environmental defender's office new south wales

COASTAL SOLUTIONS FORUM
15 November 2003
CAN WE BETTER USE PRIVATE RIGHTS TO PROTECT THE PUBLIC COMMONS?

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- *the importance of public participation in environmental decision making in achieving environmental protection*
- *the importance of fostering close links with the community*
- *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- *the importance of indigenous involvement in protection of the environment.*

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CAN WE BETTER USE PRIVATE RIGHTS TO PROTECT THE PUBLIC COMMONS?

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1. TOPIC – THE PUBLIC TRUST DOCTRINE and its RELEVANCE IN AUSTRALIA

The Public Trust Doctrine (**PTD**) is a concept which relates to the ownership, protection and use of natural and cultural resources. It recognises that those responsible for such resources owe a duty of care to protect the environment.

The PTD evolved as a principle of law that all natural resources, such as the air, rivers, the seashore and coastal waters are for the common benefit of the public. Title to those resources is held by the State, in trust for the people. The purpose of the trust is to preserve resources in a manner which makes them available to the public for certain public uses.

There are two co-existing interests in trust property. These are:

- the public right to use and enjoy trust land; and
- the private property rights which may exist in the use and enjoyment of trust land.

In accordance with the PDT while the State may convey private property rights to individual property owners, the private interest is subservient to the State's inalienable interest that it continues to hold in trust the natural or cultural resource.

Traditionally, the PTD only applied to navigable waters, including lakes, rivers and coastal waters, and to the seabed. Under the English common law (judicially created law), rivers, the sea and tidal lands were viewed as being owned by the Crown. The Crown could not grant this property to private interests so as to substantially interfere with the public interests of navigation, fishing or riparian rights. As the doctrine developed, it was applied to other natural resources. However, the most potentially useful application of the PTD is for the protection of wetlands, lakes, rivers, beaches and coastal foreshores.

The PTD was embraced by the United States of America in the 19th century and it is now a well-established legal principle. Some States have written the PDT into legislation or incorporated the doctrine in their constitutions. The Hawaiian Constitution states that *"All public natural resources are held in trust by the State for the benefit of the People"*.

The PTD has not been expressly approved by any Australian Court. However, there are several Australian cases that offer implicit support for the doctrine. There is considerable scope for the use of the PTD to protect natural resources. Using developments in the United States as a model,

there is great potential for this legal principle to be utilised in Australia to protect natural resource commons.

2. ISSUES ADDRESSED

The purpose of the PTD is to restrain a government's ability to sell or dispose of public lands and natural resourses which the government holds in trust for the community, and therefore, the government is bound by the same duties and responsibilities as any other trustee. The doctrine also acknowledges the legal right of citizens to enforce duties of protection and management of natural resources which are held in trust. Some of the duties which have been acknowledged by the courts as being owed by the government as the trustee of natural resources held in the public trust are:

- the trustee is prohibited from using the trust resources in a way which is inconsistent with the public benefit derived from the land;
- the trustee must ensure there is no significant reduction of the rights of the public to the use and enjoyment of resources held in trust for the benefit of the pubic; and
- the trustee cannot alienate trust resources unless the public benefit arising from the alienation would compensate for the loss of the previous public uses of the trust resources.

These duties will be considered in greater detail in this presentation.

3. EXAMPLES OF THE ISSUES

- *National Audubon Society v The Superior Court of Alpine Courtry* 33 Cal. 3D 419 (1983) – This case concerned an action to protect the natural beauty and importance of Lake Mono in California as a breeding area for migratory water birds. The Californian government had been diverting water from the lake for years to supply water to Los Angeles. This had resulted in a drop in the depth and volume of the lake and an increase in salinity. The Court found that the public trust exists in relation to navigable water in California. The Court acknowledged that traditionally the public trust was defined in terms of navigation, commerce and fisheries, however, *"there is a growing public recognition that the most important public use of the tidelands...is the preservation of these lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."* The Court held that the public trust operates to *"protect navigable waters from harm caused by diversion of nonnavigable tributaries."*

Australian Caselaw

- *Palmer v The Board of Land and Works* (1875) 1 VLR 80 – In this case Mr Palmer was a landowner adjoining Albert Park in Melbourne. The government intended to sell certain parts of the park. Mr Palmer commenced proceedings for an injunction to prevent the sale on the grounds that the land was set aside for the use and recreation of the pubic and that he was especially affected because the sale would ruin his views and access to sea breeze. The court

did not determine the issue of whether the park was held on trust for the public, however, the court said *"persons especially injured by a breach of a public trust might so sue"*. However, Mr Palmer's action failed because the court held that he lacked a sufficient interest to bring the proceedings.

- *Re Sydney Harbour Collieries Co* (1895) 5 LAC (NSW) 243 – This case concerned a challenge to low rental fees asked by the government for a coal mining lease of Crown land on the foreshores of Port Jackson. This was the first Australian case which acknowledged the PTD as a legal principle. The court found that the Crown held:

  "a position in relation to public lands something in the nature of a trustee under an obligation to dispose of or alienate those lands, whether permanently or temporarily, only in the interest and for the benefit of the people of this Colony."

