HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

Matter No S373/2006

WESTON ALUMINIUM PTY LIMITED — APPLICANT

AND

ENVIRONMENT PROTECTION AUTHORITY & ANOR — RESPONDENTS

Matter No S211/2007

WESTON ALUMINIUM PTY LIMITED — APPELLANT

AND

ALCOA AUSTRALIA ROLLED PRODUCTS PTY LIMITED — RESPONDENT

Weston Aluminium Pty Limited v Environment Protection Authority
Weston Aluminium Pty Limited v Alcoa Australia Rolled Products Pty Limited
[2007] HCA 50
8 November 2007
S373/2006 & S211/2007

ORDER

In matter S373 of 2006

1. *Special leave to appeal granted and the appeal be treated as instituted and heard instanter.*

2. *Appeal allowed.*

3. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 4 October 2006 and, in their place, order that the matter be remitted to the Land and Environment Court of New South Wales for further consideration conformably with the reasons of this Court.*

4. *The second respondent pay the appellant's costs of the appeal to this Court, the appeal to the Court of Appeal of the Supreme Court of New South Wales and the application to the Land and Environment Court of New South Wales.*

In matter S211 of 2007

1. *Appeal allowed with costs.*

2. *Set aside order 3 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 4 October 2006 and remit the matter to that Court for further consideration conformably with the reasons of this Court.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with P C Tomasetti for the applicant in S373/2006 and for the appellant in S211/2007 (instructed by Kanjian and Company)

R J Ellicott QC with S A Duggan for the second respondent in S373/2006 and the respondent in S211/2007 (instructed by Holding Redlich)

Submitting appearance for the first respondent in S373/2006

CATCHWORDS

Weston Aluminium Pty Limited v Environment Protection Authority
Weston Aluminium Pty Limited v Alcoa Australia Rolled Products Pty Limited

Environment and planning – Interpretation of development consents – Alcoa obtained development consent under the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act") for an aluminium remelting facility on its Yennora land – Whether that development consent permitted treatment at the Yennora facility of aluminium dross not generated on the Yennora land.

Environment and planning – Statutory interpretation – Whether variation of an existing licence under the *Protection of the Environment Operations Act* 1997 (NSW) was valid where the variation permitted a land use that required but had not been granted development consent under the EPA Act.

Words and phrases – "development consent", "controlled development".

Environmental Planning and Assessment Act 1979 (NSW), ss 76A(1), 91, 123.
Protection of the Environment Operations Act 1997 (NSW), ss 50, 58(2).

1 GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. These related proceedings (one an appeal and the other an application for special leave to appeal) require consideration of a particular development consent issued under the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act"). The critical question in each proceeding is what use of land did the development consent permit? Answering that question determines one proceeding and leads to the resolution of the other.

2 Alcoa Australia Rolled Products Pty Limited ("Alcoa") occupies land at Yennora in New South Wales. That land ("the Yennora land") is now within the Holroyd Local Government Area and is subject to the Holroyd Local Environmental Plan 1991. Since about 1960, the Yennora land has been used for the manufacture of aluminium products. In 1996, Alcoa, in joint venture with another party, acquired the aluminium manufacture operations conducted at Yennora by Comalco Australia Pty Limited (or one of its associated companies). Alcoa acquired the interest of its joint venturer in 2003.

3 Since the early 1960s aluminium cans and other aluminium scrap have been recycled on the Yennora land by melting the scrap and casting the recovered aluminium into blocks or billets. Melting aluminium scrap produces aluminium dross which, when used as a feedstock in a rotary furnace, allows recovery of more aluminium. Since the early 1960s, aluminium dross produced by the melting of scrap on the Yennora land has been used as a feedstock for rotary furnaces installed on the Yennora land.

The dispute

4 Aluminium dross is a by-product not only of melting aluminium cans or other aluminium scrap but also of aluminium smelting. Since about August 2002, Alcoa has brought aluminium dross from its smelting plant at Point Henry, Victoria, to the Yennora land and has used that dross ("imported dross") as a feedstock for the rotary furnaces installed on the Yennora land.

5 Weston Aluminium Pty Limited ("Weston") brought proceedings in the Land and Environment Court of New South Wales alleging that the processing of imported dross on the Yennora land is a use of the premises for a purpose which requires development consent under s 76A of the EPA Act and that Alcoa does not have the necessary consent. Weston sought declarations and an injunction restraining Alcoa from processing imported dross on the Yennora land.

