POLICY AS A MANDATORY RELEVANT CONSIDERATION: A REFLECTION ON *JACOB v SAVE BEELIAR WETLANDS (INC)*

Adam Sharpe*

In late 2015, an application for judicial review was commenced in the Supreme Court of Western Australia to challenge the environmental approval of a flagship project of the Barnett government — the proposed extension of the Roe Highway from the Kwinana Freeway to the Port of Fremantle. The proposal involved taking the Roe Highway through an environmentally sensitive area known as the Beeliar Wetlands. At first instance, the application for judicial review succeeded on the basis that the Environmental Protection Authority (EPA) failed to have regard to its own policies when recommending that the Minister for the Environment approve the project. On appeal, the Supreme Court of Western Australia Court of Appeal held that the EPA's policies were not mandatory relevant considerations, so any failure to consider them could not invalidate the environmental approval. These two decisions provide an ideal context for addressing an important question of administrative law: when, if ever, will government policy be a mandatory relevant consideration for a decision-maker? This article will first consider the use of policy in government decision-making and then analyse why this important question was resolved with opposing results in these two cases.

Use of policy in government decision-making

The article adopts a broad working definition of 'policy' as principles stated by the executive which are intended to guide government decision-making in individual cases. The adoption of policy by the executive raises many issues.[1] This article examines the following four issues:

1. Why does the executive make policy?
2. What is the status of policy?
3. How should decision-makers use policy to guide decision-making?
4. What are the consequences of not considering policy?

This article is primarily concerned with the fourth issue. It was this issue which led Martin CJ to conclude that the environmental approval of the proposed extension of the Roe Highway was invalid in *Save Beeliar Wetlands (Inc) v Jacob*.[2] This conclusion was overturned by the Supreme Court of Western Australia Court of Appeal in *Jacob v Save Beeliar Wetlands (Inc)*.[3]

Why do governments make policy?

A key reason why the executive government makes policy is to seek to ensure consistency of decision-making. Consistency is an important aim because it is a fundamental tenet of

* *Adam Sharpe is a barrister practising at Francis Burt Chambers, Perth, Western Australia.* *This article is an edited version of a paper presented to the Australian Administrative Law Forum National Conference, Canberra, on 21 July 2017.*

administrative justice that like cases should be treated alike. Policy can assist with consistency across decision-makers. For example, in the administration of welfare payments, there are decisions which must be made by a large number of different decision-makers in respect of a far greater number of affected persons. Policy can assist with lessening or removing differences which might arise in decision-making between different government officials as a result of the personal views or approaches of those officials.

Policy can also assist the same decision-maker to make decisions consistently over time. Therefore, a decision made in 2012 by a particular body is more likely to be made in the same way in 2017 if that body is guided by policy.

Justice Brennan eloquently expressed the consistency benefits of policy in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* in the following terms:

> Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.[4]

Another potential benefit of policy is efficiency. Decisions may be made more quickly if a policy has established a process for decision-making and identified factors for consideration (provided this is done in conformity with statutory requirements). Efficiency may also be enhanced because applicants have greater guidance regarding how to frame applications for consideration by decision-makers and so those applications can be processed more rapidly.

In addition, policy can help to ensure that decision-making accords with political platforms. The electorate expects the party or parties which form government to govern consistently with the policy positions which they announce during an election period. By setting those policy positions as government policy following the election, there is continuity between the promises made to the electorate and the actions of government. In this way, policy which guides decision-making promotes democratic accountability. For this reason, it has sometimes been suggested that policies set by a Minister should be accorded greater weight than policies set by unelected executive bodies.

Finally, policy in technical or specialised fields can be formulated with the benefit of the input of experts. A policy which is formulated by drawing upon the learning of subject-matter experts allows for the pooling of knowledge. It should lead to better decisions than would be made by an individual decision-maker who does not possess the knowledge of all those who contribute to the policy.

The status of policy

The legal status of policy is different from the legal status of legislation. This flows from the different source of authority for the making of legislation. Broadly, legislation is made by the Parliament or in the exercise of delegated legislative power, while policy is made in the exercise of executive power.

Legislation has the force of law, but executive policy generally does not.

Executive policy should be distinguished from delegated legislation — namely, legislation made in the exercise of delegated legislative power. In Western Australia, delegated legislation is typically referred to as ‘subsidiary legislation’, which is defined in s 5 of the *Interpretation Act 1984* (WA) as follows:

> [Subsidiary legislation is] any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect.

For present purposes, the key words in this definition are 'having legislative effect'. Like policy, delegated legislation is generally made by the executive, but, unlike policy, delegated legislation has the force of law.

Legislation, including subsidiary legislation, is binding upon decision-makers because it has the force of law. In contrast, policy does not bind but only guides decision-makers.

