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Lawyers for Forests Inc. v Minister for the Environment Heritage and the Arts [2009] FCAFC 114 (3 September 2009)

Last Updated: 3 September 2009

FEDERAL COURT OF AUSTRALIA

Lawyers for Forests Inc. v Minister for the Environment Heritage and the Arts [\[2009\] FCAFC 114](#)

ADMINISTRATIVE LAW – decision made under s 133 of *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) to approve proposal – whether decision authorised by Act – whether conditions attached to approval authorised by Act. [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) [ss 3](#), [3A](#), [23](#), [24A](#), [130](#), [133](#), [134](#), [136](#), [391](#)[Environment Protection and Biodiversity Conservation Regulations 2000](#) (Cth), [Part 4](#)**LAWYERS FOR FORESTS INC. v MINISTER FOR THE ENVIRONMENT HERITAGE AND THE ARTS and GUNNS LIMITED**VID 320 of 2009**SUNDBERG, DOWSETT AND JACOBSON JJ**3 SEPTEMBER 2009**MELBOURNE**

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

VID 320 of 2009

**ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT
OF AUSTRALIA**

BETWEEN: LAWYERS FOR FORESTS INC.

Appellant

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

GUNNS LIMITED

Second Respondent

JUDGES: SUNDBERG, DOWSETT AND JACOBSON JJ

DATE OF ORDER: 3 SEPTEMBER 2009

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondents' costs of the appeal.

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.

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Appellant

AND: **MINISTER FOR THE ENVIRONMENT
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First Respondent

GUNNS LIMITED

Second Respondent

JUDGES: **SUNDBERG, DOWSETT AND JACOBSON JJ**

DATE: **3 SEPTEMBER 2009**

PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

BACKGROUND

1 The second respondent (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 2.7 km offshore. That discharge may have an adverse effect on an area of Bass Strait that forms part of the Commonwealth marine environment which begins a further 2.9 km offshore. For this reason it was necessary for Gunns to obtain the approval of the first respondent (the Minister) under the [*Environment Protection and Biodiversity Conservation Act 1999*](#) (Cth) (the Act) before undertaking the construction of the mill. The Minister gave his approval on 4 October 2007. The appellant sought judicial review of the Minister's decision under the *Administrative Decisions (Judicial Review) Act 1997* (Cth) and [s 39B](#) of the [*Judiciary Act 1903*](#) (Cth). The primary judge dismissed the application: *Lawyers for Forests Inc. v Minister for the Environment, Heritage and the Arts* [\[2009\] FCA 330](#). This appeal is from that decision.

LEGISLATIVE OVERVIEW

2 The Act includes amongst its "objects" the protection of the environment and the conservation of biodiversity: s 3(1)(a) and (c). In order to achieve its objects the Act seeks to protect native species and ecosystems by various means: s 3(2)(e). The Act requires Ministerial approval before a person takes an action that has, will have or is likely to have a significant impact on certain aspects of the environment: s 11. Section 23 focuses on the marine environment, and prohibits the taking in a Commonwealth marine area of an action that has, will have or is likely to have a significant impact on that environment. Section 24A creates offences in relation to actions in Commonwealth marine areas that affect the environment.

3 Section 68(1) requires an entity proposing to take an action it thinks may be or is a "controlled action" to refer the proposal to the Minister so that the Minister may determine whether or not the proposal is a controlled action. Section 67 defines "controlled action" as an action the taking of which, without approval under Part 9 for the purposes of a provision of Part 3, would be prohibited by the provision. Such a provision is known as a "controlling provision": s 67. Sections 23 and 24A are controlling provisions.

4 When a referral is made under s 68, the Minister is required to determine whether the proposed action is a controlled action and, if it is, which of the proscriptions imposed by Part 3 applies: s 75. If the Minister determines that the proposed action is a controlled action, Part 9 requires that the environmental impact of the action be assessed, using a method determined by the Minister under s 87. Once the assessment has been made, the Minister must determine whether or not to approve the proposed action: ss 130 and 133.

