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Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts [2009] FCA 330 (9 April 2009)

Last Updated: 9 April 2009

FEDERAL COURT OF AUSTRALIA

Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts [2009] FCA 330

ADMINISTRATIVE LAW – decision made under [s 133](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) to approve proposal - whether the decision was *ultra vires* the Act – whether the Minister failed to take into account the “precautionary principle” – information “available” to the Minister – whether the Minister was obliged to seek further information prior to making decision – whether the decision was unreasonable – whether the result of the decision was uncertain – whether the decision was irrational or capricious

[Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) [ss 5\(1\)\(e\)](#) and [\(2\)\(h\)](#) [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) [ss 3, 3A, 23, 24A, 67, 68, 75, 87, 95B, 95C, 130, 131A, 133, 132, 134, 136, 143, 144, 145, 145B, 391](#)

Alexandra Private Geriatric Hospital Pty Ltd v Blewett [Associated Provincial Picture Houses Limited v Wednesbury Corporation \[1948\] 1 KB 223](#) *Attorney-General (NSW) v Quin* [\(1990\) 170 CLR 1](#) *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [\[2008\] FCA 8](#); [\(2008\) 165 FCR 211](#) *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [\[2008\] FCA 399](#); [\(2008\) 167 FCR 463](#) *Bromley London Borough Council v Greater London Council* [\[1983\] 1 AC 768](#) *Bruce v Cole* [\(1998\) 45 NSWLR 163](#) *Commonwealth v Pharmacy Guild of Australia* [\(1989\) 91 ALR 65](#) *Council of Civil Service Unions v Minister for the Civil Service* [\[1985\] 1 AC 374](#) *Director of Animal and Plant Quarantine v Australian Pork Ltd* [\[2005\] FCAFC 206](#); [\(2005\) 146 FCR 368](#) *Greyhound Racing Authority (NSW) v Bragg* [\[2003\] NSWCA 388](#) *Khan v Minister for Immigration and Ethnic Affairs* [\[1987\] FCA 457](#); [\(1987\) 14 ALD 291](#) *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [\[2008\] FCA 588](#) *Hindi v Minister for Immigration and Ethnic Affairs* [\(1988\) 91 ALR 586](#) *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [\[1986\] HCA 40](#); [\(1986\) 162 CLR 24](#) *Minister for Immigration and Multicultural Affairs v Anthonypillai* [\[2001\] FCA 274](#); [\(2001\) 106 FCR 426](#) *Minister of State for Immigration, Local Government and Ethnic Affairs v Pashmforoosh* [\(1989\) 18 ALD 77](#) *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [\[2005\] NSWLEC 426](#) *Pyneboard Pty Ltd v Trade Practices Commission* [\(1982\) 39 ALR 565](#) *Randwick City Council v Minister for the Environment* [\(1998\) 54 ALD 682](#) *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [\[2003\] HCA 30](#); [\(2003\) 198 ALR 59](#) *Seven Network Ltd v Australian Competition and Consumer Commission* (2004) 140 FCR 170 *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* (2007) 243 ALR 241 *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510

LAWYERS FOR FORESTS INC v MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS and GUNNS LIMITED VID 1112 of 2007

TRACEY J9 APRIL 2009MELBOURNE

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

VID 1112 of 2007

**BETWEEN: LAWYERS FOR FORESTS INC
 Applicant**

**AND: MINISTER FOR THE ENVIRONMENT,
 HERITAGE AND THE ARTS
 First Respondent**

**GUNNS LIMITED
Second Respondent**

**JUDGE: TRACEY J
DATE OF ORDER: 9 APRIL 2009
WHERE MADE: MELBOURNE**

THE COURT ORDERS THAT:

1. The application be dismissed.
2. Any submissions as to costs orders be filed and served in accordance with the timetable set out in paragraph [96] of the reasons of the judgment.

Note: Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#). The text of entered orders can be located using eSearch on the Court's website.

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

VID 1112 of 2007

**BETWEEN: LAWYERS FOR FORESTS INC
 Applicant**

**AND: MINISTER FOR THE ENVIRONMENT,
HERITAGE AND THE ARTS
First Respondent**

**GUNNS LIMITED
Second Respondent**

**JUDGE: TRACEY J
DATE: 9 APRIL 2009
PLACE: MELBOURNE**

REASONS FOR JUDGMENT

1. Gunns Limited (“Gunns”) proposes to build and operate a pulp mill at Bell Bay in Tasmania. When the mill is operative effluent from the production process is to be discharged into Bass Strait some kilometres offshore. It is possible that such discharge may have an adverse effect on an area of Bass Strait which forms part of the Commonwealth marine environment. In order to undertake the construction of the mill it was, therefore, necessary that Gunns first obtained the approval of the Minister for the Environment, Heritage and the Arts (“the Minister”) under the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) (“the Act”). The Minister gave his approval on 4 October 2007. The applicant (“LFF”) has been found to be a person aggrieved by that decision within the meaning of [s 487\(3\)](#) of the Act: see *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588. LFF seeks judicial review of the Minister’s decision on a number of grounds. The review is sought under both the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) (“the ADJR Act”) and [s 39B](#) of the [Judiciary Act 1903](#) (Cth).
2. I have come to the view that none of the grounds, relied on by LFF, is sustainable and that its application should, accordingly, be dismissed.

THE LEGISLATIVE CONTEXT

1. The Act includes amongst its objectives the protection of the environment and the conservation of biodiversity: see s 3(1)(a) and

(c). In order to achieve its objects the Act seeks to protect native species and ecosystems by various means: see s 3(2)(e). The legislative scheme requires Ministerial approval before any person takes any action that will have or is likely to have a significant impact on specified matters of national environmental significance. A person who is proposing to take some action which the person considers may be what the Act describes as a “controlled action”, is required to refer the proposal to the Minister so that the Minister may determine whether or not the proposed action is a “controlled action”: see s 68. A “controlled action” is action which is prohibited by Part 3 of the Act: see s 67. When a referral is made under s 68, the Minister is required to determine whether the action is a “controlled action” and, if so, which of the proscriptions imposed in Part 3 of the Act apply: see s 75. If the Minister determines that the proposed action is “controlled action”, Part 9 requires that the environmental impact of the action be assessed, using a method determined by the Minister under s 87 of the Act. Once the assessment has been made the Minister must determine whether or not to approve the proposed action: see ss 130(1) and 133.

2. When deciding whether or not to approve “controlled action” the Minister is required to have regard to matters relevant to applicable “controlling provisions” and economic and social considerations: see s 136. The Minister is obliged to have regard to the principles of ecologically sustainable development which include what is known as “the precautionary principle”: see ss 3A, 136 and 391. The Minister is also required to consider the written submissions of the designated proponent, the written advice on the proposal provided by the Minister’s Department, any public comment on the proposal and any information which the Minister has available to him or her concerning the anticipated impacts of the proposed action: see ss 95B, 95C, 131A and 136 of the Act.
3. The Act prescribes tight time limits on each stage of the process prior to the final stage at which the Minister is called on to make a final decision on whether or not to grant approval. The statutory processes have been said by Branson and Finn JJ to involve “studied haste”: see *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175; (2007) 243 ALR 241 at 262 [84].