How should decision-makers use policy when making decisions?

There is a tension between the need for consistency in decision-making and the requirement for each decision to reflect the merits of the individual case. A decision-maker who applies a policy without considering the particular circumstances of a case can be said to have made no decision at all. Policy must therefore guide decision-making but cannot be applied inflexibly. A decision which is made as the result of the inflexible application of policy is liable to be set aside on judicial review as an invalid decision.

In the case of *Falc v State Planning Commission*[5] (*Falc*), the Town Planning Tribunal refused an application for subdivision. The relevant policy was to the effect that land zoned 'Special Rural' which met certain criteria should be given subdivision approval. The Tribunal held that the land that was the subject of the application was ripe for subdivision but refused subdivision approval because the land was zoned 'General Farming'. The Supreme Court of Western Australia held that this decision was invalid on the basis that the policy had been applied inflexibly by refusing subdivision of land which was ripe for subdivision solely on the basis of its zoning.[6]

What are the consequences of not considering policy?

Falc shows that a decision may be invalid where a decision-maker rigidly adheres to policy. But what are the consequences of not considering policy? It is clear that policy does not bind decision-makers. Does it follow that policy may be ignored without legal consequences? That is, if there is a policy which is relevant to a particular decision, is a decision made without regard to that policy invalid because of a decision-maker's failure to consider it? Two cases concerning the environmental approval of the proposal to extend the Roe Highway provide an opportunity to reflect upon the consequences of not considering relevant policy.

The Roe 8 extension

In late 2015, an application for judicial review was commenced to challenge the environmental approval of the proposed extension of the Roe Highway from the Kwinana Freeway to the Port of Fremantle. The project was proposed by Main Roads Western Australia and was for the purpose of improving road freight transport access from the Port of Fremantle to industrial areas in the east of the Perth metropolitan area in particular.

The proposal, known as Roe Highway Stage 8 (or 'Roe 8'), involved extending the Roe Highway through an environmentally sensitive area known as the Beeliar Wetlands. An earlier proposal for Roe Highway Stage 8 had led the EPA to publish Bulletin 1088 in February 2003, which was entitled *Environmental Values Associated With the Alignment of Roe Highway (Stage 8)*. That document contained the following:

> This report provides advice on the key environmental values that would be impacted by construction of a highway within the alignment of Roe Highway Stage 8.
>
> The area within and adjacent to the alignment where it bisects Beeliar Regional Park is considered to be of high conservation value and significance due to the ecological linkages it provides and the wetland, vegetation, faunal, ecological, aboriginal and social values that are represented. In addition to directly impacting on the wetland, vegetation and faunal values, the construction and operation of a highway through the area will also lead to further severance of these ecological linkages, reducing the area's viability and long-term management.[7]

Section 38 of the *Environmental Protection Act 1986* (WA) (EP Act) has the effect of requiring a decision-making authority to refer to the EPA any proposal which is likely, if implemented, to have a significant effect on the environment. The Roe 8 proposal therefore required environmental assessment under the EP Act.

The Roe 8 proposal was referred to the EPA on 20 April 2009.[8] As the Chief Justice found:

> On 13 May 2009 the EPA determined that it would assess the Proposal, and that the level of assessment would be that of a Public Environmental Review (PER), with a review period of six weeks. A PER is the most detailed and intensive level of assessment utilised by the EPA and, as its description implies, involves the provision of an opportunity for public review and for submissions to be provided to the EPA by the public.[9]

Section 41 of the EP Act has the effect of preventing a decision-making authority from implementing a proposal which the EPA has determined that it will assess until the proposal is granted environmental approval by the Minister for the Environment.

EPA Report

On 10 September 2013, the EPA provided its report on the outcome of the assessment of the Roe 8 proposal to the Minister in accordance with s 44 of the EP Act (EPA Report). The EPA Report was made public on 13 September 2013. The EPA Report found that the proponent (Main Roads Western Australia) had 'sought to apply innovative planning and design measures' and had 'avoided or minimised impacts on wetlands, native vegetation and native fauna' through a number of measures.[10] The EPA Report then noted that there would be the following residual impacts:

- clearing of 97.8 hectares (ha) of native vegetation which includes 5.4 ha of Beeliar Regional Park and 7 ha of Bush Forever site 244;
- loss of 78 ha of foraging habitat and 2.5 ha potential nesting habitat for the Carnaby's Black Cockatoo and the Forest Red-tailed Black Cockatoo …;
- clearing of 6.8 ha of wetlands … including wetlands protected under the Environmental Protection (Swan Coastal Plan Lakes) Policy 1992 … and Conservation Category Wetlands …; and
- fragmentation of wetlands and fauna habitat.[11]

Critically for the purposes of the application for judicial review, the EPA Report included the following:

> The EPA considers the above residual impacts to be significant and they would therefore need to be counterbalanced through the provision of environmental offsets.[12]

The EPA was satisfied that the offsets proposed by the proponent did in fact 'satisfactorily counterbalance the significant residual impacts'.[13] The EPA Report recommended that the Minister approve the Roe 8 proposal subject to conditions.

