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The Role of Policy in Local Government Decision-making – Lessons from the Save Beeliar Wetlands case

By Denis McLeod

The decision of Chief Justice Wayne Martin on 16 December 2015 in the case *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482 (*Save Beeliar Wetlands case*) contains much useful discussion of the role of policy in administrative decision-making processes, which has potential application to local governments, particularly in their making and application of local planning policies.

Summary of decision

The gist of Martin CJ's decision was that:

a. In the circumstances of the *Save Beeliar Wetlands* case, the EPA was legally obliged to take account of policies which it had developed to facilitate the performance of its functions with respect to environmental impact assessment: [4] and [183];

a. As the EPA did not take account of its policies in its assessment of the Proposal for extension of the Roe Highway from the Kwinana Freeway to Stock Road (Stage 8), its environmental impact assessment, and its report and recommendations to the Minister allowing the Proposal to proceed, were invalid;

a. The Minister's decision to allow the Proposal to be implemented, relying on the EPA's report and recommendations, was consequently also invalid;

a. The EPA must determine, in light of the Court's reasons and in light of current circumstances, the steps which must be taken to undertake and complete an assessment of the environmental impact of the proposal which conforms with its obligations under the EP Act.

That is a brief summary of the effect and the significance of the case. But there is a great deal of discussion in the reasons of Martin CJ on the subject of policy, and the way in which policy should be dealt with by decision-makers.

Analysis of decision

The significant comments which I would make for the purpose of this Bulletin are as follows:

a. Martin CJ did not in his reasons seek to diminish the continuing application of the principle in the case *Falc Pty Ltd v State Planning Commission* (1991) 5 WAR 522 to the effect that an administrator exercising discretionary power will be found to have acted ultra vires if the discretion is exercised inflexibly, by application of a policy without regard to the merits for a particular case (at [147]).

a. On the proper construction of the EP Act, the EPA was legally obliged to have due regard to its own published policies when it made its decision and report to the Minister. However, that might not be the case with the enabling provisions for other policies including under a local planning scheme.

a. The EPA did not in fact have due regard to its relevant policies in its environmental impact assessment of, and its report on, the Roe Highway extension Proposal.

a. Therefore the EPA's environmental impact assessment of the Proposal was invalid.

a. It followed that the decision by the Minister for Environment, to approve the Proposal was also invalid, as it relied on the EPA's report and its recommendation to the Minister that the Proposal may be implemented conditional on the provision of environmental offsets.

a. The Court's decision includes a detailed examination of the extent to which a decision-maker must take into account policies which he or she has formulated as a condition of the valid exercise of the power to which the policies relate ([136]).

a. The decision should not be seen as establishing a principle that where a decision-maker makes a decision which is not in accordance with one or other of its policies, the decision will necessarily be invalid.

a. Nevertheless the case is a timely reminder of the fact that where a decision-maker establishes a policy to guide its decision-making process, it should at least have due regard to the policy in any decision-making process where the policy is relevant. That is a matter of good practice. The failure to do so in certain circumstances may result in an invalid decision.

I. It is worth noting however that Martin CJ at [151] said – '… I hold a considerable reservation as to whether there is a general legal principle of universal application to the effect that a decision-maker is bound to take account of any relevant policy which he or she has formulated as a condition of valid exercise of jurisdiction. …'

a. Whether or not a decision will be invalid by reason of failure to have regard to a policy, or to act in accordance with a policy, will depend on the circumstances of the case.

a. It will depend on the circumstances of the case, and the legislative framework in which a policy is made and applied, as to the extent to which a decision-maker is required to act in accordance with the policy. The least that is required however as a general rule, subject to the reservation at 9 above, is for a decision-maker to have regard to any of its policies relevant to its decision-making process.
b. So far as planning policies are concerned, deemed provision cl.67 in Schedule 2 of the *Planning and Development*

(Local Planning Schemes) Regulations 2015 sets out matters which are to be considered by a local government. Clause 67 uses the language of 'due regard' which seems to be equivalent to the expression used by Martin CJ in the *Save Beeliar Wetlands* case, namely 'take account of'. However it should be noted that cl.67 potentially waters down the relevance of the considerations in the clause by the introductory passage – 'In considering an application for development approval the local government is to have due regard to the following matters to the extent that, in the opinion of the local government, those matters are relevant to the development the subject of the application …'.

a. Items (c), (d), (e), (f) and (g) in cl.67 all refer to policies, item (g) referring to 'any local planning policy for the Scheme area'. Although local governments should proceed on the basis that when making a decision on a development application, they ought to have due regard to any relevant local planning policy, the language of cl.67 suggests that the local government has an overriding discretion in that it is required or at least allowed to form an opinion as to whether or not any matters set out in cl.67 are relevant to the development the subject of the application.
b. The qualification in cl.67 which allows the local government to form an opinion as to whether or not a matter contained in that clause is relevant may complicate a challenge to the validity of a decision by the judicial review process, but it is not likely to give much assistance to a local government in a merits review, such as in the SAT, if the local government forms an irresponsible or indefensible opinion that a policy, or any other consideration in cl.67, is not relevant to the development the subject of the particular application. The same may be said if the local government fails to have due regard to a policy which the SAT considers may be relevant.

Conclusion

The above comments are not intended to be in any way an exhaustive discussion of the relevance of local government policies, or more specifically, of planning policies in the decision-making process. The purpose of this Bulletin is to put into an appropriate context the highly publicised decision of his Honour Wayne Martin CJ in reports of the *Save Beeliar Wetlands* case, which appeared in the media after the decision was published on 16 December 2015. Some media reports have suggested that the EPA's decision was invalidated because it failed to act in accordance with its policies. Such descriptions of the case are misleadingly brief and inaccurate, and should not be relied on by local governments as an indication that they must rigidly apply their policies in making discretionary decisions, such as in determining applications for development approval.

Having due regard to relevant policies is however an administrative law requirement, related to the obligation of decision-makers to have regard to considerations that are relevant to the matter before them, and not to have regard to irrelevant considerations.

For further information in regard to the above, contact Denis McLeod on 9424 6201 or dmcleod@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the

circumstances of each case.