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IMPACT

ENVIRONMENTAL DEFENDERS OFFICE
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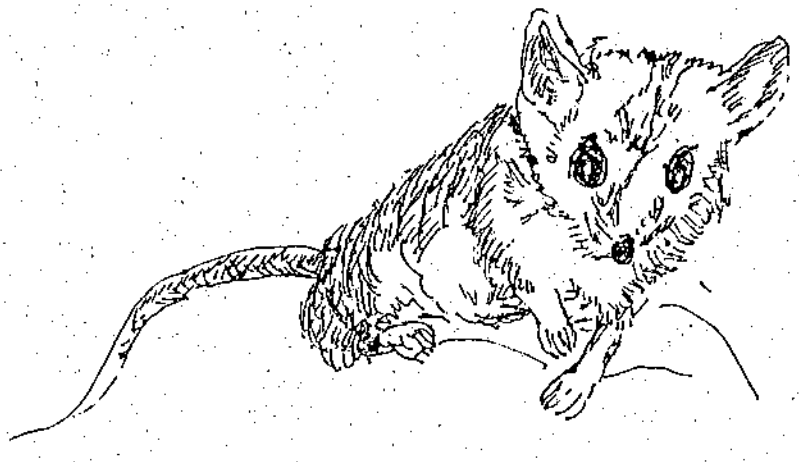
EPA ACT AMENDMENTS

IMPLICATIONS FOR PUBLIC PARTICIPATION

BY PATRICIA RYAN

A rough balance-sheet of what the Environmental Planning and Assessment (amendment) Act 1985 has given and taken by way of public participation, is set out below. This balance-sheet is not exhaustive, but is intended to serve as a further explanation to the Explanation prepared by the Department of Environment and Planning, which highlights community involvement in the amendment process and in the continued operation of the EPA Act. By way of introduction, it ought to be pointed out that, from when the first Amendment Bill was introduced in April, 1985, over 300 submissions were received in the three months period available for public comment. The final Amendment Act was introduced into Parliament in November 1985 and was not available for either public comment or even informed parliamentary debate. The Act took effect in February, 1986. The first Bill covered approximately 31 separate matters ranging from major to minor importance (not including amendments consequential on these). The Amendment Act dealt with at least double that number of matters, again ranging from the major to the minor and not including the consequential amendments. Of these, only about 17 items remained the same or substantially the same as those proposed in the first Bill.

Throughout the following summary it is assumed that there may be some benefit in a more "efficient" administration of the Act, although readers may wish to draw their own conclusions on that score.



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DEFINITIONS

"Objector" is redefined in s.4 to make clear that it only refers to a person who objects to "designated development" and not to non- designated development which is advertised under s.87. This narrow meaning is reinforced under s.101 to permit only an objector to "designated development" or to "prohibited development" to demand an inquiry under s.101.

COMMITTEES

The Environmental Planning and Advisory Committee under s.21 isabolished, depriving the community of formal representation to the Minister on the administration of the EPA Act. Although the Committee might not have functioned in any significant sense, it is worth asking why that was so. A frank answer is not available here in view of the restrictions on disclosure of information contained in s.148.

DELEGATION

The range of persons to whom the Minister or the Director may delegate powers under the EPA Act is extended by s.23(1) to include an officer of servant of a council or a Commissioner of Inquiry. Provided that persons acting with delegated powers act in "good faith", they are not subject to legal liability for any misuse of those powers as a result of a new s.23(9).

PART 3 - ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)

State Environmental Planning Policies (SEPPs)

The option of the Minister to exclude public participation in the preparation of a draft SEPP is made clearer by s.39(2).

Regional Environmental Plans (REPs)

GAINS

An REP may be sub-regional under s.40.

LOSSES

Prior exhibition of study under s.42 deleted.

Prior public submission on study under s.43 deleted.

Prior consideration under s.44 of public submissions on study and aims, etc. of draft REP deleted.

Exhibition of study and draft REP is now simultaneous under s.47, enabling study to "justify" the plan, although theoretically a study must still be prepared prior to a plan under s.41.

Local Environmental Plans (LEPS)

GAINS

Council may clearly recover costs of study from developer, but subject to the regulations under s.57(5).