On 2 July 2015, the Minister for the Environment published Ministerial Statement 1008, which gave environmental approval for Roe 8.

Application for judicial review

In or about September 2015, an application for judicial review was commenced in the Supreme Court of Western Australia in respect of the EPA Report and the Minister's approval. The application was brought by Save Beeliar Wetlands Inc and a second applicant. The active respondents to the application were the Hon Albert Jacob MLA as Western Australian Minister for the Environment, the EPA and the Attorney-General for Western Australia, who intervened in the proceeding. The respondents conceded the standing of the second applicant and so the question of the standing of Save Beeliar Wetlands Inc fell away.[14]

The application, which was heard on 30 November 2015 by Martin CJ, relied upon a number of grounds. Chief Justice Martin delivered his judgment on 16 December 2015, allowing the application on one ground and dismissing the remaining grounds. The ground on which the application succeeded was that the EPA had failed to consider its own policies which, being mandatory relevant considerations, had to be considered by the EPA in order for its report to be lawful. The respondents accepted that the invalidity of the EPA Report would lead to the invalidity of the Minister's environmental approval, so the Minister's approval was also invalid.[15]

EPA policies

Chief Justice Martin identified three EPA policies which were in force at the time that the EPA Report was given to the Minister and which were of particular relevance to the environmental assessment of the Roe 8 proposal. Excerpts of the three policies are set out below. His Honour interpreted those policies as stating that:

> [Where the EPA concluded that a proposal] would result in a significant residual impact to critical environmental assets after all efforts to mitigate those impacts on site have been exhausted, then:
>
> (a) the EPA would not consider the provision of environmental offsets to be an appropriate means of rendering such a proposal environmentally acceptable; and
> (b) there would be a presumption that the EPA would recommend to the Minister that the proposal not be implemented.[16]

This policy position had particular significance to the Roe 8 proposal because the Beeliar Wetlands contained environmental assets which were classed as 'critical', and the EPA Report found that there would be significant residual impacts upon those assets from the implementation of the Roe 8 proposal. The EPA Report concluded by recommending that the Roe 8 proposal be approved subject to conditions which included the provision of environmental offsets.

Position Statement No 9

The first of the three EPA policies identified by Martin CJ was a January 2006 publication by the EPA entitled *Environmental Offsets — Position Statement No 9*. Chief Justice Martin quoted section 4 of the position statement, including the following paragraph:

> Therefore, when the issue is before the EPA, there is a presumption against recommending approval for proposals that are likely to have significant adverse impacts to 'critical assets'. The EPA does not consider it appropriate to validate or endorse the use of environmental offsets where projects are predicted to have significant impact to the following …[17]

The Chief Justice continued:

> There follows a list of various types of environmental asset which are, by clear implication, to be taken to be 'critical assets'. That list includes the following items relevant to the Proposal for Roe Highway Stage 8:
>
> - regional parks;
> - Bush Forever reserves;
> - Declared Threatened Fauna;
> - Environmental Protection Policy wetlands; and
> - Conservation Category Wetlands.[18]

Guidance Statement No 19

The second EPA policy was published in September 2008 and was entitled *Guidance for the Assessment of Environmental Factors — Environmental Offsets — Biodiversity No 19* (Guidance Statement). That policy stated that it was to be read in conjunction with Position Statement 9. A key passage quoted from the policy by Martin CJ was in section 3.1 of Guidance Statement No 19:

> **Significant adverse impacts to assets**
>
> Where there are significant adverse impacts to 'critical' assets, the EPA will assess the proposal or scheme through EIA. The EPA, in providing its advice to the Minister, will adopt a presumption against recommending approvals of proposals or schemes where significant adverse environmental impacts affect 'critical' assets.[19]

Environmental Protection Bulletin No 1

The third EPA policy, *Environmental Protection Bulletin No 1 — Environmental Offsets — Biodiversity*, was also published in September 2008. Chief Justice Martin quoted a definition of 'environmental offsets' from the bulletin, which included the following:

> Environmental offsets are a package of activities undertaken to counter adverse environmental impacts arising from a development. Offsets are the 'last line of defence' and are considered after all steps have been taken to minimise impacts resulting from a development. Offsets aim to ensure that any adverse impacts from development are counter-balanced by an environmental gain somewhere else.[20]

