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IMPACT

A QUARTERLY NEWSLETTER ON ENVIRONMENTAL LAW
Environmental Defender's Office Ltd
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"Freedom of Information: The Costs and Difficulties"

by Elena Kirillova, Solicitor of the Supreme Court
of New South Wales

Obtaining information about governmental decision-making has been and remains a perennial problem notwithstanding the passing of the Freedom of Information Act. *When the information relates to a politically sensitive issue such as the export of koalas and the government involved, the State of Queensland, is opposed to the application of the FOI Act, the problem is compounded. In this article, Elena Kirillova follows the fate of the FOI application by Australians for Animals for information on the export of koalas as it was considered initially by the Administrative Appeals Tribunal and subsequently by the Federal Court. Her article provides some lessons for future applicants.*

Australians for Animals ("AFA") is a registered charity concerned with the protection and welfare of animals. It has been opposed for some time to the export of koalas to overseas zoos. AFA maintain that koalas should not be exported because:

1. They suffer stress, mental anguish and physical discomfort in transportation and incarceration in overseas zoos;
2. Overseas zoos may have inadequate facilities for them;
3. Overseas zoos may be unable to provide koalas with all the ingredients essential to their diet;
4. There is insufficient scientific knowledge about koalas;
5. Koala numbers in Australia are rapidly decreasing;
6. Koalas have died in overseas zoos.

In January 1985, AFA requested the Australian National Parks and Wildlife Service ("ANPWS") to provide access, pursuant to s.15 of the FOI Act, to documents including all correspondence regarding the export of koalas between ANPWS and the relevant Queensland and N.S.W. government departments. Access was granted to correspondence with the N.S.W. National Parks and Wildlife Service. Access to the correspondence with the Queensland National Parks and Wildlife Service ("QNPWS") was refused because of a request by QNPWS made on the basis that it would, or could reasonably be expected to, cause damage to relations between the Commonwealth and Queensland. The decision was reviewed internally at the request of AFA, but the earlier decision was affirmed. AFA appealed to the AAT on 13 May 1985 for a review of the decision. On 2 July, Mr. N.C. Gare, Acting Director of ANPWS decided to grant AFA access to all documents.

Queensland then appealed to the AAT for a review of Mr. Gare's decision. AFA applied pursuant to s.30(1A) of *Administrative Appeals Tribunal Act* to the AAT to be joined as a party. The EDO represented AFA at both the hearing and subsequent appeal. (The case is now reported as *Re State of Queensland and Australian National Parks and Wildlife Service (1986) 5 AAR 328).*

HEARING BEFORE THE AAT: REVIEW OF DECISION

At the commencement of the hearing, 22 documents were the subject of the hearing. At the direction of the Tribunal, access was granted to six documents because they were (1) already public; or (2) related to administrative aspects of the export of koalas and not the policy. One new document was identified as coming within the scope of the request by AFA and added.

The Tribunal divided the remaining documents into two categories, namely:

1. Information relating to the application by Queensland to the relevant Federal Minister for permission to export koalas;
2. Information relating to views expressed in developing the guidelines for export of koalas from Australia.

In deciding whether to affirm Mr. N.C. Gare's decision to release the documents, the Tribunal had to consider s.33A of the *Freedom of Information Act* ("FOI Act") and the objects of the FOI Act as follows:

"33A. (1) Subject to sub-section (5), a document is an exempt document if disclosure of the document under this Act —

(a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or

(b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

(2) Where a Minister is satisfied that a document is an exempt document for a reason referred to in sub-section (1), he may sign a certificate to that effect (specifying that reason) and, subject to the operation of Part VI, such a certificate, so long as it remains in force, establishes conclusively that the document is an exempt document referred to in sub-section (1).

(3) Where a Minister is satisfied as mentioned in sub-section (2) by reason only of matter contained in a particular part or particular parts of a document, a certificate under that sub-section in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) . . .

(5) This section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.

(6) The responsible Minister of an agency may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate to the principal officer of the agency his powers under this section in respect of documents of the agency."

Section 3 reads as follows:

"3.(1) The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by —

(a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and

(b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities.

(2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in sub-section (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information."

