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SENATOR BOB BROWN CHALLENGES LOGGING OPERATIONS IN WIELANGTA

Brown v Forestry Tasmania

In May 2005, Greens Senator Bob Brown applied to the Federal Court for an injunction to stop logging and other forestry operations in two coupes in the Wielangta forest in eastern Tasmania.

Senator Brown claims that logging at Wielangta is not in accordance with the Regional Forest Agreement (RFA) or *Environment Protection and Biodiversity Conservation Act 1999*, and that the operations at Wielangta will have a significant impact on endangered species inhabiting the forest including the Wedge-tailed Eagle and the Wielangta Stag Beetle.

As a result of these proceedings, Forestry Tasmania has agreed not to log one of the two contentious coupes in 2005, and to consider whether any further management prescriptions are desirable for the second coupe, which is already being logged.

Under the RFA, Tasmania agreed to protect endangered species. As a result, forestry operations undertaken in accordance with the RFA were given a blanket exemption from Commonwealth environmental assessment.

However, there is strong evidence that Tasmania has failed to protect the endangered species and that logging is threatening the Wielangta Stag Beetle and Tasmanian Wedge-tailed Eagle with extinction. The Wielangta Stag Beetle is already so rare that fewer than 100 have been collected in its confined range on Tasmania's east coast, and continued logging is likely to threaten the viability of the species.

If Senator Brown's full case succeeds, the power and responsibility to protect endangered species may be restored to the Commonwealth Environment Minister, who would be required to make decisions consistent with the precautionary principle.

The Court in Hobart will give Senator Brown's challenge a full hearing on 19 September 2005.

For more information, including updates on this case, please visit www.bobbrown.org.au.

EDO Tasmania Fighting to Save South Sister

In late February 2005, EDO Tasmania assisted a group of concerned residents in making an application to the Resource Management and Planning Appeal Tribunal in response to Forestry Tasmania's certified forest practices plan for selective harvesting on a coupe on South Sister.

South Sister, near St Mary's, is one of two volcanic plugs forming part of the Nicholas Range on Tasmania's east coast. The mountain is a local icon, tourist destination, recreational area and the source of springs feeding local domestic and agricultural water supplies.

The application alleges that the proposed forestry operations will cause environmental harm by reducing water supplies and increasing the risk of landslides in the area. The applicants have obtained evidence which suggests that, in the short term, the proposed forestry operations will lead to increased turbidity in local water supplies, a reduction in land stability in an area of landslide risk and, in the longer term, a significant reduction in the quantity of water available to local residents and to the town of St Mary's.

The Tribunal found that there was a prima facie case and a hearing date has been set to determine whether the forestry operations can proceed, but was not willing to grant a temporary order restraining road works and harvesting operations sought by the applicants, as the applicants were not able to give an undertaking to cover any losses suffered by Forestry Tasmania if they did not succeed at the final hearing.

However, Forestry Tasmania later announced a voluntary suspension of operations until after the final Tribunal hearing.

The final hearing for the South Sister matter will commence on 6 June 2005.

Victorian Supreme Court Rules on Unlawful Logging at Dingo Creek

On 28 June 2005, Justice Harper of the Victorian Supreme Court ruled that the Victorian government's environmental code for logging native forests (Code of Forest Practices) is enforceable under law.

Prior to this ruling, the Department of Sustainability and Environment (DSE) argued that the only mandatory requirements were (1) that the coupe be in a logging zone and (2) that the loggers have a licence to log.

The ruling was made during a Supreme Court appeal by two protestors who were convicted in 2001 in the Magistrates Court of obstructing lawful logging operations at Dingo Creek in East Gippsland.

The defendants – conservationist Tony Hastings and former mill worker Greg Tantram – argued that they were preventing the illegal logging of rainforest. They had unsuccessfully appealed to the County Court before the Supreme Court appeal.

Justice Harper said that DSE officers must ensure that 'individual licences or the boundaries of coupes' comply with the Code or logging 'will not be lawful'.

Further, he stated that 'a breach of the Code is prima facie a breach of the law', and that a County Court judge 'was incorrect in describing the Code as something which merely provides guidelines'.

This judgement has significant implications for the enforcement of Victoria's Code of Forest Practices, and is a welcome finding for conservationists frustrated by the state government's failure to enforce the Code.

Hastings v Brennan & Anor; Tantram v Courtney & Anor (No. 3) [2005] VSC 228

www.austlii.edu.au/au/cases/vic/VSC/2005/228.html.

Wilderness Society Challenges Pulp Mill Decision

The Wilderness Society (TWS), assisted by EDO ACT, have commenced legal action in the Federal Court after logging company Gunns Limited announced that Bell Bay is the preferred site for its proposed pulp mill. TWS has expressed concerns about the appropriateness of this location and is challenging the Federal government's decision not to assess the impact of the pulp mill on Tasmanian forests.

While the Federal Environment Minister has announced that the proposed Gunns pulp mill in northern Tasmania will be assessed under the Environment Protection and Biodiversity Conservation Act 1999 for impacts on the marine environment and protected species, TWS had lobbied for the Minister to also consider the impact of the pulp mill on Tasmanian forests. However, the Minister considered that these impacts were adequately addressed in the Regional Forest Agreement (RFA) and consequently are exempt from the assessment process in the EPBC Act.

TWS have responded by arguing that the 30 year lifespan of the pulp mill extends beyond the life of the current RFA, which will expire in 2017. Therefore, the Minister must have regard to the impacts of forestry activities associated with the pulp mill beyond 2017, including impacts on world heritage areas, Ramsar wetlands and threatened species such as the wedge-tailed eagle.

For more information about this case, see www.wilderness.org.au/campaigns/forests/tasmania/gunns_proposed_pulp_mill/pulp-mill.

WA Court of Appeal Rejects Coogee Bay Case

EDO Western Australia, acting for local community group Coogee Coastal Action Coalition Inc (CCAC), brought an action in Western Australian Court of Appeal against the Minister of Lands, the Western Australian Planning Commission (WAPC), the City of Cockburn and the developers of a Port Coogee development project, aiming to contain development of the beach and to reclaim a 20-hectare area of Cockburn Sound.

Key issues arising in the case were: (1) bias on behalf of the WAPC in relation to a decision to rezone the beach in 2000, and (2) infringement of common law rights to access the beach, to fish and to navigate the sea and tidal area. On 14 June 2005, the court ruled against CCAC, dismissing their appeal.

To read the full text of the judgement, see: www.austlii.edu.au/au/cases/wa/WASCA/2005/109.html.

HSI Lodges Appeal to the Full Federal Court

In 2004, the Humane Society International, represented by EDO New South Wales, commenced proceedings in the Federal Court of Australia against a Japanese whaling company, Kyodo Senpaku Kaisha Ltd, for illegally whaling within the Australian Whale Sanctuary adjacent to Antarctica.

HSI is seeking a declaration and injunction against Kyodo for contravening the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 which prohibits the killing, taking, interfering with, treating or possessing whales within the Australian Whale Sanctuary.

The evidence presented by HSI in the case is that Kyodo has killed approximately 428 whales within the Australian Whale Sanctuary since the Sanctuary was declared on 16 July 2000 and that Kyodo intends to continue to kill whales there.

As the whaling company is not present in Australia, it was necessary to apply to the Federal Court for permission to serve the originating documents on the company in Japan.

On 27 May 2005, Justice Allsop decided not to allow the HSI to serve the proceedings outside the jurisdiction. The reasons for the decision include that the case could give rise to a diplomatic incident with Japan and would not be in Australia's best interests.

EDO New South Wales will now be seeking an expedited hearing of an appeal before the Full Bench of the Federal Court to enable a decision to be made in time before Japan again sends its ships down to Antarctica in November.

HSI expects that Japan will announce at the meeting of the International Whaling Commission, which starts on 20 June, that it will increase its quota of Antarctic minke whales to 900 and will also target Fin and Humpback whales.

Each year, Japan varies the area in which it carries out the hunt in Antarctic waters. During the next season the whaling will be carried out in an area which covers about 90% of the Australian Whale Sanctuary. This will mean that up to 600 minkes may be killed in Australian waters.

For more information, including updates on the appeal, see www.hsi.org.au.

Communities sue oil companies and the Nigerian government to stop gas flaring

On 20 June 2005, communities from across the Niger Delta filed a case in the Federal High Court of Nigeria against the Shell, ExxonMobil, ChevronTexaco, TotalFinaElf and Agip joint venture companies, the Nigerian National Petroleum Corporation, and the Nigerian government, to stop gas flaring.

Nigeria is the world's biggest gas flarer, a practice which contributes more greenhouse gas emissions than all other sources in sub-Saharan Africa combined and poisons local communities with toxic emissions.