The Chief Justice also quoted the following passage from the bulletin:

> Offsets should only be considered after all efforts to avoid and minimise environmental impacts have been made and significant environmental impacts still remain.
>
> Major development proposals or schemes that have significant environmental impacts, particularly on 'critical' and 'high' value assets, will usually trigger the EPA's environmental impact assessment process. 'Critical' assets are the most important environmental assets in the State and are listed in EPA Position Statement No 9 ...
>
> The EPA advises the Minister for the Environment on whether a project should be approved or not. In providing its advice to the Minister, the EPA adopts a presumption against recommending approval of proposed projects where significant adverse environmental impacts affect 'critical' assets. The EPA determines on a case-by-case basis how significant is an impact and this in turn influences the decision to assess the project through the environmental impact assessment process and its recommendations to the Minister, including advice on the adequacy of proposed offsets.[21]

Key findings regarding the EPA policies

Chief Justice Martin carefully reviewed the EPA Report and found that it proceeded on the basis that the significant adverse impacts to critical assets which would result from the Roe 8

proposal being implemented needed to be counterbalanced by environmental offsets.[22] The Chief Justice found that this reasoning was contrary to the policy position stated by the three policies identified above.

On the Chief Justice's understanding of the policies, the application of the stated policy position would have meant that there was a presumption that the Roe 8 proposal would be refused. It would not be consistent with the policies for environmental offsets to render such a proposal environmentally acceptable.

Critically, the Chief Justice also found that the EPA Report made no reference to the policy position enunciated by the three policies.[23] The Chief Justice found that, with the exception of one meeting in April 2010,[24] the minutes of meetings of the EPA at which the Roe 8 proposal was considered did not make reference to the policy position which his Honour found was established by the three published policies referred to above. Moreover, on the Chief Justice's interpretation of the policies, the EPA Report was 'fundamentally inconsistent with, and indeed contrary to' the policies.[25] This led the Chief Justice to conclude that the EPA had not taken these three policies into account when preparing its report.[26]

This squarely raised the issue of whether those policies were mandatory relevant considerations. If they were, the failure to consider them could lead to the conclusion that the EPA Report was invalid.

Mandatory relevant considerations and *Peko-Wallsend*

The leading statement of principle regarding judicial review for failure to take into account a relevant consideration is that of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend*[27] (*Peko-Wallsend*). In truncated form, the statement is as follows:

> (a) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account in making that decision …
> (b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors — and in this context I use this expression to refer to the factors which the decision-maker is bound to consider — are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act …
> (c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision …[28]

A freestanding principle that policy is a mandatory relevant consideration?

Before Martin CJ turned to *Peko-Wallsend*, his Honour reviewed previous cases concerning the issue of whether relevant policy is a mandatory relevant consideration. The Chief Justice identified three decisions of the Federal Court which support the existence of a freestanding principle that relevant policy is a mandatory relevant consideration.[29]

In *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce*[30] (*Gerah*), Davies J said:

> Even if non-statutory rules do not, of themselves, have binding effect, the failure of a decision-maker to have regard to them or his failure to interpret them correctly may amount to an error of law justifying an order of judicial review.[31]

Subsequently, Wilcox J in *Nikac v Minister for Immigration and Ethnic* Affairs[32] (*Nikac*) cited *Gerah* with approval and then said:

> Counsel for Mr Sorensen argue that the failure of the Minister to have regard to this policy vitiated the Minister's decision. I think that this submission is correct. Although a non-statutory policy is not binding upon a decision-maker, in the sense that he or she may decide in the particular case not to act in accordance with that policy, a policy applicable to the case is always a relevant consideration in the making of a decision.[33]

Then, in *BHP Direct Reduced Iron Pty Ltd v CEO, Australian Customs Service*,[34] Carr J said:

> I think that it can readily be implied into s 273 [of the *Customs Act 1901* (Cth)] that if the executive arm of government formulated a policy for the making of determinations under that section, then the respondent was bound to take into account such factors as that policy indicated were material to such a decision.[35]

Justice Carr went on expressly to agree with the statement of principle of Wilcox J set out above.