The Tribunal affirmed Mr. Gare's decision as to the documents in the first category. It found they were not exempt under s.33A, that is the documents were not confidential and could not reasonably be expected to damage relations between the Commonwealth and Queensland, because ". . . with respect to these documents, the State of Queensland was not in a position materially different from that of other applicants to the Federal Minister for permission to export koalas. The ordinary incidents of federal administration, including the operation of the FOI Act, applied to the application." (1986) 5 AAR 328, 333.

In respect of the documents in the second category, the Tribunal held that s.33A(b) was not relevant, because (1) in the Tribunal's view there were many routine communications between the Commonwealth and Queensland involving no sensitivity; (2) although the State of Queensland considered that the communications were confidential, the Commonwealth authority, ANPWS did not; (3) the communications were between QNPWS and ANPWS, not high levels of government; (4) equivalent policy communications were made between ANPWS and bodies equivalent to QNPWS in other States (see (1986) 5 AAR 328, 334).

However, because QNPWS understood that the communications in relation to policy were confidential, release, in the Tribunal's opinion, could reasonably be expected to damage relations between the Commonwealth and Queensland. Therefore, the documents in the first category were exempt from production because they were covered by s.33A(1)(a).

The Tribunal were persuaded that the disclosure could reasonably damage relations between the Commonwealth and Queensland by the evidence to that effect given by the Director of the Intergovernmental Relations Division of The Premier's Dept. as to the concerns and views of the Queensland government. It should be noted that much of this evidence may have been rejected in a court hearing, on the grounds of hearsay. However, it was allowed in this case because the strict rules of evidence do not apply in proceedings before the AAT (see s.33(1)(c) of *Administrative Appeals Tribunal Act*).

The Tribunal also observed that Queensland did not have any legislation equivalent to the Commonwealth FOI Act and that Queensland's attitude to release of documents was different from that of the Commonwealth (see (1986) 5 AAR 328, 336).

The Tribunal, under s.33A(5), was bound to consider whether the documents should be disclosed in the public interest. AFA put forward some evidence of public interest in the form of an affidavit of a veterinary surgeon as to the lack of scientific knowledge of the care and husbandry of koalas and the lack of information on the export of koalas (see (1986) 5 AAR, 328, 336). In the opinion of the Tribunal, however, the documents in question would not have been of any use to scientists and therefore the public interest in releasing the documents was outweighed by the damage to Commonwealth-State relations which could result.

APPEAL TO FEDERAL COURT

AFA appealed to the Federal Court to affirm the decision by N.C. Gare. They alleged that the Tribunal erred in law in its construction and interpretation of S.33A(1)(a) and (5) of the FOI Act. (The case is not yet reported: *Arnold on behalf of Australians for Animals -v- The State of Queensland and Australian National Parks and Wildlife Service*, No. NSW G.395 of 1986, 13 May 1987, Woodward Wilcox and Burchett JJ.).

The decision of the Federal Court is significant for a number of reasons:

1. The Court ruled on matters to consider when a motion for security for costs is brought against a public interest group party;
2. This was the first case to deal with the question of whether an unincorporated association can appeal from an AAT decision to the Federal Court;
3. This was the first case before the Court on the interpretation of s.33A of the Act, which was brought in by amendments to the FOI Act in 1983;
4. The Court laid down principles to apply when exercising their discretion to deny a successful respondent an order for costs against an appellant.

The Court unanimously dismissed the appeal on the basis that no error of law by the Tribunal had been shown but made no order as to costs.

The Queensland Government had filed a motion for security for costs against AFA and a motion to strike out the appeal as irregular, because AFA, being an unincorporated association, did not have standing before the Federal Court. AFA filed a motion to substitute Jane Suzanne Arnold (the co-ordinator of AFA) as applicant should the Court find that AFA had no standing before the Federal Court. All motions were dealt with by the Court on the first day of final hearing.

SECURITY FOR COSTS

Wilcox J. (with whom Burchett and Woodward JJ. concurred) ruled that an order for security of costs was inappropriate because:

1. There was no evidence by Queensland to show that AFA was inpecunious;
2. This was a case where it would be wrong to stifle litigation because it raised significant questions about s.33A which had not been previously interpreted by the Court;
3. The application for security of costs was heard by the Court after a large proportion of the costs had already been incurred;
4. The consequences of an order for security of costs would have meant an adjournment of the hearing of the appeal and resulted in a waste and duplication of costs (at pp.12-13 of transcript).

His Honour also noted that there had been a statement from the Bar table about the large number of members of AFA (see p.2 of transcript).