5 When deciding whether or not to approve the taking of an action and what conditions to attach to an approval, the Minister is required to consider matters relevant to applicable controlling provisions and economic and social matters: s 136(1). In considering these matters, the Minister is required to take into account the principles of ecologically sustainable development which include "the precautionary principle": ss 3A, 136 and 391. The Minister is also required to take into account the written submissions of the designated proponent, the written advice on the

proposal provided by the Department of the Environment, Water, Heritage and the Arts (the Department), any public comment on the proposal and any information the Minister has available concerning the anticipated impacts of the proposed action: s 136(2).

6 It will be necessary later in these reasons to examine in more detail some of the provisions that have been described in general terms in the preceding paragraphs.

THE FACTS

7 The facts giving rise to the application were not in dispute. On 2 April 2007 Gunns made a referral to the Minister under s 68. On 2 May 2007 the Minister determined that the proposed action was a "controlled action" and that the controlling provisions were ss 23 and 24A. He directed that the method of assessment should be by way of preliminary documentation, one of the methods listed in s 87. On 8 May 2007 Gunns advertised the preliminary documentation. Public comment was invited by 5 June 2007, and many submissions were received. On 4 July 2007 Gunns responded to those submissions pursuant to s 95B.

8 The Department considered the submissions and other material and prepared a recommendation report pursuant to s 95C, which it submitted to the Minister on 17 August 2007. 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, one of which was 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".

9 On 19 August 2007 the proposed decision and conditions were published on the Department's website. Public comment was invited under s 131A, and many comments were received.

10 On 10 August 2007 the Minister invited the Chief Scientist of Australia (the Chief Scientist) to review and report on the scientific aspects of the proposal. The Chief Scientist formed a panel of experts to assist him (the Panel). On 24 September 2007 the Chief Scientist sent his report to the

Minister. He subsequently expressed his and the Panel members' agreement with the terms of the draft approval decision recommended by the Department. On 4 October 2007 the Minister determined to grant final approval to the proposal subject to a number of conditions. He gave his reasons for so doing on 1 November 2007.

11 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 the conditions set out in an annexure. There are 48 conditions to which the approval is "subject". Conditions 1 to 9 are concerned with what is called an Environmental Impact Management Plan (EIMP). The following conditions relating to the EIMP are particularly relevant:

2. Gunns Limited must develop and submit an Environmental Impact Management Plan (EIMP) for the Minister's approval in accordance with the outline at Schedule 2. The objective of the EIMP must be to ensure no adverse impacts on matters of national environmental significance as a result of the action. 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.

12 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. By condition 9, no commissioning activity is to commence until the final and complete EIMP is approved by the Minister. Once approved the EIMP has to be implemented.

13 Other than the above EIMP conditions, the conditions particularly relevant to the appeal are these:

34) 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.

35) 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.

36) 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...

...

38) 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 condition lists nine matters the modelling had to include.

...

40) In accordance with the EIMP and conditional on 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...

REVIEW GROUNDS

14 Although the appellant at first instance relied on [s 39B](#) of the *Judiciary Act*, the case was in fact conducted by reference to the grounds of review in the ADJR Act. As summarised by the primary judge these grounds were:

- The decision was not authorised by the Act because some of the conditions the Minister 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 because the Minister did not take into account the precautionary principle, as required by s 391. (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, which does not appear above, was abandoned.

15 The primary judge rejected all the above grounds.

PRIMARY JUDGE'S REASONS

16 The bulk of the primary judge's reasoning (so far as relevant to the appeal grounds) was directed to ground 1 of the application to review the Minister's decision. His Honour's treatment of ground 1 was largely determinative of the fate of grounds 3, 4 and 5 (absence of information about the environmental impact of Gunns' proposal).

17 Before recording the primary judge's rejection of ground 1, it is necessary to set out part of s 134 of the Act, which confers on the Minister the power to impose conditions:

(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 ...

...

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

18 The primary judge rejected the appellant's claim that the Minister lacked the degree of certainty he was required to have as a precondition to the exercise of the power in s 134(1), because the claim was based on assumptions and inferences that were not supported by the evidence. He said at [22]:

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).

19 His Honour recorded at some length the information the Minister considered prior to making his decision. In his Honour's view, this information supported the conclusions to which the Minister came. It

included material in the Department's Marine Impact Assessment and in the Chief Scientist's report.

20 After recording the Minister's findings about significant impacts on the marine environment in Commonwealth waters, the primary judge said at [26]-[27]:

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. 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 ..., 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.