The Chief Justice then referred to the decision of *Minister for Immigration, Local Government and Ethnic Affairs v Gray*[36] (*Gray*), in which a majority of the Full Court of the Federal Court held that the Administrative Appeals Tribunal was bound to consider relevant policies of the decision-maker whose decision was being reviewed. The Chief Justice noted that the majority left open whether the decision-maker was required to consider those policies.[37] In *Gray*, French and Drummond JJ said:

> the existence and content of lawful policy may properly be regarded as a relevant factor which, because it is properly contemplated by the legislature, must be taken into account by the Tribunal. In the case of the power to deport non-citizens convicted of criminal offences, the existence and content of a lawful criminal deportation policy is a matter the Tribunal is bound to take into account and to give such weight as it thinks proper having regard to all the circumstances of the case.[38]

The Chief Justice also identified two previous decisions of single justices of the Supreme Court of Western Australia which supported the existence of a principle that relevant policy is always a mandatory relevant consideration — namely, *Clive Elliott Jennings & Co Pty Ltd v Western Australian Planning* Commission[39] and *Tah Land Pty Ltd v Western Australian Planning Commission*.[40]

Despite these authorities, the Chief Justice cast doubt upon the existence of the principle which they appear to support, stating:

> I hold a considerable reservation as to whether there is a general legal principle of universal application to the effect that a decision-maker is bound to take account of any relevant policy which he or she has formulated as a condition of the valid exercise of jurisdiction.[41]

The Chief Justice determined that he was able to resolve the case by the application of what his Honour 'respectfully describe[d] as the more orthodox approach enunciated by Mason J in *Peko-Wallsend*'.[42] That is, the Chief Justice analysed whether the EPA had an obligation to take its policies into account which arose from the subject matter, scope and purpose of the EP Act.

The Chief Justice's analysis of the EP Act

Specifically, the Chief Justice sought to construe pt IV of the EP Act, in the context of the Act as a whole, to discern whether there was an implication that EPA was required to consider its own policies when undertaking an environmental impact assessment.[43] The Chief Justice

conducted a detailed review of the EP Act in carrying out this task and determined that there was such an implication. At the risk of oversimplification, it was the need for procedural fairness to be afforded to participants in the process of environmental impact assessment which guided his Honour to this conclusion.[44]

The Chief Justice identified that:

> [Part IV of the EP Act] expressly contemplates that a proponent may be required to undertake an environmental review and that members of the public may be invited to provide submissions in relation to that review. However, pt IV does not specify the administrative procedures, assessment criteria or policies which a proponent would need to know in order to undertake an effective environmental review, and which interested parties or members of the public would need to know in order to provide meaningful submissions for the consideration of the EPA.[45]

In addition, the Chief Justice observed:

> various provisions of the Act expressly empower the EPA to promulgate administrative procedures 'for the purpose of establishing the principles and practices of environmental impact assessment', assessment criteria, and environmental protection policies.[46]

The Chief Justice reasoned that, when the EPA published policies pursuant to those express powers, it is likely that participants in the process of environmental impact assessment would rely on those policies in deciding whether and how to engage in the process of environmental impact assessment.[47] If the EPA was not required to take its policies into account then participants in the process would be misled and the processes would be likely to miscarry.[48] As a result, the Chief Justice concluded that the legislature should be presumed to have intended that the EPA would consider its policies when conducting an environmental impact assessment.[49]

Not legitimate expectation

For completeness, it should be observed that Martin CJ made express reference to the doctrine of legitimate expectation but did not rely upon it in reaching the above conclusion. The Chief Justice identified authority for the proposition that policy may give rise to a legitimate expectation about the nature of decision-making processes.[50] However, the Chief Justice noted that 'these decisions were made at a time when notions of legitimate expectation played a greater role in Australian administrative law than is currently the case'.[51] Moreover, the applicants had not sought judicial review on the ground of denial of procedural fairness.[52] It followed that the doctrine of legitimate expectation was not squarely raised in the proceedings before the Chief Justice.

The Chief Justice's disposition of the judicial review application

Chief Justice Martin therefore applied the approach in *Peko-Wallsend* to reach the conclusion that the subject-matter, scope and purpose of the EP Act required the EPA to take its own policies into account when conducting an environmental impact assessment. The Chief Justice found that the EPA had not done so. Finally, the Chief Justice considered whether the failure to consider these policies was sufficiently significant to have materially affected the EPA's decision. His Honour's conclusion that the policy was 'a matter of the utmost significance'[53] to the EPA's assessment of the Roe 8 proposal led to the result that the EPA Report and the Minister's decision relying upon it were invalid.[54]

Appeal to the Court of Appeal

The Minister, the EPA and Commissioner for Main Roads commenced an appeal in the Supreme Court of Western Australia Court of Appeal. The appeal was heard on 2 May 2016, and judgment was delivered on 15 July 2016.[55] President McLure delivered the lead judgment of the Court, with Buss and Newnes JJA concurring.[56] The Court of Appeal held that the EPA policies were not mandatory relevant considerations but also disagreed with the Chief Justice's interpretation of the policies. The appeal was unanimously allowed.

