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Interlocutory Injunctions: Lessons to be Learned from the Wintergarden Case

by Peter Comans, Barrister

In this article, the author details the history of the recent Wintergarden case in which local residents sought interlocutory relief from the Land and Environment Court at first instance and later the Court of Appeal to prevent the demolition of the Wintergarden theatre at Rose Bay. Ultimately, the residents were unsuccessful. The case does provide, however, useful lessons to both lawyers and residents alike who wish to seek interlocutory relief in future cases.

The Wintergarden Theatre, situated on the shores of Rose Bay, was a rare reminder of the relatively shortlived era of the "motion picture palace". Opened in March 1928, the Wintergarden Theatre was designed by Australia's most famous theatre architect, Henry White. The theatre was originally licensed to seat 2,094 persons on two levels. In 1929 the Wintergarden became the first suburban picture theatre to instal equipment for showing sound movie films.

Although the exterior of the theatre, other than the street front, might be described as rather bleak, the architecture of the Wintergarden was typical of the classical revivalist style of the 1920s. The dress circle foyer featured a highly decorative fountain centrepiece, while the space over the dress circle and above the front stalls has been described as providing "the richest decor in this semi-classical style of any suburban or country cinema or theatre with the exception of the Civic Theatre, Newcastle."[1]

From the 1920s to the 1950s, cinema going was a major socio-cultural activity. With the introduction of television in the mid-1950s, suburban cinemas of the grand scale which had previously been viable started to disappear. In 1959 Sydney boasted 21 city theatres/cinemas and 159 suburban theatres/cinemas constructed prior to World War II. Of those there are now only 3 city theatres, none of which have permanent conservation orders (except for the facade and foyers of the Regent Theatre). Of the 159 suburban theatres 96% have been destroyed or largely altered. In 1984 only 3 such suburban theatres were in use[2].

On 19 October 1984, the Minister for Planning & Environment ("the Minister") made an interim conservation order under section 26 of the *Heritage Act*, 1977 with respect to the Wintergarden Theatre and in February 1985 the Minister appointed Charles O'Connell to hold a public enquiry under section 41 of the Heritage Act.

THE LEGISLATION

The legislative scheme established by the Heritage Act is fairly straightforward. There are usually two steps leading to the permanent preservation of an item of environmental heritage — the making of an interim conservation order and the making of a permanent conservation order. The Minister may make an interim conservation order to give temporary protection to an item of environmental heritage pending a fuller review as to whether it should be permanently protected (s.26).

"Environmental heritage" is defined as follows:

> " 'Environmental heritage' means those buildings, works, relics, or places of historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance for the State." (s.4).

The Heritage Council will make a recommendation to the Minister with respect to the making of a permanent conservation order (ss.36, 37, 38). Where the Minister proposes to make a permanent conservation order in respect of an item of environmental heritage, he is required to give notice to, among others, the owner of that item (s.39). The owner may then make a submission objecting to the making of a permanent conservation order (s.40). When an

owner makes such a submission objecting on any one or more of the following grounds:

"(a) That the building, work, relic or place the subject of that proposal should not be subject to a permanent conservation order by reason that it is not an item of the environmental heritage;

(b) That the building, work, relic or place the subject of that proposal should not be subject to a permanent conservation order by reason that its permanent conservation is not necessary;

(c) That the building, work, relic or place the subject of that proposal should not be subject to a permanent conservation order by reason that such an order would render the building, work, relic or place incapable of reasonable or economic use; or

(d) That the conservation of the building, work, relic or place the subject of that proposal could not be achieved without causing undue financial hardship to the owner, mortgagee or lessee",

the Minister is required to appoint a person to hold an inquiry into that submission (s.41).

As Commissioner O'Connell observed in his report, objections on grounds other than those mentioned above are not relevant[3].

Section 44 of the Heritage Act provides as follows:

> "(1) Where the Minister has caused notice of a proposal to make a permanent conservation order to be given under section 39(1), the Minister may —
>
> (a) if no inquiry is required to be held under section 41, after —
>
> (i) the expiration of the period during which submissions may be made pursuant to the giving of that notice; and
>
> (ii) consideration of any submissions so made; or
>
> (b) if an inquiry is required to be held under section 41, after consideration of the report furnished as a consequence of that inquiry,
>
> make an order, designated in the order as a permanent conservation order, in respect of an item of the environmental heritage specified or described in the order.
>
> (2) A permanent conservation order made in respect of an item of the environmental heritage may be expressed to apply, and, if so expressed, shall apply, to —
>
> (a) where that item is a building — the curtilage of that building or the site of that building, being the curtilage or site specified or described in the order; or
>
> (b) where that item is a work or relic — the site specified or described in the order of that work or relic."

THE COMMISSIONER'S REPORT

In his report on the Wintergarden Theatre, Commissioner O'Connell found in favour of the preservation of the theatre in respect of the matters referred to in section 41(c) and (d) of the *Heritage Act*. In this respect the Commissioner found that although the cost of renovating the Wintergarden Theatre (about $2m) would not be justified for its future use as a cinema, the use of the theatre for entertainment purposes other than a cinema may be economically feasible. Accordingly, a permanent conservation order would not render the theatre incapable of reasonable economic use and would not cause undue financial hardship to the owner[4].

In respect of the first matter for inquiry — whether the theatre was "an item of the environmental heritage" — Commissioner O'Connell relied heavily on observations made by him in his report dated November 1984 in relation to the Odeon Theatre, Manly[5]. These tended to pitch the definition of items of the environmental heritage fairly high. In Commissioner O'Connell's opinion, before an item will be considered to be an item of environmental heritage it must be widely regarded as possessing a high degree of relevance, notability, and excellence within the mainstream of the history and progress of the nation and the State in the various aspects of the environment.[6].