REGULARITY OF THE APPEAL

AFA successfully applied during the AAT proceedings to be joined as a party to the proceedings. Throughout the AAT hearing there was no question raised as to AFA's standing. This was perhaps not surprising in view of the provisions of s.27 of the *Administrative Appeals Tribunal Act* which state that:

"27.(1) Where this Act or any other enactment provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth) whose interests are affected by the decision.

(2) An organisation or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association.

(3) . . ."

However, Section 30(1) of the *Administrative Appeals Tribunal Act* 1975 provides that the parties to a proceeding before the Tribunal for review of a decision are:

"(a) any person who, being entitled to do so, has duly applied to the Tribunal for a review of the decision;

(b) the person who made the decision;

(c) if the Attorney-General intervenes in the proceeding under section 30A — the Attorney-General; and

(d) any other person who has been made a party to the proceeding by the Tribunal on application by the person in accordance with sub-section (1A)."

Sub-section (1A) of s.30 provides:

"(1A) Where an applicatioon has been made by a person to the Tribunal for a review of a decision, any other person whose interests are affected by the decision may apply in writing, to the Tribunal to be made a party to the proceeding, and the Tribunal may, in its discretion, by order, make that person a party to the proceeding."

Wilcox J., with whom Woodward and Burchett JJ. agreed, held that s.30(1A) did not include an unincorporated association and hence AFA could not be joined as a party pursuant to s.30(1A). However, this did not mean that the AAT's order joining AFA was a nullity and hence there would be no right of appeal. Wilcox J. held that the order could be read as if it joined each and every member of AFA and hence the proper manner of appealing to the Federal Court was by filing a Notice of Appeal disclosing a named representative of them all. The Court therefore acceded to the application to substitute Jane Suzanne Arnold as representative for AFA (see pp.7-11 of transcript).

Wilcox J. (Woodward J. concurring) nevertheless stated, obiter, that s.27 of the AAT Act contemplated that an unincorporated association could be an applicant for review, while Burchett J. preferred to "narrow" the section to an effect identifcal to s.30.

Clearly, if the legislature intended, as it appears to have done, to allow unincorporated associations to apply for review to the AAT, it will have to clarify the matter by amending the Act.

At present, the safe course, it is submitted, would be for an unincorporated association to nominate an applicant to the AAT "on its behalf". It would be essential in such a situation for the nominee to obtain an indemnity from the association as to costs for which the nominee may become liable as a result of proceedings.

SECTION 33A

The Court held that the appellant failed to establish any error of law by the Tribunal.

Wilcox J. (with whom Woodward J. concurred generally) accepted the appellant's submission that s.33A (5) requires only a balance in favour of disclosure but he did not find that the Tribunal had any other view. He also stated that the Tribunal's decision should not be read as stating that public interest should only prevail in rare or exceptional circumstances, but that each case was to be taken on its merits.

His Honour also stated that s.33A(5) does not confer any discretion on a tribunal. However, his Honour regarded the general principle stated in s.3 of the FOI Act as follows:

> "In a particular case, especially where the degree of public disadvantage caused by disclosure is small, or the prospect of any public disadvantage is comparatively remote, that . . . principle may itself be enough to tip the balance in favour of disclosure, notwithstanding that the information falls within s.33A(1)."

Burchett J. dealt with the provisions of s.33A in greater detail. He stated that the hallmark of the Act was the ". . . careful policy of balancing the competing interests . . ."

On the question of what could reasonably be expected to cause damage to relations between the Commonwealth and the State, Burchett J. relied on the definition of what could reasonably be expected to prejudice the future supply of information, given by Bowen CJ. and Beaumont J. in *AG's Dept. -v- Cockcroft* (1986) 64 ALR 97 at p.106, namely that they:

> "require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act."

However, upon the evidence given by Queensland which was available to the Federal Court on appeal, His Honour was satisfied that there was no doubt that Queensland in its communications was relying on s.33A(1)(a) as an exemption to disclosure. Burchett J. rejected the appellant's submission that s.3 introduces a bias to the construction of the exemptions in s.33A(1).

This view appears to be in conflict with the view of Wilcox J. that s.3 principles can prevail over s.33A(1) even when there is no great public interest for the purposes of s.33A(5). However, Burchett J's view on the matter appears to be the majority view because Woodward J. specifically concurs with it.

