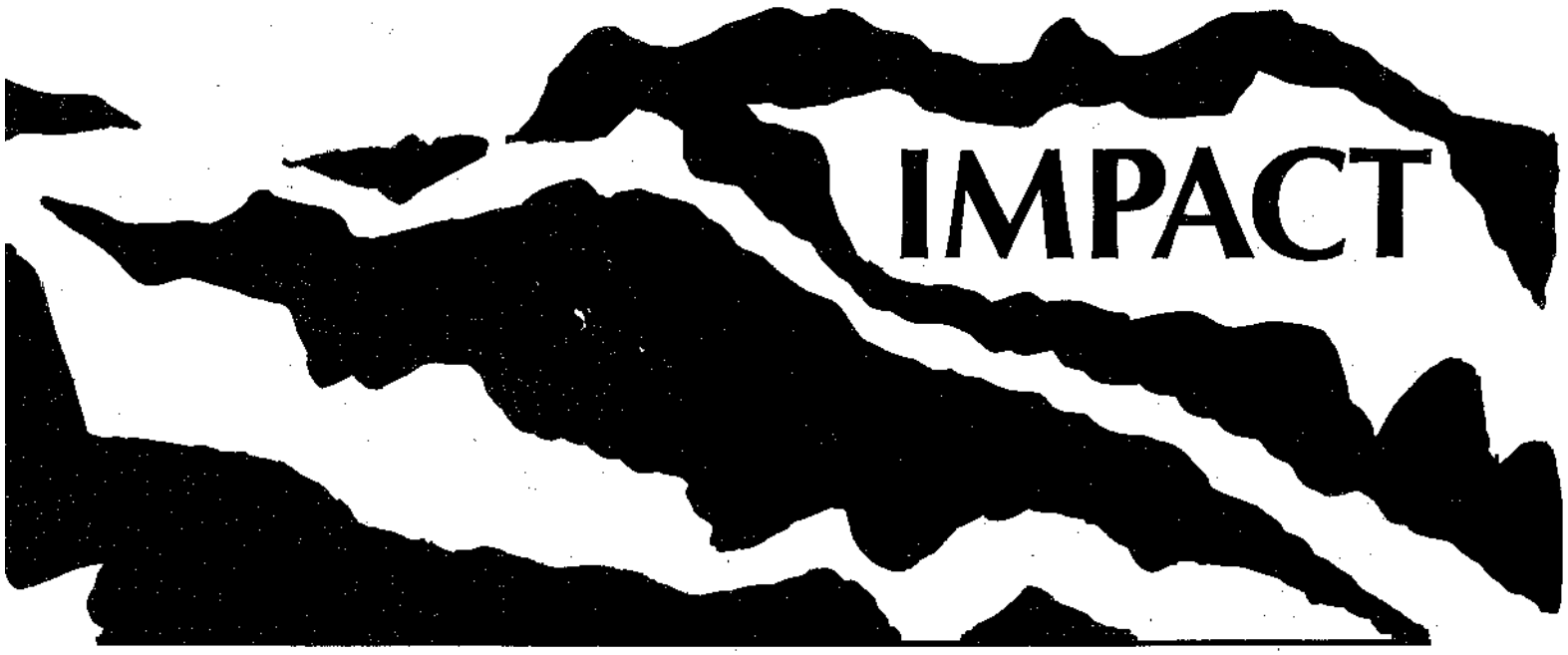


A QUARTERLY NEWSLETTER ON ENVIRONMENTAL LAW DECEMBER 1986
**Environmental Defender's Office Ltd**
3rd Floor, 142 Clarence St., Sydney 2000 Phone 29 2869

# COURT'S DISCRETION LIMITED WHERE MANDATORY, PUBLIC INTEREST REQUIREMENTS BREACHED

The Land and Environment Court has indicated that the extent of the discretion to refuse relief where mandatory statutory requirements in the public interest have been breached is limited. The case was **Broomham and Owen -v- Tallaganda Shire Council and Mehilo Pty. Ltd;** Unreported, L.& E. No. 40172 of 1985, 31 October 1986, Stein J. A preliminary application in the matter was reported in the last issue of **Impact** (August/September 1986, p.2). The Environmental Defenders Office acted for the applicants.

