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EDO Alert! Regional Forests Test Case

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New Case – TWS v The Minister for Environment & Heritage and Gunns Ltd

EDO Qld and barrister Stephen Keim SC are representing The Wilderness Society (TWS) in a new Federal Court test case. The case is significant for all states including Queensland which have Regional Forests Agreements (RFAs) or RF Areas as it explores the way the federal Minister for the Environment and Heritage interprets the RFA exemption from Commonwealth environmental assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The case will also consider the meaning of the phrase “realms of speculation”, used in the Nathan Dam case to determine where the Minister should draw the line in considering “all adverse impacts” of a proposed action.

Background to the Case

In December 2004 Tasmanian logging company giant Gunns Ltd referred to the Minister for Environment and Heritage its proposal to build and operate a bleached Kraft pulp mill in either the Long Reach or Hampshire area of Northern Tasmania. The mill is projected to operate for **30 years** and will source its timber from plantation and native forests in accordance with the guidelines set out in the Tasmanian Regional Forests Agreement (TRFA), which expires in **2017**.

On January 24 2005 the Minister decided that the action was a “controlled action” and required assessment for its likely impacts on listed threatened species and communities, listed migratory species, and the Commonwealth marine environment (those matters of national environmental significance were “controlling provisions” for the environmental assessment of the impacts of the proposed action). In setting the controlling provisions, the Minister was required to consider “all adverse impacts” that the proposal will have or is likely to have on matters of national environmental significance protected under the EPBC Act.

However, the EPBC Act exempts actions done in accordance with an RFA or in an RFA Region from the scope of the Act (with certain exceptions that do not apply here). In the case of the Gunns pulp mill proposal, this means that the Minister was not required to consider any adverse impacts on matters of national environmental significance from sourcing timber in accordance with the TRFA. But the RFA exemption will not apply once the TRFA expires in 2017, and the pulp mill will operate until at least 2038 – leaving a gap of over 20 years where impacts on matters of national environmental significance (such as World Heritage Values of listed World Heritage areas) from logging to feed the mill were not considered. The Minister’s statement of reasons says the Minister did not consider those ‘gap impacts’ because the nature, extent and specified terms of any future TRFA or replacement regime and the consequences for protected matters under the EPBC Act were “speculative” at this stage, a reference to the test set by Her Honour Justice Kiefel in the Nathan Dam case for determining where to draw the line in considering “all adverse impacts” of a proposal action.

What is the Environmental Significance of this Case?

The Wilderness Society are seeking judicial review of the Minister's decision on the controlling provisions for the environmental assessment of the proposed Tasmanian Pulp Mill, because the Minister dismissed as "speculative" the likely impacts on the World Heritage Wilderness Area and on threatened species of logging to feed the Pulp Mill after the RFA expires in 2017 but while the Mill will still be operating.

TWS are arguing that the Minister's finding that the future of the TRFA and post-2017 impacts on matters of national environmental significance were "speculative" was an irrelevant consideration, and also that he failed to take into account a relevant consideration - the adverse impacts of timber sourcing in the area after the expiry of the TRFA in 2017 but during the life of the Mill.

This case is an important test case in ascertaining the nature and scope of the nation-wide RFA exemption. The case is also a companion case to the Nathan Dam case where it was found that the Minister did not have to consider matters which "lie within the realms of speculation". In this case, the Minister has tried to rely on this ruling in failing to consider the impact of the mill beyond 2017 because the future of the RFA is "speculative".

What has Happened So Far?

EDO Qld came on the record as solicitors for TWS in early June 2005, taking the file over from EDO ACT due to that office's resource constraints and EDO Qld's expertise in EPBC Act federal court litigation.

A Directions Hearing was held at the Federal Court in Sydney on 16 June 2005 before Justice Gyles. The directions orders gave EDO Qld leave to file further evidence including on World Heritage Values and public submissions raising the question of post-2017 impacts of the Mill by Thursday 23 June 2005.

The Minister and Gunns have until 13 July 2005 to file any further defences or evidence. Justice Gyles also ordered that the matter be set down for hearing for 13th October 2005 but the location of that hearing is yet to be set. We will keep you updated on this exciting RFA test case!

For more information, contact Jo Bragg or Larissa Waters at EDO Qld. Why not join or donate to EDO so we can continue to run test cases like this? See our memberships-donations form on our website www.edo.org.au/edoqld.