated in the letter advising of the appeal. The issues raised by the appeal and considered at the hearing of the appeal, are set out in the following paragraphs.

It was contended for D & D Smith that notwithstanding that they were not at the time of the approval of the private timber reserve, entitled to object, the substance of their concerns might properly be taken into account by the Tribunal in determining the appeal.

The concerns raised by D & D Smith were in substance that they were establishing a tourism lodge on the eastern side of Montana Road opposite the south east corner of the reserve. They contended that the extent of logging would be less controlled if a private timber reserve were declared, than otherwise. That would be because the Meander Valley Council would no longer have the opportunity to control development within the reserve. The conduct of timber harvesting operations on the reserve areas visible from the Smith’s tourism lodge and its

approaches was contended to be likely to adversely affect the visual quality of the areas as seen from the tourism lodge and its approaches.

The amendments of the Act effected by No. 48 of 1998, coming into effect on the 18th of December 1998, came too late to allow D & D Smith to make an objection. Notwithstanding that, Act No, 48 of 1998 also resulted in amendments to Section 8 of the principal Act, and by Section 8(2)(f), as in effect at the time of the Board's decision to grant the reserve, the Board was required to refuse the declaration if the Board was satisfied that D & D Smith "would be directly and materially disadvantaged if the application was granted." Section 8 relevantly read:

"8 ...

- (2) An application for a declaration of land as a private timber reserve shall be refused if the Board is satisfied that -

...

- (f) An owner of land referred to in paragraph (d) of the definition of "prescribed person" in Section 7(4) would be directly and materially disadvantaged if the application was granted."

The definition of "prescribed person" in Section 7(4) relevantly read, as a result of the amendments effected by Act No. 48 of 1998:

"(4) For the purposes of this Section -

"Prescribed person" means -

...

- (d) A person who is the owner of land that adjoins, or is within 100 metres of, the boundary of the proposed private timber reserve;"

It was common ground between the parties and the Tribunal finds, that D & D Smith own land within 100 metres of the east side of the south corner of the proposed reserve. They are therefore properly joined as parties to the appeal and are persons whose interests must be taken into account.

The issue with respect to the interest of the parties D & D Smith, which the Tribunal must take into account, is whether they would be directly and materially disadvantaged if the application was granted.

Evidence was given and the Tribunal finds that a Timber Harvesting Plan was approved by the appellant Council, permitting harvesting of timber within the proposed reserve. Excepted from that Timber Harvesting Plan was an area of timber along the generally northern face of the upper levels of the "Needles Ridge", an area partly visible from D & D Smith's tourism lodge site. Also excepted from that harvesting was an area of forest 20 metres wide along the west side of Montana Road and further west of that, a 20 metre wide strip in which selective logging only would be allowed. The purpose of these reserves was to retain the visual quality of the presently forested areas, visible from Montana Road and along the Needles Ridge, from further afield including from Deloraine. It is across Montana Road that the view from the D & D Smith property, occurs. The evidence on behalf of D & D Smith was that notwithstanding the reservations, the timber harvesting allowed by the timber harvesting plan would potentially have

a significant impact upon the visual quality of the outlook from their tourist lodge area. The Tribunal finds that on the evidence given by the parties D & D Smith, there is a probability that areas where timber has been harvested will be visible from their land, particularly at the levels of slope along the north face of the Needles, rising up to that part of the timber protected under the provisions of the Timber Harvesting Plan.

It was common ground and the Tribunal finds that the proposed Private Timber Reserve would not affect harvesting and resultant effects which may occur under the presently approved Timber Harvesting Plan. If however the Private Timber Reserve was granted, then, it was contended for D & D Smith, there would be a possibility of more frequent and more extensive logging in the future, with potentially greater effect upon their tourism lodge operation. It would on the evidence and the Tribunal finds, be about 20 years after reforestation following harvesting under the present Timber Harvesting Plan, that any eucalypt plantation in the relevant area would again be ready for harvesting. There would also be the possibility of applications being made and granted for timber harvesting on those areas excluded under the existing Timber Harvesting Plan, in the interim. These potential effects are properly considered in conjunction with the principal issue raised by Council, in the later paragraphs of this decision.

