

## SUMMARY OF DECISION

On Friday 6 July 2018, the Federal Court dismissed Huon Aquaculture's legal proceedings relating to salmon farming in Macquarie Harbour.

In 2012, the Commonwealth Minister had made a decision that the expansion of finfish farming in Macquarie Harbour was not a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* if taken in a particular manner (the **particular manner decision**). Huon Aquaculture (**Huon**) had applied for a declaration that the particular manner decision was invalid.

Huon had alleged that "conditions" attached to the particular manner decision allowing the revision of the biomass limit for the harbour were uncertain and lacked finality. The company argued that the conditions allowed the Tasmanian Department of Primary Industries, Parks Water and Environment (**DPIPWE**) to decline to set biomass limits, or to set limits that were inadequate to prevent significant impacts on matters of national environmental significance, such as the endangered Maugean Skate and the Tasmanian Wilderness World Heritage Area.

Huon made its application to the Federal Court in early 2017, after years of raising its concerns about the environmental health of the harbour with DPIPWE and the Commonwealth environment department.

The Commonwealth Minister and the other Macquarie Harbour salmon farmers, Tassal and Petuna, opposed Huon's application to the Court.

The Court did not determine the merits of Huon's application about the invalidity of the particular manner decision. Instead, the Court considered a preliminary question about whether the Court would exercise its discretion to make the declaration, even if Huon could establish that the decision was invalid. Despite observing that the interpretation of the particular manner decision adopted by Tassal and DPIPWE "may well have been, as Huon believes, unfair and legally unsound", Justice Kerr was not persuaded that he should exercise his discretion to declare the Minister's decision invalid.

In reaching that view, his Honour took the following matters into account:

➤ Huon failed to give an adequate explanation for its delay in commencing the legal proceedings. The Court found that Huon was aware of the ambiguity in the operation of the conditions since at least 2014 yet did not apply to the Court until early 2017, nor did it take any of the other legal options available under the EPBC Act to resolve its concerns.

The Court noted that, in the intervening period, Huon made substantial profits from salmon farming in the harbour.

➤ If the particular manner decision was declared invalid, the operations of Petuna and Tassal in Macquarie Harbour would be required to cease at "great economic detriment to both companies and many of their local employees." Justice Kerr described these consequences as "significantly adverse for Tassal but potentially catastrophic for Petuna."

➤ His Honour dismissed arguments by Huon that the economic impacts resulting from a declaration of invalidity would be "minimal in practice". He was not satisfied that salmon farming could resume at pre-expansion levels and, based on scientific reports showing reduced species diversity and abundance in the harbour, considered it "more likely than not" that any new proposal would be a controlled action requiring lengthy assessment with no guarantee of approval.

➤ The Court accepted that Huon held genuine concerns regarding declining dissolved oxygen levels and had consistently raised these concerns with government agencies and the joined companies. However, as Huon did not call evidence to establish past, present or future environmental harm, his Honour held that evidence of Huon's beliefs in relation to environmental conditions in the harbour was not sufficient to establish "that there is in fact a public interest in the grant of relief."

➤ The recent biomass determination by the EPA Director reduced allowable biomass in the harbour to pre-expansion levels, which was the outcome effectively sought by Huon in the proceedings.

The Court dismissed Huon's application and ordered Huon to pay Tassal's and Petuna's costs, and part of the Minister's costs. Huon has until **27 July 2018** to appeal the Court's decision.

To read the full judgment, [click here](#).

## BACKGROUND

In 2012, the Department of Primary Industries, Parks, Water and Environment (**DPIPWE**) referred the expansion of finfish farming in Macquarie Harbour to the Commonwealth Minister for the Environment (the **Minister**) under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). Though DPIPWE made the referral, the action was to be jointly undertaken by the three salmon companies named in the referral – Tassal, Huon and Petuna.

The matters of national environmental significance at issue were the endangered Maugean skate and the World Heritage values of the adjoining Tasmanian Wilderness World Heritage Area, and the impact of reduced water quality on those matters.

In October 2012, the Minister determined that the Macquarie Harbour expansion was not a controlled action provided it was undertaken in a particular manner (the **particular manner decision**). Among other conditions, the particular manner decision provided:

- 2(f) *The total biomass held across all lease areas must not exceed 52.5 percent of the modelled maximum sustainable biomass until limit levels are reviewed in mid-2013 and must not exceed any such altered levels as may be identified thereafter by the Tasmanian Government.*

The particular manner decision set the maximum sustainable biomass at **29,500t**.

In October 2013, the Tasmanian Salmon Growers Association submitted a joint industry report regarding Macquarie Harbour (the **Industry Report**) to the Department of Primary Industries, Parks, Water and Environment (**DPIPWE**). The Industry Report had been prepared by senior staff of all three companies operating in Macquarie Harbour, but had not been signed by the Steering Committee (comprising the CEOs of each company).

Tassal proceeded on the basis that the Industry Report was the review referred to in clause 2(f) of the particular manner decision and, therefore, the 52.5% biomass cap was no longer applicable. In the absence of a revised biomass limit being set by DPIPWE, Tassal understood that no biomass limit applied and proceeded to increase smolt input to 100% of its allocated quota.

