



*A Community Legal Centre specialising  
in public interest environmental law.*

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**REFERRAL 2008/4674**

**PROJECT TITLE: UPGRADING EXSITING CAUSEWAY TO ENABLE TEMPORARY WEIR CONSTRUCTION IF REQUIRED**

**EXECUTIVE SUMMARY**

The proposed action is part of a larger action to build a weir or weirs in the vicinity of the Lower Lakes, which larger action is not part of the referral. Given this, the Minister should not accept the referral pursuant to section 74A of the Environment Protection Biodiversity Conservation Act ("the EPBC Act").

Further, the proposed action has unacceptable impacts on matters protected by Part 3 of the EPBC Act. In addition, the proposed action is contrary to Federal and South Australian government obligations under international conventions and the objectives of Federal and State legislation and subordinate legislation and policy.

For these reasons the proposed action should not be approved pursuant to sections 74B and 74C of the EPBC Act.

If the Minister is minded to allow the proposed action at this point (which we submit should not occur), then the action should be considered a controlled action for the purposes of the EPBC Act given the unacceptable impacts on matters protected by Part 3 of the EPBC Act.

If the Minister determines that the proposed action is a controlled action, then, given the impacts on the environment are likely to be very significant, it should be assessed at the

highest possible level, that is, by way of public inquiry or in the very least by the production of an Environmental Impact Statement (“EIS”) and the appropriate public consultation.

## **LARGER ACTION**

The referral is deficient in that it presupposes approval for a weir (described by the proponent as temporary, but having permanent consequences) separating the Lower Lakes from the River Murray at Pomanda Island.

More than 18 months ago on 4 June 2007, the proponent lodged a referral for this proposed weir<sup>1</sup>. The EPBC Act process for consideration of the proposed weir is at an advanced stage with most public consultation under the Act having taken place. Further, the proponent has indicated that the draft EIS is being considered by the Ngarrindjeri people<sup>2</sup> and it appears that this document is nearing completion.

There has been no withdrawal of the weir referral in accordance with section 170C(3) of the Act. However, the proponent indicates that the “*approach works*”, being the current referral, have been removed from the EIS guidelines for the weir referral and the approach works have been re-referred.<sup>3</sup>

Such a procedure is not contemplated nor allowed by the EPBC Act and cannot be brought.

In these circumstances, it is not possible to separate the actions set out in the two referrals. Such separation appears to be an attempt to accelerate and potentially subvert the proper process for consideration and review of the referral for the proposed weir put in place by the EPBC Act. The proper process contemplated by s74A of the EPBC Act is that related actions be assessed together. This means that all consequences and impacts of that larger action can be fully considered.

Further, the proponent indicates at paragraph 1.12 of the referral that the proposed action is not related to other actions or proposals in the region. This is clearly erroneous and misleading given the proponent’s own admission that the referral is related to the weir referral and given that the action is related to the proponent’s salt water referral<sup>4</sup>

In these circumstances, the referral should not be accepted pursuant to section 74A of the EPBC Act as it is a part of a larger action.

## **UNACCEPTABLE IMPACTS**

The action proposed by the referral is likely to have significant impacts on matters of national environmental significance, being the Ramsar listed Lake Alexandrina and its associated wetlands and the threatened species and migratory species using the site.

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<sup>1</sup> Referral number 2007/3484

<sup>2</sup> Referral number 2008/4674, p11

<sup>3</sup> Ibid, p11, para 2.6

<sup>4</sup> Referral number 2008/4618

The proponent acknowledges that this site has become fragile and urgent intervention is needed.<sup>5</sup> The proponent indicates that the proposed road will potentially destroy various wetlands, flora species and reed beds within the boundaries of this sensitive Ramsar listing, which have an area of up to more than a hectare<sup>6</sup>. This, in itself, is likely to have consequential impacts on listed threatened species and migratory species.

However, given the nature of the earth works involves intrusion and disruption into a sensitive area on a huge scale, we question this estimate and expect the impact is likely to be greater than a hectare resulting in further deleterious consequences on already threatened and vulnerable species and habitats.

