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Plan First, Court Case Later

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The NSW Department of Urban Affairs and Planning (DUAP) released a White Paper in March 2001 entitled *Plan First: a review of plan making in NSW*, which proposes significant changes to the State's scheme of environmental planning. At the same time the Attorney General's Department is conducting an inquiry into the review of development applications by the Land and Environment Court of NSW.

At first glance, these two processes seem completely separate. However, the EDO considers that they are inextricably linked. For it is the planning process which sets in place the yardsticks by which development applications are measured, whether by local councils or the Land and Environment Court on appeal; and instructs those consent authorities as to which developments are and are not appropriate. And if we are dissatisfied with the end result of this process (the decision of the Court), in many cases the true reason for that dissatisfaction can be traced back to inadequate planning controls.

In this article, we examine the relationship between these two reviews, and suggest some ways in which the perceived problems with the Land and Environment Court are a result of flaws in the planning system, and are best resolved by attacking the problems at their source as part of the current review of environmental planning.

Background - planning in New South Wales

Development in NSW is controlled by the *Environmental Planning and Assessment Act 1979*. This provides for the creation of state environmental planning policies, regional environment plans, local environment plans and development control plans. The first three variety of plans can prohibit certain types of development, impose "development standards" with which proposed development must comply, or specify matters that must be taken into account by decision makers. Development control plans may only specify matters that must be taken into account by decision makers. The DUAP White Paper sets out proposed changes to the planning system.

Plan-making and the Land and Environment Court

It is fair to say that the recent inquiry into the review of development applications by the Land and Environment Court has come about principally due to strident criticism from some of those involved in local gov-

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ernment. Their complaints relate to decisions made by councils that are overturned by the Court. The Court is frequently accused by these critics of "ignoring" planning policies of Councils when it makes its decisions.

However, in our view much of this criticism is misplaced. It is simply not open to the Court to "ignore" a planning policy that has been given full legal force and which contains firm, non-discretionary standards. Any decision that did so would be able to be overturned on appeal. Rather, in many cases where a developer succeeds in overturning the decision of a council, it is because one or more of the following factors applies:

- the relevant planning instrument is outdated and no longer relevant;
- the relevant planning instruments are flexible and subjective, rather than providing clear and prescriptive standards; or
- key issues have not been addressed in an enforceable planning instrument.

In short, many councils have failed to use the planning powers that they have effectively, thereby giving developers greater opportunity to overturn council decisions in the Land and Environment Court.

Have these issues been addressed by Plan First?

Outdated and irrelevant planning instruments

Plans should be subject to continual improvement. In addition a periodic major review of state planning policies, regional strategies and local plans should be undertaken in order to determine:

- whether the objectives of the plans remain relevant, and, if so
- whether the provisions are adequate to achieve the objectives.

Plan First agrees that a periodic review should occur every three to five years. In the EDO's view three years is the most appropriate period. Not only does this ensure that plans remain relevant, it would also enable the process to be informed by the State of the Environment Report that must be prepared by the Environment Protection Authority every three years.

An extremely positive initiative is the proposal to require all local plans to include sustainability indicators so as to provide a benchmark against which the success or otherwise of the plans can be measured. However it is questionable whether the available environmental data is adequate for this purpose. In many instances this basic information is lacking.

Many plans are currently out of date and inadequate. In most instances this is not due to any antipathy towards planning on the part of the relevant local council. A major factor is that planning is quite resource intensive. Many councils, particularly those in rural and regional areas, have a small population and resource base. This places great constraints upon their ability to effectively plan. The reforms are unlikely to be fully effective if these underlying issues are not addressed.

Flexible planning or clear and prescriptive standards?

The White Paper appears to favour planning that is based upon meeting objectives that have been set for a locality over more prescriptive approaches to planning. For example the White Paper states that it is envisaged that there will be fewer prohibited uses.

This is of serious concern. In theory objective based planning allows innovation and creativity while protecting important planning values. In practice the objectives are often vague and inconsistent resulting in inadequate protection for the environment and a lack of control over developments.

The White Paper clearly states that prohibitions will be retained. It also suggests that other prescriptive mechanisms such as development standards will be retained, however this is not express. Currently State Environmental Planning Policy 1 "Development Standards" effectively allows mandatory development standards to be ignored where, in the opinion of the Council, "strict compliance … would, in any particular case, be unreasonable or unnecessary". This significantly weakens the enforceability of planning provisions, and allows great scope for them to be varied arbitrarily in the case of specific developments. Plan First is silent on this issue.

Failure to include important matters in the planning instruments

Failure to include important matters in the planning instrument commonly arises in two situations:

- the Council has adopted an informal policy on types of developments it does and does not consider desirable, but has not bothered to give this policy legal force by including it in an environmental planning instrument; or
- the environmental planning instruments defer key matters to development control plans, which are not legally enforceable. This sends a message that the standards contained therein are not highly regarded.

There is very little that can be done in relation to the first matter other than for the State Government to take a more "hands on" approach to its role in the approval of local plans. This does not appear to be proposed.

The second issue is more important. In NSW there are two types of "local" plan. The local environment plan can

include legally enforceable standards that developments must comply with. Development control plans on the other hand must be taken into consideration by a planning authority when making its decision but do not necessarily need to be complied with.

Plan First proposes to remove the distinction between local environment plans and development control plans. This should result in the local plans being more certain – although, unless SEPP 1 is repealed or amended, portions of those plans will still be able to be overridden.

Why not simply remove the power to appeal to the Court?

A simple response to the perceived problem of expensive litigation is to remove the right of developers to appeal decisions relating to developments to the Land and Environment Court.

However the EDO considers that if anything, merits appeal rights to the Land and Environment Court should be expanded, rather than removed.

The Court can act as a valuable check and balance against approval authorities that would otherwise have untrammelled reign to determine applications as they saw fit. In this regard, it is worth noting that the Court in merits appeals is acting in the same role as the Council, and has all the Council's powers, as well as similar constraints. Apart from a few exceptional cases[1] , the Court cannot generally approve any development that the original consent authority could not have approved. This means that the decisions of the Court that are under attack could also have been made by an approval authority.