It was also contended for D & D Smith that the effect of a Private Timber Reserve would be to considerably increase the cost of obtaining power supply to their tourism lodge. Their evidence was that at the time they purchased the land for their tourism operation, 8 building blocks suitable for a rural 'lifestyle' fronted the Montana Road, 4 on either side, and all were for sale. They had been told by the electricity authority that each of the blocks would receive 3 "free" spans, 24 spans for all 8 blocks as a group. If grouped, connection costs would be in the region of \$3,000.00 per block, putting mains electricity in reach of all landholders. The grant of the Private Timber Reserve would it was contended remove 4 of those blocks within the reserve, from use as "lifestyle" building blocks, and mean that those blocks would not have owners prepared to share the cost of the electricity supply. The result was, it was stated by D & D Smith, that the cost for supply of electricity to their tourism lodge would be some \$60,000.00.. The evidence was not sufficiently precise to enable the Tribunal to make a finding about these costs, but it is assumed for the purposes of this decision that the stated cost figures are correct. Evidence was also however given by D & D Smith that because of clear felling, the purchasers other than themselves were no longer interested in development or purchase of the blocks, and the cost of electricity supply was therefore left to the Smiths alone. The "clear felling" referred to was something which would occur under the existing Timber Harvesting Plan. The potential for further harvesting to occur in say 20 years time or the intervening period, was not shown by any cogent evidence to have been likely to have affected the decision of the other 4 lot owners to withdraw from development of the power supply. The Tribunal finds on the above evidence that any detriment caused to D & D Smith, of the nature of an increase in the cost of power supply, is a detriment caused by the existing Timber Harvesting Plan and the operations under it; and not shown to be caused or significantly contributed to, by the proposed Private Timber Reserve. The remainder of the issues raised by D & D Smith above, are properly considered with the issues raised by the Meander Valley Council's appeal.

The substance of Council's appeal was based upon the fact that the visual qualities of the Private Timber Reserve area were high, and that they contributed to the vistas available from Deloraine, from Mole Creek Road, and from Montana Road. Evidence was given to that effect, was not contested, and the Tribunal finds accordingly. Under the Timber Harvesting Plan granted over the area of the proposed timber reserve, the visually important areas of forest were protected, to an extent stated by Council to be satisfactory to it. Council had, jointly with the owner of the reserve, and with Private Forests Tasmania and relevant experts, had a significant input into the preparation of the Timber Harvesting Plan. There was no evidence, and nothing was put which persuades the Tribunal, that if the area of the proposed reserve ceased to be

subject to the planning jurisdiction of Council, Council's concerns would be ignored. The Tribunal does not find any basis for concluding that if a private timber reserve were granted, the extent to which Council's concerns were taken into account by the Forest Practices Board in the preparation of any timber harvesting plan (now a Forest Practices Plan), would be lessened.

The Forest Practices Act 1985, prior to the amendments in 1998 and 1999, provided for the administration of forest practices, by the overall initial control of the Forest Practices Board, and through the operation of the Forest Practices Code. The Land Use Planning and Approvals Act 1993 by Section 20(7), exempted areas declared as private timber reserves, from the operation of municipal planning schemes. The 1999 amendment provided a further exemption from the operation of planning schemes, by removing as a basis for refusal of a private timber reserve, the prohibition of forestry operations where a planning permit was required under a planning scheme. In the second reading of the relevant bill, the Minister for Infrastructure Energy and Resources stated inter alia:

“The intent of Parliament in 1985 was to ensure that forestry, as a major industry with Statewide importance, was covered by a Statewide planning scheme in the form of the Forest Practices Act 1985 and Forest Practices Code. This intent was reinforced by Parliament in 1993 with the enactment of the Land Use Planning and Approvals Act 1993, which excludes forestry activities within private timber reserves from the provisions of planning schemes. . . . the bills presently before the House clarify the relationship between private timber reserves and planning schemes and improve the provisions which relate to the declaration on land of a private timber reserve.

The Bills clarify that a requirement to obtain a permit or other form of approval from a council in order to establish forests or harvest timber is not to be taken as a prohibition of those activities. This means that a landowner will not have to obtain a permit or approval from a council in order to have land declared as a private timber reserve. This provision will also apply retrospectively . . . Councils retain the right to object to the declaration of private timber reserves under the existing provisions of the Forest Practices Act 1985. The bills also clarify that the exclusion of private timber reserves from planning schemes is restricted to forestry operations and does not extend to other management activities . . .”.

Construing the amended Act in the light of the above statements, it is clear that the planning control of forestry operations on private timber reserves is to be through the mechanisms of the Forest Practices Act 1985, and is not to entail direct control by council. Council is entitled to have an input into the Forest Practices Act procedures, but does not exercise control over forestry, through Council planning scheme mechanisms. Council's powers with respect to uses and developments other than forestry operations, remain unaffected.