The course of proceedings

6 In 2004, Weston's application for declarations and an injunction was heard and determined by Lloyd J and it was held[1] that Weston was entitled to relief of the kind it sought. For reasons that will soon appear, it is convenient to refer to these proceedings as Weston's "first proceedings". No orders granting relief were made then, or subsequently. Rather, Alcoa made application to the relevant consent authority under the EPA Act for authority to process imported dross on the Yennora land. The authority did not determine that application within the time prescribed by the EPA Act. Alcoa brought proceedings in the Land and Environment Court to challenge what, under s 82 of the EPA Act, was the deemed refusal of its application. These proceedings had not been heard or determined at the time of the oral argument of the present matters.

7 In 2005, Weston, too, began further proceedings in the Land and Environment Court. These will be referred to as Weston's "second proceedings". By its second proceedings, Weston sought to challenge the validity of a variation made to a licence granted to Alcoa under the *Protection of the Environment Operations Act* 1997 (NSW) ("the PEO Act") permitting the processing of imported dross on the Yennora land. On 9 December 2005, Pain J dismissed[2] Weston's second proceedings.

8 Weston appealed to the Court of Appeal of New South Wales against the orders of Pain J made in its second proceedings. In answer to Weston's appeal, Alcoa sought and obtained leave to appeal out of time in respect of the earlier decision of Lloyd J in Weston's first proceedings. Weston did not oppose either the necessary extension of time or the grant of leave. Although no final orders had ever been made by Lloyd J, giving effect to the opinion expressed in the reasons his Honour had delivered in 2004, Alcoa's appeal to the Court of Appeal proceeded on the basis that Weston had been held to be entitled to declarations (and an injunction) of the kind it had sought. The Court of Appeal ordered[3] that

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1 *Weston Aluminium Pty Ltd v Alcoa Australia Rolled Products Pty Ltd* [2004] NSWLEC 551 at [43].

2 *Weston Aluminium Pty Ltd v Environment Protection Authority (No 2)* (2005) 144 LGERA 7.

3 *Alcoa Australia Rolled Products Pty Ltd v Weston Aluminium Pty Ltd* (2006) 148 LGERA 439.

Weston's first proceedings should be dismissed. The order dismissing Weston's second proceedings in the Land and Environment Court was not disturbed. Weston was ordered to pay Alcoa's costs, both in the Court of Appeal and below.

9 By special leave, Weston now appeals to this Court against the orders of the Court of Appeal dealing with its first proceedings. Weston also seeks special leave to appeal with respect to its second proceedings. Weston contends that the outcome of the application for special leave depends upon the outcome of its appeal and little separate argument was directed to that application. It is convenient, in the first instance, to put aside the application for special leave and deal only with Weston's appeal. The resolution of that appeal depends entirely upon the meaning and effect of the development consent to which Alcoa points as authorising it to process imported dross on the Yennora land. It is, nonetheless, important to begin from an understanding of the relevant statutory framework.

The statutory framework

10 Weston's application in its first proceedings, for an injunction restraining Alcoa from processing imported dross on the Yennora land, was made under s 123(1) of the EPA Act[4]. The breach of the EPA Act relied on as founding that application was a breach of s 76A(1). At the time of the proceedings before Lloyd J, that sub-section provided that:

> "If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless:
>
> (a) such a consent has been obtained and is in force, and
>
> (b) the development is carried out in accordance with the consent and the instrument."

11 The development consent upon which Alcoa relied as authorising it to process imported dross on the Yennora land was granted in 1981 under the then applicable provisions of the EPA Act. Another, earlier, development consent to

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4 "Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."

which it will be necessary to refer was granted in 1980 under Pt XIIA of the *Local Government Act* 1919 (NSW) ("the LG Act"). Argument proceeded, in this Court and in the courts below, on the footing that if processing imported dross was not permitted by either of those consents, s 76A(1) was engaged and the use of the land to treat imported dross was prohibited. It is desirable to expose some of the propositions that underpinned this accepted basis of argument.

12 First, Weston asserted, and Alcoa did not dispute, that the land which is in question was zoned under the Holroyd Local Environmental Plan 1991 as "4(a) (Industrial General Zone)". Subject to the EPA Act, land within that zone cannot be put to any purpose or use without development consent.