Some local government bodies have been attacking the Court by pointing to developments that the Court has approved which those bodies consider inappropriate. However the fact remains that these developments were approved in accordance with the planning framework laid down under Pt 3 of the EP&A Act, and are therefore of a type which the planning system has permitted to be approved. The criticism also neglects the fact that local councils are responsible for many decisions to approve developments that members of the community consider inappropriate, and those community members are unable to appeal due to current constraints on rights of merits appeal by third parties.

The Court fills a very important function in hearing merits appeals by third parties against "designated" developments – a set of developments which have been considered to potentially have significant environmental impacts such as abbatoirs, mines, chemical plants and waste disposal facilities. If the Court's merits appeal jurisdiction were to be removed, this valuable public appeal right would be lost.

One area that needs particular attention is the ability of third parties to be joined to any development appeal to the Court. At present, the Court sometimes grants leave to third parties to be heard in appeals relating to non-designated developments, but this leave does not usually extend to making the third parties an actual party to the proceedings. It is often the case that members of the public are not content for the local Council to speak on behalf of all residents, and wish to raise further matters that the Council does not want to raise. The Court should be willing and able to grant such persons full status as parties to the proceedings, if sought, so that the question of impact of the development can be fully considered.

Conclusion

Many of the reforms detailed in the Department of Urban Affairs and Planning's Plan First White Paper will result in improvements to the planning system. One of the issues that has not been dealt with adequately in the White Paper is the failure to recognise that planning and approval are two sides of the same coin. One should not be considered without at least some regard to the other.

In that light, it is surprising that the NSW Government is simultaneously reviewing both the planning process, and an important aspect of the approval process, without any apparent linkage between the two reviews. We consider that these processes should be undertaken together. In particular, the perceived dissatisfaction with some decisions of the Land and Environment Court should not be attributed entirely to the Court; rather, at least some of the blame must be attributed to the planning instruments which the Court is required to apply.

Endnotes:

1 For example, the Court is able to approve development likely to have a significant effect upon threatened species despite the absence of the concurrence of the Director-General of National Parks and Wildlife to that development.

A copy of the complete EDO (NSW) responses to the PlanFirst White Paper and the review of the NSW Land and Environment Court are available on the EDO website at: www.edo.org.au/edonsw/edonsw.htm

Senate Committee Heritage report- Commonwealth's heritage scheme strongly criticised

Marc Allas, Solicitor, EDO NSW

The Senate Environment, Communications, Information Technology and the Arts References Committee (chaired by Senator Lyn Allison, of the Australian Democrats) has recently released a report on its inquiry regarding the Federal Government's proposed heritage scheme (see v61 Impact p6). The main report has strongly criticised the proposed heritage amendments to the *Environment Protection and Biodiversity Conservation Act 1999* ('the EPBC Act'). A minority report by Government Senators disagreed with most of the Report's recommendations. Another minority report by Labor Senators expressed concern over the basic principles supporting the heritage amendments, including the ability to delegate approval powers on issues of national significance to the States through bilateral agreements.

The proposed amendments will introduce a new National Heritage List, containing places of "national heritage significance" and a Commonwealth Heritage List, which will list places on Commonwealth land that are of heritage significance. Actions that are likely to have a significant impact on these places will require an approval from the Minister of Environment under the EPBC Act. The two lists will effectively replace the Register of the National Estate. This article will outline the main recommendations of the Senate Committee report.

1. Commonwealth/State relations

The Committee recognised that any heritage scheme must be in accordance with the 1997 Council of Australian Government ("COAG") *Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment*. In that agreement, the Commonwealth and States/ Territories agreed that:

- the Commonwealth should protect the heritage of nationally significant sites, whether on Commonwealth or private land; and
- the Commonwealth undertake to bind Commonwealth lands to State environment and planning laws.

The Committee noted that the Commonwealth has failed to deliver on the second undertaking, and recommended that the Commonwealth move towards this agreed action.

Secondly, the Committee recommended that the Commonwealth should not restrict its involvement in heritage to just the proposed National and Commonwealth Lists, and that the Commonwealth should actively pursue measures to achieve common standards and benchmarks for heritage protection across the States.

2. Role of the Australian Heritage Council

The Committee expressed concern over the unnecessary restrictions placed on the independence of the proposed Council. In particular, the Council is unable to act of its own motion, without ministerial direction. The Committee recommended that the Council's role be broadened to reflect the wider powers enjoyed by the current Australian Heritage Commission. The final listing decision should reside in the Council, not the Minister, as the decision to list is a technical one, not a political one. In this respect, the Committee rejected the views of the Executive Director of the Australian Heritage Commission that heritage listings are a political decision, giving rise to "unbudgeted compensation liabilities".

The Minority Report by Government Senators disagreed that the Council should be more independant. In their view "...Government Senators reject the implication that to work to the direction of the Minister implies that the agency will be prevented from carrying out its tasks effectively and professionally".

The Committee also rejected the States' view that they should have a veto against any proposed listing.

3. Register of the National Estate

The Register of the National Estate includes over 13,000 places that have aesthetic, historic, scientific or social significance to the community (as well as over 7,000 sites pending). The Register is kept by the Australian Heritage Commission under the *Australian Heritage Commission Act 1975 (Cth)*.

A listing on the Register only restricts the activities of the Commonwealth in relation to a listed place. This narrow ambit reflected the assumptions at the time of the limited nature of Commonwealth power over the environment under the Constitution.

The new regime introduces a significant improvement, in that the new heritage provisions will also apply to private land. However instead of 13,000 sites, the new lists are likely to apply to only a few hundred "nationally significant" sites.

The new regime proposes to abandon the Register as a statutory list, and merely keep it as an information source available over the internet. The Committee disagreed with this approach. The Committee pointed out that even though the Register did not place any legal restrictions on places owned by the private sector, it nonetheless gave 'moral rights' against inappropriate developments. Or in other words, it gave an indication that a certain place was recognised by Commonwealth laws as having special heritage significance.

Despite the development of the two national heritage lists, the Committee recommended that the Register of the National Estate should be retained and actively developed and expanded as a statutory list.

The Register overcomes the parochialism of State/Territory regimes, which do not cover the same breadth and category of sites. The Committee encouraged the Commonwealth to continue working towards including National Estate sites onto State lists, and recommended all National Estate sites on Commonwealth land should be incorporated automatically into the Commonwealth Heritage List.