Gas flaring costs Nigeria about US$2.5 billion annually, while 66 per cent of its population live on less than US$1 a day. In comparison, in 2004 the joint venture companies Shell, ExxonMobil, ChevronTexaco, TotalFinaElf and Agip respectively earned US$50 million, US$69 million, US$36 million, US$31 million and US$15 million a day.

The communities claim that the practice of gas flaring involves human rights violations and breaches of Nigerian gas flaring regulations.

To coincide with the case, the Climate Justice Programme has jointly published a 36-page report on the issue with Environmental Rights Action/Friends of the Earth Nigeria (www.eraction.org).

For more information, please visit www.climatelaw.org/media/gas.flaring.sui.

Federal Minister to Assess Impacts on Great Barrier Reef

LARISSA WATERS, SOLICITOR,
EDO QUEENSLAND

In July 2004, EDO Queensland secured an important victory, in which the Full Federal Court of Australia overturned a decision by the Minister for Environment and Heritage to not consider the downstream impacts of irrigated agriculture on the Great Barrier Reef when considering the environmental impacts of the proposed Nathan Dam (reported in Issue 74, ***Impact***).[1]

The appeal confirmed the important principle that the Minister must take a broad approach when setting the terms of reference for environmental impact assessments under the ***Environment Protection and Biodiversity Conservation Act 1999***, and must consider ***indirect*** impacts and effects which are the consequences of the proposed action, even if they are undertaken by a third party.

In the case of the Nathan Dam, this meant that the Minister was required to reconsider the 'controlling provisions' for the environmental assessment of the dam. Specifically, the Minister was obliged to consider whether the proposed dam was likely to have a significant impact on the Great Barrier Reef World Heritage Area (GBRWHA), and on migratory species, taking into account the impacts of the resultant increase in irrigated agriculture, and associated chemical run-off, in the vicinity of the dam.

On 12 April 2005 the new Minister for the Department of Environment and Heritage, Senator Ian Campbell, decided that "***the proposed action is likely to have a significant impact on the world heritage values of the GBRWHA and listed migratory species, in addition to listed threatened species and ecological communities***", and hence amended his earlier decision about relevant controlling provisions for the environmental assessment to include the GBRWHA and migratory species.

The proponent for the Dam, SUDAW, will now have to include likely impacts on the GBRWHA and migratory species as well as listed threatened species and communities, when preparing their environmental assessment report.

The Minister's decision means that the Nathan Dam case has not only established an important principle for environmental impact assessment in Australia generally, but has also resulted in an important outcome for the assessment of the Nathan Dam itself.

The Minister must now reconsider what level of assessment will be required to be undertaken by SUDAW. Previously a Public Environment Report was required, but with the extra controlling provisions it is possible that an assessment of greater magnitude will be required, such as an environmental impact statement or even a public inquiry.

After preparation of that assessment by SUDAW, the Minister will consider the findings of the assessment report and then decide whether to approve the dam, approve it with conditions, or refuse it altogether.

The Minister can still approve the dam even if significant impacts on matters of national environmental significance have been shown likely in the environmental assessment report - and there have been just two refusals under the Act to date. However, we hope that Minister Campbell will use this opportunity to refuse approval for the dam and protect the Great Barrier Reef.

1 Minister for the Environment and Heritage v Queensland Conservation Council Inc. and WWF Australia [2004] FCAFC 190 (30 July 2004).

The Myth of Shareholder Primacy

CHARLES BERGER, LEGAL ADVISOR,
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If repetition were the font of truth, nothing would be truer than the mantra that company directors have a duty to maximise shareholder profits. This characterisation of directors' duties is so firmly ensconced that even the most trenchant critics of the modern corporation do not question it as a statement of legal fact. The popular documentary The Corporation, for example, proceeds from the notion that corporations are legally constrained to act only to maximise profits.

The doctrine of shareholder primacy is pushed by investor advocacy groups, accepted without question by most company directors, and taken as the basis for critique by community groups and theorists. The Australian Shareholders' Association's recent draft "Shareholders' Expectations" policy asserts that the primary purpose of a corporation is to "generate value for shareholders". Similarly, the Board of James Hardie cited their "duty to shareholders" in initially refusing to cover a shortfall in the asbestos compensation fund to meet the obligations of its subsidiaries.

As a matter of law, however, the idea that directors must act to maximise shareholder returns is a simplistic and inaccurate caricature of the law. With the prominence of directors' duties in the news recently, and the recent announcement of a review of directors' duties by the Companies and Markets Advisory Committee, we ought to remind ourselves of some basic legal principles.

First, under the Corporations Act the director's general duty is to act "in the best interests of the corporation", not the best interests of the shareholders. But what does it mean to act in the best interests of a corporation? That very much depends on one's view of what a corporation is. One point of view is that the corporation is no more than property of the shareholders. A more sophisticated view is that the corporation is a web of relationships, contractual and otherwise, among investors, workers, customers, suppliers, communities, and ecosystems. If one takes this view of a corporation, then the legal duty is more nuanced and entails acting in the collective best interests of all these groups.

This view has received the blessing of the Supreme Court of Delaware (the temple of U.S. corporate law) in Paramount Communications v. Time, Inc., where the court upheld the decision of the Board of Time, Inc., to reject a bid by Paramount Communications in favour of a less attractive bid (from the shareholders' financial perspective) that would better preserve the "culture" of the organisation. Australian law does not prescribe which view is the better one, and Australian courts have never squarely endorsed either perspective.

Second, directors in fulfilling their duty to the company must consider the interests of both present and future shareholders. This requires directors to balance the short-term and long-term interests of the corporation, and puts to rest any notion that there is a duty to "maximise profits" over any particular period of time.

Third, directors are duty-bound to consider the interests of creditors, at least when a company is nearing insolvency. The Supreme Court of Western Australia has

even gone so far as to endorse Winkworth v. Edward Baron Development, a U.K. case holding that directors should consider the interests even of future creditors. The duty to consider creditors' interests stands on equal footing with the duty to consider shareholders' interests, although obviously creditors interests are more likely to come to the fore as a company approaches insolvency. On the strength of this case, it is at least arguable that under Australian law James Hardie's Board was bound to consider the interests of future creditors, including future claimants for asbestos-related illnesses (even if they could not be individually identified), on par with the interests of its shareholders.

What follows from these principles? For one, we should not let company directors off the hook for pursuing unethical or socially and environmentally harmful company policies on the basis that they are legally constrained to maximise shareholder profits. Their hands are not so fettered as is often claimed, and we should not blame the law when it affords ample latitude for directors to act responsibly vis-à-vis the environment and society generally. The positive corollary is that directors should be encouraged to act in the broad interests of all contributors to the success of the venture without fear of retribution by profit-maximising shareholders.

This is not to say that clarification of directors' duties is undesirable. Under U.K. company law, directors are explicitly instructed to consider the interests of the company's employees, as well as its members. Most European jurisdictions either have similar requirements, or have employee representatives on the Board. In the U.S., thirty-one states have passed "non-shareholder constituency" laws in the past two decades, which either permit or require consideration of a range of nonshareholder interests in the exercise of directors' duties.

In this regard, the upcoming review by the Companies and Markets Advisory Committee is welcome. Australia should follow these international developments and clarify that directors should consider the interests of all contributors to the success of the corporation, including voluntary and involuntary creditors, communities, employees and the environment. In the meantime, however, we should recognise the myth of shareholder primacy for what it is – a statement of economic theory with little foundation in modern law.

KELO V CITY OF NEW LONDON

Compulsory Acquisition of Land for Private Parties

DAVID JEFFERY, SOLICITOR,
EDO NEW SOUTH WALES

At a time when Australian governments are increasingly relying on partnerships with private firms to deliver infrastructure and urban renewal projects, it is interesting to look at legal developments in the United States in relation to public authorities' rights to compulsorily acquire private property and hand it to private businesses, known in the US as 'eminent domain' powers.

The US Supreme Court will soon hear arguments in the case of Kelo v City of London, where home-owners are challenging the taking of their homes by a private development corporation. It is an issue that has united range of groups as diverse as local community and environment groups, public interest law centres, property law and urban planning academics, libertarian thinktanks and groups representing the elderly, farmers and ethnic minorities. Twenty-five such groups have filed "friends of the Court" briefs in support of the residents. State and local governments have filed briefs supporting the City.

For a number of years, New London has been in an economic decline. The City planned to redevelop a predominantly residential waterfront neighbourhood in an effort to generate jobs and higher property tax revenue. The plan included a waterfront hotel and conference centre, marinas, apartments, office towers and other commercial space.

The City delegated its authority over the project to a private (but non-profit) company, the New London Development Corporation. It also delegated its authority to compulsorily acquire land. The Corporation exercised its authority to forcibly acquire the homes of residents who had refused to sell their properties. A number of residents filed a court action to resist the acquisition.

