

IMPACT!

A NATIONAL JOURNAL OF ENVIRONMENTAL LAW



Public Participation on the Endangered List



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www.edo.org.au

Issue 85, June 2008



Welcome to the first edition of the new Impact. Impact has had a long history since it was first published in 1985 by the EDO in NSW. This, the first edition of Impact since 2006, re-launches the journal as a contemporary, bi-annual and hopefully highly relevant national journal of environmental law.

This edition examines a disturbing national pattern of erosion of public participation in governmental decision-making. From the Gunns pulp mill in Tasmania to the McArthur River mine in the Northern Territory, governments across Australia are reducing the public's ability to influence environmental policy and approvals.

Notwithstanding the rapid development of environmental law over the past 25 years, or perhaps because of it, environmental law has stayed true to itself. Environmental law is public law. It has long recognised that the interests affected by an issue are not necessarily limited to the interests represented before a Court. It is also recognised that expertise has many hues and that the public can contribute to good decision making.

Public interest environmental law in Australia began with the creation of procedural rights through legislation. Open standing was crucial, as was the introduction of a suite of other participatory measures including right to information provisions, community consultation and notification requirements, third party merit appeals, joinder and reviews of legislation.

The expansion of these procedural rights was a hallmark of our progress towards fair and sustainable planning regimes. Conversely, the present era – characterised by a contraction of those same rights – is moving us away from planning processes that deliver positive outcomes for both the community and the environment.

Development proponents have adopted a number of approaches to obtaining project approval and avoiding proper environmental assessment. Frequently they are saying to government that their project is too big and too important and thus requires enabling legislation or, more recently, should be dealt with under developer-sympathetic major projects rules such as Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW). It is an irony of current planning regimes that the biggest and most damaging projects frequently have the least scope for public input and challenge.

The net result is that our planning systems are facing a huge drop in community confidence and that governments need to make strenuous efforts to re-establish their credibility. We need our governments to re-embrace the idea that local communities have relevant expertise and interests in planning outcomes, that decision makers sometimes get it wrong and that a mature democracy allows its citizens real opportunities to challenge governmental authority. Until that time public participation will remain on the endangered list.

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Publisher

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ISSN

1030-3847

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Cover Photograph

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Upper Florentine Valley, Tasmania, currently threatened by logging.
For more information visit www.wilderness.org.au



IMPACT! has been printed on 100% recycled paper.

Gunns' Proposed Tasmanian Pulp Mill – Does The End Justify Any Means?

by Roland Browne

Imagine this scenario: a large corporation in a developing country is thwarted by that nation's environmental protection regime in its quest to establish a major resource project. To achieve its ends, the corporation demands that the government change the law to facilitate the approval of the project. The government, after some consternation, agrees. The result? NGOs and other observers are outraged.¹

Regrettably, these scenarios are not uncommon in developing nations. Whilst rare nationally² they are not uncommon in Tasmania, either.³ In a current example Gunns Ltd, in its quest to build a pulp mill in the Tamar Valley in northern Tasmania, has caused a statutory process to be overturned in its entirety to suit its own ends.

The only difference between the Tasmanian response to Gunns' demands and that of the developing economy's government is in the speed of response: in Tasmania, the Government agreed almost overnight to change the laws. In developing countries it usually takes a little longer.

This article will briefly examine Tasmania's major project assessment system and how the system (and the ability of the public to participate) was subverted by Gunns in its push to establish a pulp mill in Tasmania. Also discussed are the decisions made by the federal Minister responsible for the environment under the *Environment Protection and Biodiversity Conservation Act 1999* ("the EPBC Act") and challenges to the Minis-

ter's decisions in the Federal Court. By virtue of the long and complex processes and the huge amount of material generated, the consideration of all issues is concise.

Tasmania's major project assessment system (prior to April 2007)

In 1993, the Tasmanian Parliament established the state's Resource Planning and Development system. This involved the introduction of a suite of legislation reforming the *Local Government Act*,⁴ together with the establishment of the *Environmental Management and Pollution Control Act 1994*. The Parliament also created the Resource Management and Planning Appeal Tribunal⁵ and vested that body with jurisdiction to determine appeals from a variety of land use, planning and environmental jurisdictions. All component parts of the system are expressly required to conform to a series of objectives, including public participation in decision making, sustainable development and the like.⁶

The system also comprised the *State Policies and Projects Act 1993* and, eventually, the *Resource Planning and Development Commission Act 1997*. The latter two pieces of legislation, together, provide for assessment of major projects in Tasmania. A "major project" is one that is declared to be a "project of state significance" under s. 18(2) of the *State Policies and Projects Act* or, colloquially, "POSS". Once a project is granted that status, the Resource Planning and Development Commission ("the

RPDC") is invested with jurisdiction to assess the project against relevant guidelines.

One of the benefits of the RPDC, in combination with the status of a project as being one of state significance, is that the RPDC conducts an independent assessment of a POSS. Importantly, and relevantly, the RPDC has the ability to conduct public hearings to evaluate the project and, in particular, to assess the evidence provided either for or against the project.

POSS status has benefits for a proponent too, because the *State Policies and Projects Act* provides that the project will be subject to an integrated assessment, and that it overrides all other state laws. By its very nature, the assessment is wide-ranging and covers environmental, planning, occupational health and safety and other regulatory regimes. The breadth of the assessment saves the proponent from having to make multiple applications to multiple authorities for permits, licences and other approvals. In this way, it is an "integrated" assessment.

The Gunns Pulp Mill

And so, Gunns' proposal to build a bleached Kraft pulp mill in the Tamar Valley was made the subject of a declaration in 2004 that it was a POSS.⁷ This proposal to construct a pulp mill was highly controversial. The first proposal for a pulp mill at Wesley Vale in Tasmania was abandoned in the late 1980s amid great public debate. Gunns' desire for a pulp mill never waned, and



Photograph by Mike Wells - Rainforest Action Network

controversy continued to surround the issue when the current proposal crystallised in 2004.

At the time that the Gunns pulp mill proposal became a POSS, there were frequent exhortations of the integrity of the RPDC process. These originated both from the government, through Premier Paul Lennon, and from the Executive Chairman of Gunns, John Gay. At the time the project was referred to the RPDC in 2005, the expectation was that the RPDC would evaluate the project in an independent and impartial manner, in the interests of the proponent, the government and the community.

However, the pulp mill proposal - even in its 2004 format - was never far from controversy. The controversy was partly generated by the closeness between Gunns and the government,⁸ partly because of Gunns' dominance of the Tasmanian forestry industry (and its role in the conflict associated with the management of Tasmania's forests) and partly because in December 2004

Gunns commenced proceedings in the Supreme Court of Victoria against the main conservationist players in the Tasmanian forestry debate (The Wilderness Society Inc, Geoff Law, Senator Bob Brown, Peg Putt MHA and Alec Marr, amongst others).⁹ Further, the Tasmanian Government funded a "Pulp Mill Task Force" to promote the pulp mill in the face of increasing community opposition and concern. These factors, independently and in combination, had the effect of focussing the public and political spotlight firmly on the RPDC process.

The RPDC Assessment

By November 2004, the RPDC began the State assessment process. Any such project is required by the *EPBC Act* to be referred to the Commonwealth Minister for the Environment for assessment and approval. How the assessment at a Federal level is to be conducted is a matter for the Minister. Section 87(1) of the *EPBC Act* provides a range of assessment processes, from minimal desktop assessments, at one

level, to an inquiry at the other end of the spectrum. There is also a procedure for the Minister to adopt an accredited assessment process under a State law¹⁰ for the purposes of the *EPBC Act*. On 15 December 2004 Gunns referred its project to the Commonwealth Minister, pursuant to the *EPBC Act*, for approval under that Act.

On 16 December 2004 the RPDC announced that it was developing an integrated assessment process to address all State and Federal issues for the pulp mill, and on 24 January 2005 the Commonwealth Minister decided that the pulp mill proposal was a controlled action under the *EPBC Act*. On 23 March 2005 he further decided that the assessment approach under the *EPBC Act* was to be an accredited State-level assessment conducted by the RPDC.

At this time, the RPDC had control of the process. Part of the process was pursuant to State law, and involved the assessment of the pulp mill across all of the relevant and potential impacts to land, air and water

governed by State law. The RPDC also had responsibility to assess the impact of the proposal in relation to the three specific areas identified under the *EPBC Act* as controlling provisions:¹¹ impact on Commonwealth marine areas, impact on threatened species on the site, and impact on listed migratory species.

On 6 April 2005 the RPDC released for public comment a series of draft guidelines as to how it proposed to conduct the integrated assessment of the pulp mill. In the scheme of environmental impact assessment this was a highly consultative approach, in that allowing public input into the guidelines against which the pulp mill was to be assessed served to encourage public participation (and confidence) in the process. Public involvement was also available in response to the draft Integrated Impact Statement (“IIS”), the RPDC response to the IIS and at the hearing itself. The draft guidelines also included provision for assessment of the environmental effects of wood supply to the mill, in that Gunns was required to identify how the project would deliver the outcomes required by the Regional Forest Agreement in force between Tasmania and the Commonwealth.¹²

On 9 May 2005, being the last day for public comment on the guidelines, and without notice, Gunns announced major changes to its pulp mill proposal. Previously the pulp mill was mooted as being constructed at either the Tamar Valley, near Launceston, or Hampshire in the state’s North West. More importantly, it was originally proposed that a totally chlorine free pulp mill was the preferred option. However Gunns announced that it was proposing to construct an elemental chlorine free pulp process (and that a totally chlorine free pulp mill was no longer an option). The first expression (total chlorine free) means what it says. On the other hand, “elemental chlorine free” is an expression created by a public relations firm; it is not a process that excludes chlorine from the treatment of the pulp, it just excludes a type of chlorine from part of the process.