13 Secondly, "development" is defined in s 4(1) of the EPA Act as meaning, among other things, "the use of land", "the erection of a building" and "the carrying out of a work". The use of land includes a reference to "a change of building use" (s 4(2)(a)); the erection of a building includes a reference to "the rebuilding of, the making of alterations to, or the enlargement or extension of, a building" (s 4(2)(b)); the carrying out of a work includes "the rebuilding of, the making of alterations to, or the enlargement or extension of, a work" (s 4(2)(c)).

14 Thirdly, in 1981, s 91(1) of the EPA Act provided that a development application was to be determined by:

> "(a) the granting of consent to that application, either unconditionally or subject to conditions; or
>
> (b) the refusing of consent to that application."

A development consent thus hinged about the application made by the party seeking consent. It was the application that marked out the boundaries of the consent sought. The consenting authority responded to what was sought by granting or refusing consent and, if consent was granted, doing so either unconditionally or subject to conditions.

15 Finally, in 1981, s 91(4) provided that:

> "A consent to a development application for the carrying out of development, being the erection of a building, shall be sufficient to authorise the use of the building when erected *for the purpose for which it was erected where that purpose is specified in the development application*." (emphasis added)

The parties' arguments

16 Alcoa submitted that "a development consent is to be construed liberally without confining a use to the precise methods of process or activity, including the nature of the raw materials and the location from where they are sourced". Alcoa submitted that approached on this basis, the 1981 development consent permitted it to process imported dross on the Yennora land. It contended that only by making impermissible use of material extraneous to the relevant consent (and documents incorporated in the consent by express reference or necessary implication) could there be discerned any limitation upon the source of dross dealt with on the land.

17 The general approach to construction of development consents advocated by Alcoa was not disputed by Weston. It is an approach reflected in a number of decisions of the Court of Appeal of New South Wales to which reference was made[5]. Whether, as Alcoa submitted, reference may not be made when construing a consent to anything but the consent itself and any documents incorporated expressly or by necessary implication need not be examined. In particular, it is not necessary in this case to consider what reference may be made to the development application to which the consent responds.

18 Weston submitted that the consent upon which Alcoa relied, construed by reference to the principles advocated by Alcoa, does not give Alcoa permission to use the Yennora land for processing imported dross. That submission should be accepted.

The relevant development consents

19 Although Alcoa contended that the development consent granted in 1981 was determinative of the issues argued in the appeal, it is as well to begin by considering the development consent granted in 1980 in relation to the Yennora land. (Several other consents had been relied on in Alcoa's points of defence in the Land and Environment Court as permitting operations on the Yennora land, but it is not necessary to examine any of those other consents.)

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5 For example, *Royal Agricultural Society of New South Wales v Sydney City Council* (1987) 61 LGRA 305 at 310-311 per McHugh JA; *North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd* (1989) 16 NSWLR 50 at 59 per Kirby P; *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498.

20 In 1980, the Council of the Municipality of Holroyd, as responsible authority for the purposes of the LG Act, granted consent "for the erection of a Stage 1 of a can reclamation plant, consisting of 1 bag house, 1 rotary furnace, can reclamation and storage areas together with a can buy-back centre". The consent was subject to conditions. It related to "the land described as Lots 1, 3, 4, DP 533033; Lots 6A, 7, 8A, 9, 10A, DP 20170 bounded by Kiora Crescent, Norrie Street and Loftus Road". Clause 20 of the conditions provided that:

> "No consent is given or implied for any development other than Stage 1 works shown hatched on [an identified plan] and also the can buy-back centre shown on this plan. All other stages require the prior consent of Council."

As was to be expected from the consent's description of what comprised "Stage 1 of a can reclamation plant" ("1 bag house, 1 rotary furnace, can reclamation and storage areas ...") the plan identified in cl 20 of the conditions showed an area of a building to be constructed on the land that was to be set aside for a rotary furnace. But what was permitted by the 1980 development consent was Stage 1 of a "can reclamation plant". And Alcoa did not contend that this development consent now authorises it to process imported dross.

