Federal Court of Australia – Full Court Decisions

Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCAFC 175 (22 November 2007)

Last Updated: 22 November 2007

FEDERAL COURT OF AUSTRALIA

[2007] FCAFC 175

The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources

SUMMARY

In accordance with the practice of the Federal Court in certain cases of public interest or complexity, this summary has been prepared to provide assistance to members of the public in understanding the reasons for judgment published today. It is not a complete statement of the reasons for judgment which will be made available on the Federal Court's website at www.fedcourt.gov.au.

22 November 2007

FEDERAL COURT OF AUSTRALIA

[2007] FCAFC 175

The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources

SUMMARY OF EFFECT OF REASONS FOR JUDGMENT GIVEN ON 22 NOVEMBER 2007

The Wilderness Society Inc appealed to the Full Court of the Federal Court from a judgment given by a Judge of the Court which dismissed the Society's challenge to two decisions made by the Minister for the Environment and Water Resources, the Hon. Malcolm Turnbull. The Minister's decisions were made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The decisions concerned the selection of the process by which the proposal by Gunns Limited to construct and operate a pulp mill at Bell Bay in northern Tasmania was assessed under the EPBC Act, the time provided for public comment as part of that process and the identification of the matters of national environmental significance to be considered in the course of that process.The Full Court, in a majority decision, has dismissed the appeal from the judgment given by the primary judge.All members of the Full Court rejected the following submissions of the Wilderness Society:

(1) that the referral by Gunns Limited to the Minister of its proposal to construct and operate a pulp mill at Bell Bay was invalid because Gunns Limited had withdrawn an earlier referral relating to the same proposed action;

(2) that the Minister denied the Wilderness Society procedural fairness in respect of his final approval decision by setting a period for public comment on the pulp mill proposal that was too short; and

(3) that in setting a period of 20 days for public comments on the pulp mill proposal the Minister acted for an improper purpose, namely to accommodate a time frame that suited the commercial interests of Gunns Limited.The majority of the Court also rejected the submission of the Wilderness Society that the Minister was obliged to consider any adverse impacts on matters of national environmental significance of the forestry operations necessary to provide the wood chips to feed the pulp mill. The majority took the view that the EPBC Act discloses a clear legislative intent ordinarily to exclude forestry operations undertaken pursuant to Regional Forest Agreements (RFAs) from the assessment regime established by the EPBC Act. It noted that the *Regional Forests Agreements Act 2002* (Cth) makes provision for a separate regime built upon RFAs which are required to take into account environmental and other values of national significance in relation to forestry operations. The Tasmanian Regional Forest Agreement was signed by the Australian and Tasmanian Governments in 1997.The dissenting judge took the view that the obligation of the Minister to consider all adverse impacts of the proposed pulp mill was not limited by the Tasmanian Regional Forest Agreement in the way the majority held. Concluding that the Minister failed to consider whether the forestry operations necessary to supply wood chips to the pulp mill were incidental to the construction and operation of the mill, the judge held that the Minister erred by not considering the adverse effects which those forestry operations would have on matters of national environmental significance, as required by s 75(2)(a) of the EPBC Act. The judge accepted the submission of The Wilderness Society that the Minister had not properly understood or complied with his obligations, and that his decisions are therefore invalid.At the time of the judgment the subject of this appeal the Minister had not given approval for the construction and operation of the pulp mill. The legality of that decision was therefore not directly challenged on this appeal. However, had the Full Court upheld the challenges made by the Wilderness Society to the Minister's decisions, it would have found that the assessment process required by the EPBC Act was not conducted as required by law.

It is necessary to stress that the Federal Court has no jurisdiction to consider the merit or wisdom of any decision of the Minister. The sole concern of the Federal Court in this matter, both before the primary judge

and on appeal, was the legality of the decisions made by the Minister that were the subject of the proceeding before the primary judge.

The full text of the judgment is available on the Federal Court's website at: www.fedcourt.gov.auFEDERAL COURT OF AUSTRALIA

Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCAFC 175

STATUTORY INTERPRETATION – proper construction of s 170C(4) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – whether s 170C(4) has the effect that withdrawal of one referral prevents any further referral for the same proposed action **STATUTORY INTERPRETATION** – whether Minister misconstrued ss 75(2B) and 42(c) – whether Minister required to consider adverse impacts of RFA forestry operations when making decision**STATUTORY INTERPRETATION** – Minister required to consider adverse impacts of RFA forestry operations that are "incidental to another action whose primary purpose does not relate to forestry" – meaning of "incidental to"**ADMINISTRATIVE LAW** – whether appellant denied procedural fairness by imposition of 20 day period for making of public comment under s 95(2)(c) so invalidating the Minister's choice of the means of assessment of impacts under s 87(5) – importance of statutory framework when considering procedural fairness requirements – purpose of obligations to invite public comment in the scheme of Ch 4 of the Act – whether they serve distinct public purposes or embody procedural fairness requirements owed to the public **ADMINISTRATIVE LAW** – whether Minister acted for improper purpose when making decisions under ss 87 and 95(2)(c) – whether Minister's substantial purpose was to satisfy Gunns' commercial imperatives**WORDS AND PHRASES** – "cease", "incidental", "forestry"*Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 3, 3(1), 3(2)(d), 18, 18A, 20, 20A, 23, 24A, 38, 42, 42(c), 67, 68, 74B, 74C, 74C(3)(a), 74C(3)(b), 74C(3)(c), 74D(2), 75, 75(1), 75(1A), 75(2B), 75(5), 76(1), 78, 78B, 87, 87(1), 87(5), 88, 88(2), 89, 91, 91(1), 93, 93(5), 95, 95B, 95C, 95(2)(c), 98, 98(1)(c), 99, 100, 103, 103(1)(c), 104(3), 105, 130, 130(1), 130(1B)(c), 131, 131A,

131AA, 133, 136, 136(2)(bc), 156A, 156D, 170C, 170C(1), 170C(4), 180(1), 487(3), 523, Pt 3, Pt 8, Pt 9, Ch 4, Ch 4 Pt 7 Div 1A*State Policies and Projects Act 1993* (Tas)*Resource Planning and Development Commission Act 1997* (Tas) *State Policies and Projects Act 1993* (Tas)*Pulp Mill Assessment Act 2007* (Tas) s 4*Environment and Heritage Legislation Amendment Bill (No 1) 2006* (Cth)*Regional Forest Agreements Act 2002* (Cth) ss 3, 4, 6*Regional Forest Agreements Bill 2002* (Cth)*Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(e), 5(2)(f)*Environment Protection (Impact of Proposals) Act 1974* (Cth) *Environment Protection and Biodiversity Conservation Bill 1998* (Cth) *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)*Revised Explanatory Memorandum* to the *Regional Forest Agreements Bill 2002* (Cth)Australia, Senate, *Debates* (1998) Vol S 193 Australia, Senate, *Debates*, 6 November (2006) *CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2;* (1997) 187 CLR 384 applied*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 cited*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6;* (2003) 214 CLR 1 cited*Kioa v West [1985] HCA 81;* (1985) 159 CLR 550 cited*Transport Action Group Against Motorways Inc v Roads and Traffic Authority [1999] NSWCA 196;* (1999) 46 NSWLR 598 cited*Vanmeld Pty Ltd v Fairfield City Council [1999] NSWCA 6;* (1999) 46 NSWLR 78 cited*Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537 cited*Ferguson v Cole [2002] FCA 1411;* (2002) 121 FCR 402 cited*Craig v South Australia [1995] HCA 58;* (1995) 184 CLR 163 cited*Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30;* (2001) 206 CLR 323 cited*Re Patterson; Ex parte Taylor [2001] HCA 51;* (2001) 207 CLR 391 cited*Industrial Equity Limited v Deputy Commissioner of Taxation [1990] HCA 46;* (1990) 170 CLR 649 cited*Thompson v The Council of the Municipality of Randwick Corporation [1950] HCA 33;* (1950) 81 CLR 87 citedAronson, Dyer and Groves, *Judicial Review of Administrative Action* (3rd ed, 2004)**THE WILDERNESS SOCIETY INC v HON MALCOLM TURNBULL, MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES AND GUNNS LIMITEDNo TAD 21 of 2007BRANSON, TAMBERLIN AND FINN JJ22 NOVEMBER 2007MELBOURNE (VIA VIDEO LINK TO HOBART)**

IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY **TAD 21 OF 2007**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**THE WILDERNESS SOCIETY INC** **Appellant**
AND:	**HON MALCOLM TURNBULL, MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES** **First Respondent**
	GUNNS LIMITED **Second Respondent**
JUDGES:	**BRANSON, TAMBERLIN AND FINN JJ**
DATE OF ORDER:	**22 NOVEMBER 2007**
WHERE MADE:	**MELBOURNE (VIA VIDEO LINK TO HOBART)**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY **TAD 21 OF 2007**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**THE WILDERNESS SOCIETY INC** **Appellant**
AND:	**HON MALCOLM TURNBULL, MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES** **First Respondent**
	GUNNS LIMITED **Second Respondent**

JUDGES:	**BRANSON, TAMBERLIN AND FINN JJ**
DATE:	**22 NOVEMBER 2007**
PLACE:	**MELBOURNE (VIA VIDEO LINK TO HOBART)**

REASONS FOR JUDGMENT

BRANSON AND FINN JJ

INTRODUCTION

1 Gunns Limited proposes to construct and operate a bleached Kraft pulp mill, and ancillary chemical production and infrastructure, ("the pulp mill") at Bell Bay in northern Tasmania. For the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act") the construction and operation of the pulp mill is an "action" (see s 523 of the EPBC Act). On 30 March 2007 Gunns referred the proposal to construct and operate the pulp mill to the Minister for Environment and Water Resources for the Minister's decision whether or not that action is a "controlled action" within the meaning of the EPBC

Act (see s 67 of the EPBC Act). The EPBC Act prohibits a person from taking a controlled action without an approval under Part 9 of the Act (see Part 3 of the EPBC Act).

2 On 2 May 2007 the Minister made the following decisions under s 75(1) of the EPBC Act:

(a) the proposal to construct and operate the pulp mill was a controlled action; and
(b) the relevant controlling provisions of Part 3 of the EPBC Act were those concerned with listed threatened species and communities (s 18 and s 18A), listed migratory species (s 20 and s 20A) and Commonwealth marine areas (s 23 and s 24A).
On the same day the Minister decided under s 87 of the EPBC Act that the assessment approach to be used for assessment of the relevant impacts of the controlled action was assessment on preliminary documentation under Part 8 Division 4 of the EPBC Act.
3 By a letter dated 2 May 2007 the Minister required Gunns to publish the information that it had provided on the proposed action to allow for public consultation on the potential impacts of the project. The Minister directed that the information be available for third party comment for 20 business days. The public was advised that Gunns would be accepting public comments until 5:00 pm on 5 June 2007.
4 On 17 May 2007 The Wilderness Society Inc instituted a proceeding in this Court seeking judicial review of the decisions of the Minister identified in [2] above.
5 On 9 August 2007 the learned primary judge dismissed the application for judicial review. This is an appeal from the judgment pronounced by his Honour.
6 The grounds of appeal pressed by the Wilderness Society raise for determination the following issues:
(a) whether s 170C(4) of the EPBC Act precludes the making of a second referral in relation to an action where the first referral has been withdrawn?
(b) the operation in the circumstances of this case of s 75(2B) of the EPBC Act and in particular whether s 42 of the Act has the consequence that the Minister was required to consider any adverse impacts of Regional Forestry Agreements ("RFA") forestry operations on the identified matters of national environmental significance.

