CURRENT ISSUES BRIEF

No. 41 1994/95

Gunns Ltd Woodchips Export Case

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Sarah O'Brien
Law and Public Administration Group
5 April 1995

Parliamentary Research Service

Current Issues Brief No. No. 41 1994/95
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**Major Issues**

On 10 January 1995, Sackville J of the Federal Court held that the 1994 woodchip export licence of a Tasmanian company, Gunns Ltd, was invalid.

The decision hinged on the failure of the Minister for Resources to consider whether the proposal by Gunns Ltd affected the environment to a significant extent. This was the Minister's obligation under the *Environment Protection (Impact of Proposals) Act 1974 (Cth)* (*EP(IP) Act*). As it was clear the proposal would significantly affect the environment it should have been referred to the Minister for the Environment to determine whether environmental assessment was required.

The Minister for Resources committed an error of law by "diverting his inquiry to the wrong question" namely, whether a prior Tasmania-wide EIS meant that environmental impacts of the proposal had already been taken into account. The decision applies standard requirements imposed on Commonwealth decision-makers by the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* to export licence renewals.

The decision has implications for 12 other export licences renewed for 1995. To date court actions have been instituted against seven of the licences. If licences are held invalid licensees may attempt to obtain compensation from the Commonwealth for any loss caused by inability to meet contracts or expenditure on equipment or construction. However, the extent of Commonwealth liability in such cases is not clear.

The decision does not necessarily impose environmental assessment on all export licence renewals. That would be determined by the facts concerning each renewal.

Pre *Gunns case* virtually no renewals for woodchip export licences were "designated" (referred to the Minister for the Environment) or subjected to environmental assessment. It could be argued that the decision does not create new obligations under the *EP(IP) Act* but applies the Act in the broad manner intended when it was enacted.

The decision in *Gunns case* has highlighted some weaknesses in the present environmental assessment process. One of these is that the present scheme does not place one of the most important environmental decisions namely, whether a proposal should be examined to decide whether environmental assessment is required, with the most appropriate Minister, the Minister for the Environment.

The decision has dovetailed into a current review of the environmental assessment process which has identified shortcomings in the present scheme and suggested worthwhile options for change.

Recently announced proposed changes to the *Administrative Procedures* address the issue of certainty in the environmental assessment process however it is not clear at present to what extent "environmental decisions" will be vested in the Minister for the Environment under any amended Procedures. Changes to the *Administrative Procedures* will need to be consistent with the spirit and object of the *EP(IP) Act* and any improvements made to the *EP(IP) Act* following completion of the public review.
Introduction

On 10 January 1995, Sackville J of the Federal Court held that the 1994 woodchip export licence of a Tasmanian company, Gunns Ltd, was invalid.¹

Relevant law: EP(IP) Act and Administrative Procedures

The EP(IP) Act seeks to "ensure, to the greatest extent that is practicable, that matters affecting the environment to a significant extent"² are fully examined and taken into account in relation to:

• proposals;
• projects;
• negotiations;
• decisions and recommendations; and
• the incurring of expenditure by the Australian Government and its authorities, alone or with any other government, authority or person.

"Environment" is defined as including "all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings."³

Commonwealth Ministers and agencies are required to comply with the Act;⁴ and take into account any final environmental impact assessment (EIS), public environment report (PER),⁵ or recommendations.

The main issue in Gunns case concerned paragraph 1.2.1 of the Administrative Procedures made under the EP(IP) Act. This requires that after an initiative has been taken in relation to a "proposed action" affecting the environment to a significant extent, the "action" Department or Minister (Minister making the decision in relation to a proposal) must designate the

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² S. (1).
³ ibid.
⁴ s.8.
⁵ A PER is a report prepared by the proponent (person or entity seeking to undertake a project) briefly describing the proposal, environmental implications of the proposal and safeguards required to protect the environment. The Minister for the Environment directs a PER where it is considered that the public should be informed of the proposal and environmental impacts but where the impacts are not wide enough to warrant an EIS.
proposal i.e., refer the matter to the Department of the Environment. "Proposed action" is defined as a matter referred to in any paragraphs of the EP(IP) Act.6

Chronology

- In 1985 a final EIS was completed entitled Supplement to the Draft Environmental Impact Statement on Tasmanian Woodchip Exports Beyond 1988.