The legal issues revolve around what is a "public use". Under the US Constitution, authorities may only take private property for a "public use". Originally, public use was understood to mean projects that were owned by and open to the public. However, a number of court decisions have broadened that definition.

In the Connecticut Supreme Court, the City argued that a project that would benefit the community economically, by producing jobs and tax revenue, was a sufficient "public use". The residents argued that there was no public use because the new owner would not provide a public service or utility and the taking did not remove slum conditions (as had been the case in some earlier eminent domain cases). Further, any public benefit was uncertain because private parties would control the future use.

The Connecticut Supreme Court split 4 to 3 on the case, with the majority agreeing with the City. The minority said that economic development could be a public use, but because the public benefit was hypothetical and indirect, it should be subject to close scrutiny by the court. In this case, the benefits of a proposed large-scale private development that might not be completed for many years was uncertain, particularly as control of the project had been given to a private corporation that could be expected to favour private developer interests as much as the broader interests of the community.

The compulsory acquisition of property for private use has not been a big issue in Australia, unlike the US where, according to the US Institute for Justice, more than 10,000 properties have been compulsorily acquired for private parties in the past 5 years alone. But as Australian governments increasingly adopt public-private partnership models to deliver development projects, the issue may begin to emerge.

For example, in NSW the new Redfern-Waterloo Authority Act establishes a development authority charged with the mission of overseeing the development of Sydney's most disadvantaged inner-city areas into 'an active, vibrant and sustainable community'. The authority has been given broad powers to plan for, approve and carry out developments. The authority is also empowered to carry out it functions through private subsidiary corporations, to enter into joint ventures with private developers and to compulsorily acquire land.

It will be an issue to watch – in the US and in Australia.

Legal Strategies for Promoting Implementation of International Biodiversity Law in the South Pacific

PART 2

PEPE CLARKE LLB BSC

Abstract: *The immense biological diversity of the South Pacific is under threat from a range of human activities. International agreements, both global and regional, establish guiding norms and principles for the conservation of biodiversity. The capacity of national governments in the South Pacific to effectively implement international biodiversity conservation agreements is limited. Local and international civil society organisations have an important role to play in facilitating the implementation and enforcement of international biodiversity agreements. This paper explores a range of domestic and international legal strategies available to civil society organisations to promote the implementation of international biodiversity law in the South Pacific.*

This article has been published in two parts. The first part of the article appeared in the March 2005 edition of Impact.

Civil Society Legal Strategies to Promote the Implementation of Biodiversity Law

The failure of governments and intergovermental organisationals to adequately manage the environmental impacts of resource extraction and other development in the South Pacific has led to massive losses in biodiversity, contamination of the natural environment and declining natural resource stocks. There is a very real need to enhance the capacity of civil society organisations to promote the development and enforcement of environmental law and policy in the region. In discussing the global implementation of the *Convention on Biological Diversity*, Johnston argues that:

> The general frustration and disappoint ment associated with … international processes centres around the lack of implementation and the lack of commitment to turn the rhetoric of international diplomacy into concrete actions which materially address the issues currently facing society. It has been suggested that civil society turn to … the legal system to break the impasse which seems to emasculate the capacity of the international community to respond to issues in a timely fashion.1

Notwithstanding Johnston's emphasis on civil society legal strategies as a means to hold national governments to account for their international commitments, this paper takes the view that legal strategies may fulfil a wide range of functions, and that civil society legal strategies may, in many cases, involve cooperation with national governments and regional organisations. A recent review of the implementation of international environmental law in Asia and the Pacific argued that 'a culture of enhanced cooperation among government, private sector, non-governmental organisations and other civil society actors needs to be fostered in order for sustainable development initiatives to succeed'.[2]

In order to promote the realisation of these objectives in the South Pacific, local and international civil society organisations need to critically examine existing and emerging legal strategies. This paper canvasses a range of *domestic legal strategies* – such as building government legal capacity, facilitating legislative reform, delivering community legal education and conducting public interest litigation – and *international legal strategies* – including monitoring and reporting, participating in multilateral negotiations, utilising formal complaint mechanisms and taking legal action in international tribunals.

This paper does not aim to provide a comprehensive analysis of each of these strategies, or to provide an exhaustive list of legal strategies available to civil society organisations in the region. Rather, the paper aims to stimulate discussion about opportunities for strengthening civil society legal strategies in the region by encouraging information exchange, resource sharing and active collaboration between local and international civil society organisations. The issue of *building civil society legal capacity* is discussed in more detail in the final section of this paper, with an emphasis on cooperation and networking between civil society organisations in the South Pacific region.

Domestic Legal Strategies

Building Government Legal Capacity

The 2002 *Strategic Plan for the Convention on Biological Diversity* identifies 'capacity-related obstacles' as a key barrier to the implementation of the *Convention on Biological Diversity*. One of the key goals of the Strategy is to ensure that: 'Developing country Parties, in particular the least developed and the small island developing States amongst them, … have sufficient resources available to implement the objectives of the Convention.'[3]

Throughout the South Pacific, there exists a demonstrated need for capacity building support to facilitate national implementation of biodiversity conservation agreements.[4] For example, following consultations in the Cook Islands, Vanuatu and Palau, researchers from the United Nations University reported that:

> A key problem identified by all ministries, agencies and social actors … relates to the lack of institutional, financial and human capacity. The urgent need for capacity building to address physical, human resource and skill requirements was often expressed. The most abundant needs identified relate to skills, including international law, program management, communication capacities, staff training and public and community education.5

Civil society organisations with relevant expertise may play a key role in building the capacity of national governments to negotiate and implement biodiversity conservation agreements (see *Case Study A* below):

> The environments of small island oceanic countries, their marine ecosystems in particular, and their efforts to address their environmental goals are of fundamental global importance. In almost all instances, the achievement of these goals requires resources beyond the internal scope of their small island developing economies. Given this reality, it is becoming increasingly important that a strategy be developed to support small island developing countries as they attempt to meet their responsibilities under multilateral environmental agreements. This strategy must … involve all relevant members of the global community, such as UN bodies, regional and bilateral funding agencies and non-government organisations.'6 [emphasis added]

In addition to the direct benefits flowing from enhancing the capacity of government agencies to implement and enforce international environmental law, the involvement of civil society organisations in national capacity building processes can contribute to the development of productive working relationships between government agencies and non-government organisations.[7] The direct involvement of civil society organisations in government capacity building provides those organisations with direct access to key decision-makers, allowing them to present public interest perspectives and to influence the development of environmental protection measures.

Case Study A – Regional Biodiversity and Climate Change Capacity Building

The South Pacific Regional Environment Programme (SPREP), the WWF South Pacific Programme (WWF-SPP) and the Foundation for International Environmental Law and Development (FIELD) have developed a joint program to strengthen national and regional capacity for the implementation and negotiation of the international agreements on biodiversity and climate change in the Pacific Region.

SPREP, WWF-SPP and FIELD have collaborated in the past on a number of capacity-building initiatives for the Pacific island countries in relation to both biodiversity and climate change agreements, but the need was identified for a more structured and strategic longer term approach. Program activities include two regional preparation and implementation workshops per year, as well as advice and assistance through briefings and other papers on key issues within the biodiversity and climate change regimes.

The first workshop under this program of work took place in April 2003 in Samoa. This highly successful workshop benefited from the input of a range of stakeholders, including local communities, national and regional non-government organisations and the private sector. The workshop was used to discuss substantive issues, as well as addressing negotiation training needs and promoting the exchange of information through existing and new networks.[8]

Policy and Law Reform

The *Strategic Plan for the Convention on Biological Diversity* identifies 'lack of appropriate policies and laws' as a key barrier to the conservation of biodiversity. One of the key goals of the Strategy is to ensure that: 'Every Party has effective national strategies, plans and programs in place to provide a national framework for implementing the objectives of the Convention and to set clear national priorities.'[9]

Civil society organisations play a 'vital role in the identification of weaknesses and gaps in current policy or legal frameworks'.[10] In particular, they must work to ensure that each country: '(1) has an adequate legal framework for the conservation of biological diversity; (2) has adequate institutions to carry out the task of conserving the biological diversity of the country; and (3) effectively implements and enforces the legal instruments and administrative policies of the country'.[11] Civil society law reform strategies must emphasis the importance of facilitating community involvement in implementation and enforcement of biodiversity conservation measures:

> citizens and environmental non-governmental organisations should be able to be partners in the enforcement process – this involves ensuring that citizens have access to the courts in terms of open-standing provisions and access to information and financial and other resources to be able to enforce effectively the laws and policies.12

The role of civil society organisations in promoting environmental law reform depends in part on the position adopted by governments in relation to environmental matters. In many cases in the South Pacific, national governments have demonstrated a commitment to sustainable development and the conservation of biodiversity, yet lack the capacity to develop an appropriate legislative regime to put that commitment into effect. In circumstances such as these, it has been suggested that '[t]he best possible way … to support countries with regard to their legal processes is through the production and distribution of clear technical documentation'.[13]

In this regard, civil society organisations may assist by directly drafting proposed legislation, or by preparing technical reports exploring alternative legal and institutional mechanisms. For example, in 1992, the Environmental Defender's Office (EDO), a public interest environmental law centre based in Sydney, Australia, was engaged by the government of Temotu Province in the Solomon Islands to draft amendments to the endangered species protection provisions of the province's *Environmental Protection Ordinance 1989*.[14] The following year, the EDO was retained by SPREP to prepare a technical report entitled *Legal and Institutional Models for Conservation Areas*, which aimed to provide 'a broad analysis of legal and institutional options for the establishment and management of conservation areas in fourteen independent Pacific Island countries'.[15] The report contained detailed technical information and clear recommendations for legislative and administrative action.