(c) whether the Minister denied the appellant procedural fairness in respect of his decision under s 130(1) of the EPBC Act by setting a period of 20 business days for the making of comments under s 95(2)(c)?
(d) whether the Minister acted for an improper purpose in setting a period of 20 business days for the making of comments under s 95(2)(c)?

OPERATION OF SECTION 170C(4) OF THE EPBC ACT

Section 170C

7 Section 170C of the EPBC Act provides:

(1) Subject to subsection (2), a person who:
(a) has referred a proposal to take an action to the Minister under section 68; or
(b) is named as the person proposing to take an action in a proposal that is referred to the Minister under section 69 or 71;
may withdraw the referral, by written notice to the Minister.
(2) The referral cannot be withdrawn after the Minister has decided, under Part 9, whether or not to approve the taking of the action.
(3) If the Minister receives a notice withdrawing the referral, the Minister must publish notice of the withdrawal of the referral in accordance with the regulations.
(4) If the referral is withdrawn, the provisions of this Chapter that would, apart from this subsection, have applied to the action cease to apply to the action.

Referrals of the Proposal to the Minister

8 Gunns first referred its proposal to establish a bleached Kraft pulp mill in Northern Tasmania to the Minister for the Environment and Water Resources on 15 December 2004. It is not in dispute that on 23 March 2005 the then Minister decided under s 87 of the EPBC Act that the approach to be used for the assessment of the relevant impacts of the proposal was assessment by an accredited process. The process accredited was an Integrated Impact Assessment under the *State Policies and Projects Act 1993* (Tas). This involved an assessment by the Resource Planning and Development Commission ('RPDC') constituted under the *Resource Planning and Development Commission Act 1997* (Tas).

9 In August 2005 Gunns withdrew the referral of its proposal and made a new referral which contained a revised description of the project. On 26 October 2005 the then Minister again decided that the approach to be used for assessment of the relevant impact of the proposed action was assessment by an accredited process, namely an Integrated Impact Assessment under the *State Policies and Projects Act 1993* (Tas).

10 On 14 March 2007 Gunns advised the RPDC that it had decided to withdraw the pulp mill from the RPDC assessment process and to refer the project to the State Government. The next day the Premier of Tasmania made a Ministerial Statement foreshadowing the enactment of special legislation for a separate approval process for the proposed pulp mill.

11 On 28 March 2007 Gunns again withdrew the referral under the EPBC Act of its proposal to construct and operate the pulp mill. It made a new referral concerning the same proposal on 30 March 2007 ("the third referral").

12 On 30 April 2007 the *Pulp Mill Assessment Act 2007* (Tas) commenced. It provided for a consultant appointed by the Minister to undertake an assessment of the pulp mill project against specified guidelines (see s 4).

13 As noted above, on 2 May 2007 the Minister decided under s 87 of the EPBC Act that the assessment approach to be used under the EPBC Act for the assessment of the relevant impacts of the construction and operation of the pulp mill proposed was assessment on preliminary documentation under Division 4 of the EPBC Act (see [2] above).

Submission of the Appellant

14 The appellant outlined its submission concerning the operation of s 170C of the EPBC Act in the above circumstances in the following way:

15. There is no difficulty whatsoever in giving s 170C(4) its plain meaning. Gunns having withdrawn the August 2005 referral, the provisions of Chapter 4 of the EPBC Act including ss 68, 75 and 87 ceased to apply to the action: that is, they ceased to apply to the construction and operation of a pulp mill at Bell Bay. That is what the sub-section says.

16. The consequence of the plain meaning of s 170C(4) is that:

a) The 3rd referral in April 2007, purporting to be under s 68, was invalid and or ultra vires; and
b) The 3rd referral was incapable of supporting any further decisions under ss 75 and 87 of the EPBC Act.
c) Gunns' withdrawal of the 2nd referral in March/April 2007 meant the 2005 controlled action and assessment decisions ceased to apply to the action, but the prohibitions contained in Part 3 of the Act remained applicable.

Consideration

15 The above submission attributes a significance to the word "cease" in s 170C(4) which is at odds with its ordinary meaning. The *Macquarie Dictionary* relevantly defines the verb "cease" as "1. to stop (moving, speaking, etc); he ceased crying. 2. to come to an end; I'll continue as soon as that noise ceases." As these definitions indicate the word "cease" means to stop but it does not imply that that which is stopped cannot start again. A statement that a child has ceased crying does not ordinarily imply that the child will not cry again.

16 A powerful factor suggesting that the word "cease" is intended to carry its ordinary meaning in s 170C(4) is that if the appellant's submissions concerning the operation of s 170C(4) of the EPBC Act were accepted an inconvenient outcome would result; a proponent of an action who, perhaps because of unexpected financial restraints, withdrew a referral to avoid the need to incur additional costs arising from the assessment process, would be prevented from ever again seeking approval to take the action.

17 The appellant did not point to any extrinsic material which suggests that the word "cease" in s 170C(4) was not intended to carry its ordinary meaning. Indeed, the explanatory memorandum in respect of the *Environment and Heritage Legislation Amendment Bill (No 1) 2006* (Cth) said of the proposed new s 170C:

This amendment is to allow proponents to withdraw referrals at any stage in the referrals, assessments and approvals process (prior to an approval

decision) if they do not want to proceed with the *assessment*.
(Emphasis added)

18 The absence from the explanatory memorandum of any suggestion that once a referral was withdrawn the proponent would be prevented from ever again making a referral in respect of the same action suggests against a legislative intention to achieve this stark result. Moreover, were such a significant consequence intended to follow the withdrawal of a referral, the section might be expected to state this unambiguously.
19 Having regard to the terms of the explanatory memorandum, the more likely legislative intent is that s 170C is intended to make clear that a referral of an action may be withdrawn and that, when withdrawn, further steps under the EPBC Act leading to a possible approval of the action under s 133 of the Act need not be taken. Significantly, some of these steps are required to be taken within a specified time frame (see, for example, s 88 and s 91). In the absence of a provision such as s 170C(4) it might have been argued that these steps are required to be taken within the prescribed time frame notwithstanding any withdrawal of the referral.
20 Support for the above construction of s 170C(4) is found in the language of Chapter 4 of the EPBC Act. Chapter 4 is concerned with the assessment and approval of actions, not referrals. By way of example, s 75 requires the Minister, after receipt of a referral of a proposal, to decide whether the action that is the subject of the proposal is a controlled action and which provisions of Part 3, if any, are controlling provisions for the action. That is, s 75 requires the Minister to make decisions about an action, not about a referral (see also s 78 which is concerned with reconsideration of the Minister's decision). Similarly Divisions 2, 3, 3A, 4, 5, 6 and 7 of Part 8 of Chapter 4 of the EPBC Act are all concerned with the assessment of the relevant impacts of an action that the Minister has decided is a controlled action. Part 9 of Chapter 4 is concerned with the approval of actions. It is therefore logical for s 170C to provide that once a referral is withdrawn, the provisions of Chapter 4 that would otherwise have applied to the action cease to apply to the action.
21 On the construction of s 170C(4) that we favour, that section is silent on the question of whether a person who withdraws a referral may thereafter refer a proposal to take the same action to the Minister. It is therefore significant that s 68, which requires a person proposing to take an action that the persons thinks may be or is a controlled action to refer

the proposal to the Minister, is not qualified by a condition that the person has not earlier withdrawn a referral of a proposal to take the same action.
22 Support for the construction of s 170C that we favour can be found in s 74C of the EPBC Act which does impose restrictions on a person's power to refer a proposal to the Minister. Section 74C is found in Division 1A of Part 7 of Chapter 4 which is concerned with clearly unacceptable action. Division 1A was introduced into the EPBC Act at the same time as s 170C (see *Environment and Heritage Legislation Amendment Bill (No 1) 2006* (Cth)). Section 74C provides:

(1) As soon as practicable after making the decision under paragraph 74B(1)(b) in relation to a referral, the Minister must give written notice of the decision to:

(a) the person proposing to take the action that is the subject of the referral; and

(b) the person who referred the proposal to the Minister (if that person is not the person proposing to take the action that is the subject of the referral).

(2) The notice must:

(a) state that the Minister considers that the action would have unacceptable impacts on a matter protected by a provision of Part 3; and

(b) set out the reasons for the Minister's decision.

(3) After receiving the notice under subsection (1), the person proposing to take the action may:

(a) withdraw the referral and take no further action in relation to the proposed action; or

(b) withdraw the referral and refer a new proposal to take a modified action to the Minister in accordance with Division 1; or

(c) request the Minister, in writing, to reconsider the referral.

23 Read in the context of Chapter 4 as a whole, it is plain that s 74C(3) provides for three alternative courses of action; the first alternative is to withdraw the referral and not thereafter refer a proposal in respect of the same action to the Minister (s74C(3)(a)), the second alternative is to withdraw the referral and thereafter referring a proposal to take a modified action to the Minister (s74C(3)(b)) and the third is to request the Minister to reconsider the referral(s 74C(3)(c)). Had the legislature intended s 170C(4) to have the consequence that once a referral of a proposal to take an action was withdrawn, the provisions of Chapter 4 could never

thereafter be relied upon in respect of that action, it would have been sufficient for s 74C(3)(a) to identify the alternative of withdrawing the referral; s 170C(4) would mean that Chapter 4 would have no further operation in respect of the proposed action.
24 For the above reasons, contrary to the submission of the appellant, the plain meaning of s 170C(4) is not that the third referral was invalid or ultra vires. When the second referral was withdrawn, the provisions of Chapter 4 that would, apart from the subsection, have applied to the proposal to construct and operate the pulp mill ceased to apply to that proposed action. However, when Gunns again referred the proposal to construct and operate the pulp mill to the Minister, the provisions of Chapter 4 were reactivated.
Conclusion

25 This ground of appeal, in our view, fails.

OPERATION OF S 75(2B) OF THE EPBC ACT

Statutory Provisions

26 Section 75 of the EPBC Act relevantly provides:

(1) The Minister must decide:

(a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and
(b) which provisions of Part 3 (if any) are controlling provisions for the action.
...
(2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:

(a) the Minister must consider all adverse impacts ...
...
(2B) Without otherwise limiting any adverse impacts that the Minister must consider under paragraph (2)(a), the Minister must not consider any adverse impacts of:

(a) any RFA forestry operation to which, under Division 4 of Part 4, Part 3 does not apply; or

(b) any forestry operations in an RFA region that may, under Division 4 of Part 4, be undertaken without approval under Part 9.

27 Division 4 of Part 4 of the EPBC Act is constituted by ss 38-42. Section 38, which constitutes Subdivision A of Division 4, provides:
(1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

(2) In this Division:

RFA or ***regional forest agreement*** has the same meaning as in the *Regional Forest Agreements Act 2002*.
RFA forestry operation has the same meaning as in the *Regional Forest Agreements Act 2002*.

