LANSEN V MINISTER FOR ENVIRONMENT AND HERITAGE

Federal Court of Australia (Mansfield J)
13 June 2008
[2008] FCA 903

Administrative law – proposal to redevelop mine site near McArthur River – Minister's approval of 'controlled action' under *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – validity of assessment process based on Bilateral Agreement between Northern Territory and Commonwealth governments – sufficiency of information in and validity of Assessment Report on which Minister's decision was based – whether Minister's approval invalid because of failure to take into account relevant consideration – whether Minister's approval had regard to the 'precautionary principle' under *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 136(2)(a), 391(2)

Facts:

The application in this case was for a challenge to the validity of a decision made by the Commonwealth Minister for the Environment and Heritage on 20 October 2006 under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ('*EPBC Act*'). The applicants were seven native title claimant groups who had made native title claims over land in the vicinity of the McArthur River Mine in the Gulf region of the Northern Territory. The mine operator, McArthur River Mines ('MRM'), had proposed to alter its operations from an underground to an open-cut mine, which would require the McArthur River to be diverted for approximately five kilometres around the mine.

MRM's proposal, having been found by the Minister for Environment and Heritage on 4 March 2003 to be a 'controlled action' under s 75 of the *EPBC Act*, required the Minister's approval. Concerns had been raised by the Minister as to the impact upon 31 listed migratory bird species likely to be in the vicinity of the site at various times, including some that utilise permanent pools along the river, as well as six threatened species including an 'important population' of freshwater sawfish.

Before the approval could be granted, an assessment process was to be carried out by the Northern Territory Minister for Environment and Heritage pursuant to a Bilateral Agreement between the Commonwealth and the Northern Territory. This included the preparation of an environmental impact statement ('EIS'), its exposure to public comments and MRM's response to the public comments. Following the conclusion of the process, an Assessment Report was provided to the Commonwealth Minister in February 2006. Further information was requested by the Commonwealth Minister from MRM regarding the impacts of the proposal on the sawfish and migratory bird species, and details of how MRM proposed to manage, monitor and mitigate those potential impacts. The Minister approved the proposed action, subject to conditions, on 20 October 2006.

The applicants challenged the validity of that decision, and the Federal Court had to decide four main issues. Firstly, it had to be determined whether, due to the Minister's decision that the proposal was a 'controlled action' predating the Bilateral Agreement, the assessment of the proposal's environmental impacts should have been made but was not made under pt 8 of the *EPBC Act* rather than under the Bilateral Agreement. The second issue was whether the Northern Territory Minister's Assessment Report was invalid, and therefore could not empower the Commonwealth Minister to approve the proposal, because it contained insufficient information. The third issue was whether there was a requirement upon the Commonwealth Minister, subsequently unfulfilled, to take into account the conditions imposed by the Northern Territory on the proposal, relating generally to the mine development

but including its environmental impacts. Finally, the Court had to determine whether, in granting the proposal's approval, the Commonwealth Minister was required by the *EPBC Act* to give effect to the principles of ecologically sustainable development, in particular the 'precautionary principle', under ss 136(2)(a), 391(2). If so, it had to be determined whether the Minister had fulfilled that requirement.

Held, dismissing the application:

(i) in relation to the validity of the assessment process:

1. Section 83 of the *EPBC Act* operated in the particular circumstances to exclude the assessment processes provided for in pt 8 so that the assessment of the relevant impacts of the controlled action was to be made in accordance with the Bilateral Agreement. Although pt 8 applied when the Commonwealth Minister decided that the proposed action of MRM was a controlled action, it ceased to apply to the assessment of the relevant impacts of that controlled action after the Agreement came into effect: [26].

2. Section 83 should not be read to exclude the application of a Bilateral Agreement that comes into force before the Minister makes a decision under s 87 as to the assessment approach. Such a conclusion reflects the object of the *EPBC Act* in s 3(1)(d) of promoting a cooperative approach to the protection and management of the environment between governments: [26]–[27].

3. The assessment process in relation to the controlled action undertaken under the Bilateral Agreement was not of itself unauthorised or invalid: [36].

(ii) in relation to the validity of the Assessment Report:

4. When an action is assessed under pt 8 of the *EPBC Act* by a Public Environmental Report or EIS, the Minister must, in the guidelines for preparation of those documents, seek to ensure that the document contains sufficient information to make an informed decision whether or not to approve the action. However, whether or not the Minister has sufficient information to make an informed decision must ultimately be decided by the Minister. The *EPBC Act* does not envisage that the Minister should receive a report and then have to either reject it because it does not contain enough information, or to make a decision on the basis of that report without more: [104]–[105].

5. An assessment report need not be so complete that no Minister, on reasonable grounds, could not believe that there is insufficient information to make an informed decision. Nevertheless, an assessment report is required to satisfactorily present the material which has emerged in the applicable information gathering process: [109].

6. The Assessment Report was a valid assessment report for the Minister for Environment and Heritage's consideration. It contained an adequate description of the material in the EIS, of the public comments, and MRM's response to the public comments; despite the fact that the report itself said that its contents were not themselves sufficient to determine that environmental impacts of the proposal on the bird and fish species would not be affected [118]–[119].

(iii) in relation to the conditions imposed by the Northern Territory:

7. Section 134(4)(a) of the *EPBC Act* only requires that relevant conditions imposed by the Northern Territory be considered by the Commonwealth Minister. In this instance, those are conditions relevant to the controlling provisions for the action, which form the subject matter of the Minister's decision. Accordingly it was only mandatory for the Minister to consider the Northern Territory conditions that concerned threatened and migratory species: [142]–[145].

8. The Minister did not consider relevant conditions imposed by the Northern Territory on the taking of the controlled action, in particular the commitments made in the Mining Management Plan that were relevant to impacts on threatened and migratory species and the independent monitoring assessment conditions found in the amended mining authorisation: [151].

9. There was, however, no real prospect that if the Minister had considered the Northern Territory conditions there would have been any material difference to the conditions which he imposed upon his approval of the proposed action. It was unlikely that the conditions he imposed would have been different in any respect other than perhaps in terms of expression to adopt language similar to that of the Northern Territory conditions. As such the decision of the Minister is not invalid by reason of his failure to consider a relevant

consideration: [168]–[169]; *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 applied.

10. Despite the breach of s 134(4)(a): it is unlikely that Parliament intended that invalidity would result from non-compliance with the section; invalidity of the decision would lead to public inconvenience; there was no suggestion that failure to comply with the section was a conscious decision; and the apparent purpose of that section can be achieved without invalidating a departure from it. As such, there is no reason why the Minister's failure to comply with s 134(4)(a) should invalidate his decision: [175]–[179]; *Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 applied, *Hatton v Beaumont* [1977] 2 NSWLR 211 considered, *Woods v Bate* (1986) 7 NSWLR 560 considered.

(iv) in relation to taking account of the precautionary principle:

11. It had not been shown that the Minister did not consider and apply the precautionary principle as required by the Act. Despite the fact that some scientific uncertainty remained regarding the environmental impacts of the proposal's approval, the conditions attached to the decision to approve the action demonstrate that the Minister had taken those principles into account, and in particular had considered the lack of scientific certainty surrounding the population of freshwater sawfish: [184]–[187].