

# The Wilderness Society v Malcolm Turnbull & Gunns Ltd

Appeal to the Full Bench of the Federal Court of Australia

Tasmania Registry: TAD 21 of 2007



The Wilderness Society (TWS) applied to the Federal Court in May 2007 for a judicial review of two decisions of the Federal Minister for the Environment and Water Resources, Malcolm Turnbull. The decisions made under the Commonwealth *Environment Protection and Conservation Act* 1999 (EPBC) established a fast-tracked process to assess Gunns' proposed pulp mill at Bell Bay in Tasmania.

There were 9 grounds for challenging the Minister's decision, but in August Justice Marshall rejected all the grounds for the challenge. *The Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178.

The Wilderness Society is now appealing Justice Marshall's decision. The case will be heard by the Full Bench of the Federal Court (Justices Branson, Finn and Tamberlin) on 17 October 2007.

There are 4 grounds for the TWS application:

1. The Minister (and the judge) misinterpreted the EPBC Act in that the Act does not allow a company to withdraw and resubmit essentially the same proposal.
2. The Minister (and the judge) misinterpreted the EPBC Act by finding that the impact on nationally significant forests of the mill's sourcing of wood could not be assessed under the Act.
3. The Minister's decision on the assessment approach was not procedurally fair in that the public was not afforded a reasonable opportunity to comment on the proposal mill.
4. In considering Gunns commercial imperatives in deciding the assessment approach, the Minister acted with an improper (extraneous) purpose.

If TWS's application is successful, either a new assessment approach could be developed or the proposal would need to be assessed under the process mandated in October 2005.

**Note: Although some of the orders sought seek to over-turn the decision to approve the mill, this challenge is based on the assessment process, not the environmental impacts of the mill itself or the decision to approve the mill.**

## Timeline

**15 December 2004:** Gunns refer the pulp mill proposal to the Environment Minister including two alternative locations and technologies.

**24 January 2005:** The Minister determines that the pulp mill is a "controlled action" meaning that it comes under the EPBC Act.

**23 March 2005:** The Minister decides that the mill proposal will be assessed through an Integrated Impact Assessment conducted by the Tasmanian Resource Planning and Development Commission (RPDC).

**May 2005:** RPDC halts the assessment process after Gunns change scope of the proposal. Gunns withdraw the referral sometime before 15 August.

**11 August 2005:** Gunns refer a new pulp mill proposal to the Minister.

**5 October 2005:** The Minister determines that the pulp mill is a "controlled action".

**26 October 2005:** The Minister establishes a process to assess the pulp mill via an Integrated Impact Assessment by the RPDC.

**28 March 2007:** Gunns allegedly withdraws the August 2005 referral.

**2 April 2007:** Gunns makes a new referral to the Minister for what TWS says is essentially the same project.

**4 May 2007:** The Minister accepts this new referral and establishes a different assessment process based on preliminary documentation.

**17 May 2007:** The Wilderness Society applies to Federal Court for review of Minister's decision.

**4-10 July 2007:** Application heard in the Federal Court in Hobart.

**9 August 2007:** Justice Marshall rejects TWS's application for review of the Minister's decision.

**14 August 2007:** TWS files appeal against the decision of Justice Marshall.

**4 October 2007:** The Minister approves the mill proposal with conditions.

---

# The Pulp Mill Appeal Case

## What is at stake beyond the Pulp Mill

Beyond the obvious implications for the pulp mill and Tasmania's environment, the pulp mill assessment process and Justice Marshall's ruling raises a number of issues of concern for Australian environmental law and regulation generally.

---

### Process Shopping

The Wilderness Society challenged the Minister's decision on the grounds that the *Environment Protection and Biodiversity Conservation Act* did not allow a proponent to withdraw a referral for a project, then lodge another referral for the same project and get a different (easier) assessment process – which is what Gunns had done.

The trial judge found that the EPBC did allow that.

Queensland barrister. Chris McGrath, told ABC Radio's *Law Report* that this finding:

... sends a terrible message to other developers, essentially the message it sends is that if you are big and ugly enough and you are unhappy with the process that you have been given then you can throw your hands in the air, claim that it will cost all these jobs and lots of money that won't be invested in the economy, and government will do summersaults to appease you. ...It is a very worrying message from the perspective of good decision making.<sup>1</sup>

### Looking Behind the Published Reasons

Throughout the judgment, Justice Marshall refers to the Minister's stated reasons for his decision as the evidence as to what the Minister considered. The judge rejected the application to "go behind the judgment" and infer that other reasons or processes were at play.

Without commenting on the specifics of this case, the problem with such an approach generally is that it means that if the Federal Department and Environment Minister have a proper template in place and tick all the boxes, any decision is essentially unchallengeable. The mere statement that the Minister has considered an aspect of the proposal will be sufficient evidence of the consideration of that issue – regardless of the nature of such consideration.

### No Right to Procedural Fairness

The judge also found in relation to the challenge to the short timetables in the assessment process that the public had no right to procedural fairness or to be heard in the process beyond the minimum which is set out in the EPBC Act.

This ruling is particularly concerning in the face of the evidence of Gerard Early, the senior Departmental Officer testifying in the case, who said that:

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 ...<sup>2</sup>

Gerard Early also said

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.<sup>3</sup>

This appears to leave little room for community knowledge or independent expertise, and only a very limited role for public comment. In short, the government does not expect meaningful public comment and the law provides no right to a procedure to be able to make it.

### Test Case

If the Full Court decides that the EPBC Act does allow process shopping and/or does not require procedural fairness (as the Minister argues), then the Act is seriously flawed and in need of amendment. However, this is a good case to test the Act because the original assessment process was so publicly truncated by Gunns, and because the pulp mill proposal is so large that the timetable issues are crucial.

---

1. ABC Radio, *The Law Report*, 14 August 2007.  
2. Federal Court Transcript, TAD 15/2007, 5 July 2007, p 99.  
3. Federal Court Transcript, TAD 15/2007, 5 July 2007, p 123.

