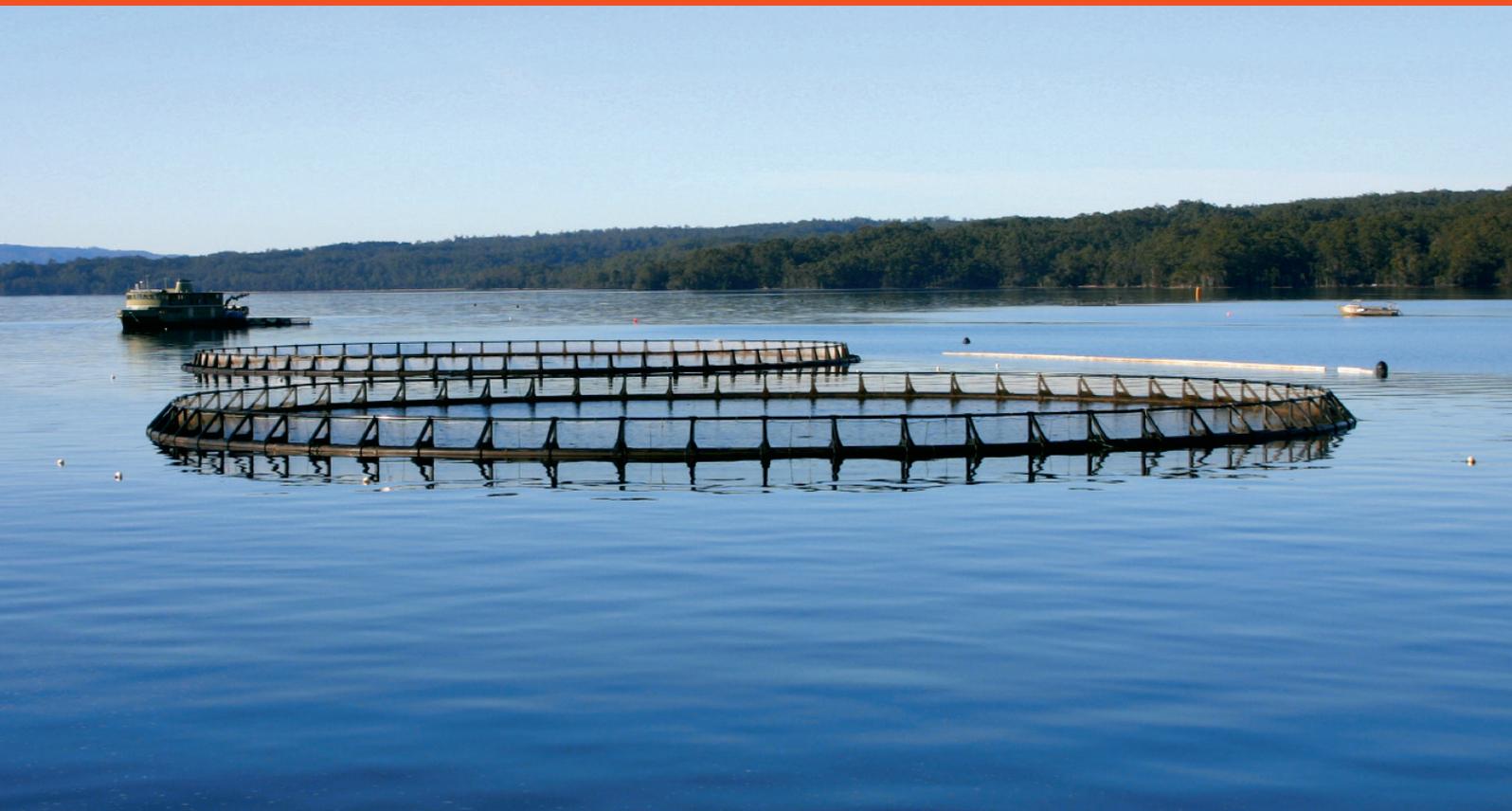


IMPACT!

A NATIONAL JOURNAL OF ENVIRONMENTAL LAW

Issue 94, 2012 // www.edonsw.org.au



IN THIS ISSUE:

The role of the NSW Planning Assessment Commission in 'reviewing' planning projects

The Olympic Dam decision: Mines, Uncle Kevin and judicial review under the EPBC Act

Politics vs science – Making better decisions

Limited access to justice in environmental law in the Northern Territory



Australian Network of Environmental
Defender's Offices Inc



DEFENDING THE ENVIRONMENT
ADVANCING THE LAW



From the editor

The articles in this issue of IMPACT! highlight the importance of strong, well-designed environmental law and regulation which allow for meaningful public participation.

The importance of public participation is highlighted in **Ashfia Osman, Kirsty Ruddock** and **Elaine Johnson's** article on the decision of the NSW Planning Assessment Commission (PAC) on the Maules Creek mine project. The PAC was introduced to promote accountability and public confidence in the NSW planning system, however ongoing concerns regarding the adequacy of environmental conditions show that there is a way to come yet in achieving these aims.

Issues relating to environmental conditions attached to major projects are also a focus of **Ruth Beach's** article, which looks at the decision of the Federal Court on Uncle Kevin Buzzacott's challenge to the approval of the Olympic Dam mine proposal in South Australia. One of the key issues in that case was that many of the environmental conditions placed on the proposal were contingent on plans or studies that had yet to be completed. Ruth also discusses the implications of this case for future decisions made under the EPBC Act.

Jess Feehely's article discusses recent changes to the assessment of aquaculture proposals in Tasmania following the proposed operation of the supertrawler, *FV Magiris*. The EPBC Act was used to apply the precautionary principle to allow a temporary halt to the supertrawler while its environmental impacts were assessed. Jess notes the importance of evidence-based decision making and the need for merits review.

Finally, **Emily O'Connell** writes on the importance of access to justice, and provides brief overview on

the current state of environmental law in the Northern Territory. In recognition of the current limitations of the system of environmental law in the Territory, EDO NT has prioritised community legal education to increase access to justice in environmental law, such as publishing an updated set of fact sheets on their website.

IMPACT! has transitioned to a free, online-based journal. Anyone can now access copies of IMPACT! online at www.edo.org.au/edonsw/site/impact.php. We hope this means more people in the community who are interested in environmental law and policy will enjoy being able to read IMPACT! each month. The journal's smaller environmental footprint also reflects EDO NSW's Green Office commitments.

This issue of IMPACT! was made possible by the generous sponsorship of Environmental Planning Law Association (EPLA), for which EDO NSW and ANEDO are grateful. To find out about upcoming EPLA events, visit their website: www.epla.org.au. An upcoming event is the 2013 Mahla Pearlman Oration, which will be given by Paul Stein AM QC, on 14 March 2013 at 5.00pm at the State Library of NSW. For reservations please email: gerard.oneill@lawcouncil.asn.au.

As always, I hope you enjoy the contents of this issue of IMPACT!. This is my last issue as editor. It has been a great pleasure to have had the opportunity to be involved with IMPACT! – an enormous thanks to all who have contributed. EDO NSW Policy and Law Reform Solicitor Emma Carmody will be editing the journal from 2013. If you would like to submit an article for consideration for publication in a future issue of IMPACT!, please email emma.carmody@edonsw.org.au.

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IMPACT! is a national journal of environmental law prepared by EDO NSW.

Publisher

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Free call: 1800 626 239 Website: www.edonsw.org.au

ISSN

1030-3847

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Editor

Emma Cocks



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The role of the NSW Planning Assessment Commission in ‘reviewing’ planning projects

Ashfia Osman, Volunteer, EDO NSW; Kirsty Ruddock, Principal Solicitor, EDO NSW; and Elaine Johnson, Solicitor, EDO NSW

Elaine is grateful for the research assistance of EDO NSW volunteers Millicent McCreath, Ben Windsor and Joelene Luu.

Many planning decisions in NSW now involve a panel of experts, such as the Planning Assessment Commission (**PAC**). For example, several large mining and CSG projects have been referred to the PAC for review.¹ There are also moves as part of the current review of the NSW planning system to increase the use of such bodies in all local government decisions, in an attempt to ‘depoliticise’ the planning system. Using independent experts as decision makers can improve environmental decision making and outcomes. However, as this article will discuss, there are difficulties and challenges in using expert-based models to make decisions that often involve complex competing interests, without clear outcomes to guide decision makers. This article proceeds in two main parts. The first part of the article briefly describes the PAC and its main functions, particularly the public hearing function and the removal of merit appeal rights. The second part of the article gives an overview of the PAC review and decision in the Maules Creek mine project. This case study illustrates that the PAC has struggled to strike a balance between concerns about the impacts of mining on the environment and community, and the economic interests of projects proceeding.