In circumstances where the position of the government is inconsistent with the public interest objectives of civil society organisations, those organisations may seek to influence government policy and promote law reform via community awareness raising, public campaigns and political lobbying. International civil society organisations must be sensitive to the positions of local groups and communities, working in partnership with local civil society organisations wherever possible.

It is important that international civil society organisations do not seek to impose inappropriate external models for biodiversity conservation, particularly in countries with strong customary law systems, including customary land ownership and decision-making systems: 'the need to enact environmental legislation must be carefully justified rather than assumed, and the precise components of that legislation must be tailored to the policy context and needs of Pacific island countries and not based on imported models from developed countries.'[16] In areas with strong customary law systems, 'law reform' activities may occur at a local level by engaging with communities in relation to local resource management issues. For example, the Environmental Law Centre (ELC), a non-government organisation in Papua New Guinea, is currently working with landowners in East Sepik to support the establishment of a community-based marine protected area.

In countries with a number of environmental organisations, such as Australia, New Zealand, Papua New Guinea and Fiji, establishing mechanisms for cooperation and consensus-building can increase the effectiveness of civil society law reform campaigns. For example, in Australia, peak environmental groups in New South Wales have established the Environmental Liaison Office, a mechanism for coordinating civil society legislative analysis and parliamentary lobbying activities (see *Case Study B* below). In Papua New Guinea, the Eco-Forestry Forum provides a mechanism for non-government organisations with a shared interest in sustainable forest management to collaborate on public awareness campaigns, law reform proposals and public interest environmental litigation.

Case Study B – Coordinating Environmental Lobbying Activities in New South Wales

The Environment Liaison Office (ELO) is an initiative of the peak conservation organisations in New South Wales, Australia. For over fourteen years, the ELO has provided a link between the environment groups and the members of the New South Wales Parliament.

The member organisations – the Nature Conservation Council, Total Environment Centre, National Parks Association, The Wilderness Society, Australian Conservation Foundation, Greenpeace, Blue Mountains Conservation Society and Colong Foundation for Wilderness – meet on a regular basis to discuss policy and law reform issues, and to brief the Environment Liaison Officer.

The Environment Liaison Officer monitors and reports on proposed legislation before Parliament, and meets regularly with members of Parliament to present the views of the ELO member organisations. The Environment Liaison Officer's position is jointly funded by the ELO member organisations. The Environmental Defender's Office, a public interest environmental law centre, participates in the ELO in an advisory capacity.

The ELO facilitates a collaborative approach to the law reform activities of the member organisations, significantly increasing the effectiveness of their engagement in the parliamentary process.

Community Legal Education

The *Strategic Plan for the Convention on Biological Diversity* identifies 'lack of local community capacity' as a key barrier to the conservation of biodiversity. There is significant scope for community capacity building activities in the region: 'Grassroots non-governmental organisations are a recent development in many of the South Pacific islands. The full potential of many community-based and indigenous non-government organisations is still not fully realised'.[17]

Community legal education has a key role to play in informing members of the public of their legal rights and empowering the community to protect the environment through law (see *Case Study C* below).[18]

Case Study C – Community Legal Education for Forest Communities in Papua New Guinea

In Papua New Guinea, commercial logging operations require the informed consent of local customary landowners. However, local communities are often not aware of their legal rights in relation to logging operations on their land, resulting in widespread illegal and unsustainable logging on community lands.

In response to this problem, the Environmental Law Centre (ELC) and the Centre for Environmental Law and Community Rights (CELCOR) conduct *legal awareness workshops* with remote forest communities. The workshops aim to provide communities with the information and advice they require to make informed decisions about the use of natural resources on their customary lands and to enforce their legal rights where customary lands are being exploited illegally.

In addition, ELC delivers *community log monitoring workshops*, intended to equip customary landowners with the practical skills and knowledge necessary to identify illegal activities by logging companies, particularly failures to adhere to proper logging practices and codes set out in forestry legislation. The workshops also incorporate community organising and mobilisation activities to support community involvement in natural resource management.

Public Interest Environmental Litigation

In the correct circumstances, public interest environmental litigation may be a powerful tool for promoting the implementation and enforcement of biodiversity conservation measures. However, it is important for civil society organisations to critically examine the effectiveness and appropriateness of litigation strategies in each jurisdiction and in relation to particular classes of environmental problem. For example, in countries with strong traditional authority structures at a local level, civil society organisations need to exercise caution in seeking to impose conservation outcomes via litigation in national or provincial courts.

In light of the limited resources available for public interest environmental litigation in the South Pacific, it is important that civil society organisations adopt a strategic approach in the selection of suitable cases. An effective litigation strategy may involve one or more of the following broad classes of legal action: *common law; administrative law; environmental law;* and, *constitutional law*. In certain jurisdictions, *customary law* will play a key role in certain aspects of litigation – for example, resolving competing claims to land – and may also form the basis of local dispute resolution mechanisms.

In relation to *common law* claims, a person may commence legal action to obtain damages or injunctive relief based on a number of causes of action, including negligence, nuisance, trespass or breach of contract. For example, landowners affected by pollution of their water supply by upstream mining operations may seek to maintain a claim in nuisance. Landowners affected by illegal logging may be able to seek damages and an injunction to prevent further trespass on their customary lands. In cases where landowners have entered into agreements with companies to allow logging, breach of environmental management provisions in an agreement may form the basis for a claim in contract law.

Administrative law is concerned with the lawfulness of government decisions. Judicial review of administrative decisions allows an 'interested person' to obtain declaratory or injunctive relief to remedy an unlawful government decision. In Papua New Guinea, for example, the Environmental Law Centre has commenced judicial review proceedings to have certain timber permits in the East Awin area declared invalid on the basis that they were issued in breach of the *Forestry Act 1991*. In preliminary proceedings, the National Court accepted that the Eco-Forestry Forum had standing to commence judicial review proceedings. This is the first time in Papua New Guinea that a community based organisation has been granted standing to seek judicial review of an administrative decision.

Environmental law, including environmental and planning legislation, as well as environmental protection provisions in sectoral legislation, provides the most direct means for individuals to obtain environmental outcomes via litigation. If the relevant legislation does not provide standing for members of the community to take legal action to enforce environmental protection provisions, standing may present a significant obstacle to civil society enforcement environmental law. If this is the case, local civil society organisations must undertake a concerted campaign to obtain open standing in environmental matters, drawing on examples from other jurisdictions[19] and emphasising support for public participation in international law.[20]

Constitutional law may also form the basis of public interest environmental litigation. Constitutional provisions in a number of South Pacific countries identify national priorities – such as the sustainable use of natural

resources – and recognise certain individual and collective rights – such as the right to a clean and healthy environment – which directly further public interest litigation objectives.[21] Constitutional law has been used to great effect by public interest environmental lawyers in jurisdictions such as India and Pakistan.[22] Furthermore, as Anderson argues, 'explicit constitutional rights to environmental protection can lie dormant unless they are actively seized by environmentalists and lawyers'.[23]

Public interest lawyers may also play a role in defending communities and civil society organisations from attempts to silence opposition to environmentally harmful activities. For example, in 2003, ELC represented customary landholders who were sued by a tuna company in relation to alleged public statements about the pollution impacts of the company's tuna company at Madang. ELC was successful in forcing the company to discontinue the legal action against the landholders.

Case Study D – Public Interest Environmental Litigation in Papua New Guinea

In 2002, the Environmental Law Centre (ELC) achieved a significant victory in litigation to prevent illegal logging in Collingwood Bay. This successful litigation resulted in the direct protection of 38,000 hectares of rainforest and exposed the fraudulent activities of resource companies seeking logging permits. Neighbouring landowners, empowered by the success of the Maisin people, have placed nearly 1.2 million hectares of land extending from Collingwood Bay under customary conservation.

