

Significant Social Effects - Lessons from Victoria

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The field of environmental law continues to mature alongside our understanding of the impact of human activity on the environment.² A circuitous route awaits Australian environmental law practitioners attempting to consider human impact on the environment. In our 'peak' national legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), we declare the *environment* to include:

- (a) ecosystems and their constituent parts, *including people and communities*; and
- (b) natural and physical resources; and
- (c) the *qualities and characteristics* of locations, places and areas; and
- (d) *heritage values* of places; and
- (e) *the social, economic and cultural aspects* of a thing mentioned in paragraph (a), (b), (c) or (d).³

This paper examines the last element and particularly social aspects of the environment. It endeavours to address the question of social effect as it is handled by the EPBC Act and, in considering the difficulties of quantifying and proving social effect, considers a recent development in Victorian planning law which indicates a further movement to the acceptance of social effect as a critical aspect of human impact.

The EPBC Act incorporates the social aspects of environmental effects by specific reference, and through defining 'the principles of ecologically sustainable development' (ESD principles), as follows:

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, *social* and equitable considerations;
- ...
- (c) the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations; ...⁴

Through reference to ESD principles, and specific reference to 'social matters', the EPBC Act regularly tasks decision makers with consideration of the human effect of human impacts. For example:

- sections compelling the Minister to consider certain matters prior to making a decision relating to the approval (or exemption from approval) of an action⁵ all require the Minister to consider the ESD principles⁶ and, in each case explicitly, relevant social matters;⁷

¹ This Article draws on an in-house memorandum prepared by Kellehers Australia, published on its website

www.kellehers.com.au/category/latest-news/

² Bates, Gerry, *Environmental Law in Australia*, Lexis Nexis Butterworths, 8th edition, at 19.

³ Section 528, *Definitions* (emphasis added).

⁴ S 3A (emphasis added). See also the *National Strategy for Ecologically Sustainable Development* (Ecologically Sustainable Development Steering Committee/Council of Australian Governments, December 1992), which also contemplates the social aspect of environmental impacts, defining ESD as 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the *total quality of life*, now and in the future, can be increased'.

⁵ Defined by s 523 to include a project, a development, an undertaking, an activity or series of activities, and an alteration of any of these things (but note s 524 exclusions).

⁶ S 37B(2) (as to declarations that an action does not require approval), s 136(2)(a) (as to decisions to approve an action) and s 146F(2) (as to decisions to approve actions in accordance with an endorsed policy, plan or program).

- in the preparation of recovery plans, wildlife conservation plans and threat abatement plans relevant to the recovery and survival of native species and ecological communities and reduction of their key threatening processes, regard must be had to the minimisation of social impacts consistent with ESD principles⁸ and to the role and interests of indigenous people in the conservation of Australia's biodiversity;⁹
- in the making of conservation orders relevant to the taking or prohibition of actions in specific areas, the Minister must be satisfied that the order is justified, having regard to social considerations consistent with ESD principles.¹⁰

In principle, this is a straightforward task - the decision maker must simply consider and decide in response to (or against) how people *feel about* and *respond to* environmental impacts. In practice, it is a vexed assignment, often paid insufficient regard.

For example, a Commonwealth agency with best intentions of fulfilling its EPBC Act obligation to report on its environmental performance and how its activities and administration of legislation accord with and advance ESD principles,¹¹ may refer to the Department of the Environment's *Guidelines for Section 516A Reporting*¹² templates as 'simple tools which [it] can apply' 'to assist [in meeting its] statutory annual reporting requirements'.¹³ The *Guidelines* (which, in their defence, are professed only as indicators based around the themes of energy efficiency, waste and water) make substantial provision for the reporting of readily quantifiable matters based on indicators including amount of electricity consumed, amount of waste going to landfills and amount of rainwater captured - and no mention of the *social effect* of any activity the agency undertook.¹⁴

Indeed, in its (predecessor's) most recent annual report, the Department of Environment itself lists the ESD principles as set out in the EPBC Act, but provides no detail as to what social effect eventuated from the substantial work it undertook during the course of the year.¹⁵

A review of EPBC Act-related caselaw shows a similar pattern. While readily quantifiable impacts, such as area of habitat lost or emissions produced, are regularly considered, despite the regular reference to social effect in the EPBC Act, the social effect of proposed actions has been the subject of direct consideration only three times in the last decade.¹⁶ In those cases, the treatment of social effects is less than comprehensive. For example, the judgment in the case of *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts*,¹⁷ an action seeking to invalidate the Minister's approval of the 2008-2009 Port Phillip Bay Channel Deepening Project, directly considered the social aspect of the environment – but only in the context of the

⁷ ss 37B(1)(b), 136(1)(b) and 146F(1)(b).