A s.65 certificate by the Director is no longer conditional on inconsistency between the draft LEP and State or regional policies, but this could also negative any participation in such policies.

A s.65 certificate may be conditional on amendment of a draft LEP before exhibition, but the benefit of this may again depend on a particular balance of conflicting community interests.

LOSSES

Public notice of specifications for study under s.57(3) deleted.

Prior exhibition of study under s.58 deleted.

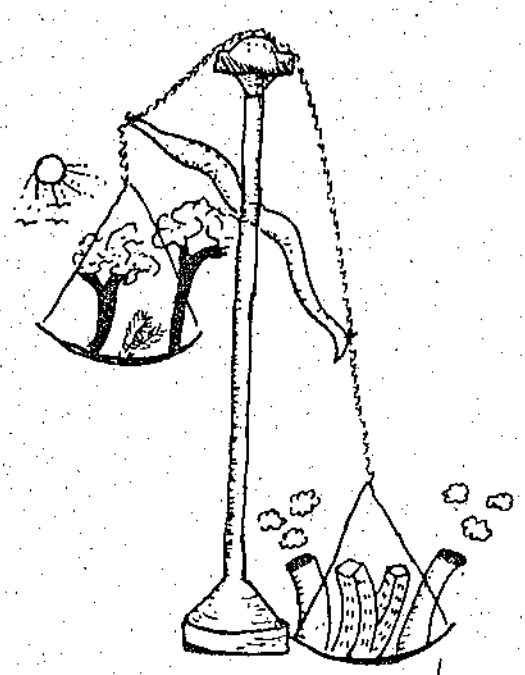
Prior public submissions on study under s.59 deleted.

Preparation of draft LEP is no longer dependent on prior preparation and exhibition of study as a result of deletion of s.60, but plan must still have regard to study under s.61.

A council may make alterations to an exhibited draft LEP not relating to public submissions made at a hearing under s.68. This would permit alterations, for example, based on information not supplied to the inquiry, but it could also negative public participation in the inquiry.

The power of a council to make a development control plan (DCP) is extended by s.72 to include reference to a draft LEP, presumably even if that draft has not reached the exhibition stage mentioned in s.90 (1)(a)(ii). This could also have negative implications for public participation.

An amending EPI is no longer restricted under s.74(1) to the land to which the amended EPI relates. (The definition of "land" is also extended in s.4). Note, however, that the need for an environmental study for an amending EPI still is not automatic under s.74 (2).



THE SCALE OF CHANGE!

A s.65 certificate by the Director is no longer conditional on inconsistency between the draft LEP and State or regional policies, but this may also have local benefit

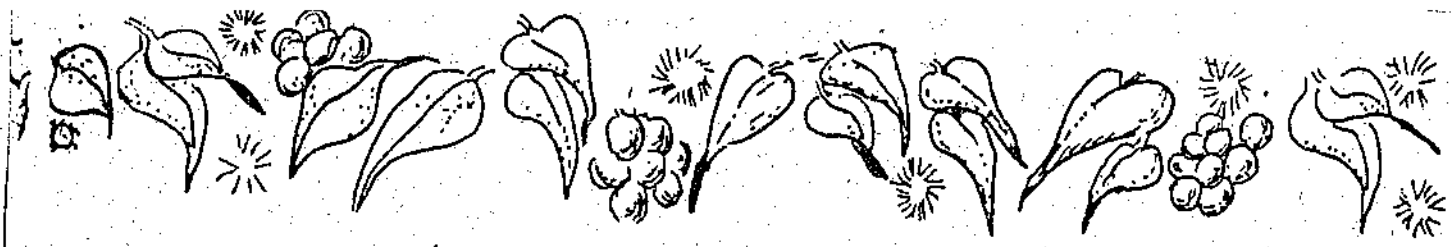
Exhibition of draft LEP and study is now simultaneous under s.66, enabling the study, in effect, to justify the plan.

Public submissions under s.67 may only be made on the draft plan, not on the study: cf.s.43 (b) re REPs.

