Supreme Court of Victoria

Environment East Gippsland v VicForests – final submissions.

The closing arguments in the Brown Mountain-Long Footed Potoroo case were heard by Justice Osborn in the Supreme Court of Victoria on 23rd-25th March 2010. These submissions culminated a 17 day trial which started on the 1st March. Justice Osborn has reserved his decision.

The main arguments by Debbie Mortimer of Counsel on behalf of Environment East Gippsland focused on breaches of the Victorian laws for protection of threatened species by VicForests and failure to adhere to the Precautionary Principle. In particular the standards and conditions in the Fauna Guarantee Act Action Statements, Forest Management Plan and the Code of Forest Practices hasn't been and can't be complied with by VicForests.
In response VicForests argued that

- EEG didn't have standing being too small a group, without a special interest in Brown Mountain, and only an emotional or intellectual interest.
- The presence of various threatened species including the Potoroo, Sooty Owl, Powerful Owl and Giant Burrowing Frog was challenged. For others like Quolls, Gliders and Freshwater Crayfish, it was argued that adequate protection is provided. In any case it was argued that the Department of Sustainability and Environment is responsible for protection of threatened species, not VicForests.
- The Flora and Fauna Guarantee Act and Sustainable Forests (Timber) Act, are not enforceable in this context.
- The relevant Forest Management Plan was out of date (ended in 2006). However, after Justice Osborn pointed out that this would make all logging in area illegal that point was then quickly resolved.

For further details see the Environment East Gippsland from EEG website at: http://www.eastgippsland.net.au/?q=campaigns/brown_mountain

Friends of Mallacoota Inc v Minister of Planning & Minister for Environment and Climate Change [2010] VSC 222 (27 May 2010)

This case involved a highly controversial proposal for a new boat ramp on the ocean beach just south of Mallacoota Inlet. The East Gippsland Shire Council wishes to replace this ramp because it does not provide safe and efficient launching and retrieval of boats under recurrent tidal and other sea conditions. The existing ramp is close to a popular swimming beach which is also heavily used during holiday periods. The ramp also lies within a sequence of breaks along the point which are popular with surfers. The Council's preferred project would create a new ramp at least 100 m further to the south protected by at least one breakwater approximately 130-140 m long and 2.8 m high. The ramp would be capable of launching craft up to 10 m in length. It would be complemented by upgraded car parking facilities. The Council sought permission to construct and carry out works on coastal Crown land from the Minister pursuant to s 38 of the *Coastal Management Act* 1995, and a permit for the removal of native vegetation incidental to the upgrade of the car park pursuant to the Planning and Environment Act 1987. In August 2000 the then Minister for Planning required preparation of an Environment Effects Statement ('EES') in respect of the proposed works pursuant to the provisions of the *Environment Effects Act* 1978 ('the EE Act'). In May 2007 the then Minister 'called in' the planning permit application and in effect took over the role of responsible authority from the Council with respect to the determination of that application.

In October 2008 the EES panel delivered a written report recommending that each of the options put forward for a new boat ramp be rejected and that the existing ramp be upgraded. The report comprised some 171 pages and contained a detailed analysis of the issues canvassed before the panel and the evidence presented to it. The Minister rejected this recommendation on the basis that it:

> "fails to consider the issue of inherent risks associated with swimmers and other beach users in close proximity

> to boating traffic near the current launch ramp location and that to do nothing is not an acceptable long term option. It is my assessment that insufficient weight was placed on the advice from the relevant local port manager in relation to the current risks of boaters and other water users."

The plaintiff sought review of this decision in an application to the Supreme Court, contending that:

> (a) the Minister failed to exercise the jurisdiction conferred by the EE Act ...;
> (b) the Minister took into account irrelevant considerations ...; and
> (c) the Minister denied the plaintiff procedural fairness ....

In rejecting all three arguments, Justice Osborn stated:

> "54 There is nothing in my view prohibiting a Minister from accepting either parts of an EES or parts of the report of a panel as accurately identifying relevant environmental impacts. It was open to the Minister as part of his assessment to express his conclusions by reference to and partial adoption of the panel report. Likewise there is nothing inherent in the notion of 'assessment' as such, which precludes the Minister from expressing a view as to the ultimate significance in relative terms of particular environmental impacts. There is also nothing in the EE Act which suggests the Minister's assessment of the environmental effects of works (whether public works or works the subject of a s 8 requirement) should be confined and not address the question of the significance of particular environmental impacts.
> ...
> 61 The EE Act does not define 'environment'. I am not however persuaded that the assessment of environmental effects of proposed works required by ss 4 and 8 of the EE Act is intended to exclude social effects (including economic effects in the sense I have identified).
> ...
> 88 The matters upon which the Minister based his assessment were not novel. He essentially gave different weight than the panel did to factors which were the subject of the EES itself, evidence and submissions before the panel, and the panel report. In so doing he expressed a different incidental assessment of the potential to address safety issues associated with the proposal by way of developing further design and operational measures. In my view it was open to the Minister to decide to proceed without inviting and receiving further comments pursuant to s 9(2)."

Victorian Civil and Administrative Appeals Tribunal

Alanvale Pty Ltd & Anor v Southern Rural Water & Ors [2010] VCAT 480 (21 April 2010)

The applicants Alanvale and Graham sought groundwater extraction licences from Southern Rural Water Authority for their respective properties north-west of Port Fairy. The Authority refused their applications and they then sought a review of these decisions by VCAT. Dr Baulch and other local landholders support the Authority's decision. VCAT heard detailed scientific evidence presented by both the applicants and the Authority. Dr Baulch and other landowners have given us the benefit of their direct observations about groundwater levels in their bores and the behaviour of other natural systems. VCAT decided that the licences should not be granted and provided the following summary of its reasons:

"This case concerns the strategic management of water resources and the long term sustainability of groundwater as a valuable but finite resource.

Rainfall is the key to the longer term security of this resource. However, rainfall is subject to short and long term variability, as well as long term climate change influences. There is evidence that the pattern of rainfall is in a state of change. What has happened in the past will not be the same as what we can expect to happen in the future.

Applying the precautionary principle, the Tribunal has decided that the licences, which are the subject of review in this proceeding, should not be granted due to lack of certainty about the existing and future projected availability