

The importance of disclosure of interests for Associations

Not for Profit 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 *Associations Incorporation Act 1987* dealing with the disclosure of financial interests by the board (sometimes also known as the management committee or council of the Association).

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.
- The effect of the expression "direct or indirect" is to expand the range of 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.

Who does this affect?

Incorporated Associations

Article Highlights

- The Supreme Court found that the environmental approvals issued by the Minister in relation to the Browse LNG Precinct were invalid because of the members' pecuniary interests.
- The disclosure requirements of members of the board or management committee of an Incorporated Association.



- 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.
- 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.

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.

Having found that 3 of the 5 EPA members clearly had 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 actions that had been undertaken by the EPA.

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 principles included:

- 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.

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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”.

Application to Incorporated Associations

It remains to be seen whether these considerations will apply equally clearly in relation to the *Associations Incorporation Act*.

Board or management committee members owe statutory duties including the obligation to avoid conflicts of interest by disclosing the nature and extent of the pecuniary interest in a proposed contract (s 21) and abstaining from deliberations or decisions with respect to that contract (s 22).

This does not apply in respect of a pecuniary interest that only exists because the board or management committee member is an employee of the Association or is a member of a class of persons for whose benefit the Association is established (ss 21(2) and 22(2)).

Any disclosures made must be recorded in the minutes of meeting and the person with the conflict must not take part in any board or management committee deliberations or voting in relation to that issue. The best practice is for the person to leave the room during the discussion and not vote on the issue.

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.

TIP: Keep “disclosures of interest” as a standard item on your meeting agenda. Often there will be nothing to note, but it serves as a reminder to members of the need to remain aware of conflicts of interest and “normalises” the disclosure process.

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