
ENVIRONMENT LEGISLATION AMENDMENT BILL 2013

Executive Summary

The Tasmanian Minerals and Energy Council (TMEC) welcome the opportunity to make a brief submission in relation to the Committee's deliberations upon the Environment Legislation Amendment Bill 2013.

The TMEC notes the Federal Court's decision in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities (2013) FCA 694 (the Tarkine Case)* and wishes to submit upon that element of the Amendment Bill.

The TMEC supports the Amendment Bill as it relates to the Tarkine Case.

However, we argue that the Tarkine Case arose because the Bill contains unnecessary prescription, which can give rise to challenges of this nature. We also argue the EPBCA should be reviewed with the aim of making it a Bill of intent, rather than specificity.

In addition, we provide background to the Tarkine Case itself, which we believe to be necessary for Committee members to comprehend the Federal Court case itself.

Background

To consider the Federal Court's decision in the Tarkine Case from a perspective wider than a legal interpretation and judgement of a prescriptive requirement in the Environment Protection and Biodiversity Conservation Act, it is necessary to go straight to the heart of the matter – whether a small iron ore mine can be built and operated in Tasmania's north-west.

The Tarkine National Coalition Incorporated is a small green-left organisation based at Burnie in Tasmania. Bob Brown, the former Greens Senator from Tasmania, is its patron. It is the spear-carrier for the green-left's long-term campaign to have all of western Tasmania as a National Park or equivalent, with no industry. They are trying to drive the mining industry out of the area.

The "Tarkine" is in the northern-most part of the west coast of Tasmania. Below it to the south is the expansive World Heritage Area, where no economic activity is allowed. Most of the "Tarkine" is already covered by formal statutory reserves. They are a mix of nature-only (the large Savage River National Park) and multiple-use (Regional Reserves and Conservation Areas). In the main they were declared in 1998 in the Regional Forest Agreement between the Tasmanian and Federal Governments. Some 80 per cent of the "Tarkine" is covered by formal statutory reserves. In addition, the Tasmanian Forest Agreement underpinned by the Tasmanian Forest Agreement Bill 2012 in the Tasmanian Parliament will essentially declare statutory reserves over the remaining twenty per cent or so of the "Tarkine" which is unreserved. The additional reserves will also be in multiple use categories, although the green-left groups see this as only a step on the longer road towards having them upgraded to exclusive conservation reserves. The multiple use reserves are in the classifications of the International Union for the Conservation of Nature (IUCN). They were declared in the multiple use categories because they have some natural values and are heavily mineralised. These categories are rejected by the green-left as not being "pure".

There is a well-documented history of mining (both small and large) in the area. It is canvassed by historian Dr Nic Haygarth (1), and it has a remarkable mineral endowment. For example, the Savage River iron ore mine of Grange Resources is in the middle of the “Tarkine” and Venture Minerals’ Mt Lindsay tin/tungsten discovery, along with smaller satellite deposits of iron ore are to the south. There are many historical mine sites, including the Mt Bischoff tin mine which was discovered in the 19th century and was mined into the 20th century. It provided the cash flow to allow the rise of Launceston as an important regional centre.

The “Tarkine” name is said to have been imagined in the 1980s by Bob Brown for campaign purposes. Until then, it was known in Tasmania by the names of its component parts – for example Couta Rocks, the Pieman River, Savage River and so forth. However, the green-left prefer areas to have names so that they can campaign to have the such-and-such “saved” even though it is not under threat. What they mean by ‘saved’ is the driving out of economic activity to fit their world view of lessened economic activity and a smaller population (Deep Ecology) as an alternative concept to Sustainable Development, in which they do not believe.

It is a campaign characteristic of the believers in Deep Ecology (also sometimes known as “dark greens”) that if they do not have their way in the legislative or regulatory processes surrounding a potential project, they resort to the tribunals or courts as a last-chance opportunity to prevent it. This is in fact the scenario with the small mine at the heart of the Tarkine Case and another case they have running in the Federal Court at the time of writing, in which they are trying to prevent Venture Minerals from developing a small project in the same area.