In contrast, Huon considered that the 52.5% limit continued to operate until DPIPWE introduced a revised limit.

On 20 August 2014 Huon and Petuna made a joint representation to DPIPWE seeking to enforce that biomass limit (15,487t) to protect the health of the harbour. In its response on 27 September 2014, DPIPWE advised that it considered that the biomass limit referred to in the particular manner decision had lapsed when the Industry Report was submitted. Despite this, DPIPWE did not impose a revised biomass limit until 9 October 2015.

Huon continued to raise concerns regarding the impact of exceeding the biomass limit in the particular manner decision, including reduced dissolved oxygen levels in the Harbour. The company met with DPIPWE staff and the Parliamentary Secretary (as delegate of the Minister), but no action was taken and no revised biomass cap was introduced until 9 October 2015.

When the revised biomass cap was introduced, it included an allocation which reflected Tassal's existing biomass (that is, increased from 2013 onwards to 100%). Huon was aggrieved, arguing that the allocation effectively penalised Huon and Petuna for having maintained the biomass limits reflected in the particular manner decision.

When further efforts to secure a reduced biomass limit and revised allocation from DPIPWE failed, Huon wrote to the Minister to request that he enforce the conditions of the particular manner decision. No enforcement action was taken.

On 6 February 2017, Huon applied to the Federal Court for a declaration that the particular manner decision was invalid. Huon argued that the particular manner decision was uncertain and inadequate to give effect to the Minister's statutory obligations under the EPBC Act.

Tassal and Petuna were joined as parties to the proceeding, each opposing Huon's application. The Secretary of DPIPWE was originally party to the proceeding but was removed following the acceptance of narrower grounds of application focussed solely on the validity of the Minister's decision.

For a more detailed timeline of events, [click here](#).

## DECISION

Justice Kerr noted that it is the Minister's statutory duty to ensure that the particular manner decision "accurately reflect the Minister's belief as to the particular manner(s) in which the action will be taken." His Honour also accepted that the validity of the decision was to be determined at the time it was made and cannot be influenced by subsequent events.

The Minister did not seek to challenge Huon's arguments regarding the validity of the particular manner decision. Instead, he urged the Court to first consider the appropriateness of granting discretionary relief and consider the question of validity only if relief would be granted. Tassal and Petuna supported the approach that discretionary factors should be considered first, "even on the assumption that Huon might succeed on the grounds it has advanced."

Justice Kerr acknowledged that, if the decision was invalidated and retrospective approval sought for the expansion, there would be "at least a significant likelihood that, after having sought further information and having regard to the precautionary principle to which he would be subject, the Minister would make a decision that the action was a controlled action." He also considered "it is not inconceivable that the proposed action might be refused, or alternatively conditions imposed that would render salmonid production in Macquarie Harbour uneconomic."

However, his Honour held that:

*Even on [the assumption that Huon succeeded in establishing its grounds], the cumulative weight of the factors... in favour of refusing relief, in the specific facts of this case, significantly outweigh the reasons to the contrary. They collectively justify the Court exercising its discretion to refuse Huon the relief it seeks.*

### **Discretionary factors**

#### **Delay in commencing proceedings**

Huon's failure to commence any proceedings until more than four years after the particular manner decision was made was a significant factor in the Court's decision.

Justice Kerr was satisfied that a number of opportunities arose for Huon to take action. These included:

- Requesting a statement of reasons for the particular manner decision
- Seeking judicial review of the particular manner decision
- Requesting the Minister to reconsider the particular manner decision under s.78A of the EPBC Act
- Seeking an injunction in response to exceedances of the 15,488t biomass limit
- Seeking an earlier declaration as to the validity of the particular manner decision.

The Minister argued that any ambiguity in the particular manner decision should have been apparent at the time of the decision. His Honour accepted that Huon had not considered the wording of clause 2(f) ambiguous at that time and had no reason to challenge its finality. However, his Honour considered that ambiguity became clear following receipt of DPIPW's advice in 2014 that it considered that the biomass limit had lapsed. He considered there was a proper foundation for Huon to commence proceedings or seek reconsideration of the particular manner decision at that point, and noted that Huon's solicitors had advised the company of its legal options around that time.

The Court was unconvinced that Huon's continued efforts to work with government to secure a sustainable biomass limit provided a sufficient explanation for the delay in commencing proceedings. His Honour considered it "implausible" that Huon could have had any legitimate expectation that these efforts would succeed.

The Court also observed that Huon had been an active party to efforts to secure the expansion of salmon farming operations in Macquarie Harbour and had accepted and taken commercial advantage of the particular manner decision for an extended period. His Honour stated (at [254]):

*Huon had been making, and continued to make, substantial profits from the exploitation of the harbour on the back of the approval it knew it could, but chose not to, impugn.*

## **Economic impacts**

While recognising that the interpretation of clause 2(f) adopted by Tassal and DPIPWE “may well have been, as Huon believes, unfair and legally unsound”, Justice Kerr considered that, in the absence of a challenge to the particular manner decision, the companies were entitled to order their affairs on the basis of their understanding of that decision.

