Federal Court of Australia

Blue Wedges Inc v Minister for the Environment, Heritage & the Arts [2008] FCA 8 (15 January 2008)

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FEDERAL COURT OF AUSTRALIA

Blue Wedges Inc v Minister for the Environment, Heritage & the Arts [2008] FCA 8

ENVIRONMENTAL LAW – project for deepening shipping channels in Port Phillip Bay – referral under *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – changes in project between referral and approval**COSTS** – costs in public interest litigation **STATUTORY CONSTRUCTION** – subordinate legislation as aid to construction**WORDS AND PHRASES –** "action" *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 67, 68, 70, 72, 74, 75, 76, 82, 87, 132, 133, 156A, 156B, 487, 523*Environment and Heritage Legislation Amendment Act (No 1) 2006* (Cth) Sch 2, Pt 2, item 3*Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 4.03, Sch 2, items 4, 5*Federal Court of Australia Act 1976* (Cth) s 43 *Federal Court Rules* O 10 r 1(2)(j)*Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 97 ALD 398 at [70] cited*Buck v Bavone [1976] HCA 24;* (1976) 135 CLR 110 at 118-119 cited*Elazac Pty Ltd v Commissioner of Patents* (1994) 125 ALR 663 at 667 followed*Hanlon v Law Society* [1981] AC 124 at 193

followed *Lion Laboratories Ltd v Evans and Others* [1985] QB 526 at 553 cited*Mees v Roads Corporation [2003] FCA 306;* (2003) 128 FCR 418 at [118] cited*Minister for Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190;* (2004) 139 FCR 24 cited*Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6;* (1996) 185 CLR 259 at 275-277 cited*Oshlack v Richmond City Council [1998] HCA 11;* (1998) 193 CLR 72 applied*Save the Ridge Inc v Commonwealth* (2006) 230 ALR 441 cited **BLUE WEDGES INC v MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS, PORT OF MELBOURNE CORPORATION AND STATE OF VICTORIA VID 1047 OF 2007HEEREY J15 JANUARY 2008MELBOURNE**

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1047 OF 2007**

BETWEEN:	**BLUE WEDGES INC** **Applicant**
AND:	**MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS** **First Respondent**
	PORT OF MELBOURNE CORPORATION **Second Respondent**
	STATE OF VICTORIA **Third Respondent**

JUDGE:	**HEEREY J**
DATE OF ORDER:	**15 JANUARY 2008**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The application is dismissed.
Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1047 OF 2007**

BETWEEN: **BLUE WEDGES INC**
Applicant
AND: **MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS**
First Respondent

PORT OF MELBOURNE CORPORATION
Second Respondent

STATE OF VICTORIA
Third Respondent

JUDGE: **HEEREY J**
DATE: **15 JANUARY 2008**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

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INTRODUCTION

1 The second respondent, the Port of Melbourne Corporation (PoMC), proposes to deepen shipping channels in Port Philip Bay and the Yarra River (the Project). The applicant, Blue Wedges Inc, challenges the legal validity of a decision of the first respondent (the Federal Minister) made on 20 December 2007 (the Approval Decision) approving the Project under s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the Environment Act).

2 Blue Wedges' basic contention is that the Project has substantially changed since the legislative approval process began. The Federal Minister, it says, must start again.

3 The present litigation does not call for a decision on the environmental or economic merits of the Project. Rather, the Court is asked to find that the Approval Decision is invalid because the procedures laid down by law have not been followed.

A brief narrative of events

4 In broad outline, and relevantly for present purposes, the process so far has been as follows:

• 15 February 2002: the predecessor of PoMC referred the Project to the Federal Minister under s 68 of the Environment Act (the Referral). The Minister was required to decide, under s 75 of the Act, whether the Project, being an "action" for the purposes of s 523 of the Act, was a "controlled action", that is to say whether it needed approval by the Minister having regard to any adverse impacts it was likely to have on matters protected by provisions in Pt 3 of Ch 2 of the Act ("matters of national environmental significance");

• 20 March 2002: a delegate of the Federal Minister made a decision that the Project was a controlled action (the Controlled Action Decision). The Pt 3 matters identified as "controlling provisions" in the Controlled Action Decision were:

o Wetlands of international importance (ss 16 and 17B)

o Listed threatened species and communities (ss 18 and 18A)

o Listed migratory species (ss 20 and 20A) and

o Action involving Commonwealth land that is likely to have a significant impact on the environment (ss 26 and 27A);

• 21 May 2002: a delegate of the Federal Minister decided under s 87 of the Environment Act that, of the various options provided for in that section, the mode of assessment of the "relevant impacts" of the Project would be an "accredited assessment process". The process chosen ("accredited") was an Environment Effects Statement (EES) to be provided under the relevant Victorian law, the *Environment Effects Act 1978* (Vic);

• July 2004: the PoMC released an EES for public comment;

• August 2004: the Victorian Minister for Planning appointed an independent panel (the First Panel) to inquire into and report on the EES;

• September-December 2004: the First Panel conducted public hearings over 45 sitting days;

• 11 February 2005: the First Panel provided its report to the Victorian Minister;

• March 2005: the Victorian Minister announced that a Supplementary Environmental Effects Statement (SEES) would be required;

• July 2005: the Victorian Minister released "directions" for the SEES;

• March 2007: the PoMC released a SEES for public comment;

• April 2007: the Victorian Minister appointed an independent panel (the Second Panel) for an inquiry into the SEES;

• June-July 2007: the Second Panel conducted public hearings over 18 sitting days;

• 1 October 2007: the Second Panel provided its report to the Victorian Minister;

• 2 November 2007: the Victorian Minister provided his assessment of the environmental effects of the Project (the Assessment) to the Federal Minister;

• 20 December 2007: the Federal Minister made the Approval Decision.