In the same year, ELC presented a complaint to the Ombudsman Commission on behalf of the Kasua people, challenging the extension of an existing timber permit. The extension covered an area of 800,000 hectares. The report of the Ombudsman Commission found that the extension was void and that there had been wrongful conduct by government officials. In response to the report, the Governor of the Western Province filed proceedings in the National Court and obtained an injunction to prevent logging in the area.

International Legal Strategies

In addition to the domestic legal strategies described above, local and international civil society organisations may also seek to employ a range of international legal strategies to promote the implementation of international biodiversity agreements, including: *monitoring and reporting; formal complaint mechanisms; multilateral negotiations; dispute resolution proceedings;* and, *legal action in internatioa-tribunals.*

Monitoring and Reporting

Civil society organisations may play an important role in monitoring the extent to which countries are implementing their obligations under international law, and reporting non-compliance to the international community.[24] By bearing witness to breaches of international environmental law, civil society organisations create pressure for states to regulate environmentally harmful activities within their jurisdiction, or create pressure for home states to regulate the activities of their nationals (see *Case Study E* below).

If the actions or omissions of a state undermine a particular international or regional agreement, a civil society organisation may submit an informal petition to the relevant convention secretariat to pressure the state to alter its behaviour. Lodging the petition may: induce the state to take action to resolve the issue; prompt the secretariat to work with the state to resolve the issue; or, raise public awareness of a previously unknown concern.[25]

In order to effectively utilise this strategy, it is necessary to: select the relevant treaty secretariat; prepare an argument establishing the basis for the secretariat's authority; present detailed information about the environmental harm and legal breach; and, recommend specific action by the secretariat.[26]

Case Study E – Monitoring and Reporting on the Impacts of the Australian Mining Industry

Since 2000, the Oxfam Community Aid Abroad Mining Ombudsman has monitored and reported on the activities of the Australian mining industry in countries in the Americas, Africa and the Asia-Pacific.

The project aims to draw attention to the impacts of these mining operations on the natural environment and human rights of affected communities (including, in the Pacific region, communities affected by the Tolukuma mine in Papua New Guinea and the Vatukoula mine in Fiji).

Oxfam's monitoring and reporting framework makes explicit reference to international human rights law, and makes clear recommendations for state action, including home-state regulation of Australian mining companies and the establishment of an independent mining industry complaints mechanism in Australia.[27]

Formal Complaint Mechanisms

Multilateral environmental agreements do not generally provide formal complaint mechanisms for non-state actors. However, there are a number of international complaint mechanisms that may directly or indirectly provide opportunities for environmental protection and biodiversity conservation, including complaints mechanisms adopted by *international human rights institutions* and *international financial organisations*.

International human rights complaint mechanisms may play a role in environmental protection in cases where environmental degradation occurs as a result of an act or omission by government, and deprivation of human rights occurs as a result of the environmental degradation. For example, authorisation of resource extraction activities on customary lands without the informed consent of landowners may constitute a breach of the right to property.[28] In the absence of a regional human rights system,[29] communities in the South Pacific are limited to the complaints mechanisms available within the United Nations human rights system including, *inter alia,* complaints to the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights. These mechanisms provide an opportunity to draw international attention to the issue and to place pressure on national governments to respond to the issue.[30]

International financial institutions, such as the World Bank and the Asian Development Bank, play an influential role in the South Pacific by financing development projects, providing technical assistance and influencing domestic economic policy. Through their lending practices and policies, international financial institutions have had a significant impact on development activities in the region.[31] Commentators such as Richardson are critical of current development assistance practices, citing examples of environmentally harmful development projects funded by development agencies and international financial institutions.[32] In response to pressure from civil society organisations, a number of international financial institutions, including the World Bank and the Asian Development Bank, have established investigation and dispute resolution mechanisms to respond to claims by affected communities that a project funded by the institution has failed to comply with a relevant environmental protection standard, including institutional policies.[33]

Case Study F – World Bank Review of Wawoi Guavi Logging Project in Papua New Guinea

In 2004, the Environmental Law Centre (ELC) was successful in lobbying the World Bank to send a team to the Western Province of Papua New Guinea to inspect the Wawoi Guavi logging project. Under the terms of a World Bank loan for a national forest conservation program, the national government is required to take certain measures to improve the sustainability of forestry operations in Papua New Guinea.

The World Bank Review Team's report highlighted a number of failures to comply with the terms of timber permits, environmental standards and operating requirements for logging operations. This report will provide a useful resource for civil society organisations seeking to draw attention to widespread prob-

lems with illegal logging in Papua New Guinea.

Participation in Multilateral Negotiations

Conferences of the parties to multilateral environmental agreements are conducted on a regular basis to promote treaty implementation, draft protocols and exchange information. Most multilateral environmental agreements allow non-state actors, including civil society organisations, to participate as observers during these meetings. Participating as an observer provides civil society organisations with access to key experts and decision-makers, and provides excellent opportunities for lobbying on implementation issues.[34]

In recent years, civil society organisations have begun to participate directly in multilateral negotiations, as members of official national delegations. For example, lawyers from the Center for International Environmental Law (CIEL) have been on US delegations for the CBD. Governments benefit from the expertise, knowledge and legitimacy of the civil society organisation. Civil society organisations gain from increased access to information and potentially more direct influence on official positions.[35]

In some cases, civil society organisations have more formally represented governments at international conferences. In these instances, the organisations actually speak for the government, in what is essentially a lawyer-client relationship. For example, CIEL has represented the Marshall Islands in negotiations over land-based sources of marine pollution, and FIELD has represented the Alliance of Small Island States (AOSIS) in climate change negotiations (see *Case Study G* below).[36]

This type of representation and assistance can be very important, particularly for developing countries, as international civil society organisations often possess more resources and expertise with respect to these negotiations than many governments.[37]

Case Study G – Civil Society Representation of Small Island States in Climate Change Negotiations

FIELD played a core role in the formation of the Alliance of Small Island States (AOSIS), a coalition of small island and low-lying coastal countries, including South Pacific island states.

AOSIS countries are amongst those most vulnerable to the adverse effects of climate change. AOSIS countries often have limited financial and technical resources, making it difficult for them to present their case in effectively during international negotiations. FIELD's legal advice and assistance to the group has helped the coalition become one of the key players in the international climate change negotiations.

FIELD assists AOSIS members by providing briefing materials on the legal and political issues at stake, informing and training AOSIS members between negotiating sessions, assisting with the drafting of submissions and interventions, supporting delegations during the negotiations, and, when requested, intervening on their behalf.

FIELD aims to assist these states to build and maintain their own capacity as effective negotiators, to promote the benefits of signing up to the most progressive targets for greenhouse gas reduction, to obtain assistance in adapting to climate change and to support the enforcement of these crucial commitments.[38]

Dispute Resolution Mechanisms

The dispute resolution mechanisms for international biodiversity agreements do not allow participation by non-state actors. However, a civil society organisation may encourage and assist a sympathetic government to initiate dispute resolution proceedings against another state in breach of convention obligations. Initiating dispute resolution proceedings may: induce the state to take action to resolve the issue; prompt the secretariat to work with the state to resolve the issue; or, raise public awareness of the issue.[39]

The South Pacific presents unique opportunities – as yet untested – for civil society organisations to work with national governments on the preparation of dispute resolution claims. As discussed above, the demonstrated commitment of certain countries in the region to environmental protection, together with the limited resources of those states, have already proven to be fertile ground for collaboration between civil society organisations and national governments in multilateral negotiations.

Legal Action in International Tribunals

A number of international tribunals, including the International Court of Justice, the International Tribunal on the Law of the Sea and the Permanent Court of Arbitration are empowered to hear disputes in relation to environmental matters. The jurisdiction of international tribunals have traditionally been limited to the resolution of disputes between states, but civil society organisations may play a role in supporting state participation in international judicial proceedings. Indeed, Richardson argues that international tribunals play a vital role in safeguarding the interests of small developing states:

> Conciliation presupposes an equal power relationship, and that the disputing parties can freely 'negotiate' and 'compromise' their differences. In fact, international relations are clearly unequal, and few developing countries can alone effectively negotiate with power industrialised nations. Instead, it is essential that developing countries be provided with the necessary financial, information and technical resources to enable them to adequately represent their interests and environmental concerns in international judicial forums.40

In the event that a state, or states, in the South Pacific, elected to commence judicial proceedings in relation to an international biodiversity conservation issue (for example, illegal fishing activities), international civil society organisations may be able to play a key role in supporting the litigation. In addition, some tribunals allow non-state actors to pres-

ent *amicus curiae* briefs to advise the court on matters relevant to the claim.