The Planning Assessment Commission

In 2007, significant new reforms to environmental planning and assessment in NSW were introduced.² The PAC was established as part of these reforms, to promote accountability in the NSW development assessment process in order to increase public confidence in the fairness of the system.³ The PAC was also introduced to achieve planning outcomes more efficiently and to make the process more streamlined and consistent.⁴

The PAC is an independent panel of experts which can review planning applications, provide advice, and make determinations in place of the Planning Minister.⁵ The PAC is not subject to the Minister’s control or direction,⁶ however its procedures are specified by the Minister, and its chairperson and members are also appointed by the Minister.⁷ The PAC has three members, unless the Minister issues a direction to the contrary.⁸ The Minister may remove PAC members, including the Chair.⁹ Each of the PAC members must have expertise in at least one of the following disciplines: architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration.¹⁰ The PAC cannot employ staff,¹¹ and therefore relies on staff from other departments or public authorities.

“The PAC was established ... to promote accountability in the NSW development assessment process in order to increase public confidence in the fairness of the system”

Public hearing function and appeal rights

Another important role of the PAC is its function of holding a public hearing when requested by the Minister.¹² ‘Public hearings’ remove the right to bring a merits appeal in the Land and Environment Court for projects with the potential to have significant environmental impacts (that is, those which would be designated development but for Part 3A of the

Environmental Planning and Assessment Act 1979 (NSW) (**EP&A Act**).¹³ For an explanation of merits appeal rights and their importance, see Natasha Hammond-Deakin and Elaine Johnson's article in Issue 92 of this journal, available online.¹⁴

The Second Reading Speech of the *Environment Planning and Assessment (Part 3A Repeal) Bill 2011* stated there would be an increase in PAC public meetings in rural and regional areas where there is significant interest in a proposal.¹⁵ It was also stated that if the PAC determines a development application after conducting a public hearing 'with an opportunity for the community to make submissions and participate in the investigation of the proposal, there will be no appeal rights for applicants and third parties'. In the second reading speech introducing the establishment of the PAC in 2008, and in response to criticism of the restriction of appeal rights, it was stated 'this is the same as the existing Act provisions which restrict appeal rights where there has been a Commission of Inquiry'.¹⁶

In addition to these concerns about the removal of appeal rights, several difficulties with the review process have been highlighted by experiences from recent PAC reviews. One such difficulty has been that the PAC has adopted a course of action whereby private meetings have been held between the PAC and a proponent, and various government agencies, to inform a review process. The process of obtaining information behind closed doors, which experience demonstrates has a significant bearing on the outcome of a review process, conveys to the public a sense of preferential treatment in favour of a proponent. Furthermore, in terms of ensuring a fair process, this puts the community in a position of disadvantage. In particular, in being excluded from the collection of evidence the community is denied an opportunity to respond to matters which the PAC will take into account as being relevant to a review. Despite the fact that the meetings are documented in the final PAC report, these procedures mean that the public hearing process is, in substance, no more than an entitlement to make a (verbal) submission in reply to a proponent's preferred project report/response to public submissions. The Regulations under the EP&A Act may make provision for the procedures of the PAC, including for reviews.¹⁷ However, at present, minimal procedures have been prescribed for the conduct of a public hearing.

Notwithstanding these difficulties, public hearings are important opportunities for interested parties to take part in an open inquiry and for their concerns to be heard before the matter is determined. However, public meetings are not always held as part of a review process.

This can be problematic, as the Maules Creek example below demonstrates. There was no public hearing after the Maules Creek PAC Review (**PAC Review**) and a second separately comprised PAC made the Maules Creek recommendations (**decision making PAC**). The community was therefore not afforded the chance to be sufficiently heard. The decision making PAC should have given the community an opportunity to be heard before determining the matter, and allow the rest of the review process to occur in a transparent way through a public inquiry.

Case study: conclusions of the PAC on the Maules Creek Coal Project.

In March 2013, the PAC delivered its Review Report on the Maules Creek Coal Project.¹⁹ The project involves the development of an open cut coal mine in the Leard State Forest, in the Narrabri Local Government area. The mine would produce up to 13 million tonnes of coal a year, disturbing 2,178 ha of land over a 21 year period, and involves the clearing of 1,665 ha of native vegetation, including 754 ha of critically endangered box gum woodland. Other potential impacts of the project include on ground and surface water flows, dust, noise and blasting emissions. The Minister for Planning and Infrastructure requested the PAC carry out a merits review of the project.

The PAC has itself highlighted some of its inherent problems in the Maules Creek Coal Project decision report (**PAC report**),¹⁹ which concluded that 'there are a number of issues arising from the assessment and approval of this project that require further investigation and/or review in the context of coal mining assessments'.²⁰ The PAC then goes on to include a comprehensive list of issues about noise, air, final void and acquisition process. Several areas of concern surrounding the final decision of the PAC are set out below.

Final land form arrangements

The decision making PAC was forced to grapple with competing recommendations of both the PAC review that considered best practice and the Department of Planning's recommendation that sought a compromise based on the economic impacts of best practice on the mine. The PAC's final project approval decision (**PAC decision**) on the Final Void is one such example. The situation was further complicated in this case by the fact that the PAC had already determined a project approval for the nearby Boggabri Coal project and insisted that its Final Void Design and Closure Plan 'demonstrate that:

- (i) the long term landform will not generate a pit lake;
- (ii) emplaced spoil has the capacity to drain to the natural environment; and
- (iii) drained waters do not adversely affect the downstream environment.²¹

When the decision making PAC examined whether to permit the final void to be an open void resulting in a pit lake or require backfilling and reshaping of the final void, it confirmed that the review PAC found that overall backfilling provided for better environmental outcomes. However, the PAC decision confirmed that the project should proceed on the basis of a final void that is open and contains a pit lake that will form a hydraulic sink, in essence accepting the Department of Planning's recommendation. The Department's reason for the preference of a pit lake rather than backfilling was Aston's monetary preference.²² The Department has therefore been able to completely ignore the concerns of the community, the environment, the PAC and even the decisions made in previous similar situations in the Boggabri Approval in preference of Aston's financial position.

Noise concerns

The PAC did, however, make a positive concession for residents in the Maules Creek Project Determination compared to its previous position during the Boggabri Determination. This was in light of submissions of the different types of properties in the Maules Creek area. The PAC accepted that some properties in the Maules Creek area were not 'broad-acre agricultural properties in the accepted sense of that expression, but are in fact 'lifestyle' properties'²³ and therefore noise levels above 40dB would have 'genuine impacts' on these properties. The PAC therefore recommended land acquisition rights, where more than 25% of land is affected by noise, and there is an existing residence on that land, regardless of (unlike in the Boggabri determination) whether the actual residence was impacted.

The PAC review and the PAC decision grappled extensively with how to best address acquisition issues. The PAC decision reflects the difficulties inherent in ensuring that such conditions deal with the varying and diverse needs of affected residents and communities. There are many residents in rural communities, tied and connected to their properties and towns. When affected by mining, these residents may wish to live outside the affected area, but return to their properties after the completion of the mining project. Future decisions need to include options to provide improved certainty and better long-term planning prospects for

residents affected by mining activities. For example, conditions could be imposed that allow the mining company to rent a property for the life of the mine, and rent alternative accommodation for the family affected. Conditions could also provide assistance with relocation to a new area if required, as an alternative to acquiring a property. The PAC decision however, felt that 'standard conditions allowing for individual written agreements between the Proponent and an affected landholder ... gives sufficient flexibility to identify and implement tailored solutions in most circumstances'.²⁴ At this stage, however, there is no indication that the proponent of the Maules Creek mine project is offering these types of arrangements to affected landowners.

Air quality issues

The PAC was also concerned about air quality issues, but their decision again sought a compromise outcome rather than best practice conditions. The PAC review recommended that Aston be required to 'ensure ... Aston ... does not cause or contribute to exceedance'. The PAC Review found that cumulative impacts from the location of the mine and the strategic context were significant and recommended that a number of regional strategies for biodiversity, air quality, noise (including rail noise), water, the form of the post mining landscape and the longer term prospects for employment and sustainable agriculture be prepared.²⁵ However the PAC review considered that the preparation of these strategies should not delay the decisions on relevant mining applications in the Leard State Forest. This leads to difficulties with enforcement as highlighted in *Ironstone Community Action Group v NSW Minister for Planning and Duralie Coal Pty Ltd*, a merits review case involving a coal mine in the Gloucester region.²⁶ Conditions under a project approval cannot be revised at a later stage, though a condition might require compliance with a management plan that is prepared at a future time. In *Ironstone Preston CJ* explains that:

The mitigation measures upon which Duralie Coal's air quality predictions were based, and which were accepted by the Director-General, are not expressly required to be undertaken in any condition of approval...