28 Subdivision B of Division 4 is concerned with regions subject to a process of negotiating a RFA. It has no present relevance. The Tasmanian RFA was made on 8 November 1997 between the State of Tasmania and the Commonwealth. It is intended to provide a framework for the management and use of Tasmanian forests which seeks to implement effective conservation, forest management, and forest industry practices (see Tasmanian RFA recital A).

29 Subdivision C of Division 4 is constituted by s 42 which provides:

Subdivisions A and B of this Division, and subsection 6(4) of the *Regional Forest Agreements Act 2002*, do not apply to RFA forestry operations, or to forestry operations, that are:

(a) in a property included in the World Heritage List; or

(b) in a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention; or

(c) incidental to another action whose primary purpose does not relate to forestry.

30 Section 4 of the *Regional Forest Agreements Act 2002* (Cth) relevantly defines *RFA forestry operations* to mean forestry operations as defined by the Tasmanian Regional Forest Agreement. Clause 2 of the Tasmanian RFA includes the following definition:
'Forestry Operations' means –

(a) the planting of trees; or
(b) the managing of trees before they are harvested; or
(c) the harvesting of Forest Products

for commercial purposes and includes any related land clearing, land preparation and burning-off, and transport operations.

Clause 2 defines "Forest Products" to mean "all live and dead trees, ferns or shrubs or parts thereof".
31 The word "forestry" is not defined by the EPBC Act nor, assuming this to be relevant, by the Tasmanian RFA. The *Macquarie Dictionary* defines the noun "forestry" as "the science of planting and taking care of forests". The *Oxford English Dictionary* is to like effect.
32 Section 523 of the EPBC Act contains the following inclusive definition of "action":
(1) Subject to this Subdivision, ***action*** includes:

(a) a project; and
(b) a development; and
(c) an undertaking; and
(d) an activity or series of activities; and
(e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).

Of present importance, the text and structure of Division 4 of Part 4 of the EPBC Act reveal the clear legislative purpose that, save in the three excepted instances specified in s 42, Part 3 is not to apply to an RFA forestry operation. The reason for this general exemption (which is reiterated in s 6 of the RFA Act) is that the RFA Act itself makes provision for a separate regime built upon Regional Forestry Agreements which itself takes account of environmental and other values in relation to forests

and forestry operations that are subject to such an RFA.
33 As the RFA Act definition of an RFA evidences, there are similarities between the concerns of this Act and those of the EPBC Act. That definition, which is in s 4, is as follows:
... an agreement that is in force between the Commonwealth and a State in respect of a region or regions, being an agreement that satisfies all the following conditions:

(a) the agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions:

(i) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;

(ii) indigenous heritage values;

(iii) economic values of forested areas and forest industries;

(iv) social values (including community needs);

(v) principles of ecologically sustainable management;

(b) the agreement provides for a comprehensive, adequate and representative reserve system;

(c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions;

(d) the agreement is expressed to be for the purpose of providing long-term stability of forests and forest industries;

(e) the agreement is expressed to be a Regional Forest Agreement.

(See also the *Revised Explanatory Memorandum* to the *Regional Forest Agreements Bill 2002* (Cth) (at p 4) which explains the background to the RFA system.)
34 The RFA Act and the Tasmanian RFA of 1997 are contextual material which provide some, albeit limited, assistance in the construction of s 42

of the EPBC Act: cf *CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2;* (1997) 187 CLR 384 at 408. There are two matters in this regard to which it is appropriate to refer. First, it is clear from the terms of the Act and of the RFA that the RFA Act regime is concerned not only with forests and forest operations but also with those industries "associated with forests and timber products" as such: see RFA Act, s 3; and Recital A (dot 3) to the Tasmanian RFA. As was said in the *Revised Explanatory Memorandum* to the RFA Bill 2002 (at p 3): "[RFAs] provide for both future forest management and the basis of an internationally competitive and ecologically sustainable forest products industry".
35 Secondly, the Tasmanian RFA was entered into before the enactment of the EPBC Act when the operative Commonwealth statute was the *Environment Protection (Impact of Proposals) Act 1974* (Cth). Nonetheless, and in a provision which in some degree anticipated both s 6 of the RFA Act and s 42 of the EPBC Act, that agreement provided (cl 28):
that subject to clause 43 activities covered by this Agreement will not require any further assessment or approval under the *Environment Protection (Impact of Proposals) Act 1974* (Cwth).

36 Clause 43 in turn provided:

The Parties acknowledge that in some *limited circumstances not related to the substance of this Agreement*, including foreign investment approvals and export controls for non-forest products or infrastructure development, Commonwealth legislative provisions may also apply.
(Emphasis added.)

Decision of the Minister

37 On 24 April 2007 Gerard Patrick Early, who was at the relevant time First Assistant Secretary of the Approvals and Wildlife Division of the Department of the Environment and Water Resources, signed a briefing to the Minister in respect of the pulp mill. Attachment B to the briefing provided a summary of key issues. It included the following section:

Forestry issues

• Tasmania's forests will continue to be protected through the Regional Forestry Agreement (RFA). The sourcing of timber for the proposed pulp mill is exempt from assessment under the EPBC Act given the protection already provided through the exhaustive RFA process.

• The current Tasmanian RFA continues until 2017. When the time comes to negotiate a future RFA, the Australian Government will not accept a reduction in the level of protection for Tasmanian Forests.

38 Unsurprisingly the Minister accepted Mr Early's advice. Paragraph 40 of the Minister's statement of reasons for his decisions under s 75(1) of the EPBC Act reads as follows:

I found that, at least until 2017, wood chips required as feed for the referred proposed action will be sourced from forestry operations undertaken in accordance with the Tasmanian Regional Forest Agreement (TRFA), which was signed by the Australian and Tasmanian Governments in 1997. I found that forest products will not be accepted as feed for the proposed action unless sourced from TRFA forestry operations. Therefore, as required by s 75(2B) of the EPBC Act, I did not consider any adverse impacts of forestry operations before 2017 for the supply of wood chips to the proposed mill.

39 We note that the Minister, while giving effect to the s 38 exemption of those forestry operations which would feed harvested timber to the mill, nonetheless accepted that the clearing activity for the mill itself would require approval. He did not give express consideration whether or not that activity itself fell within the definition of a forestry operation.
40 The Minister's statement of reasons includes no reference to s 42 of the EPBC Act nor any finding as to the primary purpose of the pulp mill or as to the RFA forestry operations, or the forestry operations, if any, that would be incidental to the construction and operation of the pulp mill. The Minister did, however, make findings relating to the likelihood of significant adverse impacts on listed fauna and flora from the clearing of native vegetation for the pulp mill (potentially 200 hectares) and for associated infrastructure: see reasons paras 22-30.

Consideration

41 The intended purpose of s 42(c) of the EPBC Act is not entirely clear on its face. The explanatory memorandum in respect of the *Environment Protection and Biodiversity Conservation Bill 1998* (Cth) states in respect of clause 42:

Clause 42 - This division does not apply to some forestry operations

117 This division does not apply to forestry operations:

- in a property included in the World Heritage List; or
- in a wetland designated under Article 2 of the Ramsar Convention.

118 In addition, the division does not apply to forestry operations that are incidental to another action the primary purpose of which does not relate to forestry. For example, the division does not obviate the need for approval for clearing activity (even if such activity falls within the definition of a 'forestry operation') which is incidental to the construction of a residential subdivision (the primary purpose of the subdivision does not relate to forestry). Approval would only be required for the clearing activity if it was likely to have a significant impact on a matter of national environmental significance - see Part 3.

42 Some additional guidance as to the intended operation of s 42(c) and s 75(2B) can be gained from the explanatory memorandum in respect of the *Environment and Heritage Legislation Amendment Bill (No 1) 2006* (Cth). This memorandum explained that the new subsection 75(2B) proposed by the Bill was:
... to clarify that in making a controlled action decision, in relation to proposed developments, such as, a factory which will use timber from as [sic] RFA region, the Minister must not consider any adverse impacts of any RFA forestry operation (as defined in section 38) ... Sections 38 ... of the Act exempt[s] RFA forestry operations ... from the need for approval under the Act. If [this section] do[es] not apply because of section 42 then new section 75(2A) inserted by this item also does not apply.

43 While it is clear that ordinarily the primary purpose of a residential subdivision will not relate to forestry (but query a residential subdivision intended to provide accommodation solely for foresters), the outer limits of the classes of actions that have as a primary purpose a purpose that relates to forestry is far from clear.
44 The Minister by his written submissions acknowledged that "[i]t is true that the proposed pulp mill is an action the primary purpose of which does not relate to forestry". By its written submissions Gunns asserted that "[s]elf-evidently Gunns' proposed pulp mill is related to forestry" but it did not advance any argument, either orally or in writing, in support of a submission that the primary purpose of the pulp mill related to forestry within the meaning of s 42(c) of the EPBC Act. By his oral submissions senior counsel for Gunns indicated that Gunns relied on what the Commonwealth had submitted both in writing and orally. For these reasons it is unnecessary on this appeal to reach a concluded view as to the precise meaning of the phrase "action whose primary purpose does not relate to forestry" in s 42(c) of the EPBC Act.
45 Nonetheless, we make the following observations. If the meaning of "forestry" in s 42(c) is to be understood by reference to either the dictionary meaning of "forestry" or the RFA's definition of "forestry operations" (or both), then the range of actions which might involve a forestry operation but have a primary purpose which does not relate to forestry is large. That range would include an action taken which fortuitously may require a forestry operation, but which has a manifest primary purpose which is unrelated to forestry or to the utilisation of forest products (e.g. the construction of public infrastructure or a property development for domestic, commercial or recreational purposes). But it would also include all actions taken which are dependent upon the utilisation of timber harvested in a forest operation, and which use that timber in a downstream (i.e. not forestry related) activity (for example saw-milling, a furniture factory or a pulp mill). While these latter actions may properly be said to have a primary purpose which does not relate to forestry they are dependent on the forestry operations that supply them with timber. If, on the proper construction of s 42(c), such forestry operations cannot be exempted from Division 3 because they are incidental to actions that use their products, the apparent legislative purpose of exempting RFA forestry operations from Part 3 (save in the three excepted instances) will have largely failed. Equally, the manifest

intent of the RFA regime reflected in the RFA Act and the Tasmanian agreement as it relates to downstream activities producing or using timber products, will have been undermined: cf the Explanatory Memorandum to the 2006 explanation of the new s 75(2B) above.
46 In our view, the key to understanding the proper construction of s 42(c) is to be found in the word "incidental". As both the *Macquarie* and the *Oxford Dictionary* confirm, "incidental" can be used with at least two different meanings. The *Oxford English Dictionary* defines "incidental" to mean:
Occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual.