The applicants claimed that the statutory notice required to be given by the Council under s.84 (1) (c) of the **Environmental Planning and Assessment Act** failed to comply in a number of respects with the requirements of cl.39 of the **Environmental Planning and Assessment Regulation** 1980. The Council admitted the breaches. Up until the day of the hearing, the developers denied the breaches. However, at the hearing, the developer conceded the breaches and instead argued that the Court should refuse on discretionary grounds to make the declaration and orders sought by the applicants.

The developer based its argument on a number of grounds including: the conduct of the applicants, the delay by the applicants, the alternative remedy which was available to the applicants, the lack of prejudice to the applicants by reason of the defective notice, the hardship upon the developer if relief were to be granted and the lack of fault by the developer.

Stein J. found that the evidence did not show any mala fides or other conduct of the applicants which would disentitle them to the relief sought. Although there had been a delay of about a year from the date of the development consent to the commencement of proceedings, which could be attributed to the applicants, there had also been another year's delay caused by the developer after the proceedings had been commenced. Furthermore, there was no evidence that the original delay had caused any prejudice to the developer.

Stein J. supported the earlier decision of Perrignon J. in the matter by holding that the fact that the applicants had a right to a third party appeal against the decision of the Council but chose not to exercise that right and instead to challenge the validity of the consent was an irrelevant consideration to the question of discretion.

Stein J. emphasised the public interest nature of the notice requirements. Hence, the question of whether there had been prejudice to the applicants was beside the point. "It is the potential harm to the public which is relevant" (at p.3 of transcript).

Stein J. found the evidence of hardship unconvincing. He pointed out that although the errors in the public notice were caused by the Council, the errors were nevertheless so obvious that the developer ought not to have disputed the breaches all the way to the hearing.

For these reasons, the Court rejected the developer's submissions. Stein J. stated that he had "considerable doubt as to the extent of the application of the discretion where mandatory requirements in the public interest are breached. Apart from the failure to comply with subclause (c) of the Regulation, all of the breaches are serious and could lead to the deprivation of the opportunity of some members of the public to qualify as objectors. . . The failure to comply with the requirement of the Regulation negates the purpose sought to be achieved by the giving of the notice. There is no question of substantial compliance" (at p.5 of transcript).
The Court ordered the developer to pay the costs of the application.

# RECENT PUBLIC INTEREST CASES: LESSONS TO BE LEARNED

*(This is the text of a paper presented by Brian Preston to the EDO's seminar on 17 October 1986 at St. Andrews Auditorium, Sydney)*

## INTRODUCTION

This last year, from the middle of 1985 to the middle of 1986, has seen several important cases which have clarified certain legal issues concerning environmental matters but also raised some tantalizing questions for future argument. This paper focuses on three cases, but will refer to many others. The three cases are the Court of Appeal's decision in **F. Hannan Pty. Limited -v- The Electricity Commission of N.S.W. (No.2)**[1] (hereinafter **"Hannan No.2"**) and the Land and Environment Court's decisions in **Guthega Development Pty. Ltd. -v- The Minister administering the National Parks and Wildlife Act and the National Parks and Wildlife Act and Ors.**[2] **("Guthega")** and **Lend Lease Management Pty. Limited and Anor. -v- The Council of the City of Sydney and Ors.**[3] **("Lend Lease").** Not every issue in the cases is dealt with but rather a selection of important or interesting issues is made.