At this stage, some criticism of the Federal Court is both necessary and warranted. The green-left organisations, such as the secretive Tarkine National Coalition (they refuse to publicly name the members of their Board) oppose these projects (including the project involved in the Tarkine Case) on a philosophical basis. That is, they are philosophically opposed to economic activity per se. On the basis of the green-left slogan of “Think Globally Act Locally” their focus is on the little projects in Tasmania’s north-west, where the unemployment rate is the highest in Australia and where any possible economic activity is desperately needed.

The organisation's spokesman has said publicly (and been quoted in the Advocate, the regional newspaper) as saying in essence that despite State and Federal government approval, these projects will not proceed. They will take whatever action is necessary or possible to stop them. They have said before seeking leave of the Federal Court to appeal, that they will appeal. At this stage they have not identified grounds for appeal. They indicate that their legal advisers will fossick about in the prescription of the EPBCA or the Federal-State agreements underpinning bilateral assessments to find possible grounds and then take them to the Federal Court. This means that they are vexatious litigants. Nonetheless, the Federal Court has found in the past, and has found in the contemporary environment, that the grounds brought forward after these searches have been adequate and the Court has granted leave to appeal. The aim of the Federal Court cases (and cases in the State regulatory framework such as the Resource Management and Planning Appeals Tribunal in Tasmania) is to prevent the projects from happening. One way to do this is to maximise the time between regulatory approval and final approval, including clearing the Federal Court. The green-left organisations know that if they are able to maximise this time, the proponents will run out of funds and the projects will not proceed. Therefore, using the Federal Court as an instrument of delay, the objective is achieved even though the appeal may not be successful. If the appeal is successful, the delay has still been achieved and may be even longer as the regulators/Parliament address the matter. In addition, potential investors in Tasmanian mineral exploration, in addition to those who have already committed funds to exploration programs, will note the court cases with some alarm. They will see that in Tasmania, EPA approval and signoff by a single or two governments, does not necessarily mean a project will proceed as it can be expected as a matter of course that the green-left groups will then challenge it in the courts. Tasmania's reputation as a sensible investment destination is damaged – which of itself is in accord with the policies of the green-left groups.

If we now come to the Tarkine Case, we can suggest that it hinged on a matter of legal technicality, invited in part by the prescriptive nature of the wording of the Act.

The Act specifies that the Minister must sight "Approved Conservation Advice" for each threatened species listed under the Act. This means the Federal Minister must receive a folder marked "Approved Conservation Advice" for each species and must look at the information in that folder. The Court in essence found the Minister did not follow this prescriptive advice and therefore the approval of the mine was disallowed.

The decision represented the victory of narrow prescription over broad intent. The species in question was the Tasmanian devil. From the time that this small mine was foreshadowed, the green-left organisations in Tasmania, and an Australian Greens Senator began to paint for public consumption a false picture of the possible impact on the Tasmanian Devil of one or two small mines in the “Tarkine”, an area which notionally covers around six per cent of the Tasmanian land mass. We say “notionally” because the “Tarkine” is unbounded. The documentation in the extensive DP and EMP plan submitted to the Tasmanian EPA for the mine included much information about the Tasmanian Devil – in fact far more than was necessary, in response to the public statements of the green-left groups about the mine’s potential impact. However, to cut to the chase, the mine will have little to no impact upon the devil population. This is borne out by a public statement from the director of the EPA, Mr Alex Schaap, which was published in a Tasmanian newspaper and which reflected scientific knowledge about the Tasmanian devil in the area and the surveys which were undertaken to support it. It is attached as “Attachment A”.

In reality, the Minister, before taking the decision which the Federal Court disallowed on legal technical grounds, considered voluminous information about the Tasmanian devil in the area and the possible impact of the mine upon the species. The DPEMP is available on the Tasmanian EPA’s website. The submission was prepared by professionals – Pitt and Sherry P/L in Tasmania.