Following receipt of the altered proposal, the RPDC brought the assessment process to an immediate halt. The change to the proposal required major changes to the guidelines.

The next step in the process was the withdrawal by Gunns in August 2005 of its first *EPBC Act* referral to the Federal Minister, and on 11 August 2005 Gunns referred the altered proposal to the Minister. This was the second of three referrals for this project. Because of the new referral, the Minister had to again go through the steps under the *EPBC Act* of identifying the controlling provisions and identifying an assessment approach. On 24 October 2005 the RPDC released revised guidelines for the assessment of the new pulp mill proposal, with public comment allowed until 29 November 2005. On 26 October 2005 the Minister again decided that the project was to be assessed by the RPDC.

The RPDC assessment process continued. On 14 July 2006, Gunns lodged its draft Integrated Impact Statement with the RPDC, a document comprising approximately 18 volumes, many appendices and approximately 7,500 pages. It was said by Gunns to have cost \$11 million and to have been the product of 350,000 hours of work.¹³ The documents were released publicly.

The RPDC began its assessment process immediately and by 2 October 2006 its Chairman had written to Gunns requesting supplementary information on the draft IIS. The RPDC sought further information on modelling, impact on air and water and health and a range of other issues. Some parts of the IIS were the subject of a request to be in a readable form. At about this time, the RPDC also released its own consultant’s reports on the draft IIS. These steps were taken in anticipation of the first public hearing on the pulp mill, which was to be held on 25 October 2006. By this time the RPDC had received a record 780 public submissions.

At the first public hearing on 25 October 2006 some of the 780 interested persons were legally repre-

sented, as Gunns was, but most were not. Directions were given requiring Gunns to provide the additional information referred to above by 15 December 2006. Following a request from Gunns, on 22 December 2006 the RPDC gave Gunns until 31 January 2007 to provide the additional information.

Behind the scenes however there was trouble brewing. Julian Green, the RPDC Executive Commissioner and Chair of the panel dealing with the pulp mill proposal resigned from the RPDC on 12 January 2007, citing political interference and the activities of the Pulp Mill Task Force over the previous 2 years, in particular, as his reasons.¹⁴ Green was a highly respected former Secretary of the Justice Department. His resignation followed that of Dr Warwick Raverty, a Panel member, who earlier resigned citing the same reasons.

On 5 February 2007 the Hon Chris Wright QC, a retired Tasmanian Supreme Court Judge and former Solicitor-General, was appointed to chair the Panel dealing with the Pulp Mill proposal, in place of Mr Green. The process thus appeared to be back on track in anticipation of the next public hearing on 22 February 2007.

Gunns’ supplementary information was lodged with the RPDC in late February 2007. It comprised a further approximately 2,500 pages. Whilst this material was made publicly available on the company’s website (www.gunnspulpmill.com), it was not made available by the RPDC. As it turned out, the RPDC had serious concerns about the new material and the IIS itself.

A second – and as it turned out, final – directions hearing was held on 22 February 2007. In the course of that directions hearing Mr Wright QC stated that the RPDC would not release the supplementary information until it had been endorsed by the RPDC. The Chair further said that the RPDC would not give a timeframe for the release of the supplementary information and flagged the possibility of the need for a complete re-write of Gunns’ IIS. He also declared that responsibility for delays in providing material to the

RPDC rested with Gunns, saying in relation to a (previously) proposed 28 May 2007 conclusion of the RPDC process:

"However, it has become quite apparent that due to accumulated delays, all or most of which appear to have resulted from Gunns' failure or inability to comply with their own prognostications or the panel's requirements, that time line can no longer apply."

When invited twice to respond to this criticism, senior counsel for Gunns, Mr J. Gobbo QC, declined the invitation.

Gunns walks away from the RPDC

Without warning on 14th March 2007, Gunns announced that it was withdrawing from the RPDC assessment process and that it "had referred the project to the State Government".¹⁵ This later phrase was curious, as there is no State Government process to refer the project to, Gunns having deserted the extant (and only) process. Gunns' announcement was by way of a statement to the Australian Stock Exchange and media release. The justification for the abandonment of a process - previously endorsed by Gunns - was that Gunns required the project to be assessed within what it described as a "commercial timeframe".

All of a sudden time was of the essence to Gunns, and it complained that the RPDC would not assess the project in time. However, given that the RPDC had made it clear that Gunns was responsible for the delays, and given that Gunns had not responded to or countered this criticism, the real reason for abandonment of the RPDC process has not emerged. It may be that Gunns saw its chances of approval from the RPDC to be an increasingly remote possibility.

The Pulp Mill Assessment Act 2007 (Tas)

On 15 March 2007 the Premier made a Ministerial Statement to the Lower House of the Tasmanian Parliament and, to the astonishment of all observers, he announced the crea-

tion of a new and separate approvals process for the pulp mill, with legislation to be introduced into the Parliament the following week. So in the space of about twenty-four hours the State of Tasmania had decided it was to set up a process of assessment solely for the Gunns pulp mill. This was unprecedented in Tasmania, and probably in Australia as well.

On 17 April 2007, the *Pulp Mill Assessment Bill 2007* passed both houses of the Tasmanian Parliament. The Bill received Royal Assent on 30 April 2007 and provided for assessment of the proposal by a consultant appointed by the Government; once assessed, and if the consultant recommended approval, the Minister was to prepare a draft permit for consideration and approval by the Parliament. Once both Houses endorsed the permit, the project was deemed to be approved, notwithstanding any other Tasmanian law.¹⁶

The third referral under the EPBC Act

As the RPDC process was also serving as the assessment process under the Commonwealth *EPBC Act*, Gunns now had no assessment process in place to secure approval under that Act. So on 28 March 2007 Gunns withdrew the second referral to the Minister and on 2 April 2007 it submitted another referral document. This was now the third referral of the project.

With this background, on 2 May 2007 the Commonwealth Minister for the Environment and Water Resources made two preliminary - but critical - decisions under the *EPBC Act*. First, assessing the project as a controlled action, he determined that the Gunns pulp mill proposal only needed to be assessed by preliminary documentation. Secondly, he allowed only 20 days for public comment on the proposal. It must immediately be acknowledged that the range of issues to be assessed under the *EPBC Act* were narrower than the RPDC process, which had to look at all State issues as well. However given that public involvement in the decision making process had been stripped back from a right to participate in

public hearings - which would have occurred over some months - to a mere 20 days of public comment, the role of the national assessment had now become critical. This was because the effect of the *Pulp Mill Assessment Act* was to permit no more than a bureaucratic desktop assessment of the proposal, excluding the public entirely.

Action in the Federal Court

In two separate actions, The Wilderness Society Inc. ("TWS") and Investors for the Future of Tasmania Inc. ("Investors") commenced proceedings in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* against the Commonwealth Minister and Gunns¹⁷ to challenge the two decisions of the Minister referred to above. Those proceedings were heard jointly by Justice Marshall from 4 July 2007, and judgment was given on 9 August 2007, dismissing both applications.¹⁸

The TWS application challenged the Minister's decisions on the grounds that the assessment approach taken by the Minister (ie the preliminary assessment approach decision) was tainted by apprehended bias, and motivated by an improper purpose. Both these complaints were argued to have arisen from the Minister's efforts to shape his decision-making process to accord with Gunns' own timeframe for approval. Other grounds for challenge claimed that the third referral was invalid as not being authorised by the *EPBC Act*, as once the Minister had made his decision the proponent could not withdraw the project so as to start again using a different assessment process. It was submitted by the applicants that withdrawal was not authorised in these circumstances under s. 170C of the Act. A further ground claimed the decision was erroneous as the relevant provision of the *EPBC Act*, s. 75(2B), required the Minister to take account of the impact of forestry operations associated with the mill's wood supply on Tasmanian forests. TWS also claimed a denial of natural justice, in that the public comment period of 20 days was inadequate given the magnitude



of the project and documentary material. The Investors' case raised virtually the same issues.

The principal judgment was given in the TWS proceeding. In relation to the process issues (ie denial of natural justice and the claims that the Minister had acted so as to accommodate Gunns' timeframes) Marshall J acknowledged that opponents of the mill would feel disappointed, angry and suspicious at the demise of the RPDC and other features of the background circumstances.¹⁹ However, his Honour was not persuaded that the Minister's actions were tainted with apprehended bias or motivated by an improper purpose. He also decided all statutory construction points against the applicants, being satisfied that the objects and requirements of the Act had been complied with and satisfied by the Minister.

TWS appealed the decision to the Full Court, concentrating on 3 grounds: denial of natural justice, inability of Gunns to withdraw the third referral (the s. 170C point), and a failure to take account of the impact of the mill on Tasmania's forests (the s. 75(2B) point).

On 22 November 2007 the Full Court dismissed the TWS appeal. With one exception, all judges (Branson, Tamberlin & Finn JJ) rejected all grounds.²⁰ In dissent Tamberlin J was of the opinion that the s. 75(2B) point was wrongly determined by

the trial judge, and he would have allowed the appeal on that basis. TWS announced on 14 December 2007 that it would not be seeking Special Leave to appeal the decision to the High Court.²¹

The effect of the judgments of the trial judge and the Full Court are, at one level, that the Minister acted within the law and has followed the requirements of the *EPBC Act*. On another level however, the judgments are cause for concern at the lack of effectiveness of Australia's national environmental laws.