- On 12 June 1986, the Commonwealth and Tasmanian governments signed a Memorandum of Understanding (MOU) providing for export of woodchips in accordance with the EIS process, but without legal obligation on the Commonwealth to grant licences.

- In October 1993 and November 1993 Gunns Ltd applied for a licence to export woodchips largely sourced from Circular Head Crown Forest in north-west Tasmania.

- On 18 November 1993 the Australian Heritage Commission provided preliminary advice to the Minister for Resources and further advice on 8 December 1993 under s. 30 of the Australian Heritage Commission Act 1975 (Cth) (AHC Act). The advice referred to the Gunn Ltd's proposal and other proposed logging and road operations including some close to the boundary of the Southern Western Tasmania World Heritage area. The Commission stated the proposals would:

  have a significant adverse effect on the National Estate. In particular, the Commission is concerned that the national estate values of old growth forest, wilderness and aesthetic quality will be significantly affected by the proposed operations.

  The Commission specifically referred to 3 coupes within the Norfolk range which form part of the Circular Head Crown forest.

- On 11 February and 10 May 1994 the Commonwealth Environment Protection Agency (EPA) wrote to the Department of Primary Industries and Energy (DPIE) stating that it considered the proposal by Gunns Ltd likely to affect the environment to a significant extent and should be referred to the Minister for the Environment in accordance with the Environment Protection (Impact of Proposals) Act 1974 (Cth) (EP(IP) Act) and Administrative Procedures operating under the EP(IP) Act.

  The EPA stated this was necessary because:

  - of changes in Tasmanian forestry practice over the 8 years since the preparation of the 1985 EIS;

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6 Paragraph 1.1, Administrative Procedures.
of commencement of the *Endangered Species Protection Act 1992* (Cth) and
- evidence there were at least three endangered species in the area;
- referral would allow for the obtaining of relevant current information and
  ensure compliance of the Minister for Resources with the *EP(IP) Act* in a
  situation where there were doubts and differences over the environmental
  significance of the proposal. It noted that referral to the Minister for the
  Environment did not necessarily mean an EIS (Environmental Impact
  Assessment) or PER (Public Environment Report); and
- of absence of a north west Tasmanian regional forestry assessment in
  accordance with the National Forest Policy Statement (NFPS).

- On 1 June 1994 DPIE advised the Minister for Resources there was no obligation to
designate Gunns Ltd a proponent as environmental impacts had been taken into
account in the 1985 EIS.

- On 10 June 1994, the Minister for Resources granted Gunns a licence from 10/6/94-
31/12/94 under the Export Control (Unprocessed Wood) Regulations to export
200,000 green tonnes of woodchips and "in principle approval" for the export of
200,000 green tonnes of woodchips until 1999 subject to the grant of annual export
licences.

- On 5 June 1994, the Tasmanian Conservation Trust wrote to the Minister for
Resources stating that it was "shocked and dismayed" by the woodchip export
approval. The Trust requested the reasons for the decisions pursuant to s.13 of the
*Administrative Decisions (Judicial Review) Act 1977* (Cth) (*AD(JR) Act*).

- On 24 August 1994, the Minister's response was received which disputed that the
Trust was a "person aggrieved" within the meaning of the *AD(JR) Act*. The Minister's
letter stated that any adverse impacts on the national estate would be minimised if the
operations were carried out in accordance with the Tasmania Forest Practices Code;
and that it was not necessary to designate Gunns Ltd as a proponent under the *EP(IP)*
Act as environmental issues had already been taken into account in the 1985 EIS.