The current referral proposes the construction of a road on the western shoreline of the narrow, sandy stretch of land, separating Pomanda Island from the mainland (“the sandy stretch of land”).

The proponent has estimated that 300,000 cubic metres of rock are required for the proposed weir<sup>7</sup>. In the referral, the proponent proposes that this rock be trucked over a road built on the sandy stretch of land. Given this, the road is likely to require substantial foundations in order to undertake the heavy impacts resulting from its use by potentially hundreds if not thousands of trucks. Without such foundation, the road is likely to be subject to rapid degradation with consequent significant impact on Ramsar listed wetlands, the Lake and the many listed threatened species and migratory species using the site. However, such foundation is likely to be significantly deleterious to the Ramsar site.

Locals have indicated that in most years the track has been inaccessible due to it being boggy and sloppy. Further, in storm conditions and when the water levels in the Lake are normal and not drought affected waves four to six feet high cover the track.

Such conditions would be likely to result in Lake Alexandrina being contaminated with pollutants from trucks, as a minimum, to at worst road rubble from the causeway itself. Such contamination has obvious impacts on the Ramsar listed wetlands, the Lake and the many listed threatened species and migratory species using the site.

In the circumstances, the proposed action should not be approved pursuant to sections 74B and 74C of the EPBC Act on the basis that the proposed action:

- is likely to have unacceptable impacts on matters protected by Part 3 of the Act, that is, the proposed action is likely to have a significant impact on:
  - the ecological character of a declared Ramsar wetland being Lake Alexandrina (sections 16 and 17B of the EPBC Act)

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<sup>5</sup> Ibid, p13

<sup>6</sup> Ibid p15

<sup>7</sup> Referral number 2007/3484 p5

- listed threatened species and ecological communities (sections 18 and 18A of the EPBC Act);
- listed migratory species (sections 20 and 20A of the EPBC Act);
- is contrary to the Australian government’s obligations under international treaties such as:
  - the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971 (“Ramsar Convention”) which provides that the Federal Government is to:
    - *“promote the conservation of the wetlands”* (in this instance in the vicinity of Lake Alexandrina) (Article 3.1);
    - *“Endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna”* (Article 5).;
  - the following conventions which place obligations on the Federal Government to preserve and enhance the environment of the birds and migratory species listed:
    - the Agreement between the Government of Australia and the Government of the People’s Republic of China for the protection of Migratory Birds and their Environment made at Canberra on 20 October 1986 (Article IV);
    - the Agreement between the Government of Japan and the Government of Australia for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment made at Tokyo on 6 February 1974 (Article VI);
    - the Agreement between the Government of Australia and the Government of the Republic of Korea on the protection of Migratory Birds made at Canberra, 6 December 2006 (Article V).

In the referral, the proponent cites other Federal and State legislation. Whilst such reference is not relevant to the decision to be made in this instance, we note that the proposed action is contrary to the objectives set out in:

- Federal legislation including the EPBC Act, the Water Act, the Murray Darling Basin Act and intergovernmental agreements including the National Water Initiative, the Murray Darling Basin Agreement and the Living Murray Icon Management Plan;
- South Australian legislation and policy and Local Government subordinate legislation including the Development Act, the River Murray Act, the Natural Resource Management Act, the Environment Protection Act, the Water Quality Environment Protection Policy and the local Development Plan;

We also note that the proponent has not given sufficient consideration to other ecologically sustainable options for providing Adelaide with water security.

We provide further detail on these issues as follows:

### **Federal legislation, intergovernmental agreements and management plan**

The proposed action is contrary to the obligations set out in the following federal legislation, agreements and plan and so should not be approved or in any event should be declared a controlled action.

