Friends of Mallacoota Inc v Minister for Planning and Minister for Environment and Climate Change [2010] VSC 222

The Honourable Justice Osborn

Firstly, what is judicial review?

The separation of powers is a fundamental principle in the model for governance of democratic states such as Australia. The principle is that the State is divided in to three 'arms' - the Executive (the government), the Legislature (the parliament) and the Judiciary (the courts). Each arm has separate and independent powers and areas of responsibility. One strictly does not interfere with the operations and decisions of another.

Accordingly, courts are not able to interfere with government decision making. For example, they won't say to a Minister about a decision: "Minister, you got it wrong". Courts are only able to look at a decision of a Minister of Government in very, very limited circumstances. Judicial review is one of these.

Judicial review is a process in which a Court looks at a decision made by a Minister and decides whether this decision was made following the correct legal process. This involves looking at the powers the Minister has to make the decision that he or she did, where these powers come from (usually an Act of Parliament), and whether or not the Minister acted out side of these powers or incorrectly according to these powers.

Following on from this, in the case of *Friends of Mallacoota v Minister for Planning and Anor,* Justice Osborn was not able to look at the merits of the Minster for Planning's decision. He could not comment on whether the breakwater development at Bastion Point is a good idea or not, or whether the Minister should have agreed with the Panel or not. Justice Osborn could only look at the process followed by Minister when making his assessment under the *Environment Effects Act 1978,* and whether or not this was correct under the law.

Decision Summary

On 27 May 2010 the Honourable Justice Osborn handed down his decision in the above proceeding.

Ultimately the Judge concluded that the process followed by the Minister in making his decision was the correct legal process.

In response to the Friends' ground that the Minister purported to *approve* the project, rather than just *assessing* the environment effects of the proposed works as he was required to do under the Act, the Judge concluded that the written assessment was just that – an assessment – and that this was correct under the Act. This conclusion was based on the regularity in which the word 'assessment' appeared in the document (despite the Minister referring to it as an 'approval' in his own media release) and that when the assessment document is read as a whole it is properly characterised as an assessment.

In response to the Friends' ground that the Minister took in to account irrelevant considerations, in particular safety, the Judge said he was not persuaded that the assessment of environment effects of proposed works required by ss4 and 8 of the Act were intended to exclude social effects (such as safety). The judge also concluded that the Act should be understood as one which embraced a flexible concept facilitating the assessment of potential harm to the environment in the broad sense, despite there being no definition of 'environment' in the Act.

In response to the Friends' ground that the Minister denied the Friends procedural fairness by departing from the Panel's recommendations without first giving the Friends the opportunity to be heard, the Judge concluded that there was no implied right to another hearing. The Judge concluded that because the Act imposes no requirement on the Minister that he must have an EES Panel hearing in the first place, no requirement that it be public, and no requirement that he even ask the public for comments, the statutory scheme could not give rise to such a procedural right.

While Justice Osborn was unable to base his final judgement on the merits of the Minister's decision, he did make the following comments:

[In response to the Minister's conclusions that do nothing was not an acceptable option, and that the Panel's assessment fails to consider the issue of inherent risks to swimmers and other beach users, and that the Panel gave insufficient weight to the advice of Gippsland Ports]: "The terms of this response are somewhat surprising given that it is plain that the panel did very carefully consider the separation risk to which the Minister refers, and that it specifically found that do nothing is not an acceptable long term option, and specifically referred to the advice the panel received from Gippsland Ports. It addressed both ramp operations and waterway hazards." (Osborn J, at paragraph 25 of Judgement).

"[T]he panel's reasons for its factual conclusions are far more replete … than the minister's reasons" (Osborn J, at page 81 of the Hearing Transcript).

[In response to submissions by counsel for the Defendants that the Minister was adamant that there has to be separation between swimmers and boat users]: "You wouldn't normally need a breakwater for that, would you? I mean, normally the way you separate swimmers and boats is to put in a line of buoys or something of that nature. You don't have to build. The purpose of a breakwater is to interrupt the sea, isn't it? It's using a sledgehammer to crack a nut to put in a breakwater just to separate different users of the water isn't it?" (Osborn J, at page 81 of the Hearing Transcript).

"There is nothing in the material before the Court which supports the view that the Panel's assessment was other than a careful, fair and balanced evaluation of all the material before it" (Osborn J, at paragraph 32 of Judgement).

Judicial review in the Supreme Court of Victoria is a very specific and limited legal process. Accordingly, the judgement of Justice Osborn can in no way be construed to be an endorsement of the *content* of the Minister's conclusion that the boat ramp should proceed. All it shows is that the Minister followed the correct legal process in undertaking his assessment decision.

An important lesson that can be learned from the decision in *FoM v Ministers* is that the *Environment Effects Act 1978* is insufficient for protecting the environment in Victoria. Justice Osborn's hands were tied in this case due to the Act providing for such a flexible process and giving the Minister for Planning such extensive discretion at every step along the way. Indeed Justice Osborn himself states at paragraph 101 of his judgement that "[t]he net effect of this scheme is to directly invest the Minister with the power to control a very flexible process."

It means that the Minister's actions – ignoring his own expert panel and the overwhelming wishes of the community – were legal. This is of grave concern. It shows that even the Supreme Court of Victoria cannot hold a Minster accountable if his legislation remains so weak and ineffectual, and we must call on Parliament to rectify the shortcomings of the *Environment Effects Act 1978* as a matter of urgency.