⁸ S 270(3)(c) (recovery plans), 271(3)(c) (threat abatement plans) and s 287(3)(c) (wildlife conservation plans).

⁹ Ss 270(3)(e), 271(3)(e) and 287(3)(e).

¹⁰ S 464(3). Social matters and the principles of ESD are also provided as potential subject matter for comments from other Ministers invited to comment on a proposed decision: ss 131(2), 146(2). If the Minister decides not to approve the taking of an action, the person proposing to take the action or the designated proponent must be provided with any information relating to social matters the Minister has considered: s131AA(2)(b).

¹¹ S 516A.

¹² Department of the Environment, Water, Heritage and the Arts, 2010.

¹³ Department of Environment, *Guidelines for Section 516A reporting - Environment Protection and Biodiversity Conservation Act 1999* (online), <http://www.environment.gov.au/resource/guidelines-section-516a-reporting-environment-protection-and-biodiversity-conservation-act> (accessed 28 July 2014).

¹⁴ See generally Simon R Molesworth QC, 'Has ESD had its day?' (Paper presented to the 2013 NELA National Conference, 8 March 2013).

¹⁵ Department of Sustainability, Environment, Water, Population and Communities, *Annual Report 2012-2013* (2013), pp 210 - 260 (s516A Report). See also pp 160, 172, which contain more glancing references.

¹⁶ *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts* (No. 2) [2008] FCA 1521 (13 October 2008); *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCA 113 (17 February 2011); *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 399 (28 March 2008).

¹⁷ [2008] FCA 399.

use of the environment by humans, rather than its meaning and importance. A relevant Inquiry Report¹⁸ had directly considered the question of the community's 'deep and unrelenting concern' and stated it was 'disappointed that the social impact assessment was not more thorough and conclusive'¹⁹. These matters were not addressed in the Federal Court decision.

The sparsity of consideration of social effects in *Blue Wedges* and more broadly in the environmental context may, simply, be put down to the difficulty (and expense) of its quantification and proof. Whatever its cause, the gravity of social effects of environmental impacts is not reflected in their treatment in case law and statutory processes.

Social effect as a planning matter in Victoria

In Victoria, direct attention is being paid and difficulties are being addressed. A late 2013 amendment to the Victorian *Planning and Environment Act 1987* introduced s 60(1)(f), which provides that decision-makers in planning, before making any decision, must consider:

*"... any significant social effects and economic effects which the responsible authority considers the use or development may have."*²⁰

The first VCAT decision to directly consider significant social effect (SSE) since the introduction of s60(1)(f) was recently delivered.²¹ The Tribunal observed that section 60(1)(f):

"now more clearly puts the significant social and economic effects of a planning decision on an equal footing with environmental effects, all of which 'must' now be considered" [48]

It required that SSEs must have a causal connection to the proposed use or development [51] and be balanced "alongside all other relevant planning considerations, as part of an overall assessment of the proposed use or development" [55]. Curiously, it adopted the view that the relevant 'effects' are:

"those that the responsible authority (or the Tribunal on review) considers to be significant, rather than those that may simply be contended as significant by one party or another" [50].

It required that an SSE must be 'sufficiently probable' [54]. This test, it said, depended not only on the probability of the effect occurring, but also on its consequences and the utility of the use and development giving rise to the effect [54]. It found that SSEs required a large scale, being:

"those that affect the community at large, or an identifiable section of the community, rather than affecting an individual or a small group of individuals" [52]

The burden of proof rests with the person asserting an SSE. To meet the burden, the Tribunal considered that it required:

"[a] proper or independent social impact assessment or socio-economic assessment... at a community level" [84]

It is unclear what a 'proper' assessment is. The Tribunal ruled that evidence of SSE must be:

- 'proper' or based on 'empirical analysis, preferably through a formal social impact or socio-economic assessment' [53];

¹⁸ *Port Phillip Bay Channel Deepening Supplementary Environment Effects Statement: Report of the Inquiry* (1 October 2007), available at www.dpcd.vic.gov.au/planning/environment-assessment/projects/port-phillip-bay-channel-deepening-proposal (accessed 29 July 2014) ('Inquiry Report'). See also the earlier Panel EES Report, which also considered social effect (and referred to the Minister's consideration of cultural heritage impacts): *Channel Deepening (EES)* [2005] PPV 13 (11 February 2005). PPV is typically more likely to give social matters full and direct consideration: see, eg, *Murray Basin Mineral Sands- Stage 2 (EES)* [2008] PPV 104; *Lonsdale Golf Course development (EES)* [2012] PPV 62 (30 May 2012); *Strathmerton Deviation (EES)* [2001] PPV 17.