Condition 19 of Schedule 3 prescribes performance standards in the form of long-term criteria for particulate matter, a short-term criterion for particulate matter and long-term criteria for deposited dust (in Tables 5, 6 and 7 in Condition 19 of Schedule 3). Condition 19 requires Duralie Coal to 'ensure that all reasonable and feasible avoidance and mitigation measures are employed so that particulate matter emissions generated by the project do not exceed the criteria listed in Tables 5, 6 or 7 at any residence on privately-owned land or more than 25 percent of any privately-owned land'. This wording falls short of

requiring Duralie Coal 'to comply with contemporary air quality criteria', as had been recommended in the Director-General's Environmental Assessment Report (p 20). ICAG proposed an alternative Condition 19 which would require Duralie Coal to 'ensure that particulate matter emissions generated by the project do not exceed the criteria listed in Tables 5, 6 or 7 ...'

I consider Condition 19 should require compliance with the criteria for particulate matter and dust, and that it is not sufficient to merely require the taking of 'reasonable and feasible avoidance and mitigation measures.' Having set appropriate air quality criteria, Duralie Coal should be required to comply with such criteria. This was the approach recommended in the Director-General's Environmental Assessment Report. It is the approach used for noise in other conditions of approval. Duralie Coal is required to ensure that noise generated by the project does not exceed the appropriate noise criteria (see Condition 2 of Schedule 3 and see further below). There is no sufficient reason for taking a different approach with respect to air quality.

Preston CJ's judgment requires there to be precise limits imposed on the cumulative operations of the mines, not just the preparation of plans in due course on these issues. The difficulty is that there was not an adequate assessment of the cumulative impacts of the Maules Creek project. Approval of these mines in the area without sufficient data on the cumulative impacts of noise, air quality and the potential biodiversity impacts across the precinct locks in development of a project where subsequent data may indicate that the risks are unacceptable and the impacts unable to be adequately mitigated. The community has no prospects to challenge such decisions through judicial review because the Court has accepted in recent judgments that uncertainty in terms of future plans is acceptable under Part 3A.²⁷

Independent expert evidence sought by EDO NSW on the air quality issues indicated that the PAC assessment of air quality failed to undertake a proper cumulative impact assessment. The close proximity of a number of mines means that the assessment of incremental impacts above a fixed background level is not an appropriate way of assessing the impacts in the area. Instead, modelling of all existing and proposed facilities in the area should be completed to properly account for cumulative impacts. The failure to undertake such an assessment has a particular bearing on the approval of the Maules Creek mine given the significant size of the mining project.

Again the PAC's decision did not necessarily reflect the PAC's Review. The PAC Review recommended that the mine be required to meet the air quality criteria even if it meant immediate shut-down under adverse

conditions.²⁸ The decision making PAC however, accepted weaker protections against noise and dust impacts, so that the proponent is now merely required to 'minimise the air quality impacts of the project during adverse meteorological conditions rather than require immediate shut down conditions'.²⁹ The community therefore does not have clear enforceable limits to protect air quality.

Another recommendation the PAC's decision chose to ignore is the PAC Review's recommended real time monitoring of air quality.³⁰ The PAC's decision merely requires publication to be 'timely'.

Surface water management

There were a number of issues raised about surface water management in the PAC review, and they recommended that the proponent be required to provide contingency storage facilities to ensure that the dirty water management system be maintained on a zero discharge basis at all times, including in high rainfall situations.³¹ This was to ensure mine water did not flow back into the nearby Black Creek System. The PAC's decision however, reflected the recommendation of the Department of Planning that 'excess water arising from unforeseen or extreme events could be discharged following treatment to acceptable standards, without causing significant environmental impact'³² and decided not to recommend further storage facilities to prevent mine water discharge.

Biodiversity offsets

There were also a number of complex biodiversity issues involved in the Maules Creek Project because of the fact that the mining will occur in an area of state forest, one of the largest areas of remnant vegetation in the area. The PAC Review found that:³³

The project involves the clearing of 1385 ha of native vegetation including 624 ha of vegetation listed as an endangered or critically Endangered Ecological Community as well as impacting 25 listed threatened or migratory species which have been identified on the site. The location of the mine within the Leard State Forest has its own substantial impacts, most significantly the potential impacts on biodiversity ...

In order to ensure the long term success and security of the biodiversity conservation areas and corridors, the Commission has recommended that a Regional Biodiversity Strategy should be developed and implemented. The strategy will need to set out the long term framework of management, monitoring and land use security to be applied consistently across all biodiversity conservation areas in the region.

The conservation corridors proposed to be developed would link directly to the Leard State Forest. Currently mining applications are seeking to mine from the north and the south of the forest only leaving a narrow strip of undisturbed vegetation between them. The Commission has recommended that the 'barrier' between the two mines should be increased to include a minimum of 500 m of undisturbed vegetation, in line with advice from the Office of Environment and Heritage.

A key part of this strategy was ensuring an effective biodiversity corridor through Leard State Forest. This was also accepted through the conditions of approval for the Boggabri Coal project. The PAC decision noted.³⁴

The proposed project is for 21 years (the maximum length of a mining lease) and leaves an area to the north beyond the mine disturbance boundary untouched at this stage. The proponent has indicated it may seek a separate approval to mine this area, known as the barrier, at a later date.

The PAC then stated that as

the companies may wish to mine this area in the future and considers that this would require very careful consideration in a separate application, rather than as a modification of any approval which may exist at the time. Should either or both mining companies seek to mine the barrier coal in the future, as a minimum, the Commission would expect the mining company would need to demonstrate that an alternative biodiversity corridor was available, of the same or better quality than the 500 m wide exclusion zone. This issue should be explicitly addressed in the Regional Biodiversity Strategy.³⁵

These conclusions result in there being no condition requiring long term protection of this corridor in the project conditions. Condition 47 of the project approval that related to long term security of the offsets does not apply to the barrier coal corridor.³⁶ Instead, condition 51 requires the mine to use their best endeavours to minimise impact on this area.³⁷ This is despite the decision making PAC acknowledging that the corridor should be a minimum of 500m as advised by the Office of Environment and Heritage (OEH)³⁸ the project approval only requires a 250m to be protected under a future decision.

More generally, the conditions applied to the project failed to address one of the key concerns of offsets acknowledged by the PAC review, that there will be a time lag between the clearing of the Leard State Forest and the ability of offset areas to provide suitable habitat, particularly hollows. The PAC review found:

While the condition of the State Forests is variable as a result of previous forestry and mineral exploration activities, the proposal involves the destruction

of some of the most valuable components of the vegetation including habitat for hollow-dwelling fauna species.³⁹

The PAC review also found that:⁴⁰

For example, modelling has shown that over a 30 year period, only shrub-dependant species, whose requirements could be rapidly grown, saw increases in suitable habitat in landscape (Bedward et al. 2009). The habitat of the canopy-dependent species initially declined and only began to increase towards the end of some simulations, while those dependent on old tree habitat declined (Brown et al. 2009).

The PAC review therefore acknowledges the importance of maintaining a biodiversity corridor, however in its final decision have considered the costs of biodiversity protection for the proponent rather ensuring the conditions reflect best practice environmental regulation.

Conclusions

Removing the rights of objectors to undertake a Class 1 merits appeal after a PAC Review creates many issues which impact on protection of the environment. The Maules Creek approval involves several instances where the decision making of the PAC has been unsatisfactory, as they have indeed admitted. This reinforces the need for stronger planning reforms to ensure there are clear obligations on the PAC to ensure that best practice environmental and social impact conditions are imposed on development. Without such clear requirements, it is difficult for the PAC to reconcile the financial interests of the proponent against the environmental and social costs to the community, that are often unquantified. Given that some of the most controversial mining and CSG projects are now being referred to the PAC for review, it is important that urgent reforms are made to PAC procedures to seek to try and redress some of the issues outlined in this article.

1 Recent projects that have been referred to the PAC for review include: the Boggabri Coal Project and the Maules Creek Coal Project, both of which seek to clear substantial proportion of the Leard's State Forest near Boggabri; the Fourth Coal Terminal at Newcastle proposed by Port Waratah Coal Services; the Coalpac Consolidation Project that includes an area of Ben Bullen State Forest; and the Camden Gas Project (stage 3) that impacts on Scenic Hills area near Camden.

2 Through amendments to the *Environmental Planning and Assessment Amendment Act 2008* (NSW).

3 New South Wales, *Parliamentary Debates*, Legislative Council, 4 June 2008, 8073 (Penny Sharpe).

4 Amanda Kiely 'The effects of the New South Wales planning reforms on developers, public participation and the role of the Land and Environment Court' 15 *Local Government Law Journal* 107, 123.