21 The primary judge concluded at [27] that conditions 34, 35, 36, 38 and 40 (set out at [13] above):

- are each linked to the EIMP;
- impose duties on Gunns that are to be performed either in accordance with the EIMP or as part of the EIMP;
- are conditions which govern the implementation by Gunns of the EIMP, and are therefore of the kind contemplated by s 134(3)(e).

22 His Honour also concluded that those conditions require Gunns, before commissioning the pulp mill, to undertake various forms of environmental monitoring and testing. Accordingly, they were authorised by s 134(3)(f).

23 The primary judge then dealt with grounds 3, 4 and 5 of the application for review, which had been argued together. They are recorded at [14] above. His Honour first observed that these grounds were built upon many of the same assumptions and inferences on which the attack on ground 1

was based, principally that the Minister's insistence on the EIMP processes demonstrated that he lacked sufficient information to make an informed decision whether to grant approval under s 133. He then said that there was nothing in the Act that conditioned the exercise of power under s 133 on the Minister being satisfied that he has sufficient information to make an informed decision. He declined to read into the section such a requirement, and rejected the contention that ss 132 and 145 showed that there was such a requirement. His Honour said at [57]:

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.

GROUND OF APPEAL

24 Leaving aside an unparticularised ground that merely asserts error on the part of the primary judge, the grounds that were pursued on the appeal are that his Honour:

2. ... ought to have held that the purported approval was not authorised by s 133(1) ... as it approves the taking of the action on a provisional, staged or incremental basis in that it contemplates, when read with the conditions, a further or separate approval for each of:

(a) the construction of the pulp mill; and

(b) the commissioning and operation of the pulp mill –

in circumstances where there was a single action referred by Gunns and s 133(1) only empowers the Minister to approve the action in its entirety on a once only basis.

3. ... erred in finding that conditions 2 to 9, 32 to 36, and 38 to 40 (the impugned conditions) and, in particular, conditions 32 to 36 and 38 to 40 and the ... EIMP ... were authorised by s 134(1) and comprehended by s 134(3)(e) or (f) ... 4. ... ought to have held that the impugned conditions were not authorised by s 134(1) ... as in substance and effect they constitute an assessment and/or provided for an approval in respect of the action and therefore it was not open to the Minister to conclude that they

were necessary or convenient for:

- (a) protecting the Commonwealth marine area from the action, being a matter protected by a provision of Part 3 for which the purported approval has effect; or
- (b) repairing or mitigating damage that may or will be, or has been, caused by the action to the Commonwealth marine area, being a matter protected by a provision of Part 3 for which the purported approval has effect.

5. ... ought to have held that the impugned conditions and, in particular, conditions 34 to 36 and 38 to 40 and the EIMP were not authorised by s 134(1) nor contemplated by s 134(3)(e) and (f) ... as they were not for the management, monitoring or testing of the action but rather were for the purpose of predicting what the impact of the action has, will have, or is likely to have on the Commonwealth marine area including the fate and impact of effluent contaminants. 6. ... ought to have held that the impugned conditions and in particular conditions 34 to 36 and 38 to 40 and the EIMP constitute an assessment of the action because the completion of the hydrodynamic modelling was essential to and intended to:

- (a) achieve an understanding of how the action may impact on the Commonwealth marine area;
- (b) determine whether response strategies to mitigate any potential impact may be required; and
- (c) achieve an understanding of the nature of those strategies.

Some of these grounds bear no resemblance to the review grounds at first instance.

APPELLANT'S SUBMISSIONS

25 The central submission is that the Act provides for a single approval process and decision, whereas the conditions provide a further approval process and a further assessment process. It was put that s 133 provides for a single and operative approval, and that the conditions contemplated by s 134 are premised on there being an approval and that the action can be taken. It was said that a condition which confers a discretion to approve or not approve the action is impermissible. A condition which erects a discretionary regime which has the same effect is also impermissible.

26 It was submitted that s 134 has as its starting point a completed

assessment process designed to identify and assess significant impacts. The section contemplates the imposition of conditions that address any identified and assessed impacts. Section 134 is said to be premised and informed by the understanding of the impact which the assessment process produces, and is not designed to ascertain what those impacts might be. The appellant submitted that conditions 2 to 9, 32 to 36 and 38 to 40 are in substance and effect an assessment and/or provide for an approval. Thus they are not authorised by s 134.