The process

5 This rather complicated approval process comes about because, under Australia's federal system of government, environmental matters are basically a State responsibility. The Federal Government's role is limited to matters in which the Federal government has specific powers and responsibilities, as for example in the present case, obligations under international treaties or the management of Federal lands and waters.

6 The process adopted is to "refer" to the Federal Minister an "action" which may have an environmental impact on areas of Federal responsibility. The Minister then decides whether the action needs Federal approval because of its potential impact on those areas, that is to say, whether it is a "controlled action". At the same time the Minister identifies the specific areas of Federal responsibility that are likely to be impacted by the action ("controlling provisions"). The Minister must then select how the relevant impacts on those areas are to be assessed.

7 In the present case, the Federal Minister chose the process of EES and public panel hearing under Victorian law. This made obvious sense. In the one process there could be an assessment of the Federal issues at the same time as the wider Victorian environmental enquiry.

Blue Wedges' attack on Approval Decision

8 Blue Wedges says that the Project the subject of the Assessment in 2007 is of a "greater scale and nature and includes different actions"

than the Project as described in the Referral in 2002. As a consequence, it argues, there was no lawful basis for the Federal Minister approving the Project because it had not been the subject of a referral, a decision under s 75, the selection of a mode of assessment under s 87 or the receipt of assessment documentation under s 133. I shall refer to this ground of alleged invalidity as "the identity of action ground".

9 Alternatively, Blue Wedges says that even if the Project the subject of the Approval Decision is not relevantly different from what was described in the Referral, the Assessment did not adequately assess the relevant impacts of the Project and/or provide enough information to enable the Federal Minister to make an informed decision. The Minister, it is said, could not make a valid decision without requesting further information under s 132 of the Environment Act. I shall refer to this ground as "the adequacy of assessment ground".

10 Blue Wedges has not yet received the Minister's reasons for the Approval Decision, those reasons having been requested by it under s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Under that Act such reasons are due by 18 January 2008. Blue Wedges sought an adjournment of the present hearing until the reasons are supplied. I refused an adjournment. Both grounds relied on by Blue Wedges turn on material which is already before the Court and cannot be affected by the reasons of the Minister. Whether or not those reasons, when supplied, disclose some further ground for legal challenge can only be a matter of speculation at this stage. When the reasons are received, Blue Wedges will be free to take such action as it sees fit.

IDENTITY OF ACTION GROUND

PoMC and the State of Victoria's case

11 The second and third respondents, PoMC and the State of Victoria, say that the Project the subject of the Assessment and the Approval

Decision was not in fact relevantly different from the Project as described in the Referral. They are both the same "action".

12 In any case, according to the respondents, such differences as there are between Referral and Assessment do not matter for present purposes. First, if the proposal of the Project in 2002 had been in the same form as that in the 2007 Assessment, the Federal Minister would have still decided under s 75 that it was a "controlled action". (Indeed, the more potentially harmful to the environment, the more likely it is that the Minister would decide the proposal was a "controlled action".)

13 Secondly, the "controlling provisions" (those matters in Pt 3 which under the Controlled Action Decision required assessment, viz wetlands of international importance, threatened species, migratory species and Commonwealth land) would still have been the same. There are other matters in Pt 3 but they are unarguably irrelevant – eg nuclear actions (s 21) or National Heritage places (s 15B), the only National Heritage place in Victoria being the Exhibition Building and Carlton Gardens. (Some brief mention will be made below as to one other Pt 3 matter, viz Commonwealth marine areas (ss 23 and 24A)).

14 Thirdly, of all the assessment options available under s 87 the Federal Minister chose that which was the most rigorous and open, involving environmental effects statements (as it turned out, two of them) and lengthy public hearings before independent panels. Blue Wedges does not say that the Minister should have chosen another of the modes of assessment that were available to him under the Act. Blue Wedges' complaint is not that the Project could not be assessed in the Assessment – rather, it is that the Project was a different one from the Project in the Referral.

15 Thus PoMC and the State of Victoria point out that Blue Wedges does not challenge the validity of decisions made by the Federal Minister (or his delegate) that:

• the Project was a "controlled action";

• the "controlling provisions" of Pt 3 were those identified; and

• the assessment would be by way of accredited assessment.

16 The conclusion is said to be that the Project in its final form (assuming, contrary to the primary argument, that this is materially different to its Referral form) has been subject to an assessment process contemplated by the Environment Act.

Federal Minister's case

17 The Federal Minister says that differences from time to time in the description of a proposed action do not necessarily have the effect that no approval decision may be made under s 133, and did not in the present case.

Can changes to a proposed "action" be made between Referral and Approval?

18 Blue Wedges' argument is inconsistent with the legislative purpose of the Environment Act. As was said in the Explanatory Memorandum when Div 1A of Pt 11 of Ch 4 was introduced into the Act in 2006:

Most actions are referred to the Minister for assessment and approval during the planning stage of a proposal. It is common for circumstances and priorities to change as a proposal to take an action is refined.
(Div 1A will be considered in more detail below.)