Currently, all Commonwealth actions having a significant impact on the environment require approval under the EPBC Act. Environment Australia's view is that the definition of 'environment' includes all aspects of heritage. However the Committee recommended that the statutory definition for 'environment' be amended to expressly include 'heritage' to avoid confusion. Additionally, the Committee recommended that Commonwealth heritage places should be recognised as matters of "national environmental significance" under the EPBC Act.

4. Indigenous Heritage Values

Indigenous interests expressed the view that indigenous heritage may not be appropriately categorised as 'nationally significant', due to the identity of different Aboriginal nations within Australia. However, the Committee recommended that the Commonwealth investigate with indigenous people the appropriateness of placing all indigenous sites currently on the Register of the National estate directly onto the new Commonwealth list.

5. Accountability

In order to increase the transparency and accountability, the Committee recommended that the Australian Heritage Council should be required to release its heritage assessments to the public on request.

6. Commonwealth Heritage

The Committee recommended that Commonwealth agencies should implement a heritage inventory of their portfolios and prepare a heritage strategy for their management. These heritage strategies should be detailed in an agency's report.

7. Compensation

The Australian Mining and Exploration Council ('AMEC') submitted to the Committee that compensation should be payable when heritage properties are listed. The Committee rejected this, stating:

> 'The Committee considers that as a matter of general policy, where the Australian people wish to protect a place for its heritage values, the owners of such places should, as much as possible, not suffer financial disadvantage. The Committee notes, however, that as with planning laws which have similar impacts, some positive, and some negative, mandatory compensation is not an effective policy nor is it a policy that is generally applied in Australia or elsewhere. In addition the Committee notes the heritage listing, in some circumstances, increases the value of a property'.

8. Triggering of 'action'

It was recommended that the Government consider means to ensure that actions triggering assessment under the *Australian Heritage Commissions Act 1975* are also assessed under the proposed scheme, especially the assessment of grants.

The Committee recommended that the Government consider incorporating further requirements for Commonwealth actions that have a significant impact on heritage, such as a duty to consider alternatives, and a duty to minimise impact on heritage.

Adopting the EDO Network's submission, the Committee recommended that the Government consider additional administrative means to protect Commonwealth heritage on lands proposed to be sold, such as leasing instead of sale, listing a place on a State Register, or selling the place to a State/Territory Government rather than the private sector.

9. 'Significant Impact'

The Committee recommended that the offence provisions be amended to prohibit any significant impacts on a "heritage place or its heritage values", instead of only protecting "heritage values".

10. Authority of the Minister of Environment

Under the current EPBC Act, whilst the Minister may request a referral under the EPBC Act, the Minister can not compel a referral if the proponent fails to do so. The Committee considered there was a case for strengthening the "call-in" powers of the Minister. The Committee recognised that this would effect the operation of the EPBC Act in a range of matters beyond the scope of the inquiry.

Conclusion

Overall, the Committee has agreed with a considerable number of submissions expressing concern over the increased Ministerial control of heritage protection, the demise of the Register of the National Estate and the equally disappointing demise of a truly independant heritage body. The Minority report by the Labor Senators stated that Labor will seek to amend the legislation.

Copies of the Report can be obtained from: www.aph.gov.au/senate/committee/ecita_ctte/hert2000/index.htm

Global Chemical Treaty means Australia must act on dioxin

Matt Ruchel, Greenpeace Australia

Between 21-25 May this year the governments of the world gathered in Stockholm, Sweden to finalise an international treaty on the reduction and elimination of persistent organic pollutants (POPs), often called "poisons without passports".

These highly toxic chemicals respect no boundaries and once released into the air or water, travel unchecked. They travel through a repeated process of evaporation, deposit, evaporation, deposit known as the "grasshopper effect". These globe-trotting poisons don't break down easily or dissolve in water and as a result they stay in the environment for decades, possibly centuries. They do dissolve easily in fats and can therefore build up in the fatty tissues of animals and humans.

The treaty obligates parties to address initially 12 POPs, the so called dirty dozen, which include organochlorine pesticides aldrin, DDT, deildrin, endrin, chlordane, hexachlorobenzene (HCB), heptachlor, mirex, toxphene; industrial chemicals polychlorinated biphenyls (PCBs); and industrial by-products dioxins and furans.

Australia announced its intention to sign the treaty at the Diplomatic meeting in Stockholm. The Foreign Minister Alexander Downer noted in the announcement that " Australia had already implemented stringent measures, consistent with the international agreement, to reduce and control POPs. "

This statement is only partially true.

Australia has banned eight of the organichlorine pesticides and PCBs short-listed in the convention and has established management plans for their collection and disposal. However, Australia is the only industrialised country which continues to use the pesticide mirex for the control of termites in the Northern Territory and northern Western Australia. Most other industrialised countries banned this chemical in the 1970's, yet Australia has a stockpile which could allow continued use for between 20-40 years. Australia has sought an exemption under the treaty for continued use of this substance.

Australia, unlike other industrialised countries also has comparatively little regulation of the ultra toxic by-products dioxins and furans. Dioxins and furans have no useful purpose and are by-products of: the manufacture of PVC and pesticide; incineration; pulp and paper bleaching with chlorine; and the smelting and recycling of metals. In 1998, Greenpeace identified 67 sites in Australia that produce or are likely to produce dioxin. Twenty of these sites are considered highly contaminated, releasing dioxin above internationally accepted standards and requiring urgent action.

In 1998, a comprehensive review of scientific studies persuaded World Health Organisation (WHO) experts that "subtle effects might already be occurring in the general population in developed countries at current background levels of exposure to dioxins and dioxin-like compounds." WHO then substantially decreased l the tolerable daily intake (TDI) for dioxins and included not only the dioxins but also the dioxin-like PCBs. At the same time, WHO "recommended that every effort should be made to reduce exposure to the lower end of this range."[1]

There is still little information about how much dioxin Australians are exposed to. However, in New Zealand leaked cabinet documents reveal that levels in the bodies of New Zealanders were estimated to be at, or marginally exceed,tolerable daily intakes set by WHO and the US Agency for Toxic Substances and Disease Registry . Cancer risk estimates may exceed one additional cancer per thousand New Zealanders, which is high.