#### Environment Protection and Biodiversity Conservation Act and Regulations

The proposed action is contrary to the positive obligations placed on the Minister to manage the Ramsar listed wetland set out in the EPBC Act and Regulations and so should not be approved:

- section 333(2) of the Act provides that *“the Commonwealth must use its best endeavours to ensure a plan for managing the wetland in a way that is not inconsistent with Australia’s obligations under the Ramsar Convention or the Australian Ramsar management principles is prepared and implemented in co-operation with the State”*
- section 334 of the Act provides that the *“Commonwealth and each Commonwealth agency must take all reasonable steps to ensure it exercises its powers and performs its functions in relation to the wetland in a way that is not inconsistent with:*

- (a) the Ramsar Convention; and*
- (b) the Australian Ramsar management principles; and*
- (c) any management plan produced under section 333 of the EPBC Act.*

- the Australian Ramsar management principles set out in Regulation 10.02 & Schedule 6 of the EPBC Regulations provide that:

*“1.01 The primary purpose of management of a declared Ramsar wetland must be, in accordance with the Ramsar Convention:*

- (a) to describe and **maintain the ecological character of the wetland**; and*
- (b) to formulate and implement planning that promotes:*
  - (i) **conservation of the wetland**; and*
  - (ii) **wise and sustainable use of the wetland** for the benefit of humanity in a way that is compatible with maintenance of the natural properties of the ecosystem.” (emphasis added)*

- The Coorong, and Lakes Alexandrina and Albert Ramsar Management Plan 2000 provides the following Objectives and Strategies:

- “Ensure that future government legislation, strategies and policies that affect the region are consistent with the Ramsar principle of wise use and Australia’s obligation for the maintenance of the ecological character of the area.” (Objective 1, Strategy 1.3)
- “Integrate the Ramsar principles of **wise use** and Australia’s obligation for the **maintenance of the ecological character** of the area into the maintenance, operational and capital works programs of relevant agencies.” (Objective 3, Strategy 3.1)
- “Protection of the full range of wetland habitats and restoration of degraded habitats in the Ramsar area and their conservation for future generations.” (Objective 4)
- “Promote property management techniques which **increase the diversity of lake edge vegetation, reduce erosion and increase the amount of indigenous woody vegetation around the lake edges.**” (Objective 4, Strategy 4.4) (emphasis added)
- “Introduce consistent planning controls to protect wetland habitats in the floodplain.” (Objective 4.7)
- “Ensure the councils of Alexandrina, Murray Bridge and Coorong cooperate with Planning SA and [Department for Environment and Heritage] to amend the Development Plan by introducing consistent planning controls in the floodplain **which protect wetland habitats from inappropriate development, and implement the Planning Strategy ...**” (Objective 4, Strategy 4.7, Action 4.7.1) (emphasis added)
- “Reduce all polluting discharges into the River Murray, Coorong and Lower Lakes.” (Objective 5, Strategy 5.5)

### Water Act

The proposed action is contrary to the objects of the Water Act which include the intent to give effect to international agreements as set out above and:

*s3(b)“... to give effect to relevant international agreements .... and, in particular, to provide for special measures, in accordance with those agreements, to address the threats to the Basin water resources [which includes Lake Alexandrina];*

*(c) to promote the use and management of the Basin water resources in a way that optimises economic, social and **environmental** outcomes” (emphasis added).*

### Murray-Darling Basin Act

The Murray-Darling Basin Act gives the force of law to the Murray Darling Basin Agreement, the most relevant terms of which are set out below.

### Murray-Darling Basin Agreement

The proposed action is contrary to the following objectives and obligations in the Murray Darling Basin Agreement (entered into by the Commonwealth, New South Wales, Victoria and South Australia):

- the purpose of the Agreement set out in Clause 1 is to “*promote and coordinate effective planning and management for the equitable efficient and **sustainable** use of the water, land and other environmental resources of the Murray-Darling Basin.*” (emphasis added).
- The Ministerial Council and the Commission set up by the Agreement must carry out the purpose set out in clause 1 (clause 8(3), clause 9 and clause 17);
- In exercising its powers, the Commission must take into account an environmental assessment of the exercise of its powers (clause 47).

### National Water Initiative

The proposed action is contrary to the National Water Initiative where the contracting parties (which include the Federal and South Australian Governments) acknowledge the need to ensure the health of river systems and the use of water in an environmentally sustainable manner.

### Living Murray Icon Site Management Plan

The Murray-Darling Basin Ministerial Council has set up Icon Sites due to the declining health of the River Murray.