THE BACKGROUND FACTS

1. On 2 April 2007 Gunns made a referral, relating to its proposed pulp mill, to the Minister, under s 68 of the Act. On 2 May 2007 the Minister determined that the proposed action was “controlled action”. Relevantly, he determined that the controlling provisions were ss 23 and 24A of the Act which dealt with Commonwealth marine areas. He directed that the method of assessment should be by way of preliminary documentation. On 8 May 2007 Gunns advertised the preliminary documentation. Public comment was invited by 5 June 2007. Two hundred and seventy-nine submissions were received. On 4 July 2007 Gunns sent its response to those submissions to the Minister: see s 95B of the Act.
2. The Department considered the submissions and other material and prepared a recommendation report which it submitted to the Minister on 17 August 2007: see s 95C of the Act. The report recommended that the Minister approve Gunns taking the proposed action subject to certain conditions. In making the recommendation the Department had regard to a number of scientific reports. These included:
 - A paper prepared by the Environment Protection Branch of the Department entitled “Review of the Marine Impact Assessment of effluent from the proposed Bell Bay Pulp Mill” (“the Department’s Marine Impact Assessment”).
 - A report commissioned by the Department entitled “Treatment and recycling options Bell Bay Pulp Mill Project”.
 - A report entitled “Review of Documents Re: Hydrodynamic Modelling of Effluent from Proposed Offshore Effluent Outfall for Gunns Pulp Mill, Tasmania” prepared by consultants commissioned by the Department.
 - A report entitled “Proposed Gunns Pulp Mill Outfall: Assessment of Modelling Reviews” prepared by BMT WBM Pty Ltd which was commissioned by the Department.
 - A paper by Dr Stuart Godfey entitled “Inadequacies in the Hydrodynamic Modelling performed for Gunns Pulp Mill IIS”.
 - A Memorandum of Advice prepared by BMT WBM Pty Ltd entitled “Review of Godfey Paper”, dated 16 August 2007; and
 - A Memorandum of Advice prepared by BMT WBM Pty Ltd entitled “Additional General Advice in Response to Ministerial

Question” dated 16 August 2007.

3. On 19 August 2007 the proposed decision and conditions were published on the Departmental website. Public comment was invited under s 131A of the Act. This invitation led to over 30,000 comments being received from members of the public. One of these responses was a joint submission from Drs Godfey, Raverty and Wadsley to which was attached a paper by Dr Wadsley.
4. On 10 August 2007 the Minister invited the Chief Scientist of Australia to review and report on the scientific aspects of the proposal. The Chief Scientist formed a panel of experts to assist him to conduct the review.
5. On 29 August 2007 the Minister extended the time for making his final decision so that he would have time to consider both the public submissions and the Chief Scientist’s report.
6. On 24 September 2007 the Chief Scientist sent his report to the Minister. He subsequently expressed his agreement with the terms of the draft approval decision which had been recommended by the Department.
7. On 4 October 2007 the Minister determined to grant final approval to the proposal subject to a range of conditions. He gave his reasons for so doing on 1 November 2007.
8. The Minister’s decision approved Gunns proposal “to construct and operate a bleached Kraft pulp mill at Bell Bay, Tasmania, and associated infrastructure ...” subject to 48 conditions. There is reference in many of these conditions to an “EIMP”. This is an Environmental Impact Management Plan which Gunns is required, by some of the other conditions, to develop in order to manage, monitor and respond to the environmental impacts occasioned by the operation of the pulp mill. It will be convenient to return to the conditions relating to the development and approval of the EIMP after identifying the conditions to which most of the argument was directed. Conditions 31, 32, 34, 35, 36, 38, 40 and 42 are of particular relevance to the present application. They read:
“31) The volume of wastewater effluent discharged from the operation of the pulp mill to the marine environment must not be more than 64 megalitres per day on an average monthly basis.

1. Gunns Limited must sample the effluent discharge from the operation of the pulp mill for the parameters in the tables below on at least a daily basis. The pulp mill must not operate if the monthly average effluent concentrations from the pulp mill exceed the maximum limits provided in the tables below. These limits may be revised in the final EIMP if agreed by the Independent Expert Group and approved by the Minister as a result of further studies. Maximum limits and trigger levels on additional effluent contaminants (for example, nitrate, resin acid and colour) will also be developed in the EIMP in accordance with Schedule 2.

Parameter	Monthly average effluent concentration	
	Trigger Level	Maximum Limit
Dioxins and furans	2.0 pg TEQ/L	3.4 pg TEQ/L
Chlorate (ClO_3^-)	1.9 mg/L	3.7 mg/L
Total chloroacetic acids	237 $\mu\text{g/L}$	237 $\mu\text{g/L}$

Parameter	Monthly average effluent concentration Maximum Limit
Total nitrogen	2.5 mg/L
Total phosphorus	0.8 mg/L
Total suspended solids	20 mg/L
Biological oxygen demand	11 mg/L

...

1. In accordance with the EIMP, Gunns Limited must obtain (from overseas pulp mills already using technologies similar to that proposed) effluent samples, and conduct chemical analyses and whole effluent toxicity testing to identify the key contaminants and their concentrations and the effluent dilutions needed in the mixing zone for the proposed mill. Gunns Limited must report on the temporal variability in both the contaminant concentrations and toxicity in the effluents from these mills.
2. In accordance with the EIMP, to determine the properties affecting the fate of fine particulate organic matter in effluent, Gunns Limited

must undertake laboratory studies, agreed to by the Department, to assess the likely settling and flocculation properties of fine particulate organic materials in equivalent effluent.

3. In accordance with the EIMP, to establish the level of background contaminants in sediments and biota, Gunns Limited must:
 - a. Undertake a survey of sediment grain size and organic carbon content for the region containing the outfall, including adjacent coastal and offshore regions, and identified depositional zones.
 - b. Determine background concentrations of contaminants of potential concerns for sediments along transects from the proposed diffuser site, including both inshore and offshore sites, paying particular attention to depositional zones with fine grain size and high organic content.
 - c. Demonstrate how these findings have both informed, and been informed by, the refined hydrodynamic and sediment transport modelling required by the EIMP.
 - d. Limit samples for this research to the top 2 cm of core samples, so that recent deposition can be determined in later studies.
 - e. Determine background concentrations of contaminants of potential concern needed to be established for sentinel biota from outside of the mixing zone and from sediments collected both inshore and at identified likely deposition zones. Species selection must be agreed to by the Department on the basis of:
 - i. Benthic surveys; and
 - ii. Expert knowledge of the prey species of listed threatened migratory and marine species and shore birds and the wide-ranging top predators, the Australian Fur Seal (*Arctocephalus pusillus*) and the Little Penguin (*Eudyptula minor*).
- ...
1. Additional modelling must be carried out in relation to the fate of effluent, as part of the EIMP, prior to the commencement of commissioning of the mill. The details of the modelling to be commissioned and the organisation responsible for performing the modelling must be approved by the Department. The modelling to be commissioned must include, but not be limited to:
 - a. The inclusion of a sediment transport component.

- b. The use of three-dimensional models for all levels of spatial resolution.
- c. Increased vertical resolution for the high resolution model used in the water quality analysis.
- d. Forcing from all mechanisms that may potentially influence residual or diurnal dynamics, including background sea level gradients, low frequency sea level oscillations, surface heat flux, sea level, temperature and salinity open boundary and initial conditions which capture mesoscale variability and wave enhanced bottom friction.
- e. The execution of long term simulations that capture seasonal variability, and evidence of the model achieving pseudo-steady state in the regional (Bass Strait) field.
- f. The calibration of model tracers (e.g. temperature or salinity) and velocity to data derived from moored instruments (for temporal comparisons) and measured profiles (for spatial comparisons) over the period the model is simulated. This will involve a supplementary field program designed specifically for model calibration (i.e. implemented over an annual cycle). Detailed evidence of satisfactory calibration must be supplied, including correlation between phase and amplitude of calibration variables.
- g. Sensitivity analysis for key model parameters, particularly horizontal diffusion.
- h. The use of appropriate simulation lengths for generating plume statistics.
- i. The use of data (modelled or measured) that captures the three-dimensional nature of the water column and seasonal variability for use in the near-field model.

...

1. In accordance with the EIMP and conditional of the outcomes of the hydrodynamic and sediment modelling, Gunns Limited must undertake surveys to establish baseline ecological data upon which impacts of effluent can be measured. This must include, but not necessarily be limited to:
 - a. A baseline (pre-commissioning) survey of both benthic infauna and epibenthic flora including:

- i. Abundance and diversity at ‘impact’ locations outside the defined mixing zone; and
- ii. At control locations to the east and west of the outfall.
- ...
1. The maximum limit of concentration of dioxins and furans in the benthic sediments in any location within Commonwealth marine waters is 850pg TEQ/kg. To ensure the concentrations do not reach this level, trends in concentrations of samples collected in State and Commonwealth waters, in accordance with the EIMP, must be analysed and independently reviewed on a six-monthly basis.”