The POPs Convention (to be called the Stockholm Convention) places obligations on Parties to "reduce total releases …with the goal of their continuing minimization and, where feasible, ultimate elimination" for POPs produced as by-products from industrial process (such dioxins and furans, but also including PCBs and HCB).

Actions specified under the treaty include :

- Developing a national or regional action plan which incorporates best available techniques and best environmental practices (article 3);
- Promoting application of practical measures to reduce or eliminate sources (article 3);
- Promoting "…substitute or modified materials, products and processes to prevent the formation and release of the chemicals…" (article 3).
- Properly assess and remove the potential for dioxin and other POPs to be produced in new facilities (Annex C, Part V, B(b))

In a flurry of activity, prior to the Stockholm Convention State & Federal Ministers under the Australian New Zealand Environment and Conservation Council (ANZECC) released a discussion paper on establishing a National Dioxin Program. Groups were given six weeks to comment on the discussion paper and a series of workshops were held in South Australia, Victoria, New South Wales and Queensland. The scope of a program is expected to be

discussed at the ANZECC meeting on June 29, 2001 in Darwin. The tone of the discussion paper was conservative with a strong emphasis on further research.
Not only is there a real health threat posed by dioxins but now we have an international mandate for the National Dioxin Program to focus on reduction of dioxin and furans and other POP by-products, not just conduct more research.

While the world's governments are signing on to this convention which seeks reduction and elimination of these chemicals Australia is being inundated with dioxin producing industries. Dioxin producing large scale municipal waste incinerators are proposed for Western Australia and Tasmania. Magnesium smelters, which depending on the type of technology used, can produce a cocktail of POPs are proposed for South Australia, Queensland and Tasmania. Stage 1 of the Stuart Oil Shale project in Gladstone Queensland, was approved without assessment of dioxin and was later found to be a significant source. Homebush Bay, one of the world's worst dioxin contaminated sites has still not been cleaned up. Hardly implementation of 'stringent measures' to control dioxin.

Greenpeace maintains that three key things must be addressed in a National Dioxin Program:

- a goal to reduce dioxin emissions in Australia by 50% by 2005.
- a process to ensure all new facilities are assessed to avoid the production of POPs such as dioxins and furans. (This could be achieved via an amendment to the Federal *Environment Protection Biodiversity and Conservation Act* (EPBC Act)).
- research on the levels of dioxin in the population and environment, and programs to reduce exposure to high risk groups.

For more information please contact Matt Ruchel:
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[1] Van Leeuwen, F., Younes, M. 1998. WHO revises the Tolerable Daily Intake (TDI) for dioxins. Organohalogen Cpds. 38: 295-298.

Pacific Youth Environment Network Calls For Global Action

Viisti Dickens, Pacific Youth Environment Network

The Pacific is a diverse region, both geographically and culturally. It boasts a high ecosystem and species diversity, high endemicity, economic and cultural independence, vulnerability to a wide range of natural and environmental disasters, and a diversity of cultures, languages and customs, mostly focused on the marine and coastal environment. All island nationals share a reliance on natural resources through agricultural production, forestry and fisheries and indirectly through tourism.(United Nations Environment Program (UNEP) GEO, 1999).

However on a global scale, due to its relatively limited population and seemingly negligible economic and political clout, the Pacific is often overlooked when it comes to international decision-making.

Further, a UNEP GEO report states: "over the past 100 years the Pacific has experienced far-reaching economic changes, which have lead to environmental change and degradation" (UNEP GEO, 1999:1). Increasing climate change due to increasing greenhouse gas emission exacerbates these conditions.

This message was brought home during the recent Pacific Youth Caucus on the Environment (PYCE), held in Wollongong Australia April 18-21 2001[1]. The inaugural conference was the first event realised by the Pacific Youth Environment Network, a collective of Pacific environmental activists drawn from a wide range of professions. The themes of Youth Empowerment and Action and Equity, Sustainability and Technology were overarching concerns for the caucus, with the sub-themes of Resource Ownership, Partnerships and Poverty and Development also receiving attention. Also covered were issues of waste management and significantly, climate change.

According to a study Cities, Sea and Storms: Managing Change in Pacific Island Economies, sponsored by the World Bank during the Global Convention on Climate Change (The Hague, November 2000), the most substantial impacts of climate change could include: losses of coastal infrastructure and land; more intense cyclones and droughts; failure of subsistence crops and coastal fisheries; losses in coral reefs; and the spread of malaria and dengue fever.

Such issues have immediate ramifications for Pacific islanders in their daily lives. Tawati Uawati, one of the delegates who recently attended PYCE explained how villagers are already forced to adjust to rising tides.

" Every day the tides come up under some houses in the villages. My people have to move their cooking equipment inland just to eat. We are afraid our island is disappearing," said Mr Uawati.

In the wake of increasing global concern about climate change

and global warming following the recent withdrawal of the USA from the international Kyoto Protocol[2], there has never been a greater need for governments around the world to work together to alleviate symptoms like those reported by Mr Uawati at PYCE.

In a statement issued to public and private sector leaders around the world, PYCE delegates demanded increased action regarding a conclusive global climate change agreement: "We the Pacific Youth Environment Network call for a binding, long-term agreement amongst the International community to mitigate the detrimental effects of climate change upon our region.

We hope that this document will incorporate specific protocols that address greenhouse gas emissions and the other causes of climate change. We call for immediate global action!"

As early as March 2001, the G8, a group of the world's eight largest industrialised nations, issued a declaration committing "to strive to reach agreement on outstanding political issues to ensure in a cost effective manner the environmental integrity of the Kyoto Protocol". As at 19 March 2001, 84 Parties had signed and 33 Parties had ratified or acceded to the Kyoto Protocol (http://www.unfccc.de/resource/convkp.html). However to date the treaty has not gone into effect because it as not been ratified by a sufficient number of countries.

Recent statements from major stakeholders like the USA have accentuated the difficulties associated with reaching international agreement whilst meeting national interests. The USA's current Bush administration claims that implementing the protocol or regulating the carbon dioxide emission from power plants would harm the national economy. The New Yorks Times (March 29 2001) quotes Ari Fleischer, the White House spokesman, who said: "The president has been unequivocal. He does not support the Kyoto treaty…It is not in the United States' best economic interests".

