FEDERAL COURT

Waratah Coal Inc v Minister for the Environment Heritage and the Arts [2008] FCA 1870

This case involved a challenge to the Minister's decision to deny EPBC Act approval for a new coal project in central Queensland. The applicant is a coal exploration company incorporated in Canada. It has identified a resource of some 4.3 billion tonnes of coal in the Galilee Basin in Queensland approximately 38 kilometres north-west of Alpha. It intends to establish a new coal mine, railway and port to export high volatile, low sulphur, steaming coal to international markets. The project also includes the possible establishment of a water supply pipeline between the coal mine and Lake Dalrymple, and the provision of a high voltage distributor electricity transmission line between the closest high voltage distributor and the port. The Project required both State and Federal government approval.

The Referral was submitted by the applicant to the Commonwealth Minister for Environment Heritage and the Arts on 29 July 2008. On 5 September 2008 (more than the 20 days later) the Minister's department advised the applicant by telephone that it was in the process of making an announcement (pursuant to s 74B EPBC Act) pertaining to the Referral, namely that the Minister had declared the Project "Clearly Unacceptable" and had dismissed the application for referral. A copy of the decision was forwarded to the applicant on 7 September 2008.

The applicant sought judicial review under s 39B *Judiciary Act 1903* (Cth) based upon the wording of s 74B, which suggests that a Minster's decision must be made within 20 business days. The application was rejected by Collier J. in the Federal Court, who stated:

> '... a plain reading of the EPBC Act demonstrates clearly that failure of the Minister to comply with a time limit prescribed by the EPBC Act does not affect the validity of a decision under the Act made outside a set time limit, including decisions made under s 74B.' ....
>
> 'The event upon which the operation of the section depends is the prompt making of a decision by the Minister that the proposed action will have unacceptable environmental impacts, not the passage of 20 business days. In other words the ***making*** of a decision of the Minister is critical – the time period of 20 business days, while relevant to the making of the decision, does not determine its validity (cf *Hatton v Beaumont* (1977) 2 NSWLR 211 at 224).'

NEW SOUTH WALES - Land and Environment Court

Scrap Realty Pty Limited v Botany Bay City Council [2008] NSWLEC 333

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Can you add a separate lot using Section 96?

Let's assume you wish to add a lot to your existing development. Do you need to lodge a new development application or can you amend your existing consent? Until the decision in *Scrap Realty Pty Limited v Botany Bay City Council*, there was no clear answer to that question.

Background

Scrap Realty Pty Limited owns land at Botany in two separate lots, being Lot 5 and Lot 21 (the **Site**). It also owns land immediately adjacent to the Site which was a former road reserve, Lot 1 which the Council sold to Scrap Realty many years ago. The Site is leased to a tenant (OneSteel) who uses the site for a scrap metal yard pursuant to a 1976 consent for scrap metal storage (the **1976 Consent**). There was no consent for the use of Lot 1 for storage of scrap metal.

In 2008, Scrap Realty applied to the Council under s96(2) of *EP&A Act* to modify the 1976 Consent to include Lot 1. Proceedings were commenced in the Land and Environment Court following the deemed refusal of the modification application. The issues raised by the Council in the proceedings related to the following:

1. whether the modification proposed was substantially the same as the development currently approved;
2. whether the Court should, on its merits, approve the modification application given the issues relating to stormwater, contamination, amenity and safety that were present on the Lot 1; and
3. whether the Court should approve the modification application without requiring the modification of the development on the Site to ameliorate the same merit issues raised in relation to Lot 1, in particular the stormwater and contamination issues, that were also present on the Site.

Can a separate title of land be added using Section 96?

The threshold question of whether the modification proposed was substantially the same as the approved development became the main question to be answered. The Council submitted that the extension of a development consent to include an additional lot of land cannot be achieved under s96 of the *EP&A Act*. It was argued that the description of the land is so essential to a development that it cannot be modified.