Condition 2 required Gunns to develop the EIMP. It had to be approved by the Minister. Condition 3 provides:

“3) The EIMP must include trigger points and maximum limits in relation to effluent discharge from the operation of the pulp mill as well as specific remedial management responses to be undertaken by Gunns Limited if trigger points are exceeded or maximum limits are reached. It shall be an operational objective of the pulp mill, and reflected in the EIMP, that trigger points, and maximum limits, are not to be reached.”

By Condition 4, if it appears, on reasonable grounds, that maximum limits for effluent discharge are likely to be exceeded and that the response strategies are unlikely to prevent this occurring “the mill must cease to operate until such time as a tertiary treatment solution satisfactory to the Minister is installed.” Condition 5 requires Gunns to implement response strategies within prescribed time limits if the trigger limits for effluent discharge are exceeded.

REVIEW GROUNDS

1. By its Further Amended Application LFF seeks review of the Minister’s decision on the following grounds:
 - The decision was not authorised by the Act because some of the conditions he imposed were repugnant to provisions of the Act or were otherwise outside the object and purpose for which the power to impose conditions, provided for in s 134, was granted. (Ground 1).
 - 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. (Ground 2).

- 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 allow him to make an informed decision. (Ground 3).
- 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. (Ground 4).
- The decision was not authorised by the Act because the Minister made the decision when the assessment of the relevant impact 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. (Ground 5).
- The decision involved an improper exercise of power because it was so unreasonable that no reasonable person could have so exercised the power. (Ground 6).
- The decision was an improper exercise of power because the result of the exercise of the power was uncertain. (Ground 7).
- 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. (Ground 9.)

Ground 8 was abandoned. As will become apparent there was a good deal of overlapping between grounds.

GROUND 1 – CONDITIONS IMPOSED UNDER S 134 OF THE ACT

1. Under this ground LFF alleged that, certain of the conditions imposed by the Minister, which require Gunns to undertake further research relating to the impact of the project on the marine environment were made *ultra vires* or, alternatively, were repugnant to or inconsistent with other provisions of the Act.
2. The power to impose conditions is conferred on the Minister by s 134 of the Act. Relevantly, it provides:

“(1) The Minister may attach a condition to the approval of the action if he or she is satisfied that the condition is necessary or convenient for:

 - (a) protecting a matter protected by a provision of Part 3 for which the approval has effect (whether or not the protection is protection from the action); or
 - (b) repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage has been, will be or is likely to be caused by the action).

...

(3) The conditions that may be attached to an approval include:

 - (aa) conditions requiring specified activities to be undertaken for:
 - (i) protecting a matter protected by a provision of Part 3 for which the approval has effect (whether or not the protection is protection from the action); or
 - (ii) repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage may or will be, or has been, caused by the action); and

...

(e) conditions requiring the preparation, submission for approval by the Minister, and implementation of a plan for managing the impacts of the approved action on a matter protected by a provision of Part 3 for which the approval has effect such as a plan for conserving habitat of a species or ecological community; and

(f) conditions requiring specified environmental monitoring or testing to be carried out; and

(g) ...

(h) ...

This subsection does not limit the kinds of conditions that may be attached to an approval.”

Relevantly, the matter protected by a provision of Part 3 of the Act is the Commonwealth marine environment: see ss 23 and 24A.

1. LFF divided its submissions in support of the ground into two parts:
 - In what it terms its “express terms submission”, it contended that, on a ordinary reading of s 134, the section does not permit conditions to be imposed which are designed to assess the significance of impacts on the environment; and
 - In what it describes as its “repugnancy submissions”, it contended, in the alternative, that the power conferred by s 134(1) does not extend to the imposition of conditions that are repugnant to or inconsistent with other provisions of the Act.

It will be convenient to deal first with the “express terms submission” and defer consideration of the “repugnancy submission” until Grounds 3, 4 and 5 are considered.

1. The particular conditions which LFF contended are *ultra vires* the Act are:
 - Condition 34 (which requires Gunns to obtain effluent samples from overseas pulp mills and to conduct chemical analyses of those samples);
 - Condition 35 (which requires Gunns to undertake laboratory studies to assess the likely settling and flocculation properties of fine particulate organic materials in equivalent effluent);
 - Condition 36 (which requires Gunns to undertake surveys and other assessments to establish the level of background contaminants in sediments and biota in offshore depositional zones);
 - Condition 38 (which requires Gunns to undertake additional

modelling in relation to the fate of effluent prior to the commencement of commissioning of the mill); and

- Condition 40 (which requires Gunns to undertake surveys to establish baseline ecological data upon which impacts of effluent can be measured).

Apart from Condition 38, each of these conditions is prefaced with the words “In accordance with the EIMP ...” The modelling required by Condition 38 is said to be a “part of the EIMP.” The finer details of the nature of the required research and the methods by which it was to be conducted were thus matters left for prescription in the EIMP.

1. LFF submitted that the Minister cannot exercise his powers under s 134(1) of the Act unless he knows “with some degree of certainty”, what the environmental impact of the proposed action may be or is likely to be. This requirement is said to arise from the following considerations:
 - The Minister cannot be satisfied that any condition imposed under s 134(1) is “necessary or convenient” for one or more of the identified purposes unless he has this knowledge.
 - The requirements of necessity and convenience each demand a comparison of the impacts of the proposed action, on the one hand, and the measures considered necessary to protect the environment from or to mitigate those impacts, on the other.
 - The imposition of conditions of the kind contemplated by s 134(3)(e) proceeds on the assumption that the relevant environmental impacts have already been assessed. Such an assessment is also a logical prerequisite to the imposition of a monitoring or a testing regime under para (f).
2. LFF contended that the evidence establishes that the Minister did not have the requisite degree of certainty when he determined to approve the construction and operation of the pulp mill and attach conditions to that approval. LFF pointed to certain parts of the material which was before the Minister when he made his decision and, in particular, certain passages from the Chief Scientist’s report. It also relied on the fact that the Minister found it necessary to impose conditions which required further studies to be undertaken to assess the environmental impact of offshore effluent discharge (Conditions 34, 35, 36, 38 and 40) and the possibility that the outcomes of these

studies could lead to a variation of the limit imposed on effluent discharge by other conditions such as Condition 32.

Consideration

1. Before the Minister may exercise the power, conferred on him by s 134(1) of the Act to impose a condition on an approval granted under s 133 he must be satisfied that the proposed condition is “necessary or convenient” for one or more of the purposes identified in paras (a) and (b). Section 134(3) identifies various types of conditions which might be attached by the Minister to an approval. This inclusive provision permits conditions to be imposed which require the preparation, submission for approval and implementation of an EIMP (s 134(3)(e)) and require specified environmental monitoring or testing (s 134(3)(f)).
2. LFF’s claim that the Minister lacked the degree of certainty which he was required to entertain as a precondition to the exercise of his powers under s 134(1) of the Act, is based on assumptions and inferences which are not supported by the evidence. At the heart of LFF’s case is the assertion that the Minister was seeking, by the imposition of conditions, to obtain knowledge of the impact of the discharge of effluent and that, without this knowledge, it was not possible for him to impose the conditions in the first place. There are a number of difficulties with this assertion. The first is that LFF was unable to adduce any direct evidence that the Minister considered that he laboured under the disability which it attributed to him. He did not say so in his reasons or elsewhere. His reasons suggest that, on the contrary, he felt that he was in a position to make the decision. The second is that it fails to take into account the range of information which was before the Minister when he made his decision. Thirdly, LFF fails to define, with precision, the level of knowledge which it says the Minister must have in order to come to the degree of certainty which it says he must have before he can impose conditions under s 134(1). Its argument does, however, assume that the results of the studies and the monitoring which the conditions require be undertaken form an essential part of that body of knowledge.
3. It is not necessary to record all of the information which the Minister had available to him and considered prior to making his decision. It

will suffice to refer to some of that information in order to illustrate the point that the Minister considered material which supported the conclusions to which he came. That material included the Department's Marine Impact Assessment which:

- Found that other pulp mills employing similar technology to that proposed for the Gunns' mill, which discharged effluents with similar dioxin and furan levels had not given rise to a build-up of high dioxin sediment levels or caused significant environmental and health problems.
- Noted that, where overseas mills had been converted to elemental chlorine free technology the result had been "dramatically reduced levels of dioxins and furans in sediment and biota."
- Advised that the United States Environment Protection Agency guidelines on which some of the discharge limits, incorporated in the conditions, had been based were developed for freshwater concentrations in lakes and rivers rather than the marine environment. Despite this, the Department advised that "[i]n general, however, an ocean outfall should be less likely to cause pollution concerns than a lake or river because of the larger dilution factor."
- Noted that the Canadian guideline on which the concentration limits in Condition 42 are based had been derived for the freshwater environment and was not, therefore, "a proven ecological or toxicological basis for its application to the marine environment." The Canadian guidelines, nonetheless, had potential application to the marine environment. Environment Canada used the guideline to assess the ecological impact of dioxins and furans in marine sediments and had expressed the opinion that, if the guideline figures were not exceeded, it would not be expected that there would be adverse health effects even in the most sensitive species.
- Concluded that "the balance of available evidence does not suggest that there is likely to be a significant impact on Commonwealth waters from dioxins and furans, noting that the proposed pulp mill meets best practice international guidelines for effluent levels and is discharging via an ocean outfall."

The Chief Scientist's report also advised the Minister that:

“Partly due to lack of relevant international experience with comparable technologies in comparable greenfield marine sites, the possibility of longer-term unacceptable environmental impacts under Commonwealth jurisdiction cannot be eliminated, but there is not a prima facie case for high risk. The residual risk can in the view of the Panel be managed by appropriate monitoring ...”

1. Having considered this and other material the Minister proceeded to make findings. He noted that his Department had “not identified any likely significant impacts on the marine environment in Commonwealth waters from the proposed pulp mill.” He accepted the Chief Scientist’s opinion that, based on overseas experience, the type of mill proposed should enable an effluent composition to be achieved which met the world’s best practice. He considered that, nonetheless, it would be prudent to monitor pollutant levels in Tasmanian waters (into which the offshore discharge was to be made) in order to ensure that there was no indirect adverse impact on Commonwealth waters beyond the three nautical mile limit.
2. The Minister concluded, on the basis of the various findings made by him “that the likely impacts of the action on listed threatened and migratory species and the Commonwealth marine area could be prevented or mitigated by attaching conditions to an approval.” He continued: “I concluded that the action carried out in accordance with these conditions would not have a significant impact on listed threatened and migratory species or Commonwealth marine areas.” It is implicit in these statements that the Minister had determined that it was necessary or, at least, convenient to attach the various conditions, on which he had settled, to the approval. The Minister said that he had determined to impose the conditions in order to prevent or mitigate the likely impacts on the Commonwealth marine environment of the proposed discharge of effluent.
3. There was nothing in the material which was before the Minister which would have enabled him to have been satisfied, to a level of scientific certainty, that the proposed marine outfall would have a particular impact on the Commonwealth marine environment. There was, however, sufficient information to enable him to conclude, as he did, that the *likely* impact of the discharge of effluent into the marine environment could be prevented or mitigated by imposing conditions which imposed limits, based on overseas experience, on

the concentration and volume of toxic materials being discharged.

4. This, in my view, provided a sufficient foundation for the Minister to determine that it was necessary and/or convenient to impose conditions of the kind adopted by him. The Minister could so act even though he was unable to determine, with certainty, what the environmental impact of the proposed discharge into the marine environment would be. The precautionary principle, to which the Minister was bound to have regard (and which will be considered in greater detail in dealing with Ground 2), specifically contemplates that decisions of the kind presently under consideration can be made notwithstanding the “lack of full scientific certainty”. The Minister acknowledged a risk and fixed on conditions which he considered to be appropriate to deal with that risk. Conditions 34, 35, 36, 38 and, 40 are each linked to the EIMP. The duties which they impose on Gunns are to be performed either in accordance with the EIMP or as part of the EIMP. They are, therefore, conditions which govern the implementation, by Gunns, of the EIMP. They are conditions of the kind contemplated by s 134(3)(e). Each of these conditions also requires Gunns, before commissioning the pulp mill, to undertake varying forms of environmental monitoring and testing. They are, thus, conditions of the kind comprehended by s 134(3)(f). Even if a particular condition, were, contrary to my view, to be held not to fall within one of the paragraphs of s 134(3), this would not matter because the sub-section does not contain an exhaustive list of the types of conditions which may be imposed.
5. This ground must be rejected.

GROUND 2 – THE PRECAUTIONARY PRINCIPLE

1. LFF contended that, despite being required to do so by ss 136(2)(a) and 391 of the Act, the Minister failed to take into account the precautionary principle which is explained in s 391(2):

“The *precautionary principle* is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.”

LFF acknowledged that the Minister, in his reasons, specifically said that he had taken the principle into account in coming to his decision and, in particular, had done so when deciding to impose the conditions relating to

the marine discharge of effluent. It contended, however, that such consideration as was given to the precautionary principle was not proper, genuine or realistic. That this was so was said to be demonstrated by an examination of the material which was before the Minister which, according to LFF, established that the maximum limits imposed by Conditions 31, 32 and 42 and the trigger levels in Condition 32, could not reasonably constitute measures for the protection of the relevant environment. Furthermore, it was suggested that the failure to establish those maximum limits, before granting approval, effectively constituted the postponement of the implementation of the measure to protect the environment or a failure to impose any measure to prevent the degradation of it in the face of threats of serious environmental damage. This failure was also said to confirm that the conditions which were imposed were but “temporary measures pending assessment of the relevant impacts of the effluent.”

1. Condition 31 requires that no more than 64 megalitres of wastewater effluent (averaged monthly) be discharged each day. This is the figure which Gunns says it proposes to discharge each day. LFF asserted that this limit had no scientific significance and that, in fixing on that figure, the Minister did not take into account any assessment of the effect of the effluent on the marine environment. LFF also pointed out that there is no express provision for the variation of this limit should this prove necessary.
2. Condition 32 fixes 3.4 pg TEQ/L as the maximum permissible monthly average effluent concentration of dioxins and furans in the effluent to be discharged by Gunns. The figure is said to be based on a prediction, made by Gunns. It is not, according to LFF, a figure that takes into account any assessment of the impacts of the effluent on the relevant environment because those impacts are unknown and will not be known until further studies have been undertaken. The 3.4 pg TEQ/L figure is below limits set by a Tasmanian planning agency and certain overseas regulators. LFF pointed to passages in various reports which were before the Minister which suggest that international guidelines to which the Minister had regard did not establish a measure for adequate environmental protection and cast doubt on the relevance of overseas experience in countries where the environment had been altered by years of effluent discharge. Gunns,

on the other hand, was proposing to discharge effluent into an environment which had not been subject to earlier discharges. LFF also noted that the trigger levels for pollutants which are imposed by Condition 32 are not expressly subject to any variation.

3. Condition 42 imposed a limit of 850 pg TEQ/kg on the concentration of dioxins and furans in the benthic sediments in any location within Commonwealth marine waters. Although this figure is the same as the one adopted by Canadian authorities, LFF objected that there was no evidence before the Minister that the Canadian guideline was a safe maximum limit in the context of the marine environment in Bass Strait. Moreover, so it was said, the Departmental report had observed that the Canadian guideline was derived from the studies of the freshwater environment and not from a marine environment. Although the limit could be varied downwards pursuant to Condition 44, there was no provision for it to be varied upwards if it were later to be judged to be too stringent.