## HANNAN NO.2

### History of Litigation

**Hannan No.2** was the last in a series of cases and appeals concerning the decision of the Electricity Commission of N.S.W. ("Elcom") to construct a electricity transmission line near Tuggerah and across, in part, land owned by Hannan. Elcom had completed the power line except for a stretch across Hannan's land. Elcom purported to resume an easement over Hannan's land but failed to prepare an environmental impact statement in accordance with s.112 of the **Environmental Planning and Assessment Act** (NSW). Hannan brought suit seeking firstly declarations that the purposted resumption was in breach of the Act and hence invalid and secondly, orders restraining Elcom.

Cripps C.J. dismissed Hannan's application. Hannon appealed. The Court of Appeal allowed the appeal and the Court also ordered that Elcom be restrained from entereing upon Hannan's land for the purpose of constructing the power line. (See **F. Hannan Pty. Limited -v- Electricity Commission of New South Wales (No.1.).**

After the decision in **Hannan No.1**, Elcom prepared an environmental impact statement both for the part of the line to be constructed across Hannan's land as well as for the remainder of the line which had been constructed already, albeit illegally.

Hannan objected to the E.I.S. arguing that Elcom had already made a final decision and was debarred from subsequently making another decision. That is, after making its first and only final decision within s.112, Elcom could never prepare an E.I.S. in compliance with s.112, as a step towards making another final decision.

Elcom, naturally enough, disagreed. It brough proceedings in the Land and Environment Court for declarations that the E.I.S. was valid and that Elcom could, notwithstanding the past history of the matter, nevertheless make another final decision after complying with the E.I.S requirements of Part V of the Act.

In the Land and Environment Court, Cripps C.J. held in Elcom's favour on two preliminary questions. Hannan appealed. The Court of Appeal upheld the appeal in part and remitted the proceedings to the Land and Environment for further determination.

### Scheme of N.S.W. Environmental Legislation

Although **Hannan No.2** (and **Hannan No.1**) concerned Part V of the Act as it was before the recent amendments which came into effect in February 1986[5], much of the dicta of the Court of Appeal in **Hannan No.2** is still relevant.

In particular, the summary by the Chief Justice, Sir Laurence Street, of the legislative scheme of the **Environmental Planning and Assessment Act** is useful in uderstanding the powers of the Land and Environment Court and the Court's discretion in exercising those powers. The Chief Justice stressed that the Act, combined with the **Land and Environment Court Act**, confer upon that Court "a wide ranging responsibility for the protection of the environment. Commensurate with that wide ranging responsibility is a wide ranging jurisdiction designed to give to that Court exclusive control to determine how, in the public interest and in the interests of the parties and other affected or interested persons, particular dispute situations should be resolved."[6]

The Chief Justice stated that the open standing provision in s.123 is of major importance in identifying the true role of the Court.[7]

> "This provision read in the context of the objects of the Act as set out in s.5 makes it apparent that the task of the Court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice inter partes. Section 123 totally removes the conventional requirement that relief is normally only granted at the wish of a person having sufficient interest in the matters sought to be litigated. It is open to **any person** to bring proceedings to remedy or restrain a breach of the Act. There could hardly be a clearer indication of the width of the adjudicative responsibilities of the Court. The precise manner in which the Court will frame its orders in the context of particular disputes is ultimately the discretionary province of the Court to determine in the light of all the factors falling within the purview of the dispute".[8]

The Chief Justic concluded, in the light of this legislative

scheme, that the course of the litigation between Hannan and Elcom in the past did not necessarily dictate what should be done for the present or future in relation to the construction of the power line. The Court's duty was to formulate such order as it thinks fit in the circumstances as they exist at the time of the Court's determination. Thus, the Court could decide to lift the injunction (upon application being made to it) and leave the way open for Elcom to finish what it had started, albeit illegally. Alternatively, the Court could decide that the circumstances require Elcom to suffer the consequence of its wrongdoing and order that Elcom be permanently restrained. Street C.J. therefore proposed that the proper course was for Elcom to apply to have the injunction lifted at which time the Land and Environment Court could determine what the proper order should be for the future.