¹⁹ Inquiry Report at p 18 (3.3).

²⁰ S 60(1)(f), *Planning & Environment Act 1987* (Vic).

²¹ *Rutherford & Ors v Hume CC* (includes Summary) (Red Dot) [2014] VCAT 786 (14 July 2014) ('*Rutherford*').

- ‘objective, specific, concrete, observable’ as to likely consequences [53];
- not ‘based on philosophical or moral or religious values’ [53];
- not merely ‘opposition by a section of the public or a large number of objections’ [53];
- ‘preferably’ ‘a formal and independent social impact or socio-economic assessment’ [55]; and
- where trauma or mental health effect is in issue, evidence must be ‘proper’ [72] and ‘expert evidence’ [74].

Thus, even where evidence was given by a highly experienced planning consultant, the absence of evidence from ‘a qualified social planner’ was viewed as a shortcoming in the way this case was prepared. Nevertheless, VCAT accepted that socio-economic assessment:

“would be very difficult at an objective level, having regard to the inherent difficulties in assessing any ethic [sic] divisions or prejudices in a community, or comparing the needs and aspirations of different faiths.” [84]

The case rejected personal evidence of trauma as not providing ‘an objective basis for considering social effects at a community level... for the purpose of planning decision-making’ ([74]). It also regarded survey evidence gathered by the party claiming SSE as of lesser weight than Council’s ‘sense of the social needs and well-being of its community’ ([84]) and critiqued the survey methods used by the community (with inaccurate reference to the evidence before it).

The Tribunal ultimately, and somewhat surprisingly, noted that:

“Planning schemes do not generally seek to regulate the compatibility of uses within zones on social grounds” [34].

It also freely referred to certain social elements it assumed existed and, particularly as to racism, did so in the face of evidence and clear submissions to the contrary.

Rutherford as it affects those tasked to respond to social effects

Rutherford is important in indicating that, in the absence of professional expert social planning evidence, VCAT intends to rely mainly on Council’s assessment (made without expert evidence) as evidentiary basis for an approach to the mandatory consideration of SSEs.

VCAT’s reliance on expert evidence rather than ‘lived’ experience given as evidence under oath as indicators of social effect reflects concerns frequently raised by Indigenous Native Title claimants who find their tradition and stories requiring verification by ‘expert’ anthropologist to whom they must pass them.²²

While, through *Rutherford*, VCAT appears to have adopted a position of SSEs requiring strict expert evidence in the planning context, it would not be feasible for every decision requiring consideration of the social aspects of human impact - whether in the planning context, under the EPBC Act or otherwise - to be made on the basis of a full, expert, social impact assessment. To require such would be to yet further complicate and convolute statutory processes - under the EPBC Act, planning legislation, or like regimes - and increase ‘red tape’ and costs.

In the Victorian planning context, since the making of the Order in *Rutherford*, local government decision-makers have expressed concern that the decision effectively requires Victorian Councils to have a full-scale

²² Leonie Kelleher, *Schumpeter’s Bahnbrechen considered in the light of Native Title legislation and indigenous entrepreneurship* (PhD Thesis, Royal Melbourne Institute of Technology, (2012) 164-165, 209; Frances Morphy, ‘Performing law: The Yolngu of Blue Mud Bay meet the native title process’, in Benjamin Smith and Frances Morphy (eds.), *The Social Effects of Native Title: Recognition, Translation, Coexistence* (Research Monograph No. 27, Australian National University Centre for Aboriginal Economic Policy Research, 2007) 31; Martin Nakata, *Disciplining the Savages Savaging the Disciplines* (Aboriginal Studies Press, 2008).

social impact assessment prepared by an expert, and to incur the attendant financial and time costs, in order to meet their obligation to consider the significant social effects of every planning proposal put before them, or whether such exist.

The ready solution is in widening requirements for consultation and consideration of the impact of proposals on humans, as expressed by impacted humans, and, where necessary, to consider and balance these with the assistance of expert minds.

Conclusion

'Planning is not a panacea for all ills'²³, as VCAT stated in *Rutherford*, but with social effect a mandatory consideration in all planning and environmental matters, relevant statutory processes and decision makers must take measures to address the "ills" they are actually tasked to address. Whilst increased attention to the question of social effects in the Victorian planning context appears to reflect their importance in decisions regulating human impact generally, the application of stringent standards of evidence may have the impact of excluding the most relevant and revealing evidence - that of the people actually experiencing the effect.

²³ *Rutherford* at [33], citing *Hunt Club Commercial Pty Ltd v Casey CC (Red Dot)* [2013] VCAT 725 at [15]-[17].