Gunns' manipulation of the *EPBC Act* process so as to achieve a less rigorous *EPBC Act* assessment process, and one that would deliver an approval within Gunns' chosen time frame, does not enhance public confidence in the Act or its processes. This is especially so given that the Tasmanian Government, at the behest of Gunns, has excluded the public from the assessment process and sped up the time line for a decision by the enactment of special legislation.

Major projects generate pressures that have the effect of distorting democratic processes, thwarting environmental protection and shutting out the local community from participation in decision making. The proposed Gunns pulp mill is an example of this, *par excellence*.

If ever there was a project that evolved amidst controversy and cried

out for public input and consultation, especially given the conflict in expert opinion and the huge volume of material bearing upon the environmental impact of the proposal, this was it. Once the public was shut out from the formal process, and that process was dismantled (in the case of Tasmania) and avoided (in the case of the Commonwealth), Australia lost the opportunity for the best possible decision to be made on the proposal.

¹⁹For example, in 2003, BHP Billiton pushed to scrap the legal protection for forests in both Ghana and in Indonesia, so as to enable the mining of bauxite under protected forests. In both countries BHP has been pushing to have the environmental protection regimes relaxed, so as to facilitate mining. (Source: Mineral Policy Institute).

²⁰The most recent example known to the author in the environmental area is the *Hindmarsh Island Bridge Act 1997* (Cth.).

²¹For example, after the Meander Valley Dam project was rejected by Tasmania's independent Resource Management and Planning Appeal Tribunal the State legislated to override the decision: *Meander Dam Project Act 2003*.

²²This was the *Local Government Act 1962*.

²³*Resource Management and Planning Appeal Tribunal Act 1993*.

²⁴This is achieved through the identical Objectives set out in the Schedule to each statute.

²⁵22 November 2004.

²⁶See the Article in the Monthly Magazine No 23 May, 2007 by Richard Flanagan.

²⁷*Gunns Ltd v. Marr & Ors* No 9575/2004.

²⁸EPBC Act s. 87

²⁹Which pick up and regulate matters of National Environmental Significance under the *EPBC Act*.

³⁰The Tasmanian RFA governed all commercial forestry operations in Tasmania, and purportedly required the State to protect a range of forest related values, including threatened species. See *Brown v. Forestry Tasmania* (No 4) [2006] FCA 1729, 19 December 2006 as to how RFAs operate in Tasmania. On appeal this decision was reversed: *Forestry Tasmania v. Brown* [2007] FCAFC 186; 30 November 2007.

³¹Gunns' Media Release 14 March 2006.

³²See <http://www.news.com.au/mercury/story/0,22884,21157345-921,00.html>.

³³Gunns' Media Release 14 March 2007.

³⁴*Pulp Mill Assessment Act 2007*, s. 8.

³⁵Investors initially only joined the Minister as respondent, but Gunns was subsequently joined on its own application.

³⁶*The Wilderness Society Inc v. The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178; *The Investors for the Future of Tasmania Inc v. The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1179.

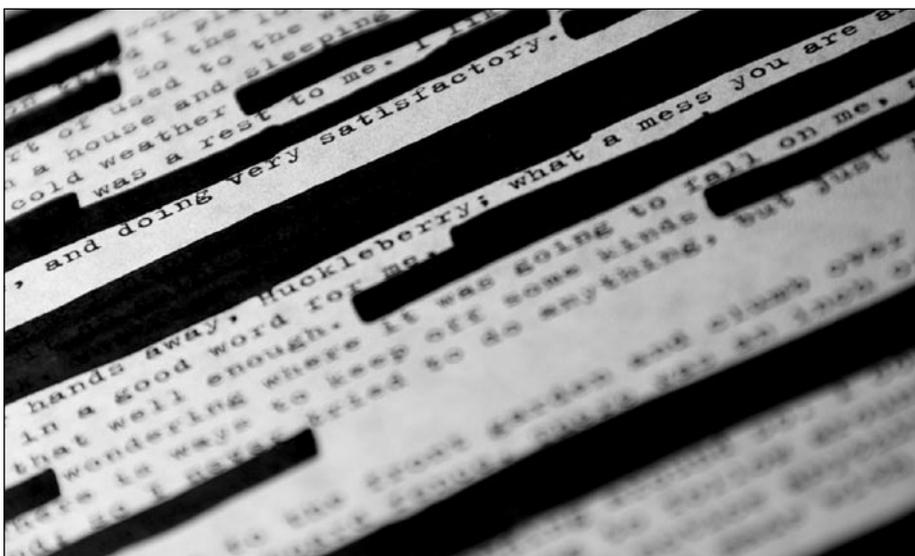
³⁷*Ibid* at [145] – [146].

³⁸*The Wilderness Society Inc v. The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175.

³⁹See: http://www.wilderness.org.au/campaigns/forests/tasmania/gunns_proposed_pulp_mill/highcourt/.

Slip, Slop, SLAPP: It's Time For Action

by Michael Bozic SC



In 1996 the American academics George Pring and Penelope Canan published *SLAPPS: Getting Sued for Speaking Out*.¹ The term SLAPP was an acronym coined by the authors for Strategic Litigation Against Public Participation.² For the purposes of their study, Pring and Canan considered a SLAPP suit (a term that ever so slightly grates on Australian ears), as:

"a lawsuit [that met] one primary and three secondary criteria. Primarily it had to involve communications made to influence a governmental action or outcome, which, secondarily, resulted in (a) a civil complaint or counterclaim (b) filed against non-government individuals or organisations on (c) a substantive issue of some public interest or social significance." (pp. 8-9)

The term 'SLAPP suit' has since become a short hand label for various forms of litigation arising out of an individual or organisation speaking out on a matter of significant public interest. The term has pejorative connotations because it contains within it the assumption

that the object, or at the very least, the effect, of the law suit is to silence the defendant, thereby preventing criticism of a person or organisation and/or conduct in which that person or organisation is engaged.

Although the term coined by Pring and Canan was new, the litigation to which it referred was not. The first 'anti-SLAPP' statute came into effect in the State of Washington in 1989, and similar laws came into effect in California and New York in 1993. The California legislation commenced with the following recitation of legislative concern:

The Legislature finds and declares that there has been a disturbing increase in lawsuits primarily to chill the valid exercise of constitutional rights of free speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

If we put the term 'SLAPP suit' to one side, what we are dealing with is not a unique American phenomenon. One does not need to go to the United States for examples of litigation threatened, or commenced, that has had the effect of stifling debate and the legitimate voice of protest. In 1999 the Sydney lawyer Bruce Donald gave a landmark speech to the Free Speech Committee of Victoria entitled *Defamation Actions Against Public Interest Debate*.³ He cited a number of examples of legal action, or the threat of legal action, against those with the resources to fight (such as the ABC and SBS) as well as against ordinary individuals with courage and commitment but without the financial resources to engage in prolonged litigation. Donald concluded that there was in this country a widespread problem crying out for reform.

To date no Australian state or territory has passed legislation protecting public participation.

Eight years after Bruce Donald's plea for reform Brian Walters SC published *Slapping on the Writs*.⁴ The book contained a series of case studies in which the threat of litigation had the effect of silencing critics and severely curtailing public participation in issues of public importance. It makes salutary reading, as does *Gunning for Change: The Need for Public Participation Law Reform*,⁵ the December 2005 report written by Dr Greg Ogle, the legal co-ordinator of The Wilderness Society. Taken to-

gether, the speech by Bruce Donald, the book by Brian Walters and The Wilderness Society Report mount a powerful and compelling case for legislative intervention to protect the rights of individuals to robustly participate in public debate.

To date no Australian State or Territory has passed legislation protecting public participation. Attempts at legislative reform have thus far been unsuccessful. In May 2002 the Environmental Defender's Office in South Australia drafted a *Protection of Public Participation Bill* for that State. The Bill attempted to set out all of the elements of a proposed law and to provide some suggestions for the structure, content and wording of the Act. Much of the draft was taken from various other statutes from around the world.

In December 2006 Mark Parnell, a Greens Member of the South Australian Legislative Council, introduced a Bill to protect and encourage participation in public debate on matters of public interest, and to discourage the bringing of legal proceedings that interfere with another's right to engage in public participation. On 10 October 2005 the late Mr Peter Andren, then the independent member for Calare, raised the issue by way of a motion in the House of Representatives calling on state governments, through the Standing Committee of Attorneys-General, to establish preliminary procedures which would allow unsoundly based 'SLAPP suits' to be dismissed by a court at an early stage in the proceedings. In 2005 in the ACT Legislative Assembly the Greens MLA Dr Deb Foskey tabled the *Court Procedures (Protection of Public Participation) Amendment Bill 2005*. The Bill was referred to the Legislative Assembly's Standing Committee on Legal Affairs. After a detailed inquiry the Standing Committee reported to the Assembly on 29 May 2007 recommending that a Bill be introduced recognising a positive right to public participation and providing not only for a declaration that actions are public and therefore protected but also for exemplary and punitive damages.