**Validation of Unlawful Activity**

Priestley J.A. dealt primarily with the issue of the nature of a final decision under s.112 and the consequences. Since the reference to "final decision" has now been dropped from the Act, this part of His Honour's judgment need not concern us. An interesting issue referred to by Priestley J.A. was whether an activity, unlawfully carried out, can be subsequently validated. Hannan had argued that it could not be validated, relying upon the decision in **Tennyson Textiles -v- Ryde Municipal Council** which held that building approval cannot be obtained for building work after it has been done. Priestley J.A. did not decide the issue for the reason that the activity in question concerned the **future** construction of the line across Hannan's land. Nevertheless, it may be useful to remember such an argument for another case where the facts warrant it.

**Power of Court to Make Declarations of Invalidity**

McHugh J.A.'s judgement is notable for his assertion that the Land and Environment Court lacks the power to make a declaration that a decision of a determining authority is void. As I have stated elsewhere,[11] this statement is difficult to understand given the wide-ranging jurisdiction of the Court. This jurisdiction includes not only the powers in section 124 of the Act but also those previously exercised by the Supreme Court and now vested in the Land and Environment Court pursuant to s.20 of the **Land and Environment Court Act**. The latter source of power includes the power of the Court to make a declaration that a decision is void: See **Grace Bros. Pty. Ltd. -v- Willoughby Municipal Council.**[12]

**Choosing the Right Relief**

One matter which all the justices referred to was the inappropriateness of the declatory relief sought by Elcom whilst the injunction was extant. The Court noted that in **Hannan No.1** liberty to apply had been reserved. Hence, the Court considered it would have been more appropriate for Elcom to have applied to have the injunction lifted or its terms varied than to seek declaratory relief.

## GUTHEGA

**Facts**

**Guthega** concerned certain governmental decisions to grant leases to Mount Blue Cow Ski Bowl Pty. Ltd. ("Ski Bowl") and the Skitube Joint Venturers ("Skitube") in relation to the Skitube developments in Kosciusko National Park. As in **Hannon No.2, Guthega** concerned Part V of the Act as it was before the amendment but the case is still useful.

**EIS Prepared by or on Behalf of Proponent**

The primary argument of Guthega was that the environmental impact statement prepared by the National Parks and Wildlife Service was inadequate in law.

This argument was advanced on a number of grounds, one of which was that the statement was not prepared "by or on behalf of the proponent" in accordance with s.112. Guthega sought to rely on the decision in **Burns Philp Trustee Company Limited -v- Wollongong City Council.**[13] That case held invalid an environmental study under Part III of the Act on the ground that it was prepared by the developer rather than the local Council which had the responsibility to prepare it prior to rezoning. However, Cripps C.J. distinguished the **Burns Philp** case on the different legislative provisions and on the facts. Although unsuccessful in this case, the argument may still be worth pursuing in certain cases. One which comes to mind is the Harris Daishowa E.I.S. This was prepared by Harris Daishowa pursuant to the **Environmental Protection (Impact of Proposals) Act** (Cth.) in relation to woodchip export licences in the Eden-Bombala area. It would be arguable that the Forestry Commission of NSW could not "adopt" this E.I.S. as their own for the purposes of Part V of the NSW Act in relation to the Commission's activities in that area. The E.I.S. would not have been prepared "for or on behalf of" the Commission. Fortunately, the Commission has not "adopted' the Harris Diashowa E.I.S. to date.

**Separate EIS Not Necessary for Each Activity**

Another breach alleged by Guthega was that there was no environmental impact statement prepared in respect of certain other activities, including the Skitube extension lease. Whilst this was technically correct, in that there was not a separate E.I.S. entitled "Skitube Extension Lease", Cripps C.J. nevertheless held that a separate E.I.S. was not necessary since the E.I.S. prepared for the main Skitube extensively addressed the environmental consequences of the extension and this was sufficient.