However in the absence of adaptation and implementation of emission standards, a high Pacific island such as Viti Levu in Fiji could experience damages of US$23-52 million a year by 2050, equivalent to 2-4 percent of Fiji's current Gross Domestic Product (GDP). A group of low islands such as the Tarawa atoll in Kiribati could face average annual damages of more than US$8-$16 million a year, equivalent to 17-34 percent of Kiribati's GDP. (taken from draft report Cities, Sea and Storms: Managing Change in Pacific Island Economies published November 21, 200 at The Hague, during the Global Convention on Climate Change).

It is these statistics coupled with the human stories recounted by delegates at PYCE that highlight the urgency of the situation. Engaging in national and international decision making processes as well as community education will therefore be pivotal for the Pacific Youth Environment Network. The outcomes of PYCE, which include a number of significant declarations[3], will be sent to all pertinent high-level meetings during the lead-up to the World Summit on Sustainable Development to be held in South Africa next year.

However without the support, vision and action of decision makers in the international community to impose greenhouse gas emissions targets, climate change will continue to wreak havoc in the Pacific and around the world. The Kyoto dilemma may have caused a tsunami that continues to rock the international treaty boat, but for islanders like Tawati Unati of Kiribati, it is only a matter of time before the voices of his people are completely drowned out.

For further information about the Pacific Youth Environment Network see www.pyce.org.

Wollongong Declaration

This declaration was created with the specific intent of submission at the next Earth Summit (Rio+10) in Johannesburg 2002 allowing for representation of the concerns of young delegates from the Pacific in this forum. The declaration identifies climate change and sea level rise as the most significant issue facing the Pacific. It also identifies the right to intellectual and cultural heritage, environmental restoration and protection, the transportation of waste and hazardous substances, nuclear issues, mining development issues, and youth involvement in decision making and environmental policy as critical to the environmental and social well-being of the Pacific. The Wollongong Declaration articulates our vision of a sustainable future as young delegates from the Pacific, and also our specific requests to our governments and the international community to address the environmental and social dimensions of the environmental crises threatening our futures.

Endnotes:

[1]The Pacific Youth Caucus on the Environment spanned four days of formal proceedings during which participants engaged with a range of speakers from academic, business, non government and governmental backgrounds, in workshops and in planning and drafting sessions.

[2]The Kyoto Protocol – a treaty drawn up in 1997 committing the world's industrialised nations to cutting emissions of greenhouse gases – requires signatory countries to develop programs to reduce emissions of greenhouse gases and to report on their progress.

[3] These include the Wollongong Declaration and Climate Change Declaration. Other significant outcomes include the Pacific Youth Strategy and the Pacific Youth Action Plan, Whale Sanctuary Statement, and Youth State of the Environment Report.

Win for objector appeals

Case note: *Wilson v Bourke Shire Council and ors* [2001] NSWLEC 28

By Chris Norton, Senior Solicitor, EDO(NSW)

A recent decision of the NSW Land and Environment Court represents a victory for third party objectors, finding that merits appeals by third parties under s 98 of the *Environmental Planning and Assessment Act 1979 (NSW)* (the 'EP&A Act') relate to the whole of the development the subject of a consent even where only part of that development has triggered the right of appeal.

Facts:

The applicant, Mr Wilson, is appealing on behalf of the Gurrungar Environment Group against a consent granted by Bourke Shire Council to Hoynes Wheeler and Thorne Pty Ltd for a 10,800ML above ground water storage facility and irrigated agriculture development on the property "Beemery", between Bourke and Brewarrina. "Beemery" is owned by Clyde Agriculture Ltd. The Group considers that the development will cause significant environmental impacts by raising the water table beneath the development, increasing salinity levels, increasing extraction of water from the Barwon/Darling River and increasing saline water flow into the river. EDO(NSW) is acting for Mr Wilson.

Sch 3 of the *Environmental Planning and Assessment Regulations 1994 (NSW)* contains a list of 'designated developments'. When consent is sought for designated development, an environmental impact statement has to be prepared. Section 98 of the EP&A Act provides that an "objector" who was dissatisfied with the determination of a consent authority to grant consent to a development application may appeal to the Land and Environment Court. The term "objector" is defined to mean a person who has objected to designated development. In practice, this means a person who objects to designated development has the right to have a decision to approve that development reviewed on the merits by the Land and Environment Court.

Both the water storage facility and the irrigated agriculture development required development consent. One development application was lodged for the entire development, and one development consent was issued. The artificial waterbody satisfied the test for 'designated development' in Sch 3, and an environmental impact statement was prepared for the whole development. However, if the artificial waterbody had not been part of the development application, it would not have been designated development.

Mr Wilson's appeal was brought under s 98 of the EP&A Act. However, the Council sought an interlocutory order that Mr Wilson's appeal be limited only to the water storage facility component of the development application, as it was only that part of the development that was designated.

Held:

The Court ruled in Mr Wilson's favour, finding that Mr Wilson's appeal rights extended to the entire consent for the development. This is because s 98 does not expressly confine an objector's right of appeal to the designated component of the development application, but rather grants the right to appeal to any objector dissatisfied with a determination of a consent authority. In this case, Mr Wilson was an objector (having lodged an objection to an application for consent for designated development), and was also "dissatisfied with the determination of the consent authority".

Comments:

This decision is of great significance for public participation in the development assessment process. It confirms that once one component of a development application is "designated development", the requirements to prepare an environmental impact statement and arrange for public exhibition and comment apply in respect of the whole development, not merely the portion that is designated. Merits appeals by third party objectors apply to the whole development.

This is a commonsense result. Difficulties would result if a third party's merits appeal rights extended only to part of a development consent. Development consents are almost inevitably granted subject to conditions, and it would be conceivable that the Court on appeal might impose different conditions on a consent, or refuse consent altogether. If the Court's decision applied to part only of the consent granted by the council, it would create confusion and uncertainty. Precisely what would be the limits of the Court's decision? How would conflicts between conditions be resolved?

Another difficulty in attempting to separate the development application into different parts would be the need to consider the other portions of the development anyway as part of the environmental impact assessment process. For example, in the case of the Beemery development, one of the necessary impacts of the artificial waterbody is the use that will be made of it to irrigate the cotton crops. It would be artificial to attempt to divorce different elements of a development comprising several interrelated parts, and to consider them separately.