Burchett J. reaches the same conclusions as Wilcox J. about s.33A(5) — namely, that it does not confer any discretion on the Tribunal. He goes on to state that the section requires a determination of a matter of fact, that is, whether there is a public interest.

TEST

Thus where a s.33A(1) exemption is raised it is appropriate for a Tribunal to decide whether, despite the fact that s.33A(1) (a) or (b) applies, disclosure of documents, would on balance, be in the public interest.

A problem with the appeal alluded to by both Burchett and Wilcox JJ. was that all the evidence was not before the Court, some confidential documents having not been disclosed in the appeal book.

It appears that AFA had to run their case without knowing the content or description of the documents, the subject of the hearing. Due to the fact that the tribunal ruled that the documents were confidential, Mr. Preston, the Counsel for AFA, was often asked to leave the Court during the proceedings, which would then continue "in confidence". It is submitted that a more desirable way of retaining confidentiality would have been to allow only the legal representatives to be privy to the confidential documents.

AFA's case may have been assisted had they put on more evidence of the public interest of allowing animal welfare groups access to government documents on significant Australian fauna. However, any such evidence would have no doubt been in the most general terms because AFA was unaware of the content of the documents in question.

COSTS

The decision not to award costs against AFA was unanimous. Reasons for this decision were given by Wilcox and Burchett JJ. Both judges reasoned that Queensland should not be able to recover costs because:

1. The matter raised questions of interpretation of legislation, the resolution of which was important for both the Commonwealth and Queensland;
2. AFA were successful in relation to the preliminary matters of security for costs and the status of the appellant.

Wilcox J. also relied on the facts that:

1. AFA was a public interest group;
2. Queensland was an intervener before the AAT.

Burchett J. raised the further reason that the difficulty of categorising the correspondence was significantly contributed to by Queensland because Queensland failed to make its attitude clear at the time.

CONCLUSION

This decision is an important precedent for public interest litigants. Firstly, it has clarified to some extent the hitherto unclear position of standing of an unincorporated association before the AAT and on appeal from the AAT to the Federal Court.

Public interest litigants almost inevitably have to contend with a motion for security for costs. Here the Federal Court in refusing the motion relied, inter alia, on the fact that it was wrong to stifle litigation which raised significant questions of legal interpretation not previously before the Court.

Finally, in deciding not to award costs against AFA, the Court relied principally on the fact that the matter raised important questions of interpretation of legislation, that AFA was a public interest group and, perhaps most importantly for public interest litigants, that AFA was successful in interlocutory matters brought by its opponents.

"Should Your Association Incorporate?"

by Terry Mehigan, Solicitor
of the Supreme Court of New South Wales

The EDO often receives inquiries from resident and environment groups concerning incorporating their group. As the author states in this article, the principal reason for incorporation is usually to bestow legal status upon the group itself and distance it from the individuals who make up the group. This is especially important if the group wishes to take legal action in its own name: see earlier article this issue by Elena Kirillova on the difficulties of freedom of information actions by unincorporated groups. The author examines the Associations Incorporation Act *1984 (N.S.W.) and sets out the steps which a group wishing to incorporate must follow.*

Members of unincorporated associations may be familiar with the difficulties which flow from the lack of recognition by the law of an unincorporated association as a separate legal entity.

Before 1984 in New South Wales, charitable organisations or public interest groups could only incorporate as companies limited by guarantee or as co-operatives. Incorporation in those forms subjects the incorporated body to a body of law designed to regulate trading, profit-generating organisations with a view to protecting investors and creditors of those organisations. However, since the passing of the *Associations Incorporation Act* 1984 (N.S.W.), a flexible and simple method of incorporation is available to small associations set up for a lawful purpose other than making money.

A. **Why Incorporate?**

The principal problem facing unincorporated associations is that the law does not recognise an unincorporated group — only the individuals who make up that group. Consequently, an unincorporated group must rely on individuals within the group to do things in the group's name.

For instance, if the group wishes to rent premises, individuals in the group must sign the lease in their own names on behalf of the group. Consequently, disadvantages flow to both the group and the individuals who sign on behalf of the group. The premises are legally rented to the individuals who have signed the lease and those individuals are legally liable to pay the rent, even if they dissociate themselves from the group.