**Justification of Economic Viability**

The economic viability of the skitube was also challenged. Guthega sought to demonstrate that the economic analysis justifying the project was deficient. Cripps C.J. stated that the requirement in cl.57(2)(f) of the **Environmental Planning and Assessment Regulation** 1980, viz that the contents of an E.I.S. shall include "justification of the proposed activity in terms of environmental, economic and social considerations", "is not the same as a requirement that the development be justified on the ground that it will be economically viable. The question to be addressed by cl.57(2)(f) is whether, in all the circumstances, the proposal is justified on economic, social and environmental grounds".

It is not entirely clear what Cripps C.J. meant by this explanation of the requirement. Obviously, the Regulation requires justification in respect of three considerations and not just economic viability. Further, the economic viability is, in one sense, and especially for private developers, a matter for the developers. If developers want

to lose money, why should the Court stop them? However, in another sense, economic viability is usually the paramount justification advanced for environmental destruction. The very reason, it seems to me, for letting a development go ahead in the vast majority of cases is that the economic benefits of "progress" outweigh the environmental costs. If then, there is no economic benefit, on what basis can environmental destruction be permitted? I have yet to hear the argument that progress is **instrinsically** good. Hence, justification of the economic viability remains an essential part of an E.I.S.

**Court's Discretion to Refuse Relief**

A final point on **Guthega**. Although Cripps C.J. concluded that there were no breaches of the **Environmental Planning and Assessment Act** or the **National Parks and Wildlife Act**, he went on to say that even if breaches had been established, he would have declined to make any order. Such a course was, of course, foreshadowed by Street C.J. in **Hannan No.2.**[14] That this is a course that may properly be adopted by the Court is sometimes forgotten by zealous public interest litigants anxious to see technical breaches of the law remedied. Such circumstances as the practical utility of the litigation and whether overall there has been substantial compliance must be considered before proceedings are commenced.

Note: The **Guthega** case went on appeal but the decision of the Court of Appeal is still pending.

## LEND LEASE

The **Lend Lease** case concerned the redevelopment of George Patterson House and the Metropolitan Hotel on George Street near Bridge Street. The new development is to be called "No.1 Bridge Street" and the case is sometimes referred to by that name.

**s.104A: Limitation Period**

A preliminary issue arose as to whether s.104A, which was introduced by the 1985 amendments, precluded Lend Lease from bringing the proceedings. The section is poorly drafted and is open to two interpretations. The first and perhaps the strictly literal interpretation is that Lend Lease could only bring proceedings within 3 months **after** the Council published notice of its decision. That is, Council had to first publish its decision and then Lend Lease would have 3 months to commence proceedings. Since the Council had no intention of publishing its decision, for that would allow Council's decision to be challenged, this interpretation would have barred Lend Lease from the Court.

The second interpretation is that there is no time period unless and until Council publishes notice of it decision. Only upon publication would the 3 month time period commence to run. Since Council had not published in this case, there was no time period and Lend Lease would have been able to properly commence proceedings.

Cripps C.J. adopted the second interpretation saying that to adopt the literal interpretation would, in practice, defeat the objects of the Act.[15] This decision was followed in the case of **Priestley -v- Kempsey Shire Council.**[16]

Lend Lease alleged breaches of both the **Heritage Act** and the **Environmental Planning and Assessment Act.**

**Breaches of the Heritage Act**

**(i) Failure to Give Public Notice of Demolition Application**

In respect of the **Heritage Act**, Lend Lease argued that the Heritage Commission's decision to allow demolition, pursuant to s.63, of George Patterson House, which was then the subject of an interim conservation order, was void on the ground that the required public notice had not been given pursuant to s.61. This section required the Heritage Council to give public notice of an application in respect of an item of environmental heritage where, if the application is approved, it would materially affect the significance of that item as an item of environmental heritage.