  The Court went on to state that it was:

  "the duty of the Government not only to take the greatest care to protect both present and contingent public interests, but also to obtain the best consideration for the temporary alienation of frontages which, if the Crown could be in law a trustee, it holds in trust for the health, recreation, and enjoyment of an enormous and ever-increasing population...And it is apprehended that the duty of a trustee of the public lands...to make as good a bargain as he conscientiously can on the sale of lease of any portions of lands."

  Significantly, the Court concluded that:

  "no consideration in the nature of rent could afford any compensation or consolation for the difigurement of a harbour [by a coal mine]*."*

- *Kent v Johnton* (1973) 21 FLR 177 *(Black Mountain Tower Case)* – In this case the Commonwealth government proposed the construction of a communications tower on the Black Mountain Reserve in Canberra. The action was brought by a resident Mr Kent, who argued that the government had a duty to maintain the park as a public space and the construction of the tower would breach this duty and destroy the environmental value of the reserve. The Court rejected Mr Kent's argument and held that there is no *"such trust or obligation upon the defendants arising out of the declaration of the reserve as a public park under the Public Parks Ordinance 1928-1942"*.

- *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 :GERA 19 – In this case the applicant challenged the decision of the National Parks and Wildlife Service to lease parts of the Davidson State recreation reserve for private development. The Court held that as well as being prohibited development under the relevant planning instrument, the development was in breach of the *National Parks and Wildlife Act* 1974 (NSW) ("***NPW Act***"). Section 47B of that Act stated that the Minister may reserve land as a State recreation area *"for the purpose of public recreation and enjoyment"*. The Court stated that:

  "Those charged with the responsibility for national parks and public recreation need to be alert that parks remain accessible to the public for their recreation and enjoyment. Great care needs to be taken in permitting commerical uses which maylead to the public use and enjoyment of an area being diminished in favour of private utilisation and enjoyment."

- *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710 – This case concerned the proposed development of a private university in the South Head national park in Sydney Harbour. The Court held that:

  "If Parliament wishes to provide that private business concerns can purchase effectively exclusive occupation of parts of national park, then so be it. But until such provision is clearly made, I do not believe that it is a purpose which the Court should spell out of the generality of language by which Parliament has conferred powers on the Minister and a the Director.

- *Packham v Minister for the Environment* (1993) 80 LGERA 205 – This case concerned a proposed access way through a national park to private property. The Court held that there was no legislative power in the *NPW Act* to enable the NPWS to use national park land for any use other than "*public recreation and enjoyment"*.

The *Kent*, *Willoughby*, *Woollahra* and *Packham* cases concerned matters of statutory interpretation, although they raised the possibility for the further development of the PDT in the common law. In *Willoughby*, the Land and Environment Court offered implicit support for the PTD. Unfortunately, following these cases, the *NPW Act* was amended to make it clear that there could be private use of national park land.

4. EXAMPLES OF CONCEPTS OR SOLUTIONS

As can be seen from the cases outlined above, the PTD has only been applied in Australia to lands which have been specifically set aside for public use, such as national parks and reserves. It has not been applied to State owned land.

The PTD is closely linked to the international principle of ecologically sustainable development (**"ESD**"**),** which forms part of the objects clauses of a large number of environmental statutes in Australia. The statutory definition of ESD could be amended to specifically include reference to the PTD, thereby opening a statutory avenue for cases to establish the existence of a duty of care owed to the public on the part of the government as a trustee of public lands in the use and management of those lands.

Possible areas of application for the PTD in Australia:

- Policy implementation of the State government as a benefactor or guardian of the public benefits and the environmental values of Crown lands.
- Preventing State governments from selling or leasing Crown land, or approving developments on Crown land for private gain unless it could be shown that some public benefit would ensue to the public, and that benefit adequately compensates for reduction in public use of the area.
- Ensuring full cost recovery of timber exploitation in public forests;
- Ensuring public access to the coastal foreshores;
- Placing a statutory obligation on State governments to minimise sources of water pollution eminating from Crown land, including Crown land which is leased to private occupiers;
- Placing a continuing obligation on the State government to balance the use of public land between recreational uses and the protection of environmental values.

5. EXAMPLES OF THIS SOLUTION IN ACTION

- Prevention of foreshore development encroachments. There is already substantial movement in this direction through the legislative implementation of the *NSW Coastal Policy* in *State Environmental Planning Policy No. 71 – Coastal Development* ("**SEPP** 71"). There have also been recent amendments made to the *Coastal Protection Act* 1979 to include the coastal areas of the central coast of NSW in the coastal zone. There is still some way to go. The urban areas of Sydney, the Sydney Harbour and Botany Bay remain excluded from the coastal zone and are vulnerable to inappropriate development encroachments on the foreshores. There are also a number of loopholes in the operation of SEPP 71, which will be discussed in this presentation.
- Implementation of environmental costs in water pricing.
- The application of the *Native Vegetation Act* to coastal areas.

8. READINGS AND SOURCES

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