

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NOS. P1816/2011, P1818/2011  
P1820/2011, P1822/2011, P1829/2011 & P1846/2011

**In P1829/2011 & P1846/2011:**

**APPLICANT** Dual Gas Pty Ltd  
**RESPONDENT / AUTHORITY** Environment Protection Authority

**In P1816/2011, P1818/2011, P1820/2011 & P1822/2011:**

**APPLICANTS** P1816/2011 Martin Shield  
P1818/2011 Doctors for the Environment Australia Inc.  
P1820/2011 Environment Victoria Inc.  
P1822/2011 Locals into Victoria's Environment Inc.  
**RESPONDENT / AUTHORITY** Environment Protection Authority  
**RESPONDENT** Dual Gas Pty Ltd  
**SUBJECT LAND** Commercial Road, MORWELL VIC 3840  
(Lot 2 on PS 449983 A)  
**WHERE HELD** 55 King Street, Melbourne  
**BEFORE** Mark Dwyer, Deputy President  
**HEARING TYPE** Practice Day Hearing  
**DATE OF HEARING** 26 August 2011  
**DATE OF ORDER** 5 September 2011  
**CITATION**

## ORDER

- 1 In relation to the interlocutory application by the Environment Protection Authority seeking orders confirming the Tribunal's jurisdiction, and on the basis of the submissions thusfar before the Tribunal on town planning matters, the Tribunal declines at this stage to make any declaration, or to exercise any discretion under clause 62 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 2 By **23 September 2011**, Dual Gas Pty Ltd must file with the Tribunal and serve on the other parties a report, prepared by a qualified town planner, indicating his or her opinion whether a planning permit is required for the works proposed in the works approval (either for the 600 MW power station the subject of its application, or the 300 MW power station the subject of the EPA works approval), and the basis for such opinion. The report should incorporate the substance of any communication with Latrobe Shire Council on this issue.
- 3 Any party -
  - contending that the proposed works requires a planning permit under the Latrobe Planning Scheme; and/or
  - that seeks to challenge the validity of the works approval in this proceeding on the ground that it is void under s 19B(7B) of the *Environment Protection Act 1970* –must do so by filing and serving written notice of such issue by **30 September 2011**, together with supporting submissions. If any party gives such notice, the Tribunal may give further directions on the matter and/or convene a further preliminary hearing or deal with the issue as a preliminary matter at the final hearing.
- 4 No order as to costs.

**Mark Dwyer**  
**Deputy President**

## **APPEARANCES:**

For Environment Protection Authority	Simon Molesworth QC and David Deller of counsel, instructed by Corrs Chambers Westgarth
For Dual Gas Pty Ltd	Stuart Morris QC and Barnaby Chessell of counsel, instructed by Maddocks
For Martin Shield	Martin Shield, in person
For Doctors for the Environment Australia Inc.	Jane Treleaven of counsel, by direct brief
For Environment Victoria Inc. & Locals into Victoria's Environment Inc.	Adrian Finanzio and Rupert Watters of counsel, instructed by the Environment Defenders Office

## **REASONS**

### **What is this order about?**

- 1 Following the practice day hearing on 26 August 2011, I published an order (dated 31 August 2011) with directions on a number of issues, but reserved to a further order the town planning and related jurisdictional issues raised by the EPA. This further order and reasons deals only with that issue.
- 2 In essence, the EPA is concerned that a planning permit may be required for the proposed works covered by the works approval it has issued, and this has implications for the validity of the works approval and, consequentially, the Tribunal's jurisdiction to review the works approval.
- 3 The EPA thus seeks an order that the Tribunal confirm its jurisdiction, if appropriate, by exercising its discretion under clause 62 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* to disregard the EPA's possible failure to include a condition on the works approval relating to the planning permit requirement.