19 It cannot possibly be the case that literally no changes at all can take place in the "action" between referral and approval. To take an obvious example, the Referral in the present case gave as the timeframe in which the action was proposed to occur the following details:

Detailed investigations Feb 02 – April 03
Dredging including Tender Preparation July 03 – Dec 04
Understandably, Blue Wedges did not argue that because these details of the "action" could obviously no longer apply the Project was not the same "action".
20 More importantly, a proposed action may change in a way that is *positive* for the environment. For example, in the present case there could have been a change in the design of the Project which meant less dredging. In such a case, it would be surprising if no approval decision could be made because the "action" was not the action the subject of the referral.
21 It is likely that the Act was drafted on the assumption that it would be preferable that proposed actions be referred at an early stage in their development in order that proposals could evolve in a direction that is positive for the environment. If a proposed action can be referred when its details are still being formulated, the Department (the Minister's advisers) can play a role in the development of the proposal having regard to the principles and objectives of the Act. Referral at an early stage permits, amongst other things, early identification of possible impacts on relevant environmental matters and allows the opportunity to address and possibly avoid those impacts as the proposal is developed.
22 The function of the referral step is not to fix in stone all the details of a proposed "action" for the subsequent approval process. Rather, this mechanism results in the proposal either being brought within the Environment Act assessment and approval regime, or being exempted from the requirements of assessment and approval under the Act. In *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 97 ALD 398 at [70], Stone J described the scheme of the Act as providing
an initial clearing house so that actions that are likely to have a significant impact on the environment are properly assessed and those that do not fall into that category may be identified in a timely way and not impeded.

The referral mechanism operates as a kind of triage system. It is not the function of the triage nurse to make a detailed diagnosis, let alone prescribe treatment.
23 Since the environmental approval process for a major project can stretch out over years, as witness the present case, it would be a strange result if making an environment positive (or environment neutral but cost positive) change meant proponents were forced to start all over again, with inevitable cost and delay. If Blue Wedges' argument is correct there would be a strong disincentive for proponents to keep looking for environmentally friendly changes to a project.
24 The text of the Environment Act does not support Blue Wedges' construction.
25 The term "action" is defined in the broadest terms. By s 523 it includes
(a) a project; and
(b) a development; and
(c) an undertaking; and
(d) an activity or series of activities; and
(e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).

This width of definition is not surprising, given the varied work that the term has to do in the Act, including in the prohibitions in Pt 3, and given the limitless range of possible human conduct which might affect the environment, ranging from major complex operations like the Project to a simple, transient event.

26 When it comes to particular proposed actions, the Act does not purport to define a particular proposed action by reference to a description of the proposed action given in any document. Further, subject to certain limited exceptions described below, the Act does not require the referral to contain any particular information or to descend to any particular level of detail about the proposed action.

27 The form and content of referrals are matters left to be prescribed

by regulations under the Act. Section 72 provides:

(1) A referral of a proposal to take an action must be made in a way prescribed by the regulations.
(2) A referral of a proposal to take an action must include the information prescribed by the regulations.
(3) A referral of a proposal to take an action may include alternative proposals relating to any of the following:
(a) the location where the action is to be taken;
(b) the time frames within which the action is to be taken;
(c) the activities that are to be carried out in taking the action.

28 Subsection (3) was introduced by a 2006 amending Act, the *Environment and Heritage Legislation Amendment Act (No 1) 2006* (Cth). By Sch 2, Pt 2, item 3 of that Act, the amendment "applies in relation to a proposal" referred to the Minister before the "commencement time" (12 December 2006) and thus "applies" to the Referral in the present case. The practical result would seem to be that where, as will be seen happened in the present case, a pre-amendment referral included alternatives, any doubt as to the validity of such referral is removed.
29 The regulations made under the Act, the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), provide by reg 4.03 that a referral must include the information mentioned in sch 2. As to the description of the proposal, item 4 of sch 2 requires
A description of the proposed action, including:

(a) details of the location of the project area;
(b) the latitude and longitude of the action;
(c) the timeframe in which the action is proposed to be taken;
(d) activities proposed to be carried out in the action;
(e) an explanation of the context, including any relevant planning framework, in which the action is proposed;
(f) whether the action is related to other actions or proposals in the region.

No form is prescribed by the regulations although the Department has developed a form in questionnaire format which was used for the Referral in the present case.

30 It will be seen that the description required is in the most general terms, and implicitly recognises that the detail existing at the time of referral may, and probably will, develop and change by the time of assessment. This suggests that, as already mentioned, drafters of the Act understood that the earlier a referral was sought, the better, and that change was almost inevitable.

31 In my view this is one of the exceptional occasions where regulations can be used as an aid to the construction of an Act. The Act, in this case the Environment Act, "provides a framework built on contemporaneously prepared regulations": *Hanlon v Law Society* [1981] AC 124 at 193; *Elazac Pty Ltd v Commissioner of Patents* (1994) 125 ALR 663 at 667.