The proposed action is contrary to the Icon Site Management Plan which sets out the Vision for Lake Alexandrina and the region as including:

*“Conservation of the ..... Lower Lakes Ramsar Wetlands by incorporating world’s best practice in integrated natural resources management to:*

- *Conserve the environmental and ecological attributes of the wetlands for the benefit of future generations;*
- *Improve water quality and increase flows through wetlands;*
- *Fulfill Australia’s obligations under the Ramsar Convention and other international agreements.”*

### **State Legislation, Policy and Local Government Development Plan**

#### Development Act

The proposed action is a “development” within the meaning of term in section 4 the Development Act in that the proposed action will result in a change of use of the land.

The proponent describes the proposed action as the “**upgrading of the existing Causeway to enable temporary Weir construction if required**” (emphasis added). This, however, overstates the nature of the current track on the sandy stretch of land. Locals indicate that the track is a predominantly a sand bank covered with kikuyu grass, partially bordered by reeds and which has been formed by the wave action of storms over many years. The track has only been accessible about four times in the last 50 years for short periods of time of about two to four months on each of those occasions.

In these circumstances, the construction of a road to carry thousands of trucks loaded with up to 300,000 cubic metres of rock is a huge increase in the current minimal use of the track and not ancillary to any existing use, but is rather a change of use.

Given that the proposed action constitutes development, the proponent is obliged to carry out the approval process set out in the Development Act. This has not occurred and so the proposed action should not be approved unless and until such approval is obtained (if at all).

### River Murray Act (SA) 2003

The proposed action is contrary to the objectives of the River Murray Act (SA) 2003 charges the Minister to take care of the River Murray system, including Lake Alexandrina and the species reliant on it. The key sub-sections are as follows:

s7(2) “*The river health objectives are as follows:*

- (a) *the key habitat features in the River Murray system [which includes the Lake Alexandrina] are to be maintained, protected and restored in order to enhance ecological processes;*
- (b) *the environments constituted by the River Murray system, with particular reference to high-value floodplains and **wetlands of national and international importance, are to be protected and restored** (emphasis added);*
- (c) *the extinction of native species of animal and vegetation associated with the River Murray system is to be prevented;*
- (d) *barriers to the migration of native species of animal within the River Murray system are to be avoided or overcome.”*

The proposed action is contrary to the following water quality objectives:

s7(4) *The water quality objectives are as follows:*

- (a) *water quality within the River Murray system should be improved to a level that sustains the ecological processes, environmental values and productive capacity of the system;*

...

*(c) nutrient levels within the River Murray system are to be managed so as to .... minimise other impacts from nutrients on the ecological processes, environmental values and productive capacity of the system;*

*(d) the impact of potential pollutants, such as sediment and pesticides, on the environments constituted by the River Murray system is to be minimised.*

Finally, section 8 of the Act requires the Minister to further the objects of the Act. The proposed action is contrary to the objects and so should not be approved.

#### Natural Resource Management Act (SA) 2004

The proposed action is contrary to the following objects set out in the Natural Resource Management Act and so should not be approved:

7(1) *“The objects of this Act include to assist in the achievement of ecologically sustainable development in the State by establishing an integrated scheme to promote the use and management of natural resources [including surface water] in a manner that—*

- (a) recognizes and protects the intrinsic values of natural resources; and*
- (b) seeks to protect biological diversity and, insofar as is reasonably practicable, to support and encourage the restoration or rehabilitation of ecological systems and processes that have been lost or degraded; and*
- (c) provides for the protection and management of catchments and the sustainable use of land and water resources and, insofar as is reasonably practicable, seeks to enhance and restore or rehabilitate land and water resources that have been degraded...”*

#### Environment Protection Act (SA) 1993

The proposed action is contrary to the objects and duty set out in the Environment Protection Act and so should not be approved.

In its objects in section 10 of the Act, it provides that development and protection of the environment should be managed in a way which enables:

- “(A) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and*
  - (B) safeguarding the life-supporting capacity of air, water, land and ecosystems; and*
  - (C) avoiding, remedying or mitigating any adverse effects of activities on the environment;*
- (ii) that proper weight should be given to both long and short term economic, environmental, social and equity considerations in deciding all matters relating to environmental protection, restoration and enhancement.”*

Section 25 of the Act sets out a general environmental duty to refrain from undertaking an activity which might pollute the environment. In this instance, the proposed road on the fragile sandy stretch is likely to pollute the environment.