Consideration

1. There are a number of provisions of the Act which deal with the question of how the Minister is to give effect to the precautionary principle when exercising his powers under the Act. These provisions are not entirely consistent.
2. Section 391(1) (when read with sub-section (3)) stipulates that the Minister “must take account of the precautionary principle” in making decisions under s 133 to the extent he “can do so consistently with the other provisions of [the] Act.” Section 136(1) provides: “In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must consider the following, so far as they are not inconsistent with any other requirement of this Subdivision:
 - (a) matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action;
 - (b) economic and social matters.”
1. Subsection 136(2) provides that, in considering the matters identified in subsection (1) “the Minister must take into account” various considerations including “the principles of ecologically sustainable

development.” These principles are identified in s 3A. They include, in para (b), a different formulation of the precautionary principle: “if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environment degradation;”

1. Neither s 391(1), nor s 136(2) requires the Minister to “take account of” or “take into account”, the precautionary principle in isolation. Under s 391(1) the Minister is obliged to take into account the precautionary principle only to the extent that this can be done consistently with the other provisions of the Act. Under s 136 the Minister is required to take into account the precautionary principle together with the other principles of ecologically sustainable development and a variety of other matters including economic and social matters. The Minister is not obliged to accord pre-eminence to the precautionary principle when making decisions under ss 133 and 136. So long as the Minister, as he did in the present case, takes account of the precautionary principle, it is a matter for him to determine what weight is to be accorded to the principle having regard to the wide range of other considerations which he is also required to take into account.
2. It is in this statutory context that LFF’s complaint that the Minister failed to give proper, genuine or realistic consideration to the precautionary principle falls to be considered. The requirement that a decision maker must give “proper, genuine and realistic consideration” to the matters which he is required to have regard can be traced to the decision of Gummow J in *Khan v Minister for Immigration and Ethnic Affairs* [\[1987\] FCA 457](#); [\(1987\) 14 ALD 291](#) at 292. This dictum has been applied in a number of immigration cases heard by this Court: see, for example, *Hindi v Minister for Immigration and Ethnic Affairs* [\(1988\) 91 ALR 586](#); *Minister of State for Immigration, Local Government and Ethnic Affairs v Pashmforoosh* [\(1989\) 18 ALD 77](#). This approach to judicial review has attracted a good deal of academic criticism: see, for example, J McMillan, “Judicial Restraint and Activism in Administrative Law” [\(2002\) 30 Federal Law Review 335](#) at 361-364; M Aronson, B Dyer and M Groves, “Judicial Review of Administrative Action” (3rd ed), Lawbook Co. 2004, at 254. One element of this criticism has been that such a requirement cannot be superimposed on the “failure to

have regard to relevant considerations” ground of judicial review. To do so would be inconsistent with the analysis of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 41, where his Honour held that, if a decision maker failed to give adequate weight to a relevant factor of great importance when coming to a decision, the preferred ground of review was manifest unreasonableness, not failure to have regard to relevant considerations. More importantly, however, is the concern that the “proper, genuine or realistic consideration” requirement operates as an invitation to Courts to enter on the merits of administrative decision making. Later curial decisions have echoed this concern: see, for example, *Bruce v Cole* (1998) 45 NSWLR 163 at 186 (per Spigelman CJ). In *Minister for Immigration and Multicultural Affairs v Anthonypillai* [2001] FCA 274; (2001) 106 FCR 426 at 442 a Full Court of this Court observed that the formula “creates a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any ... decision can be scrutinised”.

3. There may be cases in which a decision maker can be shown to have done no more than pay lip service to an obligation to have regard to a particular matter which he is obliged to take into account. These will be rare cases. The present is not one of them.
4. The Department’s recommendation report (which was prepared under s 95C of the Act and to which the Minister was required by s 136(2)(bc)(ii) to have regard) gave careful attention to the precautionary principle. It advised the Minister that:

“There is clearly a lack of full scientific certainty about the proposal but the Department recommends a range of measures to prevent degradation of the environment.”

These measures included the attaching of conditions to the grant of approval. This recommendation led the Minister to conclude:

“that any lack of certainty related to the potential impacts of the effluent discharge on the Commonwealth marine environment ... would be satisfactorily addressed by conditions that restrict the discharge of pollutants to prescribed levels, impose strict monitoring of the effluent and the receiving environment and adopt trigger points and maximum limits which, if exceeded or reached, require the application of remedial

management responses in a timely manner to avoid adverse impacts.” This was, plainly, an application of the precautionary principle.

1. It led the Minister to impose the conditions which prescribe maximum levels of discharge, impose a monitoring regime and mandate trigger points at which remedial management responses are required. LFF attacks the efficacy of the conditions which give effect to the Minister’s decision. It seeks to suggest that they cannot be characterised as provisions which provide protection to the environment in accordance with the precautionary principle: rather, it is said, they are temporary restrictions which reflect the lack of scientific information available to the Minister on the environmental impact of the proposed effluent discharges. This attack is founded on the same selective analysis of the evidence and recommendations which have been dealt with under Ground 1. It is, in my view, but a thinly veiled attack on the merits of the Minister’s decision insofar as it involved the imposition of conditions. LFF has failed to establish that the Minister failed to give adequate consideration to the precautionary principle. On the contrary, the Minister, in imposing Conditions 31, 32 and 42 and those which put in place the monitoring regime, sought to give effect to that principle: cf *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 at [55]- [56]. These conditions were designed to deal with any unexpected adverse outcomes of the decision to approve the mill.
2. I have, thus far, assumed that the Minister was required, by either or both ss 136(2) and 391(1) of the Act, to have regard to the precautionary principle when exercising his powers under ss 133 and 134. It may, however, be doubted that, having regard to the material before him, he was under any such obligation. The precautionary principle, as expressed in both ss 3A(b) and s 391(2) of the Act, is called into play where there exist “threats of serious or irreversible environmental damage”: see *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736; (2006) 232 ALR 510 at 521. The findings made and the conclusions reached by the Minister, which are recorded above at [24] and [25] strongly suggest that he did not identify any threat of serious or irreversible damage to the

Commonwealth marine environment which would be caused by the proposed discharge of effluent. Certainly he made no express finding to this effect.

3. Some of the arguments advanced by LFF in relation to this ground turn on the question of whether the Minister has the power to vary the discharge limits which he has imposed should the results of monitoring suggest that this is necessary. On the view I take of the issues raised by Ground 2, nothing turns on this point. The matter was, however, fully argued and was also pressed in the context of Grounds 6 and 9. I will, therefore, venture some short observations. All parties accepted that the Minister had power, under s 143(1) and, in particular under paras (b) and (ba), to revoke, vary or add conditions if it is found that approved action has had (or the Minister believes will have) “a significant impact” on the environment. Para (b) deals with the situation where that impact was not identified at the time at which approval was given. Para (ba) applies where the impact is substantially greater than the anticipated impact which was identified prior to approval.
4. LFF argued that these provisions were “not apt to deal with impacts which, although foreseen, were not assessed adequately at the time of approval.” The power conferred on the Minister by s 143(1) is not conditioned on a test of what was or was not foreseen at the time at which approval was given under s 133. Paras (b) and (ba) confer power on the Minister by reference to whether the relevant impact or the effect of the impact had been identified during the assessment process leading to approval. In a case such as the present where the potential for some damage to the environment was recognised but, after the action had been taken, it was found to have been underestimated, para (ba) would enable the Minister to add more stringent conditions if he was satisfied that the impact of the action on the environment was substantially greater than that earlier identified.
5. Ground 2 must be rejected.

GROUND 3, 4 AND 5 – ABSENCE OF INFORMATION ABOUT THE ENVIRONMENTAL IMPACT OF GUNNS’ PROPOSAL

1. Grounds 3, 4 and 5 were argued together. Their common theme was that the material which was before the Minister, at the time at which

he made his decision, was not sufficient to enable him to make an informed decision as to the likely impact of the proposal to discharge waste into Bass Strait. That this is so is apparent, according to LFF, from the various conditions which require that further studies and monitoring occur. This, it is suggested, implies that the Minister did not, when he made his decision, believe that he had enough information to make an informed decision. The legal consequence, LFF contended, is that the Minister's decision was not authorised by the Act.