How the matter got to court

Sackville J gave the Tasmanian Conservation Trust standing (ie permission to bring the
challenge) as a "person aggrieved" under s.3(4) of the *Administrative Decisions (Judicial
Review) Act 1977* (Cth). A "person aggrieved" is defined in s.3(4) to include a person (or an
organisation) whose interests are adversely affected by a decision, conduct or failure to act.
The Trust then sought review of the decision under s.5 of the *AD(JR) Act* which imposes
requirements on Commonwealth Ministers and agencies concerning how they make
decisions.
The decision

Sackville J held:

- The Minister for Resources was obliged under the Administrative Procedures to decide whether the proposal significantly affected the environment. (This decision is reviewable under the AD(JR) Act.)

- There was sufficient evidence to show that the proposal significantly affected the environment. The Minister was therefore obliged to designate Gunns Ltd as a proponent (i.e., refer the proposal to the Minister for the Environment).

- It was the Minister for the Environment's responsibility to decide whether an EIS or PER was required. Evaluation of the 1985 EIS was the responsibility of the Minister for the Environment once the proponent was designated.

- The Minister for Resources' decision not to designate Gunns Ltd was an error in law under s.5(2)(b) of the AD(JR) Act and was void as:

  He [erred] by failing to take into account a relevant consideration, namely whether the proposed action affected the environment to a significant extent. The Minister failed to direct his mind to this issue because he took the view that any adverse impact on the environment of Gunns' proposal had previously been considered by the final EIS and the 1986 MOU.\(^7\)

The Minister was "diverted from the relevant inquiry."\(^8\)

Sackville J's reasoning

Gunns' proposal was the "proposed action"

Sackville J held that the "proposed action" was the application of October 1993 by or on behalf of Gunns Ltd identifying its intended activities in obtaining and processing logs and transporting and exporting woodchips.\(^9\)

There was an "initiative"

Therefore the Minister should have designated Gunns as a proponent. Gunns had argued there was no obligation to designate a proponent because action taken concerning the 1994

\(^7\) *ibid*, p 615.

\(^8\) *ibid*, p 602.

\(^9\) *ibid*, p 598.
proposal was not an "initiative" but merely repeated Commonwealth actions in relation to earlier proposals.

Sackville J rejected this argument. The term "initiative" was not limited to initiatives of the Commonwealth. The "initiative" was either Gunns' application of October 1993 or the Minister's response to that application in late 1993 and early 1994. The Minister's actions were not merely repetitive of actions that had already occurred some ten or eleven years earlier. 10 There may be circumstances however, in which a Minister's action:

is so closely related to a previous action, such as the grant of an earlier licence or an earlier direction to designate a proponent, that the latter action cannot properly be described as an 'initiative in relation to a proposed action'. 11

Sackville J found, however, that the Gunns Ltd proposal was not merely a continuation of earlier proposals. It was a new proposal which had not been made previously by Gunns Ltd or any other company. Earlier licences granted to Boral and North Broken Hill were for different activities.

The fact that Gunns' proposal contemplated a quantity of woodchips for export within the overall framework suggested by the [1985] EIS and endorsed by the MOU ...falls short of establishing that the minister's actions in contemplating the grant of a licence were merely repetitious of previous decisions or actions of the Commonwealth. 12

The 1985 EIS had only addressed sustainable aggregate quantity of pulpwood from Tasmania as a whole. It had spanned fifteen years from 1988 and did not address the

volume of woodchips that should be extracted in 1994 and subsequent years from the areas... identified in Gunns' proposal" [nor address] the volume... sourced to particular coupes".

The Minister's "in principle approval" was not authorised by the Export Control (Unprocessed Wood) Regulations and was not a "decision" under s.3(1) of the AD(JR) Act and therefore not reviewable under s.5. Nor was the approval reviewable as "conduct for making a decision" under ss.3(4), (5) and (6) of the AD(JR) Act.

Standing of Tasmanian Conservation Trust

The grant of standing to the Tasmanian Trust affirmed that environment interest groups can be a "person aggrieved". Sackville J used the same reasoning as in an earlier decision 13 in

10 ibid, p 605.
11 ibid, p 606.
12 ibid.
which he held that the North Coast Environment Council was a "person aggrieved" and was entitled to the Minister's reasons for his decision to grant a licence to export woodchips to Harris-Daishowa.