The right to participate in debate about contentious public issues goes to the very heart of a democracy. In the second edition of his classic work *Freedom of Speech*⁶ Eric Barendt explores some of the arguments commonly put forward to justify the principle of free speech, "a concept prized by liberals for reasons they may not understand" (p.1). Without descending into the detail of the arguments, it is worthwhile noting that some of the theoretical underpinnings of free speech provide some justification for public participation legislation, in particular:

- (i) The importance of open discussion to the discovery of the truth. This is undiluted John Stuart Mill and it remains as relevant and as powerful a consideration in the twenty-first century as it was when it was written;
- (ii) Free speech is an integral aspect of each individual's right to self-development and fulfilment. In other words, the right to express beliefs and political attitudes "instantiates or reflects what it is to be human" (p.13);
- (iii) The argument of a citizen's participation in a democracy. This is perhaps the most self-evident argument, or as Barendt says, "the most easily understandable, and certainly the most fashionable, free speech theory in Western democracies" (p.18);

Since the recent federal election, there is now a Labor Government in each State and Territory as well as at the federal level. The website of the Australian Labor Party contains the following statement of an 'enduring value':

"Democracy. Labor is committed to the essential democratic principle that every person should have the right to a say, directly or indirectly, in the decisions that affect his or her life. That right includes:

- *democratic participation in the choice of governments;*
- *the opportunity for representation in the workplace; and*
- *the opportunity for a voice in planning, the environment, the delivery of*

public services and other aspects of community life."(emphasis added)

Cynicism and experience combine to suggest that this 'enduring value' is simply an anodyne motherhood statement devoid of any substantive content. Yet there is no reason why it should be. What better way to give content to this so-called 'enduring value' than by passing legislation protecting public participation. After all, half the states in America have passed such legislation. 'Free speech theory' as well as ample evidence, both anecdotal and in the record of court proceedings, compels the conclusion that the continuing failure to enact public participation legislation detracts from the quality of our democracy because it deters participation by those who matter most, individual concerned citizens.

¹Temple University Press, 1996.

²The term was first used by Pring and Canan in their 1985 article "Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches" (1985) 2 Law & Society Review 22.a

³http://www.ccsa.asn.au/HIB/Bruce_Donald_article.html

⁴UNSW Press, 2003.

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Justice in the Northern Territory?

by Kirsty Ruddock

In a country booming from mining revenue, governments are keen to support mining in the face of environmental and Indigenous concerns. The recent machinations around the McArthur River Mine illustrate the extent to which the Northern Territory ('NT') Government is prepared to facilitate mining in the face of strong opposition from traditional owners, and from environmentalists. In this matter, the NT Government was even willing to overturn a Supreme Court decision that highlighted the illegality of the approval and found problems inherent in the approval process.

The McArthur River Mining Pty Ltd ('MRM') project poses significant risks to cultural heritage and to the environment. MRM's expansion of the lead, zinc and silver mine involves the diversion of five kilometres of the McArthur River, a tropical river system with particular significance to the 'Traditional Owners' of the area.¹ The purpose of the diversion is to allow an open cut mine in the river bed. This is the first time a tropical river diversion has occurred in Australia.

The McArthur River Mine Expansion

Since 1993, MRM has extracted and processed zinc, lead and silver through an underground mining operation. The mine is located 4.5 kilometres from Borroloola in the Gulf Region of the Northern Territory. In 2003, MRM announced their intention to commence open cut mining on the site. The proposed expansion involved digging an open cut pit in the location of the McArthur River. In order to mine, it was necessary to re-route the river over a section of

approximately 5.5 kilometres. The extension proposed is to increase the life of the mine by 25-35 years.

Concerns of Traditional Owners

Traditional Owners have expressed continued concern about the McArthur River being diverted to allow the mining expansion. The river is important to the cultural beliefs of four Indigenous language groups: the Gurdanji, Mara, Garrawa and Yanyuwa, who live along the river. Harry Lansen, a senior Traditional Owner of Gurdanji group, said:

"I will be sick if they cut the place you know because my spirit's there, all my songs for crossing the river... I don't want to see this thing happen there in that McArthur River."²

Traditional Owner groups located downstream of the mine are concerned about the impact the diversion will have on water and marine species, and pollution. In 2001, floodwaters breached a tailings dam at the mine site. One Yanyuwa Traditional Owner, Steve Johnston, described the event:

"There were dead fish everywhere, as far as the eye could see, around the islands. We have no proof but we are convinced that minerals flushed down from the dam contaminated the gulf and killed the fish."³

In 2002, oysters located at Bing Bong Port (near where the mined ore is shipped overseas) contained high levels of cadmium which were consistently above the level acceptable in food.⁴ From 2001 to 2004, there were four reported cases of fishermen suffering serious bacterial infections after exposure to the McArthur River system. Medical

experts indicated the possibility of a connection between the mine and the illnesses, stemming from exposure to lead and zinc.⁵ However the isolation of the neighbouring community at Borroloola means little public health outcry has occurred to date, nor any medical research on the impacts of such pollution on the Indigenous community.

The Traditional Owners have a current native title claim over the mine site, however they do not have any formal veto rights over the proposed project as it was approved prior to the introduction of 'future act' provisions to the *Native Title Act 1993*. They have had to use judicial review proceedings to ensure the protection of their rights.

"There were dead fish everywhere, as far as the eye could see, around the islands."

Environmental Issues

The McArthur River system is one of the largest in northern Australia. It sustains significant biodiversity, as well as having a recreational and cultural purpose. It has a catchment area of 20,000 square kilometres and flows for 300 kilometres, with a flow of 4,200 million cubic metres. The river contains 36 per cent of the water flow for the NT's Gulf Rivers, with 90 per cent of the run-off occurring between December and April each year.⁶ When the river is not flowing, its surface water is restricted to waterholes and lagoons that form essential refugia during the dry season for aquatic and terrestrial animals. The

river houses the Freshwater Sawfish, a critically endangered threatened species, listed under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), as well as a number of listed migratory species.⁷ The McArthur River estuary is an important area for dugong and marine turtles. Many of these species have significance, both culturally and as food sources for Traditional Owners. The estuary is

operations as well as the surrounding downstream environment, which could be affected by any heavy metal pollution and sedimentation.

Northern Territory Assessment

In August 2005, MRM drafted an Environmental Impact Statement ('EIS'). In February 2006, the Northern Territory Environmental Pro-

identified by an independent geomorphologist;

- Failure to include hydrological information in the EIS for Barney and Surprise Creeks – particularly given that the former would pose a greater risk to the mine infrastructure in larger floods;

- The challenge of re-vegetating the diverted channel as it would require considerable resources. Furthermore, this held implications for the channel stability as well as ecological values of the river;

- The potential environmental risk of operations and the component tailings storage facility, and an overburdened emplacement facility and flood protection bund located within the primary channel of a tropical river;

- The potential environmental risk in regard to the long-term management of materials and their impact on ground and surface waters, both during and post mining operations.

The Northern Territory Government agreed to allow MRM to submit further environmental assessment information in order to address the above concerns. MRM then undertook a further Public Environment Report ('PER') in July 2006. The Environment Minister found the PER addressed some earlier concerns, however, broadly, it failed to demonstrate that MRM could conduct the mine without significant, irreversible and unacceptable impacts on the McArthur River environment. In particular, MRM failed to show that the substantial risks posed by the diversion channels were adequately addressed as outlined in the NT EPA's previous report. Notably, MRM failed to address a number of social issues and concerns of Traditional Owners and environmentalists alike. Of particular concern was the fact that MRM proposed to wait and see if impacts including pollution issues occurred before taking remedial action, rather than adopting a precautionary principle approach.⁹

In September 2006, Prime Minister John Howard wrote a letter to the Northern Territory Chief Minister,



Image courtesy of The Environment Centre NT

a delicate environment that includes rapidly diminishing breeding and feeding grounds for marine species, which are found in few other coastal areas. The adjacent Sir Edward Pellew Islands are the traditional lands of the Yanyuwa. Importantly, the Yanyuwa have been active with the Lianthawirriyarra Sea Ranger project to manage the coastal area lands and work towards protecting their islands and sea through a marine park in the region. Some Traditional Owners have established fishing and ecotourism facilities on the island that are succeeding in bringing tourists to the area, and are concerned about the risks to those areas from the mine expansion.

There is a high risk involved in diverting a tropical river. In particular, large-scale flooding has affected the mine site during several wet seasons. This risk applies to both the site of

tection Agency ('NT EPA') issued an Environmental Assessment Report recommending that the proposal not proceed. This advice was adopted by the NT Minister for Natural Resources, Environment and Heritage who rejected the mine expansion. The rejection was based on several key factors, including:⁸

- Lack of certainty, with insufficient and incorrect information having been provided regarding the potential impacts associated with the realignment of the McArthur River and Barney Creek;

- The predicted impacts of down and upstream morphology of the river including: degradation and consequent destruction of the McArthur River channel, sand aggradation downstream of the diversion channel and continuing erosion of the diversion channel banks. These impacts were

'urging' her to approve the expansion of the mine.¹⁰ On 20 September 2006, the Federal Environment Minister announced his approval for the expansion of the mine under the *EPBC Act*. Subsequently, on 13 October 2006, the NT Minister for Mines and Energy approved the expansion of the mine pursuant to his powers under the *Mining Management Act 2001*.

The Court Case

In December 2006, representatives of the registered native title claimants from within the four Traditional Owner groups stood united and took proceedings in the Northern Territory Supreme Court, seeking a judicial review of the Mining and Energy Minister's decision to grant approval.

The Traditional Owners challenged the decision to approve the change from underground to open-cut mining through an amended Mine Management Plan. They argued that the decision to allow open-cut mining was unlawful because the Minister had accepted this change through an amendment to the Mine Management Plan, rather than varying or revoking the existing mining authorisation.¹¹ This was inconsistent with the procedures set out in the *Mining Management Act 2001*. The defendants (the Minister for Mines and Energy, the NT Government and MRM) argued that the variation of the mining method did not involve a different mining activity and therefore was allowable.¹² In particular they argued that no specific method of mining had been specified in the original authorisation.