Applying this interpretation of what constitutes an item of the environmental heritage within the meaning of the Act, the Commissioner found that "the Wintergarden Theatre, Rose Bay, is not of historic, cultural, social or architectural significance for the State" and that it "does not have the level of significance for the State required by the Heritage Act to qualify as an item of the environmental heritage under the Act"[7].

The Commissioner presented his report in June 1985. In September 1985 the Minister announced that he had "removed heritage protection from the Wintergarden Theatre in Rose Bay"[8]. In a letter to Ms. Andrea Godfrey, President of the Wintergarden Action Committee and the applicant in subsequent proceedings, Mr. K. Cripps, Executive Assistant to the Minister for Planning & Environment informed Ms. Godfrey that the Minister had approved the revocation of the interim conservation order in respect of the Wintergarden Theatre on 4 October 1985 and that the Minister had decided not to make a permanent conservation order in respect of the Theatre.

PROCEEDINGS LAUNCHED

For several years the Wintergarden Action Committee ("the Committee") had been active in efforts to save the Wintergarden Theatre from the threat of demolition by the owner, Wintergarden Pty. Limited ("Wintergarden") to make way for an international hotel on the site.

In October 1986, the Committee approached the Environmental Defenders Office ("EDO") for legal advice. On 17 October 1986, a Class 4 application was lodged by Ms. Godfrey in the Land and Environment Court seeking certain declarations. The Class 4 proceedings were in respect of two distinct matters.

First, declarations were sought on the basis that the purported local environmental study for the development of the Wintergarden site was inadequate. In short, the basis of the claim for this declaration was that the requirements of section 57 of the **Environmental Planning & Assessment Act**, 1979 ("the EPA Act") had not been fulfilled as there was no, or alternatively only inadequate, consideration of alternative uses for the site (i.e. uses alternative to the proposed redevelopment as an international hotel):

See *Burns Philp Trustee Co. Ltd. -v- Wollongong City Council*[9].

Secondly, declarations were sought on the basis that Commissioner O'Connell had failed to make findings in accordance with the law in his report pursuant to section 41 of the *Heritage Act*. It was this second aspect of the case which became the focus for interim relief.

EX PARTE INJUNCTIONS

Late in 1986, Ms. Godfrey and the Committee became concerned at rumours that demolition work on the Theatre was about to commence, notwithstanding the fact that approval for redevelopment of the site had not been granted. Of course, it would be open to the owner of a building to demolish the building in advance of obtaining approval for the proposed redevelopment of the site. In this case, however, the Committee believed that the developer would not risk clearing the site before redevelopment approval was finalised since, if the site became vacant land, there could be considerable pressure to maintain the site as open space and to refuse consent for a multi-story development. Shortly before Christmas, the EDO sought an undertaking from Wintergarden not to demolish the Theatre pending resolution of the Class 4 proceedings. The solicitors for Wintergarden replied advising that they were seeking instructions on the matter.

On 6 January 1987 Ms. Godfrey saw that demolition work had commenced and later that day obtained an interim ex parte injunction from the Land and Environment Court restraining Wintergarden from carrying out any demolition or further demolition of the theatre and requiring that the owner "replace any roof sheeting already removed from the building . . . or alternatively cover the roof of the said building with such material as will provide reasonable protection to the interior of the said building from rain, hail or such other damage as may be reasonably forseeable as a result of the removal of the said roof sheeting". The injunctions granted on 6 January were supplemented by further ex parte injunctions granted the following day.

MOTION TO DISSOLVE THE INTERIM INJUNCTIONS

The matter came again before Bignold J. on 9 January 1987 at which time Wintergarden moved for dissolution of the injunctions granted on 6 & 7 January 1987. Wintergarden also sought an order that the applicant (Ms. Godfrey) lodge security, in the order of $350,000.00, in respect of damage which Wintergarden alleged it may sustain if the injunctions were renewed. Ms. Godfrey, in her affidavit in support of further injunctive relief, informed the Court that she was unable either to provide such security or to continue her undertakings as to damages (such an undertaking in the usual form having been given in relation to the injunctions granted on 6 & 7 January 1987).

It was anticipated that the inability of the applicant to renew her undertaking as to damages would be a major hurdle to be overcome in her application for further interim relief. In this regard, there is a tension between the policy expressed by section 153 of the *Heritage Act* — which allows "any person" to bring proceedings to remedy any breach of the Act — and the usual requirement that an undertaking for damages be given. Clearly, a provision such as section 153 is designed to remove the requirement that an applicant have a special interest sufficient to sustain an action for a prerogative writ at common law. The broad standing granted by section 153 is consistent with the concept of the *Heritage Act* as an important component of the environmental law enacted for the benefit of the community as a whole.

In *F. Hannon Pty. Limited -v- Electricity Commission of N.S.W.*[10], Street C.J. made some comments in relation to the role of the Court under section 123 of the EPA Act, a provision not significantly different to section 153 of the *Heritage Act*. In that case the Chief Justice, with whom Priestley & McHugh JJ.A. agreed, characterised section 123 of the EPA Act, read in the context of the objects of the Act as set out in section 5 of the Act, as making 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 a sufficient interest in the matter 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."