EPA policies were not mandatory relevant considerations

Like the Chief Justice, the President referred to *Peko-Wallsend* in her review of the law of relevant considerations.[57] The President's reasoning diverged from that of the Chief Justice on the issue of whether the EPA policies were, by statutory implication, mandatory relevant considerations. The President concluded that the express provisions of the EP Act left 'no room for an implication that the Policies, or any of them, are mandatory relevant considerations' in the EPA's assessment of the Roe 8 proposal.[58]

The President held that there were 'a number of aspects of the legislative scheme in the [EP Act] compelling that conclusion'.[59] The 'first and most important' of these was pt III of the EP Act, which concerns 'approved policies'.[60] Policies which have the status of 'approved policies' under pt III of the EP Act are given the force of law by s 33(1) of the Act. The President identified that the 'approved policies' are 'express relevant considerations'.[61] Given that pt III of the EP Act established a 'lengthy, tortuous process' for formulation and adoption of approved policies, the President held that the legislature could not have intended that the EPA could make policies which did not follow the pt III process which the EPA was impliedly required to take into account.[62] None of the policies identified by the Chief Justice were 'approved policies' and therefore they were not mandatory relevant considerations.

Secondly, the President held that the structure of the decision-making process under the EP Act was inconsistent with the implication that all relevant EPA policies were mandatory relevant considerations. Specifically, the President said that an assessment report by the EPA is 'a long way short of any final decision on the proposal in issue' because the Minister had obligations to consult and consider appeals after receiving the EPA's report before making a final decision regarding environmental approval. This process 'strongly weighed' against a statutory implication that the EPA's policies were mandatory relevant considerations at the EPA report stage.[63]

The President identified other indications from the statute which were against the implication found by the Chief Justice. The President referred to s 44(2) of the EP Act, which specified matters the EPA is obliged to set out in its assessment report. The express identification of these mandatory relevant considerations militated against the implication of other mandatory relevant considerations.[64]

Further, the President held that the 'nature and role' of the EPA was significant. In producing its report, the EPA acted as an 'independent expert body' which was 'performing an expert evaluative and advisory function, not exercising a discretionary power'.[65] Finally, the President observed that, in the absence of a ministerial direction, s 40(2)(b) of the EP Act gives the EPA 'sole control of the form, content, timing and procedure' of any environmental review it is required to produce. That provision, together with s 122 of the EP Act, was the source of the EPA's power to give the 'very detailed guidance' which the EPA provided to those 'involved or interested in' the assessment process.[66]

The President therefore concluded that EPA policies (unless approved policies under pt III of the EP Act) were not mandatory relevant considerations for the EPA when carrying out an assessment and allowed the appeal.

The Court of Appeal's interpretation of the policies

Although the Court of Appeal allowed the appeal on the basis that no implication could be drawn from the EP Act to the effect that the EPA policies were a mandatory relevant consideration, the Court of Appeal (or at least McLure P and Buss JA[67]) appeared to disagree with Martin CJ's interpretation of the three policies.

As set out above, the three policies had been found by the Chief Justice to establish a policy position that:

> [Where the EPA concluded following environmental assessment that a project] would result in a significant residual impact to critical environmental assets after all efforts to mitigate those impacts on site have been exhausted, then:
>
> (a) the EPA would not consider the provision of environmental offsets to be an appropriate means of rendering such a proposal environmentally acceptable; and
> (b) there would be a presumption that the EPA would recommend to the Minister that the proposal not be implemented.[68]

President McLure quoted the following 'tests' from Position Statement 9:

> Test 3 — are residual environmental impacts expected to have a significant adverse impact on critical or high value assets?
>
> Test 4 — do residual impacts remain significant but not so significant that the activity is likely to be found environmentally unacceptable (including in a cumulative impacts context)?[69]

The President found that:

> The approach in these two questions is in tension with the rigidity of the other quoted statements [which had led the Chief Justice to his interpretation of the policies] but is entirely consistent with the other policies. Guidance Statement 19 and EPA Bulletin 1, both published in September 2008 (the 2008 Policies), also refer to offsets in relation to critical assets.[70]

The President therefore disagreed that the policy position established by the three policies included the proposition that the EPA would not consider the provision of environmental offsets in cases where a proposal would result in significant residual impacts to critical environmental assets. Given that the issue of principal concern for this article is when policies will be a mandatory relevant consideration, the proper interpretation of those EPA policies need not be considered further.

The outcome in the Court of Appeal

The active respondent in the Court of Appeal, Save Beeliar Wetlands (Inc), filed a notice of contention raising additional grounds on which it said the primary judge's decision should be upheld. Each of these grounds was rejected by the Court of Appeal. While it is not necessary for the purposes of this article to consider those grounds, it is noteworthy that, in the course of dismissing those grounds, President McLure reached the conclusion that a review of the entirety of the EPA process of environmental impact assessment of the Roe 8 proposal revealed that the EPA had in fact taken the three policies into account.[71]

The result was that the appeal was allowed. The consequence of this was that the EPA Report was valid and, therefore, so was the Minister's environmental approval of the Roe 8 project.