Incorporation, on the other hand, creates a legal entity separate from its individual members. The newly created legal person has the rights, powers and privileges of a natural person — it can sue (or be sued), enter into contracts, hold property and perform acts in the corporate name. The liability of the members of the association for acts of the association is limited to the property of the association and the subscriptions paid by members.

B. **Requirement for Incorporation**

Incorporation under the Act is available to any association whose primary function is not the conduct of trade — however, an association may have trading or fund raising activities which are not substantial in relation to the association's other activities. Very large non-profit groups cannot incorporate under the Act as the greater duties of audit and disclosure required under the *Companies (New South Wales) Code* or the *Co-operative Act 1923* are considered more suitable for such associations.

The steps to incorporation are quite simple. First, it is necessary to reserve the proposed name of the association (involving fees of $18.00). Second, an application form (involving fees of $60.00) must be completed which details certain information about the proposed incorporated association. The information includes:

- The principal place of administration.
- The names and addresses of the committee members of the association.
- Details of the property of the unincorporated body.
- Details of mortgages, charges and other securities affecting the property of the unincorporated association.
- A statement of the yearly income or likely yearly income of the association and the sources from which it is derived.
- A statement of the yearly expenditure or likely yearly expenditure of the association.
- A list of persons with whom the association principally deals.
- A statement of the number of persons employed or likely to be employed by the association.

It is also necessary to provide the Corporate Affairs Commission with a statement of the objects and rules of the association which must:

- Provide details of membership qualifications (if any).

- Provide details of fees and subscriptions payable by members.
- Specify members' liabilities.
- Set out provisions relating to the constitution, membership and powers of the committee or managing body of the association.
- Set out the procedures for calling and conducting general meetings.
- Set out the provisions relating to the source of funds of the incorporated association and the management of those funds.
- Set out the provisions relating to the alteration of the objects and rules of the association.
- Set out the provisions relating to the custody and use of the common seal of the association, and custody and inspection of the books and records of the association.

C. **What Incorporation Does Not Provide**

Incorporation does not provide community or public interest groups with a comprehensive insurance package. However, the Act does impose an obligation upon incorporated groups to take out public liability insurance cover of not less than $2,000,000 (failure to take out this insurance can lead to a $500 fine). Further, it may be prudent to take out other insurance such as worker's compensation, government volunteers indemnity or more comprehensive public liability insurance.

Incorporation also does not provide community groups with the status of a charity. To become registered as a charity in New South Wales an application must be made to the New South Wales Department of Finance. Groups carrying on particular functions are exempted from being registered as charities. Charity status allows groups to appeal directly to the public for donations and to run lotteries or raffles, without permission, which carry a maximum prize value of not more than $15,000. Certain audit requirements are imposed on charitable organisations who may appeal to the public.

To obtain tax exemptions, such as enabling donations to be tax deductible or exemptions from income tax, sales tax, payroll tax, stamp duty, bank accounts debits tax or financial institutions duty, a group which is eligible for such exemptions must make a separate application to each relevant government body.

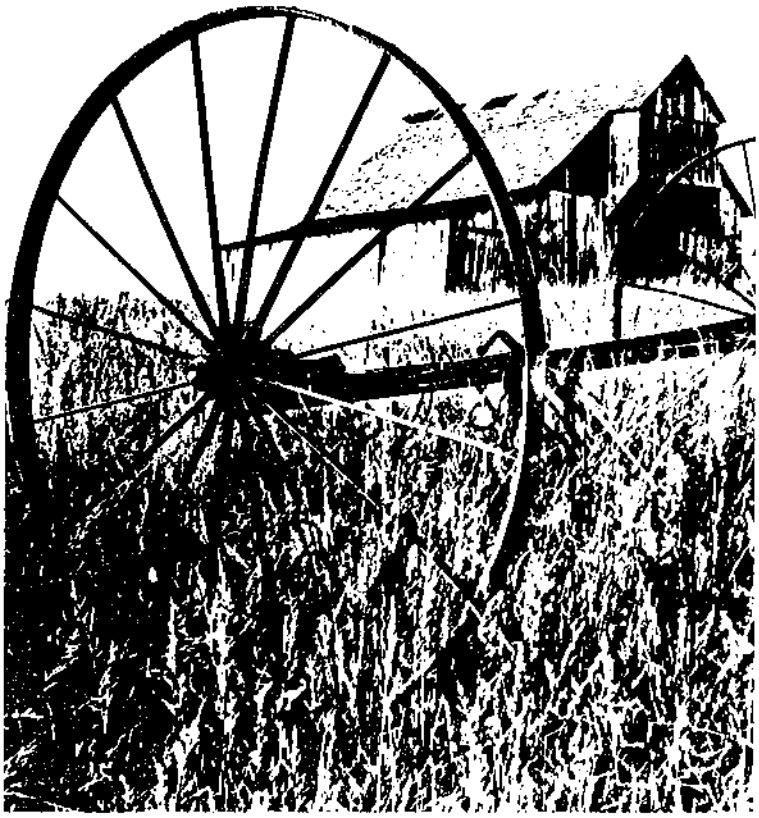
D. **Management of Incorporated Bodies**