32 Blue Wedges argued that the regime established under Ch 4 of the Act proceeds on the assumption that the nature of an action referred for assessment will remain consistent throughout the assessment process. It said the regime is predicated on a series of decisions designed to ensure that the impacts of the action *which has been referred* are adequately assessed for each of the designated controlling provisions. That regime, it is said, would be subverted if the action changed during the course of the referral process such that the impacts of the action were likely to be different from the impacts of the action which was originally referred for determination. It is for this reason, so the argument went, that the Act places such importance on the accuracy of the information provided for the purposes of assessment. Blue Wedges cited *Mees v Roads Corporation* *[2003] FCA 306*; (2003) 128 FCR 418 at [118], where it was said the Minister

has no fact-finding role in the process of examining a referral of a proposed action. The Environment Minister must make a decision on the information provided in the referral. This consideration renders it

all the more important that the referral document must contain information that is truthful and complete, so as not to mislead.
33 However, the Act expressly provides for the Minister to invite comments on the referral from various persons and bodies, including the public at large (s 74) and to seek further information from the proponent (s 76). Nor is there any reason to suppose that the Minister could not seek advice on factual matters from the Department or from any other person who might be able to assist the Minister in making a decision. Further, s 78 enables the Minister to reconsider his or her decision under s 75 in various circumstances, including where new information becomes available or where there has been a substantial change in circumstances relating to the likely impacts of a proposed action. So while obtaining truthful and accurate information is without doubt important, the freedom explicitly given to the Minister to obtain information from any source suggests, amongst other things, that it was contemplated the Minister might want information about a change in the proposed action.

34 Although in the present case the Referral came for the (then) proponent of the Project under s 68, the Environment Act also provides that a referral may come from a State or Territory (s 69), or a Commonwealth agency (s 71). There is a further provision that if the Federal Minister believes a person proposes to take an action that the Minister thinks may be or is a controlled action, the Minister may request that person, or a State or Territory that has responsibilities relating to the action, to refer the proposal (s 70).

35 Thus the Environment Act contemplates that a proposed action may be referred and made subject to the Act's processes whether the proponent likes it or not. This is hardly surprising; it could not be left up to proponents to decide whether or not the Act should apply. The significance of this for present purposes is that a proposed action may be referred to the Federal Minister against the wishes of the proponent, and regardless of its stage of development, and whether or not the proponent has had the opportunity to respond to issues raised by the Minister or anybody else. It would be quite unworkable if in

such circumstances the proposed action could only be assessed in its form as at the time of referral.

36 Moreover, none of the decisional steps along the way – the controlled action decision, identification of controlling provisions, selection of assessment method – require a detailed assessment of the proposed action. That step only comes when the assessment itself is carried out and the subsequent approval given or refused. There seems to be no point in insisting that all the details of the proposed action remain the same throughout the whole process.

37 Blue Wedges relied strongly on Pt 1A, which includes the following:

156A (1) If:
(a) a proposal (the **original proposal**) by a person to take an action has been referred to the Minister under Division 1 of Part 7; and
(b) after the referral is made, the person wishes to change the original proposal;
the person may, subject to subsection (2), request the Minister to accept a variation (a **varied proposal**) of the original proposal.

156B (1) Within 20 business days after receiving a request under subsection 156A(1) to accept a varied proposal to take an action, the Minister must decide whether or not to accept the varied proposal.
Note: The Minister may request further information for the purpose of making a decision under this subsection. See section 156C.
(2) The Minister must not decide to accept the varied proposal unless the Minister is satisfied that the character of the varied proposal is substantially the same as the character of the original proposal. This subsection does not limit the matters the Minister may consider in deciding whether or not to accept the varied proposal.
(3) In considering, for the purposes of subsection (2), whether or not the character of the varied proposal is substantially the same as the character of the original proposal, the Minister must have regard to the change (if any) in:

(a) the nature of the activities proposed to be carried out in taking the action; and
(b) the nature and extent of the impacts (if any) the action:
(i) has or will have; or
(ii) is likely to have;
on the matter protected by each provision of Part 3.
38 I agree with the submission of the Federal Minister that Div 1A does not provide for a compulsory variation approval process; rather, it provides a voluntary mechanism that allows proponents to seek certainty as to the consequence of a variation to a proposal.

39 The effect of Div 1A is not that a proposal may only be varied by means of the formal variation process contained in that Division. So much is clear from the permissive terms in which s 156A(1) is cast; the person proposing to take the action "may" request the Minister to accept a variation of the original proposal. There is no reason here not to give "may" its ordinary meaning.

40 No power is given to the Minister to require or request a person to use the Division 1A process, in contrast to s 70, which empowers the Minister to request a person to make a referral of a proposal.

41 Further, no explicit provision is made by the Act for what is to occur if a proposal has been varied but that variation has not been subject to the Div 1A process. There is no provision, express or implied, to the effect that a proposal may be varied under Div 1A, but not otherwise.

42 The construction for which the Federal Minister contends is consistent with what was said in the Explanatory Memorandum for the 2006 Bill that introduced Div 1A. The memorandum said as to s 156A:

This amendment allows a person who has referred an action to the Minister for assessment and approval to request the Minister to accept a variation to the action. ... The purpose of this amendment is to

provide greater flexibility for dealing with changes during the assessment process by providing a *formal process* for the variation of proposed actions. (Emphasis added)

The expression "formal process", read in light of the use of the term "may" in s 156A(1), suggests an informal process of change could be legitimate. Further, the proposition that every variation to a proposal must be subject to the relatively elaborate and time-consuming process in Div 1A is incompatible with s 156A's objective of enhancing flexibility.