Application for special leave refused

There was an application for special leave to appeal to the High Court from the decision of the Court of Appeal. The application for special leave was refused following a hearing on 16 December 2016.[72] The legal issue argued on the application for special leave concerned legal unreasonableness and arose from the notice of contention filed by Save Beeliar Wetlands (Inc) in the Court of Appeal. There was no argument concerning the issue of whether EPA policies were mandatory relevant considerations on a proper construction of the EP Act.

Current status of Roe 8

Although the environmental approval of Roe 8 was ultimately held to be valid, the then Labor opposition had adopted a policy that it would not proceed with the Roe 8 proposal if it were elected on 11 March 2017. Labor won the election on 11 March 2017, so the Roe 8 extension is not being implemented.

Conclusion

Both the Chief Justice and the Court of Appeal applied the framework established by *Peko-Wallsend* in determining whether relevant policy was a mandatory relevant consideration for the EPA when conducting environmental impact assessments. In both cases, it was accepted that there was no express statutory requirement, so it was necessary to consider whether an implication arose from the subject-matter, scope and purpose of the EP Act. The difference between the Chief Justice and the Court of Appeal concerned the proper construction of the EP Act and its subject-matter, scope and purpose.

The idea that relevant policy must be considered by a decision-maker has an intuitive appeal. It is an incident of good public administration that relevant policy will be considered by a decision-maker. From an Australian administrative law perspective, however, it seems difficult to argue for a freestanding principle that policy should be a mandatory relevant consideration. To be consistent with the framework established by *Peko-Wallsend*, it would seem that the conclusion that policy is a mandatory relevant consideration will need to rest on an express legislative statement to that effect or be 'determined by implication from the subject-matter, scope and purpose of the Act' on a statute-by-statute basis.

It should be acknowledged that the three Federal Court decisions referred to by Martin CJ were decided after *Peko-Wallsend*. Indeed, in *Nikac,* which was decided only two years after *Peko-Wallsend*, Wilcox J expressly refers to Mason J's judgment in *Peko-Wallsend* shortly after stating that 'a policy applicable to the case is always a relevant consideration in the making of a decision'.

With respect, it must be the case that a statute could expressly provide that any executive policy formulated in respect of the EP Act was not a mandatory relevant consideration. However, there might be room for the development of a presumption that a policy is a mandatory relevant consideration as a refinement of *Peko-Wallsend*. This presumption could be grounded in the procedural fairness type considerations identified by Martin CJ. Such a presumption would bear some resemblance to (and may gain some support from) the principle that the requirement to afford natural justice is only excluded by clear language.

The development of such a presumption in the near term in the Western Australian courts appears to be largely foreclosed by the decision of the Court of Appeal. That decision applies *Peko-Wallsend* in an orthodox manner and without any suggestion that relevant executive policy might be in any special category when it comes to the ascertainment of mandatory relevant considerations. If such a development is to occur in the near term, it is likely to be in another jurisdiction.

The decision of the Court of Appeal settles for Western Australian law the question of whether EPA policies (except for policies made under pt III of the EP Act) are mandatory relevant considerations for the EPA when conducting environmental impact assessments with a resounding 'no'. It does leave open the possibility that relevant policy may be implied to be a mandatory relevant consideration in other Acts.

Of course, where a statute makes it express that policy is a mandatory relevant consideration, a decision-maker must consider the policy. There are two examples concerning the WA State Administrative Tribunal (SAT) where such a requirement to consider policy is expressly stated. Section 28 of the *State Administrative Tribunal Act 2004* (WA) provides that the responsible Minister may certify that a gazetted policy was in effect at the time of a relevant decision and, if the original decision-maker had regard to the policy, the SAT must have regard to that policy when conducting its review. As regards the SAT's planning review jurisdiction, s 241(1)(a) of the *Planning and Development Act 2005* (WA) provides that the SAT must have due regard to any state planning policy which may affect the subject-matter of the application.

In the absence of such an express statement, the question of whether relevant policy is a mandatory relevant consideration will need to be determined on a statute-by-statute basis by reference to the subject-matter, scope and purpose of the statute. Given that conclusion, it will continue to be prudent for decision-makers to seek to identify and refer to relevant policy when making decisions. This will be especially important when the decision made does not accord with the policy.