- 5 *Environmental Planning and Assessment Act 1979* (NSW), Pt 2A.
- 6 EPA Act, s 23B.
- 7 EPA Act, Schedule 3, cl 2.
- 8 EPA Act, Schedule 3, cl 4; *Environmental Planning and Assessment Regulation 2000*, cl 268P.
- 9 EPA Act, Schedule 3, cl 10.
- 10 EPA Act, Schedule 3, cl 2.
- 11 EPA Act, s 23D.
- 12 *Environmental Planning and Assessment Act 1979*, s 23D(1)(b)(iii).
- 13 *Environmental Planning and Assessment Act 1979*, s 75L (as continued by Schedule 6A to that Act).
- 14 Natasha Hammond-Deakin and Elaine Johnson, 'Merits appeal rights in New South Wales: Improving environmental outcomes' (2012) 92 *IMPACT!* 6, available at: www.edo.org.au/edonsw/site/pdf/impact/impact_92.pdf.
- 15 Second Reading Speech, *Environmental Planning and Assessment Amendment (Part 3A Repeal) Bill 2011*, Legislative Council, 20 June 2011, Honorary Greg Pearce, Minister for the Illawarra.
- 16 Second Reading Speech, *Environmental Planning and Assessment Amendment Bill 2008*, Legislative Council, 17 June 2008, Honorary Penny Sharpe on behalf of Hon Michael Costa.
- 17 *Environmental Planning and Assessment Act 1979*, s 23E.
- 18 NSW Planning Assessment Commission, *Review Report Maules Creek Coal Project* (2012).
- 19 NSW Planning Assessment Commission, *Determination Report for the Maules Creek Coal Project* (23 October 2012) ('Determination Report').
- 20 *Ibid.*
- 21 NSW Department of Planning *Boggabri Project Approval*, 31, cl 72(d).
- 22 NSW Department of Planning *Major Project Assessment Maules Creek Coal Project*, August 2012 (Directors General), 2.
- 23 NSW Planning Assessment Commission, *Determination Report for the Maules Creek Coal Project* (23 October 2012), 13.
- 24 *Ibid.*, 15.
- 25 NSW Planning Assessment Commission, *Review Report The Boggabri Coal Project* (2012), 4.
- 26 [2011] NSWLEC 193-195.
- 27 *Barrington Gloucester Stroud Preservation Alliance v Minister for Planning & Ors* [2012] NSWLEC 197.
- 28 NSW Planning Assessment Commission, *Review Report Maules Creek Coal Project* (2012), 57.
- 29 NSW Planning Assessment Commission, *Determination Report for the Maules Creek Coal Project* (23 October 2012), 17.
- 30 NSW Planning Assessment Commission, *Review Report Maules Creek Coal Project* (2012), 32.
- 31 NSW Planning Assessment Commission, *Review Report Maules Creek Coal Project* (2012), 43.
- 32 NSW Department of Planning *Major Project Assessment Maules Creek Coal Project*, August 2012 (Directors General), 55.
- 33 NSW Planning Assessment Commission, *The Boggabri Coal Project Review Report* (2012), ii.
- 34 NSW Planning Assessment Commission, *The Boggabri Coal Project Review Report* (2012), 9.
- 35 NSW Planning Assessment Commission *The Boggabri Coal Project PAC Review Report* NSW Planning Assessment Commission, Sydney (2012), 25.
- 36 NSW Department of Planning, *Boggabri Coal Project Approval*, Condition 51, 24.
- 37 Dept of Planning, *Boggabri Coal project Approval*, Condition 51, 26.
- 38 NSW Planning Assessment Commission *The Boggabri Coal Project PAC Review Report* NSW Planning Assessment Commission, Sydney, (2012) 27.
- 39 NSW Planning Assessment Commission *The Boggabri Coal Project PAC Review Report* NSW Planning Assessment Commission, Sydney, (2012) 27.

40 NSW Planning Assessment Commission *The Boggabri Coal Project PAC Review Report* NSW Planning Assessment Commission, Sydney, (2012) 24.

The Olympic Dam decision: Mines, Uncle Kevin and judicial review under the EPBC Act

Ruth Beach, Solicitor and Mediator

Ruth Beach operates her own legal practice which includes advising on environmental and planning law. She was formerly a solicitor at Environmental Defenders Office (SA) Inc (**EDO SA**) and had the conduct of this case on its behalf with the assistance of other staff and volunteers at EDO SA.

The tenth of October 2011 was a momentous date for the environment around Roxby Downs in South Australia and, given the long-term impacts of radioactive tailings, within Australia generally. On that date, the South Australian and Federal governments, in separate decisions, approved BHP Billiton's (**BHP**) application to expand its mine at Olympic Dam near Roxby Downs. The mine, if developed, was to be the largest of its kind in the world, located on the world's largest uranium deposit, and would also mine copper, gold and silver. The federal approval of the expansion is effective until 2061.¹ After providing a brief background to the decision, this case note summarises Mr Buzzacott's main arguments and the Court's findings in relation to those arguments and as to costs. The article concludes by looking at the implications of the decision in relation to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

Background

In late February 2012, Mr Kevin Buzzacott, an Aboriginal Elder of the Arabunna Nation, brought an application for judicial review of the Federal Environment Minister's decision under the EPBC Act. Mr Buzzacott wanted to improve the environmental conditions that applied to the proposal, to protect the environment at the project site and its surrounds, and also because Dreamtime stories crisscross the land on which mine is situated and the land surrounding it.

The proponent, BHP, and the State of South Australia successfully applied to be joined to the proceedings. At BHP's request, the Federal Court expedited the matter and Besanko J handed down his decision on 20 April 2012 in *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities*,

BHP Billiton Olympic Dam Corporation Pty Ltd and State of South Australia (No 2) (**Buzzacott decision**).²

Mr Buzzacott, represented by the Environmental Defenders Office in South Australia, with the pro bono assistance of Mr Geoffrey Kennett SC and Mr Ashley Stafford, submitted that the Federal Minister's decision should be set aside on the following grounds:

- the decision was uncertain; and
- environmental impacts resulting from radioactive tailings waste, the export of uranium and the taking of water from the Great Artesian Basin (**GAB**) were not considered or were not properly considered by the Minister in making his decision.

Justice Besanko found in favour of the respondents on all grounds, as discussed below.

Uncertainty

Mr Buzzacott argued that the decision to allow the expansion of the mine at Olympic Dam was uncertain, in that parts of the proposed mine expansion hadn't yet been defined or assessed including studies that would inform conditions that the Minister had placed on the approval. Many plans and studies were still to be prepared or undertaken by the proponent at the time of the Minister's decision. In effect, the decision was a 'decision to make a decision' at various stages in the future, that is, when each of the plans and studies were finalised and approved.

For example, the decision was subject to plans or studies being completed in relation to the following conditions:

- 4-12 – environment protection management program;
- 14-15 – radiation;
- 17 – site contamination;
- 18, 20 and 21 – fauna;
- 23-25 – groundwater;
- 28 – extraction of water from the GAB;
- 30-3 – best practicable technology;
- 32 – mine closure;
- 42 – desalination Plant;
- 45 – Minister can agree to higher salinity level;
- 47 and 50 – giant cuttlefish;
- 55-57 – operational dilution factor;
- 58 – review of program;
- 62 – management plan for barge landing facility;
- 66 – transport to Darwin and export;
- 71-72 – infrastructure plan;
- 77 and 79 – future consultation with indigenous representatives and measure to protect indigenous cultural heritage;
- 82 – environmental offsets plan;
- 83-91 – general provisions concerning plans as well as the proposed Greenhouse Gas and Energy Management Plan.

Mr Buzzcott submitted that leaving so much of the decision for determination pursuant to plans and studies in the future (which plans and studies are unlikely to be the subject of public consultation), went beyond the intention of ss 134(1) and 134(3) (e) and (f) of the EPBC Act, as it left major aspects of the proposal relating to the definition, assessment and mitigation of impacts to be decided by yet to be completed plans and studies.

It was therefore submitted that the decision was:

- not envisaged within the powers conferred in ss 133 and 134 of the EPBC Act and so was an ‘improper exercise of power’ pursuant to s 5(1) (e) *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**); and
- ‘an exercise of a power in such a way that the result of the exercise of the power [was] uncertain’ pursuant to s 5(2)(h) ADJR Act.

Mr Buzzcott acknowledged that s 134 of the EPBC Act allows the Minister to place conditions on a decision if satisfied that it is ‘necessary or convenient’ for ‘protecting a matter’ under the Act or ‘repairing or mitigating damage’ to a matter protected under the Act. The section goes on to set out the types of conditions

which may be attached to a decision. Such conditions include those:

- requiring the ‘preparation, submission for approval by the Minister, and implementation of a plan for managing the impacts of the approved action on a matter protected [under the Act] for which the approval has effect such as a plan for conserving habitat of a species or ecological community’ under s 134(3)(e);³ and
- requiring ‘specific environmental monitoring or testing to be carried out’ under s 134(3)(f).⁴

Mr Buzzcott argued that the extensive use of the powers in ss 134(3)(e) and (f) went beyond the intention of the legislature and had the effect of deterring or avoiding the determination required by ss 130, 133 and 136 of the EPBC Act. As a result, the decision was ‘not authorised’ by the EPBC Act as envisaged by s 5(1)(d) of the ADJR Act or was made in excess of statutory jurisdiction pursuant to s 5(1)(c) of the ADJR Act.