Matters deferred from an exhibited draft LEP when it is submitted to the DEP under s.68 need not be publicly re-exhibited when subsequent action is taken on the deferred matters, but s.68(6) as amended sets no time limit for the taking of such subsequent action.

The power of the Minister under s.70(1) to alter an exhibited draft LEP is extended to "any matter which in the opinion of the Minister is of significance for State or regional environmental planning." Such matter presumably need not be a matter of prior public knowledge, such as in a SEPP, REP or s.117 direction.

There is a blanket retrospective validation of amending instruments which may have breached the former s.74(1), without provision for individual review of those EPIs.



The right to challenge the validity of an EPI under s.35 is made more restricted, in that the 3 month period applies irrespective of the grounds on which invalidity is alleged. It operates retrospectively except where legal proceedings had already commenced.

PART 4 - DEVELOPMENT CONTROL.

GAINS

DAs.

The situation where an occupier of Crown lands does not require ministerial consent for a development application (DA) is narrowed under s.77 (2).

The purely subjective decision by a developer to supply environmental impact information under s.77 (3)(c) with a non-designated DA is removed, but replaced by particulars to be prescribed in the regulations.

Designated DAs.

Notice of designated DAs must go to public authorities as well as to persons previously\prescribed under s.84(1).

Matters for consideration

Additional considerations for determining a DA are spelt out in s.90(1)(m1) and (p1).

LOSSES

DAs.

Need for landowner's consent to a DA by a public authority is narrowed under s.77(2A).

Designated DAs.

The form and content of a notice of designated development under s.84 is left to be prescribed by regulation and is no longer governed by the Act itself.

DA Determination.

The specific provision in s.91(5) that development consents are void for non-compliance with the Act or an EPI is entirely removed and not limited to an amendment consequential on the Minister's power to approve "prohibited development" under s.101

Public amenities contribution conditions.

A wider basis for s.94 contributions to public amenities or services is provided, but the Minister may make specific or general directions re such contributions under s.94 A.

A "material public benefit" may be required under s.94 in lieu of a dedication of land or a cash contribution under s.94(2C), but is subject to s.94A directions.

Prohibited development.

The Minister may grant consent uinder s.101 to "prohibited development" (as defined in s.100A), notwithstanding the provisions of an EPI: cf.s.90 (1)(a)(i). This would benefit a community-based development which was thwarted by local planning processes, but also has negative implications for community-based local plans.

A "prohibited" DA must be available for public comment under s.101 (3) as if it was a "designated development", but does not necessarily require an EIS under s.77 unless it is also "designated". In one sense, this right is no different from the right to inspect a draft EPI intended for a spot rezoning.

Crown developments.

The power of a council to refuse or impose conditional consent for a DA by the Crown (or prescribed persons under the regulations) is made conditional by s.91A on the written approval of the Minister. Failure of a council to decide in accordance with the Minister's notification means that unconditional consent is deemed to have been given. Whilst the section does not specifically remove objector rights re Crown developments which are "designated" or "prohibited", the Court hearing any third party appeal would be bound, like a council, by a s.91A notification.

Public amenities contribution conditions.

The new s.94 removes ,the need for an EPI to identify a demand for public amenities or services prior to a consent condition being imposed for provision or improvement of such amenities or services. This removes planning participation prior to specific development control.

It seems that a s.94 condition towards amenities or services provided prior to a particular development need not be "reasonable" under s.94(2B)

Prohibited development

The Minister may grant consent under s.101 to "prohibited development" (as defined in s.100A), notwithstanding the provisions of an EPI: cf.s.90 (1)(a)(i). This could also have some positive aspects for public involvement as mentioned under 'GAINS' Irrespective of individual positive effects,

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Note that, although participatory rights apply to the EIS duties under ss.112 and 113, the legal requirements enforced under s.123 for a "proper" decision on a Part 5 development are far more open-ended than under Part 4. However, whatever public sector developments do not effectively end up under SEPP 4 – Development without Consent (and therefore under Part 5), the remainder (under Part4) will largely be protected by s.101 where they are prohibited and by s.91A where they do require development consent. No appeal on merits is possible for either a Part 5 of a s.101 decision and a s.91A decision is for all intents unappealable against the Minister's notification. That only leaves a s.123 proceedings for the purposes of taking technical points on the legality of thesedecisions. This could mean that the definition of "prohibited development" under s.100A, for instance, could take on some importance in at least providing a public merits forum by way of a s.101 inquiry. The way s.100A is worded could open the way for arguing that some s.91A decisions could only have been made under s.101.

