

WESTON ALUMINIUM PTY LIMITED v ALCOA AUSTRALIA ROLLED PRODUCTS PTY LIMITED (S211/2007)
WESTON ALUMINIUM PTY LIMITED v ENVIRONMENT PROTECTION AUTHORITY & ANOR (S373/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 4 October 2006

Date of grant of special leave - S211/2007: 24 April 2007

Date of adjournment into the Full Court - S373/2006: 24 April 2007

The first of these matters (S211/2007) concerns the method of construction of Council development consents and the validity of a variation to a licence under section 50(2) of the *Protection of the Environment Operations Act 1967* (NSW) ("PEO Act"). The second of these matters (S373/2006) concerns costs.

Alcoa Australia Rolled Products Pty Limited ("Alcoa") has a plant at Yennora. That plant reprocesses aluminium scrap including "dross", a by-product of the initial re-melting process. It operates under a series of Council development consents and a licence issued under the PEO Act. In 2002 it obtained a variation of that licence to allow it to treat dross from its Port Henry smelter in Victoria. Weston Aluminium Pty Limited had previously treated the dross from Point Henry and it commenced two sets of proceedings in the Land and Environment Court. One sought declarations that the variation was in breach of the *Environmental Planning and Assessment Act 1979* (NSW), while the other challenged the validity of the variation granted under the PEO Act. The first before Justice Lloyd was successful while the second before Justice Pain was not.

The Court of Appeal (Spigelman CJ, McColl and Basten JJA) allowed Alcoa's appeal in the first matter and ordered costs in its favour in the second. Their Honours held that the terms of other documents may be incorporated, either expressly or by necessary implication, when construing a development consent. They further found that the consents granted did not limit the permitted activity by reference to previous practices. The Court also held that while the proceedings before Justice Pain had addressed the wrong questions, the order dismissing that application should stand.

On 24 April 2007 Chief Justice Gleeson and Justice Gummow granted special leave to appeal in *Weston Aluminium Pty Limited v Alcoa Australia Rolled Products Pty Limited* (S211/2007). Their Honours however adjourned *Weston Aluminium Pty Limited v Environment Protection Authority & Anor* (S373/2006) into the Full Court to be listed with *Weston Aluminium Pty Limited v Alcoa Australia Rolled Products Pty Limited* and for it to be argued as if it was an appeal.

The ground of appeal in matter number S211/2007 is:

- The New South Wales Court of Appeal erred in finding that development consent 80/40 granted by Holroyd Council on 25 February 1980 in respect of the Respondent's can reclamation plant at Yennora, New South Wales

permitted the Respondent to process dross from Point Henry, Victoria, in the rotary furnace comprising part of the can reclamation plant.

The questions of law said to justify a grant of special leave to appeal in matter number S373/2006 are:

- Whether, in the event that this Court grants special leave to appeal in S372/2006 (S211/2007), it is just and reasonable to grant special leave to appeal in these proceedings given that:
 - (i) Both proceedings were heard together in the Court below;
 - (ii) Final relief was declined to the Applicant and orders were made, including orders for the payment of costs of all proceedings having regard to the judgments made in both appeals; and that
 - (iii) Absent this application being granted, this Court will not have jurisdiction to make an appropriate declaration and order finally determining all issues in dispute including a costs order that is just and reasonable?