In response, the Minister and BHP submitted that:

- the statutory context needed to be considered, including the fact that the development was very substantial and was to be carried out over a very long period of time (until 2061);
- the Act contains a wide power to impose conditions and there is no reason to read into the Act a limit on the number of conditions nor read them in a hypercritical fashion; and
- the conditions imposed enabled the Minister to retain control of the proposal in that, for example, the environment protection management program was to be reviewed every three years with a report being provided to the Minister (condition 10).

The Minister and BHP also made various other points with respect to certain conditions.⁵ The respondents also relied on the judgment of Tracey J at first instance in *Lawyers for Forest Inc v Minister for the Environment, Heritage and the Arts and Anor*⁶ and on appeal.⁷

Justice Besanko held in favour of the respondents and found that:

- the power to impose conditions under the EPBC Act is very wide including the power to attach a condition which is ‘necessary or convenient’;⁸
- the conditions imposed on the proposed development (and hence the decision) was sufficiently certain and ‘the conditions make it reasonably clear to [BHP] what it is required to do.’⁹

“Mr Buzzacott submitted that leaving so much of the decision for determination pursuant to plans and studies in the future ... went beyond the intention of the EPBC Act”

Environmental Impacts - radioactive tailings waste

With respect to the remaining grounds, Mr Buzzacott submitted that pursuant to ss 5(1)(e) and 5(2)(b) of the ADJR Act, the making of the decision was an ‘improper exercise of the power’ conferred by ss 130(1) and 133 of the EPBC Act because the Minister ‘failed to take a relevant consideration into account’ as required by s 136(1)(a) of the EPBC Act.

As an anti-nuclear campaigner for many years, Mr Buzzacott was particularly concerned to protect the environment and future generations from the impacts of uranium. Mr Buzzacott submitted that the Minister did not properly consider impacts from the above ground storage of radioactive tailings waste, in circumstances where the long-term impacts were likely to last for hundreds of thousands of years. Such consideration was required by s 136(1)(a) and ss 21 and 22A of the EPBC Act, which prohibit the Commonwealth from taking a ‘nuclear action that has, will have or is likely to have a significant impact on the environment’.

BHP’s draft Environment Impact Statement acknowledged that ‘[a]s some of these radioisotopes have very long half-lives ... the tailings will remain radioactive for hundreds of thousands of years, decreasing over time.’¹⁰ On the other hand, in making his decision, the Minister had considered impacts ‘in the order of 10,000 years’.¹¹ Mr Buzzacott argued that such consideration was insufficient in that it placed a temporal limitation on the operation of the EPBC Act which was not envisaged by the legislative drafters.

Justice Besanko agreed that the Minister had to consider the long term effects and impacts on the environment on the storage of tailings. However, his Honour found that the Minister did in fact consider those long term impacts and that there was no need to consider the ‘impacts on the environment of the storage of tailings in a particular manner and to a particular extent’.¹² His Honour then quoted particular references, albeit brief, to evidence such consideration in the Environment Impact Statement.¹³

Environmental Impacts – internationally, from the export of uranium

Mr Buzzacott submitted that the Minister did not consider the environmental impacts associated with the export of uranium, which was a consequence of the proposal, as required by the EPBC Act.

As indicated above, ss 21 and 22A of the EPBC Act prohibits the Commonwealth from taking a ‘nuclear action that has, will have or is likely to have a significant impact on the environment’.

Section 5(2) of the EPBC Act limits the extraterritorial application of the Act to ‘acts, omissions, matters and things *in the Australian jurisdiction except insofar as the contrary intention appears*’ [emphasis added]. It was submitted that such contrary intention was to be gleaned from interpreting the meaning of the word ‘impact’ within s 21 in a manner that was consistent with international law,¹⁴ in particular, Principle 21 of the Stockholm Declaration which provides:

States¹⁵ have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and *the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*’ [emphasis added].

As intimated in the Stockholm Declaration, the environment has no national boundaries and so impacts beyond such boundaries should be considered.

However, Besanko J found that the consideration of ‘impact’ was not so broad as to include the impact on the environment of the export of uranium; and that even if it were, the Minister had considered such impacts because questions of nuclear safety were in the material before the Minister.

Environmental Impacts and the Great Artesian Basin

Mr Buzzacott submitted that, in making the decision, the Minister did not:

- properly consider the impacts of the expansion on groundwater resources including the GAB;
- consider State laws (including amendments to the *Roxby Downs (Indenture Ratification) Act 1982 (SA)*) relating to extraction of groundwater from the GAN which did not place any total cap on the additional water that can be drawn from the GAB generally (but only imposes a cap on extraction from the drawdown area from wells A and B).

This issue was of particular relevance to Mr Buzzacott as he has witnessed in his life time the gradual decline in water flowing from the Mound Springs.¹⁶ Further, he has seen the reduction in the retention of flooding rains in his country in the vicinity of the water extraction.

The Minister noted in his reasons that the mine currently extracts around 33 million litres of water per day¹⁷ from the GAB pursuant to current licences over wellfields A and B. The water licences were not before the Minister when he made his decision.

The current licences enable extraction of up to 42 million litres of water from the GAB and the proposed expansion would take additional groundwater from the wells up to this amount.¹⁸

In addition, the *Roxby Downs (Indenture Ratification) Act 1982 (SA)* and its amending Act, the *Roxby Downs (Indenture Ratification) (Amendment of Indenture) Act 2011 (SA)* (**the Amended Indenture Act**), do not place a total cap on any additional water (that is, additional to the 42 million litres of water) that can be drawn from the GAB generally, as opposed to the drawdown from wells A and B. The Amended Indenture Act was not before the Minister as it was only introduced into the South Australian Parliament some eight days after the Minister's decision.

Mr Buzzacott relied on s 134(4)(a) of the EPBC Act which provided at the relevant time:

Considerations on deciding on condition

(4) In deciding whether to attach a condition to an approval, the Minister must consider:

(a) any relevant conditions that have been imposed, or the *Minister considers are likely to be imposed*, under a law of a State or self-governing Territory or another law of the Commonwealth on the taking of the action [emphasis added]

This provision was applied by Moore and Lander JJ in *Lansen v Minister for Environment and Heritage & Anor*¹⁹, where the Full Court concluded that the Minister is obliged to have regard to the matters in s 134(4)(a) and if the Minister failed to do so, the decision was invalid.²⁰ Mr Buzzacott submitted that pursuant to s 134(4)(a), the licences and the Amended Indenture Act should have been considered by the Minister in making the decision.

However, Besanko J held that the Minister had in fact considered the extraction of water from the GAB. Further, his Honour agreed with the respondents in finding that the conditions relating to extraction of water either:

- related to conditions which were already approved under the original development; or

- were not required to be considered, because the law (in this case, the Amend Indenture Act) was only a *proposed* law at the time of the decision.

Costs

Significantly, Besanko J ordered that there be no award as to costs.²¹ Ordinarily, in Federal Court matters, costs follow the event, that is, the loser of proceedings pays the other party's costs. However, Besanko J noted that the discretion to order costs (or not) in s 43 of the *Federal Court of Australia Act 1976 (Cth)* is a wide power.

In deciding not to award costs against Mr Buzzacott, Besanko J considered a number of cases including *Oshlack v Richmond River Council*²² (**Oshlack's case**). In Oshlack's case, the High Court set out three matters which may be considered in determining whether or not to depart from the usual rule as to costs. First, the Court will ask whether or not the proceedings are 'public interest litigation', including whether or not there are a significant number of people who share the concerns of the applicant. In this regard, Besanko J noted that:

A matter may be in the public interest because a substantial section of the public are (sic) affected by the subject matter of the litigation. By contrast, a matter may not be in the public interest for the purpose of determining the appropriate order as to costs simply because members of the public are interested in the result. There may be cases where the circumstances are such the public confidence in the rule of law is advanced by the hearing and determination of the important issues by a Court. There may be a significant public interest in the determination of important and difficult questions of law.²³

A second consider is whether the applicant is motivated by private gain in bringing the proceedings or rather seeking compliance with the law. Third, the Court will consider whether the application is arguable.

In this matter, Besanko J made no order as to costs. His Honour considered the cases dealing with costs awards where an applicant is acting in the public interest. He found that Mr Buzzacott was a man with a long history of environmental advocacy and that he had no personal or financial interest in the matter. He also found that the main grounds of review were clearly arguable.

This decision is particularly significant as it addresses circumstances in which costs orders should not be granted where a person brings litigation in the 'public interest'.