27 It was contended that a necessary step in the approval process is a determination by the Minister whether there is or is likely to be a significant impact. That is to be determined before the attachment of conditions to the approval. This is said to be because the nature and extent of the significant impact found to exist is the very thing that informs the conditions, and to which they must be addressed. The appellant contends that it subverts the process to proceed directly to the condition making power. What the Minister has done has the result that his ascertainment of the impact of the discharge of effluent is only able to be ascertained by reference to the conditions themselves.

28 The appellant attacks the primary judge's application of s 134. It contends that in concluding that simply because a condition could be protective of the environment it comes within the section, is to engage in fallacious reasoning. The consequence of that approach is to allow the use of conditions as an assessment and approval mechanism, and to substitute for the protection of Part 3 of the Act the lesser and more indirect protections of conditions through the prosecution for breaches under Div 2 of Part 9.

29 The appellant contends that reliance on s 134(3)(e) and (f) is misplaced for three reasons. The first is that these paragraphs are a subset of the conditions permitted by s 134(1) and (2) and cannot expand them. The second is that the "plan for managing the impacts" in s 134(3)(e) contemplates a plan which responds to the identified impacts that have been assessed. Thus pars (e) and (f) do not support conditions such as 34, 35 and 38, which are designed to identify rather than manage impacts. The third reason is that par (f) is limited to the monitoring or testing of the action, rather than monitoring or testing as a precursor to the taking of the action.

GROUNDS OF APPEAL

Ground 2

30 This was not a ground of review propounded at first instance. It is not mentioned in the application, and is not included in the primary judge's summary of the grounds of review recorded at [14]. Counsel for the appellant asserted that the complaint in ground 2 falls within ground 1 of the notice of appeal, which asserts that the primary judge erred in finding that the approval was not affected by invalidating legal error. In our view his Honour cannot be said to have erred in not examining an issue that was not put to him. In any event, we do not think this ground has any substance.

31 Section 68(1) provides that an entity proposing to take an action that it thinks may be or is a controlled action must refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action. By s 72 a referral must be made in a way prescribed by the regulations and include the information prescribed by them. [Part 4](#) of the [Environment Protection and Biodiversity Conservation Regulations 2000](#) deals with these matters.

32 The word "action" is expansively defined in s 523 of the Act to include a project, a development, an undertaking and an activity or series of activities.

33 Section 133(1) provides that after receiving the assessment documentation relating to a controlled action, the Minister may approve for the purposes of a controlling provision the taking of the action.

34 Gunns' referral was submitted in the prescribed manner. Under the heading *Detailed project description* is a NOTE forming part of what appears to be the referral form provided by the Department:

The proposal described here is the action(s) on which ALL subsequent decisions under the EPBC Act will be made, including decisions on significance, level of assessment (if needed) and approval (if needed). It is therefore important that the description is complete and includes all components and activities associated with the action ...

35 The description provided by Gunns stated that the "two major phases of the action are the construction and operation of the pulp mill". Gunns listed the activities involved in the construction phase and the components of the operation phase. The latter included mill technology, pulping process, bleaching process, effluent treatment and disposal, mill capacity, wood supply, raw materials, water supply and wharf facilities.

36 A further NOTE printed on the form alerts proposers to the terms of s 74A which allows the Minister "to not accept" a referred action that is a component of a larger action and to request the proposer to refer the larger action for consideration. Under this note Gunns stated that the "project represents the entire works proposed".

37 The Minister's decision to approve the taking of the action describes the "action" as "to construct and operate a bleached Kraft pulp mill at Bell Bay, Tasmania, and associated infrastructure".

38 The assertion in ground 2 that the approval contemplates a further or separate approval for (a) the construction of the mill and (b) its commissioning and operation does not accord with the facts. Gunns referral was of one project consisting of two phases. The Minister approved the project, describing both its phases. There was clearly only one approval. He did not, as the appellant asserts, approve "part of an action or a staged approval process (ie the approval of part of an action with the subsequent approval of another part)".