Ihis decision relates to the wording of s 98 prior to its amendment in 1998. There is a strong argument that the decision would still apply to development applications determined under the new wording of the EP&A Act, but there is no conclusive judicial statement on this matter as yet.

The restraint of environmental consequences of previous breaches of law

Casenote: Winn v Director General of National Parks and Wildlife and ors [2001] NSWCA 17

Marc Allas, Solicitor, EDO NSW

The NSW Court of Appeal in Winn v Director General of National Parks and Wildlife and ors [2001] NSWCA 17 has held that breaches of laws must be "present and continuing" before relief can be granted under open standing provisions for contraventions of Acts impacting on the environment.

The Court upheld an appeal brought by the applicant, Mr Winn, an interested member of the public, who sought relief against a company's mining operations. However, the significant aspect of the case is the majority's view that past breaches of laws can not be subject to relief, even if the consequences of those breaches are still present.

Background

The Tomago sandbeds are an extensive coast sand deposit north of Newcastle, between the Hunter River and Port Stephens. They are 32km long, and between 4 and 14 km wide with an average depth of 14m.

RZM Pty Ltd ("RZM"), a mining company, had for some years been conducting sand mining on the Tomago sandbeds, pursuant to two development consents and several mining leases. However at the time of proceedings, RZM had permanently stopped mining operations at Tomago. Even though mining had stopped, the detrimental effects on the aquifer were still on-going, and would be present for the next 20 years.

There was evidence that the sand mining operations of RZM had significantly elevated the iron and arsenic levels in the aquifer found in the sandbeds, thus polluting the potable water supply of the Hunter area.

The applicant's claim

The applicant brought proceedings against RZM (see previous v45 Impact p15) for breach of conditions of its development consent and mining lease requiring RZM to "conduct operations" so as not to cause any detrimental effect to the aquifer, and to cause no increase in the saline, iron or other deleterious content of the water ("groundwater conditions").

In respect of breaches of the development consent, the applicant sought relief under s 124 of the *Environmental Planning and Assessment Act 1979 (NSW)* ("EP& A Act") which provided that any person can "remedy or restrain" a breach of that Act. This article will not be examining this part of the case.

Rather, the more interesting part of the case was the fact that in respect of breaches of the mining leases, the applicant sought relief under s 25 of the now repealed *Environmental Offences and Penalties Act 1989 (NSW)* ("EOP Act") which provided that any person may bring proceedings to "restrain a breach" (not "remedy") of any Act, if the breach is causing or is likely to cause harm to the environment. Section 25 has been re-enacted in substantially the same form as s 253 of the *Protection of the Operations Act 1999 (NSW)* ("POE Act").

Although RZM was conducting some limited form of remediation of the affected land, the applicant sought specific orders for more stringent remediation of the site. In response, RZM's submitted that because mining at the sandbeds had ceased, RZM was not "conducting operations" anymore and therefore could not be "restrained" for breach of the groundwater conditions in the mining leases.

The decision-"present and continuing breach of law"

At first instance, the Land and Environment Court (per Talbot J) dismissed the applicant's claim for breach of conditions. The Court of Appeal upheld the appeal, and found that RZM had been responsible for some breaches of conditions. However the major significance of the case is the Court of Appeal's interpretation of the word "restrain" and its reasoning that past breaches are not eligible for relief under the EOP Act.

The majority of the Court of Appeal (Spiegelman CJ, Powell JA) held that s 25 only applies to current breaches, and not past breaches even if they have current effects. The first step is to properly characterise a condition, and consider what range of activities may lead to breach of that condition. The proper construction of the groundwater condition was to focus on the operations, and not to focus on the consequences of mining. Because the relevant condition required RZM to "conduct operations" in a certain way, "…if there are no operations, there is no present and continuing breach".

Stein JA in dissent held that the on-going contamination could be restrained under s 25. His Honour held that the essence of the groundwater conditions was to ask whether the operations were causing a detrimental effect on the aquifer. His Honour found that "the breaches, that is the

...cont' from page 11
contamination of the aquifer, are continuing. They are the continuing consequences of the mining operations".

The Court commented that once one can prove that there is a present and continuing breach of law, the term "restrain" should not be interpreted in a narrow sense, permitting only injunctions. Rather "restrain" permits the Court to make whatever orders "to prevent" or discontinue the harm, including declarations, and mandatory injunctions, following Brown v EPA (1992) 78 LGERA 119.

The Court also suggested that a company's remediation of the site could constitute the continuing conduct of mining operations in breach of environmental conditions (although all three judges left this issue unresolved).

Comment on conditions

The decision of Winn has significant implications for developments that have ceased, for instance through the insolvency of a developer, but which cause on-going contamination to the environment. Conditions of approvals which are drafted to govern only a development's "operations" may not be effective in regulating environmental effects of on-going contamination left behind by a development.

Speigelman CJ's reasoning suggests that an appropriately drafted condition which did focus on the consequence of mining such as "the effect of the mining activities subject to this development consent must not pollute the waterways", might be construed as giving rise to a breach, even after operations had ceased.

Consent authorities and other approval bodies should consider drafting conditions that focus on the consequences of a development, and not just its operations. This is possible under ss 79C and 80A of the EP& A Act, and ss 45 and 71 of the POE Act.

Comment on "remedying" a breach

Whilst the Court held that s 25 of the EOP Act could not apply to past breaches, s 124 of the EP& A Act was sufficient to encompass orders to "remedy" past breaches in law, and remediation. However s 124 permitted only the remedying of breaches to the EP& A Act, not other Acts, like the Mining Act.

Like the EP& A Act, the *Native Vegetation Conservation Act 1997 (NSW)* ("NVC Act"), and the *National Parks and Wildlife Act 1974 (NSW)* allow open standing to "restrain or remedy" a breach. Winn's case confirms that if land clearing has taken place in breach of the NVC Act and regulatory authorities fail to prosecute, any person can bring action in the Court to remedy that breach, and seek orders for remediation.

[The matter has been remitted to the Land and Environment Court to determine findings of fact regarding the breaches of the EP& A Act and appropriate remediation orders].