Sackville J summarised the common law test for an "interested"/"aggrieved" person as follows:

- demonstration of a "special interest" in the subject matter of the action. A "mere intellectual or emotional concern or" genuinely held convictions are not sufficient. The interest must go beyond that of members of the public in upholding the law;
- merely alleging non-compliance with the EP(IP) Act is not sufficient; and
- merely making submissions to an EIS process is also not sufficient grounds for the court to grant standing.

He listed 6 ways in which the Tasmanian Trust satisfied the criteria in relation to standing: 14

1. the Trust is recognised by Commonwealth and Tasmanian governments as the peak environmental organisation for Tasmania;
2. Commonwealth recognition as a significant and responsible environmental organisation through the Peak Environmental Organisation since 1983; annual Commonwealth administration grants; and extensive support;
3. representation on wide range of Tasmanian government bodies, including forestry;
4. detailed research/advisory activities with Commonwealth funding on woodchipping/preservation of Tasmanian forests "the very subject matter of the present litigation";
5. other activities (eg supporting World heritage listings) demonstrated its commitment to conservation "well beyond" submissions to the 1985 EIS; and
6. "the Trust is a substantial body, in terms of membership, income and range of activities". 15

Effect of decision on 12 licences renewed 1/1/95 - 31/12/95

The practical consequence of Gunns case on the 12 licence renewals is the probable standing of relevant environmental organisations in the Federal Court to seek:

- reasons under s.13 of the AD(JR) Act for the Minister's renewals;

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14 Ibid, pp 613-615.

15 Although Sackville J considered that size or resources of an organization is not critical. Ibid, p 615.
• review of the decisions under s.5 of the *AD(JR) Act*;

• (possibly) injunctions to stop logging/chipping until validity of a licence is established; and

• declarations on whether licences are valid.

### Possible grounds of challenge

The 12 licences may be subject to challenge on various grounds.

• 10 of the 11 renewals (including the 1995 Gunns' licence) may be invalid on the same ground as in Gunns case.

• For some licences the Minister may not have complied with the *Australian Heritage Commission Act 1975* (Cth). Section 30 of the *AHC Act* provides a Minister may make a decision "adversely affecting the national estate" only if there is "no feasible or prudent alternative".

  In *Australian Conservation Foundation v Minister for Resources*, the ACF was granted standing to seek a declaration that the Minister for Resources granting of an export licence had not complied with the *AHC Act*. However, on the substantive issue as to whether the *AHC Act* had been complied with, it was held that the Minister had considered whether there was a feasible or prudent alternative and that following this the decision was a "value judgment" for the Minister.

  In relation to the 1994 licences an organisation granted standing may argue that the Minister did not satisfy the *AHC Act* as he did not have adequate environmental information.

• Possible non compliance with the *Endangered Species Protection Act 1992* (Cth)

### Commonwealth appeal against Gunns decision

The Minister for Resources has instituted an appeal against the decision in *Gunns case*. The Minister has not, however, appealed against the grant of standing to the Tasmanian Conservation Trust. It is likely that the main grounds of appeal will concern the meanings of "proposed action" and "initiative" in the Administrative Procedures. The case is expected to be heard in June 1995.

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16 (1989) 19 ALD 70
Court actions against 1995 licences instituted by interest groups

To date, court actions have been instituted against seven of the 1995 woodchip export licences:

- the Tasmanian Conservation Trust has instituted actions against the 1995 licence granted to Gunns Ltd and the licence granted to North Ltd;

- Environment Victoria has instituted actions against three licences granted to Midway Forest Products Ltd and the licence granted to Harris-Daishowa; and

- the North Coast Environment Council has instituted action against the licence granted to Sawmiller Exports Pty Ltd.

If licences are held invalid

If any of the licences are held to be invalid by the Federal Court, the Minister for Resources would have to reassess the licence applications. This reassessment would have to be in compliance with:

- the EP(IP) Act which requires referral of a proposal to the Minister for the Environment where the proposal significantly affects the environment. The Minister for the Environment then determins whether environmental assessment is required.