43 The Federal Minister's construction of Div 1A does not render it redundant. A proponent can use Div 1A to achieve a degree of certainty about the implications of any change to the original proposal. Div 1A is analogous to the tax legislation provisions which give a taxpayer the option of obtaining a binding ruling from the Commissioner: *Taxation Administration Act 1953* (Cth) Sch 1, Div 359.

44 I conclude that elements, and substantial elements, of an "action", in this case the Project, can be changed between Referral and Approval Decision without rendering the latter invalid. Obviously there might come a point where the "action" becomes a different action. This has not been reached in the present case, for reasons to which I now turn.

Is the Project as approved the same "action" as that referred?

Blue Wedges' case

45 Blue Wedges submitted that the Project changed materially between the referral in 2002 and the preparation of the EES by the PoMC in 2004, and then changed again between that Statement and the SEES in 2007. The changes between the referral and the EES were the subject of review (and criticism) by the First Panel in its report to the Victorian Minister for Planning. The First Panel stated that the 2002 Referral "gives minimal information about the project", noting that it does not mention any of the following actions which were within the scope of the EES:

(a) placement of spoil (including the placement of potentially contaminated material) within Port Phillip Bay;
(b) maintenance dredging;
(c) works at berths/docks; and
(d) ongoing use of the shipping lanes by larger vessels.

46 The First Panel also noted that it was not clear whether the location described in the 2002 Referral (which is detailed by reference to the co-ordinates of three points, one of which is on land, one to the west of Hovell Pile and one to the south of Yarra mouth) constituted the location of the project area (as required by cl 4.01 of Schedule 2 to the Regulations) or the affected area (as required by cl 5.01 of Schedule 2 to the Regulations). However, the First Panel observed that "[i]n either case, the area of proposed activity [described in the EES] extends considerably beyond the referred area", and included:
(a) the Heads, including widening beyond the width of the Great Ship Channel taking the project closer to the Port Phillip Heads Marine National Park;
(b) the Yarra River;
(c) South Channel east; and
(d) The proposed south east Dredged Material Ground (DMG).

47 In relation to the depth of dredging, the First Panel noted that the 2002 Referral indicated that the expected deepening of the channels will be only "in the order of 1.5 to 2 metres", and concluded, based on its own summary of the information about dredge depths provided to it, that while the EES did not make a clear and consolidated statement about the actual depths of material that are proposed to be moved and disposed, the deepening proposed ranged up to 5.6 metres, with over dredging of up to an additional 2 metres. Commenting on the prospect of an increase in the depth of dredging in the Great Ship Channel at the Heads, the First Panel observed:

It is ... of critical importance in environmental terms that the physical implications of such issues are well understood. If detailed calculations of operational protocols lead to the view that the Great Ship Channel at The Heads channel requires to be deepened by a further 1 or 2 metres, or that it needs to be widened further over and

above the maximum values assessed in the EES, these changes could have profound consequences for assessments undertaken elsewhere in the EES.
48 The First Panel recommended that the proponent should be required to complete its evaluation of design and operational criteria for the Great Ship Channel at the Heads, and concluded that should the proposed works significantly depart from the original design definition or require a deepening or widening of the channel in addition to that assessed in the EES, "all directly and indirectly impacted aspects of social, economic and environmental effects should be rigorously re-assessed".

49 Following the First Panel's report, the Project changed even further, with the undertaking of a trial dredging program for the purposes of clarifying the design at the Heads and the preparation of a SEES by the PoMC. Blue Wedges argued that the SEES amounted to a "fresh start" by the PoMC, which intended that the SEES should "stand-alone from the EES". Blue Wedges contended that the result of these changes is that, in activities, location, scale or impacts, the project no longer can be said to be the same project which was the referred to the Minister under s 67 of the Environment Act.

50 The differences between the action the subject of the 2002 Referral and the action the subject of the 2007 Assessment have been summarised by Dr Simon Roberts, a scientific witness who swore an affidavit on behalf of Blue Wedges. (I interpolate here that I agree with the respondents that Dr Roberts' evidence was strictly speaking inadmissible since it went beyond the areas of his expertise and amounted to comparing documents which speak for themselves. However, since, by the same token, his report could be made as a submission I will receive it on that basis: *Federal Court Rules* O 10 r 1(2)(j).)

51 Dr Roberts concluded that "the 2007 action appears to be significantly larger in area, volume, depth and its likely impact on controlled provisions of the Environment Act, than the 2002 action".

52 The differences identified by Dr Roberts are summarised in a report attached to his affidavit (the Roberts Report). Based on the Roberts Report, Blue Wedges submitted that the following differences between the project as referred in 2002 and as approved in 2007 exist and are particularly significant (the "2002 Action" is the Project in the Referral, the "2007 Action" is the Project the subject of the Assessment and the Approval Decision):