Having regard to all of the above matters, the Tribunal finds that the substantial basis of Council's ground of appeal, is inconsistent with the above legislative provisions. It is not a persuasive ground of objection to declaration of a private timber reserve, that Council will no longer be able to exercise direct control over forestry operations within that private timber reserve, through the application of Council's Planning Scheme.

For the above reasons, the Tribunal also considers that the declaration of a Private Timber Reserve would not cause D & D Smith to “be directly and materially disadvantaged”.

The evidence before the Tribunal with respect to the material provided for the Forest Practices Board, to enable it to evaluate the proposed private timber reserve, persuades the Tribunal that

appropriate investigations were undertaken and that factors such as landscape value, were given extensive regard. Further, the evidence included evidence that substantial care had been taken in the administration of the Timber Harvesting Plan, for the protection of valued species such as Wedge Tailed Eagles. The Tribunal sees no basis for finding or concern that these standards would be differently applied in the future, whether or not a private timber reserve were to be granted.

Having regard to all of the above matters, the Tribunal is persuaded that the proposed private timber reserve should be affirmed.

For Council it was contended that the Reserve should be approved upon conditions excluding areas such as those excluded from harvesting by the Timber Harvesting Plan.

It was contended for Council that the Tribunal had power to either impose conditions upon the declaration of the Private Timber Reserve or alternatively exempt certain areas encompassed in the application, from the reserve. The legislation itself has no specific power enabling the imposition of such conditions. Counsel for the appellant relied upon Country Road Board v. Neale Ads Pty Ltd (1930) 43 CLR 134, for the proposition that whenever a statutory discretion to approve or to grant a permit exists, there is also a discretion to grant the permit upon conditions or modifications.

A useful collation of the relevant authorities is set out in Friends of Hinchinbrook v. Minister 142 ALR 632, where Sections 9 and 10 of the World Heritage Act (Cth) were in issue. At page 669 Sackville J stated at page 669:

“ . . . referred to a line of authority in the High Court establishing the general proposition that, if power is given to make a by law for the purpose of ‘prohibiting’ an activity, the power will, in the absence of a contrary indication, enable the making of a by law prohibiting the activity either absolutely or subject to a condition: *Foley v. Padley* (1984) 154 CLR 349 at 358-9; . . . 380-3 . . . ; *Country Road Board v. Neale Ads Pty Ltd* (1930) 43 CLR 126 at 134-5 per Knox CJ, Starke and Dixon JJ. These authorities explicitly recognise that, in the end, the question of construction will depend upon the statutory language; see *Country Road Board v. Neale* at 135; *Foley v. Padley* at CLR 358.” (his Honour then made reference to the High Court authorities) “unlike those authorities, the World Heritage Act does not confer on the Minister a power to prohibit particular activities by subordinate legislation. . . . where an act is prescribed, as occurred in the present case with the making of Reg 3F, S.9(1) makes it unlawful, except with the written consent of the Minister, to do that act. . . . in my opinion, a number of factors point to the conclusion that neither S.9 or S.10 of the World Heritage Act confers power on the Minister to grant consents subject to conditions. These factors are the following: (Sackville J then referred to the fact that neither provision expressly conferred a power to consent subject to conditions on the Minister, and that had such a power been intended, it would have been easy to include it in the legislation; that the World Heritage Act provided no explicit mechanism for enforcement of any conditions attached to a consent; and the absent otherwise of any reference to dealing with conditions upon a consent.)

In the Forest Practices Act, there is no reference at all to conditions upon a power to declare or refuse to declare, a private timber reserve. There is no reference to enforcement of such conditions, to the ability to vary them, to the ability to appeal from them, or otherwise. Further, as a matter of construction of the Forest Practices Act 1985, such a construction would be

internally inconsistent. Section 8 gives a power to Forest Practices Board either to “grant the application” or to refuse it. No power to impose conditions or to modify the application, is included. By way of contrast, where the Act makes provision for Forest Practices Plans (previously Timber Harvesting Plans) there is provision for the Board to amend the plan (S.19(1)(c)), and for it subsequently to be varied (S.22); and the Forest Practices Plan normally contains, and does in the present instance contain, an extensive list of the conditions applicable to the harvesting of timber under the Plan.

Accordingly the Tribunal is unable to impose conditions upon the Reserve.

The Tribunal will entertain any application for an order for costs in this appeal, if made to the Tribunal in writing with supporting submissions within the next fourteen days. If requested the Tribunal will reconvene to hear any evidence in respect of any matter bearing on an order for costs.

In the absence of any such application for an order for costs the order of the Tribunal is that each party bear its own costs.

Dated this.....day of 1997

D Grant
(Member)

KAM Pitt QC
Chairman

B Walker
(Member)