

14 AUG 2007

No. TAD 21 of 2007  
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IN THE FULL COURT  
OF THE FEDERAL COURT OF AUSTRALIA  
Tasmanian District REGISTRY  
On appeal from a single Justice of the Federal Court

**THE WILDERNESS SOCIETY INC.**  
**Appellant**

BETWEEN:

**HON MALCOLM TURNBULL,**  
**MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES**  
**First Respondent**

and-

**GUNNS LIMITED**  
**Second Respondent**

#### **NOTICE OF APPEAL**

The appellant appeals from the whole of the judgment and orders of the Federal Court given on 9<sup>th</sup> August 2007 at Hobart.

#### **GROUND OF APPEAL:**

- 1) The learned judge erred in finding that the referral lodged by the second respondent on 30 March 2007 was valid, and that s 170C(4) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**the EPBC Act**) did not preclude the lodging of a second referral in relation to the same action. His Honour should have found:
  - a) Section 170C permits a proponent to withdraw a referral at the proponent's election; but
  - b) The effect of s 170C(4) is to preclude another referral being made by the proponent in respect of the same action.

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**Filed on behalf of the appellant**  
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2) The learned judge erred in finding that s 75(2B) of the EPBC Act operated in the circumstances of the action proposed by the second respondent in the referral lodged 30 March 2007 to prohibit the Minister from taking into account the adverse impacts of the harvesting of trees from native and plantation forests necessary to feed the pulp mill. His Honour should have found that by reason of s 75(2B)(a), read with s 42(c), before the Minister could exclude an examination of the adverse impacts of timber harvesting in the north and west of Tasmania from his decision under s 75, the Minister was required to, but did not, determine both:

a) Whether the RFA forestry operations were in accordance with a RFA ( s 38); and

b) Whether the RFA forestry operations were incidental to another action (in this case the construction and operation of a pulp mill) ( s 42).

3) The learned trial judge erred in finding that the making of the 2007 assessment approach decision (as defined in the appellant's Third Amended Application dated 10 July 2007), alternatively the conduct of the first respondent in relation to the making of a decision under s 130(1) of the EPBC Act, involved no denial of procedural fairness to the members of the public interested in the assessment of this action, and in the question whether the first respondent should or should not approve the taking of this action. His Honour should have found:

a) In making a decision whether or not to approve the taking of an

action, the Minister is required to afford members of the public a reasonable opportunity to be heard, or to give comments under s 95(2)(c); and

- b) The Minister, by setting a period under s 95(2)(c) of 20 business days, failed to afford such an opportunity in the circumstances of this case.
- 4) In the circumstances of this case, including on the facts as found by his Honour, the learned judge erred in finding that the 2007 assessment approach decision was not affected by apprehended bias.
  - 5) The learned judge erred in finding that the second respondent had withdrawn the second referral in accordance with s 170C(1). His Honour should have found that the lodging of a new referral under s 68 of the EPBC Act could not, in law or in fact, constitute the withdrawal of an existing referral under the EPBC Act.
  - 6) The learned judge erred in finding that the 2007 assessment decision, including the specification of a 20 day time limit for public consultation under s 95(2)(c) of the EPBC Act did not involve an improper exercise of power. His Honour should have held that the decision was made for the purpose of:
    - a) Not disrupting or interfering with Gunns' asserted commercial imperatives; and/or
    - b) Ensuring that the assessment process chosen would enable Gunns to meet its commercial imperatives; and/or

c) Meeting a time line for assessment set by Gunns, or with which Gunns agreed;

each being a purpose other than that that for which the power was conferred.

**ORDERS SOUGHT:**

The appellant seeks the following orders:

1. An order setting aside paragraph 1 of the order of the learned trial judge made the 9<sup>th</sup> August 2007;
2. In lieu of that order:
  - A. A declaration that the referral made by the second respondent under s 68 of the EPBC Act and dated 30 March 2007 is invalid and of no effect.
  - B. A declaration that the decision of the first respondent made on or about 4 May 2007 pursuant to s 75 of the EPBC Act, to designate the proposed construction and operation of a bleached Kraft Pulp Mill at Bell Bay in northern Tasmania as a controlled action, with ss 18, 18A, 20, 20A, 23 and 24A of the EPBC Act as the controlling provisions, is invalid and of no effect.
  - C. A declaration that the decision of the first respondent made on or about 4 May 2007 pursuant to s 87 of the EPBC Act, to determine that the proposed action by the second respondent

be assessed under Division 4 of Part 8 of the EPBC Act on preliminary documentation, is invalid and of no effect.

- D. An order setting aside the decision of the first respondent made on or about 4 May 2007 pursuant to s 75 of the EPBC Act, to designate the proposed construction and operation of a bleached Kraft Pulp Mill at Bell Bay in northern Tasmania as a controlled action, with ss 18, 18A, 20, 20A, 23 and 24A of the EPBC Act as the controlling provisions, effective from 4 May 2007.
- E. An order setting aside the decision of the first respondent made on 4 May 2007 pursuant to s 87 of the EPBC Act, to determine that the proposed action by the second respondent be assessed under Division 4 of Part 8 of the EPBC Act on preliminary documentation, effective from 4 May 2007.
- F. An order that the respondents pay the appellant's costs of the appeal, and of the proceedings below.

DATE: 14th August 2007



Fitzgerald and Browne  
Solicitors for the appellant.

To the first respondent c/- Australian Government Solicitor 188 Collins Street, Hobart

And to the second Respondent c/- Freehills, Lev 43 101 Collins Street, Melbourne

TAKE NOTICE:

- (a) Before taking any step in the proceeding you must enter an appearance in the Registry, unless you have already entered an appearance under Order 52, rule 7.

Time and date for directions hearing:            day of  
2007 at        am/pm *To be advised*

Place:

The appellant's address for service is:

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