

The impact of pecuniary interests by decision makers – \$40 billion environmental approval declared invalid

Local Government Update

Although Woodside had already pulled the pin on its \$40 billion James Price Point proposal, on 19 August 2013 the Supreme Court delivered its decision in *The Wilderness Society of WA (Inc) v Minister for the Environment* [2013] WASC 307, finding that the environmental approvals issued by the Minister in relation to the Browse LNG Precinct were invalid. The basis for the decision was a failure to have recognised or acted upon direct or indirect pecuniary interests held by 3 of the 5 members of the Environmental Protection Authority in relation to the proposal, which fatally tainted the processes leading up to the Minister's approval.

The decision is of interest because the Chief Justice of the Supreme Court explored the scope of a "direct or indirect pecuniary interest" and considered in some detail the effect of a failure to recognise or act upon such an interest in accordance with the provisions of the *Environmental Protection Act 1986*. These matters have close parallels with provisions of the *Local Government Act 1995* dealing with the disclosure of financial interests by Councillors and Local Government employees.

As to the scope of a "direct or indirect pecuniary interest", the Chief Justice made the following findings:

- A pecuniary interest means any interest that is either monetary or capable of being measured in monetary terms, relying on the formulation adopted in relation to such interests by Councillors of local governments in *Raccuia v Allpike* (1991) 76 LGAR 388 and *Downward v Babington* [1975] VR 872 (at [180]).
- The effect of the expression "direct or indirect" is to expand the range of

Who does this affect?

- Local Governments

Article Highlights

- The Supreme Court found that the environmental approvals issued by the Minister in relation to the Browse LNG Precinct were invalid due to a failure to have recognised or acted upon direct or indirect pecuniary interests held by 3 of the 5 members of the EPA.
- The Chief Justice concluded that compliance with the requirements of ss 11 and 12 of the *Environmental Protection Act* is a condition of the valid exercise of the powers and duties conferred upon the EPA by the Act.

interests beyond those that are held in a legal or beneficial sense by the person in question, to also include interests which might not be held by the person but from which the person could expect to derive a pecuniary benefit or detriment by reason of an interest which he or she has in relation to the entity or person holding the legal or beneficial interest (at [183]).

- Examples of indirect pecuniary interests include the holding of shares in a relevant company, either personally or by holding units in a unit trust where the trust then owns shares in the relevant company – including by way of a superannuation investment (at [183]-[184]).
- Another example of an indirect pecuniary interest arises where a pecuniary interest is held by a spouse or dependent child (or other relative) of the person in question, although the Chief Justice expressly left open the question of whether this extends to interests held by family members who are financially independent of the person in question (at [185]).

These findings are directly relevant to the definitions of “direct or indirect financial interest” and related concepts found in sections 5.60, 5.60A, 5.61 and 5.62 of the *Local Government Act 1995*.

The Chief Justice noted that the magnitude of an interest will often be relevant when dealing with the common law rules relating to procedural fairness and bias, but the *Environmental Protection Act* provisions were not qualified by any reference to the extent or magnitude of a pecuniary interest. He found that it was unnecessary to decide whether the Act might be construed as being subject to some analogous *de minimis* principle, because in this case the shareholdings and interests of the EPA members could not be described as being of a trivial character (at [181]).

Section 5.68(1)(b) of the *Local Government Act* allows a Councillor to participate in decision-making on a matter despite a financial interest, if the Council determines that the interest is “so trivial or insignificant as to be unlikely to influence the disclosing member’s conduct in relation to the matter”. However, this determination must take place prior to the participation, and requires the recognition and disclosure of the interest in the first place. It also leaves open the question of what constitutes a trivial or insignificant interest.

Having found that 3 of the 5 EPA members clearly had a direct or indirect pecuniary interests in relation to the Browse LNG Precinct proposal, the more difficult question was whether a failure to recognise or act on those interests as required by the *Environmental Protection Act* invalidated the further actions that had been undertaken by the EPA leading to the Minister’s approval.

To answer this question, the Chief Justice had regard to the legal principles outlined by the High Court in the decision of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 319, including the language of the statute, the subject matter and objects of the statute and the consequences of a finding that acts done in breach of the requirements of the statute are void. The consideration of those

Contact:



Julius Skinner
PARTNER

t: +61 8 9426 6874

e: j Skinner@jacmac.com.au

principles included (at [200]-[224]):

- The imperative language of the provisions of the *Environmental Protection Act* dealing with the obligation to disclose pecuniary interests and not to participate in the consideration of matters to which an interest applies.
- The purpose of the provisions, being to ensure the integrity of the operations and processes of the EPA in the public interest.
- That the provisions of the *Environmental Protection Act* supplanted and replaced the common law principles relating to apprehension of bias.
- That while the consequences of a finding that the actions were invalid were potentially severe, this could not be a determinative factor in the proper construction of the statute.

The Chief Justice concluded that "...I am firmly of the opinion that the Act should be construed such that compliance with the requirements of ss 11 and 12 of the Act is a condition of the valid exercise of the powers and duties conferred upon the EPA by the Act. Within the matrix of considerations identified by the decision in **Project Blue Sky**, this seems to me to be a relatively clear case".

It remains to be seen of course whether these considerations will apply equally clearly in relation to *Local Government Act*. There are certainly additional issues to take into account, such as the provisions of sections 5.68 and 5.69. The Chief Justice also concluded this section of the judgment by acknowledging that "nice questions might arise as to the effect of participation by a disqualified person in the activities of a panel, the other members of which were not disqualified". He referred to several decisions dealing with this situation and whether the participation of a disqualified person so taints the actions of the group as to render the collective action invalid. Those issues did not arise in the **Wilderness Society** case because a majority of the members of the EPA were impacted, but suffice to say that those issues are difficult, the decisions not easily reconciled and the outcome is often determined by reference to the particular factual circumstances.

As noted at the outset, the final impact of the decision in the **Wilderness Society** case is lessened by Woodside's earlier withdrawal from the Browse LNG Precinct project for other reasons, but that had no bearing on the decision, which is a stark example of the consequences that can flow from a failure to recognise and act on a pecuniary interest.

Disclaimer: This publication is intended to provide general information only and should not be relied upon as legal advice. If you require legal advice on a matter please contact us.

Contact Us

☎ +61 8 9426 6611 ☎ +61 8 9321 2002 ✉ jacmac@jacmac.com.au
📍 Level 25, 140 St Georges Terrace, Perth, Western Australia 6000
📦 GPO Box M971, Perth, Western Australia 6843

www.jacmac.com.au