In *Ellison -v- Warringah Shire Council*[11], Bignold J. had considered the position of an applicant in an action under section 123 of the EPA Act who seeks interlocutory injunctions but is unable to give the usual undertaking as to damages. In that case Bignold J. found that the applicant had not made out any claim of prejudice or impairment to the right asserted by the applicant, or of irreparable damage being sustained by the applicant, by virtue of withholding of interlocutory relief and for this reason he dismissed the application[12]. Bignold J. went on, however, to make some observations as to his view of the role of such an undertaking in the exercise by the Court of its discretion whether to grant an injunction. His Honour referred to *Commercial Bank of Australia -v- Insurance Brokers Association of Australia*[13] where some consideration was given to the role of the undertaking as to damages in the context of an application under Section 80(6) of the *Trade Practices Act* 1974 (Cth.). Bowen C.J. there said that:

> "The approach of the Court I think should be that it will inquire from a private person seeking an interim injunction whether he is willing to give an undertaking as to damages. The Court should then take into account on the balance of convenience the presence or absence of such an undertaking as one of the factors to be considered in exercising its discretion"[14].

Bignold J. then referred to certain passages from the speech of Lord Diplock in *Hoffman-La Roche & Co. A.G. -v- Secretary of State for Trade & Industry*[15], which he quoted at length. The essence of Lord Diplock's comments in *Hoffman-La Roche* was that the purpose of an undertaking as to damages is to provide a means for compensating the defendant for his loss should the plaintiff ultimately fail and hence minimising the risk that the granting of interim relief might ultimately result in injustice to the defendant. Furthermore, the giving of an undertaking "relieves the Court of the necessity of embarking at an

interlocutory stage upon an inquiry as to the likelihood of the defendant being able to establish facts to destroy the strong prima facie case which ex-hypothesi will have been made out by the plaintiff", hence allowing the interlocutory hearing to be somewhat shortened[16].

In *Ellison,* Bignold J. concluded:

> "Accordingly I am of the opinion that where a private person suing with the benefit of s.123 of the *Environmental Planning & Assessment Act* seeks an interlocutory injunction it will be generally (if not invariably) appropriate for the Court to refuse relief unless the applicant furnishes the usual undertaking as to damages"[17]

In the Wintergarden case, the question whether it would be appropriate for the Court to grant interlocutory relief notwithstanding the failure of the applicant to give the usual undertaking as to damages was argued in considerably greater detail than it had been argued in *Ellison's* case[18]. In particular, the attention of the Court was drawn to extensive United States authority of the special position of an environmental law plaintiff suing to enforce compliance with the *National Environmental Policy Act* ("NEPA")[19].

In the United States Rule 65(c) of the *Federal Rules of Civil Procedure* provides as follows:

> "(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

In *Natural Resources Defence Council -v- Morton*[20] the United States District Court, District of Columbia, considered the application of this rule in a case where the Government requested that the plaintiffs post a bond in favour of the United States in the sum of $750,000.00 in respect of a one month delay to a proposed development, with a provision for increasing the amount to $2.5m per month for delay beyond the first month. The Court observed as follows[21]:

> "To require the plaintiffs in the case at bar to post security in the amount requested by the Government to cover the alleged losses would have the effect of denying three non-profit environmental organisations from obtaining judicial review of the defendants actions under NEPA. Congress has indicated that private environmental organisations should assist in enforcing NEPA ... The requirement of more than a nominal amount as security would in the Court's opinion stifle the intent of the Act, since these three "concerned private organisations" would be precluded from obtaining judicial review of the defendants' actions."

The Court noted that in other cases involving similar situations only nominal bonds had been required and, accordingly, the Court set the bond to be lodged by the defendant pursuant to Rule 65(c) as $100.00.

In *Boston Waterfront Residents Association, Inc. -v- Romney*[22] the U.S. District Court, Massachusetts, required no bond to be filed pursuant to Rule 65(c) in a NEPA action where the plaintiffs sought preliminary relief to prevent the imminent demolition by the respondent of a series of buildings in Boston as part of a redevelopment project. The Court noted that "there is controversy between the parties over the historical value of the Fulton Street buildings, the plaintiffs have offered to prove that the buildings have been proposed for listing on the national register of historic landmarks." The Court observed that:

> "While the court at this stage makes no determination of the historic value of the buildings in question, it is clear that the act of demolition is irrevocable. Consideration of alternative plans which might include the preservation and rehabilitation of the present structure is permanently foreclosed once they have been razed."[23]

In *Friends of the Earth, Inc. -v- Brinegar*[24] the United States Court of Appeals (9th Circuit) overturned a District Court order that the defendant file a $4.5m bond in respect of a NEPA action to enjoin a programme for the expansion of San Francisco airport. In ruling that a bond in the amount of $1,000.00 be substituted for the $4.5m bond the Court made the following comments[25]:

> "Appellants assert that environmental interest groups and individual plaintiffs usually have limited resources. They contend if that public interest groups and citizens are required to pay substantial bonds in NEPA cases in order to secure preliminary injunctions or injunctions pending appeal, plaintiffs in many NEPA cases would be precluded from effective and meaningful appellate review. More importantly, they argue, such bonds would seriously undermine the mechanisms in NEPA for private enforcement ...
>
> We recognise that in NEPA, Congress sacrificed some efficiency and economy in order to further a strong policy of environmental protection. However, we need not reach the question of whether no more than a nominal bond may be required in any NEPA case in which environmental groups or individuals procure an injunction pending appeal. Here, we are impressed that another panel of this court has already granted an injunction and thus implicitly concluded that appellants have a likelihood of success."

The expedient of requiring only a nominal bond, or in some cases no bond at all, in satisfaction of Federal Rule 65(c) appears well entrenched in the American Federal judicial system and the cases referred to above are by no means unique[26].

In the result, Bignold J. ruled as follows[27]:

> "In my opinion the fact that the Applicant does not give the usual undertaking is, at the very least, a significant factor operating against her, in the exercise of the Court's discretion in considering the balance of convenience to the parties. Notwithstanding the United States cases relied on by the Applicant, I would be disposed to adhere to what I stated on this question in *Ellison* (see pp.13-17), and to apply it to the present case."