Implications of the decision

Justice Besanko's decision impacts the operation of the EPBC Act in several ways. First, with respect to the content of decisions, the decision confirms that: approvals under the EPBC Act can be granted for projects that are still in the planning phase and have not yet been clearly defined or assessed in detail, particularly where such projects are substantial developments which may be carried out over a long period of time. Further, the decision demonstrates that the Minister's discretion as to the nature of the conditions imposed on a proposal is very broad. This has the effect of allowing considerable flexibility for a proponent which is arguably at the expense of environmental protections. Secondly, the decision means that, although consideration of long term impacts is required under the EPBC Act, the level of that consideration is largely at the Minister's discretion. A third effect of the Buzzacott decision is that the EPBC Act does not extend to impacts on the environment outside of Australia. Finally, the decision highlights that the Minister is required to consider 'likely' conditions imposed at a State level. However, in this case, such consideration did not extend to the Amended Indenture Act which was introduced into the South Australian parliament 8 days after the approval.

Mr Buzzacott has appealed the decision and judgment is pending. The issues before the Appeal Court relate to the uncertainty ground; and the second argument of the last ground, that is, that the Minister failed to take into account conditions imposed or likely to be imposed under South Australian law (being the Amended Indenture Act) for the taking of additional groundwater including consideration of *Lansen v Minister for Environment and Heritage*. It remains to be seen whether the Appeal Court will uphold Besanko J's reasoning in the Buzzacott decision with respect to the issues before it.

Since the hearings at first instance and on appeal, BHP has announced that it is considering other methods of extraction of the ore which arguably means that a new referral under the EPBC Act is required. The South Australian government has also extended the time within which BHP may comply with the State approval²⁴ of the expansion to the mine. The Federal government recently proposed to refer its power under the EPBC Act to the States, but deferred this decision following a backlash from the environment sector. A referral of power would affect the checks and balances currently in place under the EPBC Act and would result in a return to the days before the Tasmanian Dams Case²⁵ and the saving of the Franklin River where local party political issues impacted robust decision making

that was aimed at protecting areas of environmental significance.

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- 1 The Federal approval expires in 2061, but the approval by the South Australian government expires in 2051.
 - 2 [2012] FCA 403 ('Buzzacott decision').
 - 3 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), s 134(3)(e).
 - 4 EPBC Act, s 134(3)(f).
 - 5 Buzzacott decision at [48]-[50].
 - 6 (2009) 165 LGERA 203.
 - 7 Buzzacott decision at [50]-[57].
 - 8 Ibid [58].
 - 9 Ibid [59].
 - 10 Draft EIS Appendix F1 p28 [4.11.1]
 - 11 Approval from Department Sustainability Environment Water Population and Communities, 10 October 2011, condition 32(c).
 - 12 *Buzzacott decision* at [84].
 - 13 Ibid [85].
 - 14 *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972
 - 15 In this context, 'States' means countries.
 - 16 These are springs which rise up out the surrounding flat land to the height of an average house and out of which water flows and gurgles in a very dry climate. The mound springs are listed under the EPBC Act.
 - 17 That is, approximately 13 Olympic sized swimming pools of water per day, is drawn from the Great Artesian Basin at no cost to BHP. This calculation is based on an Olympic-sized swimming pool being a minimum of 2,500,000 L depending on depth.
 - 18 Draft EIS p136 Table 5.24; Supplementary EIS p 304.
 - 19 (2008) 174 FCR 14.
 - 20 Ibid at [74].
 - 21 See *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (No 3) [2012] FCA 744.
 - 22 (1998) 193 CLR 72.
 - 23 *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (No 3) [2012] FCA 744 at [7].
 - 24 An application to judicially review the State decision was lodged, but withdrawn before trial.
 - 25 *Tasmania v The Commonwealth* (1983) 158 CLR 1.

Politics vs science – Making better decisions

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Jess would like to thank Ben Bartl and Jed Watson for their contributions to this article.

In recent months, the proposed operation of the supertrawler, *FV Margiris* (subsequently re-named the *Abel Tasman*), in Australian waters has provoked widespread debate regarding scientific uncertainty and the need for a precautionary approach to the management of natural resources.

When introducing amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) to allow a temporary halt to the supertrawler while its environmental impacts were assessed,¹ Federal Environment Minister, Tony Burke, stated that the amendments were designed to give him 'the powers that [he] had hoped to have to be able to apply a much more precautionary approach to the super-trawler'.² On 19 November 2012, the Minister made a final declaration preventing the operation of the supertrawler for two years. He stated:

I am of the view that there is uncertainty about the environmental impacts of this type of fishing operation and it is appropriate to prohibit it while it is assessed by an expert panel.³

The supertrawler debate has raised questions about the extent to which expert scientific conclusions reached by agencies such as the Australian Fisheries Management Authority (**AFMA**) should be relied upon to guide decision-making. While there have been a range of dissenting scientific views,⁴ many reputable scientists were satisfied that the quotas set by AFMA were conservative and there was no basis to conclude that a boat of the size of the supertrawler would lead to localised depletion or a greater risk of bycatch than a series of smaller vessels catching the same total allocation of fish.⁵

Minister Burke's decision to prohibit the trawling operation pending further assessment has been criticised by some for preferring political considerations

over scientific evidence.⁶ Ironically, similar criticisms have been levelled at the Tasmanian Primary Industries Minister, Bryan Green, in relation to the governance of aquaculture in Tasmania, but in a context where development has been allowed to proceed despite scientific uncertainty.

This article briefly examines recent changes to the assessment of aquaculture proposals in Tasmania, and explores the importance of precautionary, evidence-based decision making and the need for merits review.

Marine Farming in Tasmania

Marine farming in Tasmania is often described as a great economic success story, achieving a gross value in 2011-2012 of over \$400 million.⁷ Given Tasmania's relatively poor economic position, aquaculture (and salmon farming in particular) is being actively promoted as a key industry in the Tasmanian Economic Development Plan, and has received a number of research and development grants to facilitate improved operations.

This work was strongly emphasised in a recent House of Representatives Committee report on its inquiry into the role of science in fisheries and aquaculture.⁸ It is true that some sectors of the Tasmanian aquaculture industry are improving community engagement and transparency, and investing heavily in research initiatives.⁹ However, this is not universally the case and, without a rigorous regulatory framework to ensure that planning and assessment decisions are in fact based on the best available science, independent monitoring is carried out and appropriate enforcement actions are taken, the community remains cautious in its support of industry expansion.

Governance issues

Aquaculture in Tasmania is principally governed by the *Marine Farming Planning Act 1995* (Tas) (**MFP Act**). Under the Act, the Department of Primary Industries, Parks, Water and Environment (**DPIPWE**) is responsible for preparing Marine Farming Development Plans (**MFDPs**) for aquaculture zones, granting licences in accordance with the plans and monitoring compliance. The Minister is ultimately responsible for approving MFDPs, including amendments to allow expansion.

“The supertrawler debate has raised questions about the extent to which expert scientific conclusions reached by agencies ... should be relied upon to guide decision-making”

The MFP Act also establishes the Marine Farming Planning Review Panel (the **Panel**), an independent panel comprised of eight individuals with expertise in a range of disciplines relevant to marine farming. The Panel is responsible for assessing proposed amendments to MFDPs to allow expansion, relocation and other changes to marine farming activities, having regard to recommendations from DPIPWE and public submissions.

Previously, if the Panel was not satisfied that a proposal would meet the sustainable development objectives of the Act, it could refuse the proposal outright, without reference to the Minister.¹⁰ The Panel had never exercised its powers to refuse a proposed amendment until March 2011, when it refused an expansion proposal in the D'Entrecasteaux Channel on grounds that potential impacts on a fragile reef system near the site had not been adequately assessed.¹¹

The government subsequently passed amending legislation which removed the refusal powers of the Panel. Instead, decisions regarding amendments now rest solely with the Minister for Primary Industries, who is no longer required to follow any recommendation made by the Panel and may make any changes to a proposal he considers appropriate without further consultation. In his second reading speech when introducing the *Marine Farming Planning Amendment Bill 2011* (Tas), the Minister stated that the amendments were made in direct response to the Panel's earlier decision, after it became clear that the proponent had not had any avenue to challenge the Panel's refusal.

The MFP Act is explicitly intended to facilitate marine farming. The government agency responsible for monitoring and regulating marine farming is also responsible for promotion of the industry, and the Panel is comprised primarily of industry representatives. The fact that only one expansion has been refused since the commencement of the Act indicates that the industry is not disadvantaged by the legislation. The 2011 amendments tip the balance even further and move decision-making from the expertise of the scientific panel to the political will of the Minister, without resolving the principal concern that such decisions cannot be challenged.