The *Macquarie Dictionary* includes a similar meaning for "incidental". In this sense, the occurrence of the forestry operations in conjunction with the operation of the pulp mill could not be said to be incidental. Rather it would be essential to the operation of the mill.
47 However, the *Macquarie Dictionary* gives the word "incidental" a different meaning when used in the phrase "incidental to"; this phrase it defines to mean "liable to happen in connection with; naturally appertaining to". The *Oxford English Dictionary* provides a somewhat similar definition of "incidental to".
48 If the question posed by s 42(c) is, as the Minister contended, whether the relationship of the foreshadowed forestry operations to the proposed pulp mill was an incidental one, the ordinary dictionary meanings of the word "incidental" would suggest that there is only one reasonable answer. However, if, as the Wilderness Society contended, the question posed by s 42(c) is to be understood by reference to the ordinary dictionary meaning of "incidental to", the opposite answer would be given; that is the forestry operations would be "incidental to" the operation of the pulp mill.
49 Though s 42(c) uses the "incidental to" formula, it would be inappropriate to give the clause a literal interpretation without regard to the text, structure and purpose of the Act and to the legislative context of Chapter 4 of the EPBC Act: see *CIC Insurance Ltd v Bankstown Football Club Ltd*, at 408. We have already indicated that in our view the text and structure of Part 4 Division 4 evidence the clear legislative intent that Part 3 is not to apply to an RFA forestry operation undertaken in accordance with an RFA save in the three specifically excepted instances contained in s 42. This at least suggests not only that Part 4 should be interpreted, if

possible, in a way which gives s 38 (and s 40) reasonable work to do, but also that it not be interpreted in a way that nullifies the legislative intent noted.

50 More importantly when Part 4 Division 4 is considered not only in the context of the EPBC Act, but also in the context of the relationship of that Act with the RFA Act and its RFA regime – a relationship acknowledged in the provisions of both Acts: EPBC Act s 38 and s 75; RFA Act s 6 – there is, in our view, a discernible and intelligible purpose served by s 42(c). This purpose can be achieved without substantial departure from the literal or ordinary meaning of the language of s 42(c) if the word "incidental" is given its ordinary meaning when standing alone; that is, when it is not part of the phrase "incidental to". In our view, it is manifest that it was in this sense that the legislature used the word "incidental" in s 42(c).

51 We therefore conclude that a fortuitous or subordinate connection such as we have described, is what is signified by forestry operations that are "incidental to another action" in s 42(c). Equally we conclude that an essential connection is not what is envisaged by s 42(c). It is such a connection that is in issue in this appeal as the action in question is one that involves the processing of RFA harvested timber product (in the form of woodchips).

52 This interpretation effectuates what we consider is the purpose of the EPBC Act considered in the context of the RFA Act and the RFA regime. It exempts from Part 3 forestry operations connected with actions for which the use of product from RFA forestry operations forms an essential and indispensable part. Such operations, related as they are to forest products industries, are of the very type which the RFA Act regime envisaged would be assessed in accordance with its scheme and in effectuation of that Act's purposes. In contrast, where there are forest operations that are only adventitiously or fortuitously connected with another action, it is in our view intelligible that, when the adverse impacts of *that* action are being considered, all adverse impacts including from forestry operations should be considered. Not being an essential element in another action which itself is contemplated by, and which effectuates the purposes of, the RFA Act scheme, it is unsurprising that the legislature would be unprepared to exempt such operations from the purview of the EPBC Act for the purposes of considering the adverse impacts of *that* other action.

53 The appellant's contentions in relation to s 42(c) proceeded at two levels. The first was that the Minister should have determined, but did not determine, whether s 42(c) applied to the proposed forestry operations (i.e. the harvesting of trees to feed the pulp mill), the Minister having determined that those RFA forestry operations were undertaken in accordance with an RFA. The Minister, it was said, simply misunderstood s 75(2B) and so proceeded on the basis that there was a blanket exemption for all RFA forestry operations; in so doing he committed jurisdictional error. The second level of the submission was that the appellant did not have to show that s 42(c) would have applied to the relevant forestry operations. This submission, though, had two presuppositions contained in it. They were, first, that the relevant action (i.e. the pulp mill proposal) arguably did not have a primary purpose related to forestry – a matter conceded by the Minister – and, secondly, that the forestry operations arguably could, as a matter of fact, be found to be "incidental to" the proposed action. The second of these proceeded upon a construction of those words in s 42(c) that we do not accept.
54 We reject this ground of appeal.

DID THE MINISTER DENY THE APPELLANT PROCEDURAL FAIRNESS?

55 The issue raised by this ground of appeal has a deceptive simplicity. It is whether the Minister denied the applicant, as an interested member of the public, procedural fairness in respect of his decision to be made under s 130(1)/s 133(1) of the EPBC Act whether or not to approve the taking of the controlled action, by setting a period of twenty business days for the making of comments under s 95(2)(c).

56 The complexity in this issue arises from a number of sources. First, at the time of the primary judge's decision the Minister had not made any s130/s 133(1) decision. It was made almost two months later. Secondly, while s 131AA imposes procedural fairness obligations to the proponent (or designated proponent) of the controlled action prior to making a decision whether or not to approve that action, it not only does not impose like obligations in respect of the interested public, it also provides that the requirements of the section are to be taken to be "an exhaustive statement of the requirements of natural justice hearing rule" in relation to the Minister's decision whether or not to approve the taking of the action.

Thirdly, though the scheme of Ch 4 of the EPBC Act (which includes s 95, s 130 and s 133) makes systematic provision for public comment at various stages in the processes leading to a decision on approval, there is a very real question as to whether an obligation to the public such as is propounded by the appellant is compatible with the Act itself. Fourthly, while the proposed obligation to give a reasonable opportunity to be heard relates to the s 130/s 133 approval decision to be made, the denial of such an opportunity is alleged to invalidate, not that prospective decision, but the anterior decision taken by the Minister under s 87(5) that the relevant impacts of the referred action were to be assessed on preliminary documentation. The s 95(2)(c) direction prescribing the time within which public comments were to be made "conditioned", so it is said, the s 87 power to choose from the various assessment approaches mandated by s 87(1). Finally, while the s 95(2)(c) direction decision of the Minister is one separately provided for in the Act, no direct challenge has been made to that decision either on the ground of unreasonableness, or because there had been a failure to comply with a requirement of the Act by, for example, giving a direction which did not afford an actual opportunity for public comment. Each of the above complicating factors has been accentuated by one or other of the respondents in their submissions.

The Statutory Setting

57 As has been emphasised by the High Court on many occasions the statutory framework within which a decision-maker exercises statutory discretions is of critical importance when considering what, if anything, procedural fairness requires: see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26]. For this reason it is necessary to consider in some detail the scheme and provisions of Chapter 4 of the Act ("Environmental assessments and approvals").

58 Reference has earlier been made in these reasons to the initial processes by which proposals for what might be "controlled" actions under the Act are to be, or may be, referred to the Minister and to the action that is to be taken by the Minister on receipt of such a referral. For present purposes only the following need be noted. (i) A referral must be made in the way prescribed, and must include the information required, by the regulations: s 72. The information so provided is a primary source of the information upon which public comment is to be invited under s 95. (ii) Section 74

specifies authorities and persons from which the Minister must or may invite comment "as soon as practicable after receiving ... a referral", on whether the proposed action is a controlled action. The comments so invited are to be given "within 10 business days (measured in Canberra)". (iii) The public's participation in this process is provided for in s 74(3):

(3) As soon as practicable after receiving a referral of a proposal to take an action, the Environment Minister must cause to be published on the Internet:

(a) the referral; and

(b) an invitation for anyone to give the Minister comments within 10 business days (measured in Canberra) on whether the action is a controlled action.

(iv) If the Minister determines "within 20 business days" after receipt of the referral that it is clear that the action would have unacceptable impacts on a matter protected by Part 3 of the Act, he may determine that the provisions of Division 1A should apply to the referral: s 74B. In such a case the proponent may (inter alia) request the Minister to reconsider the referral: s 74C(3)(c). If such a request is received, s 74D(2) requires that: (2) The Minister must, within 10 business days after receiving the request, publish on the Internet:

(a) a notice stating that the Minister proposes not to approve the taking of the action that is the subject of the referral; and

(b) the reasons for the Minister's decision; and

(c) an invitation for anyone to give the Secretary, within 10 business days (measured in Canberra), comments in writing on:

(i) the impacts that the action would have on a matter protected by a provision of Part 3; and

(ii) the Minister's proposal to refuse to approve the taking of the action.

Within ten further business days after the period for comment, the Secretary must prepare a written report about the relevant actual or likely impacts of the action and give the Minister that report as well as a copy of the comments received within the period for comment. The Minister must then make his or her reconsideration decision within twenty business days after receiving the report. (v) In deciding whether the action the subject of a referred proposal is a controlled action, the Minister must consider the public comments received "within the period specified in the invitation" on whether the action is a controlled action: s 75(1A). The decision on the referral is required to be taken within twenty business days after his or her receipt of it: s 75(5). (vi) If the Minister believes on reasonable grounds that the referral does not include enough information for the Minister to make his or her decision, a request for specified information relevant to making the decision can be made of the proponent: s 76(1). (vii) Division 3 provides for ministerial reconsideration of a decision on request from a person other than a State or Territory Minister and specifies a parallel procedure (which includes inviting public comment: s 78B) involving like timetables as are applied to reconsideration of unacceptable proposals under Div 1A.

59 The second major stage of the processes leading to a s 130/s 133 decision is that of assessing impacts of controlled actions. It is this stage which is of immediate relevance to the present ground of appeal. Having determined that a proposed action is a controlled action, the Minister must, subject to a power to request further information (s 89) make a decision on the same day "as the determination" (s 88(2)) as to which of six possible assessment options will be used for assessment of the relevant impacts of the controlled action: s 87(1). One of the six permits choice of an accredited assessment process carried out under a law of the Commonwealth, a State or a Territory: s 87(1)(a) and (4). That choice, as has been seen, was adopted in respect of the first two referrals of Gunns' pulp mill proposal (see [8] and [9] above). It is only of present interest insofar as it was responsible for generating a considerable volume of information about the proposal itself. The remaining five options involve assessment processes for which provision is made in Divisions 3A to 7 of Part 8 of the EPBC Act. These Divisions were introduced into the Act by amending legislation in 2006: see *Environment and Heritage Legislation Amendment Act (No 1) 2006* (Cth) Sch 1 Pt 1. It is unnecessary to set them out in detail although the following should be noted. (i) One such option

involves the conduct of a public inquiry on terms of reference with appointed commissioners having powers and protections commonly given commissions of inquiry. Such an inquiry is to be held in public with witnesses being called, oaths administered, etc. That process of assessment is of no present relevance. (ii) The remaining four options differ from each other in both the manner in which information is assembled and assessed and in the possible time frames for completion of the respective types of assessment. Nonetheless, they all involve a similar methodology for present purposes. This involves (a) invitation to the public to comment upon designated information, be it a draft report (s 93 and s 98) specified information (s 95) or a draft environmental impact statement (s 103); (b) the provision to the Minister of such public comments as were made with the prescribed period for comment (which varies from within 10 business days (s 93(3) to "within the period specified in the invitation" (s 95(2)(c), s 98(1)(c) and s 103(1)(c)): see s 93(5), s 95B, s 99 and s 104(3); (c) the preparation of recommendation report by the Secretary for the Minister: s 93, s 95C, s 100 and s 105; and (d) the common stipulation of relatively short times not before which, or within which, required actions etc are to occur. For the purposes of this appeal it will be necessary to return below to the provisions of s 87 and s 95 of Divisions 3 and 4 of the Act.
60 The final stage in the Act's scheme for assessment and approval involves the Minister's decision whether or not to approve the controlled action. This decision must be taken within a specified period (varying from 20 to 40 business days depending on the assessment option chosen) of receipt of the assessment information, recommendation report etc required to be given to the Minister: s 130. Before the Minister makes his or her decision including as to the conditions if any to attach to any approval given, he or she is obliged to invite comment from designated other ministers: s 131. The Minister is also required by s 131AA(1) to: (a) inform the person proposing to take the action, and the designated proponent of the action (if the designated proponent is not the person proposing to take the action), of:

(i) the decision the Minister proposes to make; and

(ii) if the Minister proposes to approve the taking of the action – any conditions the Minister proposes to attach to the approval; and

(b) invite each person informed under paragraph (a) to give the Minister, within 10 business days (measured in Canberra), comments in writing on the proposed decision and any conditions.