(a) **the basis of the proposed action:** The 2002 Action is described as a proposal to deepen the shipping channels by reference to a particular depth ("of the order of 1.5 to 2 metres"). The 2007 Action is described as a proposal to deepen the shipping channels for a particular purpose ("to accommodate vessels with a draught of 14 m at all tides with the exception of severe metocean conditions"). The consequence of this fundamental shift in approach is that, whereas the 2002 Action is specifically confined in its dredging depth, the 2007 Action provides for dredging of an unspecified depth, provided it is sufficient to achieve the stated objective. This has significant consequences both for the depth of dredging and the activities included within the scope of the proposed action.`
(b) **the location of the proposed action**: The 2002 Action is expressly confined to the "existing shipping channel alignment", and does not mention works in relation to either the existing DMG, or the need to construct an entirely new DMG in the south of the Bay. The co-ordinates by which the location of the 2002 Action is defined do not include the Heads, the Yarra River or South Channel east (although there is reference to dredging of the Great Ship Channel and Yarra River estuary in the body of the referral). By contrast, the 2007 Action expressly includes dredging outside the shipping channels in the Entrance, the turning area at Hovell Pile in the South Channel East, the southern end of the Port Melbourne channel, and the Swanson Dock swing basin. The 2007 Action proposes to re-align and extend some of those channels and to extend the Great Ship Channel into parts of the existing Western and Outer Western channels. The 2007 Action also involves significant river works and

works on berths and docks at locations which were not included in the 2002 Referral.

(c) **the activities included in the proposed action:** Other than investigatory works, the only activities described in the 2002 Action are "deepening" or "dredging" of the channels and the Yarra River estuary. The 2002 Action makes no reference to the disposal of contaminated dredge material, either within the existing disposal areas or otherwise. It makes no reference to the need to construct a Confined Aquatic Disposal facility in the existing DMG or an entirely new DMG in the south of the Bay. It does not include river works to stabilise the banks of the Yarra River and expansion of the swing basin at Swanson dock; modification to berths and docks; the installation of new navigation aids; protection or decommissioning of infrastructure assets that traverse the shipping channels proposed for dredging; increased maintenance dredging until 2030; or ongoing use of the shipping lanes by larger vessels, including tankers. All of these activities are within the scope of the 2007 Action.

(d) **the depth of dredging involved in the proposed action:** The most basic determinant of the nature, scale and likely impact of the two actions is the depth of dredging proposed to be undertaken. The 2002 Action clearly specified that "the expected deepening of the channels is of the order of 1.5 metres to 2 metres". By contrast, the 2007 Action provides for variable dredging of unspecified depth such as to accommodate vessels with a draught of 14m. In the 2007 Action the deepening of the channels in the Northern areas will be in the vicinity of 3 metres, and in the Entrance by more than 4 metres (and potentially as great as 8 metres, as a result of scour resulting from the trial dredging program).

(e) **the scale of the proposed action:** While the 2002 Action does not give any direct indication of its size or the amount of material to be removed, its reference to the project taking place "within the existing shipping channel alignment", and its failure to refer to the need to either extend the existing DMG or create a new DMG suggests that it is a project of limited scope which will not be dissimilar to dredging works which have been carried out on previous occasions. By

contrast, the 2007 Action will remove and dispose of approximately 23 million cubic metres of material from shipping channels and other areas of the Bay, with parts of the 2007 Action containing sections of continuous dredge area of greater than 10km in length. The First Panel report emphasised the importance of having regard to the scale of the proposed action:

[T]he amount of material to be dredged in the capital phase of the project is more than the equivalent of digging a 2 metre deep by 15 metre wide trench from Melbourne to Sydney. This dredged material will then be transported and dumped at two spoil grounds. If instead it were placed on the City of Melbourne's Hoddle Grid (the central city area), it would cover it to a depth of approximately 23 metres, the equivalent of a typical eight-storey building.

53 Having regard to the above differences, argued Blue Wedges, the impact of the 2007 Action is likely to be significantly greater than that of the 2002 Action. In particular, the significantly greater scale of the 2007 Action, and its inclusion of the need to dispose of contaminated material, suggest that its environmental impact is likely to be far more extensive than the confined dredging "within the existing shipping channels" proposed in 2002.

54 In addition, Blue Wedges submitted that the elements of the each of the protected matters likely to be impacted by the 2002 Action and the 2007 Action are significantly different. In particular:

(a) **Wetlands of international importance**: The 2002 Controlled Action decision identifies three distinct areas likely to be impacted within the Port Phillip Bay (Western Shoreline) and Bellarine Peninsula declared Ramsar Wetlands: Swan Bay and Swan Island, Mud Islands, and Werribee-Avalon. [Ramsar is a city in Iran where the applicable international treaty was signed.] The 2007 Assessment identifies a slightly different set of wetlands which are likely to be impacted by the proposal: Swan Bay, Mud Islands, and the Spit Wildlife Reserve component of the western shoreline of Port Phillip Bay.

(b) **Listed threatened species**: The 2002 Controlled Action decision

considers the impact on five listed threatened species and determines that the action is likely to have an impact only on the orange-bellied parrot. Significantly, the 2002 Controlled Action decision determines that the 2002 Action is not likely to threaten any important habitat or population of the Australian Grayling. By contrast, the 2007 Assessment considers the impact on eighteen listed threatened species and determines that the action is likely to have an impact only on the Australian Grayling.

(c) **Listed migratory species**: The 2002 Controlled Action decision considers the impact on four listed migratory species and determines that the action is likely to have an impact only on the orange-bellied parrot. The 2007 Assessment considers the impact on nine listed seabirds and twenty-six listed shorebirds, none of which are determined to be threatened by the action.

(d) **Commonwealth land**: The 2002 Controlled Action decision identifies one area of Commonwealth land which may be impacted by the 2002 Action: Swan Island. The 2007 Assessment identifies three areas of Commonwealth land which it considers may be impacted: Swan Island Defence Precinct, Swan Island and Naval Waters, and Point Nepean Commonwealth area.