THE LEGAL BASIS OF THE CHALLENGE

Notwithstanding his doubts as to the appropriateness of granting further interlocutory relief to an applicant who

does not furnish the usual undertaking as to damages, Bignold J. preferred to rest his decision to refuse further relief on the ground that the applicant had not raised a "serious question to be tried"[28].

Two questions of law were put forward by the applicant on the application for extension of the injunctions as "serious questions".

The applicant's primary contention was that Commissioner O'Connell misdirected himself as to the meaning of "environmental heritage" under the *Heritage Act* in preparing his report pursuant to that Act and, accordingly, failed to furnish a report to the Minister as required by the Act.

In preparing his report on the Wintergarden Theatre, Commissioner O'Connell relied heavily on the report which he had prepared in respect of the Odeon Theatre, Manly. In the Odeon Theatre report Commissioner O'Connell set out what was, in his view, the correct interpretation of "environmental heritage" for the purposes of the *Heritage Act*. The starting point is, of course, the definition in the Act (see earlier).

Commissioner O'Connell correctly observed that the *Heritage Act* gives no express guidance as to what is meant by cultural, historic, social or aesthetic significance for the State. Clearly it is necessary to arrive at a conclusion as to what matters are "significant" in order to determine the breadth of application of the definition.

In an attempt to determine the matters which might be "significant", Commissioner O'Connell turned to the Hansard reports of the second reading speech and debates on the bill for the Heritage Act and he found in those debates reference to matters, and examples of items considered by various Members to be significant and within the intended protection of the Act. Commissioner O'Connell concluded as follows[29]:

> "I think it is clear from these Hansard extracts that the Government was primarily concerned with elements of the environmental heritage which would be widely regarded as possessing a high degree of relevant notability, and excellence within the mainstream of the history and progress of the nation and the State in the various aspects of environment included in the definition of the term 'environmental heritage' ".

The applicant argued that this reading of the definition of "environmental heritage" in effect substituted for the definition in the Act a completely different, and much narrower definition. Indeed, the use made by Commissioner O'Connell of the Hansard reports in order to arrive at the definition adopted by him was in itself quite inappropriate. It is clear that Hansard may be referred to in order to ascertain the "mischief" sought to be remedied by a particular statute[30]. However, as Lee J. said in *Building Construction Employees and Builder's Labourers Federation of N.S.W. -v- Minister for Industrial Relations*[31], there is "quite obviously a fundamental difference between taking what a Minister, introducing a Bill, says in the House as the meaning of a section or sections of the Bill and then applying that to the construction of that section or sections, and taking his statement of the state of affairs which have prompted the passing of the Act as evidence of the mischief sought to be remedied".

It was argued by the applicant that in adopting such a restricted interpretation of "environmental heritage" Commissioner O'Connell confused the concept of environmental heritage under the Act with the ultimate decision whether an item warrants preservation. Clearly, the Act may operate satisfactorily even if a wide range of items constitute items of "environmental heritage" as the fact that an item comes within that definition does not automatically provide it with any special protection by virtue of the Act — such protection only arises where the Minister exercises his discretion in respect of such an item: see ss.39 and 44 of the Act. An item of "environmental heritage" is merely an item the preservation of which *may* be considered under the Act.

The next argument of the applicant was that the Act contemplates that the Minister will consider a report by a Commission of Inquiry before making a permanent conservation order; indeed he *must* consider such a report before making an order. Accordingly, it was argued, that, at least where an interim conservation order is in force and where the Minister has directed the holding of a Commission of Inquiry, it may be said that the Minister may not decide that he will not make a permanent conservation order without considering the report.

The latter proposition is not expressly stated in the Act. Section 44 merely provides that the Minister *may* make a permanent conservation order and that, before he does so, he *shall* consider a Report under the Act. It is clear that, even where a Report prepared under the Act recommends the making of a permanent conservation order, the Minister has discretion to decide not to make such an order. An order in the nature of mandamus would not, it seems, lie against the Minister to force him in any circumstances to make a permanent conservation order.

However, where the Minister has in fact made an interim conservation order and directed the holding of a Commission of Inquiry, there is much to be said for the view that he may not make a positive decision *not* to make a permanent conservation order without considering the relevant Report.

Bignold J. disagreed. "Principally for the reason that the Minister's function or power under s.44 is *not* such that he can be legally compelled to *make* a permanent conservation order"[32]. For this reason alone, Bignold J. ruled that the applicant could not sustain any claim for continuing interlocutory relief[33]. Because of the consequences to the applicant of his decision, Bignold J. extended the prohibitory injunctions (but not the mandatory injunction) previously granted for an additional 5 days to afford the applicant reasonable opportunity to test, in the Court of Appeal, his decision.

An appeal was lodged against the decision of Bignold J. and a motion filed seeking an extension of the injunctions pending an expedited hearing of the appeal. The Notice of Motion came on for hearing before Samuels J.A. on 14 January 1987.

Again, interlocutory relief was refused.

The test applied by Samuels J.A. in order to determine whether to grant further relief was that discussed in *Alexander & Ors. -v- Cambridge Credit Corporation Limited*[34]. Samuels J.A. referred to the following passage which considered the extent to which a Judge of the Court

of Appeal should consider the merits of the appeal in an interlocutory context.

> "Secondly, although courts approaching applications for a stay will not generally speculate about the appellants prospects of success, given that argument concerning the substance of the appeal is typically and necessary attenuated, this does not prevent them considering the specific terms of the stay that will be appropriate fairly to adjust the interests of the parties from making some preliminary assessment about whether the appellant has an arguable case".

Accordingly, Samuels J.A. said:

> "What I must do is to examine the strength or substance of the appeal and put that into the scales along with the other factors which I am bound to consider"[35].

