occurring so as to accord with recent changes to the Act which substituted "development plan consent" for "provisional development plan consent" and "building rules consent" for "provisional building rules consent".

The second change affected Regulation 5A. Previously, Torrens title land division of a Class 1 or 2 building required that any walls exposed by the division to a fire source must be appropriately fire-rated and no development authorisation could be issued until this occurred. Now, Regulation 5A provides that *a certificate under Section 51* (rather than a development authorisation) cannot be issued until the appropriate fire-rating has occurred.

The third change introduces a new form of development by amendment of Schedule 2 to the Regulations, being the division of land subject to a lease under a prescribed Crown Lands Act (in practical terms, land held pursuant to a Crown Lease) where an application has been made to freehold the land and it is envisaged the division would occur after the grant of the land in fee simple. This seeks to address the situation which arose in *Hagger v Development Assessment Commission* [2006] SAERDC 56.

Development (Schedule 10) Variation Regulations 2007

By Lisa Goodchild – Normans Waterhouse Lawyers

The Variation Regulations vary the Development Regulations 1993 ("the Regulations"). A new clause 3A has been inserted into Schedule 10 to the Regulations prescribing that any development involving a change in the use of land for the purpose of establishing or expanding a commercial forest within a prescribed area where the area to be planted pursuant to the development equals or exceeds 20 hectares.

For the purpose of this clause a prescribed area will mean any areas in the Adelaide Hills Council, Alexandrina Council, Barossa Council, District Council of Mount Barker, City of Victor Harbour, District Council of Yankalilla, or any part of the City of Onkaparinga outside the metropolitan area or within the metropolitan area that is Policy Area 61 or 62 in the Rural Zone of the City of Onkaparinga Development Plan.

TASMANIA

Tom Baxter

The Wilderness Society Inc v The Hon Malcolm Turnbull, Minister for the Environment and Water Resources and Gunns Limited [2007] FCA 1178

As reported in the previous edition, on 2 May 2007 Minister Turnbull made two important decisions for the assessment of Gunns' Tamar Valley pulp mill proposal. The Minister decided that under the EPBC Act ss 75 and 87 respectively:

- Gunns' 2007 referral of its pulp mill proposal is a controlled action subject to the EPBC controlling provisions the Minister specified; and
- the assessment approach is by preliminary documentation.

On 17 May 2007, The Wilderness Society filed an application in the Federal Court seeking judicial review of both these decisions. The application named Minister Turnbull and Gunns Limited as the two respondents. The Construction, Forestry, Mining and Energy Union subsequently applied for leave to intervene opposing the application but this was refused.

The hearing of the proceeding was expedited and occurred from 4-6 and 9-10 July 2007. On 9 August 2007, Marshall J delivered his decision in *The Wilderness Society Inc v The Hon Malcolm Turnbull, Minister for the Environment and Water Resources and Gunns Limited* [2007] FCA 1178 (the TWS proceeding).

In accordance with Federal Court practice in some cases of public interest, importance or complexity, Marshall J also provided a summary of the Court's reasons for judgment, as follows.

> "1. ....
>
> 2. This proceeding involves an application by The Wilderness Society Inc (The Wilderness Society) made under ss 5 and 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth) to review two decisions made by the Commonwealth Minister for the Environment and Water Resources (Minister). The two decisions were made by the Minister during the assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) of a proposed action, being the proposal by Gunns Ltd to construct and operate a pulp mill at Bell Bay in Tasmania. The first decision was to designate the action as a controlled action subject to certain controlling provisions. The second decision was that the relevant impacts of the proposed action be assessed on preliminary documentation under Div 4 of Pt 8 of the EPBC Act. This proceeding does not involve any judgment by the Court on whether it is appropriate or not that a pulp mill be constructed at Bell Bay.
>
> 3. The Wilderness Society made the following allegations:
> - there is no valid referral of the proposal to support either decision;
> - in making the first decision, the Minister misconstrued s 75(2B) of the EPBC Act, failed to take into account a relevant consideration, being the potential adverse impact on matters of national environmental significance of sourcing timber from Tasmanian forests to supply the pulp mill, or took into account an irrelevant consideration;
> - in making the first decision, the Minister failed to consider whether the pulp mill would have or is likely to have a significant impact on the environment on Commonwealth land and thereby failed to take into account a relevant consideration;
> - the Minister misconstrued and/or misapplied s 87(5) of the EPBC Act in making the second decision;
> - in making the second decision, the Minister denied The Wilderness Society, and other members of the public interested in the assessment of the proposed action, procedural fairness;
> - the second decision is invalid because it is affected by apprehended bias in the Minister;
> - the second decision involved an improper exercise of power by the Minister; and
> - the second decision was manifestly unreasonable.
>
> 4. ....
>
> 5. The Court has rejected all grounds of review raised by The Wilderness Society. It will make a formal order dismissing the application. The question of costs is reserved and will be dealt with by written submissions."

Justice Marshall's reasons for judgment are available in full via http://www.fedcourt.gov.au

On 14 August The Wilderness Society filed an appeal against Marshall J's judgment and orders. The notice of appeal is at http://www.wilderness.org.au/pdf/pulpmill/TWS-Notice-of-Appeal140807.pdf .

The Full Court appeal will be heard in October 2007.

The Investors for the Future of Tasmania Inc v Minister for the Environment and Water Resources [2007] FCA 1179

The Investors for the Future of Tasmania Inc (IFT) proceeding was heard at the same time as the TWS proceeding summarised above. On 9 August 2007, after delivering his judgment in the TWS proceeding, Justice Marshall delivered his judgment in the IFT proceeding.