Macquarie Harbour expansion

Interestingly, the 2011 amendments to the *Marine Farming Planning Act 1995* were introduced only one week after a proposal was lodged for a joint venture between Tasmania's three largest aquaculture companies, Tassal Operations Pty Ltd, Huon Aquaculture Group Pty Ltd and Petuna Aquaculture Pty Ltd, to expand farming operations in Macquarie Harbour by an additional 360 hectares.¹³

In addition to concerns regarding the propriety of the proposed amendments, conservationists objected to the expansion proposal on the basis of potential impacts on the Maugean skate, *Zearaja maugeana*. The Maugean skate, 'a Gondwanan relic that is the oldest lineage of skate in the world', has an estimated population of only 2,500 and its habitat range is restricted to Bathurst Harbour – Port Davey and Macquarie Harbour.

Conservation groups highlighted advice from the Institute of Marine and Antarctic Studies indicating that there was 'currently no information about the potential effects of salmon farming in Macquarie Harbour on the Maugean skate'.¹⁵ There is also limited survey data and poor understanding of the likely movement of nutrients within Macquarie Harbour.¹⁶ The Panel acknowledged those concerns, but ultimately recommended that the proposal proceed under an 'adaptive management' framework, allowing maximum nutrient levels to be refined as more information becomes available.

In contrast to the caution advocated by the government in respect of the supertrawler,¹⁷ Minister Green granted approval for the project. Two days later, DPIPWE (as proponent for the project) wrote to the Federal Minister and argued that the Macquarie Harbour expansion was not a controlled action under the EPBC Act, as proposed management prescriptions would prevent any significant impact on the Maugean skate.

On 8 October 2012, Minister Burke determined that the proposal was not a controlled action, provided adaptive management conditions were followed. Conservation

groups were critical of the decision, claiming that the Minister had failed to exercise precaution in approving the significant expansion without sufficient baseline data to adequately understand the risks to the endangered species, let alone guarantee that there would be no significant impact.¹⁸

Adaptive management

Adaptive management, a tool frequently used in forestry operations, is gaining acceptance in fisheries and aquaculture. Adaptive management essentially acknowledges that full certainty can rarely be achieved, and therefore managers should be able to respond to new information as it becomes available.

There are clear benefits to an adaptive approach that responds to unanticipated problems, such as revising catch limits where data indicates lower populations than expected, or setting lower trigger limits in response to data showing poor nutrient flushing. However, adaptive management should not be used to overcome shortcomings in scientific evidence, particularly where potential impacts are significant, including where an endangered species is potentially at risk.

If sufficient data is not provided with an application to satisfy the decision maker that impacts will be avoided or appropriately managed, the proposal should be refused, or suspended while further information is sought. Approving a development subject to conditions requiring key information to be submitted or determined later cannot be considered a precautionary approach.

Science-based decisions

Resource management decisions must be made on the basis of rigorous and transparent scientific evidence. In any debate regarding controversial environmental management issues, including fisheries and aquaculture, all sides will draw on scientific information to support their views.¹⁹ Recognising the ability to use evidence selectively (and politically), it is critical that the evidence used in decision-making is able to be independently tested through merits review. Unfortunately, such opportunities are currently limited in respect of fisheries and aquaculture management.²⁰

The supertrawler and the Macquarie Harbour proposals highlight the importance of science-based decision-making. However, too often the role of science is limited to science favouring approval of a proposal (such as improved efficiency), rather than in guiding strategic planning for natural resources or supporting the need for precaution. The *Netting the Benefits* report stated (at 4.97):

Science has an important part to play in all areas of aquaculture, including improving the productivity and

environmental performance of existing aquaculture species, the domestication of wild species, and the future integration of numerous activities ... The Committee commends researchers around Australia who are working in these fields, contributing to existing and future aquaculture operations in Australia and around the world.²¹

It is certainly true that a lot of valuable research is being undertaken in relation to aquaculture in Australia. However, the above statement confirms that the emphasis of such science (at least, the application of such science) is often on increased production, rather than on discouraging aquaculture in particular situations or locations.

Adaptive management is often used as a complementary tool for ongoing research work. For example, it is common for fishing vessels to be used as 'ships of convenience', to undertake surveys and compile catch data while conducting authorised fishing activities. In its final report in relation to the Macquarie Harbour expansion proposal, the Panel noted that the proposal provided an opportunity to undertake survey work and to require the proponent to contribute to research to better understand the impacts of their operations on the endangered species.

While contributions from specific proponents or industries should not be discouraged, such contributions must not influence assessment decisions or divert the general scientific agenda away from public interest sustainability research and towards research into commercial innovations.

Conclusion

In her speech regarding the supertrawler amendments to the EPBC Act, Greens Senator Larissa Waters said:

This bill demonstrates that when the political risks are low, and when it is forced to by circumstance, the government can step up and act in a sensible way and apply the precautionary principle.

The distinctions between the way in which Minister Burke responded to lack of scientific certainty in relation to the supertrawler, and his response to uncertainty regarding impacts on an endangered species in the Macquarie Harbour expansion, make it clear that science (or the absence of) continues to be used selectively and that there is no consistent approach to precautionary management. In one case, the uncertainty resulted in the government 'hitting pause' while further assessment was done. In the other, with a highly endangered species at stake, the project was allowed to proceed with uncertainty to be addressed through adaptive management.

In this context, it remains critical that legislative frameworks for resource management require a

proponent to provide sufficient information, allow decision makers to request further information if needed, ensure that evidence relied upon is publicly available, and provide opportunities for merits review.

- 1 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 15B. The original Bill referred to environmental, social and economic uncertainty, but the reference to social and economic considerations was removed from the final legislation.
- 2 Tony Burke MP and Senator Joe Ludwig, 'Supertrawler – Murray Darling Basin reform - Tasmanian Forestry - Wheat Export Marketing Bill – live animal exports' (Press Conference, 11 September 2012), www.environment.gov.au/minister/burke/2012/tr20120911a.html.
- 3 Tony Burke MP, 'Super trawler banned while expert assessment is carried out' (Media release, 19 November 2012), www.environment.gov.au/minister/burke/2012/mr20121119.html.
- 4 For example, Jessica Meeuwig, 'One Fish, Two Fish, Red Fish, Blue Fish – Science Doesn't Support the Super Trawler', 30 August 2012, *The Conversation*, www.theconversation.edu.au/one-fish-two-fish-red-fish-blue-fish-science-doesnt-support-the-super-trawler-9143.
- 5 *ABC News* (Online), 'Operator Says Fishing Plan on Track', 22 August 2012, www.abc.net.au/news/2012-08-22/margiris-operator-not-fazed-by-scrutiny/4214690. For example, Professor Keith Sainsbury of IMAS said:
'This vessel, whatever its size, it's going to be limited to catching the catch quota that has been set and that catch quota's been set at a very safe way and that's why we're quite comfortable with the sustainability of this particular fishery.'
See also: Bob Kearney, 'Opposition to the Margiris 'super trawler' not evidence based', 15 August 2012. *The Conversation*, 15 August 2012, <http://theconversation.edu.au/opposition-to-the-margiris-super-trawler-not-evidence-based-8839>.
- 6 For example, Kelly, J, 'Ministers fishing for too much power', *The Australian*, 14 September 2012.
- 7 Wes Ford, 'Marine Farming Planning in Tasmania – The Perspective of the Planning Authority', Presentation delivered at Managing Marine Farming: Have we achieved best practice?, University of Tasmania, 8 March 2012, www.edo.org.au/edotas/pdf/2012conf_ford_marine_farm_planning_tas.pdf.
- 8 Standing Committee on Agriculture, Resources, Fisheries and Forestry, House of Representatives, *Netting the Benefits: The Role of Science for the Future of Fisheries and Aquaculture* (2012), www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=arff/fisheries/report.htm.
- 9 For example, Tassal Operations have recently produced their first Sustainability Report and the Tasmanian Oyster Growers Association has an ongoing relationship with the Southern Coastcare Association to facilitate efforts to eradicate feral oysters.
- 10 *Marine Farming Planning Act 1995* (Tas), s 42. Note: In contrast, if the Panel was satisfied that a proposal would be sustainable, the Panel could recommend it to the Minister. However, the Minister retained final discretion regarding approval.
- 11 Marine Farming Planning Review Panel, Department of Primary Industries, Parks, Water and Environment (Tasmania), *Section 40 Report in relation to the Draft Amendment No.3 to the D'Entrecasteaux Channel Marine Farming Development Plan February 2002* (2011), [www.dpiw.tas.gov.au/inter.nsf/Attachments/VWAS-8DF5EV/\\$FILE/Soldiers%20Point%20Zone%2023%20Section%2040%20report.pdf](http://www.dpiw.tas.gov.au/inter.nsf/Attachments/VWAS-8DF5EV/$FILE/Soldiers%20Point%20Zone%2023%20Section%2040%20report.pdf).
- 12 Bryan Green, Second Reading Speech – *Marine Farming Planning Amendment Bill 2011* (17 November 2011), www.parliament.tas.gov.au/bills/Bills2011/pdf/notes/75_of_2011-SRS.pdf.
- 13 The Macquarie Harbour expansion will increase the area under marine farming leases from 564 hectares to 926 hectares (an increase of approximately 60%).
- 14 Karen Parsons, 'Nowhere Else on Earth: Tasmania's Marine Natural Values' (2011) Report prepared for Environment Tasmania, Aqenal, www.oceanplanet.org.au/resources/nowhere-else-on-earth-tasmanias-marine-natural-values/. The only sightings of the skate in the past 10 years have been within Macquarie Harbour.
- 15 Advice extracted from: Department of Primary Industries, Parks, Water and Environment, *Macquarie Harbour Draft Amendment No.1 Section 40(c)-(d) Report* (2012), pp9-10. See also: *Environment Tasmania, Background briefing paper: Draft Amendment to the Macquarie Harbour Marine Farming Development Plan 2005*, www.et.org.au/system/files/userfiles/Briefing%20paper_Macquarie%20Harbour%20fish%20farm%20expansion%20proposal_13dec2011.pdf.
- 16 Rebecca Hubbard, *Environment Tasmania / Ocean Planet joint submission on the Draft Amendment to the Macquarie Harbour Marine Farming Development Plan 2005* (2011), www.et.org.au/system/files/userfiles/ET-OP_Submission%20to%20Macquarie%20Harbour%20EIS_22Dec2012.pdf.
- 17 On 22 August 2012, the Tasmanian House of Assembly passed a motion with tripartite support, indicating that the House 'will not support the *FV Margiris* operation in Australian waters and waters around Tasmania until the Parliament can be satisfied that the vessel and proposed harvest strategy will not adversely