In reaching his conclusion that the appeal was "barely viable"[36] Samuels J.A. focused on the alleged deficiencies in Commissioner O'Connell's report. For this purpose, Samuels J.A. assumed that the Commissioner did place a gloss upon the language of the definition in s.4 which the Act did not readily permit[37]. However, Samuels J.A. rejected the appellant's argument that in applying the wrong definition the Commissioner exceeded his jurisdiction — an argument primarily based on *Anisminic Ltd. -v- Foreign Compensation Commission & Anor.*[38] His Honour found that if the Commissioner made an error "it was an error in the course of doing what the Commissioner was required to do"[39], in other words that it was an error within his jurisdiction[40]. This conclusion of Samuels J.A. must be open to serious question.

Although the distinction between an error which goes to jurisdiction and an error within jurisdiction may still be sustained, *Anisminic* swept away much of the force and utility of any such distinction. In any case, the clearest example of an error of jurisdiction is one where an authority is required by statute to perform a certain function and it exceeds the power conferred on it by statute in purporting to perform the function. Clearly, the authority of a Commissioner of Inquiry under the *Heritage Act* extends to determining whether in fact an item is an item of "environmental heritage" within the meaning of the Act. However, it cannot be said that the function of such a Commissioner includes the determination of what the term "environmental heritage" in the Act means. Of course, in order to exercise his function a Commissioner must take some view as to the meaning of the provision. However, if he takes a view which is not warranted by the statute then it is the proper function of a Court to put him right. By way of analogy the Parliament must in practice exercise its judgment as to the meaning and scope of the provisions of the *Constitution* which confer legislative power on it, but if Parliament purports to enact a law which is in fact on an erroneous view of the scope of its power the law will be ruled invalid by the courts.

Once Samuels J.A. decided that the appeal was barely viable, it was a short step for him to say that further interlocutory relief should be refused, having regard to the prejudice to the respondent which would be caused by further delaying work on the respondent's redevelopment project. Additionally, Samuels J.A. took into account, in favour of the respondent, the fact that the appellant had not commenced any proceedings until late 1986 although demolition permission had in fact been granted on 30 September 1985, a fact which, if not actually known to the appellant, could readily have been ascertained.

THE CONCLUSION OF THE ACTION

For the Wintergarden Theatre the judgment of Samuels J.A. proved to be the end of the road. Without the protection of interlocutory injunctions, work on the demolition of the Wintergarden Theatre was able to proceed. Although final demolition of the shell did not in fact occur until a couple of weeks later, irretrievable damage was occasioned to the interior fairly rapidly.

The applicant was not able to take her claim for further interlocutory relief to the only other forum legally available to her, the High Court, due to lack of funds. Although legal aid had been granted for the hearings before Bignold J. and Samuels J.A. the applicant was in a difficult position in that her original application for legal aid in respect of the Class 4 proceedings in the Land and Environment Court had initially been refused by the Legal Aid Commission. The matter was due to come before the Reivew Panel of the Legal Aid Commission, but the process was not assisted by the intervention of the Christmas period. At its meeting on 4 February 1987 the Review Panel decided that further aid would not be granted in the matter.

CONCLUSIONS FOR ENVIRONMENTAL LITIGANTS

The Wintergarden case dramatically illustrates a number of the practical hurdles which face an environmental law litigant.

The delay of the applicant in commencing proceedings was a significant factor in the final determination that relief would not be granted. Of course, it will often be the case, as it was here, that the applicant does not seek professional legal advice in the early stages of the campaign against a particular proposal which the applicant considers will harm the environment. Indeed, in many cases the persons concerned will simply be unaware of the availability of legal relif. These matters are typically regarded as "political"[41].

Secondly, lack of funds is often a major problem. An individual applicant will be very wary of commencing legal proceedings which could result in an order against the applicant for costs, even where the applicant represents a group of concerned persons. Should the applicant ultimately not succeed in the proceedings brought, that person will, of course, generally be liable not only for his or her own costs but also for the taxed costs of all respondents. In the context of environmental litigation there are good arguments for the availability of public funding (such as legal aid) where the action may be seen as brought for the benefit of the community rather than the private benefit of a few individuals[42].

The Wintergarden case also illustrates the major difficulty faced by an applicant who seeks to restrain irreparable harm to the environment pending the hearing of the applicant's substantive action. Under the normal principles applicable to the granting of interlocutory relief the applicant will not be granted such relief in the absence of an undertaking as to damages. However, it will indeed be a rare case where the applicant is in a position to give such

an undertaking. Clearly, where the action may be seen as one brought not purely for the private benefit of the applicant, questions of "social justice" arise which require a reconsideration of the traditional rules surrounding interlocutory relief.