The Court looked at the provisions of the *Mining Management Act 2001*, particularly its realisation of environmental objectives through mining authorisations.¹³ Mining cannot occur unless it is authorised and complies with such authorisation, otherwise it is subject to penalty provisions. The Authorisation previously issued was subject to the application to mine in 2003 and did not describe the nature of the mining as detailed in the Mining Management

Plan.¹⁴ As His Honour Justice Angel indicated:

*The Authorisation sought was not "to carry out mining activities" of whatever type, for whatever minerals, and by whatever methods as may from time to time profitably be the subject of a Mining Management Plan acceptable to the Minister for Mines and Energy. The authorisation sought was for a mine, of a particular generic description, namely an "underground lead/zinc/silver mine". The Authorisation as sought and granted no more comprehends an open-cut mine than a gold mine or a coal mine.*¹⁵

The Court found therefore that the Authorisation did not approve open-cut mining and the Judge accepted that the Mining Management Plan was of no effect because it was not in respect of activities to which the Authorisation related. He therefore ruled that the decision to approve the mine was invalid.

Special Legislation

In May 2007, some two days after the Supreme Court judgment, the *McArthur River Project Amendment (Ratification of the Mining Authorities) Bill 2007* ('the Bill') was introduced to the Northern Territory Parliament. The Bill removed any limitations that were emphasised by the Court's decision, and ratified the ability for MRM to open cut mine.

In his second reading speech to the Northern Territory Parliament, Chris Natt, the Minister for Mines and Energy, stated that his 'decision was made after a thorough and transparent process'.¹⁶ Mr Natt additionally claimed that they had:

*rigorously followed due process... Our public consultation process has been thorough. The decision of the Court, which found that my approval of the amended Mining Management Act was of no effect, was based on a technicality and in no way has any bearing upon the extensive environmental assessment process, including consultation with the traditional owners...*¹⁷

Despite the fact that the Court found that due process was not followed and that the significant concerns of the Traditional Owners and

environmentalists (including the NT EPA) were not addressed during the assessment process, the legislation passed quickly and without much comment. Subsequently, the mine's operation is now protected from legal scrutiny.

Despite this, the Traditional Owners are resolute in fighting the river diversion and are still continuing with legal proceedings against the Commonwealth Environment Minister's approval of the mine under the *EPBC Act*. A judgment in the Federal Court is expected shortly.

Conclusion

This case shows the need for greater protection of Traditional Owner rights against mining activities, as well as adequately addressing threats to the environment. Few governments wish to reject mining because of the perceived economic benefits. However, mining companies should not be allowed to make money at the expense of Traditional Owners and their livelihoods, or the environment. With the extensive mining reserves available in the Northern Territory, including uranium deposits, it is imperative that mining and environmental laws place greater emphasis on protecting the rights, interests and wishes of the 'Traditional Owners' of the land.

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¹⁰The Gurdanji people are Traditional Owners of the mine site. The Mara, Garrawa and Yanyuwa people are Traditional Owners downriver from the site.

¹¹ABC (reporter: Barbara McCarthy), 'Mine Plan', *Stateline Northern Territory*, 7 March 2003.

¹²Lindsay Murdoch, 'Dugongs Versus Development No Open-and-Shut Case for Miner' *Sydney Morning Herald* (Sydney), 13 March 2006, 5.

¹³Xstrata Zinc (McArthur River Mining), 'Open Cut Project: Oyster Analysis', Factsheet 7 (2006).

¹⁴Anna Ralph and Bart J Currie, '*Vibrio vulnificus* and *V. parahaemolyticus* necrotising fasciitis in fishermen visiting an estuarine tropical northern Australian location', (2007), 54(3) *Journal of Infection* e111.

¹⁵See The Environment Centre Northern Territory, Current Campaigns: McArthur River, <http://www.ecnt.org/html/cur_mining_mcarthur_new.html> at 12 December 2007.

⁷Ibid

⁸Environmental Protection Agency (NT), 'McArthur River Mine Open Cut Project' (Environmental Assessment Report 51, February 2006) 15-16.

⁹Environmental Protection Agency (NT), 'McArthur River Mine Open Cut Project', (Environmental Assessment Report 54, August 2006) 17-18.

¹⁰Letter from Prime Minister John Howard to Northern Territory Chief Minister Clare Martin referred to in 'Martin Defends Howard's Letter Over Mine Expansion, *ABC News* (online), 4 October 2006, <<http://www.abc.net.au/news/stories/2006/10/04/1755641.htm>> at 12 December 2007.

¹¹*Lansen & Ors v Northern Territory Minister for Mines and Energy & Ors* [2007] NTSC 28, [12]-[13].

¹²Ibid [14]-[15].

¹³Ibid [22]-[23].

¹⁴Ibid [33].

¹⁵Ibid [37].

¹⁶Northern Territory, *Parliamentary Debates*, Legislative Assembly, 2 May 2007, [3] (Chris Natt, Minister for Mines and Energy).

¹⁷Ibid [5].

Civil Society and Dissent: The Federal Government Strikes Back

by Dr James Arvanitakis

Aid/Watch is an independent watchdog for Australia's aid program. Established in 1995, the organisation was founded to highlight the increasing amounts of official aid being delivered for profit rather than poverty alleviation. In fact, Australia's aid policy has long been the subject of controversy for its twin objectives of serving the national interest as well as aiming to reduce poverty; concerns that were confirmed in 1997 by the Howard-government instigated Simon's Review.

Consequently, Aid/Watch has often been critical of government policy related to trade, aid and debt.

In pursuit of its objectives, Aid/Watch engages in a wide variety of activities including initiating, conducting and publishing research into the effects of development policies and practices. To do this effectively, it develops partnerships with communities in low-income countries, helping them in their dealings with governmental authorities.

Aid/Watch also produces and disseminates educational information to raise public awareness about development issues, engaging in community outreach programs. It also monitors and comments on Australian Government aid, trade and debt policies, seeking to ensure that they are consistent with United Nations' sustainability principles.

In early 2007 the Australian Tax Office (ATO) revoked Aid/Watch's charitable status, dismissing an appeal against its original decision of October 2006. This is a decision that has much wider consequences and

seriously threatens the public role of all civil society generally, and Australian charities specifically. In an ATO ruling, Aid/Watch has lost its ability to act as a charity for 'trying to procure changes in Australia's aid and development programs' and for being a 'political' organisation.

In October 2006 an ATO decision removed charitable status from Aid/Watch.

Since 2000, there has been a flurry of Federal Government reviews of the form that charities take. The 2001 *Inquiry into the Definition of Charities and Related Organisations* recommended that 'charitable purpose' be broadly defined as for public benefit, including 'protection, maintenance, support, research, improvement or enhancement'. It acknowledged non-party political activity as acceptable for charities, provided it 'furthers or are in aid of, the charity's dominant charitable purpose'.

In 2005 an ATO ruling banned charities from having a purpose of 'promoting a particular point of view'. At the same time, it stated that political activities in pursuit of a charitable purpose were acceptable, provided 'political activities are no more than ways of carrying out the charitable purposes'.

The initial October 2006 ATO decision to remove charitable status from Aid/Watch recognised that Aid/Watch's objectives are entirely

charitable. However, it cited three activities of the organisation that it believed were not consistent with charitable status:

1. Participation in joint campaigns to promote human rights and democracy in Burma. This was at a time when the Australian aid program was engaging the military junta in the area of human rights education. This was criticised by Burmese activists and opposition spokespersons for giving legitimacy to the regime whilst demanding no tangible results. As recent events have highlighted, the concerns of the Burmese activists have been realised;
2. Participation in efforts to convey concerns about the Free-Trade Agreement between Australia and the USA;
3. Involvement in a media event highlighting the environmental impacts of World Bank programs.

The ATO alleged that these three activities sat outside the ATO definition of acceptable political activities for a charity. Though Aid/Watch appealed in April 2007, the ATO upheld its original decision.

The ATO's new ruling in response to the appeal goes even further by defining the purpose of the organisation through activities such as these. For the ATO, such activities now define an organisation, and thus Aid/Watch can not be considered a

charity. This ruling has application for the charitable sector as a whole.

With this ruling, the distinction between purpose and activities is dissolved – Aid/Watch's uncharitable political purpose is inferred by its activities. In this context, any political activity, even signing a petition against the military dictatorship in Burma, can put an organisation in breach of its charitable status.

Aid/Watch is a very small charitable organisation, with an annual income below \$100,000, and the removal of charitable status threatens its very existence. A new appeal was submitted in early May 2007 and is currently pending. The basis for this appeal is that the ATO has breached its own 2005 ruling by confusing purpose with activities, and that the purpose of Aid/Watch is indeed charitable.

The new ATO ruling establishes a worrying precedent that charities cannot engage in 'any activity designed to change Australian Government laws, policies or decisions. Neither can charities engage in propagating or promoting a particular point of view'.

The attack on Aid/Watch continues on a number of fronts. Recently, the organisation released a report highlighting the ongoing concerns regarding the Iraqi conflict, the AWB and links to the Australian aid program. Rather than responding

to the concerns, the then Foreign Affairs Minister, Alexander Downer, responded by calling Aid/Watch an 'extremist organisation'. Shortly after, AusAid vetoed a speaker from Aid/Watch at a conference they had co-funded with the Australian Mekong Research Centre (at the University of Sydney).

It is hard to avoid the conclusion that the crack-down on charities is designed to silence organisations whose advocacy work the Federal Government does not like. It therefore poses a grave threat to civil society and the health of our democracy.

Dr James Arvanitakis teaches at the University of Western Sydney and is a Member of Aid/Watch's Committee of Management. For more information see aidwatch@aidwatch.org.au.