Naturally, incorporation has the effect of imposing a more rigid structure on a group's activities. A formal distinction between the group and its managing body becomes necessary. The rules of the association should specify the rights and obligations of the committee. Apart from the obligations imposed by the association's rules, the committee members are under a general obligation to act in good faith and with care, diligence and skill. In short, they must place the interests of the association ahead of their own interests when acting for the association. The committee is also responsible to ensure that all necessary documents, accurately prepared, are promptly lodged with the Corporate Affairs Commission.

It must not be forgotten that the committee of an association in the performance of its management functions can legally bind an association. The association's will is evinced on formal documents by affixing the common seal of the association. However, in more routine transactions, committee members can bind the association by their own signatures or by oral agreement. The committee of an association has a great deal of power over the association's affairs.

Generally speaking, if a group has a reasonable degree of cohesion and a likelihood of continuing its activities for some time the advantages of incorporation far outweigh the disadvantages.

If your group is considering incorporation, further information on incorporation under the *Associations Incorporation Act* should be obtained by contacting the Corporate Affairs Commission, the Council of Social Service of New South Wales, a Community Legal Centre or a firm of solicitors.



"Recent Developments of Heritage in New South Wales"

by Ben Boer
Senior Lecturer in Law, Macquarie University,
Convenor of EDO Board

In the May issue of Impact, *Bernard Dunne highlighted changes in the Commonwealth heritage law. In this note, Ben Boer focuses on recent amendments to the N.S.W. Heritage Act and looks at the profile of the Heritage Council of N.S.W.*

(i) **Amendments to the Heritage Act**

After ten years of operation, the New South Wales Government has moved to amend the *Heritage Act*. The amendments aim to improve the Act's efficiency and to tie it in more closely to the operation of the *Environmental Planning and Assessment Act*.

In bringing the amendments forward, Mr. Carr, Minister for Planning and Environment and Minister for Heritage traced the history of the passing of the original Act in 1977 recalling that before then the only way in which to preserve heritage items was to enlist the help of the Builder's Labourers' Federation and its then secretary, Jack Mundey. The Federation had in the years prior to 1977 developed a system of "Green Bans", which were effectively stop-work bans on new construction which directly threatened heritage items. These bans were also used to stop work on new construction in order to halt work on other sites around Sydney where heritage items were threatened.

Presently some 405 permanent conservation orders and around 195 interim conservation orders are in existence relating to items of both the cultural and natural heritage.

The most significant amendments to the Act are:

- reducing the period of an interim conservation order from a maximum of two years down to a maximum of one year.
- to provide for a right of notification for people whose property rights are to be affected by imposition of an interim conservation order.
- to allow people with a right of objection to have the imposition of an interim conservation order referred to a Commission of Inquiry. The Commission of Inquiry will examine and report on the desirability of the order and whether it should be made permanent.
- the definition of "relic" has been extended to any deposit, object or material evidence relating to the European settlement of New South Wales, and which is more than 50 years old (previously, "relics" had to relate to the period of European settlement before 1900.)
- the membership of the Heritage Council has been extended to 12 members — the twelfth person is someone who "in the opinion of the Minister possesses suitable knowledge relating to the building, development and property industries."
- the functions of the Heritage Council have been extended. Previously the functions included:
  - — to make recommendations to the Minister relating to the conservation exhibition provision of access and publication of information concerning heritage items.
  - — carrying out investigations, research and inquiries.
  - — organising consultations, discussion and seminars.