IMPLEMENTATION AND ENFORCEMENT

The power of the Minister under s.117 to direct a council in relation to the preparation of a draft LEP is no longer limited to matters of State or regional significance. The power of the Minister under s.118 to replace a council by a planning administrator for the purposes of carrying out the EPA Act is no longer conditional upon a hearing at council's request. Incidentally, the administrator need no longer be an officer of the DEP but may be simply a "person".

PUBLIC INQUIRIES

Inquiry powers are exteended under s.119 to the administration and implementation of any statute (not solely the EPA Act) administered by the Minister.

MISCELLANEOUS

Other amendments include essentially housekeeping amendments re Commissioners of Inquiry (s.18); various notifications between local councils and the DEP under Part 3 (ss.53(4), 68(4)(d)(ii) and 70(7) and under Part 5 (s.112(3)); introduction of a power of entry (ss.117A and 117B); settlement of disputes under s.121(3); constitution of development areas under s.132(6)(b); assessment of loan commitments under s.143; numerous consequential amendments; the new right of a Part 5 proponent under s.112(5) to receive reasons for refusal or conditional approval of an "activity" and a less specific obligation under s.149 to issue a certificate but subject to regulation. Of more particular note is the deletion of requirements under ss.146 and 147 concerning thepreparation and tabling in Parliament of an annual report, since doubts have recently been expressed about the effectiveness of the State's Annual Reports legislation. Finally, regulations may change any provisions contained in the Amendment Act with respect to transitional or savings arrangements consequent upon implementation of the amendments.

In summary, the Amendment Act suffers from three basic democratic ailments:-

1. A shift from planning principle to ad hoc development decisions, with direct consequences for the quality of public input which will be forced to be more reactionary than constructive and forward-looking;

2. A shift from direct parliamentary responsibility to greater use of regulations;

3. A concentration of power in the Minister, contrary to the object in s.5(b) of shared central and local government responsibility.

These may well add up to increased efficiency but a very decided cost to the S.5(c) object of increased public involvement and participation in environmental planning and assessment. Since the EPA Act is now very much an internal contradiction with the s.5 objects, one can only wonder what various commands in the Act and in SEPPs to have regard to the s.5 objects will mean in practice.

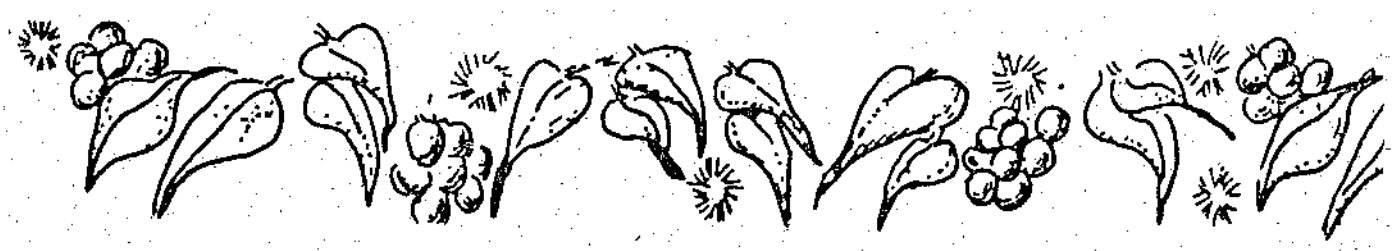
Perhaps, however, the amendments at least will result in greater public vigilance than in the past for the various public notifications which may be made under the Act. In this way, the object in s.5(a)(vi), to encourage the protection of the environment, might be negatively reinforced. We should also be grateful, of course, that Parliament need no more waste its time on special statutes exempting particular development proposals from EPA Act requirements.

LEGAL BRIEFS.