The traditional exclusion of non-state actors from international judicial proceedings is becoming increasingly ill-defined. According to Sands:

> Individuals, non-government organisations, corporations and intergovernmental organisations are now actively involved in cases before some [international tribunals]. In some cases, these new actors are formally involved. … [I]n other cases, even if they are not formally involved, these new actors are present behind the scenes, exerting their influence in numerous ways.41

In 2001, the Permanent Court of Arbitration adopted optional rules for the arbitration of disputes relating to natural resources and the environment, which provides for the resolution of disputes between state and non-state actors.[42] The optional rules provide an interesting mechanism for the involvement of civil society actors in international environmental arbitration, but are limited by the voluntary nature of the court's jurisdiction.[43]

Civil Society Legal Capacity Building

Established civil society organisations have an important role to play in supporting the establishment and ongoing development of public interest environmental law centres and programs in the South Pacific. Public interest environmental law centres now exist in many countries around the world. Collaboration between existing centres, and support for emerging centres, is an important mechanism for improving the effectiveness of civil society legal strategies.

International environmental law organisations, such as the Centre for International Environmental Law (CIEL), have played a key role in this regard. For example, CIEL was instrumental in the establishment of the Centre for Environmental Law and Community Rights (CELCOR) in Papua New Guinea.[44] However, there is also considerable scope for national environmental law organisations to work in partnership to build the capacity of public interest environmental lawyers in the region (see *Case Study H* below).

Case Study H – Civil Society Capacity Building in Papua New Guinea

For a number of years, the Environmental Defender's Office (NSW) (EDO), a public interest environmental law centre based in Australia, has worked in partnership with the Environmental Law Centre (ELC) in Papua New Guinea, providing capacity building support. The capacity building project aims to enhance the effectiveness of ELC's litigation,

law reform and community education programs by providing training, advice and assistance.

The project provides opportunities for regular lawyer exchanges. EDO lawyers travel to Port Moresby to deliver training sessions for ELC and CELCOR staff and to work with ELC staff on current litigation matters. ELC lawyers travel to Sydney to participate in external training programs and to work with EDO staff on ELC projects. Information exchange, advice and assistance are facilitated by an email discussion group involving all legal staff from both offices.

Civil society collaboration and capacity building also occurs via national, regional and international networks. There are substantial benefits associated with the establishment of civil society legal networks: 'regional and national networks of organisations improve the efficacy of individual organisations by facilitating coordination and exchanging information and expertise'.[45]

International and regional networks, used effectively, have the potential to meet the following objectives:

- strengthening environmental law implementation and enforcement;
- facilitating transboundary collaboration and information exchange;
- building government and non-government institutional capacity;
- identifying regional priorities and building consensus; and
- overcoming limited resources.[46]

The Environmental Law Alliance Worldwide (E-LAW) is an international network of approximately two hundred public interest environmental lawyers and scientists from around the world. Working primarily through the internet, E-LAW supports and facilitates public interest environmental litigation and law reform, builds lasting local capacity to defend the environment through law, and fosters global and regional collaboration among the members of the network.[47] Membership of the E-LAW network in the South Pacific is currently limited to Australia and Papua New Guinea.

Other international environmental law networks, open to individuals working in the field of environmental law from a variety of sectors, include the International Network of Environmental Compliance and Enforcement (INECE), the Environmental Law Network International, the International Council of Environmental Law, and the IUCN Commission on Environmental Law.[48]

Regional environmental law networks provide opportunities for collaboration and information exchange on issues of regional concern. The physical proximity and shared interests of regional partners allows a stronger emphasis on substantial collaboration in the development and implementation of national and regional legal strategies (see *Case Study I* below).

Case Study I – Regional Civil Society Networking in the Americas

The Asociación Interamericana para la Defensa del Ambiente (AIDA), or the Interamerican Association for Environment Defence, is a regional civil society network that works through the collaborative efforts of participating organisations, each of which is an established public interest environmental law centre.

AIDA's mission is to promote the ability of citizens to protect their health and environment through development and enforcement of national and international laws. The members of the network accomplish this by bringing cases of international concern before national and international tribunals, and advocating for laws and treaties that protect the human right to a healthy environment and provide for citizen enforcement of environmental laws.

Collaboration between member organisations, with support from the AIDA secretariat, has played a vital role in the success of a number of key cases, including litigation to prevent

petroleum exploration on tribal lands in Colombia and legal action against offshore oil drilling and open-pit gold mining in Costa Rica.

The South Pacific currently lacks a regional public interest environmental law network. In Australia, the nine member organisations of the EDO Network collaborate in relation to federal litigation and law reform matters, but do not engage systematically with other organisations in the region.[49] To date, interactions with public interest environmental lawyers in New Zealand have remained limited.[50]

In Papua New Guinea, ELC and CELCOR work closely on issues of common concern, and maintain informal links with public interest environmental lawyers in Australia and South-East Asia, but interaction with environmental organisations in other parts of the South Pacific remains relatively limited. There are currently no established public interest environmental law centres in the island states of the South Pacific.

The Environmental Defender's Office (NSW) is currently working with CELCOR, ELC and E-LAW to develop a capacity-building program for civil society organisations in the South Pacific. The key elements of the proposal are:

reaching out to individuals and civil society organisations in the region to assess the capacity of these individuals and organisations to establish an environmental law centre or program;

building the capacity of public interest lawyers and environmental law organisations in the region by providing training and assisting with organisational development; and

providing ongoing legal and scientific support that public interest lawyers and environmental law organisations in the region need to protect biodiversity through law.

The aims of the project, subject to the availability of adequate funding, are:

short term: to establish and maintain contact with civil society organisations in the South Pacific and to provide practical training on the practice of public interest environment law;

medium term: to assist with the establishment of at least one environmental law centre, or the establishment of at least one environmental law program within an existing organisation; and

long term: to establish a network of public interest environmental law centres in the South Pacific, working effectively to conserve biodiversity and promote sustainable development.

Regional networks require thoughtful design in order to achieve their objectives. Key network design elements to be considered include: membership and participation, governance and coordination, network structure, financial resources, and communication systems.[51] The selection of appropriate models for capacity building and network building is greatly assisted by examination of existing regional organisations (see *Case Study J* below):

> Networking is a very powerful tool for achieving cooperation among countries in areas such as environmental implementation and enforcement. … [E]merging regional networks can look to existing networks and build on their strengths and supplement their weaknesses.'52

Case Study J – Regional Human Rights Capacity Building in the South Pacific

The Regional Rights Resource Team (RRRT) is a non-profit training and technical resource organisation specialising in human rights advocacy, law and education tailored specifically to the Pacific region. The organisation's goal is to strengthen the capacity of partners in the region to implement principles and practices of democracy and human rights.

The RRRT provides human rights training, legal advisory services and technical support to government and civil society organisations throughout the region. The RRRT has a sustained presence in the Cook Islands, Fiji, Kiribati, Solomon Islands, Tonga, Tuvalu and Vanuatu, with established national partners permanently based in those countries.

The RRRT plays a key role in building the capacity of national partners to promote good governance and observe human rights. Two key components of the RRRT's approach to capacity building at the national level include training and supporting:

legal rights training officers: these officers are based in a national non-government organisation with a strong commitment to human rights, and are responsible for community level workshops, undertake public awareness programs, provide individual advice to those in need, and participate in local policy and law reform dialogues.

community paralegals: these paralegals are civil society leaders and government field officers, who have undertaken a six-week human rights training program, and agreed to act as community mobilisers, promoting human rights awareness to outlying rural areas, as well as providing a support network for legal rights training officers.

The RRRT provides an excellent model for regional collaboration and capacity building for environmental civil society organisations, and also presents interesting opportunities for collaboration in relation to issues that include both environmental and human rights dimensions, such as pollution from mining activities and illegal logging on indigenous lands.[53]

Conclusion

Global biodiversity is the contemporary manifestation of millions of years of evolution, a living web essential for human survival. Natural and agricultural biodiversity forms the foundation of human society and the global economy. In many cultures, and for many individuals, living things and wild places represent important aesthetic, spiritual and religious values. Further, it is increasingly

accepted that life on earth has intrinsic value, placing an ethical obligation upon humankind to conserve global biodiversity for its own sake:

> Not only economic, but moral and ethical reasons also justify the conservation of wildlife. The ongoing mass extinction is changing the planet's evolutionary processes. Ethicists can thoughtfully ask what right we have to imperil so many other species. And for some the loss of wildlife means a little more of the earth's magic will be lost forever.54

The decline of biodiversity in the South Pacific requires urgent action by all stakeholders: communities, civil society organisations, national governments and intergovernmental organisations. Civil society legal strategies have a key role to play in facilitating and, as necessary, compelling, national action for biodiversity conservation. However, as noted by Mere Pulea:

> Legislation is … only one measure to ensure sustainable development and to prevent and minimise the adverse effects on the environment … [E]nvironmental law, though a powerful tool, cannot be solely relied upon. The scale of environmental problems dictate other measures, such as environmental education, to support and supplement environmental legislation.55

Numerous local and international civil society organisations are active in the South Pacific, undertaking scientific research, educating local communities, coordinating on-ground environmental projects and engaging in political campaigning. Public interest lawyers will need to work closely with these organisations, as well as national governments and intergovernmental organisations, to ensure that legal and non-legal strategies for biodiversity conservation are complementary and mutually supportive.