39 It is true that condition 7 provides that the EIMP may be submitted in sections, and that some parts will need to be approved pre-construction, while others may require the completion of further studies. But the approval of the EIMP is a different approval from that already accorded the project as a whole. That there may be sequential approvals of different parts of the EIMP does not mean that the Minister has given separate approvals for the construction and operation of the mill. The same applies to condition 9, which provides that no commissioning activity is to commence until the "final and complete EIMP has been approved by the Minister".

40 The construction and operation of the mill involves many sequential steps, and conditions are imposed so that, for example, step 2 is not taken until step 1 has been completed. Thus condition 21 provides that in order to minimise impacts on the habitat of two species of frog, Gunns must not commence construction of effluent and water supply pipelines until such time as the relevant pre-construction and construction requirements have

been approved by the Minister. Again, this does not involve more than one s 133 approval. Rather, the Minister's blanket approval of the project has attached to it conditions, some of which involve the approval of a step in the construction or commissioning phases before another step can take place.

41 For the foregoing reasons, the first ground of appeal is not made out.

Grounds 4, 5 and 6

42 These three grounds assert much the same thing. Ground 4 is that the impugned conditions in substance and effect constitute an assessment and/or provide for an approval in respect of the action. Ground 5 is that the conditions are for the purpose of predicting the impact of the action on the marine area. Ground 6 is that the conditions constitute an assessment of the action because the completion of the modelling is essential to achieving an understanding of the impact of the action.

43 In order to deal with these grounds it is necessary to examine the Minister's reasons for granting approval subject to conditions. Under the heading *The Commonwealth marine environment* (pars 49 to 56) the Minister made a number of findings and observations:

- he found that the Commonwealth marine environment may be affected by effluent discharge into Bass Strait from the marine outfall proposed for the mill, which would be situated 2.7 km offshore;
- he noted that, based on the available evidence, the Department had not identified any likely significant impacts on the marine environment in Commonwealth waters;
- he noted that the Chief Scientist's report stated that, based on current international experience, an Elemental Chlorine Free (ECF) mill incorporating best available technology should enable an effluent composition to be achieved that meets best practice Australian and international water quality standards outside the initial mixing zone, and that implementation of these technologies will achieve an effluent composition that is substantially better than those in the State permit conditions;
- he noted that notwithstanding the Department's and the Chief Scientist's

opinions, both advised him that monitoring of pollutant levels in Tasmanian waters would be prudent to ensure no indirect adverse impacts on Commonwealth's waters;

- he noted advice from the Department and the Chief Scientist that there is no analogous situation in terms of a new ECF mill discharging effluent into a marine environment which has not previously been exposed to effluents of this nature. Dioxin levels from overseas mills into which effluent has been discharged over many years are much higher than could be expected to result from the operation of the proposed mill, a greenfields ECF mill;
- he noted the advice of the Chief Scientist that residual risk posed by the lack of analogous situations and doubts about the Gunns modelling could be managed by appropriate monitoring;
- he found that, given the absence of a reliable model for predicting possible sediment and biota concentrations, the lack of effluent and sediment field data from comparable greenfields ECF mills and the different possible interpretations of the hydrodynamic model used by Gunns, it was advisable that competent monitoring programs be put in place to provide early warning of any unexpected trends and allow adequate opportunity to correct them;
- he found that Gunns could be required to obtain effluent samples from overseas pulp mills using technologies similar to that proposed, 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 mill;
- he found that Gunns could be required to undertake additional modelling in relation to the fate of effluent, as part of the EIMP, prior to the commencement of commissioning of the mill; and
- he concluded that if these measures were enforced through conditions of approval, the action would not have a significant impact on the Commonwealth marine environment.

44 Under the heading *Environmental Impact Management Plan*, the

Minister

- found that, as recommended by the Chief Scientist, an efficient, effective and transparent means of ensuring minimal adverse impacts on matters of national environmental significance would be to require that, as part of the approval conditions, Gunns develop an EIMP for his approval;
- found that it should be an operational objective of the mill, reflected in the EIMP, that trigger points and maximum limits in relation to effluent discharge not be reached;
- said it was his expectation, based on the advice of the Chief Scientist and the Department, that the mill will operate at levels of emissions significantly below the trigger points he was proposing to require;
- notwithstanding the foregoing, considered that a precautionary approach would be appropriate where effluent discharges must be monitored on a daily basis with remedial action being required should trigger levels be exceeded in any one month.