55 Blue Wedges further contended that the difference between the 2002 Action and the 2007 Action is also reflected in the fact that:

(a) The 2002 Referral does not include the relocation works for services which traverse the Yarra River just south of the West Gate Bridge or the trial dredging program. As a result, these actions were the subject of separate referrals to the Minister under s 67 of the Environment Act. By contrast, the 2007 Assessment expressly encompasses the protection of infrastructure assets that traverse the shipping channels and builds on the results of the trial dredging.

(b) The 2002 Referral includes reference to maintenance dredging, while the 2007 Assessment expressly excludes consideration of maintenance dredging except insofar as it impacts on "*options for management of dredged material*".

56 In sum, Blue Wedges submitted that the action now proposed to be undertaken varies substantially in scale, location, nature, and impact

from that originally proposed in 2002. The action changed substantially in 2004 and then again in 2007. At either of these points the proponent could have initiated the process for a new referral or, in relation to the most recent changes, requested a variation under s 156A of the Environment Act. Instead, however, it has ignored the processes of the Act and sought thereby to exclude the new project from the scrutiny afforded by the Act's protections.

57 Blue Wedges argued that those protections serve a vital public function by ensuring that all of the impacts of a proposed action are adequately assessed. The proponent's failure to recognise the differences between the 2002 Action and the 2007 Action undermines that function and in doing so subverts the purposes of the Act. Accordingly, Blue Wedges asked that this Court give effect to that purpose and declare the Approval Decision invalid because it was based on a referral for what was essentially a different "action".

Conclusion: the Project is the same "action" as that in the Referral

58 Senior counsel for the PoMC and the State of Victoria pointed out that Dr Roberts' analysis suffered from the fundamental defect that it did not take into account the Maunsell report, a substantial report which accompanied the Referral. (This was no criticism of him as the report had not been made available to him.) Certainly the Maunsell report in a number of important instances puts forward alternatives or ranges. For example, in Table 2.4 there is a Summary of Spoil Volumes which provides estimates for the range of approximate volumes of spoil at the various sites. The upper limits add up to 27.02 million cubic metres, which is greater than the quantity said by Blue Wedges to be a 2007 expansion of the original figure.

59 However, it is not necessary to descend into further detail. I accept that there are differences in the Project the subject of the Approval Decision as compared with the Project in the Referral (including the Maunsell report). For the reasons already mentioned, in a project of this magnitude it would be surprising if there were not. Whether those differences can be characterised as "significant" or "substantial" or by

some other adjective suggesting importance is not to the point. The "action" was described in the Referral in these terms:

To deepen the shipping channels at Port Phillip Heads, in Port Phillip Bay and the Yarra River and its approaching channels.
The Project the subject of the Approval Decision is for the deepening of channels. It is not for any other work. Deepening channels necessarily involves disposal of the material removed. The Project is to take place at Port Phillip Heads, in Port Phillip Bay and the Yarra River and its approaching channels, and nowhere else. It is the same "action". That action has been the subject of public hearings over 63 days. The Approval Decision is lawful. The law does not require the process to be started all over again.

60 For the sake of completeness I should add that a complaint was made in the course of the hearings that the "controlling provisions" identified in the Controlled Action Decision did not include Commonwealth marine areas. The short answer is that Blue Wedges' application does not attack the validity of the Controlled Action Decision. In any event, that matter was considered at the time of the Controlled Action Decision. The Minute of Mr Gerard Early, Deputy Secretary of the Department, which was submitted to the decision-maker, stated:

Commonwealth Marine

Though the proposed works may result in a permanent increase in high tide levels, from increased channel depths, and a temporary increase in water turbidity associated with dredging works, adverse impacts on the Commonwealth marine environment are not expected or considered likely. Port Phillip Bay is State waters and Commonwealth waters commence 3 nm [nautical miles] from the Heads.
Thus this matter was specifically considered. There is no basis for concluding that his aspect of the decision-making process was unlawful.

ADEQUACY OF ASSESSMENT GROUND

Blue Wedges' case

61 Blue Wedges contended that by treating the Project in its 2007 form and the 2002 Referral form as the same "action", the Assessment was limited under s 82 of the Environment Act to the "relevant impacts" of the Project in its 2002 form, and did not consider all of the matters under Pt 3 of the Act. In particular, there was no consideration of whether the Project in its 2007 form might impact on the environment of a Commonwealth marine area.

62 The 2007 Assessment also expressly excluded consideration of maintenance dredging, notwithstanding that it was a significant component of the project and has the potential to have far-reaching effects, particularly in the context of the scour caused by the trial dredging program.

63 Accordingly, Blue Wedges submitted, the Assessment did not adequately assess all of the impacts of the Project. By making his decision on the basis of the Assessment and by failing to request additional information under s 132 of the Act, the Minister has failed to have regard to all considerations relevant to his decision under s 133 of the Act: see *Minister for Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190;* (2004) 139 FCR 24.

Conclusion: Federal Minister not prevented from making Approval Decision

64 Although s 87(4)(d) of the Environment Act envisages that the Assessment report should contain "enough" information to let the Minister make an "informed decision", the Act does not require that the report is the sole repository of information for the Minister to make such a decision. Indeed, s 132 (amongst other sections) assumes that the Minister may have other sources of information available on

which to base a decision under s 133, and may need to utilise those sources even after the receipt of an Assessment report.