#### Water Quality Environment Protection Policy

The proposed action is contrary to the principal objects and the duties of the Water Quality Environment Protection Policy.

The Principal object of the Policy is to “achieve the sustainable management of waters” and particularly “to promote best practice environmental management” and “promote within the community environmental responsibility and involvement in environmental issues” (subsection 7(1) and 7(2) (d) and (e) of the Policy).

Section 12 of the Policy, which is a mandatory provision, makes it a Category B offence to discharge or deposit:

*“a pollutant into any waters, [causing] any of the following:*

*...*

*(h) an increase in turbidity or sediment levels.”*

#### The Coorong, and Lakes Alexandrina and Albert Ramsar Management Plan 2000

As set out above<sup>8</sup>, the proposed action is contrary to The Coorong, and Lakes Alexandrina and Albert Ramsar Management Plan 2000 and so should not be approved.

#### Murray Bridge Development Plan

The proposed action is contrary to the following objectives and principals of development control set out in the Murray Bridge Development Plan and so should not be allowed:

- *“The maintenance of the water quality of the River Murray”* (Objective 20, p12);
- *“The Murray Bridge District Structure Plan shows in general terms the desired strategy for future development of the district, based on the following measures:*
  - ....*
  - (h) recognition and protection of areas worthy of conservation, particularly adjacent to Lake Alexandrina;*
  - ...*
  - (o) recognition of the River Murray, its valley and Lake Alexandrina as a significant natural resource and feature.”* (Objective 1, p30);
- *“Development should take place in a manner that will not compromise the utilization, conservation or quality of surface and ground water resources, especially the River Murray and Lake Alexandrina, or the capacity for natural systems to restore or maintain water quality.”* (Principal of Development Control 5, Primary Industry Zone).

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<sup>8</sup> page 5-6

- “No development should be undertaken which could present any risk of pollution or contamination to Lake Alexandrina or adjoining water bodies.” (Principal of Development Control 3, South West Area – Policy Area 16)
- “Development should not occur where there is a risk of adverse impacts on biodiversity, including water dependent ecosystems and species.” (Principal of Development Control 4, South West Area – Policy Area 16)
- “The quality of the water of the River Murray and Lake Alexandrina [be] preserved.” (Objective 2, Fringe Zone)

### **Other Options**

The proponent appears to have given insufficient consideration to other ecologically sustainable options for providing water security for Adelaide, which would reduce and potentially obviate reliance on the Murray River including:

- substantially increasing the existing effective recycling of storm-water and waste water such as a management system and technology to create a series of wetlands throughout Adelaide to capture and filter water which can then be pumped into aquifers for later use;<sup>9</sup>
- a comprehensive management plan to most efficiently use and reuse Adelaide’s current water resources through improvement of water infrastructure, a system of water restrictions and a government scheme to harvest rainwater by installing rainwater tanks in every household and business.

### **Conclusion: Unacceptable Impacts**

Given the significant impacts the proposed action is likely to have on internationally protected wetlands and species; given the Federal and South Australian governments’ obligations to protect these wetlands and species as set out above and given the other options available, the proposed action should not be approved at first instance.

### **CONTROLLED ACTION**

If the Minister is minded allow the proposed action at this point (which we submit should not occur), then the action should be considered a controlled action for the purposes of the Act given:

- the unacceptable significant impacts on matters protected by Part 3 of the Act as set out above;
- the Federal and State governments’ obligations to protect these wetlands and species as set out above;

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<sup>9</sup> <http://www.saveourgulf.org.au/ourposition.htm>

- other options available as set out above.

### **ASSESSMENT METHOD**

If Minister determines that the action is a controlled action, then, given the impacts on the environment are so significant it should be assessed at the highest possible level, that is, by way of public inquiry or in the very least by the production of an Environmental Impact Statement and the appropriate public consultation in accordance with regulation 3.02 of the Environment Protection and Biodiversity Conservation Regulations.

### **ENVIRONMENTAL DEFENDERS OFFICE (SA) INC**