The Environment Legislation Amendment Bill seeks to nullify this decision of the Federal Court, in that a failure to follow the exact prescription will not in future (or in past approvals where the same set of circumstances may apply) invalidate the Minister’s decision to approve. From that standpoint, the Tasmanian Minerals and Energy Council support the Bill. However, it will foreclose only one very narrow opportunity for the green-left groups to have overturned a favourable decision on a mining project on narrow legal grounds. It will not preclude similar challenges based upon other legal technicalities in the future. In fact, one of them is already in progress with the Federal Court on another small mining venture in Tasmania’s north-west, on a different set of technicalities.

It may have been better had the Federal Government sought to remove some of the prescription in the Act, to allow intent to rule. For example, an amendment which simply said the Minister should consider the effect of a project on listed threatened species before approving or rejecting a project may have been a better approach. At the same time, the specificity around the Minister having to see “approved conservation advice” would have been removed.

The green-left groups will probably continue to fail to have projects stopped in the legislative and regulatory arenas in which most people trust. However, they will also continue to try to impose their minority view upon broader society by pursuing narrow technical arguments – and in some cases they will succeed and the Tasmanian economy will continue to shrink and opportunities for employment will be foreclosed against the will of the vast majority of Tasmanian people.

- (1) A Peopled Frontier. The European Heritage of the Tarkine Area
Copyright Nic Haygarth, Perth , Tasmania, 2008
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Published December 2008. Reprinted April 2009.

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Attachment A



Tarkine mines devil threat not big factor

By SEAN FORD

Dec. 4, 2013, 9 p.m.

ALLEGED threats to Tasmanian devils from two new Tarkine mines were not big factors for the state Environment Protection Authority.

Environmentalists' opponents of Shree Minerals' Nelson Bay River and Venture Minerals' Riley iron ore mines made much of claims they would further endanger devils, already reeling from the deadly facial tumour disease.

However, the EPA board did not believe threats to devils from the mines were significant.

"While public commentary on the (Shree) proposal has tended to focus upon wilderness values and impacts on Tasmanian devils, these considerations were not of great consequence in this assessment," EPA director Alex Schaap said in the body's annual report.

"The mine site is adjacent to active forestry operations, has nearby past quarry activity and is well served by roads and tracks.

"While it has aesthetic appeal, it does not score highly in terms of wilderness values.

"The board also concluded that devils use the area and may be impacted by habitat disruption and road kill, but those impacts were not likely to be of sufficient consequence to warrant further mitigation measures."

Mr Schaap said the assessment was a difficult one because of complex geotechnical and geochemical issues, which needed careful consideration.

"The board concluded that those issues could be effectively managed under appropriate conditions."

He said the Venture proposal, for near Tullah, was more straightforward as it involved short-term surface mining of shallow deposits in an area that had previously been heavily disturbed and altered by mining and forestry.

"The issue of concern in this case was ensuring that site rehabilitation would allow for adequate recovery of the natural values of the area and the board was satisfied that this could be achieved.

"Again, the board did not see the wilderness or devil issues as warranting further mitigation measures... "

The Shree mine is operating.

Save the Tarkine is challenging Venture's federal environmental approval in the Federal Court.

Comment was being sought from Save the Tarkine.

www.theadvocate.com.au/story/1952131/tarkine-mines-devil-threat-not-big-factor/

ATTACHMENT B

Significant dates for Shree Minerals' Nelson Bay mine

26 July 2012	Tasmania's EPA approved Shree Minerals' mine.
17 August 2012	Circular Head Council approved Shree Minerals' mine.
13 September 2012	The Tasmanian Government granted Shree Minerals Ltd a Mining Lease for its Nelson Bay River iron project in North West Tasmania.
5 October 2012	The Tasmanian Resource Management and Planning Appeals Tribunal dismissed the Tarkine National Coalition's appeal against Circular Head Council's approval of the Nelson Bay River mine project.
18 December 2012	Federal Minister Tony Burke approved Shree Minerals' mine.
17 July 2013	The Federal Court declared the mine's approval as invalid due to an administrative error by the former Federal Environment Minister, Tony Burke.
31 July 2013	The Federal Environment Minister Mark Butler reapproved Shree Minerals' mine with extra conditions.
31 October 2013	The mine was officially opened.