In response to this submission, Preston CJ held:

> It is true that a consent authorises the carrying out of development on only the land the subject of the development consent. Development cannot be approved in abstract, isolated for the land to which it relates. The development and the land on which the development is carried our are indivisible. However, this does not preclude the consent being modified to extend the development approved by the consent to other land.

Essentially, Preston CJ held that so long as a proposed modification can be said to be substantially the same development as that which is currently approved, an additional parcel of land can be included in a consent under s96 of the *EP&A Act*.

Is the addition of a Lot substantially the same development?

In considering whether the addition of Lot 1 was substantially the same, Preston CJ had regard to a qualitative and quantitative comparison of the development consent and the consent as proposed to be modified. Indirectly, his Honour was referring to the principle of assessing modifications in terms of quantitative and qualitative assessment as established in *Moto Projects Pty Limited (No.2) v North Sydney City Council* (1999) 106 LGERA 298.

In quantitative terms, Preston CJ held that the addition of Lot 1 was not a material addition due to its small size (it was only increasing the site area by 10%). In qualitative terms, Preston CJ held that the mitigation measures proposed to limit the impacts of the addition of Lot 1 were such that there was no merit reason to refuse the application.

Considering unacceptable environmental impacts on the site

A complicating factor in these proceeding was Council's submission that the use of the Site was having such unacceptable environmental impacts that the extension of the site area should not be granted unless the Applicant installed the mitigation measures it proposed for Lot 1 (i.e. capping and stormwater works) over the Site as well. In

relation to this argument, Preston CJ held:

> I am not minded to decline to approve a modification application which I have determined is appropriate ... because some aspects of the current operation ... are said to be environmentally unacceptable. There is no evidence establishing that approval of the modification application, by allowing the approved storage use to be carried out on Lot 1 ... will, in any way, exacerbate the environmental impacts or otherwise adversely impact the use of Lot 5.

A further issue that arose (but was not decided) was the extent to which a consent authority could impose conditions on a modification under s96 of the *EP&A Act*. The Council suggested that the consent authority has the right to revisit a development consent if an application is made to modify that consent. In contrast, Scrap Realty argued that only those conditions sought or consented to by an applicant should be able to be imposed. The Court held that because of the amendments made to the application by the Applicant during the course of the hearing that this issue did not need to be decided.

VICTORIA - Victorian Civil and Administrative Tribunal

Yarra Ranges SC v Australian Native Landscapes [2008] VCAT 2342

This case dealt with several proceedings arising from odour nuisances arising from composting facility operated by Australian Native Landscapes Pty Ltd (ANL) within a Green Wedge Zone (Schedule 2) on land subject to an Environmental Significance Overlay under the Yarra Ranges planning scheme. The facility is on land owned by Boral Resources (Vic) Pty Ltd where it conducts a quarry, to the north east of Lilydale between Lilydale and Coldstream.

For over two years complaints have been made by residents living in the surrounding area and a local school about intermittent recurring odour nuisances which they have been suffering at locations up to several kilometres away from the composting site. The odours complained of have been described as a sweet vomit smell and eucalyptus or burnt eucalyptus odour. At times the odours were said to be so severe as to significantly interfere with the enjoyment of life, with residents needing to stay indoors and complaints of adverse symptoms including burning sensations in the throat, itchy eyes, and in a few instances, dry retching.

These proceedings included an application by the responsible authority under s.114 of the *Planning and Environment Act 1987* (PE Act) for an enforcement order, and a request by the responsible authority under s.87 PE Act for cancellation of the relevant planning permit, which would amount to removing the ability of ANL to lawfully conduct its activities on the land. A third proceeding was an application by ANL under s.33A(1)(b) of the *Environment Protection Act 1970* (EP Act) to review the failure of the EPA to grant a licence to discharge waste to air.

After detailed consideration of the history of the facility, the Tribunal concluded that the complainants have been subjected to repeated serious odour nuisances and that composting procedures cannot go on as they have been conducted in the past. However, given that ANL is willing to commit further effort and money to achieving nuisance free operation, it should be allowed a further opportunity to establish odour free operation. Accordingly orders were made allowing the parties to make submissions as to how matters should proceed.