The Court was satisfied that, if the particular manner was declared invalid, Petuna and Tassal's operations in Macquarie Harbour would be required to cease at “great economic detriment to both companies and many of their local employees.” Justice Kerr described these consequences as “significantly adverse for Tassal but potentially catastrophic for Petuna.”

His Honour dismissed arguments by Huon that the economic impacts resulting from a declaration of invalidity would be minimal in practice. Huon submitted that, following invalidation, the companies would revert to pre-expansion levels (see below). As the most recent biomass determination for the Harbour imposed limits that were consistent with pre-expansion levels, a declaration of invalidity would have no greater economic impact than the impact of complying with the current determination. His Honour did not accept this argument. On the contrary, he considered that the equivalence of the current determination with the levels Huon sought to achieve through its application was a factor against granting the application, as the declaration was no longer necessary to secure pre-expansion biomass limits.

Justice Kerr also rejected submissions that he should take into account that the detriment Petuna and Tassal will suffer will also affect Huon. His Honour held that “One is a consequence of choice, the other of imposition.”

## **Environmental impacts**

Counsel for Huon argued:

*...[E]ven if the Court is satisfied that the evidence establishes that there are factors weighing against the exercise of the discretion, the public purpose of ensuring that the purpose of the EPBC Act, being to protect the environment, is furthered is the most significant factor in this case and one which deserves paramount importance. That purpose, properly applied, serves to modify what might conventionally be taken to be factors relevant to the exercise of discretion in light of the nature and purpose of the Act under which the [particular manner decision] was made.*

The Court accepted, and neither of the joined companies contested, that Huon held genuine concerns regarding declining dissolved oxygen levels and had consistently raised these concerns with government agencies and the joined companies.

Justice Kerr also held, based on preliminary results from recent IMAS surveys showing a reduction in species diversity and abundance, that, if the Macquarie Harbour operations were to be reconsidered “it is more likely than not that the Minister would be unable to form a belief on the materials before him that the action was not a controlled action.”

However, Huon did not call evidence to establish past, present or future environmental harm. His Honour held that the material presented was evidence of Huon's beliefs in relation to environmental conditions in the harbour but did not establish “that there is in fact a public interest in the grant of relief.”

## **Reversion to pre-expansion levels**

Huon argued that, if the particular manner decision was invalid, the companies could revive their existing use rights under s.43B of the EPBC Act and resume operations at pre-expansion volumes.

His Honour rejected this proposition, stating (at [185]):

*[Section 43B] does not apply to an action which is not a continuation of a use. If, by reason of s 43B(3)(a), an action does not have that character because there has been an enlargement, expansion or intensification, a later repudiation of an enlargement, expansion or intensification does not restore the original position. Once continuity of use for an action has been broken, for that reason, the protection is lost.*

He also noted that the particular manner decision had not only increased the size or almost all of Huon, Petuna and Tassal's lease sites in Macquarie Harbour, but also altered their locations. Therefore, it was not practicable, even if s.43B allowed for it, to simply resume pre-expansion operations.

## CONCLUSION

Justice Kerr accepted that the Minister's frame of reference was the objectives of the EPBC Act, but the Court's was the "proper administration of justice."

Having regard to Huon's inexplicable delay in challenging the particular manner decision, the profits Huon had made in reliance on the decision, and the significant economic impacts of invalidating the decision on the other companies, his Honour held that it would be unjust to grant the relief sought by Huon.

The Court dismissed Huon's application and ordered Huon to pay the costs incurred by the Minister, Tassal and Petuna in the proceedings.

## IMPLICATIONS OF THE DECISION

The decision turns very strongly on the particular circumstances in Macquarie Harbour and between the parties. However, some of the broader implications of the decision include:

- Where an activity relying on a pre-existing use right is expanded or intensified, any challenge to the approval of the expansion / intensification will not restore the pre-existing use rights. Once an activity is expanded, existing use rights are lost.
- Any person concerned by a decision made by the Minister should proceed swiftly to legal proceedings – any delay resulting from efforts to seek political, regulatory, or commercial resolutions may be a factor counting against any legal relief ultimately sought once other options.

This is potentially concerning for public interest parties with limited resources, who often pursue all other options before resorting to legal proceedings.

- The Court may consider discretionary factors regarding relief prior to forming a view as to the legal question that would otherwise give rise to the availability of that relief.

Particularly where adverse economic impacts factor heavily against the exercise of discretion, assessment of discretion as a preliminary matter may reduce opportunities for substantive legal issues to be debated. Even where relief may not be granted, judicial consideration of the merits of arguments raised by the parties can lead to a better understanding of the operation of the EPBC Act.

- In weighing discretionary factors, the Court's primary consideration is the administration of justice, rather than the objectives of the EPBC Act.

To read the full judgment in *Huon Aquaculture Group Limited v Minister for the Environment and others* [2018] FCA 1011, [click here](#).

**For more information about the regulation of marine farming in Tasmania, contact EDO Tasmania on (03) 6223 2770 or visit our website: [www.edotas.org.au](http://www.edotas.org.au)**



**edotasmania**

**using the law to protect the natural and built environment**