65 Section 132 of the Act provides:

If the Minister believes on reasonable grounds that he or she does not have enough information to make an informed decision whether or not to approve for the purposes of a controlling provision the taking of an action, the Minister *may* request any of the following to provide specified information relevant to the making of the decision:
(a) the person proposing to take the action;
...
(e) any other person the Minister considers appropriate.
(Emphasis added.)

66 Thus, the power (which is expressed in discretionary, non-obligatory terms) to request information depends, not on an objective assessment of the sufficiency of the information before the Minister, but on the Minister's judgment (no doubt reasonably formed) as to whether he or she has enough information to make an informed decision. As to the difficulty of making out a legal challenge to decisions made under such powers, see *Buck v Bavone* *[1976] HCA 24;* (1976) 135 CLR 110 at 118-119, and *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* *[1996] HCA 6;* (1996) 185 CLR 259 at 275-277.

67 There is no evidence in this case that the Federal Minister believed that he did not have enough information to make an informed decision. On the contrary, the fact that the Minister has made the Approval Decision in itself provides a very strong indication that the Minister believed that he had sufficient information to make an informed decision. The point about Commonwealth marine areas has been discussed above.

COSTS

68 It follows from the foregoing that Blue Wedges' application must be dismissed. The usual consequence would be that costs follow the event, that is to say that Blue Wedges should pay the respondents'

costs. Counsel for all respondents submitted that such an order should be made in the event of the application being dismissed.

69 Costs are in the discretion of the Court: *Federal Court of Australia Act 1976* (Cth) s 43. In considering the award of costs under a similarly broad statutory discretion in *Oshlack v Richmond City Council [1998] HCA 11;* (1998) 193 CLR 72, a majority of the High Court held that the trial judge's discretion had not miscarried by taking into account such matters as the unsuccessful party's motivation to ensure obedience to environmental law and preservation of an endangered koala habitat, the fact that a significant number of members of the public shared that view, and that the basis of the challenge was arguable: see per Gaudron and Gummow JJ at [20],[49] and per Kirby J at [133], [136]-[144]; see also *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411 (discussing departures from the ordinary costs rule in public interest cases).

70 Blue Wedges represents the interests of over 65 community and environment groups. It has been actively campaigning to raise public awareness of threats to the environment of Port Phillip Bay over many years. As such it qualified for the express conferral of standing to bring proceedings such as the present one conferred by s 487(3) of the Environment Act. (The respondents in their defences objected to Blue Wedges' standing but did not pursue such objections at the hearing.)

71 Blue Wedges' solicitor Mr Michael Morehead also acts for a number of businesses, such as diving schools, who fear they will be commercially damaged by the Project. He has notified to PoMC potential claims for compensation on their behalf. Nevertheless this commercial element of the case does not gainsay the public interest which lies at the base of the present application.

72 Mr Morehead initially had the services of counsel acting pro bono in a directions hearing in December but was unable to obtain such assistance for the hearing which, because of the urgency, took place

during the holiday period. So Mr Morehead, who runs a one-man practice at Portsea, conducted the case himself. Against the combined resources of the Commonwealth and the State of Victoria, who were able to retain five barristers, including four senior counsel, Mr Morehead on his own advanced serious and competent argument, for which the Court is grateful. He frankly informed the Court that his appearance was not pro bono. Nevertheless, I doubt if his earnings from this case will propel him into the *Australian Financial Review* list of top fee earners.

73 In my view, however, this is a clear case for the application of the *Oshlack* approach. The condition of Port Phillip Bay is a matter of high public concern, and not only for the four million or so Victorians who live around it. As might be expected, the Project has attracted much controversy. On Saturdays the Melbourne *Age* publishes a list of which it considers to be the "Five Big Issues" of the week. Last Saturday, 12 January, Port Phillip Bay channel deepening was third, topped only by Andrew Symonds in the Sydney Test and Hillary Clinton in New Hampshire. Although, as has been said in another context, there is a difference between what is in the public interest and what is of interest to the public (*Lion Laboratories Ltd v Evans and Others* [1985] QB 526 at 553), in the present case the two happen to coincide. There is a public interest in the Approval Decision itself, and equally in whether it has been reached according to law. Also, the application raised novel questions of general importance as to the approval process under the Environment Act: cf *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 430 at [11]-[12] (acknowledging that the existence of a novel and important question of statutory construction will be relevant to a court's discretion in public interest litigation to depart from the ordinary costs rule, but concluding that the issues of construction presented in that case were not questions of general importance.)

74 As often happens in litigation, after a full hearing the Court can reach a firm conclusion. But it by no means necessarily follows that the case of the party who loses could have been seen from the start as

hopeless and without merit. Certainly that is not so in the present case. Further, there was not unreasonable delay by Blue Wedges in bringing its application. Until the Victorian Minister provided his assessment to the Federal Minister, an application could well have been attacked as premature.

75 Accordingly, although I will order that the application be dismissed, there will be no costs order.

I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Heerey .
Associate:Dated: 15 January 2008

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Solicitor for the Respondent:	Australian Government Solicitor
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Solicitor for the Second and Third Respondents	Victorian Government Solicitor
Date of Hearing:	10 January 2008
Date of Judgment:	15 January 2008

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