  The new functions allow the Heritage Council to:
  - — make submissions relating to:
    - environmental studies
    - draft environmental planning instruments
    - environmental impact statements
    - provide opinions, statements or other information relating to heritage items if the Council considers it appropriate to do so.

(ii) **Public profile of the Heritage Council**

Given the importance of the Heritage Act in the past decade, it is curious that the Heritage Council itself has had a relatively low profile. Many people (including a parliamentarian in the recent debate on the amendments) still confuse the functions of the Heritage Council with that of the National Trust. (The National Trust has, of course, no statutory power to protect heritage items at all.)

The problem of public recognition of the Heritage Council was recently addressed at a workshop organised by the Education and Publications Committee of the Council. Results of the workshop, together with a study and recommendations by Peter Spearritt and Carolyn Stone of Macquarie University, are soon to be released and will be available from the Heritage and Conservation Branch of the Department of Environment and Planning.

(iii) **Public Accounts Committee Inquiry**

The profile of the Heritage Council may soon be raised somewhat further in the near future as a result of an inquiry into the Council by the Public Accounts Committee. The terms of reference of the Inquiry are to examine and report on the operations of the Heritage Council of New South Wales and in particular to:

(i) review of the overall financial position of the Council;

(ii) assess the adequacy of procedures and guidelines for the allocation and control of grants, loans and other financial assistance for heritage projects;

(iii) examine the use of consultants including guidelines for engagement and management of consultants, and evaluation of consultancy projects;

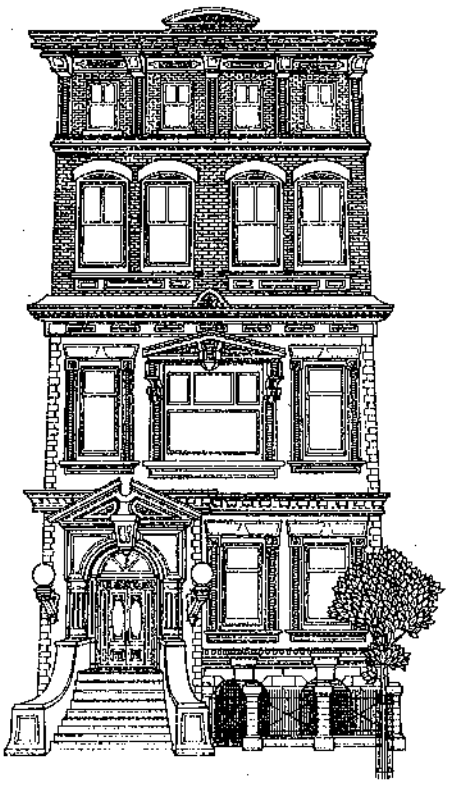
(iv) assess the adequacy of the organisation's objectives to fulfil the Council's statutory role and review performance review mechanisms; and

(v) inquire into the report on any other matters arising from the inquiry which impact on the efficiency and effectiveness of the Heritage Council.

Readers of this Newsletter are encouraged to make submissions to this inquiry. Those wishing to obtain assistance in relation to their submissions should contact the writer on 805 7111.

Submissions are to be sent to:

The Clerk
Public Accounts Committee
Parliament House, Macquarie Street,
Sydney NSW 2000.



LEGAL BRIEFS

NEW PRINCIPAL SOLICITOR FOR EDO

As of July 1987, the EDO has a new principal solicitor. Andrew Langley decided to take a step back from full-time legal work and become more involved in grass-roots, community activities and spend more time in his other areas of expertise, music and dance. He will continue doing some part-time legal work, however, to keep his hand in.

Nicola Pain replaces Andrew as the EDO's principal solicitor. She comes to the EDO with three years practice as a solicitor with a country firm and a medium-sized Sydney firm where she has worked in litigation. Nicola enjoys outdoor activities such as rowing, bushwalking and tennis. Continuing the trend set by her predecessor, Andrew Langley, as well as by her fellow solicitor, Elena Kirillova, Nicola is bi-lingual, speaking Japanese as her second language. High level negotiations with Japanese woodchipping companies may now be possible for the EDO!

FORESTRY FOLLOW-UP

In the August/September 1986 issue of *Impact*, Ben Boer and Brian Preston reported on the paper they presented to the TEC's Woodchipping Conference last year. An edited version of the conference paper is now published in (1987) Vol. 4 No. 2 *Environmental and Planning Law Journal* 80 (June 1987 issue).