2. Reliance was placed on a range of provisions which, individually, or in conjunction with other provisions, were said to prevent the Minister from proceeding to a decision in the circumstances which obtained at the time at which the impugned decision was made.
3. LFF pointed first to the structure of Chapter 4 of the Act which, it contended, disclosed a legislative intention that the assessment of the relevant impacts of an action must be undertaken before approval is given for the taking of that action. Next, attention was directed to various provisions which require the Minister to be satisfied of various matters before taking particular steps. Section 87(5) empowers the Minister to make an assessment on preliminary documentation, but only if he is satisfied that this will enable him to make an informed decision as to whether or not to approve the taking of the action. Section 132 empowers the Minister to request further information if he believes, on reasonable grounds, that he does not have enough information to make an informed decision to approve the taking of proposed action. The wide terms in which these pre-decisional powers to obtain information are framed was contrasted with the terms which empower the Minister to attach conditions to an approval. Attention was directed particularly to the language of s 134(3)(e) and (f) which refer to the "managing" of environmental impacts and "environmental monitoring or testing". These provisions suggest, so it was contended, that the imposition of conditions is not intended to facilitate the obtaining of information which it is necessary for the Minister to have in order for him to make an informed decision to grant or refuse approval.
4. LFF next pointed to various provisions which identify the types and sources of information which the Minister is required to take into account when making a decision. These provisions contemplate that

the Minister will actively seek information from sources other than the proponent. Reference was made to the precautionary principle (s 391), the requirement that the Minister be provided with comments (if any) from members of the public (s 95B(1)), the recommendation report which the Secretary of the Department is required to prepare and provide to the Minister (s 95C), any other information the Minister has on the relevant impacts of the proposed action (s 136(2)(e)) and any relevant comments given to the Minister in accordance with an invitation extended under ss 131 or 131A (s 136(2)(f)).

5. LFF also sought to derive support for its construction points by reference to the power, conferred on the Minister by s 145 of the Act, to revoke an approval granted under s 133. Section 145(1)(a) provides for revocation where there has been a contravention of a condition attached to an approval if that contravention has had a significant impact on the environment. Section 145(1)(b) and (2) permit revocation where an unforeseen or unpredicted impact on the environment has occurred. Section 145(2A) allows revocation if the Minister believes that the approved action has had an impact on the environment which was not “accurately identified” in the information considered by the Minister at the time at which approval was granted. Section 145(2B) allows the Minister to revoke an approval if the Minister believes, on reasonable grounds, that a condition has been contravened and the Minister is satisfied that approval would not have been granted had that condition not been imposed. It was submitted that these powers of revocation and, in particular that provided for in s 145(1)(b) and (2), would be otiose if, at the time of approval, the Minister identified a potential adverse impact on the environment but deferred assessment of its significance until after the action had been approved. Indeed, LFF went so far as to contend that s 145(2)(b) assumes that the Minister will not grant approval in such circumstances. This is because s 145(2), when read with s 136(2)(e) and the precautionary principle, prevents the Minister from making a decision under s 133 until he has had regard to “all information reasonably obtainable” before granting approval. As I understood the argument it equates the concepts of “available” and “reasonably obtainable”. It is also premised on the assumption that s 132 imposes a mandatory

obligation on the Minister to seek to obtain such information before making a decision.

6. What the Minister should have done, according to LFF, was to exercise his power under s 132 and request that he be provided with additional information.

Consideration

1. These submissions must be rejected.
2. These three grounds are built upon many of the same assumptions and inferences on which LFF relied to support Ground 1. As with Ground 1 they have at their heart the notion that the Minister's insistence on the EIMP processes was sufficient to demonstrate that he lacked sufficient information to make an informed decision as to whether to grant his approval under s 133 of the Act. For the reasons earlier given these assumptions are not sustainable and the inferences should not be drawn.
3. Some additional issues are raised by these grounds. Before dealing with them some preliminary observations should be made. The first is that, nowhere in his reasons, does the Minister so much as hint that he has formed the view that he did not have sufficient information before him to make an informed decision. Nor was there any suggestion, in the Department's recommendation report, that he may form the view that the material before him was insufficient to enable him to make an informed decision.
4. This is hardly surprising given the tenor of that report and the conclusion of the Chief Scientist's Report and, in particular, the parts set out above at [23].
5. It is next to be noted that the Act, does not, in terms, condition the exercise of power under s 133 on the Minister being satisfied that he has sufficient information before him to make an informed decision. LFF's case requires the reading in of words which do not appear in s 133. It supports its case by reference to a number of other provisions, which are to be found in Chapter 4 of the Act, including s 132.
6. It is in s 132 that the phrase "an informed decision" appears. The context in which it appears is important. As already noted s 132 provides a discretionary power, pursuant to which the Minister may request additional information before making a decision under s 133.

He can seek such information if he forms the subjective opinion that he does not have sufficient information to make an informed decision. Even if he forms this opinion, he is not required, by s 132, to instigate further enquiries. As Heerey J observed in *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [\[2008\] FCA 8; \(2008\) 165 FCR 211](#) at 227 [\[66\]](#):

“Thus, the power (which is expressed in discretionary, non-obligatory terms) to request information depends, not on objective assessment of the sufficiency of the information before the Federal Minister, but on the Federal Minister’s judgement (no doubt reasonably formed) as to whether he or she has enough information to make an informed decision. As to the difficulty of making out a legal challenge to decisions made under such powers: see *Buck v Bavone* [\[1976\] HCA 24; \(1976\) 135 CLR 110](#) at 118-9, and *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [\[1996\] HCA 6; \(1996\) 185 CLR 259](#) at 275-277.”

1. The Minister cannot exercise his power under s 133 until after he has received the assessment documentation which relates to the controlled action. In a case such as the present that documentation includes the material comprehended by s 95B(1) and the recommendation report provided for in s 95C: see s 133(1) and (8). The Minister will not have occasion to consider the exercise of his power under s 132 until after he has read this material. It will be for him to determine whether he considers that it provides him with sufficient information to make an informed decision. Even if he answers this question in the negative he is not obliged to seek further information. There is, therefore, nothing in the scheme of Chapter 4 of the Act which supports, much less compels, the reading into s 133(1) of a mandatory requirement that the Minister not grant approval under s 133 unless he has material before him which, objectively, enables him to make an informed decision. The imposition of such an implied requirement would, in the event of a challenge, almost certainly, require the reviewing Court to assess the merits of competing submissions.
2. LFF’s “reading in” case, insofar as it is based on the power of the Minister to revoke approval under s 145 of the Act, must also fail. Section 145 relevantly provides:
“(1) The Minister may, by written instrument, revoke an approval under this Part for the purposes of a specified provision of Part 3 if:

- (a) a significant impact on the matter protected by the provision has occurred because of the contravention of a condition attached to the approval; or
- (b) the conditions specified in subsection (2) are satisfied.

(2) The conditions are that:

- (a) the action has had, or the Minister believes that the action will have, a significant impact that was not identified in assessing the action on a matter protected by a provision of Part 3 for which approval has effect; and
- (b) the approval would not have been granted if information that the Minister has about that impact had been available when the decision to approve the action was made.

...”

1. LFF argued that the Minister’s decision to attach Conditions 34, 35, 36, 38 and 40 to the final approval was contrary to the requirement, said to be imposed by s 145, that the Minister take account of all “available” information at the time at which he makes a decision. These conditions require Gunns to conduct various studies to obtain information relating to the environmental impact of effluent discharge on the Commonwealth marine environment. In addition to arguing that an informed decision could not be made until the outcome of these studies was known, LFF contended that the Minister was required to obtain this information before making a decision. The success of this argument depends on acceptance of the proposition that the “available” information referred to in s 145 means information which is “reasonably obtainable” but which has not been provided to the Minister under the pre-decisional processes prescribed by Chapter 4.
2. The ordinary and natural meaning of the word “available”, as defined in the Macquarie Dictionary (4th ed 2005) is “suitable or ready for use; at hand; of use or service”. The studies contemplated by Conditions 34, 35, 36, 38 and 40 will, necessarily, take a good deal of time to complete. Until they are completed they will not yield relevant information. Plainly, that information was not to hand or ready for use by the Minister at the time at which he made his

decision. What was available was the information which emerged from the pre-decisional processes which were carried out in accordance with the requirements of Chapter 4. So understood, the word “available” in s 145(2)(b) does not extend to information which might reasonably be obtainable as a result of further studies which have yet to be conducted. LFF’s argument proceeded on the assumptions that those studies would produce relevant information and that such information was reasonably obtainable.