First land clearing prosecution commenced

Andrew Macdonald, Solicitor, EDO(NSW)

The Department of Land and Water Conservation has commenced the first prosecution for an offence under the *Native Vegetation Conservation Act 1997*. On 22 March 2001, the Department commenced proceedings in the Land and Environment Court against Prime Grain Pty Ltd, a Moree company, and Mr Ronald Greentree. The Department alleges that the defendants cleared over 2,000 hectares on property near Mungindi in contravention of the Act.

The offences carry penalties of up to $1.1 million. According to documents tabled in State Parliament, there have been around 380 breaches of the Act reported to the Department since the Act came into force.

The Department has stated that of these reported breaches, around a third are currently still under investigation. In the remaining cases, no offence was found to have been committed while others were dealt with by such means as stop work orders or revegetation orders.

The Fraser Island Dingo Case

Chris McGrath
LLB (Hons), BSc, LLM (Environmental Law), PhD candidate (QUT)
Barrister-at-Law

In the recent Fraser Island Dingo Case the Federal Court declined to grant two applications sought under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ("EPBC Act") for interim injunctions restraining the culling of dingoes by the Queensland Government within the Fraser Island World Heritage Area. The decision is only the second judicial consideration of the new EPBC Act but again it highlights the sea change for public interest litigation and the protection of biodiversity that has come about with the new Commonwealth legislation.

Background to the case

On 4 May 2001 a nine-year-old boy, Clinton Gage, and his younger brother went from their campsite at Waddy Point within the Fraser Island World Heritage Area to explore the nearby sand dunes. They were only 150m from the campsite when they noticed that two dingoes were circling them. Scared by the dingoes, they started to run for their campsite, Clinton fell and was attacked by the dingoes. His brother raised the alarm at the campsite and returned with his father to find Clinton had been mauled to death by the dingoes. Realising that the dingoes still represented a danger, the father sent the young brother back to camp. The dingoes attacked him but the father managed to fight them off.

The two dingoes were shot later that day by officers of the Queensland Parks and Wildlife Service ("QPWS"). What followed was a media and public outcry over the attack and management of dingoes generally within the Fraser Island World Heritage Area.

In response to the media and public outcry that followed the attack, the Queensland Government ordered a cull of dingoes within the Fraser Island World Heritage Area. Initial information was scant but conservationists and representatives of the traditional owners became increasingly concerned during the following week as media reports of the culling continued and the public statements from the Queensland Government indicated the cull might extend to a large number of dingoes and continue over an extended period. On Friday 4 May 2001 there were media reports of 12 dingoes being culled on Thursday 3 May 2001. The Queensland Government refused to hold off on the immediate cull so that a considered management decision could be made or to confirm that the cull would be limited to a certain level.

The concern over the culling of dingoes within the Fraser Island World Heritage Area was not simply an esoteric love of dogs or wilderness values. Dingoes play an important ecological role within the Australian environment as a high order predator contributing to ecological and evolutionary processes.[1] Although their total numbers are difficult to estimate, it is believed that there are between 100-200 dingoes within the Fraser Island World Heritage Area[2] The unique and high biodiversity of Fraser Island, including the genetic purity of the resident dingo population was one basis of the nomination and listing of Fraser Island on the World Heritage List under the World Heritage Convention.[3] In discussing the island's unique biodiversity, the nomination of Fraser Island by the Government of Australia noted the significance of the resident dingo population as follows:[4]

> "Fraser Island supports a population of several hundred dingoes (*Canis familiaris*), regarded as the purest strain of dingo remaining in eastern Australia. The dingo belongs to an equatorial group of primitive dogs. It arrived Australia relatively recently and may have been introduced by Aborigines. …"

Given the small numbers, ecological importance and status as part of the world heritage values of dingoes on Fraser Island and faced with a situation of considerable uncertainty over the possible continued cull over an extended period, two applicants urgently sought interim injunctions to restrain the cull on the afternoon of Friday 4 May 2001 under the EPBC Act.

The relevant law

At a State level, dingoes (Canis familiaris dingo) are excluded from general protection as native fauna under the *Nature Conservation Act 1992 (Qld)* ("NCA").[5] However, within protected areas such as the Fraser Island National Park and World Heritage Area, they are protected under s 62 (Restriction on taking etc. of cultural and natural resources of protected areas) of the NCA. While the decision of the Queensland Government to cull dingoes on Fraser Island was arguably *ultra vires* (i.e. beyond its legal power) as inconsistent with the management principles for National Parks stated in s 17 (Management principles of national parks) of the NCA[6] and that standing could possibly have been obtained to challenge the decision through judicial review,[7] the EPBC Act presented a far simpler and more direct avenue to challenge the *merits* of the cull.

While dingoes are not listed as threatened under the EPBC Act, as part of and contributing to the world heritage values

of the Fraser Island World Heritage Area, they are protected under s 12 of the EPBC Act, which, as relevant here, provides as follows:

> *12 Requirement for approval of activities with a significant impact on a declared World Heritage property*
>
> *(1) A person must not take an action that:*
> *(a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or*
> *(b) is likely to have a significant impact on the world heritage values of a declared World Heritage property.*
>
> *Civil Penalty:*
> *(a) for an individual – 5,000 penalty units;*
> *(b) for a body corporate- 50,000 penalty units.*

This provision has been analysed elsewhere.[8] Of particular relevance to the Fraser Island Dingo Case was that the State of Queensland is a legal person and capable to be sued.[9] Section 4 of the EPBC Act states that the Act binds the Crown in each of its capacities, which includes the Crown in Right of Queensland.[10] Although standing (i.e. the legal right to bring an action) and the general obligation to give an undertaking as to damages when seeking an interim or interlocutory injunction have caused considerable difficulty to public interest litigants previously, ss 475 and 478, (which widen standing for conservationists and conservation groups and remove the requirement to give an undertaking as to damages,) appear to have largely overcome these difficulties.[11] Indeed, the respondent Queensland Government did not raise these issues in argument nor any constitutional issues.