In the event that the Minister proposes not to approve the taking of the action for the purposes of a controlling provision, he or she is obliged to provide the proponent (or the person taking the action) with designated information: s 133AA(2)ff. Section 133AA(7) in turn specifies that the section itself is to be taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation (inter alia) to the Minister's decision under s 133 whether or not to approve, for the purposes of a controlling provision, the taking of the action.
61 Distinctly, s 131A empowers the Minister before he or she takes such a decision to publish on the Internet:
(a) the proposed decision and, if the proposed decision is to approve the taking of the action, any conditions that the Minister proposes to attach to the approval; and

(b) an invitation for anyone to give the Minister, within 10 business days (measured in Canberra), comments in writing on the proposed decision and any conditions.

It should be emphasised that this is the one instance in Chapter 4 where the Minister is given a discretion as to whether or not to invite public comment.
62 The formal power to decide to approve an action is conferred by s 133. In turn s 136 indicates considerations which the Minister must, may, or must not, take into account in his or her decision. It is only at this stage, for example, that economic and social matters and the principles of ecologically sustainable development are to be taken into account.
63 In the present matter the method of assessment selected by the Minister was by way of assessment on preliminary documentation. The Minister's power so to select was conferred by s 87(5). Insofar as presently relevant, it provides:
The Minister may decide on an assessment on preliminary documentation under Division 4 only if the Minister is satisfied ... that that approach will allow the Minister to make an informed decision whether or not to approve under Part 9 (for the purposes of each controlling provision) the taking of

the action.

Notice in writing of such a decision must be given to the person proposing to take the action (or to the designated proponent) within ten business days after the decision was made: s 91(1). At the same time as the Minister gives notice of that assessment approach, s 95(2) requires that:
... the Minister must give the designated proponent a written direction to publish, within the period specified in the direction (not being less than 10 business days), in accordance with the regulations:

(a) specified information included in the referral to the Minister of the proposal to take the action; and

(b) specified information relating to the action that was given to the Minister after the referral but before the Minister made the assessment approach decision; and

(c) an invitation for anyone to give the designated proponent, within the period specified in the direction, comments in writing relating to the information *or the action*.
(Emphasis added.)

As the highlighted words indicate, the comments invited are not limited to comments on "the information". It should also be emphasised that the direction itself is to specify the information to be published and did so in this matter.
64 Section 95B, which is of some significance, provides for the procedures to be followed by the designated proponent if public comments are received within the period for comment. The proponent must "as soon as practicable after the end of that period" (s 95B(1)):
(a) prepare a document that:

(i) sets out the information given to the Minister previously in relation to the action, with any changes or additions needed to take account of the comments; and

(ii) contains a summary of the comments received and how those comments have been addressed; and

(b) give the Minister:

(i) a copy of the document prepared under paragraph (a); and

(ii) a copy of the comments received.

The document so prepared must then be published by the proponent within 10 days of giving it and a copy of the comments to the Minister: s 95B(2) and see reg 16.03 ff *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth). Both the document and the comments are material that the Minister is obliged to take into account when deciding whether or not to approve the controlled action: s 136(2)(bc).

65 There are several additional aspects of the EPBC Act to which reference ought be made. First, it is a declared intent of the Act that, in order to achieve the objects stated in s 3(1), the Act "adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed": s 3(2)(d). The theme of timely decision making through the use of tight statutory timeframes at all stages in the process was emphasised in the Second Reading Speech on the EPBC Bill (1998) (No 2): see Australia, Senate, *Debates* (1998) Vol S 193, p 210. The themes of efficiency and timeliness were returned to in the Second Reading Speech on the 2006 Amending Bill: see Australia, Senate, *Debates*, 6 November (2006) at 138, 140.

66 Secondly, reference should also be made to the Explanatory Memorandum to the 2006 amending legislation which introduced the choice of assessments contained in Divs 3A to 7. It indicated that the introduction of the new Div 3A method of assessment ("assessment on referral information") was for the purpose of increasing the "efficiency and flexibility of the Act" and was intended for "assessing a proposed action that involves a small number of straight forward environmental issues": at [98] and [99]. Of the new Div 4 (which the Minister availed of in the present matter) it is said:

100. New Division 4 streamlines and increases the transparency of assessment on preliminary documentation. Assessment on preliminary

documentation is appropriate for actions that involve more complex environmental issues than those to be assessed on referral information, but still involve relatively straight forward issues.

101. New section 95 applies to those actions that are suitable for assessment on preliminary documentation based on the information contained in the referral. This amendment encouraged proponents to provide adequate information for assessment at the time of referral to take advantage of a reduced timeframe for assessment.

67 There are two aspects of the above that warrant comment. First, no challenge has been made to the Minister's s 87(5) decision on the basis that, because of the environmental issues to be assessed, assessment on preliminary documentation was not a decision that at all reasonably could have been so made in the circumstances for the purposes of s 5(1)(e) and s 5(2)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Secondly, the Division 4 assessment was envisaged to be one in which assessments would be made in a "reduced timeframe".
68 Finally, the Explanatory Memorandum's Regulation Impact Statement emphasised (at p 4) that the extensive public consultation provisions and statutory timeframes in the original Act introduced "new standards of accountability and transparency" but that there were some areas where additional transparency would enhance the ability of interest groups and the general public to participate in Act processes. To that end the 2006 amending Act would increase transparency by introducing an additional stipulated publication and public comment requirement: (pp 4 to 5). These themes were returned to in the context of delay and frustration of processes when it was said (p 7):
The Act makes extensive provision for consultation and participation in regulatory processes. *It is important to maintain a high level of public participation and transparency, while ensuring that processes achieve their objectives in an efficient and equitable manner*.
(Emphasis added.)
Factual Matters

69 These can be referred to briefly.

70 (i) As mentioned above, the s 87(5) assessment decision was taken by

the Minister on 2 May 2007, the same day as that on which he made the s 75 referral decision. His reasons for the assessment decision were provided on 30 May 2007. They are not relevant to any issue in this ground of appeal.

71 (ii) The s 95(2)(c) decision of 20 business days for public comment was made at the time of the above decisions and a letter of that date containing the Minister's s 95(2) direction was signed by him. As Gunns' invitation to comment indicates, public comment had to be received by 5 pm on 5 June 2007. The Minister's direction specified that the information to be published and on which public comment was invited was (a) the referral and (b) a report entitled "Impact Assessment under the *Environment Protection and Biodiversity Conservation Act 1999*".

72 (iii) Such evidence as there is concerning the selection of the 20 business day period was given by Mr Early who, as mentioned above, was at the relevant time First Assistant Secretary of the Approvals and Wildlife Division of the Department of Environment and Water Resources. He managed the EPBC Act administration. In his evidence-in-chief he indicated that he considered that the referral raised only a limited number of matters of national environment significance: cf s 3(1)(a) of the Act; preliminary documentation was the most commonly used assessment method under the EPBC Act; and it was often used for highly controversial projects in States and Territories noting that the respective public comment periods in the three examples he gave were ten, twenty-five and ten days. He went on:

So, essentially, what we knew about the project, the fact that – and the other consideration was that it had been in the public arena for two years, and I may have been mistaken, but my judgment was that there wouldn't be anybody out there who couldn't make comment within 20 business days. We weren't asking them to do an assessment. That's our job. All they were asked to do was provide comment, and I couldn't believe that – so all those factors suggested to me that in fact preliminary documentation was the correct call in the matter, and in fact, you know, I mean, I discussed that with the Minister as well. And, you know, that was his view obviously.

It is not apparent when the discussion with the Minister occurred. A

briefing note containing a recommendation by Mr Early for a 20 day comment period was received in the Minister's office. Mr Early's oral account of his discussion with the Minister as it related to the s 95(2)(c) directions was that the Minister asked him "why 20 days" and his response was:
I said, 'Well, look, this has been in the public arena for two years. It's been highly controversial. Everybody who's got a view on it has got a view already," and I couldn't believe that – as I said, I may have been wrong, but I said I couldn't believe that there would be anybody who wouldn't be able to articulate comment on the proposal within ...

In cross-examination on the comment period Mr Early said that 20 business days was "the top end pretty much" of general public comment for a preliminary documentation assessment. He went on to explain:
... you have got to understand what the process is about. It is about getting the issues on the table so that we can do the assessment, it is not about doing the assessment for us. We are not expecting the public to be able to do anything other than provide their comments about what's worrying them about a particular proposal or what they support. I mean we do get people actually supporting projects from time to time.

73 The evidence relied upon by the appellant given by Paul Osting, one of its employees, was directed at showing why the comment period was not considered to provide a reasonable opportunity for comment. That evidence pointed to the volume of material that the RPDC had put into the public domain under the first and second referrals; to evidence supplied by Gunns to that Commission which was not made available until 21 February 2007; and to the lack of time to verify information or to obtain reports.
74 The Commonwealth was given leave to adduce further evidence on the appeal relating to the Minister's decision under s 131A to invite public comment on his proposed decision and the conditions recommended relating to the pulp mill. This decision was taken subsequent to the decision of the primary judge. For reasons we later give it is unnecessary to refer further to this decision, to the public's response to it, or to the Minister's reasons for a later decision to extend the period for making his approval decision.

The Primary Judge's Decision

75 The denial of procedural fairness raised before the primary judge matches that raised in the ground of appeal. It is that the s 87(5) assessment decision, or the Minister's approach to the approval decision under s 130(1), involved a denial of procedural fairness to the appellant and to other interested members of the public in that it did not give them a reasonable opportunity to be heard or to give comments under s 95(2)(c). His Honour rejected the challenges so made. Insofar as it was premised upon a duty to accord procedural fairness to members of the public in relation to the Minister's decision whether or not to approve the taking of the controlled action, his Honour gave full effect s 131AA's indication that that section contained an exhaustive statement of the Minister's duty to accord procedural fairness in relation to the Minister's decision. Section 131AA did not impose any such obligation to the public. As to the s 87(5) assessment approach decision, his Honour held there was no requirement in the EPBC Act to invite public comment on the choice of assessment approach. He concluded that the Minister did not have an obligation to accord procedural fairness to the appellant other than in accordance with the provisions of the EPBC Act.

Consideration

76 On the appeal there appeared to have been some level of misunderstanding between the parties as to what was the substance and effect of the denial of procedural fairness alleged. The written submissions reflected this. The way in which we now understand the ground is put by the appellants is as follows. (i) The s 87(5) assessment decision is itself conditioned by the s 95(2)(c) direction decision as to the period of public comment. (ii) These two decisions involve a statutory recognition of procedural fairness in the assessment stage prior to the final decision of the Minister. (iii) Though the denial of a reasonable opportunity to comment under s 95(2)(c) has prospective practical consequences, i.e. it denies the public a reasonable opportunity to make comments to inform the Minister in his decision, its direct legal consequence is not upon that decision under s 133(1). Rather it is the s 87(5) assessment decision which the denial invalidates. (iv) By so linking the obligation to the assessment decision, s 131AA(7), it is said, does not come into play as the obligation to the public propounded by the appellant is imposed by the EPBC Act itself.