21 The 1981 development consent on which Alcoa relied granted consent "for an aluminium remelting facility generally in accordance with plans submitted to Council on 26th June 1981". Again, the grant was subject to conditions and it will be necessary to consider one of those conditions. It is important, however, to begin by identifying the relationship between this 1981 development consent and the 1980 consent.

22 The 1981 consent was expressed to relate to "the land described as follows: Lot 23, DP 606744 on the south-western corner of Norrie Street and Loftus Road". The can reclamation operations, the subject of the 1980 development consent, were conducted on that land. Examination of the plans referred to in the 1981 consent shows that the proposed new "aluminium remelting facility" required the construction of new factory buildings to the west of buildings used for the can reclamation operations. Although the 1980 and 1981 consents related to the same land, the consents were for separate and different uses of the land. The latter consent did not supersede the earlier. But examination of the conditions of the 1981 consent shows an important, but limited, relationship between the two operations.

23 Condition 19 of the 1981 consent required that disposal of liquid effluents and solid wastes be "strictly in conformity" with the details set out in two items

of a specified Environmental Impact Statement. One of those items (entitled "Generation and Disposal of Solid Waste") dealt with, among other things, "dross formation" and "[d]ross handling". The dross to which the item referred was dross produced in the aluminium remelting processes to be conducted in the new facilities. The text of the item showed, as was the fact, that the new facilities were to replace existing remelting operations conducted elsewhere on the Yennora land but nothing now turns on that fact. The item proposed, and condition 19 of the 1981 consent required, that the dross produced in the aluminium remelting processes to be conducted in the new facilities be treated "in the adjacent rotary furnace complex". The "adjacent rotary furnace complex" was part of the can reclamation plant conducted under the 1980 consent. In its terms, then, the 1981 consent required the use of the rotary furnaces operated as part of the can reclamation plant to be used for treating dross generated in the aluminium remelting operations permitted by the 1981 consent.

24 Once that relationship between the uses permitted by the 1980 and the 1981 development consents is understood, it is evident that the 1981 consent does not permit Alcoa's use of the land to process imported dross.

25 The 1981 consent permits Alcoa to conduct an "aluminium remelting facility". Alcoa submitted that processing dross, by melting it in a rotary furnace, is a form of aluminium remelting, and that processing imported dross falls within the description of the relevant use of land as being for an "aluminium remelting facility". But the text of so much of the Environmental Impact Statement as is incorporated by reference in the 1981 development consent requires rejection of this submission.

26 The relevant item of the Environmental Impact Statement referred to in condition 19 of the 1981 development consent shows that "[d]ross handling" is distinct from aluminium remelting. One of the consequences of operating an aluminium remelting facility is the generation of aluminium dross, a particular form of "[s]olid [w]aste". The 1981 consent both requires and permits that the dross which is generated by conducting the aluminium remelting facility should be treated in a particular way. The dross generated in the aluminium remelting facility is to be treated in the rotary furnaces which form part of Alcoa's can reclamation plant. But neither the 1980 consent permitting the operation of the can reclamation plant nor the 1981 consent permitting the operation of the aluminium remelting facility permits Alcoa to process imported dross in part of its can reclamation plant. Yet that is what it has been doing.

27 Processing imported dross is not using the land as a can reclamation plant and it is not using the land as an aluminium remelting facility. It is a use of the

land that is not permitted by the 1981 development consent and Alcoa did not contend it is permitted by any other development consent. The Court of Appeal erred in ordering that Weston's first proceedings be dismissed. It follows that Weston's appeal to this Court should be allowed with costs, and the order of the Court of Appeal dismissing Weston's first proceedings should be set aside.

28 Two further matters must then be examined. First, what further orders should be made as a consequence of allowing Weston's appeal to this Court and setting aside the Court of Appeal's orders dismissing the first proceedings? Secondly, how should Weston's application for special leave be resolved?

Consequential orders

29 Because Lloyd J made no final orders disposing of the first proceedings, the parties to those proceedings have not had any opportunity to be heard about the precise terms in which declarations should be made or an injunction should be granted. Moreover, it may be that the form in which any orders of that kind should be made may now be affected by the outcome of the proceedings brought by Alcoa seeking the grant of a development consent permitting it to process imported dross. In those circumstances, the matter should be remitted to the Court of Appeal for its further consideration. Whether that Court deals with the matter, or remits it for further consideration to the Land and Environment Court, is for the Court of Appeal to decide.