As Preston concludes in his paper on the role of law in biodiversity conservation in the Asia-Pacific:

> [L]awyers will need to work with professionals and experts from many other disciplines of knowledge, local communities, indigenous people, non-governmental organisations and other persons who have a vital role to play in this process. For only through the co-operative, comprehensive and concerted effort of the present generation of people will the biological diversity of the Earth be conserved for future generations and for the other members of the community of life on Earth.

ENDNOTES

1 Johnston, S. (1997) 'The Convention on Biological Diversity: The Next Phase' 6 RECIEL 219 at 229.

2 Johnston, S. (1997) 'The Convention on Biological Diversity: The Next Phase' 6 *RECIEL* 219 at 229.

3 'A culture of enhanced cooperation among government, private sector, non-governmental organisations and other civil society actors needs to be fostered in order for sustainable development initiatives to succeed'. UNESCAP (2000) 'Review of the Implementation of Agenda 21, International Environmental Conventions, the Regional Action Program for Environmentally Sound and Sustainable Development, and the Program of Action for the Sustainable Development of Small Island States', *Ministerial Conference on Environment and Development in Asia and the Pacific 2000*, Kitakyushu, Japan, 31 August – 5 September 2000. URL: www.unescap.org/mced2000/so3.htm (last accessed 26 May 2005).

4 CBD Conference of the Parties (2002) *Strategic Plan for the Convention on Biological Diversity*, Part C: Strategic Goals and Objectives. See also Appendix 1: Obstacles to the Implementation of the Convention on Biological Diversity.

5 Following a recent meeting of judges from the South Pacific, the judges recognised 'the widespread regional need for continued strengthening of the capacity of judges, lawyers, enforcement officers and non-government organisations to promote the implementation of national and international environmental law through domestic compliance and enforcement regimes'. *Statement of Conclusions and Recommendations,* adopted at the Pacific Island Judges Symposium on Environmental Law and Sustainable Development, Brisbane, Australia, 5-7 February 2003.

6 Velasquez, J., Piest, U. and Mougeot, J. (2002) *Interlinkages: Synergies and Coordination among Multilateral Environmental Agreements – Pacific Islands Case Study*, United Nations University, Tokyo, p.31.

7 Velasquez, J., Piest, U. and Mougeot, J. (2002) *Interlinkages: Synergies and Coordination among Multilateral Environmental Agreements – Pacific Islands Case Study*, United Nations University, Tokyo, p.2.

8 See, for example: Boer, B.(ed)(1996) *Environmental Law in the South Pacific: Consolidated Report of the Reviews of Environmental Law in the Cook Islands, Federated States of Micronesia, Kingdom of Tonga, Republic of the Marshall Islands and Solomon Islands,* IUCN, Gland and Cambridge, p.243.

9 'Strengthening Implementation and Negotiating Capacity: Pacific Islands and the Climate Change and Biodiversity Conventions', Foundation for International Environmental Law and Development, www.field.org.uk, 22 May 2005.

10 CBD Conference of the Parties (2002) *Strategic Plan for the Convention on Biological Diversity*, Part C: Strategic Goals and Objectives. See also Appendix 1: Obstacles to the Implementation of the Convention on Biological Diversity.

11 ESCAP (2000) *State of the Environment in Asia and the Pacific 2000*, p.304.

12 Preston, B. (1995) 'The Role of Law in the Protection of Biological Diversity in the Asia-Pacific Region', 12 EPLJ 264 at 270.

13 Preston, B. (1995) 'The Role of Law in the Protection of Biological Diversity in the Asia-Pacific Region', 12 EPLJ 264 at 275.

14 Velasquez, J., Piest, U. and Mougeot, J. (2002) *Interlinkages: Synergies and Coordination among Multilateral Environmental Agreements – Pacific Islands Case Study*, United Nations University, Tokyo, p.2.

15 Robinson, D. (1992) 'Endangered Species Protection and Environmental Management in the Solomon Islands', 9 *EPLJ* 51, at 51.

16 Environmental Defender's Office (1993) *Legal and Institutional Models for Conservation Areas*, Environmental Defender's Office Ltd, Sydney, p.1.

17 Farrier, D. (2003) 'Emerging Patterns in Environmental Legislation in Pacific Island Countries', 20 *Journal of South Pacific Law* 1.

18 ESCAP (2000) *State of the Environment in Asia and the Pacific 2000*, p.368.

19 In 1996, a review of environmental laws in selected South Pacific countries, commissioned by the IUCN and SPREP, highlighted 'the need for more awareness within government departments, conservation organisations and the general community of the role and potential for environmental law in addressing the local and national environmental issues faced by each country'. Boer, B.(ed)(1996) *Environmental Law in the South Pacific: Consolidated Report of the Reviews of Environmental Law in the Cook Islands, Federated States of Micronesia, Kingdom of Tonga, Republic of the Marshall Islands and Solomon Islands,* IUCN, Gland and Cambridge, p.19.

20 For example, in New South Wales, most environmental statutes provide standing for 'any person' to commence civil enforcement action to remedy or restrain a breach of the relevant statute. See, for example, the *National Parks and Wildlife Act 1974, Environmental Planning and Assessment Act 1979, Threatened Species Conservation Act 1995* and *Protection of the Environment Operations Act 1997*. cf. *Environment Protection and Biodiversity Conservation Act 1999,* s.475 re standing ('interested person' test).

21 For example, *Rio Declaration on Environment and Development,* Principle 10 and the UNECE *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice* ('Aarhus Convention').

22 For example, one of the national goals in the Constitution of Papua New Guinea is 'for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and to be replenished for the benefit of future generations.' See also the Constitution of Vanuatu: 'Every person has the fundamental duty to themselves, their descendants and to others to protect Vanuatu and to safeguard the national wealth, resources and environment in the interests of present and future generations.'

23 Hunter, D., Salzman, J. and Zaelke, D.(1998) *International Environmental Law and Policy*, Foundation Press, New York, p.1352-7.

24 Anderson, M. (1996) 'Human Rights Approaches to Environmental Protection: An Overview', in Hunter, D., Salzman, J. and Zaelke, D.(1998) *International Environmental Law and Policy*, Foundation Press, New York, p.1352.

25 Hunter, D., Salzman, J. and Zaelke, D. (1998) *International Environmental Law and Policy*, Foundation Press, New York, p.429. See discussion of civil society involvement in monitoring CITES compliance.

26 Malone, L. and Pasternak, S. (2004) *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law*, Transnational Publishers, New York, p.155.

27 Malone, L. and Pasternak, S. (2004) *Defending the Environment*, p.156.

28 Oxfam Community Aid Abroad (2004) *Mining Ombudsman Annual Report 2004,* Oxfam-CAA, Melbourne, pp.1-15.

29 Malone, L. and Pasternak, S. (2004) *Defending the Environment*, pp.9-13.

30 Regional human rights systems in Europe and the Americas provide for binding orders to be issued by a regional human rights court. No similar institution exists in the Asia-Pacific.

31 Detailed discussion of human rights strategies is beyond the scope of this paper. For a practical guide to the use of human rights complaints mechanisms, see Malone, L. and Pasternak, S. (2004) *Defending the Environment*: *Civil Society Strategies to Enforce International Environmental Law*, pp. 9-100.

32 Boer, B., Ramsay, R. and Rothwell, D. (1998) 'Regional Environment Issues and Responses' in *International Environmental Law in the Asia-Pacific*, Kluwer Law International, London, p.56.

Endnotes continued on page 15...

Undermining Public Participation in Western Australia

Amendments to the Western Australian Mining Act 1978 have recently been passed by both Houses of Parliament. The amendments will come into force when the accompanying regulations have been published. This is expected to happen in early 2005.

EDO Western Australia was not consulted in relation to these amendments despite having indicated its concerns formally during the various government reviews of the workings of the project approvals systems. We are concerned about the potential impact of the amendments in the Mining Amendment Act 2004.