Abiding by the Umpire's Decision: Special Legislation and the Planning System in NSW and Australia

by Jeff Smith

1 Introduction

Special legislation is a loose term of art that refers to the phenomenon whereby laws are introduced to either anticipate or retrospectively validate matters before the court. Such laws are introduced to deal with “exceptions to the rule” – that is, Parliament does not wish to alter the law generally but only to do so in respect of a particular set of circumstances, place or person.

Special legislation has perhaps been most controversially used in relation to individuals or criminal matters. In the mid-1990s in Australia, community protection laws were introduced to keep specific individuals in preventive detention – namely, Gary David and Gregory Kable.¹ In the USA, Terri's law was passed in 2003 allowing Governor Jeb Bush to intervene to, amongst other things, reinsert the feeding tube for Terri Schiavo, who had suffered extensive brain damage and had been in a persistent vegetative state for 15 years.² These laws have been rare but also the subject of vigorous constitutional challenge.

By way of contrast, special legislation in the planning and environmental field has been used all too frequently, with Australia's planning history being replete with examples: from Roxby Downs (SA), McArthur River (NT), Xstrata Mine (QLD) to Parramatta Stadium (NSW).

This short article examines the types of circumstances where special

legislation is passed and how we can begin to understand and limit its use.

2 Models of Special Legislation

There are arguably four, overlapping, types of special legislation in the environmental sphere.

a) *Laws that oust prospective legal challenges*

This model has been a common response from government. In 1997, the NSW Government passed special legislation on no less than three occasions within 12 months for the Bengalla Mine, the Port Kembla Copper Smelter and the Kooragang Coal Terminal.

Helen Hamilton challenged the NSW Government's approval of an application by a Japanese consortium to reopen a copper smelter at Port Kembla.³ Shortly before the case commenced, the NSW Government introduced the *Port Kembla Development (Special Provisions) Act 1997*, which extinguished all rights of appeal against the grant of consent. Consent was subsequently given.

In the Bengalla Mine matter, the Minister made a State Environmental Planning Policy approving a mine proposal. When this was challenged, the Government passed special legislation validating both the SEPP and the approval.⁴

Finally, the *Kooragang Coal Terminal (Special Provisions) Act 1997* was introduced to head off an appeal to the Court of Appeal. The Land and Environment Court had previously upheld the validity of a development consent in connection with the expansion of the terminal in Newcastle. The consent had been challenged by Robert Bell in *Robert Duncan Bell v. Minister For Urban Affairs & Planning* [1997] NSWLEC 98 in relation to the adequacy of the Environmental Impact Statement (EIS) regarding noise and vibration issues. The Court found that the omissions in the EIS were not sufficiently serious to invalidate it and therefore the development consent was valid. The purpose of the Act was to remove any doubt about the validity of the Minister's consent for development.

The level of specificity by which this is done is exemplified by yet another example drawn from NSW. Section 4 of the *Botany and Randwick Sites Development Act 1982* states:

(1) Any proceedings in any court (including the proceedings in *Gwynvill Southpoint Pty Limited, Burns Philp Trustee Company (Canberra) Limited and Australian Mutual Provident Society v The Council of the Municipality of Botany, the Minister for Planning and Environment, R. B. Smyth, Westfield Developments Pty Limited and W.D. & H.O. Wills (Australia) Limited, No 40075 of 1982*, in the Land and Environment Court) pending immediately

before the date of assent to this Act in relation to:

- (a) any of the planning instruments in so far as they apply to any of the land to which the relevant instruments apply,
- (b) any development application or grant of consent referred to in section 3 (2), or
- (c) any associated matters, are terminated.

In similarly final and brutal terms, the *Blue Mountains Land Development (Special Provisions) Act 1985* terminated Court proceedings against a resort proposal.⁵

b) Laws that oust community challenge mid-hearing

This type of special legislation differs only from the above in timing. However, it more dramatically brings into relief the loss of legal rights vis-à-vis those enjoyed by the community under general planning laws.

When the *Walsh Bay Development (Special Provisions) Act 1999* was second read in Parliament, the matter had already commenced and the parties adjourned the matter, as proceeding would have been futile.

c) Laws that retrospectively validate or overturn decisions of the Court

The proposal to build a Waste Transfer Terminal in Clyde, NSW caused a storm of controversy for some years. A community challenge to the proposal commenced, with the media variously describing it as a David versus Goliath battle and analogous to *The Castle*.⁶ The Land and Environment Court found that the proposal was prohibited and that the development consent issued for the project was unlawful.⁷ Shortly after the judgment, however, the *Clyde Waste Transfer Terminal (Special Provisions Act) 2003* was enacted. The Act overturned the judge's decision validating the project and disallowing further appeals.⁸

The NSW Parliament passed legislation to retrospectively validate all water sharing plans made under the *Water Management Act 2000*, includ-

ing plans that may have been invalidly made.⁹ As a result, the Nature Conservation Council, represented by the EDO, was forced to abandon its High Court challenge to the Gwydir Water Sharing Plan.

d) Laws that anticipate and oust community opposition

From time to time, governments pass laws to head off potential challenges to specific proposals. This is arguably a further type of special legislation. For example, the *Snowy Mountains Cloud Seeding Trial Act 2004* contained a privative clause ousting the application of all other laws (and, for the removal of doubt, specifically also mentioned the key environmental statutes).¹⁰

3 What is the stated rationale for special legislation?

Sometimes governments seek to bury the retrospective validation of environmental laws. This was done in the 2005 amendments to the *Water Management Act 2000*, which dealt with a range of matters including the retrospective validation of all water sharing plans.¹¹

More commonly, governments have been forced to use a variety of means to justify intervening in planning matters. A common thread in these cases is the need for *certainty*. The threat that the proponent will go elsewhere and that the economic benefits of the proposal, and associated jobs, will be lost.¹² The Honourable Morris Iemma, then Minister for Public Works and Services, said about Walsh Bay:

When projects of State significance are put at risk by unnecessary and endless delay and frustration by those who would pursue an ideological campaign, particularly when they place on the public record their determination to pursue every possible avenue simply to defeat a proposal, then the Government must act, as governments have acted in the past.¹³

Another approach is to *trivialise* the judicial proceedings, as demonstrated by the *McArthur Mine* case in the Northern Territory. The proposed expansion of the mine envisaged a

change from an underground mine to an open cut mine. The authorisation of this was successfully challenged under judicial review proceedings in the case of *Lansen and Ors v Northern Territory Minister for Mines and Energy and Ors*. In introducing the *McArthur River Project Amendment (Ratification of Mining Authorities) Bill 2007*, the Minister for Mines and Energy described the Bill as addressing a "technicality".¹⁴ A similar line was argued by the Minister for Urban Affairs and Planning regarding the upgrading and expansion of the copper smelter and refinery at Port Kembla.¹⁵

Governments have also sought to focus on the merits of the proposal notwithstanding the legal challenge. This is amply demonstrated in the *Clyde Waste Transfer* case. In this matter, the applicants were successful on both merit and judicial review grounds. While acknowledging this, the Minister for Infrastructure and Planning, the Honourable Craig Knowles, expounded upon the evident worth of the project and the expert testimony of the proponents that it should go ahead.¹⁶

A final thread is the invocation of the *public interest*. In the Second Reading Speech regarding the *Penola Pulp Mill Authorisation Bill 2007*, the South Australian Minister for Forests, the Honourable RJ McEwen, stated:

This government does not use special legislation for significant projects in a rash or unconsidered manner. It will not shy away from doing so, however, when it believes the best interests of the State and, in this case, communities of the South East will be furthered.¹⁷

4 What can we make of all this?

Special legislation arises largely as a result of liberal standing provisions that recognise the right of the community to enforce breaches of planning law.¹⁸ In NSW, planning legislation for a long time recognised that public participation is central to the effective operation of those laws. While not an issue of individual rights, the public has a right to know

what they are fighting against and shape their actions accordingly.

Likewise, the community has a reasonable expectation that developers will carry out their activities in accordance with the law. Special legislation offends these principles and is anathema to the rule of law.

By both anticipating opposition and ousting it, as well as retrospectively validating unlawful developments, governments of various hues around Australia have shown scant regard for community rights that would otherwise operate under laws of general application.

It is telling that government has frequently used these powers in relation to major developments, precisely the circumstances one would expect to be appropriately supervised by community and the courts. As Tim Bonyhady has commented:

these Acts have deprived the public of their general rights to comment, object and appeal. The result has been a two-tier system in which public participation has been allowed where it mattered least and excluded where it mattered most.¹⁹

Special legislation is, by its nature, only used in extra-ordinary circumstances. In effect, by introducing such laws the Government is asking Parliament to be the development consent authority over particular parcels of land in NSW. This point is amply demonstrated by definitions such as those appearing in the *Blue Mountains Land Development (Special Provisions) Act 1985*:

“the relevant land” means:

(a) land in the vicinity of Fitzroy Street and Gladstone Road, Leura, as shown edged heavy black on Sheet 1 of the map marked “Blue Mountains Local Environmental Plan No. 28” deposited in the office of the Council; and

(b) portion 367 and part of portions 88, 153 and 366, Parish of Jamison, part of lots 9 and 10, section 2, D.P. 4305, part of a closed road and part of a public road off McLachlan Road, Leura, as shown edged heavy black on Sheet 2 of the map marked “Blue

Mountains Local Environmental Plan No. 28” deposited in the office of the Council.