Some of the court actions referred to above (particularly the action against the Sawmiller Exports licence) challenge the reliance on general EIS in granting the licences, rather than environmental assessment of impacts on the particular forests in question. Under present practice (which some argue is unsatisfactory) a proposal may be designated and in the process of an EIS but the licence is still granted and operative; and

- the AD(JR) Act which requires the Minister for Resources to make take into account relevant considerations and comply with his or her legal obligations under the EP(IP) Act.

Commonwealth civil liability?

If licences are held to be invalid, licensees may attempt to obtain compensation from the Commonwealth. Under s.56 of the Judiciary Act 1903 (Cth) the Commonwealth may be sued

17 For example the Sawmillers Exports licence was designated in 1990 with a final EIS completed in May 1994. Woodchips were exported under the licence during that time. Another example was the designation of a proposal by Midway Forest Products at the same time as the grant of an export licence.
in civil actions. However liability of Ministers and officers of the Commonwealth for damages for negligence is not fully settled by the High Court. To successfully sue for damages for another tort, misfeasance, a plaintiff would have to establish that the conduct of the public officer was performed in bad faith, ie with knowledge that it was outside the jurisdiction or purpose of the office.

If any suit was successful licensees would argue for damages for economic loss such as inability to meet contracts or loss of expenditure on shipping, construction or equipment caused by reprocessing delays, invalidity or revocation.

**Ex gratia payments or other arrangements**

The Commonwealth could offer ex gratia payments to licensees for substantiated loss or make other arrangements with licensees such as rescheduling of source areas for woodchips.

**Effect on export licences generally**

Pre Gunns case virtually no renewals for woodchip export licences and other resource export licences were designated ie. referred to the Minister for the Environment to determine whether environmental assessment was required.

Under Sackville J’s interpretation, export licences in other resource areas may be affected if an organisation was given standing to ask the Federal Court to determine:— whether renewals of export permits or the industry proposal itself, are "initiatives" requiring designation of a proponent; or are merely "repetitive acts". This will depend on whether a renewal/proposal involved a significant change (either in the activity or environmental evidence in relation to the activity) from the prior licence/proposal.

**Review of environmental assessment processes**

In recent years there have been several reviews of the environmental assessment process. The EPA is currently conducting a review of environmental impact legislation and processes. A preliminary discussion paper was released in 1993 followed by the receipt of public submissions.

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A further discussion paper, *Public Review of the Commonwealth Environmental Impact Assessment Process*, was released in November 1994 which also invited public submissions. The 1994 paper adopted 8 principles as integral to any reformed environmental process:

The Commonwealth impact process should:

- provide real opportunities for public participation in government decision making;
- be open and transparent;
- provide certainty of application and process to all participants, including the community, governments, industry and project proponents;
- provide accountable decision making;
- be administered with integrity and professionalism;
- provide cost effective processes and outcomes;
- be flexible enough to deal effectively and efficiently with all proposals assessed; and
- ensure practical outcomes for effective environmental protection.

The *Gunns case* highlighted some of the problems in the existing environmental process. These and other problems have been identified in the 1994 discussion paper. The main problem, and the one at the hub of Gunns case, concerns the current processes for activating the Act. These processes are described in the 1994 discussion paper as:

- **Uncertain and unpredictable.**

The *EP(IP) Act* at present does not define what activities will have a significant effect on the environment. At present the decision to refer a proposal to the EPA is left to the action agencies and Minister. Action agencies often lack environmental expertise to determine whether a proposal significantly affects the environment. Advice given to the action Minister or agency is not binding. There is uncertainty as to what proposal will be referred for assessment.

- **Inadequate at providing information to the public and proponents.**

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21 *ibid*, p. iii.

22 *ibid*, paras 95-102.
Late or non referral of proposals compromises the Commonwealth's environment protection obligations. Lack of accountability means action agencies are not required to disclose to the public projects they have not referred.\textsuperscript{23}

- **Not timely enough.**

The \textit{EP(IP) Act} does not specify at what stage of the proposal it should be referred. Early commencement of the process ensures that environmental impacts are comprehensively analysed and reduces the potential for delay of the proposal. It also ensures that environmental considerations are integrated into the planning and design of the project. If environmental assessment is initiated too late it is regarded as an obstacle by proponents who have may have already invested in the project.\textsuperscript{24}

- **Inconsistency with ecologically sustainable development.**

All these shortcomings mean the process may be inconsistent with ecologically sustainable development.\textsuperscript{25}

**Options for improving the environmental assessment process**

The 1994 discussion paper indicated there are two main options for improving the environmental assessment process.