The decision of the Federal Court

The two applications for an interim injunction to restrain the culling of dingoes within the Fraser Island World Heritage Area, *Schneiders v The State of Queensland* and *Jones v The State of Queensland* [2001] FCA 553,[12] were heard together by Justice Dowsett in the Federal Court at Brisbane late on Friday 4 May 2001. The applicants gave affidavit evidence that the dingoes were part of the world heritage values of the Fraser Island World Heritage Area and an ecologist gave evidence as to the impact that the culling would have on the dingoes. In response to this for the respondent Queensland Government, a senior manager of the QPWS gave evidence that at 2pm on 4 May 2001, officers of the QPWS had culled 17 dingoes on Fraser Island following the death of the young boy. Further, this witness gave evidence that the culling would not exceed a total of 30 animals and be completed by last light on the following day, 5 May 2001. This became the basis upon which the applications were argued.

In making its decision, the Court found that dingoes were part of the world heritage values of Fraser Island and that there was a serious question to be tried under s 12 of the EPBC Act; however, in relation to the balance of convenience, Justice Dowsett concluded:

> "I must balance issues of public safety against world heritage issues … In all of the circumstances I am not persuaded that the balance of convenience favours intervention by the Court at this stage. The proposed continued cull will extend for a finite period of time and will involve a relatively small number of animals. In those circumstances, and particularly having regard to the relative weakness of the case, I consider that the balance of convenience does not favour interim relief at this stage."

Consequently the Court declined to grant the applications sought and the Queensland Government completed its cull of 30 dingoes on Fraser Island.

Conclusion

The decision in the Fraser Island Dingo Case is only the second judicial consideration of the EPBC Act.[13] The case is remarkable perhaps more for what was not argued, rather than what was argued. That the respondent Queensland Government did not raise the issues of standing, an undertaking as to damages nor any constitutional issue is truly remarkable. That two private citizens were able to

bring an action before a court challenging the actions of a State Government in managing State land and be able to argue the merits of their case is a fundamental change over the previous situation. Twelve months ago (i.e. prior to the commencement of the EPBC Act) such an action would not have been possible. There are interesting times ahead as the new Act continues to be tested.

Endnotes

[1] L Corbett, *The Dingo in Australia and Asia*, University of NSW Press, Sydney, 1995; LK Corbett in R Strahan (ed) *The Mammals of Australia*, New Holland Publishers, Carlton, 1998 at pp 696-698.

[2] LK Corbett, 'Management of Dingoes on Fraser Island for Queensland Department of Environment', ERA Environmental Services Pty Ltd, Darwin, 1998 at p 7.

[3] *Convention for the Protection of the World Cultural and Natural Heritage* ATS 1975 No 47.

[4] Commonwealth of Australia, *Nomination of Fraser Island and the Great Sandy Region by the Government of Australia for inclusion in the World Heritage List*, Department of the Arts, Sport, the Environment, Tourism and Territories, Canberra, 1991 at p 64.

[5] See Schedule 5 *Nature Conservation (Wildlife) Regulation* 1994 (Qld), which expressly excludes dingoes from the definition of common mammals indigenous to Australia. This excludes dingoes from the protection of s 88 (Restrictions on taking etc. protected animals) of the NCA.

[6] See *Cape York Aboriginal Land Council v Executive Director of the Department of the Environment* [2000] QCA 202 (Qld CA); DE Fisher, 'Considerations, Principles and Objectives in Environmental Management in Australia' (2000) 17 (6) EPLJ 487 at 497.

[7] Ibid. Note *North Queensland Conservation Council Inc v The Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 (Chesterman J). Contrast *Central Queensland Speleological Society v Queensland Cement and Lime Pty Ltd* [1989] 2 Qd R 512 (Qld CA).

[8] See C McGrath, 'An introduction to the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, its implications for State environmental legislation and public interest litigation' (2000) 6 (28) QEPR 102.

[9] *Crown Procedure Act* 1980 (Qld).

[10] It is now well settled that Commonwealth legislation may bind State Governments: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (The State Banking Case); *Victoria v Commonwealth* (1971) 122 CLR 353 (The Payroll Tax Case); *Commonwealth v Tasmania* (1983) 158 CLR 1 (The Tasmanian Dam Case).

[11] For a discussion of these issues see C McGrath, 'Casenote: Booth v Bosworth' (2000) 18 (1) EPLJ 23.

[12] The decision is available on the internet at <http://www.federalcourt.gov.au>.

[13] For the first decision, see *Booth v Bosworth* [2000] FCA 1878; McGrath, op cit n 11.

National EDO Network News

EDO NETWORK CONFERENCE

"BACK TO THE SEA GRASS ROOTS : CASE STUDIES IN COASTAL SUSTAINABILITY"

EDO Queensland is pleased to be hosting the national EDO Network conference in Brisbane on Friday 2 November 2001. Session topics include aquaculture and fisheries, planning and pollution and marine parks. There will be a wide array of speakers from legal, government and conservation backgrounds. A preliminary program will be available soon. To register your interest, email Melinda Robertson at edoqld@edo.org.au or phone on (07) 3210 0275.

EDO NETWORK PEOPLE

Matt Paterson joined EDO-NQ in March 2001 as the new Project/Legal Officer, replacing Jann Crase. Matt is returning to Queensland having worked in private practice in NSW for some years.

Rebecca Hoare will be joining EDO Victoria as their second solicitor in early July. Rebecca studied in Brisbane and Germany before working as a Judge's Associate in the Federal Court. Most recently Rebecca has been working in private practice in Melbourne. Rebecca replaces Megan Bowman who has left EDO to pursue further study in Canada.

Melissa Honner has resigned as the EDO ACT solicitor and Caroline Flood has resigned as Administrator of EDO Tasmania.

At EDO NSW, Policy Director Louise Blazejowska is on parenting leave after the birth of her daughter Josephine in March 2001. Director Lisa Ogle is working in East Timor for 6 months on developing their environment law and policy, and we welcome back Nicola Pain as Director in her absence. Lucy Sharman is the new Education Coordinator (job sharing with Natalie Ross). She replaces Debbie White who resigned in May 2001. Warren Kalinko is locum solicitor until November 2001.

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The papers from the EDO(NSW) conference held on 27 April 2001 will soon be available. The conference focussed on proposed reforms to the plan making sections of the *Environment Planning and Assessment Act* and integrated natural resource management. Speakers included Mary White, Kathryn Ridge, Ian Causley and speakers from the Department of Urban Affairs and Planning, the Department of Land and Water Conservation, and the National Parks and Wildlife Service.

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