5 What can be done?

Unlike in the criminal area, special legislation for planning and environmental issues has generally been immune from constitutional challenge. In particular, Courts have held that there is no constitutional prohibition on the alteration of rights which may be in issue in judicial proceedings: *Australian Building Construction Employees & BLF v Commonwealth* (1986) 161 CLR 88 at 96-97. This was not an unlawful interference with judicial power as argued in the Queensland case of *HA Bacharach v Queensland*²⁰ (the High Court confined this to the criminal law sphere).

More generally, it is worth noting that some jurisdictions have fast-track or discretionary regimes in place which obviate the need for special legislation in any event. For example, in NSW the passage of Part 3A of the *Environmental Planning and Assessment Act 1979* – and, more particularly, provisions relating to critical infrastructure projects – was motivated at least partly by a desire to do away with special legislation. Similar discretionary approaches are in evidence in jurisdictions such as Victoria and Queensland.

While legal avenues of redress may be limited, politics may, in part, provide the answer. In the USA, the non-profit public interest law firm Earthjustice, established a Policy and Legislation Division in Washington DC around 15 years ago due to the frustration involved in winning a public interest case only to find Congress reversing the finding. The Policy and Legislation Division operates essentially as a backstop against such efforts to reverse a legal victory. It plays a co-ordination and liaison role with clients and environment groups, and particularly those located close to the subject-matter of the litigation, to ensure that there is a common voice and consistent message for Earthjustice matters. Local members are also briefed and lobbied about the matter. In Washington DC, the Division also undertakes a rapid

response role (doing so-called fire drills) for dealing with bureaucrats and politicians on Capitol Hill. The NSW Environmental Liaison Office partly performs this sort of function closer to home.

It is ironic that the primary means of redress available to people who wish to see that the community has its day in Court and that the rule of law is upheld lies in the area of lobbying and politics. Abiding by the umpire’s decision, it would seem, is itself often at the discretion of the government of the day.

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¹The *Community Protection Act 1990* (VIC) applied to Gary David; the *Community Protection Act 1994* (NSW) applied to Gregory Kable.

²See 2003 Florida Laws Ch 418.

³*Hamilton v Minister for Urban Affairs and Planning* (1996) NSW LEC # 40307 of 1996, 29 May 1997. See also Arcioni E and Mitchell G (2005) “Environmental Justice in Australia: When the RATS became IRATE” *Environmental Politics* 14(3), June 2005 at pp363-379.

⁴See the case of *Rosemount Estates Pty Ltd v Cleland* (1995) NSW LEC 5, 24 January 1995 and the *State Environmental Planning (Permissible Mining) Act 1996*.

⁵See *Blue Mountains Land Development (Special Provisions) Act 1985* section 4.

⁶See “Backyard legal team that laid a multinational to waste” in *SMH* 14 November 2003 and “Judge hails laymen’s work in waste case” at <http://www.abc.net.au/news/stories/2003/06/25/888068.htm>.

⁷*Drake & Ors, Auburn Council v Minister For Planning And Anor; Collex Pty Ltd* [2003] NSWLEC 270.

⁸See sections 4, 6, 7 and 9.

⁹*Water Management Act 2000*, Schedule 9, Part 5, clause 71.

¹⁰Section 7.

¹¹*Water Management Act 2000*, Schedule 9, Part 5, clause 71.

¹²For example, the *Walsh Bay Development (Special Provisions) Act 1999* and the *Penola Pulp Mill Authorisation Bill 2007*.

¹³*Walsh Bay Development (Special Provisions) Bill*, Second Reading Speech, 13 May, 1999, at p4: <http://143.119.255.90/isquery/9a30fb0e-c617-4f09-aa99-12793917330e/36/doc/>

¹⁴*McArthur River Project Amendment (Ratification of Mining Authorities) Bill 2007*, Mr Natt, Second Reading Speech, June 4, 2007, at p1: http://www.austlii.edu.au/au/legis/nt/bill_srs/mrpaom-ab2007678/srs.html.

¹⁵*Port Kembla Development (Special Provisions) Bill*, Second Reading Speech, 29 May 1997, Mr C Knowles at p1: <http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key?LA19970529006>.

¹⁶*Clyde Waste Transfer Terminal (Special Provisions) Bill*, Second Reading Speech, 5 December 2003, at p1: <http://bulletin/Prod/Parliament/HansArt.nsf/fe74bade7b77456d100026cf49/c950f667>.

¹⁷*Penola Pulp Mill Authorisation Bill*, Second Reading Speech 30 May, 2007, The Hon. R.J McEwen, at p3: http://www2.parliament.sa.gov.au/hansard_data/2007/HA/WH300507.HA.htm.

¹⁸See, for example, (NSW) *Environmental Planning and Assessment Act 1979* s 123; (NSW) *Threatened Species Conservation Act 1995* s 147; (QLD) *Nature Conservation Act 1992* s 173B.

¹⁹Bonyhady T (1993) *Places Worth Keeping: Conservationists, Politics and Law* at pp25-26.

²⁰(1998) 198 CLR 547.

Anvil Hill Coal Mine

by Ian Ratcliff

Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources & Anor [2008] FCAFC 3

An unsuccessful appeal in the Federal Court confirms that the decision whether a particular project needs Commonwealth environmental assessment is for the Federal Minister for the Environment and Water Resources alone and cannot be factually reviewed in the Court.

In *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources & Anor* [2008] FCAFC 3¹, the Anvil Hill Project Watch Association ('the Association') unsuccessfully argued that the question whether the Anvil Hill coal mine was a controlled action under the *Environment Protection and Biodiversity Conservation Act 1997* ('EPBC Act') was a "jurisdictional fact". That is, the objective existence or non-existence of facts would determine the decision that the Minister could legally make.

The Association had contended that if the Minister wrongly decided that the coal mine was not likely to have a significant impact on a matter of national environmental significance, this was a matter that could be determined by the Court on objective evidence.

The Full Federal Court (Tamberlin, Finn and Mansfield JJ) dismissed the Association's appeal, agreeing with the decision of Stone J that this was not a jurisdictional fact.² Their Honours indicated that s.75(1) involved a subsidiary duty to determine whether the project would be prohibited under the *EPBC Act*

because the project has, will have or is likely to have a significant impact on a relevant aspect of the environment. That subsidiary duty, in the Full Court's opinion, was assigned to the Minister and not to the Court and was not expressed in an objective manner. This meant that it was not a condition precedent to the performance of the Minister's overall duty under s.75(1).³

The lack of an objectively determined fact informing the Minister's decision under s.75(1) was the key to the Full Court's decision.⁴

The acceptance by the Federal Court of the argument that the existence of a jurisdictional fact would be inconsistent with the "purpose of adopting an efficient and timely environmental assessment and approval process" over and above the objective of the Act to protect the environment is a significant concern.⁵ This is because the "purpose" referred to in the *EPBC Act* goes on to state that it is a process "that will ensure activities that are likely to have significant impacts on the environment are properly assessed" (s.3(2)(d)). Clearly, given the discretion open to the Minister and the potential politicisation of that decision, the lack of meaningful rights to appeal against a "wrong" decision not to assess what is, in fact, a controlled action can result in the failure to meet either of those objects. This decision emphasises the need for reform of the *EPBC Act* to provide more merit appeal rights.

The decision of the Federal Court in the *Anvil Hill* case at first instance also confirmed the need for a greenhouse trigger in the *EPBC Act*.

Effectively, Stone J confirmed that it was no error of law for the

Minister's delegate to find that the Anvil Hill project would not have any significant impact on relevant World Heritage areas because there was no identifiable link between the emission of 12.5 million tonnes of CO₂ per year for 21 years as a result of the burning of the coal derived from the Anvil Hill mine and the likely impacts of climate change on World Heritage areas such as the Great Barrier Reef.⁶ In doing so, her Honour affirmed the approach of Dowsett J in the *Bowen Basin* case.⁷

If a single project whose emissions are equivalent to over 2% of the entire NSW emissions can avoid environmental assessment at the Commonwealth level because the contribution to climate change is considered insignificant, then it is urgently necessary to amend the *EPBC Act* to ensure that any future projects do require such assessment.

¹An appeal from *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources & Anor* [2007] FCA 1480.

²See fn 1. In determining that the decision under s.75(1) of the Act did not involve a jurisdictional fact, her Honour placed weight on the following 4 matters:

- (i) The Act distinguishes between a controlled action and the Minister's decision that an action may be characterised as that;
- (ii) The evidence before a Court would be different to that before the Minister;
- (iii) The Act provides for consequences to flow from the fact of the Minister's decision rather than whether the proposed action is or is not a controlled action;
- (iv) Focus on the object of "an efficient and timely Commonwealth environmental assessment and approval process" which would not be assisted by "the availability of merits review at this stage."

The Court and Full Court also dismissed an argument that the delegate had made an error of law in determining whether or not a critically endangered ecological community was on site. This aspect of the decision is not discussed in this case note.

³At [26].

⁴See also the discussion of *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 and *Dowe v Commissioner of the New South Wales Crime Commission; Gedeon v Commissioner of the New South Wales Crime Commission* [2007] NSWCA 296, at [29]-[32].

⁵*Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources & Anor* [2008] FCAFC 3, at [33]; Fn 1 above, at [70].

⁶Fn 1 above, at [39]-[40].

⁷*Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors* (2006) 232 ALR 510.

