



Our ref: Letter – 080913 - Committee Secretary – Submission Inquiry

Classification: Commercial-In-Confidence

4 September 2008

Committee Secretary
Senate Standing Committee on Environment, Communications and the Arts Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir / Madam

Submission to the Inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999

Introduction

We refer to the Terms of Reference for the Inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999 ('Inquiry'). The Port of Melbourne Corporation ('PoMC') takes this opportunity to make a submission to the Committee in relation to issues raised by the Inquiry.

Port of Melbourne Channel Deepening Project

The Port of Melbourne is an integral infrastructure component critical to the economy of the State of Victoria and of the Commonwealth. Through the initiative known as the Channel Deepening Project, PoMC has proposed to deepen existing channels and berths in Port Phillip Bay, Hobsons Bay, the Yarra River and the Entrance to a depth sufficient to accommodate ships with up to a 14 metre draught.

The Channel Deepening Project was subject to a rigorous and transparent approval process requiring approval from the Victorian and Federal Governments under the Victorian Environmental Effects Act 1995 and the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 ('EPBC Act').

The Channel Deepening Project was referred to the Commonwealth Minister under section 68 of the EPBC Act on 15 February 2002. A final decision to approve was issued on 20 December 2007. Throughout the approval process – and despite there being no bilateral agreement between the Commonwealth and Victoria under the EPBC Act – PoMC's experience with the Channel Deepening Project and the EPBC Act approval system was smooth, professional and appropriate.

Previous legal challenges to the Channel Deepening Project

As the Committee will be aware, the Commonwealth Minister's decision under the EPBC Act in relation to the Channel Deepening Project was the subject of a number of legal challenges. In

particular, we refer to the case of Blue Wedges Inc v Minister for the Environment, Heritage and the Arts [2008] FCA 8 in which Blue Wedges Inc. argued that there was no lawful basis for approval under the EPBC Act of the Channel Deepening Project. The basis of this argument was the fact that the subject of the approval in 2007 was of a 'greater scale and nature and includes different actions' than the project as described in the 2002 referral, and therefore, was not a valid approval. This ground of argument is known as the 'Identity of Action Ground'.

The Federal Court dismissed the Identity of Action Ground, finding that substantial elements of an 'action' referred under the EPBC Act can be changed in the time between referral and ministerial approval without rendering the approval invalid. Further, the Federal Court made a finding that the 'action' approved by the Commonwealth Minister in 2007 in relation to the Channel Deepening Project was the same action as that referred to the Commonwealth Minister in 2002.

Port of Melbourne Corporation's submission

In relation to the Terms of Reference for the Inquiry, the Port of Melbourne Corporation submits that the Federal Court's decision on the Identity of Action Ground is a logical, reasonable and appropriate decision. It is a decision which acknowledges the realities of the referral and approval process under the EPBC Act.

The Federal Court's response preserves certainty for both developers and the Commonwealth minister and permits a measure of flexibility to alter a project which is necessary. A contrary decision would have introduced uncertainty on the part of developers which would diminish the co-operative aspect of the EPBC Act referral process which was experienced by PoMC.

It is important that as the assessment of a controlled action proceeds, after referral and a decision by the Commonwealth that a project is a controlled action, there is adequate scope for the project identity to be adjusted to address issues identified by the proponent while it is conducting its assessment. The provision of such a feedback mechanism assists in optimising environmental outcomes by allowing a proponent to address and resolve issues during the preparation of assessment documentation. A prescriptive approach to project identity would lead to proponents either not incorporating project changes at an early time to avoid the need to re-refer the proposed action to the Commonwealth Minister, or subjecting a project to unnecessary delay by re-referring a project as the assessment process identifies the need for project modifications to address environmental issues.

In this regard, PoMC submits that no changes should be made to the EPBC Act which would be contrary to the finding of the Federal Court in Blue Wedges Inc v Minister for the Environment, Heritage and the Arts [2008] FCA 8.

PoMC thanks the Committee for the opportunity to make submissions in relation to the Inquiry.

Yours sincerely




Stephen Bradford
Chief Executive Officer