77 Put in short form the appellant's submission is that the obligation to afford procedural fairness involved two steps under the EPBC Act. As counsel put it: "You choose the assessment approach and you specify periods". That is what the scheme requires the Minister to do and that is the way it imposes obligations about procedural fairness.

78 We entertain considerable doubt whether the decisions under s 87(5) and s 95(2)(c) direction are linked in the manner suggested. While, as in this case, these decisions may be taken in tandem, the Act does not require this: see s 91(1) and s 95(2). It is not immediately apparent that if the Minister fails to give a s 95(2) direction, or gives one which is colourable, which does not provide any meaningful opportunity for public comment at all, which is in prosecution of some improper purpose, or which is totally unreasonable, that decision could not be the subject of independent challenge in appropriate judicial review proceedings. As we have already indicated and the respondents emphasise, no such direct challenge has been made to the 20 business days direction itself.

79 A curiosity in the alleged interconnectedness of the two provisions is that while they together are said to impose a procedural fairness obligation in the giving effect to a decision to use a particular method of assessment, no such obligation is said to arise in relation to the choice of that method. The Act clearly does not impose a statutory duty to invite public comment on the s 87 choice to be made.

80 In our view the appellant's submission on this ground of appeal misconceives the nature and purpose of the provision for public comment in the scheme of the Act. The submission simply assumes it enshrines a statutory procedural fairness requirement of sorts. Whether this is so, indeed whether it is at all helpful to resort to the language of procedural fairness in relation to the public comment provisions, is questionable. Irrespective of whether the duty to accord procedural fairness is properly to be characterised as a common law duty subject to a contrary statutory intent or as an implied legislative qualification on a statutory discretion, it is clear that, in either case, any consideration of whether such a duty exists at all in a given instance and, if so, what is its content, depends first and foremost upon a critical examination of the statutory framework within which the statutory power in question falls to be exercised. Such an examination of the EPBC Act leads inevitably to a rejection of the

appellant's submission.

81 The first stated object of the Act is to provide for the protection of the environment, especially those aspects of the environment that are matters of "national economic significance". Such matters provide the principal focus of the actions and activities requiring approval under Chapter 2 Part 3 Division 1 of the Act: see also Australia, Senate, *Debates* (1998) Vol S 193, pp 209-210. Consistent with this national focus, the text and structure of the legislation clearly acknowledges the interest the public may have in the burden of the Act itself, and in its administration, and in the likely interest members of the public may have in particular actions and activities for which approvals are required under the Act. This is reflected in the extent to which it provides for transparency and accountability (primarily through the imposition of publication requirements at various stages in the assessment and approval process, the duty to give reasons for decisions and in enhanced provisions for judicial and other review) and for public participation (particularly in its requirements for inviting public comments and for how such comments are to be dealt with).

82 Significantly, the various public comment provisions in Divisions 3A to 6 are indifferent to whether the responding members of the public support, oppose or are indifferent to, approval being given to the referred action in question. The invitation to comment, in other words, is not limited to persons who might be affected directly and adversely in their rights, interests or legitimate expectations by an exercise of the Minister's s 133 power to approve the taking of a controlled action. This rather suggests that the public comment provisions themselves are not aimed at avoiding "practical injustice": cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6;* (2003) 214 CLR 1 at [37]; to persons who are likely to be affected adversely by an approval decision: cf *Kioa v West [1985] HCA 81;* (1985) 159 CLR 550 at 584. Rather, as the language of s 95(2)(c) suggests, the invitation is to "anyone" to comment irrespective of any affect an approval decision may be likely to have on them. The section's purpose in consequence appears to be to invite the participation of members of the Australian community and of interested entities to express such opinions, remarks, criticisms etc as they are minded to make on (in the case of s 95(2)(c)) the information specified in the direction and on the controlled action, those opinions etc being

matter that must be published in the manner required by s 95(1) and that the Minister is obliged to take into account when making a decision under s 133: see s 136. So viewed the purpose of the public comment provisions (of which s 95(2)(c) is one) can, in the context of the provisions requiring their publication, being forwarded to the Minister etc, properly be characterised as devices intended to promote and enhance (a) public participation in the processes of the Act; (b) transparency in the Act's administration and (c) accountability of the Minister and his Department. The comment provisions serve public purposes, not the purposes of individual members of the public who accept the invitation to comment. It is, in our view, inapt to describe them as statutory procedural fairness provisions or as having procedural fairness notions engrafted upon them.

83 This characterisation becomes the more apparent when one has regard to the second major preoccupation evidenced in the Act's assessment and approval scheme. This relates to efficient and timely decision-making in the assessment and approval process. We have referred to aspects of this in our consideration of the Act itself and have noted, for example, the use and/or recurrence of phrases such as "on the same day", "as soon as practicable", etc. As the Second Reading Speeches to the 1998 Bill and the 2006 Amending Bill acknowledge, the Act employs tight statutory timeframes in all stages of the process: see ante [65].

84 The approach of the EPBC Act to assessment and approval can well be described as one of studied haste. This can create some tension between the conduct of assessment processes (including community participation therein) and securing expeditious finalisation of the approval process itself. "Efficient decision making should be well informed": cf the comments of Mason P in *Transport Action Group Against Motorways Inc v Roads and Traffic Authority [1999] NSWCA 196;* (1999) 46 NSWLR 598 at 621. But the processes of information gathering themselves are not without costs, financial and otherwise, which may have their own imperatives and which may contrive the period to be allowed for comment in the decision making scheme itself.

85 It may be accepted that a purpose of the s 95(2)(c) public comment requirement is to promote informed decision making by the Minister. The Act requires the proponent to prepare a document setting out (inter alia) changes or additions to the information he has given to the Minister which

the proponent has needed to make to take account of public comments made: s 95B(1)(a); and the Minister in turn has to receive the comment and to take them into account in taking the approval decision: s 95B(1)(b) and s 136(2)(bc). This said, the scheme of the Act in providing for public comment in s 95(2) can hardly be said to privilege the time to be given for making that comment over the manifest policy of efficient and timely decision making that is otherwise evidenced in the timeframe in Parts 7 and 8 of Chapter 4. While it is the case that s 95(2), in common with s 98(1)(c) and s 103(1)(c), does not specify a period for public comment, the clear legislative intent of Division 4, in our view, is that the time specified in the s 95(2) direction will be consonant with the timeframe otherwise set for an assessment on preliminary documentation: see s 91(1), s 95(2), s 95B(1), s 95C(1) and s 130(1B)(c). We would note in passing that the 20 business day period selected in the present matter cannot reasonably be said to be otherwise than compatible with that timeframe. That no time for comment is legislatively specified for the period of comment seems to provide no more than flexibility in fixing an appropriate time in a given instance, regard being had to the timeframe otherwise fixed for assessment under Division 4. Paragraph 101 of the Explanatory Memorandum to the 2006 Amending Act clearly envisaged that s 95 would allow a proponent who provided adequate information for assessment in its referral to take advantage of a "reduced timeframe for assessment". This at least suggests that a relatively short period for comment was envisaged for assessments on preliminary documentation.

86 Section 95(2) cannot, in context, reasonably be said to manifest a legislative intent that the Minister, while setting a time limit binding the public at large, is required to accommodate the needs or desires of everyone (whose individual identities will not be known at the time of direction) who may wish to avail of the opportunity. The invitation is not to individual members of the public or to classes of such members. It is to provide the opportunity for "anyone" to comment on specified information and on the action. Provided such an opportunity actually is given, is not illusory or wholly unreasonable, and is not otherwise tainted with illegality, this provision of the statute will have been complied with. It is not to the point that a more generous period would possibly have enhanced the quality of the comment that might have been made. It is not to the point that the period chosen might seriously compromise the comment

which particular persons or entities wished to, or were able to, make. These may be matters which, in a given instance, may affect the level of public confidence or satisfaction in the public comment process. Of themselves they do not go to the legality of the particular opportunity given for comment.

87 What we have said is sufficient to dispose of this ground of appeal. It is appropriate, though, to make the following observations.

88 (i) While the appellant clearly had standing to bring the application in this proceeding by virtue of s 487(3) of the EPBC Act, and while it had the right to provide comments to Gunns pursuant to the s 95(2)(c) invitation, it is greatly to be doubted that it was entitled to complain of a denial of procedural fairness, i.e. of a reasonable opportunity to provide information etc by way of comment to Gunns and ultimately to the Minister of which account was required to be taken in the Minister's s 133 approval decision. That, in practical terms, is the opportunity said to have been denied. Having regard to the nature and subject matter of the s 133 power, it was not one the exercise of which would have affected the appellant in respect of any tangible right, interest or expectation of a character which the duty of procedural fairness is designed to protect: cf *Vanmeld Pty Ltd v Fairfield City Council [1999] NSWCA 6;* (1999) 46 NSWLR 78 at 97; *Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537 at 553-554; *Ferguson v Cole [2002] FCA 1411;* (2002) 121 FCR 402 at [57]- [58] and see generally Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 410 ff (3rd ed, 2004). In saying this we acknowledge that the appellant has attempted to cast its case in a way that avoids this objection by tying the procedural fairness claim – unsuccessfully in the event – to s 87 of the Act.

89 (ii) It is to be doubted, insofar as public comment is concerned, that that comment is limited to the impact assessment of Division 4. Rather comment is invited both on the information specified by the Minister and on the action itself. As already noted, the comments made in turn are to be provided to the Minister and are to be taken into account in the Minister's s 133 approval decision. Given this link between the s 95(2) invitation and the Minister's ultimate decision, it is questionable whether the assessment process and the approval process can be compartmentalised as the appellant sought to do, so as to escape s 131AA and its exhaustive

statement of the requirements of the natural justice hearing rule in relation to the Minister's s 133 approval decision. In any event, we do not accept that s 131AA is intended only to delimit the obligation of procedural fairness owed to the proponent of the action (or the person taking the action if not the proponent).

90 (iii) Though the appellant's case as put tied the denial of procedural fairness back to s 87, we consider that in substance it related to the then still prospective s 133 decision. That we consider is how the alleged denial should be characterised and it would involve a direct, not an indirect, challenge to the s 133 decision to be made. We have not been asked to deal with such a challenge in these proceedings. We refrain from expressing any view on it or on the significance to be attributed to the steps taken by the Minister in relation to public comment after the primary judge's decision.

Conclusion

91 We also reject this ground of appeal.

IMPROPER PURPOSE

92 We agree with the reasons for judgment of Tamberlin J concerning this ground of appeal.

CONCLUSION ON APPEAL

93 For the above reasons the appeal will be dismissed with costs.

I certify that the preceding ninety-three (93)
numbered paragraphs are a true copy of the
Reasons for Judgment herein of the Honourable
Justices Branson and Finn.
Associate: Dated: 22 November 2007

IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY **TAD 21 OF 2007**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**THE WILDERNESS SOCIETY INC** **Appellant**
AND:	**THE HONOURABLE MALCOLM TURNBULL, MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES** **First Respondent**
	GUNNS LIMITED **Second Respondent**

JUDGES:	**BRANSON, TAMBERLIN AND FINN JJ**
DATE:	**22 NOVEMBER 2007**
PLACE:	**MELBOURNE (VIA VIDEO LINK TO HOBART)**

REASONS FOR JUDGMENT

TAMBERLIN J

94 The background to this appeal is summarised in the joint reasons of Branson and Finn JJ. I address each of The Wilderness Society's grounds of appeal below, with the exception of the ground dealing with procedural fairness. On that point, I agree with the reasons of the majority.