Injunction Granted in Japanese Whaling Case

by Dr Chris McGrath¹

HSI Technical Bulletin

Injunction granted in Japanese Whaling Case

The Federal Court has declared Japanese whaling in Australia's Antarctic waters is unlawful under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and granted an injunction restraining it. The result is the culmination of a series of decisions since 2004 in the Japanese Whaling Case that have navigated the complex interplay between international law and Australian domestic law applying to Antarctica and whaling.²

The case began in late 2004 when the Humane Society International Inc (HSI) commenced proceedings in the Federal Court against the Japanese company that conducts whaling in waters adjacent to Antarctica, including in the Australian Whale Sanctuary (AWS) adjacent to the Australian Antarctic Territory. As the Japanese company has no registered office in Australia, to proceed against it HSI needed the permission ("leave") of the Federal Court in accordance the *Federal Court Rules* and the principles of private international law.

Justice Allsop refused to grant leave to serve the originating process after the then Attorney-General, Phillip Ruddock MP, submitted to the Court that allowing the case to proceed would cause a diplomatic incident.³ HSI succeeded in its appeal against this refusal and was granted leave to serve the originating process. The Full Court held that diplomatic and political considerations were

irrelevant where, as here, the Parliament has provided that the action is justiciable in an Australian court.⁴

After being granted leave to serve the originating process, HSI sought to effect service through the diplomatic channel as normally required by the *Federal Court Rules*. However, this failed due to the Government of Japan refusing to serve the respondent company because of the Government's non-recognition of Australia's jurisdiction over Antarctic waters. HSI then sought and was granted an order for substituted service of the originating process by post and personal service.⁵

After service was effected by substituted service the matter came on for trial before Allsop J. The respondent Japanese whaling company did not appear at the trial and Allsop J proceeded to hear the matter in September 2007. At the trial Allsop J sought confirmation of the Attorney-General's views on the proceedings. In October 2007 the then Attorney-General, Philip Ruddock MP, confirmed his opposition to the proceedings. However, following the Australian federal election in November 2007, the new Attorney-General, Robert McClelland MP:⁶

requested the Court not to place any reliance upon the views conveyed to the Court on behalf of the previous Attorney-General. The Commonwealth Government believes that the matter would best be considered by the Court without the Government expressing a view.

Allsop J did not acknowledge the changed views of the new Attorney-General in his reasons for judgment but ultimately granted the declaration and injunction sought by HSI pursuant to the principles for public interest injunctions stated by the majority of the Full Court. HSI has since effected substituted service of the orders, thereby enlivening the potential for future contempt proceedings should the Japanese whaling company refuse to comply with the injunction.

Despite the declaration and injunction issued in this case, ultimately enforcement of the prohibition against whaling in the AWS under the *EPBC Act* rests on the shoulders of the new Australian Government. The Australian Government could stop the whaling by the respondent Japanese company by ordering an Australian customs or fisheries vessel to arrest the Japanese whaling company's vessels operating in the AWS adjacent to Antarctica. Prior to being elected and prior to the injunction being issued by the Federal Court, the Australian Labor Party committed itself to "enforce Australian law banning the slaughter of whales in the Australian Whale Sanctuary", stating:⁷

- It is illegal under the *Environment Protection and Biodiversity Conservation Act 1999* ... to kill or injure a whale within the Australian Whale Sanctuary. Since 1999, more than 400 whales have been killed in the Australian Whale Sanctuary without a single prosecution, despite these actions being illegal under Australian law.
- The Attorney-General, Phillip Ruddock, tried to block an action by the environment group Humane Society International to get Federal Court enforcement of Australian law, arguing that the prosecution of Japanese whalers would "create a diplomatic disagreement with Japan".
- A Federal Labor Government will enforce Australian law prohibiting whaling within the Australian Whale Sanctuary adjacent to the Australian Antarctic Territory, penalising any whalers found to have breached Australian law.

In January 2008 the Australian Government dispatched the customs vessel, *Oceanic Viking*, to monitor Japanese whaling but stopped short of intercepting and arresting the Japanese vessels. The new Attorney-General is also removed of the previous government's opposition to HSI's litigation but it remains to be seen whether the new Australian Government will fulfil its election commitment to enforce Australian law against the whalers.

⁷BSc, LLB(Hons), LLM, PhD, Barrister-at-Law. Junior counsel for HSI in the Japanese Whaling Case. This is a shortened version of a paper presented at an EDONSW Seminar, "Can whaling in Antarctica be stopped?", Sydney, 21 February 2008.

⁸The primary citations of the series of decisions in this case are: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; [2005] FCA 664; [2006] FCAFC 116; [2007] FCA 124; [2008] FCA 3; [2008] FCA 36. Background documents for this case, including court documents, submissions, affidavits and maps, are available at <http://www.envlaw.com.au/whale.html> (viewed 23 January 2008).

⁹*Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664.

¹⁰*Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116; (2006) 154 FCR 425 at 430 [13] per Black CJ and Finkelstein J with whom Moore J agreed on this point (at 434 [38]) though dissenting on the question of futility.

¹¹See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124.

¹²Correspondence, dated 12 December 2007, written on behalf of the new Attorney-General to Allso J.

¹³Rudd K and Garrett P, "Federal Labor's Plan To Counter International Whaling" (ALP Media Statement, 19 May 2007), available at <http://www.alp.org.au/media/0507/msehlo0190.php> (viewed 23 January 2008).

Failure to Consider the Impacts of Climate Change

by Josie Walker

Walker v the Minister for Planning & Ors [2007] NSWLEC 741

The Facts

The Sandon Point site comprises 53ha of mostly open space land on the coast north of Wollongong. It is an area of considerable significance for the local Aboriginal community. In May 2007 the eastern part of the site was declared an Aboriginal Place under the *National Parks and Wildlife Act 1979*. The site also contains endangered ecological communities and significant bird habitat.

Since the 1990s, there has been strong community opposition to redevelopment of the site for residential purposes. Locals have lobbied the state government to acquire the site for public open space. There has been an Aboriginal tent embassy at Sandon Point since 2000.

A Commission of Inquiry into the site in 2003 recommended that only limited areas of the site should be developed, to allow for preservation of Aboriginal cultural values, natural creek corridors and bird habitat.

In 2006 developers Stockland and Anglican Retirement Villages lodged a joint application to subdivide the site into approximately 180 residential dwelling allotments, 3 super-lots for future apartment or townhouse development, up to 250 seniors living units and a residential aged care facility.

An important issue to be resolved in connection with the concept plan was the treatment of three water-courses on the site, which were prone to flooding. The proponent wanted to construct relatively narrow and straight stream corridors which would maximise the developable

area. The Department of Natural Resources (“DNR”) argued that wider creek corridors should be provided to reduce flooding risk and preserve ecological values. The Minister eventually approved the concept plan subject to conditions which modified the creek corridors proposed by the proponent, but not to the full width recommended by DNR.

Neither the Minister nor the Director General (D-G) considered whether the flooding risk would be exacerbated by climate change.

The legal consequences of obtaining concept plan approval are that any subsequent approval granted by the local council must be consistent with the concept plan, and further project approvals are not subject to appeal on the merits. Although there is no legal compulsion on the Minister to consent to subsequent project applications on a concept plan site, the concept plan is taken to indicate in-principle approval of the project, based upon which the proponent can proceed to draw up more detailed plans.

The Findings of Justice Biscoe

The applicant alleged that the Minister when granting concept plan approval had failed to consider the principles of ecologically sustainable development (“ESD”) because he had not considered whether the flood risk on the site would be exacerbated by climate change, had not obtained up-to-date mapping of endangered ecological communities, and had not carried out further investigations into a possible “womens area” on the site. ESD is described in s 6(2) of the *Protection of the Environment Administration Act 1979* and includes the ‘precautionary principle’. The precautionary principle states that

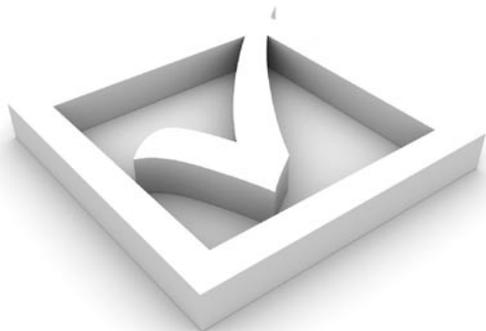
decision-makers should make an assessment of the risk-weighted consequences of any action before deciding to proceed with the action.

Biscoe J held that under cl 8B of the *Environmental Planning and Assessment Regulations*, the D-G was obliged to include in his report those aspects of the public interest which he considered to be relevant. It had been established in previous cases that ESD was an aspect of the public interest, therefore the D-G was obliged to consider ESD in deciding what matters needed to be addressed in his report. In this case the D-G had apparently failed to consider whether the climate-change related flood risk was a matter which needed to be addressed in his report.

His Honour observed at paragraph [161]:

Climate change presents a risk to the survival of the human race and other species. Consequently, it is a deadly serious issue. It has been increasingly under public scrutiny for some years. No doubt that is because of global scientific support for the existence and risks of climate change and its anthropogenic causes. Climate change flood risk is, prima facie, a risk that is potentially relevant to a flood constrained, coastal plain development such as the subject project.

In addition to being a win for the local Sandon Point community, this case has served to highlight the far-reaching ramifications of climate change for all kinds of economic activities. The same reasoning could be applied to any development which is potentially impacted upon by climate change. This might include developments which are affected by increased drought risk, decreased snowfall, coral bleaching or coastal erosion.



EDO NSW Launches New Compliance Portal

A tool to assist citizens in enforcing environmental law

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Most environmental legislation in NSW requires that certain information must be made publicly available through public registers or online resources. Much of this data is now available online, often with a fee payable. A summary of how to access this information is provided in the Compliance Portal.

Note however that every public document is now obtainable under a Freedom of Information Request subject to statutory exemptions.

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