The Heritage Council endeavoured to argue that because it had recommended to the Minister that the interim conservation order lapse and not be replaced by a Permanent Conservation Order, it could not be said that the Council was of the opinion that approval of the application would materially affect the significance of George Patterson House. Cripps C.J. rejected this argument saying that merely because the Council, after long negotiations with the developers, decided to agree to the destruction of George Patterson House does not necessarily mean that the Council was of the opinion that there would be no material effect. To the contrary, the evidence suggested that the Council at the relevant time was of the opinion that it would have a material effect. In the alternative, Cripps C.J. held that even if the Council did not have the required opinion, the failure of the Council to hold that opinion was so unreasonable that it was not reasonably open to it in all the circumstances.

Cripps C.J. held, following **Scurr -v- Brisbane City Council**[17] and **Attorney-General (NSW) Ex Rel Franklins Stores Pty. Ltd. -v- Lizelle Pty. Ltd.**[18], that the public notice provisions were mandatory and that failure to observe those requirements rendered the decision of the Heritage Council of no legal effect.

**(ii) Invalidity of Development Application and Council's Consent**

Cripps C.J. also held that the development application under the **Environmental Planning and Assessment Act** and the consent to that application granted by the Council were void as being in breach of sections 67 and 69 of the **Heritage Act.** Section 67 provides that a development application made to a Council before the approval of the Heritage Council is void. Section 69 provides that an approval by a consent authority (a Council) to a development application given otherwise than in accordance with the **Heritage Act** is void.

**(iii) Invalidity of Conditional Approval**

A final ground of invalidity under the **Heritage Act** was that the purported approval left significant matters for further consideration by the Heritage Council. The approval was subject to a condition that the developer present new plans to the Heritage Council for approval. The new plans were to "fully satisfy the objectives and principles for the harmonious integration of the Metropolitan Hotel and the new building, the treatment of the lower facade of the new building along George Street and the maintenance of the existing building alignment along George Street in a manner which is in harmony with the hotel building."

Cripps C.J. referred to **Parkes Developments -v- Cambridge Credit Corporation Limited**[20] where Hope J.A. stated that. . . "if a Council decides that the applicant must put in completely revised plans and that, if he does, the Council will then decide whether to give its approval, the Council has rejected the original application, and has invited the applicant to make a fresh one."

As a result, Cripps C.J. was of the opinion that the purported approval was not in fact an approval in law.

### Breaches of the EPA Act

In respect of the **Environmental Planning and Assessment Act,** Cripps C.J. held the consent to be invalid on three grounds:-

1. it did not fix the floor-space ratio but left that to the determination of the Chief Town Planner;
2. it sought to grant consent subject to standard conditions without specifying what those conditions were; and
3. it was in breach of s.67 of the **Heritage Act** in that it approved a design inconsistent with the conditions of approval of the **Heritage Act.**

### Invalidity of Approval Subject to Standard Conditions

In respect of the first two grounds, the Council argued that it had delegated to the Planner the task of settling the conditions. Cripps C.J. rejected this submission. He referred to **Yeomans -v- Woollahra Municipal Council**[21] and stated that it is not to open a Council to grant consent but then leave it to some other person to settle the conditions. The Council must either delegate the whole task — that is the decision whether or not to grant consent and the settling of conditions — or perform the whole task itself.

This decision is of vital importance. It has been the practice of local councils to often approve minor developments subject to 'standard conditions' but I have been noticing that increasingly this method is being used in relation to large-scale, contentious developments to hurry the matters through with inadequate debate at meetings. It is likely that unless Councils change, this may provide a fruitful ground for challenging Council's decisions.

### Breach of Ordinance 1: Grounds for Invalidity of Consent?

A final point which was raised by Cripps C.J. in the Lend Lease case but was not determined was whether if there had been a failure to comply with the provisions in **Local Government Ordinance 1** in relation to Council meeting protocol and procedure, such a failure could have the effect of invalidating a consent given under the **Environmental Planning and Assessment Act.** This may well be a fruitful area for further research and argument in an appropriate case.

Note: The **Lend Lease** case is on appeal. A date has yet to be set for hearing the appeal.