SECTION 75(2B)

95 The Wilderness Society submits that the Minister misunderstood s 75(2B) of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ("the Act"), and incorrectly found that it precluded him from considering the adverse impacts of those RFA forestry operations which harvest the timber necessary for the operation of the pulp mill. As a consequence, it is said, both the controlled action decision under s 75 and the assessment approach decision under s 87 are based on an error of law and are invalid.

96 The Minister and Gunns submit that, because the forestry operations which will supply wood to the mill are covered by a regional forest agreement ("RFA"), the Minister, pursuant to s 75(2B), *must not* consider any adverse impacts relating to those forestry operations when considering the referral of the proposal to construct and operate the mill.

97 In his reasons for the controlled action decision, the Minister stated that "as required by s 75(2B) of the EPBC Act, I did not consider any adverse impacts of forestry operations before 2017 for the supply of wood chips to the proposed mill." In his reasons for the assessment approach decision, the Minister based his findings on, inter alia, a brief from his Department of 24 April 2007, which gave advice in relation to s 75(2B) to the same effect.

98 To understand the obligation arising under s 75(2B), it is necessary to consider several other provisions of the Act, especially ss 75(2)(a), 38 and 42.

99 Section 75(2)(a) requires that the Minister, when making a controlled action decision, must take into account *all* adverse impacts which the controlled action is likely to have on certain environmental matters protected under Part 3 of the Act. Section 75(2)(a) is subject to the exception in s 75(2B)(a), which obliges the Minister *not* to consider *any* adverse impacts of "any RFA forestry operation to which, under Division 4 of Part 4, Part 3 does not apply". The words "under Division 4 of Part 4, Part 3 does not apply" are important in this case because they limit those RFA forestry operations which fall outside the scope of the obligation in s 75(2). Notably, there is no reference to them in the Minister's reasons for decisions or in the Departmental briefing on which he acted.

100 Sections 38 and 42 are in Division 4 of Part 4 of the Act, which deals with forestry operations in areas covered by RFAs. Section 38 provides that Part 3 of the Act does not apply to RFA forestry operations undertaken in accordance with an RFA. Part 3 is important in this case because it sets out requirements which must be satisfied before an action can commence. In this case, the relevant "controlling provisions", as they are called, are those relating to listed threatened species and communities, listed migratory species and the marine environment. The effect of s 38 is to provide that these selected Part 3 prohibitions do *not* apply to RFA

forestry operations that are undertaken in accordance with an RFA. RFA forestry operations include the planting and management of trees before they are harvested and the harvesting of timber for commercial purposes, which includes any associated land clearing or preparation, burning-off or transport operations: see s 38(2) of the Act, which incorporates s 4 of the *Regional Forest Agreements Act 2002* (Cth), which in turn incorporates the definition from clause 2 of the Tasmanian RFA. This definition is relevant here because the Tasmanian RFA covers all forestry operations in Tasmania and consequently applies to any forestry operations necessary to supply wood for the operation of the pulp mill.

101 However, s 38 is subject to s 42, which provides that s 38 does not apply in three specified instances. The first and second are where the RFA forestry operations take place "in a property included in the World Heritage List" or "in a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention": see s 42(a) and (b). These are sites which, by reason of their sensitivity and international significance, have been singled out for special treatment. Neither of these provisions is relevant in this case.

102 The third exception in s 42(c) excludes the application of s 38 where RFA forestry operations are "*incidental* to another action whose *primary purpose* does not relate to *forestry*" (emphasis added). The operation of this exception is central to this appeal. If it applies, the consequence is that, contrary to his express finding, the Minister was bound by s 75(2)(a) to take into account the adverse impacts of the RFA forestry operations occasioned by the need to supply timber to the pulp mill. This is because s 42(c) renders inapplicable s 38, which in turn means that the relevant RFA forestry operations are not covered by Division 4 of Part 4, and consequently are not RFA forestry operations to which s 75(2B) applies. With the application of s 75(2B) thereby excluded, s 75(2)(a) remains a blanket mandate that the Minister must consider "all adverse impacts" which the pulp mill will have or is likely to have on those matters prohibited in Part 3 of the Act.

103 The Minister and Gunns submit that s 42(c) does not apply in this case because the forestry operations which supply the pulp mill are not "incidental" to it. The Minister submits that to construe s 42(c) in a way that requires the Minister to consider the impact of RFA forestry

operations which will supply timber to the mill would deprive the exemption in s 38 of any meaningful operation. This is because most large-scale harvesting of forest products relate to and supply some form of subsequent industrial use. The Minister suggests that an example of forestry operations which are "incidental" to another action falling within the scope of s 42(c) would be the clearing of land carried out as preparation for the construction of a residential subdivision.

104 The Minister also refers to the Explanatory Memorandum to the *Environment and Heritage Legislation Amendment Bill (No 1) 2006* (Cth) ("the Bill"), s 189 of which introduced s 75(2B) into the Act. That Explanatory Memorandum refers to s 75(2B) as clarifying the position that "in making a controlled action decision, in relation to a proposed development, such as, a factory which will use timber from as (sic) RFA region, the Minister must not consider any adverse impacts of any RFA forestry operation". The example given by the Explanatory Memorandum, it is said, is analogous to the present the case and supports the conclusion that s 75(2B) applies to the present situation and requires the Minister to disregard the adverse impacts of any RFA forestry operation.

105 There are two difficulties with this argument. The first is that the Explanatory Memorandum expressly states that, if s 38 does not apply because of the operation of s 42, then the application of s 75(2B) will also be excluded.

106 The second difficulty is that the example of "a factory which will use timber from as (sic) RFA region" is inapt because the mere *use* of timber by a factory is not necessarily coextensive with the undertaking of a forestry operation *incidental* to the construction and operation of a factory which will use timber. The expression "use" can include a situation where the timber required for the operation of the factory was sourced at a time or in a way which demonstrates that it was not intended for or associated with a particular factory or process of manufacture. In such a situation, the factory would "use" timber from an RFA region, but the forestry operation which was necessary to supply that timber cannot be said to be connected or "incidental" to the operation of the factory. Accordingly, the example given in the Explanatory Memorandum is expressed at a broader level of generality than the specific circumstances contemplated by s 42(c). It is therefore unhelpful to rely on it as an indication that the use of timber by a

proposed action, such as the construction and operation of a factory, excludes the more specific circumstances to which s 42(c) is directed.

107 In addition, counsel for Gunns submits that the effect of s 38 is that forestry operations conducted in accordance with an RFA are not subject to the prohibitions contained in Part 3 of the Act. It is said that, if the forestry operations are to be undertaken in accordance with the Tasmanian RFA, those operations cannot *become* prohibited under Part 3 simply because they are related to an action for which approval is sought. If the operations were legal before the proposal, they cannot become illegal *as a result of* that proposal.

108 The difficulty with this submission is that no forestry operations have yet begun. This is not a situation where what was originally a "lawful" operation is transformed into an "unlawful" operation. It is not to the point to consider whether forestry operations which at one point in time are not prohibited may become prohibited at a later point in time because of the effects which the operation of the pulp mill may have. Given that no forestry operations for the pulp mill have yet begun, no appraisal of the effects of pulp mill *in conjunction with* the effects of forestry operations has been conducted, and therefore the suggested pre-existing legality of one (the forestry operations) has no bearing on a determination of the legality of the other (the proposed construction and operation of the pulp mill).

109 I turn to consider the terms of s 42(c).

110 The expression "incidental" is a word of wide import. In ordinary usage, the term can mean "liable to happen in connection with" or "naturally attaching to" or "naturally appertaining to". These are meanings for which The Wilderness Society contends, saying that the forestry operations in this case are related to or necessary for the operation of the pulp mill, and therefore are incidental to it. However, the word can also mean "following upon as a subordinate circumstance". This is the construction for which counsel for Gunns contends, arguing that the forestry operations cannot be said to be subordinate to the operation of the pulp mill, and thus are not incidental to it. There is no force in this latter contention because something can be both subordinate and incidental; there is no mutual exclusion of the two concepts.

111 In my view, the meaning of the word "incidental" in s 42(c) is sufficiently wide to include the relationship between the operation of the pulp mill and the RFA forestry operations which will supply the necessary timber. Included in each of the definitions canvassed above is a presumption that some relationship exists between the operation of the pulp mill and the forestry operations supplying the wood.

112 Whether a particular forestry operation is in fact "incidental" to a particular action will require consideration of the proposed action and its degree of dependence and closeness of association with the relevant forestry operations. In my view, the RFA forestry operations relevant to this case may be characterised as incidental to another action, namely the construction and operation of the mill.

113 The interpretation of "incidental to" favoured by the majority in this case could produce the odd result whereby fortuitous or subordinate logging on a relatively small scale, such as a one-off activity to clear part of a forest to make space for the construction of a road or school or playing field, would be covered by s 42(c) as incidental, yet other essential forestry operations on a very large scale and having much greater adverse impacts over several decades in relation to many millions of tonnes of harvested timber would be regarded as not incidental. In my view, this anomalous consequence points strongly against the interpretation favoured by the majority.

114 Furthermore, an interpretation of s 42(c) that limits the application of the provision to fortuitous small scale logging which is not essential to an action does not, in my view, accord with the purpose to which s 42 is directed. Section 42 lists three specific exceptions to the requirement in the Act that Part 3 is not to apply to an RFA forestry operation conducted in accordance with an RFA. Two of these exceptions arise where important matters of international environmental significance are at stake, namely sites on the World Heritage List or the List of Wetlands of International Importance. In this context, it would be incongruous to construe the third exception in s 42(c) in a way which confines its application to fortuitous or subordinate forestry operations which, because they comprise only one-off and relatively small scale related logging with limited adverse impacts on matters of national environmental concern, may be of much less significance. The preferable interpretation in my view is one which treats

the third exception set out in s 42(c) as having a level of importance and significance proportionate with the other exceptions in s 42.

115 The second question of construction relates to the meaning of "primary purpose" in s 42(c). It is important to note the use of the adjective "primary". Although a proposed action may have several purposes, the task of the decision-maker is to ascertain the purpose which is dominant, as opposed to other secondary, subordinate or collateral purposes. In this case, there is no real dispute that the proposed pulp mill is an action which does not have the primary purpose of forestry. The Minister conceded this, and counsel for Gunns, although previously suggesting otherwise, adopted the Minister's submissions.

116 The term "forestry" in s 42(c) is not defined in the Act, the Tasmanian RFA or any Commonwealth legislation to which I have been referred. In my view, the primary meaning of the term denotes the science or practice of studying, managing, growing and caring for forests and forest plantations. This interpretation is supported by both the definition of "RFA forestry operation" in the Tasmanian RFA, which refers to the "management" and "harvesting" of trees, and the description given by *The Macquarie Dictionary* (2nd edition), which is "the science of planting and taking care of forests" and "the act of establishing and managing forests". Therefore, the expression "forestry", understood in context, does not cover the processing of wood into pulp after the wood has been chipped. Such a secondary processing is two stages removed from the process of managing and harvesting forests.

