



Express law fast track information for clients

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Federal Court confirms flexibility in EPBC Act referral and assessment processes

The recent Federal Court decision in the case about dredging in Port Phillip Bay and the Yarra River—[*Blue Wedges Inc v Minister for the Environment, Heritage & the Arts \[2008\] FCA 8*](#) (15 January 2008)—has confirmed that, under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (EPBC Act), changes made to projects after their initial referral to the Commonwealth Minister for the Environment, Heritage and the Arts will not necessarily require a new referral.

The EPBC Act prohibits actions that have or are likely to have a significant impact on a matter of national environmental significance, unless the person taking the action has obtained approval from the Commonwealth Minister. A person wishing to take such an action refers the action to the Minister for a decision as to whether it does need approval (that is, whether it is a 'controlled action'). If the Minister decides it is a controlled action, an assessment of the relevant impacts of the action is required before the Minister decides whether to grant an approval.

Background

In this case, Blue Wedges Inc challenged a decision of the Minister to approve a project to deepen shipping channels in Port Phillip Bay and the Yarra River. Blue Wedges Inc argued in the Federal Court that the project had changed substantially between the original referral in 2002 and the final decision to approve the project in December 2007, and that the approval process should start again.

Decision of the Federal Court

Justice Heerey dismissed the application by Blue Wedges Inc and held that the approval decision was lawful. His Honour declined to order that Blue Wedges Inc pay the legal costs of the Commonwealth and the other respondents.

Changes to a proposed action between referral and assessment

The first ground of challenge to the approval decision was that the subject of the 2007 assessment had changed so much from what was described in the 2002 referral that it was a different project.

The changes in the project between 2002 and 2007 were said to be changes in scale (deepening shipping channels to a greater depth than originally proposed), location (extension of the project to channels and parts of the bay not identified in the referral), nature (involving additional activities such as the disposal of contaminated dredge material) and impact.

Justice Heerey rejected this ground, acknowledging that changes to proposed actions between the referral and assessment stages are inevitable, particularly since the environmental approval process for a major project can take years.

His Honour said that it was likely that the EPBC Act was drafted on the assumption that it would be preferable for proposed actions to be referred at an early stage, so that they could evolve in a direction that was positive for the environment. It would be a strange result if making an environmentally positive (or environmentally neutral but cost positive) change meant proponents were forced to start all over again.

His Honour described the referral mechanism as a kind of 'triage system', not intended to make a detailed diagnosis or to fix in stone all details of a project.

Justice Heerey said that there may come a point where changes to a proposed action were so substantial that it became a different action, but that point had not been reached in this matter.

Adequacy of assessment

Blue Wedge's alternative ground of challenge was that the assessment did not adequately address the relevant impacts of the project and did not provide enough information for the Commonwealth Minister to make an informed decision.

Justice Heerey also rejected this ground, saying that the assessment report was not the sole repository of information for the Minister to make an informed decision. Section 132 of the EPBC Act allowed the Minister to request further information 'if the Minister believes on reasonable grounds that he or she does not have enough information to make an informed decision'.

His Honour considered that there was no evidence in this case that the Commonwealth Minister believed he did not have enough information to make an informed decision.

Costs

The usual position is that the unsuccessful party must pay the winning party's costs, but in this case Justice Heerey declined to make an order requiring Blue Wedges Inc to pay costs.

Following the High Court's decision in *Oshlack v Richmond River Council* (1998) 193 CLR 72, his Honour gave consideration to the high level of public concern about the channel deepening and the role of Blue Wedges Inc in raising public awareness and representing numerous community and environmental groups, as well as the fact that the challenge raised novel questions of general importance about the approval process under the EPBC Act. These factors supported the exercise of the court's discretion not to award costs; and the fact that the applicant's solicitor also acted for businesses who feared commercial damage arising from the project did not detract from the public interest in the litigation.

Implications for clients

This decision confirms that proposed actions referred under the EPBC Act can change between the referral and assessment stages, as the project evolves, without the process having to start again. Formal variation under Div 1A of Pt 11 is one mechanism for dealing with such changes, but projects can also evolve and change by informal processes within the EPBC Act framework.

There are clear environmental benefits from a system of early referral of projects to the Minister, and flexibility as to the details of a project leading up to assessment should help to encourage the development of proposals in environmentally positive directions.

AGS Senior Executive Lawyer Emily Nance and Lawyer David Brown acted as instructing solicitors for the Minister for the Environment, Heritage and the Arts in this case.

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