

## TASMANIA

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**Full Court Majority Dismisses Pulp Mill Assessment Appeal:**

As previously reported, on 2 May 2007 the Hon Malcolm Turnbull, (then) Minister for the Environment and Water Resources, decided the EPBC Act assessment process for Gunns' latest pulp mill referral. The Minister's decisions relevantly included that the EPBC assessment approach to be used was assessment on preliminary documentation, with 20 business days for public comment.

The Minister's subsequent statement of reasons also stated, *inter alia*, "... 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."

On 17 May 2007 The Wilderness Society instituted an application seeking judicial review of relevant decisions by the Minister. On 9 August 2007 this application was dismissed by Marshall J: [2007] FCA 1178.

The Full Court of the Federal Court (Branson, Tamberlin and Finn JJ) heard the Society's appeal from 17-19 October 2007. On 22 November the Court, by majority (Tamberlin J dissenting), dismissed the appeal: *The Wilderness Society Inc v. Hon Malcom Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175.

Following is the Full Court's summary of the effect of its reasons for judgment:

"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."

### **Full Court Upholds Forestry Tasmania's *Wielangta* Appeal**

On 30 November 2007, the Full Court of the Federal Court delivered its decision in *Forestry Tasmania v Brown* [2007] FCAFC 186 (30 November 2007). In a joint judgment, Sundberg, Finklestein and Dowsett JJ upheld Forestry Tasmania's appeal against Marshall J's judgment.

Vanessa Bleyer, '*Brown v Forestry Tasmania* (No 4) [2006] FCA 1729 (19 December 2006) – Federal Court finds logging unlawful' Summer 2006: 4 *NELR* 25-30 discussed the first instance decision. Following the appeal, the case is now the subject of an article by Shashi Sivayoganathan, '*Forestry Tasmania v Brown: Biodiversity Protection – An Empty Promise?*' later in this edition.

Forestry Tasmania expressed delight at the Full Court judgment: <<http://www.forestrytas.com.au/news/2007/11/forestry-tasmania-comments-on-federal-court-decision-on-wielangta>>.

Senator Brown said he intended to apply to the High Court for special leave to appeal the Full Court's decision: <<http://www.on-trial.info>>.