### **Background**

- 4 The EPA has issued a works approval to Dual Gas for a proposed demonstration power station in Morwell, using synthesis gas generated from brown coal as the primary fuel for power generation. Dual Gas had applied for a 600 MW power station, whereas the EPA works approval limits the demonstration project to 300 MW. There are six applications for review before the proceeding. Four are by objectors, and two are by Dual Gas – one relating to conditions, and one based on an alleged failure by the EPA to decide the whole application before it.

- 5 The applications are a matter of some public controversy, and will no doubt be hard fought. The Tribunal hearing is scheduled to commence on 24 October 2011 for approximately 4 weeks, with substantial expert evidence to be produced. There are also interlocutory matters requiring preliminary determination. Overall, it will be a protracted and costly exercise for those involved.
- 6 The EPA wishes to avoid any outcome of these extensive proceedings being later challenged on a jurisdictional basis by reference to town planning matters. The EPA has thus sought an order confirming the Tribunal's jurisdiction as a 'risk mitigation measure'.

### How does the jurisdictional issue arise?

- 7 Section 19B of the *Environment Protection Act 1970* deals with the issue of a works approval by the EPA. The relevant parts of s 19B provide as follows:

#### 19B Works approval

...

(3)The Authority [i.e the EPA] shall upon receiving an application for a works approval—

(a)refer a copy of the application and a copy or summary of the accompanying plans, specifications and other information to—

...

(iii) any responsible authority under the **Planning and Environment Act 1987** administering a planning scheme applying to the land for which the application for works approval is made;

...

(4A) A responsible authority to which a copy of an application for a works approval has been referred under subsection (3)(a)—

(a)must tell the Authority in writing within 21 days after the day on which the copy was sent whether—

...

(ii) a permit is required under the **Planning and Environment Act 1987** for the proposed works;

...

(7A) If a planning scheme requires a permit to be obtained under the **Planning and Environment Act 1987** for the proposed works and a permit has not been issued, any works approval issued by the Authority for the proposed works must be issued subject to a condition that the approval does not take

effect until a copy of the permit is served on the Authority by the applicant.

(7B) Any works approval issued in contravention of subsection (5)(c) or (7A) is void.

- 8 Here, the EPA referred the works approval application to Latrobe Shire Council, as responsible authority for the Latrobe Planning Scheme. The Council advised that no planning permit was required for the proposed works. The EPA relied upon this advice from the Council and issued a works approval without any condition under s 19B(7A). At face value, there is no contravention of s 19B(7A), and no reason to consider that the works approval may be void by reference to s 19B(7B).
- 9 However, *if* it were now found that a planning permit had been required, and *if* the works approval issued by the EPA without the s 19B(7A) condition is therefore void by reference to s 19B(7B), the Tribunal *may* technically lack jurisdiction to deal with the applications seeking to review the issue of the works approval. [I have emphasised the words ‘if’ and ‘may’ in italics, as no formal findings have been made on these issues, nor their legal consequences.]

### **Consideration of issues**

- 10 Given that the EPA’s issue of a works approval is for a 300 MW power station, rather than the 600 MW applied for, the final ‘footprint’ of a 300 MW power station (if ultimately approved by the Tribunal) is apparently unclear. The EPA however now believes that the proposed power station may marginally encroach into an area covered by an Environmental Significance Overlay (ESO) under the Latrobe Planning Scheme where a planning permit may technically be required. The EPA did not however take me to any plans, planning scheme maps, or planning scheme provisions to substantiate its concern in this regard, nor is there any material before me about possible exemptions under other relevant planning scheme provisions or other enactments.
- 11 The EPA’s interlocutory application is for the Tribunal to ‘confirm its jurisdiction’, and is thus designed to remove uncertainty. However, I am not convinced that uncertainty is removed by the Tribunal dealing in advance with the effect of a hypothetical scenarios on its jurisdiction.
- 12 Clause 62 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* provides as follows:

#### **62 Tribunal may disregard failures to comply**

The Tribunal has jurisdiction to determine a proceeding under a planning enactment despite any failure to comply with the planning enactment or any other enactment and, in doing so, may determine to disregard that failure if the Tribunal considers it in the interests of justice to do so.