An end to public notification of mining proposals?

The amendments provide that new applications for mining leases will only be able to be made if they are accompanied by either:

- a mining proposal; or
- a significant mineralisation report and a statement indicating what mining operations are likely in the future.

Those applications which are accompanied by a mining proposal will be subject to the same public notification provisions as previously. The public will still be able to lodge objections to mining on environmental grounds with the Mining Warden, and refer mining proposals to the Environmental Protection Authority (EPA).

However, those applications which are only accompanied by a mineralisation report and statement of likely activities will not readily permit scrutiny of environmental consequences. The public are therefore not likely to have the necessary information to lodge environmental objections with the Mining Warden, and will in fact be prohibited from referring the matter to the EPA.

While the public can refer the proposal to the EPA if the mining proposal is lodged after a lease is granted, there is no provision in the Act for public notification of mining proposals lodged after a lease is granted. This means that there is no way the public can:

- find out about the mining proposal;
- object to the mining proposal; or
- refer the proposal to the EPA when the relevant information is actually available!

The EDO believes that the Regulations should provide procedures for public notification and objection to mining proposals lodged after a lease is granted.

The amending Act provides that all new mining leases and exploration licences will be granted subject to a statutory condition that there can be no use of ground disturbing equipment on the land unless the work was dealt with in a mining proposal, or an environmental officer (or Minister) approves the works program.

A public notification and objection procedure should apply to works programs in the same way as it does to mining proposals. If works programs are not going to be subject to such procedures, it would be possible for many mining activities which affect the environment to be approved without any public scrutiny.

Warden's power to award costs against environmental objectors

Section 134(2) of the Mining Act currently restricts the Mining Warden from awarding costs against objectors (including environmental objectors) unless they raise frivolous or vexatious issues. This restriction was removed by the Amendment Act.

This means that, unless the Regulations provide otherwise, objectors will risk having to pay the miner's legal costs unless the Mining Warden finds mining is completely unacceptable.

However, it is rare that the Mining Warden finds that mining is completely unacceptable. Rather, the Warden usually finds that mining is unacceptable on some parts on the area applied for, or finds that mining should only proceed subject to certain environmental conditions.

As such findings are made after the Warden has had the benefit of hearing the objector's environmental evidence it appears unfair that the objector could now be ordered to pay miner's legal costs.

The risk of having to provide 'security for costs' – that is a bond or other form of guarantee for the potential legal costs the miner will incur in meeting the objector's case – will effectively preclude many ordinary citizens from exercising their rights to object to mining leases and be heard before the Warden.

Extension of licences

Exploration licences are currently granted for 5 years, with a possibility of two 2 year extensions, then 1 year extensions if there are exceptional circumstances. The amendments

change this to a 5 year term with a possibility of a 5 year extension, then 2 year extensions in "prescribed circumstances".
There is therefore a potential for exploration licences to be extended indefinitely. This is problematic, because if an area is found to have significant environmental value, it is unlikely to be declared a conservation reserve or otherwise protected if it is indefinitely subject to exploration.

EDO Western Australia believes the Regulations should prescribe public notification and objection procedures for the grant of extensions. It is also considered that extension applications which affect the conservation estate and environmentally sensitive areas should also be referred to the relevant Minster and agencies.

Fees for viewing information

Fees may be required by the Regulations if people want to see or copy information about mining proposals. These fees should not be set so high that they make relevant documents prohibitively expensive for environmental groups to obtain.

Typically these fees are set up on a costs recovery basis and the size of the miners' documents labour charges for photocopying and postage, mean that the charges are likely to be high.

EDO Western Australia would prefer to see a flat fee apply in relation to ordinary citizens, with full cost recovery being able to be waived.

Reversion scheme

The Bill provides for a scheme to enable applicants for mining leases to withdraw their applications and "revert" to exploration licences. The details will be set out in a scheme to be published by the Governor. EDO Western Australia believes that the scheme should address (at least) the following:

- people who have objected to the mining lease application should be able to maintain their objection to the reversion application;
- new objections should be able to be made to the reversion as circumstances may have changed since the initial application was made;
- reversions which affect the conservation estate should be referred to the Minister for the Environment, the Department of Conservation and Land Management;
- any reversion which may affect 'environmentally sensitive areas' should be referred to the Minister for the Environment and the Department of Environment.

For more information, please contact Leigh Simpkin, Principal Solicitor, EDO Western Australia on 08 9221 3030.

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[33] For example, a rice-growing scheme in Fiji, which resulted in the clearing of ecologically valuable mangrove vegetation to create new land for rice growing, but local people were deprived of traditional areas for shellfish, crab, and high salinity left much of the area useless. Richardson, B. 'A Study of the Response of Transnational Environmental Law and Policy to the Environmental Problems of East Asia and the South Pacific' (1990) *EPLJ* 209 at 214-5.

[34] Detailed discussion of international financial institution complaint mechanisms is beyond the scope of this paper. For a practical guide to the use of these mechanisms, including the World Bank Inspection Panel and the ADB Inspection Committee, see Malone, L. and Pasternak, S. (2004) *Defending the Environment*: *Civil Society Strategies to Enforce International Environmental Law*, pp.100-7.

[35] Malone, L. and Pasternak, S. (2004) *Defending the Environment*, pp.158-9.

[36] Hunter, D., Salzman, J. and Zaelke, D. (1998) *International Environmental Law and Policy*, Foundation Press, New York, p.427.

[37] Hunter, D., Salzman, J. and Zaelke, D. (1998) *International Environmental Law and Policy*, Foundation Press, New York, p.427.

[38] Hunter, D., Salzman, J. and Zaelke, D. (1998) *International Environmental Law and Policy*, Foundation Press, New York, p.427.

[39] For more information about FIELD, see www.field.org.uk.

[40] Malone, L. and Pasternak, S. (2004) *Defending the Environment*, p.157.

[41] Richardson, B. 'A Study of the Response of Transnational Environmental Law and Policy to the Environmental Problems of East Asia and the South Pacific' (1990) *EPLJ* 209 at 225.

[42] Sands, P. (2001) 'ITLOS: An International Lawyer's Perspective' in Malone, L. and Pasternak, S. (2004) *Defending the Environment*, p.184.

[43] Permanent Court of Arbitration *Optional Rules for the Arbitration of Disputes Relating to Natural Resources and/or the Environment.* For more information, see www.pca-cpa.org.

[44] Malone, L. and Pasternak, S. (2004) *Defending the Environment*, p.195.

[45] For more information about CELCOR, visit www.celcor.org.pg. For more information about CIEL, visit www.ciel.org.

[46] Hunter, D., Salzman, J. and Zaelke, D. (1998) *International Environmental Law and Policy*, Foundation Press, New York, p.424.

[47] Environmental Law Institute (1998) *Networking in the Americas: Environmental Law Implementation and Enforcement*, pp.1-2.

[48] For more information about E-LAW, visit www.elaw.org.

[49] Environmental Law Institute (1998) *Networking in the Americas: Environmental Law Implementation and Enforcement (Draft for Review)*, Environmental Law Institute, Washington D.C., p.6.

[50] For more information about AIDA, visit: www.aida-americas.org.

[51] The EDO Network consists of nine independently constituted public interest environmental law centres in the Australian Capital Territory, New South Wales, the Northern Territory, North Queensland, Queensland, South Australia, Tasmania, Victoria and Western Australia. For more information about the EDO Network, visit www.edo.org.au.

[52] For example, the Environmental Defence Society: www.eds.org.nz.

[53] Clarke, P. and Bishop, S. (2005) *Building Civil Society Capacity to Protect the Biodiversity of the South Pacific Through Law*, (Unpublished Discussion Paper) Environmental Defender's Office, Sydney.

[54] Environmental Law Institute (1998) *Networking in the Americas: Environmental Law Implementation and Enforcement (Draft for Review)*, Environmental Law Institute, Washington D.C., p12.

[55] Environmental Law Institute (1998) *Networking in the Americas: Environmental Law Implementation and Enforcement (Draft for Review)*, Environmental Law Institute, Washington D.C., p.15.

[56] For more information about the RRRT, visit: www.undp.org.fj/rrrt.htm. For information about links between human rights and environmental issues, visit Fundación Centro de Derechos Humanos y Ambiente (CEDHA) at: www.cedha.org.ar.

[57] Hunter, D., Salzman, J. and Zaelke, D. (1998) *International Environmental Law and Policy*, Foundation Press, New York, p.6.

[58] Boer, B.(ed)(1996) *Environmental Law in the South Pacific,* IUCN, Gland and Cambridge, pp.18-19.

[59] Preston, B. (1995) 'The Role of Law in the Protection of Biological Diversity in the Asia-Pacific Region', 12 EPLJ 264 at 275.

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