3. LFF also impugned the efficacy of Condition 4 on the ground that it could not be imposed consistently with the Minister’s powers of suspension and revocation under ss 144 and 145 of the Act. Condition 4 provides for a staged response where it is reasonably anticipated that the maximum limits for effluent discharge, prescribed in the conditions, are likely to be exceeded. In such circumstances Gunns must “immediately implement the response strategies in the EIMP, in accordance with the stipulated time frames.” If Gunns is unable to demonstrate to the satisfaction of the Minister that the response strategies have reversed the undesirable impacts of the discharge in a timely manner, “the mill must cease to operate until such time as a tertiary treatment solution satisfactory to the Minister is installed.” A condition of this kind is comprehended by s 134(3)(aa) of the Act. It also gives effect to the precautionary principle.
4. LFF objected to that part of Condition 4 which stipulates that, as a last resort, the mill must close down until remedial action which is acceptable to the Minister is taken. This element of the condition was said to be inconsistent with ss 144 and 145 of the Act because they prescribe exhaustively the circumstances in which the Minister may suspend or revoke approval of an action. Condition 4 could, conceivably, apply to close down the mill in circumstances where neither ss 144 or 145 would be available.
5. Both ss 144 and 145 confer discretionary power upon the Minister. There is nothing in the language of either provision to indicate that it was intended that it should provide an exhaustive statement as to when an approval might be suspended or revoked. Even if such a construction could be placed on these sections it does not follow that a condition which requires the mill to close in order to protect the Commonwealth marine environment is properly to be characterised

as a suspension or revocation of approval. Plainly, it is neither of these things.

6. The various provisions of Chapter 4 of the Act on which LFF relied to support its arguments in relation to Grounds 3, 4 and 5 are the same provisions on which it relied for the purposes of its “repugnancy submissions” under Ground 1. In short, LFF submitted that, because, on its construction of the relevant provisions, the Minister could not proceed to grant approval under s 133, there was no valid approval to which conditions could be attached under s 134. The related argument was that the Minister was required, by s 132, to await the outcome of the studies required by the conditions before proceeding to make a decision under s 133. The Minister could not seek to remedy the deficiency in the information before him by imposing conditions which required the information to be obtained after he had granted approval for the action. For the reasons given in dealing with these grounds, the “repugnancy submissions” must also be rejected.

Ground 6 – Unreasonableness

1. LFF contended that certain elements of the Minister’s decision are manifestly unreasonable, illogical or irrational. The first is that the upper limits on discharge, imposed by Conditions 31 and 42, and the trigger limits in Condition 32 cannot be varied even if variation is found to be necessary following the conduct of the studies which Gunns is required to conduct. The other is that any breach of the upper limit imposed by Condition 32, as varied by the EIMP, would not be a breach of a condition imposed by the Minister.

Consideration

1. These contentions cannot be accepted. They are based on flawed premises and, in any event, the relevant parts of the conditions do not evidence an unreasonable exercise of power.
2. The “unreasonableness ground” of judicial review must be applied with caution lest the reviewing Court exceeds its proper function. As Mason J warned in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [\[1986\] HCA 40](#); [\(1986\) 162 CLR 24](#) at 40-1:

“The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the

court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned. ...”
See also *Attorney-General (NSW) v Quin* [\(1990\) 170 CLR 1](#) at 36.

1. The language employed by courts in formulating the test to be applied when determining whether a particular exercise of discretionary power is unreasonable reflects this concern. In the well-known case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [\[1948\] 1 KB 223](#) at 230 Lord Greene MR said:

“It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming ...”

1. Perhaps the strictest formulation of the test is that propounded by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [\[1985\] 1 AC 374](#) at 410. His Lordship held that the unreasonableness ground of judicial review “applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.” Judges of this Court have preferred to frame the test in terms which are somewhat less vehement: see, for example, *Commonwealth v Pharmacy Guild of Australia* [\(1989\) 91 ALR 65](#) at 87; *Alexandra Private Geriatric Hospital Pty Ltd v Blewett* (1985) 7 FCR 341. Some judges have quoted with approval and applied Lord Diplock’s alternative formulation in *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 821 where his Lordship said that, in order for a challenge under the unreasonableness ground to be made out, it must “be shown that in reaching the decision the body exercising the discretion has acted on an erroneous view of the applicable law; and decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them.”: see *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [\[2008\] FCA 399](#); [\(2008\) 167 FCR 463](#) at 487 [\[102\]](#) (per North J). Although these formulations of

the test for unreasonableness differ in their stringency, they make clear that it will be a rare case in which an unreasonable exercise of discretionary power will be made out.

2. LFF does not allege that the choice of maximum limits and trigger points contained in Conditions 31, 32 and 42 involves an unreasonable exercise of power. Rather, it is contended that, even if the further research which the Minister requires Gunns to conduct suggests that a variation of these limits is needed in order to protect the environment, the conditions cannot be varied and that any breach of the upper limit stipulated in Condition 32, as varied by the EIMP, would not be a breach of the condition.
3. Even if LFF were correct in its submissions concerning the capacity of the Minister to take remedial action should limits imposed by the conditions be exceeded, this would not, in my opinion, render the conditions unreasonable.
4. Furthermore I do not consider that LFF is correct in its assertions about the legal consequences of a breach of the conditions should those conditions be varied.
5. For reasons given above at [42] and [43] I consider that the Minister does have power, under s 143(1)(b) and/or (ba) to vary the limits imposed by the conditions if he is satisfied that the impact of the discharge on the environment has been substantially greater than had previously been identified. There is, in addition, scope for variation of the conditions by agreement pursuant to s 143(1)(c).
6. LFF's other contention is that, if the upper limit imposed by Condition 32 is varied by the EIMP, any later violation of that limit would not constitute a breach of a condition imposed by the Minister.
7. This contention cannot succeed. Condition 9 places Gunns under an obligation to implement the EIMP approved by the Minister. Condition 44 deals with the consequences of a subsequent revision of the EIMP. It provides that "[i]f the Minister approves a revised EIMP pursuant to this condition, Gunns Limited must implement that EIMP instead of that previously approved." This provision ensures a continuing obligation on Gunns to comply with the EIMP. If Gunns fails to comply with this obligation a breach of Condition 44 will occur which may lead to the suspension or revocation of approval under ss 144 or 145 of the Act.
8. Ground 6 must fail.

GROUND 7 – UNCERTAINTY

1. LFF submitted that the terms in which many of the conditions were framed, when considered in the context of the statutory regime under which they were made, were so uncertain as to warrant the quashing of the decision. Counsel for LFF described the uncertainty ground as the corollary of Ground 1. It was submitted that the conditions and the regime to which they gave rise “are not such that from the moment of their creation the Court can say with any reasonable certainty in what events the approval is liable to be suspended or revoked.”
2. LFF relied on substantially the same arguments as it did in supporting the preceding ground. It contended that it is not certain whether the upper limits imposed in Conditions 31 and 42 or the trigger levels contained in Condition 32 are able to be varied in or by the EIMP and that it is not certain that a breach of a maximum limit fixed in the EIMP could result in suspension or revocation of approval.

Consideration

1. The statutory ground on which LFF relied appears in s 5(1)(e) and (2)(h) of the ADJR Act. It deems an exercise of power to be improper if it has been exercised “in such a way that the result of the exercise of the power is uncertain.” It may be doubted that the construction of this ground requires resort to the body of case law which has dealt with the requirement that delegated legislation may be invalid by reason of uncertainty: see *Randwick City Council v Minister for the Environment* (1998) 54 ALD 682 at 730. The common law approach is, nonetheless available to LFF under s 39B of the *Judiciary Act* on which it also relied. It is not necessary to pursue this issue further because the parties are agreed that the ground will be made out if the impugned conditions do not convey to Gunns, with reasonable clarity, what it is required to do: cf *Seven Network Ltd v Australian Competition and Consumer Commission* [2004] FCAFC 267; (2004) 140 FCR 170 at 182 [49]. Put another way: the conditions must, on a fair reading, make it reasonably clear to Gunns what action is required of it: cf *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 39 ALR 565 at 570.