REFERENCES

1. Charles O'Connell, Report the the Minister for Planning & Environment, June 1985, p.33.
2. These were a "modest Art Deco example" being restored and used as a community facility at Campsie, the Wintergarden and the Mecca Savoy at Hurstville: Commissioner's Report p.35.
3. Commissioner's Report p.58.
4. *Ibid,* p.88.
5. *Ibid,* pp. 59-63.
6. *Ibid,* p.62.
7. *Ibid,* p.88.
8. Press release of Minister for Planning & Environment, September 1985.
9. (1983) 49 LGRA 420.
10. Unreported, Court of Appeal (Street C.J., Priestley & McHugh JJ.A.) 28 August 1985.
11. (1985) 55 LGRA 1.
12. *Ibid,* p.10.
13. (1977) 16 ALR at pp.168-169.
14. *Ibid,* pp.168-169.
15. [1975] AC 295 at pp.360-361.
16. Id.
17. (1985) 55 LGRA 1 at p.17.
18. Judgment of Bignold J., 9 January 1987, p.2.
19. The author acknowledges the valuable assistance provided by Mr. B. Preston in making available the manuscript of *Environmental Litigation in Australia* which includes extensive reference to the U.S. authorities. See also B.J. Preston, "Environmental Litigation in Australia: Some Specific Problems for Public Interest Plaintiffs" — A Paper presented to the 1986 National Environmental Law Association Conference, 5 September 1985, Canberra, pp.16-18.
20. 337 F. Supp. 167 (1971).
21. *Ibid,* pp.168-169.
22. 343 F. Supp. 89 (1972).
23. *Ibid,* p.91. The U.S. District Court, Massachusetts, also waived the requirement for a bond in *Silva -v- Romney* 342 F. Supp. 783 (1972). See also: *H-3 Association -v- Volpe* 349 F. Supp. 1047 (1972) ($100.00 bond) and *Sierra Club -v- Froehlke* 359 F. Supp. 1289 (1973) ($100.00 bond).
24. 518 F. 2d. 322 (1975).
25. *Ibid,* p.323.
26. For a more complete list of cases in which only nominal bonds have been required see Preston and Keon-Cohen, *Environmental Litigation in Australia* (forthcoming).
27. Judgment of Bignold J., p.2.
28. An applicant for interlocutory injunction must establish that there is a serious question to be tried and that the balance of convenience favours grant of the injunction: *Australian Coarse Grain Pool Pty. Limited -v- Marketing Board of Queensland* (1982) 46 ALR 398 (Gibbs C.J.): *A. -v- Hayden (No. 1)* (1984) 56 ALR 73 (Dawson J.): *Cohen -v- Peko-Wallsend Ltd.,* Unreported, 26 November 1986 (Gibbs C.J., Mason and Wilson JJ).
29. Commissioner's Report, p.62.
30. *Wacando -v- Commonwealth* (1981) 148 CLR 1 at p.25; *Federal Commissioner of Taxation -v- Whitfords Beach Pty. Limited* (1981) 150 CLR 355 at pp.373 and 374.
31. [1985] 1 NSWLR 197 at p.205.
32. Judgment of Bignold J., pp.3-4.
33. *Ibid,* p.4.
34. [1985] 2 NSWLR 685, esp. p.694.
35. Samuels J., Judgment p.6.
36. *Ibid.*
37. Samuels J.A., Judgment p.8.
38. [1969] 2 AC 147, esp. p.171 per Lord Reid.
39. Samuels J.A., Judgment p.8.
40. Samuels J.A. relied on *Queen -v- Commonwealth Court of Conciliation and Arbitration ex parte Amalgamated Engineering Union* (1953) 89 CLR 636.
41. As to the difficulties that can arise when a plaintiff unnecessarily and unreasonably delays in commencing proceedings, see B.J. Preston, "Laches in Public Interest Litigation", (1986) 3 *Environmental and Planning Law Journal* 224.
42. See B. Boer, "Legal Aid in Environmental Disputes", (1986) 3 *Environmental and Planning Law Journal* 22.

STOP PRESS

Since this article was written the Wintergarden Theatre has been fully demolished. The owner, despite its plan to build an international hotel, has now advertised that the vacant site is to be auctioned.

Recent Legislative Reform

by Bernard Dunne,
Tutor in Law, Sydney University

Recently, a number of Commonwealth and State environmental statutes have been amended. In an earlier issue of Impact, *Patricia Ryan set out the February 1986 amendments to the* Environmental Planning and Assessment Act *1979 (see* Impact *(June 1986). In this article, Bernard Dunne examines three other legislative developments: the proposed amendments to* Environment Protection (Impact of Proposals Act) *(Cth.), the enactment of the* Protection of Movable Cultural Heritage Act *1986 (Cth.) and amendments to the* Clean Air Act *(N.S.W.)*

THE ENVIRONMENT PROTECTION (IMPACT OF PROPOSALS) AMENDMENT ACT 1987 (CTH.)

In 1974, legislative requirements for environmental impact assessment (EIA) were established under the *Environment Protection (Impact of Proposals) Act.* In 1975, the Act was supplemented by *Administrative Procedures* (the Procedures) which prescribed the EIA process in greater detail[1]. The purpose of the Act and the procedures, as explained in s.5(1) of the Act, is to ensure "to the greatest extent practicable that matters affecting the environment to a significant extent are fully examined and taken into account" in relation to proposed Commonwealth projects, proposed State Government projects directly funded by the Commonwealth, and proposed State Government or private projects which require Commonwealth approval[2].

The *Environment Protection (Impact of Proposals) Amendment Act* 1987 is intended to improve the general administration of the Act as well as enhance the role of public participation in the EIA process. The Act is expected to be proclaimed on 21 May.

The most significant innovation in the Act is the introduction of a Public Environment Report (PER). At present EIA is conducted on the basis of the preparation and consideration of an Environmental Impact Statement (EIS). As Mr. Cohen, the Minister for Arts, Heritage and the Environment ("the Minister") explained in the second reading speech, the Act will create two types of EIA:

> "The Act will continue to provide for the preparation, public review and submission to the Commonwealth Environment Minister of EIS for proposals of major environmental significance. Amendments will provide, however, for the preparation of Public Environment Reports for proposals with less complex or less important environmental implications. Experience has shown that many proposals of a localised nature or involving only one or two issues may not warrant the preparation of an EIS, which is normally a comprehensive document requiring considerable time and resources to prepare in draft and then final form. However, under current procedures there is no provision for obtaining comment on the environmental aspects of proposals except through the procedures associated with an EIS. a PER will be a simpler and less costly document but will still provide a sound basis for public comment and government consideration".

Under cl. 3 of the Act the Minister will be given clearer powers to require additional information from a proponent in order to determine whether a PER or an EIS is necessary.