Endnotes

1 The legal issues arising from the use of policy in executive decision-making is the subject of ch 11 of the text by Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action* (4th ed, LexisNexis Australia, 2015).
2 [2015] WASC 482.
3 (2016) 50 WAR 313.
4 (1979) 2 ALD 634, 640.
5 (1991) 5 WAR 522.
6 (1991) 5 WAR 522, 529–30.
7 Environment Protection Authority, *Environmental Values Associated With the Alignment of Roe Highway (Stage 8): A Report by the Environmental Protection Authority under Section 16(j) of the Environmental Protection Act 1986*, Bulletin 1088 (February 2003) 16.
8 [2015] WASC 482, [71].
9 [2015] WASC 482, [72].
10 Environmental Protection Authority, *Report and Recommendations of the Environmental Protection Agency: Roe Highway Extension: Main Roads Western Australia*, Report 1489 (September 2013) iii.
11 Ibid iv–v.
12 Ibid v.
13 Ibid.
14 [2015] WASC 482, [11].
15 [2015] WASC 482, [105].
16 [2015] WASC 482, [2].
17 [2015] WASC 482, [49].
18 [2015] WASC 482, [50].
19 [2015] WASC 482, [62] (footnote omitted).
20 [2015] WASC 482, [69].
21 [2015] WASC 482, [70].

22 See, for example, [2015] WASC 482, [88].
23 [2015] WASC 482, [96].
24 The Chief Justice observed that this meeting was 'more than three years before the EPA considered and resolved upon the outcome of its assessment' and, further, that 'only two of the five members of the EPA present at the meeting on 29 April 2010 were present at the meeting on 18 July 2013 when the EPA resolved to recommend that the Proposal may be implemented': [2015] WASC 482, [190].
25 [2015] WASC 482, [191].
26 [2015] WASC 482, [201].
27 (1986) 162 CLR 24, 39–40.
28 (1986) 162 CLR 24, [15].
29 [2015] WASC 482, [137]–[139].
30 (1987) 17 FCR 1.
31 (1987) 17 FCR 1, 15.
32 (1988) 20 FCR 65.
33 (1988) 20 FCR 65, 81.
34 (1998) 55 ALD 665.
35 (1998) 55 ALD 665, 682.
36 (1994) 50 FCR 189.
37 [2015] WASC 482, [140].
38 (1994) 50 FCR 189, 206.
39 [2002] WASCA 276, [24]–[26].
40 [2009] WASC 196.
41 [2015] WASC 482, [151].
42 [2015] WASC 482, [151].
43 [2015] WASC 482, [152].
44 See, for example, [2015] WASC 482, [146], [168], [181].
45 [2015] WASC 482, [165].
46 [2015] WASC 482, [166] (footnotes omitted).
47 [2015] WASC 482, [185].
48 [2015] WASC 482, [186].
49 [2015] WASC 482, [187].
50 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Century Metals and Mining NL v Yeomans* (1989) 40 FCR 564, 592 (Fisher, Wilcox and Spender JJ).
51 [2015] WASC 482, [145].
52 [2015] WASC 482, [145].
53 [2015] WASC 482, [205].
54 [2015] WASC 482, [211].
55 *Jacob v Save Beeliar Wetlands (Inc)* (2016) 50 WAR 313.
56 Justice of Appeal Buss agreed generally, but Newnes JA specifically referred to the matters set out at [55]–[60] of McLure P's reasons as the basis on which his Honour agreed that none of the policies are mandatory relevant considerations.
57 (2016) 50 WAR 313, [50].
58 (2016) 50 WAR 313, [54].
59 (2016) 50 WAR 313, [55].
60 (2016) 50 WAR 313, [55].
61 (2016) 50 WAR 313, [55].
62 (2016) 50 WAR 313, [56]. Chief Justice Martin had considered pt III of the EP Act but found it to be consistent with the implication that his Honour identified: [2015] WASC 482, [167].
63 (2016) 50 WAR 313, [57]. As with pt III of the EP Act, Martin CJ had also considered the appeals process provided in the EP Act and found this was consistent with the implication that his Honour identified: [2015] WASC 482, [175]–[176], [182], [185](f)–(g).
64 (2016) 50 WAR 313, [58].
65 (2016) 50 WAR 313, [59].
66 (2016) 50 WAR 313, [60].
67 It may be that Newnes JA was seeking to avoid being taken to agree to this different interpretation of the policies by stating that his Honour agreed that the appeal should be upheld but then referring specifically to paras [55]–[60] of her Honour's judgment, which concerned statutory interpretation of the EP Act.
68 [2015] WASC 482, [2].
69 (2016) 50 WAR 313, [18].
70 (2016) 50 WAR 313, [19]. See also [76].
71 (2016) 50 WAR 313, [79]–[82].
72 *Save Beeliar Wetlands (Inc) v The Hon Albert Jacob MLA* [2016] HCATrans 313 (16 December 2016).