117 Taking into account all of the above, I am of the view that s 42(c) is sufficiently broad to permit a conclusion that the RFA forestry operations contemplated in the present case can be regarded as incidental to another action, namely the construction and operation of the pulp mill, which has as its primary purpose the processing of wood in a way that does not relate to forestry.

118 The above conclusion is supported by reference to the purpose for which the Act was created. As is evident from its title, from its objects as expressed in s 3, and from the Explanatory Memorandum to the *Environmental Protection and Biodiversity Conservation Bill 1998* (Cth), the purpose of the Act is to ensure the protection of the environment, while

promoting ecologically sustainable development and conserving biodiversity through the responsible exercise by the Commonwealth of its obligations and powers to consider proposed actions in an efficient and timely manner.

119 As noted above, neither the operation and effect of s 42(c), nor the impact which the RFA forestry operations necessary to source wood for the pulp mill will have on the matters protected by Part 3, were considered by the Minister when making his controlled action and assessment approach decisions. Having intentionally excluded consideration of these matters, the Minister erred in law in relation to his decisions under ss 75 and 87 of the Act. Specifically, when considering the mandate in s 75(2B) that he must not consider any adverse impact of "any RFA forestry operation to which, under Division 4 of Part 4, Part 3 does not apply", the Minister erred in law by not considering whether and how Division 4 of Part 4 applied in these circumstances. The failure to address a relevant and clearly significant statutory question, and the resulting misconception of the nature of the statutory power to be exercised and the relevant considerations to be taken into account, constitutes an error of law, and as a consequence the decisions are invalid: see *Craig v South Australia* [*[1995] HCA 58*](); (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* [*[2001] HCA 30*](); (2001) 206 CLR 323 at 351 (per McHugh, Gummow and Hayne JJ); *Re Patterson; Ex parte Taylor* [*[2001] HCA 51*](); (2001) 207 CLR 391 at 419 (per Gaudron J).

120 In my view, to discharge the statutory obligations arising in this case, the Minister was required to consider (i) whether the RFA forestry operations undertaken to supply wood to the pulp mill were "*incidental* to another action whose *primary purpose* does not relate to *forestry*" (see s 42(c)), and if they were, (ii) whether the RFA forestry operations have any "adverse impacts" on matters protected by Part 3 of the Act (see s 75(2)(a)). If this process of consideration had been followed, then on the proper construction of the relevant provisions it may have been open to the Minister to reach a different conclusion. Therefore, the failure to address s 42(c) means that it would not be futile for the question to be reconsidered by the Minister according to law. Accordingly, I am of the view that the decisions under ss 75 and 87 of the Act in this case are invalid because they are based on an error of law.

121 I agree with the observation of the majority that the approval process was progressed by the Minister with "studied haste". In circumstances where it was seen as expedient to comply, so far as possible, with the schedule urged by Gunns, it is not difficult to see how consideration of s 42(c) was overlooked both by the Minister and his advisors when he decided to exclude from consideration the impacts of the pulp mill on the matters protected by Part 3 of the Act.

122 Accordingly, the decisions of the Minister should be set aside, and the declaratory relief sought by The Wilderness Society should be granted.

IMPROPER PURPOSE

123 The Wilderness Society submits that the Minister made his assessment approach decision under s 87 and determined a period of consultation under s 95(2)(c) for the purpose of satisfying, and avoiding disruption to, Gunns' commercial imperative to have these decisions made no later than August 2007. This, it is said, was a substantial operative purpose of the Minister when making his decisions, and was extraneous to the purpose for which the decision-making power was conferred under those sections of the Act.

124 The matters on which The Wilderness Society relies to demonstrate the Minister's improper purpose include the following:

• Evidence provided by Mr Early before the primary judge;

• The clear and unequivocal desire expressed by Gunns to the Minister to receive approval by August 2007;

• The emphasis in communications between Gunns and the Department on co-operation by the Minister with meeting Gunns' expressed time constraints;

• The communicated desire of the Minister that the Department "agree" on a schedule with Gunns, together with the Minister's statement that he wished to be informed if the August deadline could not be met;

• The evidence in a briefing note by the Department to the Minister of an

agreement with Gunns regarding the proposed timing of the process;

• The absence of any other expressed reason for adopting the very tight timetable proposed by Gunns;

• The fact that the decisions were made within Gunns' proposed timetable; and

• The fact that the times fixed were extremely short and carried a risk of failing to provide a proper opportunity to make and properly consider inquiries, representations and the large volume of relevant material.

125 In relation to the last point, the majority expresses in its reasons, which I agree with, the basis for rejecting the suggestion that there has been a failure to provide procedural fairness.

126 The primary judge rejected The Wilderness Society's contention of the existence of an extraneous or improper purpose. His Honour observed at [156] that an allegation of improper purpose is a serious one which should not be lightly inferred: see also *Industrial Equity Limited v Deputy Commissioner of Taxation* [1990] HCA 46; (1990) 170 CLR 649 at 672 (per Gaudron J).

127 In my view, the matters referred to above, considered either individually or collectively, are not sufficient to support any inference of improper purpose in this case. Neither the evidence before the primary judge concerning the briefing note drafted by the Department and its correspondence with Gunns, nor the eventual approach taken by the Minister, prompt the conclusion that the Minister improperly took into account Gunns' commercial imperatives. At most, these matters establish that the Minister fulfilled his obligations under the Act whilst also endeavouring to co-operate with Gunns' request, to the extent that his duties under the Act allowed him to do so. This does not meet the test of substantiality necessary to establish improper purpose: see *Thompson v The Council of the Municipality of Randwick Corporation* [1950] HCA 33; (1950) 81 CLR 87 at 106. There is no sufficient indication that the Minister agreed to assist Gunns in such a way as to compromise or depart from the purpose of his statutory powers in the Act.

128 Furthermore, it is to be noted that Mr Early gave evidence, accepted by the primary judge, that the Minister discussed with him the assessment approach decision, and asked him why the assessment was to be done on preliminary documentation rather than through a more onerous environmental impact statement. The fact that the Minister, as the evidence shows, bore several options in mind in respect of his assessment approach decision, and raised at least one of these options with his Departmental advisors, suggests that there was no improper collaboration between the Minister and Gunns to accommodate the latter's commercial requirements. The timetable ultimately adopted by the Minister was not inconsistent with the tight prescriptive timetable required by the Act, and, in any event, there is nothing in s 87 which prevents the Minister giving, within appropriate limits, some weight to the timetable which Gunns considered necessary. Indeed, such a consideration gives effect to one of the objectives of the Act specified in s 3(2)(d) that the process for deciding the assessment approach should be "efficient and timely".

129 For the above reasons, I am not persuaded that the Minister took into account or gave substantial weight to any improper purpose when making his decisions.

SECTION 170(C) – EFFECT OF WITHDRAWAL

130 The Wilderness Society submits that, as a consequence of Gunns' withdrawal of its August 2005 referral, s 170C(4) of the Act operated to prevent any further referral in respect of the same action because the relevant provisions of the Act, namely ss 68, 75 and 87, no longer applied to the construction or operation of the pulp mill. It says that this interpretation accords with the language of the provision. Therefore, Gunns' third referral in April 2007, purportedly made under s 68, was invalid and incapable of supporting any further decisions under ss 75 or 87 of the Act. The Wilderness Society says that, in order to reach a different conclusion, it is necessary to read additional words into the section, an approach for which there is no proper basis.

131 Contrary to this submission, the Minister and Gunns submit that the effect of the provision is not to prohibit any future referral for the same action, or the consideration of such a referral in accordance with the legislative scheme. The respondents say that the reference to "action" is a

reference to the "subject-matter of a particular referral, and not [to] an action divorced from a particular referral". This is so because s 170C(1) makes it clear that the section is concerned with the situation where a person "has *referred a proposal* to take an action" (emphasis added).

132 There are several difficulties with the submission of The Wilderness Society. The first is that the language of the provision does not contain any prohibition, either express or implied, on the making of another later referral in respect of the same action. One impractical consequence of The Wilderness Society's submission would be that where a referral was withdrawn, for example, for temporary financial reasons such as lack of funding, it would not subsequently be able to be resubmitted because such a later referral in respect of the same action would be prohibited. However, if such a far-reaching and substantial constraint was intended, there should be an indication in the form of an express prohibition or a clear implication in the Act. There is no such indication. The construction suggested by The Wilderness Society serves no purpose which the legislation seeks to achieve.

133 The second difficulty lies in the use of the conditional phrase "would ... have applied" in s 170C(4). The use of this expression (rather than, for instance, "were applicable" or "applied") supports the view that the provision dispenses with the need for the Minister to follow through with subsequent steps in the approval process which would otherwise have applied if there had not been a withdrawal of the relevant referral. These words do not disclose an intention on behalf of the legislature to prohibit a further referral in respect of the same action.

134 In my view, it is not possible to see any basis for the implication in s 170C that a withdrawal of one referral in respect of an action should lead to an incapacity to submit another referral for the same action at a later time when relevant circumstances have changed. Any withdrawal which is made must necessarily occur in a certain temporal and circumstantial context and, in light of this, it is difficult to perceive any cogent reason why such a withdrawal would prevent consideration of the same action when that context has changed. The Explanatory Memorandum to the Bill clarifies that the purpose of the provision is to *empower* withdrawal of referrals at any stage if the proponent does not wish to proceed further with the assessment of the proposal. This indicates that the provision was

designed to *enable* withdrawal rather than to *prohibit* subsequent referrals.

135 To support its position, The Wilderness Society has referred to other provisions of the Act, including ss 74B, 74C, 78, 156A and 156D. However, in my view, these provisions, taken either alone or together, deal with particular circumstances which do not assist in the interpretation or effect of s 170C. For example, s 74C is an empowering provision which enables a party to withdraw a referral of a proposal which the Minister considers "clearly unacceptable". In these circumstances, after receiving notice from the Minister, the person proposing to take the action may withdraw the referral and either take no further action in relation to the proposed action or refer a new proposal to take a modified action. There is nothing remarkable about empowering a person to do this in relation to a proposed action which the Minister considers is clearly unacceptable. Accordingly, this provision throws no light on the interpretation of the language used in s 170C because it refers to a different action in a different context.

136 In my view, the construction contended for by the respondents makes sense, avoids obvious inconvenience of result, accords with the language used in s 170C(1) and provides the flexibility which is necessary and appropriate for a provision of this kind.

137 For the above reasons, I accept the construction of s 170C(4) proposed by the respondents and reject the construction contended for by The Wilderness Society.

CONCLUSION

138 On the basis of my reasons and findings, I am unable to join the majority's disposition of this matter. For my part, I would order that the appeal be allowed because the Minister erred in law when misconstruing his obligation under s 75(2B) of the Act, that the primary judge's decision be set aside in relation to that point and that the appeal be otherwise dismissed.

I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin.
Associate: Dated: 22 November 2007

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Date of Hearing:	17, 18 and 19 October 2007
Date of Judgment:	22 November 2007

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