- 13 Under clause 2 of Schedule 1, a ‘planning enactment’ is defined to include the *Environment Protection Act 1970*.
- 14 The EPA seeks an order to the effect that, pursuant to clause 62, I determine in the interests of justice to disregard the *possible* failure by the EPA to comply with s 19B(7A) of the *Environment Protection Act 1970*, and to thus retrospectively cure any defect that may later be the subject of challenge. [I have placed the word ‘possible’ in italics, as it is not used in clause 62 itself.]
- 15 The use of clause 62 in other planning contexts is not entirely beyond doubt, and the EPA quite properly referred me to a number of authorities on clause 62 in its written submission<sup>1</sup>. On the basis of some of those authorities, it may well be open to the Tribunal to use clause 62 to address a failure by the EPA to comply with s 19B(7A) of the *Environment Protection Act 1970* within the current proceedings. However, none of these authorities deal with a non-compliance directly comparable to s 19B(7A), where the governing enactment expressly renders the non-complying decision ‘void’.
- 16 Equally, there may be other options to address the matter. One of the Dual Gas proceedings (P1829/2011) is an application to review conditions on the works approval. This application therefore proceeds on the assumption that the works approval has otherwise been validly issued. However, the alternative application by Dual Gas is a proceeding (P1846/2011) alleging that the EPA has failed to determine the works approval application. Whilst that application is based on other grounds<sup>2</sup>, there is therefore already an application before the Tribunal that proceeds on an assumption that there is (as yet) no valid works approval. Under the *Victorian Civil and Administrative Tribunal Act 1998*, the failure of the EPA to issue a valid works approval is a deemed refusal of the works approval, with the Tribunal having jurisdiction to review that refusal. This alternative proceeding may thus already vest the Tribunal with a broad discretion to overcome the EPA’s concerns.
- 17 Although the EPA’s interlocutory application is undoubtedly well intended, I consider the matter still to be somewhat hypothetical and/or premature, and I see no utility in making any order at this stage confirming the Tribunal’s jurisdiction. Moreover, I do not consider it is the role of the Tribunal to engage in shadow-boxing on an issue where there is, as yet, no real dispute before it.
- 18 As I have indicated, no failure to comply with s 19B(7A) of the *Environment Protection Act 1970* has yet been determined. The relevant responsible authority, Latrobe Shire Council, was initially a party in one of

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<sup>1</sup> including *Harvey v Mustaers* [2011] VSC 23, the decision in which is currently the subject of an appeal to the Court of Appeal.

<sup>2</sup> i.e. the approval of something materially different to what was applied for, through the approval of a 300 MW power station when the application was for a 600 MW power station

the proceedings, but has since been removed as a party at its request, and without objection by other parties, on the basis that there were no relevant planning issues. At an earlier practice day hearing on 15 July 2011, when the EPA first raised its concerns, Latrobe Shire Council reiterated its opinion that no planning permit is required for the proposed works. The proponent Dual Gas has not contested this opinion, nor has any objector sought to advance an alternative view in its grounds for review. As I have also indicated, I have not been referred to any plans, planning scheme maps, or planning scheme provisions to substantiate an alternative opinion. Even the EPA does not emphatically claim (at least not at this stage) that a planning permit is required, and it raises the issue whilst maintaining that 'no concession as to uncertainty of jurisdiction is made'.

- 19 I do not therefore consider it appropriate, at least not at this stage, to exercise any discretion under clause 62 in the absence of there being a substantiated failure to comply with s 19B(7A), or at least a reasonable *prima facie* case.
- 20 Given the EPA's underlying concerns, it would nonetheless be useful to put this issue to rest one way or another within these overall proceedings, and to flush out whether any party (including the EPA) seriously contends that the proposed works require a planning permit under the Latrobe Planning Scheme. My order facilitates this.

**Mark Dwyer**  
**Deputy President**