Senior Assessor Hanson has held in Anthony v Manly Municipal Council No. 10200 of 1985 4 September 1985 that the impact a proposed development will have on the views currently enjoyed by adjoining residents is a legitimate consideration from the aspect of amenity of the neighbourhood. As such it is required to be considered by the Council in determining a development application along with the other matters in s.90(1) of the Environmental Planning and Assessment. However, the mere fact that a development will diminish or eliminate views is not sufficient in itself to debar consent to a development application. This was the situation in Marusic v Manly Municipal Council No. 20104 of 1982, where the issue was whether extensions, reasonable in themselves, should be allowed in order that a neighbour might continue to enjoy a view across the Marusic property.

In contrast, in Anthony's case, there were other planning considerations which together with the loss of views justified refusal of the development application.

What does the tree have to say in it's own defence?



Any person making a submission on a "prohibited" D.A. may demand an inquiry under s.101 (5) but the inquiry does not make the final decision: cf a third party appeal under s.98, where the Court may substitute its decision for that of a consent authority: cf. the more qualified right for a public inquiry for a spot rezoning under s.68(1). (Whether a prohibited development occurs through s.101 or by a spot rezoning, there is no right of appeal even to the developer).

Non-conforming existing uses

Restrictions on the lawful continuance of uses prohibited by an EPI are tightened under s.107 by not allowing enlargement, expansions or intensification of the existing use, thereby ensuring some greater consistency with EPI objects.

The right under s.109 to continue an existing use which would require consent under an EPI, without being prohibited as such, is brought into line with s.107 as amended.

Loopholes regarding the lawfulness of uses originally commenced unlawfully, but subsequently deemed "lawful" are closed by s.109A(1).

Loopholes regarding the continuation of a use unlawfully commenced, but protected by the definition of "development" under deemed EPIs (requiring an actual change in land use), are closed by s.109A(2).

however, the amendment destroys the integrity of the planning system whereby planning ideally precedes specific development decisions.

Consent modification.

A consent may be modified under s.102 and not merely the "details of" consent. Although the modification must relate to substantially the same development and "objectors" (see s.4) to the original consent must be considered, there is no further right of appeal by third parties and the question of whether there is substantially the same development might go unchallenged.

Nonconforming existing uses.

Alterations in the s.107 and s.108 sense to an existing use prohibited by an EPI are not subject to the "existing use" controls under the regulations if a consent has already been granted under s.101 by the Minister.

It is also possible that the Minister could use a s.102 to alter a s.101 consent, rather than re-use s.101, so that there would be no fresh right to an inquiry.

Validity challenges.

S.104A mirrors the amended s.35 in limiting all challenges to the validity of a development consent to a period of 3 months. No restriction at all existed previously

Note that it is not entirely clear what the position is for extending the period in which a "prohibited development" with s.101 consent must be commenced.

Under s.99 and (1)(a)(i) and s.101 (9)(b) such consent would lapse if not commenced in time and would require fresh s.101 action with attendant objection rights. However, s.99 (4) assumes an extension may be granted by the Minister under s.99 (3) even though from s.101 itself it seems that the Minister is not a "consent authority" as such but simply placed in the position of a consent authority. Similarly it is not clear that the Minister acting under s.101 is a "consent authority" for the purposes of s.94 contribution conditions.

PART 5- ENVIRONMENTAL ASSESSMENT (EIA)

GAINS

The new definition of "activity" under s.110 has potential for including any act, matter or thing covered by an EPI under s.26, provided it is prescribed in the regulations.

The definition of "activity" is no longer in terms of specific purposes, and might mean that a multi-faceted development could be broken down into component parts under both Part 4 and Part 5.

A definition of "approval" is now included in s.110.

The removal of the need for a "final decision" to be reached under s.112 should make both the operation and non-operation of that section clearer.