- **Compilation of list of designated proposals**

The \textit{EP(IP) Act} could be amended to contain a schedule listing proposals or types of proposals automatically referred to the EPA for a decision on whether assessment of the proposals is required. In that way, the decision on which proposals are referred is made by Parliament by enacting amendments to the \textit{EP(IP) Act}. It would also provide greater guidance and certainty to proponents of a proposal and groups interested in those types of proposals.

A system of a list of designated proposals could also be supplemented by the Minister for the Environment having a residual discretion/power to require assessment where a matter significantly affects the environment. This would cover unique proposals which may otherwise escape the assessment process and achieves a balance between certainty and flexibility.\textsuperscript{26}

\textsuperscript{23} ibid, paras 103-104.

\textsuperscript{24} ibid, paras 105-107.

\textsuperscript{25} ibid, para 108.

\textsuperscript{26} \textit{ibid}, paras 109-126.
Expressly giving interested persons standing

The discussion paper recommends that the *EP(IP) Act* be amended to specify that any person may seek review by the Administrative Appeals Tribunal of Ministerial decisions made under the *EP(IP) Act.* This approach has been followed in the *Endangered Species Protection Act 1992 (Cth).* Rather than the present system where persons have to satisfy the "aggrieved party" test in the *AD(JR) Act* as the Tasmanian Conservation Trust had to do in the *Gunns case.*

**Recent proposed changes to the Administrative Procedures**

Following the decision in *Gunns case,* on 29 March 1995 Cabinet decided to amend the Administrative Procedures under the *EP(IP) Act* to clarify their operation in relation to "routine operational decisions". The amendments will specify that operational decisions such as the renewals of licences for existing operations will not be referred to the EPA if an environmental assessment has already been done. There would still be assessment where there has been an "environmentally significant change in circumstances since the last assessment [such as]...increase in scale of operation, or introduction of new technology, or a change in geographical location, going beyond what was previously assessed". It is envisaged that the changes will allow existing activities to continue during an environmental review so as to minimise impact on industry.

It could be argued that the explanation for the changes overstates the effect of Sackville J's decision as the decision does not require all licence renewals to be subject to environmental assessment. The test he applied was that renewals which were not merely repetitive acts had to be referred to the Minister for the Environment who would then decide whether environmental assessment was required.

27 *ibid,* paras 209-219.

28 S.131 of the *Endangered Species Protection Act* grants standing to "interested persons" to seek injunctions restraining the Minister for the Environment or the Director of the Australian Nature Conservation Agency from engaging in any conduct in contravention of that Act; and to ask the Federal Court to require the Commonwealth agency to do something under the Act. s. 131 (3) defines "interested person" as:

(a) a person who has engaged in a series of activities relating to the protection or conservation of, or research into, listed native species or listed ecological communities; or

(b) ...an organisation or association (whether incorporated or not) whose objects or purposes include, and whose activities relate to the protection or conservation of, or research into, listed native species or listed ecological communities.


30 *ibid.*
The proposed changes to the Administrative Procedures address the issue of certainty in the process. However, it is not clear to what extent the Minister for the Environment will be involved in determining whether decisions/renewals are merely "routine and operational" and whether there had been "environmentally significant changes since the last assessment."

It is understood that the proposed changes will be considered by the Executive Council on 19 April 1995. After that they will be considered by the Governor-General for approval and the fixing of a commencement date and will be published in the Commonwealth Gazette. The Administrative Procedures must be tabled in each House of the Parliament where they are subject to disallowance.\(^{31}\)

Changes to the Administrative Procedures will need to be consistent with the spirit and object\(^{32}\) of the EP(IP) Act and any improvements made to the EP(IP) Act following completion of the public review.

\(^{31}\) S.7

\(^{32}\) S.6.