45 Under the heading *Reasons for decision* the Minister:

- in deciding whether or not to approve the taking of the proposed action, said he had taken into account (amongst other matters) the principles of ecologically sustainable development (s 136(2)(a)) and the precautionary principle (s 391);
- considered his proposed decision would be consistent with the principles of ecologically sustainable development because of the strict conditions he was contemplating imposing in accordance with the precautionary principle;
- concluded that any lack of certainty related to the potential impacts of the effluent discharge 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; and

- concluded, in light of his findings, that the likely impacts of the action on the Commonwealth marine area could be prevented or mitigated by attaching conditions to an approval, and that the action carried out in accordance with these conditions would not have significant impact on Commonwealth marine areas.

46 The precautionary principle to which the Minister referred at [85] of his reasons is a matter he is required by s 391 to take into account in making a decision under s 133 "to the extent he or she can do so consistently with the other provisions" of the Act. The 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. The precautionary principle was to have featured more prominently in the appeal. However the ground asserting that the Minister had failed to apply it was not pressed.

47 It is apparent from the Minister's reasons that the impugned conditions were not imposed so as to enable him to assess the environmental impact of the proposed action or for the purpose of predicting that impact. Although on the evidence no significant impacts were likely, the conditions were designed to deal with a residual risk from unexpected trends or events, and were imposed in accordance with the precautionary principle for the purpose of guarding against them by resort to monitoring and management.

48 The Minister recorded the Chief Scientist's advice that the residual risks posed by the lack of analogous situations and doubts about the modelling undertaken by Gunns could be "managed by appropriate monitoring", including the fall-back "management option" of tertiary treatment. The Minister accepted that advice. Part 3 of the Chief Scientist's report is headed *Framework for Best Practice Management of Environmental Impacts*. After referring to the residual risks mentioned above, the Chief Scientist said that the Panel found that these risks and associated uncertainties should be able to be satisfactorily managed through an EIMP. Among the core components of such a plan recommended by the Panel were the design and implementation of an appropriate monitoring program and identification by Gunns of specific remedial management responses to be undertaken if trigger point levels

were exceeded. The report stated that the EIMP should specify management responses, including potential changes to the mill processes and operation that will be undertaken if further studies to reduce current uncertainty around environmental risk and impact result in "unacceptable increases in the assessed risk to Commonwealth environmental assets".

49 The Chief Scientist and the Panel provided what they called a "framework" for best practice "management of environmental impacts". They were not dealing with the assessment of impacts. They regarded the Department as having made that assessment in its draft approval decision. They were concerned with managing unacceptable increases in that assessed risk.

50 Given that the Minister adopted the Chief Scientist's recommendation, describing it as advice that the residual risks could be managed by appropriate monitoring, it is clear that he intended the conditions he imposed to constitute the management of the residual risks or any unacceptable increases in the assessed risks.

51 The appellant submitted that conditions 34, 35 and 38 cannot be regarded as actually managing impacts. That may be so, but in our view they are part of a plan for managing the residual risks to which the Minister and the Chief Scientist referred. Thus, condition 34 requires Gunns to obtain effluent samples from overseas pulp mills already using technologies similar to that proposed and perform various tests to identify the key contaminants and their concentrations. One of the residual risks identified by the Chief Scientist arose because of the "lack of analogous situations". Condition 34 can thus be seen to be part of a management process directed at ascertaining more information about analogous situations so as to become better informed about unlikely but possible risks.

52 Condition 35 requires Gunns to undertake laboratory studies to assess the likely settling and flocculation properties of fine particulate materials in effluent from analogous mills (equivalent effluent). This condition is thus of the same character as condition 34. Further, it is a study to reduce current uncertainty around environmental risk which, though not likely, could result in unacceptable increases in the assessed risk.

53 Condition 38 is concerned with additional modelling in relation to the fate of effluent. Like condition 35, this condition is concerned to reduce current uncertainty around environmental risk. In particular, it is directed to the residual risks posed by doubts about the modelling undertaken by

Gunns. The Chief Scientist thought this risk could be managed by appropriate monitoring. The matters to be covered by the monitoring that are listed in the condition are those that appear in par 2.4.1.6 of the Chief Scientist's report. It is plain that he regarded the material that became the condition as part of the management of the risk identified. The Minister accepted the Chief Scientist's advice that residual risks posed by doubts about Gunns' modelling could be managed by appropriate monitoring, informed by a revised hydrodynamic and sediment transport model: par 53. In par 54 the Minister found that in view of, amongst other things, the absence of a reliable model for predicting possible sediment and biota concentration and the different possible interpretations of Gunns' model, it was advisable that competent monitoring programs be put in place to provide early warning of any unexpected trends and allow adequate opportunity to correct them.