The application for special leave

30 Weston submitted that, if its appeal in relation to its first proceedings succeeded, it followed that the licence issued under the PEO Act, which was the subject of Weston's second proceedings, was invalid and that Weston should have its costs of the second proceedings. Alcoa submitted that the validity of the licence issued under the PEO Act turned upon the proper construction of that Act and the effect of non-compliance with its provisions.

31 The licence the subject of Weston's second proceedings was varied to permit Alcoa to process imported dross. The critical provision of the PEO Act is s 50. In the form it took at the time of the variation of the relevant licence, the section provided:

"(1) **Licensing of development controlled under EP&A Act**

This section applies to development that cannot be carried out without development consent under the *Environmental Planning and Assessment Act 1979*. This development is called ***controlled development*** in this section.

(2) **Licence to be concurrent**

A licence that relates to controlled development must not be granted by the appropriate regulatory authority, unless development consent has been granted for the controlled development. However, this section does not prevent the consideration of a licence application by the appropriate regulatory authority before development consent is granted.

(3) **Existing use**

Without limiting the above, this section does not apply to the extent that development consent is not necessary under the *Environmental Planning and Assessment Act 1979* because of an existing use.

(4) **Definitions**

In this section:

development has the same meaning as in the *Environmental Planning and Assessment Act 1979*.

development consent means consent under Part 4 of the *Environmental Planning and Assessment Act 1979*.

existing use has the same meaning as in Division 10 of Part 4 of the *Environmental Planning and Assessment Act 1979*."

32 Alcoa submitted that the prohibition in s 50(2) against *granting* a licence does not extend to prohibiting *variation* of an existing licence.

33 The PEO Act makes separate provision for the issue, transfer and variation of licences. Section 53 provides for making an application for issue of a licence. Section 54 deals with transfer of a licence. Section 58 permits variation of a licence. A variation includes attaching, substituting, omitting or amending a condition (s 58(2)).

34 Although the making of these different provisions gives an evident textual basis for Alcoa's submission, the submission should be rejected. The hinge about which s 50(2) turns is "controlled development". Because "development" has the same meaning as in the EPA Act, it includes the use of land. Section 50(2) must therefore be understood as directed (among other things) to the grant of licences that regulate particular uses of land. Is the sub-section concerned only with new licences or is its prohibition wider?

35 The better construction of the prohibition contained in s 50(2) is that its prohibition is directed not only to the grant of a new licence by "the appropriate regulatory authority" but also to any variation of an existing licence. That is, s 50(2) should be read as providing that the appropriate regulatory authority is prohibited from issuing any licence which regulates a particular use of land (whether by making an original grant or by varying an existing licence) unless development consent has been granted for that use. This construction of s 50(2) should be adopted because, as Basten JA, speaking for the Court of Appeal, said in the present matter[6], "[a] contrary conclusion can readily be seen to give rise to anomalous results which would be entirely subversive of the legislative policy underlying the scheme" for which the PEO Act provides.

36 For the reasons given earlier, when the appropriate regulatory authority (the first respondent to the application for special leave, the Environment Protection Authority) varied the relevant licence, Alcoa did not have development consent to use the Yennora land to process imported dross. Section 50(2) therefore prohibited the Authority granting that variation. It follows that the variation was invalid.

37 At first instance, Pain J had concluded that s 50(2) did not prohibit the appropriate regulatory authority varying the relevant licence. For the reasons that have been given, her Honour erred in this conclusion. Contrary to the view taken in the Court of Appeal, the dismissal of Weston's second proceedings at first instance was not to be supported on other grounds and Alcoa did not contend to the contrary. Both Weston and Alcoa argued the application for special leave on the footing that the determinative issue, if leave were granted, was the question of construction of s 50(2).

38 There should be a grant of special leave to appeal; Weston's appeal should be treated as instituted, heard instanter and allowed, and the orders of the Court

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6 (2006) 148 LGERA 439 at 459 [76].

of Appeal set aside. Weston should have its costs of its second proceedings, as against Alcoa, in this Court and both the Court of Appeal and the Land and Environment Court. Because the proceedings before Pain J in the Land and Environment Court were conducted in a manner analogous to the determination of separate questions, the matter should otherwise be remitted to the Land and Environment Court for further consideration conformably with the decision of this Court.