The end of the road for Save Beeliar?

28 July 2016
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Background

The Roe Highway extension (**Roe 8**) is a key part of the Western Australia State Government's $1.6 billion Perth Freight Link plan to build a heavy haulage network between Perth's eastern suburbs and Fremantle Port. The proposed alignment of Roe 8 cuts through an area known as 'Beeliar Wetlands', the majority of which has been subject to a primary regional road reservation since 1963.

On 10 April 2009, Main Roads Western Australia (**MRWA**) referred the Roe 8 plans to the Environmental Protection Authority of Western Australia (**EPA**) for assessment under section 44 of the *Environmental Protection Act 1986* (WA) (**EPA Act**). The EPA assigned the proposal as subject to 'Public Environmental Review', the most detailed and intensive level of assessment. Having concluded their assessment, on 13 September 2013 the EPA recommended to the Minister for Environment, the Hon Albert Jacob MLA, (**the Minister**) that the Roe 8 project be approved subject to the implementation of recommended conditions, including offsets which the Minister adopted.

Decision at first instance

Save Beeliar Wetlands (Inc) (**Save Beeliar**) sought judicial review of the EPA's recommendation and the Minister's decision in the Supreme Court of Western Australia pursuant to section 100 of the EPA Act, arguing that the EPA had failed to take into consideration its own policies when assessing the environmental implications provided by MRWA and the failure was an act in excess of the jurisdiction conferred by the EPA Act.

Each of the policies contained provisions to the effect that where the EPA concluded that implementation of a proposal would result in significant residual impacts to critical environmental assets despite mitigation efforts, there was a presumption that the EPA would not recommend approval of the project to the Minister.

In December 2015, Chief Justice Martin held (at [186]) that the policies were mandatory relevant considerations and that the EPA was bound to take into account its policies as a condition of a valid exercise of the jurisdiction to assess. If not it was likely that:

- persons relying on those policies would be misled;
- the various steps of the process would miscarry;
- the requirements of procedural fairness would not be met (because many of those engaged in the process would be proceeding on the basis of a false premise); and
- there would be a very real risk of differential treatment, inconsistency and idiosyncrasy.

That result would fundamentally undermine the legislative objectives of the EPA Act. The express provisions for promulgation of policies and administrative procedures meant that the legislature intended the EPA was bound to take into account the policies.

Decision of the Court of Appeal

The State Government appealed the decision, arguing that His Honour erred in law in holding that the policies were mandatory relevant considerations.

The Full Bench of the Court of Appeal constituted by McLure P, Buss JA and Newnes JA overturned the decision, finding the policies were merely permissive relevant considerations.

In the judgment handed down on 15 July 2016, the Court held that the words of the EPA Act left no room for an implication that the policies were mandatory relevant considerations in the EPA's assessment and recommendation of the Roe 8 project to the Minister.

The factors that weighed against the policies being mandatory considerations were:

- Part III of the EPA Act contains a mechanism for elevating a policy into an 'approved policy' with the force of law. None of the policies had ever been an 'approved policy', nor had there ever been an attempt to make them an 'approved policy';
- s 122 of the EPA Act provides for the development of administrative procedures for the purpose of establishing principles and practices for environmental impact assessments. These policies are not mandatory relevant considerations and need not be considered in the EPA's assessment report reasoning;
- s44 of the EPA Act details the matters that the EPA is obliged to consider in their assessment report. The Policies are not included in s44;
- Subject to Ministerial direction, the EPA has the discretion as to the form, content, timing and procedure for the assessment report; and
- An obligation to expressly consider policies formulated by the EPA in their assessment report would cause undue delay, inconvenience, inefficiency and increased costs.

The Court was satisfied that the mandatory considerations provided for by the EPA Act, as well as the 'approved policies' provided sufficient certainty to proponents and stakeholders.

Additional Contentions of the first Respondent

The first Respondent contended that the failure to take into consideration its own policies rendered the EPA's assessment and recommendation to the Minister unreasonable with the focus on the decision making process, rather than on the final decision itself. The claim was, in effect, that there is an implied condition of validity of the exercise of the duty in s 44(2) of the EPA Act that the EPA give reasons for why it did not have regard to the policies. As the Court of Appeal found that the policies were not mandatory relevant considerations, this contention was rejected, as there is no obligation on the EPA to give reasons why they did not address policies when the policies were permissive relevant considerations.

What next?

Save Beeliar are awaiting a decision on any costs order before assessing whether to appeal to the High Court of Australia. The State Government has announced plans to enter into contracts for the construction of Roe 8 before the next state election.

For more information or discussion, please contact our Planning team.

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