54 It is also apparent from the Minister's reasons that the impugned conditions do not constitute a separate approval process. The approval under s 133(1) was accompanied by the conditions attached to it. We do not accept the appellant's contention that s 134 conditions are "subordinate" to the approval. The approval and the conditions came into being uno flatu. Sections 134 and 136 make clear that a consideration of what, if any, conditions are to be imposed will be an integral part of the decision to approve. The Act speaks of a condition being attached to an approval. But it is clear that there are not two different things – an approval and a condition. Rather, when a condition is attached to an approval, there is a conditional approval or an approval subject to conditions.

55 At first instance much attention was given to whether, when the Minister gave his approval subject to conditions, he believed he had enough information to make an informed decision, or in fact had sufficient information for that purpose. We are uncertain whether these matters were pursued on the appeal. On the one hand the appellant, in written submissions, asserted that a decision under s 133(1) is "predicated on the Minister having a detailed understanding of the environmental impact on each matter protected by a controlling provision", and that absent that knowledge, the precautionary principle applies to constrain him granting approval. On the other hand, elsewhere the appellant asserted that its attack on the impugned provisions does not depend on the sufficiency of the evidence before the Minister or "the degree of certainty that attended

his state of knowledge".

56 For the avoidance of doubt, if the former of the two apparently inconsistent assertions represents the applicant's position, we should say that we agree with what the primary judge said about the claim that the Minister lacked the required degree of certainty he was required to have as a precondition to the exercise of his powers under s 134. See [18] above. We also agree with his Honour's conclusion that the Minister in fact had sufficient information to enable him to conclude 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. See [20] above. We also agree with his Honour's rejection (at [52] of his reasons) of the submission that the Minister's insistence on the EIMP process itself demonstrated that he lacked sufficient information to make an informed decision to approve the action.

Ground 3

57 Having disposed of what the appellant contended were obstacles to the Minister's imposition of the impugned provisions in reliance on s 134, we turn to whether they are in fact supported by it. Section 134(1) empowers the Minister to attach a condition to the approval of the action if satisfied that the condition is necessary or convenient for protecting, or repairing or mitigating damage to, a matter protected by a provision of Part 3 for which the approval has effect. Subsection (3) gives examples of the kind of conditions that may be attached. Paragraph (aa) supports condition 4, which enables the Minister to require that the mill be shut down in certain circumstances and that a satisfactory tertiary treatment solution be installed. Conditions requiring Gunns to prepare an EIMP and on approval implement its provisions are supported by par (e). Conditions requiring Gunns to undertake environmental monitoring and testing are supported by par (f). We do not accept the appellant's contention that par (f) cannot support the monitoring and testing because "approval comes first and the conditions are to follow the approval". We refer to what we have said at [54]. The primary judge correctly held at [27] that the impugned conditions were effectively imposed under s 134.

58 This is a convenient stage at which to mention an argument directed specifically against the EIMP. This is that even if the individual conditions

are otherwise authorised by s 134, the EIMP as a whole falls outside the section because the Minister is given a discretion to approve it. It was said that no criteria for approval were prescribed. Condition 2 thus gave him an unbridled discretion to approve or not approve. It was not explained why it was that the existence of the discretion took the matter outside s 134. Condition 2 requires Gunns to develop and submit an EIMP for the Minister's approval in accordance with the outline at Schedule 2. Section 134(3) authorises conditions requiring the preparation of a plan for managing the impacts of approved action for approval by the Minister. That expressly authorises the approval of the EIMP for which condition 2 provides.

CONCLUSION

59 None of the grounds of appeal has been made out, and the appeal must be dismissed.

I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Sundberg, Dowsett and Jacobson.
Associate:Dated: 3 September 2009

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Date of Hearing:

6-7 August 2009

Date of Judgment:

3 September 2009

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