## CONCLUSION

The range of issues raised in just these three cases shows the dynamic growth of environmental law in New South Wales in recent years. Administrative law and equity principles are increasingly being invoked. But these principles must be understood in the light of the novel legislative scheme introduced since 1979. Lawyers, courts, developers and citizens need to realise that the rules that have been devloped over the past in relation to inter partes matters may no longer be relevant. The court's goal is now to implement social justice consistent with the objects of the new environmental legislation.

**REFERENCES**


1. C.A. 31 of 1985, 28 August 1985.
2. L & E. 40110 of 1985, 5 November 1985.
3. L & E. 40094 of 1986, 17 July 1986.
4. (1983) 51 L.G.R.A. 353 (Land and Environment Court), 51 L.G.R.A. 369 (Court of Appeal).
5. **Environmental Planning and Assessment (Amendment) Act** 1985 (Sched. 6).
6. C.A. 31 of 1985, 28 August 1985 at p.7 of transcript.
7. at p.7 of transcript.
8. at p.12 of transcript.
10. 18 L.G.R. 231
11. See B.J. Preston, "Ultra Vires Decisions in Environmental Law" (1986) Vol.3 No4 **Environmental and Planning Law Journal** (forthcoming December issue).
12. (1980) 44 L.G.R.A. 400 at 418, 419 per Wootten J.
13. (1983) 49 L.G.R.A. 420
14. C.A. 31 of 1985, 28 August 1985 at pp.8, 9, 10 of transcript and see **Re The Victorial Farmers' Loan and Agency Co. Limited** (1897) 22 VLR 629 at 635 and **Queensland Estates Pty. Limited -v- Co-Ownership Land Development Pty. Limited** (1969) Qd.R. 150 at 157.
15. Cripps C.J. followed the dicta of Mason and Wilson J.J. in **Cooper Brookes (Wollongong) Proprietary Limited -v- The Commissioner of Taxation of the Commonwealth of Australia** 147 C.L.R. 297.
16. L & E. 40037 of 1986, 15 August 1986 per Cripps C.J.
17. (1973) 133 C.L.R. 242; 28 L.G.R.A. 50.
18. (1977) 2 N.S.W.L.R. 955.
19. No. 40094 of 1986, 17 July 1986 at pp. 14, 15, 43, 44.
20. (1974) 33 L.G.R.A. 196 at 206.
21. (1977) 36 L.G.R.A. 81.


# LEGAL BRIEFS

**EDO Seminar**

The EDO held its inaugural seminar on 17 October 1986 at the Auditorium of St. Andrews House near the Town Hall in Sydney. Over 60 people attended, both Friends of the EDO and other persons. The function was successful on a number of grounds. It afforded Friends of the EDO and EDO staff and Board members the opportunity to meet on an informal, social basis. The talks given by David Farrier and Brian Preston were well received and generated a number of questions. As an added bonus, the function raised $480.00 for the EDO. We are extremely grateful to those people who made donations. Thanks are also due to Board members Judy Thomson and Bernard Dunne and the EDO's Co-ordinator, Dorothy Davidson for organising the seminar. It is hoped to have another seminar around March 1987. Further details will be advertised in the near future.


**EDO Christmas Function**

The EDO will be celebrating the Christmas/New Year season with a picnic on Sunday, 14 December 1986 at The Basin Picnic Area in the Watagan State Forest, north of Sydney. The area can be reached by taking the Newcastle Expressway as far as Peats Ridge (near Oaks Milk Bar) where the Mangrove Mountain/Kulnura/Wollombi Road should be taken. This road should be followed as far as the letter 'A' (look out for letterboxes) where a right turn should be made onto Walkers Ridge Forest Road which heads into the State Forest. The Basin Forest Road to the Basin picnic area will be on the left after approximately 5-6 kms. The Watagan State Forest can also be reached from Cooranbong (via Martinsville Road, Martinsville Hill Road and onto Walkers Ridge Forest Road). A map is enclosed.