impact on the recreational fishery': www.parliament.tas.gov.au/ParliamentSearch/isysquery/b90590f0-5c7d-4254-9f0e-4aea17f125ad/21/doc/.

- 18 Rebecca Hubbard, 'No Precaution on Threatened Species as Federal Government Approves Macquarie Harbour Fish Farms' (Media release, 9 October 2012), www.et.org.au/system/files/userfiles/MR_EPBC%20approval_9oct2012.pdf.
- 19 For example, see Stephen Bocking, 'Wild or Farmed? Seeking Effective Science in a Controversial Environment' (2007) 1 *Spontaneous Generations* 48, 55.
- 20 Following the challenge by the Humane Society International to the decision to declare the Southern Bluefin Tuna fishery as an approved wildlife trade operation in 2006 (*Re Humane Society International and Minister for the Environment and Heritage* [2006] AATA 298), the EPBC Act was amended to remove the right to appeal against Ministerial decisions on wildlife trade operations. Similarly, no right of appeal exists for decisions to accredit fisheries management plans or to amend the list of exempt native specimens for export purposes. There is also no right to appeal against a decision under the *Marine Farming Planning Act 1995* to approve an amendment to a Marine Farming Development Plan to facilitate an aquaculture proposal.
- 21 Standing Committee on Agriculture, Resources, Fisheries and Forestry above n 8, 92.

Limited access to justice in environmental law in the Northern Territory

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The Environmental Defenders Office (NT) Inc has prioritised community legal education to increase access to justice in environmental law. Access to justice in environmental law in the Northern Territory is severely limited. This is due both to the nascent state of environmental law and the limited access to free or pro bono legal services in public interest environmental law.

Access to justice in environmental law is an established theory set out at an international level by Principle 10 of the United Nations Rio Declaration, which formed the basis for subsequent agreements such as the Aarhus Convention.¹ The Aarhus Convention supports the principle that ecologically sustainable development requires the participation of all stakeholders. It is important for society to be able to engage in effective decision-making as this leads to improved quality of environmental decisions, more equitable decision-making and better society-wide acceptance of government decisions.

Access to justice in environmental law is the ability of society to be able to participate in and review the:

1. Making of environmental laws.
2. Decisions of land use and development.
3. Enforcement of these laws.

Some of the ways that people can access justice are through:

- The provision of proper notice of applications for development to the community.
- Consultation with the community.
- The ability for the community to object.
- The ability for the community to review decisions on both merits and judicial review grounds.

- Access to information about proposals and decisions and reasons for decisions.
- Knowledge of the laws and access to affordable lawyers.
- Environmental impact assessment for developments that may have significant impacts on the environment.

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The public has a right to participate in decision-making that will impact on the environment, the health and well-being of the community and the use of natural resources. The community also expects to be able to participate in and influence government decision-making. When people do not have this ability, either because they have not been aware of the legal process so missed the opportunity to participate or because the law does not allow them to participate effectively in decision-making, they feel frustrated and disempowered.

The principles of access to justice form part of the principles of ecologically sustainable development. The foundation of ecologically sustainable development is intergenerational equity. Ecologically sustainable development is development that meets the needs of present generations while not compromising the ability of future generations to also meet their needs.

The global interest in ecological sustainability was recognised internationally in the early 1970s. In 1992 the Northern Territory Government, Commonwealth Government and the States and Territories signed the Intergovernmental Agreement on the Environment to take environmental principles into account when making decisions and developing and implementing policy.

Few of the Northern Territory environmental laws recognise ecologically sustainable development; much less have the concept implemented in legislation. In February 2010, the Northern Territory Environment Protection Authority produced a comprehensive report analysing environmental law in the NT within the framework of ecologically sustainable development and made recommendations to adopt a governance regime based on the concept and principles of ecologically sustainable development.²

The state of environmental law in the Northern Territory can be summarised as being:

- Fragmented institutionally.
- Limited in its provision of access to justice and public participation.
- Out of date in terms of a weak environmental assessment regime that does not recognise nor implement the principles of ecologically sustainable development.

In the Northern Territory, people live in a space with vast and still largely pristine environments experiencing unprecedented development pressure, limited access to justice in environmental law and an outdated environmental assessment regime which does not acknowledge or implement the principles of ecological sustainable development. Despite the high value of the environment, very few projects go through a formal environmental assessment process.

Earlier this year, the Australian Network of Environmental Defenders Offices produced a comparison of environmental assessment regimes across Australia. The ratings were from relatively good to very poor. The NT environment assessment process rated as poor in comparison to those in other States and Territories. The reason the regime did not rate as very poor which was the lowest rating was because the Northern Territory does not have fast-tracking legislation. Environmental assessment is one of the cornerstones of ecologically sustainable development.

As a result of the limitations of the Territory environmental assessment process, one of the few ways the public can meaningfully participate in environmental decision-making is through Australia's national environmental

law, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). The EPBC Act recognises the importance of ecologically sustainable development. The preservation of Australia's national environmental laws is fundamental for the protection of environment in the national interest.

The NT Environment Protection Agency (**NT EPA**) has also produced a report in April 2010 recommending an overhaul of the environmental assessment regime in the NT.³ The Act has hardly changed since its commencement more than 30 years ago. The *Environmental Assessment Act (NT)* and *Environmental Assessment Administrative Procedures (NT)* were modeled upon the Environment Protection (Impacts of Proposals) Act 1972 (Cth) which was repealed and replaced by the EPBC Act over 10 years ago. The NT EPA described the Act as being a product of its time and no longer relevant to deal with the current development pressures, the evolution of environmental assessment procedures and community expectations.⁴

The Northern Territory government will increase the role of the NT EPA to manage the environmental assessment process. Though there are a number of issues with the proposed legislation, hopefully this is a step in the right direction towards improving environmental assessment in the Northern Territory. However, amendments do not propose the much needed overhaul of the regime to improve access to justice and achieve ecologically sustainable development.

- 1 The 1992 Rio Declaration on Environment and Development was adopted during the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil from 3-14 June 1992: see www.unep.org/Documents/Multilingual/Default.asp?documentid=78&articleid=1163. The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25 June 1998 at the Fourth Ministerial Conference in the 'Environment for Europe' process in Aarhus, Denmark: see www.unece.org/env/pp/introduction.html.
- 2 EPA Northern Territory, *Ecologically Sustainable Development in the Northern Territory* (February 2010) accessed on 14 December 2012 at: www.epa.nt.gov.au/node/569. See also: EPA Northern Territory, *Ecologically Sustainable Development in the Darwin Harbour Region* (November 2010) accessed on 14 December 2012 at: www.epa.nt.gov.au/node/567.
- 3 EPA Northern Territory, *Ecologically Sustainable Development in the Northern Territory* (February 2010) accessed on 14 December 2012 at: www.epa.nt.gov.au/node/569.
- 4 EPA Northern Territory, *The Environment Protection Authority's Final Advice on Improving Environmental Assessment in the Northern Territory*, (16 April 2010), page i, accessed on 14 December 2012 at: www.epa.nt.gov.au/our-work/strategic-advice/environmental-assessment-review/about-review.



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