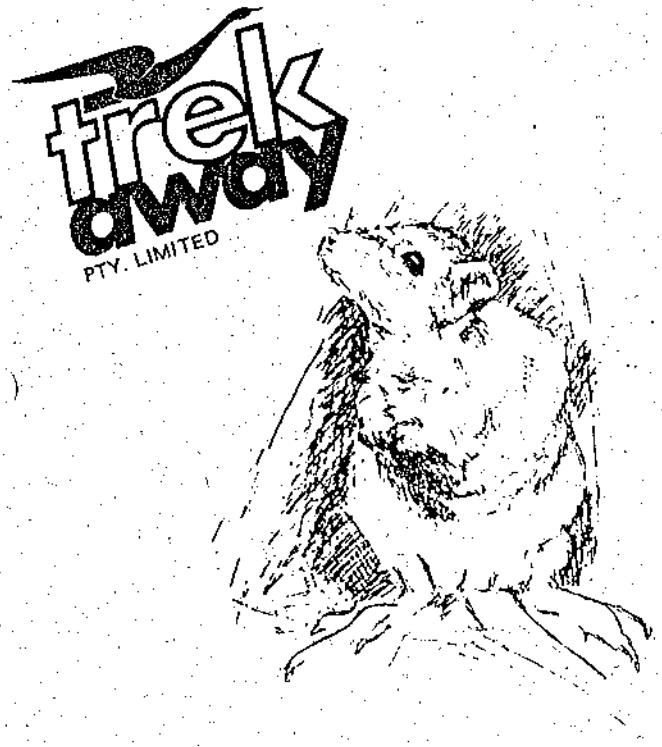
LOSSES

The definition of "activity" under s.110 is narrowed similar to the meaning of "development" in s.4 with a consequential narrowing of the duty to prepare an EIS under s.112. Although the general duty of EIA under s.111 does not appear to be affected, no formal participatory rights apply to s.111.

The nomination of a "nominated determining authority" under s.110A relieves other determining authorities from being concerned with the operation of ss.112 and 113, but not with s.111.

The definition of "activity" now specifically excludes matters prohibited under an EPI, giving rise to a possibility of some development requiring neither Part 4 nor Part 5 assessment in a situation such as occurred in E.Hannan Pty Ltd v Electricity Commission of N.S.W. [1983] 3 N.S.W.L.R. 282.

May / June '86



FREE HOLIDAY TO INCREDIBLE FRASER ISLAND

The E.D.O is offering as a prize to Friends of the EDO, a two week Trekaway holiday to Fraser Island in Queensland. All you have to do is win the prize is to be the person who signs the greatest number of new Friends of the EDO and you could be on your way. Conditions of the competition are set out below:

THE HOLIDAY.

Fraser Island, or Great Sandy as it was originally called, is the biggest sand island on earth.It has been the centre of a prolonged conservation campaign(including the High Court case of Murphylores Inc.Pty.Ltd.v The Commonwealth and Others(1976)50 ALJR 570) and it's magnificent potential World Heritage area.The trip focuses on exploring this world of coloured sands, fresh-water lakes and rain forest. En route you will explore other interesting national parks such as Bundjalung, Cooloola, Lamington,Yuraygir, Crowdy Bay, and Myall Lakes.

This fantastic holiday, valued at $790 (ex Sydney), has been kindly donated by Tekaway Pty. Ltd. an experience company offering exploration holidays to Australia's most scenic areas. A full programme of Trekaway holidays will appear in the next newsletter .

THE CONDITIONS

1.Entrants must be currently a Friend of the EDO.
2. Before an entrant will be considered eligible for the competition , he or she must have signed up at least three individuals(at $30.00each) or one organisation (at $100.00 each).
3. The Trekaway holiday must be taken personally and is not refundable for cash.
4. The Trekaway holiday must be taken either on the 24th of August through to 6th September, 1986, or on the 12th of October through to 25th October,1986.
5. The competition commences 5pm. 2nd of May 1986 and closes 5pm ,4th of July 1986. No entries after that date will be considered for the competition.
6. The judges decision is final and no correspondence will be entered into!

HELP THE EDO

Trekaway Pty Ltd. has donated this holiday because it believes in what we are doing and wants to see the EDO continue helping members of the public to protect Australia's environment.

We are asking people to show their support by participating in this competition. Use the forms in this Newsletter for people to sign.Additional forms are available from the EDO.

Remember to insert your name in the space provided so we know who to credit .! Good luck!

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Please make your cheque payable to the Australian Conservation Foundation, sign the statement of preferance below and post this form to the Australian Conservation Foundation,67b Glenferrie Road, Hawthorn,3122.
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