The EDO picnic is for Friends of the EDO, as well as their families and friends. Please bring your own picnic food and beverages.

There are two walks from the picnic area, one of about an hour and another of about four hours. There is quite interesting vegetation with littoral rainforest along the creeks and wet and dry sclerophyll forest on the hills.

The area also has facilities for camping so people can arrive on Saturday, 13 December 1986 and stay the night if they wish.

We look forward to seeing you.

**New Staff**

Brian Preston has finished employment as Principal Solicitor for the EDO but is continuing to be actively involved in the capacities of EDO Board member and editor of **Impact.**

Andrew Langley has taken over as Principal Solicitor. Andrew graduated from Macquarie University with a BA LLB (Hons.). His Honours thesis was on "Citizen Participation in Controversial Environmental Issues: A Case Study of the Franklin Dam Dispute". He worked as a solicitor in private practice in Wagga Wagga N.S.W., before joining the EDO. Whilst in Wagga, Andrew was involved with a local disarmament group and ran a radio programme called "Radioactive" on the local community FM radio station. He enjoys outdoor activities including bushwalking, cross-country skiing and wild river rafting. Andrew is multi-lingual, speaking German and French.

The EDO has also taken on a second solicitor, Elena Kirillova. Elena is a Sydney University graduate (LLB). She has a background of involvement in Law Revues and was Vice President of the College of Law Students Association. She recently directed the Law Society Revue "Rambo of the Bailey". She has worked for **Choice** magazine and assisted Brian Camilleri, a barrister who edits the High

Court and Federal Court Practice Service. Prior to joining the EDO, she worked as a solicitor with a Sydney city firm. Elena enjoys ballet and skiing. She speaks Russian.

**Articles**

Brian Preston's latest article on "Ultra Vires Decisions in Environmental Law in New South Wales" will be appearing in (1986) 3 **Environmental Planning Law Journal** (December issue). The article is timely in that it addresses a number of issues recently raised and considered by the courts. The article commences with a general analysis of the doctrine of ultra vires. It examines some examples of errors which have in the past been held to render a decision of a consent authority (e.g. local council) invalid. One such error is the failure to give the required public notice of a designated development (see case note this issue on **Broomham & Owen -v- Tallaganda Shire Council and Anor.**).

The article then examines the power of the Land and Environment Court to grant relief for ultra vires (invalid) action. It suggests that the Court has power to make a declaration that a decision of a consent authority is invalid.

The article concludes by examining the various factors which will influence a court in exercising its discretion to grant the appropriate relief.

**Submissions**

Ben Boer and Brian Preston recently made a joint submission to the Constitutional Commission which is investigating, among other matters, the distribution of powers between the Commonwealth and the States. As the Franklin Dam case vividly showed, the issue of the Commonwealth's power to legislate on environmental matters is a contentious one. Ben Boer and Brian Preston are members of the Environmental Law Commission (ELC), a national body of environmental lawyers set up under the auspices of the Australian Conservation Foundation.

The ELC submission was essentially two-fold: first, the powers pursuant to which the Commonwealth has to date legislated on environmental matters (e.g. external affairs, trade and commerce and corporations powers) should be retained and not contracted; and second, an express power should be inserted in the **Constitution** permitting the Commonwealth to make laws in respect of the protection and conservation of the environment throughout Australia.

In addition, the submission urged that the Commonwealth and its departments and instrumentalities should be bound by State environmental laws unless the Commonwealth expressly states that it will not be bound in any particular case. This provision would reverse the current presumption that the Commonwealth is not bound by State laws. It was for this reason that the proposed army base at Bathurst/Orange, the second airport for Sydney and the OTC satellite receiving station at Belrose were not bound to comply with State environmental and planning laws.

The difficulty that s.92 of the **Constitution** poses in respect of controlling the illegal interstate trade in wildlife in Australia was also referred to.

A copy of the ELC's submission is available for interested persons at the EDO office for the cost of photocopying it.