2. LFF does not allege that Conditions 31, 32 and 42 fail to make it clear to Gunns what it is required to do and what it is not permitted to do. Such a submission would have been untenable. The conditions make it clear that Gunns is not to discharge effluent into the marine environment in excess of, or in concentrations greater than, the prescribed limits. It is also required to take certain action when trigger points are reached. The uncertainty which LFF says exists is uncertainty as to whether the conditions may be varied and as to the consequences of a contravention of the conditions if they are varied.
3. For the reasons given above at [42], [43], [73] and [75] I do not consider that there exists any uncertainty on these issues. The conditions are subject to variation and a breach of the conditions may warrant suspension or revocation of approval under ss 144 or 145 of the Act.

GROUND 9 – IRRATIONAL OR CAPRICIOUS EXERCISE OF POWER

1. Under this ground LFF attacks the validity of Condition 42. It is said that the imposition of the condition was not authorised by s 134 because “it was an irrational or capricious exercise of the power given by [that section].” More specifically, LFF argued that, the adoption of the Canadian guideline limit of 850pg TEQ/kg in respect to the permissible concentration of dioxins and furans in the benthic sediments in the Commonwealth marine environment was unsupportable having regard to the information which was before the Minister.
2. That information included:
 - Advice that the organic carbon content of the relevant sediments had a bearing on the environmental aspects of dioxins. Gunns had, for example, advised the Minister that “sediment organic carbon” was one of the “critical parameters influencing the calculations of dioxin uptake into biota.”
 - A submission, contained in the paper prepared by Dr Wadsley, that the 850pg TEQ/kg figure needed to be adjusted to take into account the level of organic carbon in the sediments in the Commonwealth marine environment, because the sediment concentration limit which will prevent the degradation of, protect, or mitigate damage to that environment depended on

the level of organic carbon in the relevant sediments.

3. LFF further asserted that there was no information before the Minister, when he made his decision, that the unadjusted 850pg TEQ/kg figure would prevent the degradation of, protect, or mitigate damage to the marine environment. LFF again relied on its submission that the upper concentration limit, imposed by Condition 42, could not be varied.

Consideration

1. This ground must fail.
2. Neither of the respondents contended that an exercise of discretionary power could not be impugned on the ground that it was irrational or capricious. This emerging common law ground of judicial review appears to have been recognised by the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 198 ALR 59 and see: Aronson et al, op cit at 247, 263-8. There have yet to be any definitive judicial pronouncements as to the degree of irrationality or capriciousness which would be required to justify curial intervention. The facts of *S20* suggest that a high degree is required. Indeed, it has been said that an applicant will have greater difficulty in satisfying the standard imposed by *S20* than in making good a challenge on the ground of unreasonableness: see *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [59] (per Santow JA). There is an added level of complexity in cases such as the present where the exercise of a statutory discretion is preceded by fact finding and it is sought to allege that irrationality and capriciousness have tainted both parts of the process and where the exercise of power is informed, in part, by scientific predictions: see *Director of Animal and Plant Quarantine v Australian Pork Ltd* [2005] FCAFC 206; (2005) 146 FCR 368 at 382-384.
3. It is not necessary to develop these issues in great detail because, on any view, the decision to impose the 850 pg TEQ/kg concentration limit cannot be characterised as irrational or capricious.
4. The Macquarie dictionary relevantly defines the word “irrational” as meaning “without the faculty of, or not endowed with, reason” and “not in accordance with reason; utterly illogical.” The same dictionary defines the word “capricious” as meaning “subject to, led

by, or indicative of caprice or whim.” The Minister’s decision to impose the 850 pg TEQ/kg limit is neither irrational nor capricious in these senses. As recorded above at [23] the Minister was advised by his Department that this limit was imposed by Environment Canada. Although it had been developed in the freshwater environment it had been applied in the marine environment and Environment Canada had expressed the opinion that, if the figure were not exceeded, it would not be expected that there would be adverse health affects on even the most sensitive marine species. The Minister was entitled to act on this advice. To do so was in no sense irrational; nor was the Minister motivated by caprice.

5. The Minister’s position is not undermined by his decision to require Gunns to determine background concentrations of contaminants of potential concern for sediments in the Commonwealth marine environment: see Condition 36(b). It was not irrational for the Minister to accept advice and fix the 850 pg TEQ/kg limit and, having done so, to seek to confirm, by further scientific study, that this concentration limit was sufficient to protect the environment from any harmful effects of effluent discharge. The requirement that Gunns undertake further scientific study is no more than a recognition of the reality which underlies the precautionary principle, namely, that full scientific certainty as to the effects of particular discharges on the environment is impossible to attain: see *Telstra Corporation Ltd v Hornsby Shire Council* [\[2006\] NSWLEC 133](#); [\(2006\) 67 NSWLR 256](#) at 271-273. It follows that caution suggests but does not dictate that further study or monitoring should occur in order to determine whether predictions, based on current scientific knowledge, prove to be correct.
6. A good deal of LFF’s argument on this ground centered on whether the Minister was correct to reject certain submissions which had been made by Dr Wadsley. Dr Wadsley’s submission was before the Minister when he made his decision and was considered by him. It was Dr Wadsley’s opinion that, before it could have application to the Commonwealth marine environment in Bass Strait, the 850 pg TEQ/kg figure would have to be adjusted to take account of the level of organic carbon in that environment because levels of organic carbon may vary between freshwater and marine environments. The Department reviewed Dr Wadsley’s submission and rejected it. It did

so on the basis of Environment Canada's advice to which reference is made above at [23]. The Minister chose to act on his Department's advice. His failure to accept Dr Wadsley's advice and the implications of that advice for the establishment of an upper concentration limit in Condition 42, involved no irrationality or capriciousness. The Minister was confronted with conflicting scientific advice and chose, for reasons which he explained, to act on the opinion of Environment Canada in preference to that of Dr Wadsley. It is not appropriate, in a judicial review proceeding, for the Court to pass upon the merits of scientific advice.

7. Insofar as Ground 9 depends on the contention that the 850 pg TEQ/kg limit cannot be adjusted even if subsequent scientific findings suggest that it should be, these submissions must be rejected for the reasons given above at [42] and [43].
8. During argument, senior counsel for LFF raised the question of whether a purchaser of Gunns' interests in the pulp mill would be able to resist any attempt by the Minister to vary the conditions imposed on Gunns. A number of provisions of the Act bear on this issue. When an approval is granted under s 133 it is granted to a named person: see s 133(2)(c). That person becomes the holder of the approval. The holder may transfer the approval to another person by written agreement, but only with the Minister's consent: see s 145B(1). One matter which the Minister is entitled to consider when asked to consent to a transfer is whether the transferee can comply with the conditions attached to the approval: see s 145B(4)(b). If the Minister is not so satisfied then he may decline to grant consent and the transfer will not occur.
9. In the event that Gunns disposes of its interest in the pulp mill it is theoretically possible that, under s 133(2A) of the Act, it remains the holder of the approval but authorises its successor to take the authorised action. Even then, however, the taking of the action would probably be subject to the conditions attached to the approval because the purchaser would be acting as the agent of Gunns.
10. Even if a third party purchaser of Gunns' interests were to find a way, consistently with the Act, to avoid being bound by Condition 42, this possibility would not render the Minister's decision to impose the condition and, if need be, vary it, irrational or capricious.

CONCLUSION

1. For these reasons the application will be dismissed.
2. If LFF wishes to contend that costs should not follow the event it should file and serve short written submissions on or before 17 April 2009. If such submissions are filed and served the respondents should file and serve any answering submissions on or before 23 April 2009.

I certify that the preceding ninety-six (96) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice TRACEY.

Associate:

Dated: 9 April 2009

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Date of Hearing: 18 and 19 June 2008

Date of Judgment: 9 April 2009

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