Clause 4 of the Act amends s.10 of the Principal Act, a section which requires the Minister to promptly reply in writing to any persons' written request for information about the environmental assessment of a proposal which has been taken or is proposed to be taken. Cl.4 stipulates that the Minister must now reply within a period of 3 months after the date of written notice by the person requesting the information.

Section 11 of the Principal Act provides that the Minister may set up a Commission of Inquiry whether or not an EIS has been furnished to the Minister. The Commission reports its findings and recommendations to the Minister. At present, however, the Principal Act does not require the Commission to report within a specified period of time. Cl.5 of the Act will empower the Minister to direct the Commission to report its findings and recommendations by a particular date.

The amendments to the Procedures are also designed to contribute to improved administration of the Act and greater public involvement in decision-making processes. The Procedures have only recently been drafted and are not yet available for public scrutiny. However, as Mr. Cohen pointed out in the second reading speech, the amendments to the Procedures will:

- require the Minister to make public the Minister's decision to direct an EIS and the reasons for not directing an EIS;
- provide procedures for consultation between the Department of Arts, Heritage and the Environment, other Governmental authorities and public interest groups (such as the Australian Conservation Foundation and the Wilderness Society) with respect to the guidelines for the preparation of an EIS;
- enable the Minister to extend the period of public review of a draft EIS beyond the present 28 day minimum;
- implement "round-table" discussion of public analysis of the EIS; and
- "make public the Department's Assessment report prepared after examination of a final EIS and the Minister's recommendations following such examination";.

The proposed amendments to the Principal Act and the Procedures will implement desirable changes to the EIA process at the Commonwealth level. However, in one sense, the amendments are more significant for what they

fail to do. The discretionary nature of the Principal Act and Procedures in relation to the initial decision to apply the EIA process; the decision whether or not to request an EIS (and now a PER); the opportunity for extent and influence of public involvement in the decision-making process; and the form and adequacy of the EIS (and PER) and its ultimate application to the proposed action, remain unaffected by the proposed amendments. Furthermore, the proposed amendments are not concerned with alleviating the problems created by the principles of justiciability and locus standi. It is generally recognised that the procedures are not justiciable, thereby preventing any legal challenge to restrain or remedy a breach of any of the paragraphs in the procedures. Even s.8 of the Principal Act, which imposes a legal duty upon the Minister responsible for the proposed action to ensure that the procedures are adhered to and any final EIS and related suggestions or recommendations are taken into account, while potentially enforceable by the courts, provides each Minister with such a wide discretion as to make proof of a breach of this duty extremely difficult "in other than the most obvious circumstance".[3]

The application of the principle of locus standi means that the Act may only be enforced by those persons or groups with an appropriate interest.

THE PROTECTION OF MOVABLE CULTURAL HERITAGE ACT 1986

The *Protection of Movable Cultural Heritage Act* 1986 was passed to strengthen the protection afforded to objects of Australian cultural heritage as well as those of other countries. The Act enables Australia to accede to the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.* The Act is expected to be proclaimed on 1 July.

Protection existed before the Act was passed at both the Commonwealth and State level. Mr Cohen explained in the second reading speech that the Act will neither subsume nor replace these protections but rather establish improved protection at the Commonwealth level.

As s.7 provides, the Act will only protect those objects that are of importance to Australia or to a particular part of Australia, for ethnological, archeological, historical, literary, artistic, scientific or technological reasons being objects falling within one or more of the following categories:

(a) objects recovered from the soil, inland waters or seas of Australia;

(b) objects relating to the Aboriginal race and descendants of the indigenous inhabitants of the Torres Strait Islands;

(c) objects of ethnographic art or enthnography;

(d) military objects;

(e) objects of decorative art;

(f) objects of fine art;

(g) objects of scientific or technological interest;

(h) books, records, documents or photography, film or television material or sound recordings;

(i) any other prescribed categories.

The meaning of "importance to Australia" can be gleaned from the second reading speech where Mr. Cohen stated that the purpose of the Act is to protect only those objects which if exported from Australia would constitute an "irreparable loss to our cultural heritage". S.10(b)(6) also gives some guidance through the use of the words "significantly diminish the cultural heritage of Australia".

Section 8 of the Act provides for the establishment of a National Heritage Control List through regulations supplementing the Act. The List will contain those objects that constitute the movable cultural heritage of Australia and are subject to export control. The list will be compiled on the basis of the categories in s.7, prescribing criteria for each category for the purpose of determining whether or not the export of a particular object will significantly diminish the cultural heritage of Australia. The criteria will be specific to each category but generally will include matters related to variety, age, value, historical association and availability of similar objects in public collections.

The Control List will not only be divided into categories. Objects in each category will also be divided into Class A objects and Class B objects. Class A and Class B objects are referred to as Australian protected objects. The export of Class A objects will only be permitted where an owner temporarily imports the object into Australia or in circumstances in which the owner may wish to subsequently export the object. To export a Class A object a person must obtain a certificate of exemption under s.12 of the Act. Class B objects may be exported either by obtaining a s.12 certificate or a s.10 export permit. The Control List will be widely circulated so that owners of cultural objects will be made aware of the export controls imposed by the Act.

Section 9 makes it an offence to export or attempt to export an Australian protected object otherwise than in accordance with a permit or certificate. If an object is unlawfully exported it is immediately forfeited to the Commonwealth. If an attempt is made to unlawfully export an object the object is liable to forfeiture. A person who knowingly exports or attempts to export an Australian protected object without a certificate or permit, or knowingly contravenes a condition of a permit or certificate, shall be punishable by a fine not exceeding $100,000.00 or a period of imprisonment not exceeding 5 years or both. If the offender is a corporation the penalty is a fine not exceeding $200,000.00.