The grounds of review relied on by IFT overlapped substantially with the grounds relied on in the TWS proceeding. As in the TWS proceeding, Marshall J rejected all grounds of review raised by IFT and dismissed its application. Justice Marshall did not repeat in full his reasons for judgment from

the TWS proceeding, but said the two judgments should be read together. At paras [7] – [19] His Honour added some comments regarding IFT's procedural fairness ground of review, as follows.

> **[7]** IFT was incorporated on 9 October 2006 as a result of Gunns' proposal to build and operate a pulp mill at Bell Bay. IFT's members own, operate and/or are involved in various businesses and organisations, most of which are located in Launceston, Bell Bay and the Tamar Valley. Those businesses are in industries such as tourism, hospitality, food, agriculture, resources, public relations and training.
>
> **[8]** IFT appeared before the RPDC, including at the 22 February 2007 directions hearing. Before the demise of the RPDC, IFT had intended to obtain detailed expert reports on flora and fauna and social and economic issues including, but not confined to, the impact of the pulp mill on tourism. IFT also intended to seek legal, economic and other expert advice on the material that Gunns had submitted to the RPDC. IFT says that the 2007 assessment approach decision and the requirement to make comments within 20 business days of that decision, denied it the opportunity to undertake further investigations and to obtain detailed expert reports.
>
> **[9]** In the TWS proceeding, I held that s 131AA(7) of the EPBC Act is a complete statement of the Minister's obligation to provide procedural fairness in relation to his decision to approve, for the purposes of a controlling provision, the taking of an action and any conditions attaching to approval. If that is not correct and the obligation is wider, it is one that must be considered in the context of the EPBC Act and in the context of the facts and circumstances before the Minister (see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 592 at [26]).
>
> **[10]** That the EPBC Act has provisions dealing with steps to be taken before a decision on approval is made suggests that the EPBC Act makes careful provision for when, and to what extent, comment from interested persons and/or the public is required.
>
> **[11]** Under s 74(3) of the EPBC Act, as soon as practicable after receiving a referral of a proposal to take an action, the Minister must cause to be published on the internet the referral and "an invitation for anyone to give the Minister comments within 10 business days" on whether the action is a controlled action. In making a controlled action decision under s 75, the Minister is required by s 75(1A) to consider the comments received in response to such an invitation, as long as they are received within the time specified. Under s 75(5), the Minister is obliged to make the controlled action decision within 20 business days after receiving the referral.
>
> **[12]** By contrast, there is no obligation on the Minister to invite comments and consider comments when making an assessment approach decision under s 87 of the EPBC Act.
>
> **[13]** There is no requirement in the EPBC Act to invite comments, or to consider the views of the public, on what assessment approach should be adopted. This tells strongly against the suggestion that the Minister has an obligation to accord procedural fairness to interested persons and the public concerning an assessment approach decision under s 87.
>
> **[14]** The Minister must consider the matters set out in s 87(3) in making an assessment approach decision under s 87(1). Those matters include, under s 87(3)(c), an obligation to consider any relevant information received in response to an invitation to the appropriate State or Territory Minister to comment on whether

the action is a controlled action and to give the Minister "information relevant to deciding which approach would be appropriate to assess the relevant impacts of the action ... " (see s 74(2)(b)(ii)).

[15] There is no similar obligation for the Minister to invite or consider any other comments on an assessment approach decision. There is nothing to stop the Minister taking into account the views of interested persons or the public on the appropriate assessment approach, however, nothing in the EPBC Act compels the Minister to do so.

[16] A further complication with IFT's procedural fairness argument, and also in the TWS proceeding, is that it is difficult to assess whether there has been any practical unfairness until the Minister makes a decision on approval. The decision on approval may attach conditions on approval which assuage the concerns of opponents of the pulp mill. It must also be remembered that the Minister's decision on approval only concerns matters that are the subject of the controlling provisions, as well as social and economic issues. Environmental matters raised in IFT's evidence which extend beyond the controlling provisions, such as noise and air pollution, are matters for Tasmania.

[17] In order to establish practical unfairness, it must be shown that a person has been given an expectation by the Minister "as to a procedural step to be taken", which was not taken so that it may be said that a legitimate expectation held was disappointed (see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [36] per Gleeson CJ).

[18] Neither IFT nor any of its members or, indeed, The Wilderness Society Inc, can show it or they were misled by the Minister. The subjective expectation held by opponents of the proposed action was generated by the RPDC process. While the Minister's predecessor agreed on assessment through the RPDC jointly with Tasmania, nothing the Minister did contributed to the demise of the RPDC. Further, the number and nature of the environmental matters relevant to the Minister's decision on approval are narrower than those dealt with by the RPDC. Even in that respect, the evidence of IFT is very general. There is no evidence of what precise material would have been put to the Minister had he decided on a longer period for "comment" than 20 business days. For example, Ms Christina Holmdahl referred to "detailed expert reports" on "flora and fauna and social and economic issues including but not only the impact on tourism".

[19] The kind of material which IFT wished to put to the Minister, if there was more time, largely relates to matters which are relevant to Tasmania's assessment process, rather than the Minister's. The same can be said of the matters identified by Mr Paul Oosting at [59] of his affidavit dated 16 May 2007 in the TWS proceeding, with the exception of "marine impacts (including environmental impacts and particular species impacts)", "threatened species, as it relates to the site of the pulp mill", "social impacts" and "economic impacts". The limited nature of the matters which could be addressed with respect to the controlling provisions, combined with the limited nature of the evidence that could be put forward in respect of them, does not make it clear that the 20 business day time limit for comment amounts to a denial of procedural fairness in the circumstances.

Justice Marshall then dismissed the IFT application.