



Express law

fast track information for clients

30 January 2013

Commonwealth win in the Victorian alpine grazing case

The decision in [Secretary to the Department of Sustainability and Environment \(Vic\) v Minister for Sustainability, Environment, Water, Population and Communities \(Cth\) \[2013\] FCA 1](#) demonstrates an appreciation for the practical realities of administrative decision-making.

The case involved judicial review of a decision on cattle grazing in Victoria's alpine areas made under the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).

The decision

The Victorian Department of Sustainability and Environment (Victoria) had referred a proposed action under s 68(1) of the EPBC Act to the Commonwealth Minister for Sustainability, Environment, Water, Population and Communities (the Minister). The referral concerned cattle-grazing trials at sites primarily within Victoria's Alpine National Park, which is included in the National Heritage List. Under s 74B of the EPBC Act, the Minister decided that the action would clearly have unacceptable impacts on a matter protected by Pt 3 of the Act (ie the National Heritage values of the Alpine National Park). As a consequence, the Minister was not required to further consider the referral.

Victoria sought review of this decision on a number of grounds (see at [29]). In rejecting Victoria's application, Kenny J made a number of findings, including the following:

- Section 74B required the Minister to make the decision 'on the basis of the information in the referral'. However, this did not prevent the Minister from drawing on other information in his own and his department's knowledge in making the decision, as well as departmental advice – provided that the information in the referral was treated as the foundation for the consideration. In construing a statute creating administrative processes and in considering the lawfulness of an administrative action, account must be taken of 'the practical realities as to the way in which administrative decisions involving judgments based on technical considerations are reached' (at [81]). Therefore, generally, 'Parliament can be taken to have known and expected that the Minister would obtain information from his department when engaged in decision-making under the EPBC Act, including s 74B' (at [83]) (see at [53]–[88]).
- The existence of a statutory right of review or appeal may affect whether and in what way the rules of procedural fairness apply at an earlier level of decision making. A range of factors, including the provisional nature of a decision under s 74B(1), indicated that the Minister was not obliged to give Victoria an opportunity to comment on material considered for the purposes of the decision. Other provisions in the EPBC Act (ss 74C and 74D) created a procedure that would allow Victoria to be heard at a later stage, before the decision could become final (see at [91]–[105]).

- The applicant claimed that the Minister's power to make a decision about 'unacceptable impacts' under s 74B of the EPBC Act is limited by ss 15B(6) and 15C(14) to National Heritage values whose protection is appropriate and adapted to give effect to art 8 of the *Convention on Biological Diversity*. The Minister's statement of reasons revealed that he considered that the proposed action would clearly have unacceptable impacts on biodiversity values of the Alpine National Park and therefore established the necessary connection to art 8 of the *Convention on Biological Diversity*. This basis for the decision was independent of other findings on recreational and aesthetic values and the presence of these other findings in his reasons, therefore, did not invalidate the impugned decision (see at [157]–[161]).

Implications for Commonwealth agencies

Kenny J's decision reflects courts' appreciation for the practical realities of administrative decision making. This case shows how courts are willing to take a realistic approach in deciding which materials statutory decision makers can consider in making the decision: even where a statute does not expressly authorise this, the decision maker may be allowed to draw on their own knowledge and that of their department, as well as departmental advice.

Further, Kenny J's approach is an example of the principle that procedural fairness is not necessarily required at *every stage* of the decision-making process. Some decisions are subject to a full reconsideration (or merits review) and persons affected by the decision may be given an opportunity to be heard at a later stage in the decision-making process (before the decision becomes final). Depending on the statutory context, courts may find that the decision maker is not *also* required to afford an opportunity to be heard prior to the earlier decision.

AGS was instructing solicitor for the Commonwealth Minister in this matter.

For further information please contact:

Emily Nance
Senior Executive Lawyer
T 03 9242 1316
emily.nance@ags.gov.au

Susie Brown
Senior General Counsel
T 02 6253 7132
susie.brown@ags.gov.au

Greg Prutej
Senior General Counsel
T 02 6274 1391
greg.prutej@ags.gov.au

Cherie Canning
Senior Lawyer
T 03 9242 1382
cherie.canning@ags.gov.au

Joel Gilbourd
Counsel
T 02 6253 7412
joel.gilbourd@ags.gov.au

Andrew Yuile
Senior Lawyer
T 02 6253 7237
andrew.yuile@ags.gov.au

Important: The material in the *Express Law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:
<mailto:unsubscribe@ags.gov.au>