As s.9 includes the word "knowingly", where a person or corporation innocently exports or attempts to export an Australian protected object, otherwise than in accordance with the Act, they cannot be prosecuted.

Section 14 of the Act affords protection to the movable cultural heritage of countries who are parties to the 1970 UNESCO Convention or countries with whom Australia has bilateral agreements concerned with protecting objects exported from a foreign country. If a protected object has been unlawfully exported from a foreign country and imported into Australia that object is liable to forfeiture. It is an offence punishable by the same penalties as appear in s.9 to knowingly import an unlawfully exported protected object of a foreign country. S14 will, however, only be enforced when an official request is received from the respective foreign country for the return of the object. In accordance with the 1970 UNESCO Convention, a coun-

try making such a request must be prepared to provide financial compensation to any innocent third party purchaser.

Section 15 establishes the National Cultural Heritage Committee. The Committee will consist of four people each representing a different collecting institution; a member of the Australian Vice-Chancellor Committee; a nominee of the Minister for Aboriginal Affairs; and two persons having experience relevant to the cultural heritage of Australia. The Committee will have the function of advising the Minister with respect to: the operation of the Act; the inclusion, removal, classification and reclassification of objects in the Control List; applications to export Class B objects; and the operation of the National Cultural Heritage Fund. The Committee is also required to establish and maintain a register of expert examiners. Expert examiners will give advice on matters referred to them by the Committee. Finally, the Committee must also consult with appropriate authorities of the Commonwealth, States and Territories and other organisations, associations and persons on matters related to its functions.

The Act will also create the National Cultural Heritage Fund which will have the function of facilitating the acquisition of Australian protected objects and associated functions: s.25. In the second reading speech, Mr. Cohen explained that the Fund will have two main functions:

1. To ensure that Australian protected objects which cannot be exported are made available to the public through their acquisition and display in public collections; and
2. To provide a means to enable an owner to reach a fair price in the Australian market for an object he/she intended to sell internationally.

The enforcement of the Act will be conducted by inspections in the form of members of the Federal police or the police forces of the States or Territories: s.28. Magistrates are authorised to issue search warrants empowering an inspection to enter by force, if necessary, and search any land, premises, structure, vessel, aircraft or vehicle, and to seize anything he/she believes to be forfeited or connected with an offence under the Act: s.30. In urgent circumstances a Magistrate may grant a warrant by telephone: s.31.

In emergencies, an inspector may search a person or enter any land, premises, vessel, aircraft, structure or vehicle and seize anything he/she believes to be forfeited or connected with an offence, without the authority of a court order or warrant: s.32. An inspector also has the power to arrest, without a warrant, any person the inspector believes on reasonable grounds is committing or has committed an offence against the Act and proceedings against that person by way of summons would not be effective: s.33.

A person may appeal to the Administrative Appeals Tribunal to review the Minister's decision in relation to: a refusal to a certificate or permit; conditions attached to a certificate or permit; and the variation of the conditions or period of a certificate or permit: s.48.

THE CLEAN AIR (AMENDMENT) ACT 1986

This act amends the *Clean Air Act* 1961. The primary aim of the Amendment Act is to substantially reduce the amount of brown haze in the Sydney region. Sections 1 and 2 of the Amendment Act came into force on 6 May 1986. The remainder of the Amendment Act came into force on 27 June 1986.

The Amendment Act introduced s.24A into the Principal Act, the effect of which is to empower the State Pollution Control Commission ("SPCC") to prohibit the burning of fires in the open or in incinerators when air dispersion is predicted to be poor. Officers of local councils and the SPCC have been given the authority of issue directions to extinguish fires which contravene a s.24A order or which in the opinion of the officer are a health hazard or are likely to cause serious discomfort or inconvenience: s.24B. These officers also have the power to issue infringement notices to any person in breach of s.24A or s.24B: s.24C. Under s.24D, the SPCC is authorised to require the occupier of any premises who cannot, or is not willing to instal control equipment for any fuel burning equipment or industrial plant, or where the equipment or plant is prohibited, to render the equipment or plant inoperable.

Section 14 of the Principal Act has been amended to make it an offence for the occupier of scheduled premises to cause or increase air pollution through improper or inefficient maintenance work on fuel burning equipment or industrial plant. S.19B creates a similar offence in relation to unscheduled premises. S.19B also makes it an offence for the occupier of unscheduled premises to cause or increase air pollution by a failure to operate fuel burning equipment, properly and efficiently. However, s.19B does not apply to a store, incinerator or similar fuel burning equipment used for domestic purposes other than an incinerator or similar fuel burning equipment used by, or on behalf of, the occupiers of two or more dwellings in a residential flat building: s.19B(3).

Section 34 of the Principal Act has been amended to permit regulations to be made: regulating or prohibiting the use of fuel, fuel burning equipment or industrial plant, and the burning of open fires: s.34(1)(r); prohibiting the operation of fuel burning equipment or industrial plant which does not comply with the standards and specifications prescribed by the Act: s.34(1)(s); and prohibiting or regulating the sale and distribution of fuels or fuel burning equipment: s.34(1)(f5).

The new s.23A introduced by the Amendment Act authorises the SPCC to require the occupier of any premises on which there is any fuel burning equipment or industrial plant to measure levels of air pollution in the locality. The Amendment Act, through s.5 and Part IVB, has also created licensing and approval provisions to cover mobile industrial plant or fuel burning equipment.

REFERENCES

1. R.J. Fowler, *Environmental Impact Assessment, Planning and Pollution Measures in Australia.* (Canberra: Australian Government Publishing Service, 1982) at p.15.
2. *Ibid,* at p.17.
3. *Ibid,* at p.29.