DEVELOPMENTS IN EIA IN W.A.

The Western Australian environmental impact assessment system has recently been remodelled. Of particular interest is the provision to allow public participation in the decision-making process concerning the level of EIA to which a proposal must be subjected.

Section 38 of the *Environmental Protection Act* 1986 (W.A.) provides for the referral of any "proposal" which is likely to have a "significant effect" on the environment to the W.A. Environment Protection Authority (EPA). Referral of proposals is obligatory for decision-making authorities, although a discretionary judgment is required to be exercised as to what constitutes a "significant effect". As a safeguard, s.38(1)(b) also allows *any person* to refer a proposal to the EPA. The EPA then determines an appropriate level of EIA with respect to the proposals referred to it.

The three levels are, firstly, to require the provision of further information in the form of a Notice of Intent or Public Environmental Report, secondly, to require the proponent to undertake an environmental review and to report thereon to the Authority (Environmental Review and Management Programme), or, thirdly, with the approval of the Minister, to conduct a public inquiry. Any or all of these courses of action may be followed. Any member of the public can appeal to the Minister against a

decision of the EPA as to the appropriate level of assessment. However, the level of assessment cannot be reduced, only increased, if an appeal is successful.

For further information on the changes to Pt. IV of *Environmental Protection Act* 1986 (W.A.) see note by R.J. Fowler in (1987) 4 *Environmental and Planning Law Journal* 156-157.

WILDERNESS ACT: IS IT TOO LATE?

There is concern that the N.S.W. Government is losing its will to become the first State to implement a Wilderness Act. The report which suggested a separate Wilderness Act is being considered by the Inter-Departmental Committee but it is understood that a compromise decision is being canvassed. This would mean a strengthening of the *National Parks and Wildlife Act* but no separate Wilderness Act. Urgent action needs to be taken now to prevent us losing the only opportunity Australians have had to have strong wilderness legislation. For further information, contact the Wilderness Society or ACF.

SUCCESSFUL PROSECUTION FOR BREACH OF TREE PRESERVATION ORDER

We often hear the complaint that legislative provisions for the protection of the environment are ineffective because of an unwillingness on the part of those administering the legislation to adequately enforce it. This, until recently, was certainly the case in the Hawkesbury Shire Council area, where no prosecutions had been brought against persons in breach of the Council's tree preservation order (TPO) in the six years or so since the order was made.

In August 1986, some concerned residents of Bowen Mountain near Kurrajong approached the Environmental Defender's Office to enquire how the Council's TPO might be enforced against another resident who had cut down four red cedar trees. One of these trees was not even on the property owned by the person who had cut it down.

The Council's Shire Engineer had initially decided not to prosecute for these actions, which appeared to be a blatant breach of the Council's TPO. After advice from the EDO's solicitors the residents lobbied the Hawkesbury Shire councillors, who resolved to prosecute the offender.

In the result, both the landowner who ordered the trees felled and the contractor who actually felled them were fined $750.00 plus costs of $273.00, in the Windsor local court on 28 May and 18 June 1987.

It is hoped that these successful prosecutions will encourage Council officers to be more vigilant in enforcing tree preservation orders in future.

FORTHCOMING NELA CONFERENCE

The Annual National Environmental Law Association Conference will be held in Melbourne from 3-6 September 1987. The theme of the conference is "Government and Development — The Struggle for Flexible Controls". Conference topics include:

- Councils in their dual role as Planning/Consent Authorities and Developers.
- The Fettering of Planning Discretion.
- The Impact of Federal Legislation on State Planning Processes.
- Review of Planning Appeal Processes in Australia and New Zealand.
- Using Crown Land as a Development Resource.
- The Role of Statutory Development Agreements.
- Proposed Flora and Fauna Guarantee Legislation.

For further information, contact John Taberner, Freehill Hollingdale & Page, D.X. 361, Sydney (02) 225 5000.

APPLICANTS FOR DESIGNATED DEVELOPMENT APPEALS

A recent court case has emphasised the importance of residents choosing carefully the person or persons who are to be the applicant(s) on a s.98 appeal against a decision of a Council granting consent to a designated development. In *McInnes -v- Wingeecarribee Shire Council* (1986) 59 LGRA 385 (Land and Environment Court, Stein J.), a number of residents had made submissions, whilst the designated development application was on public exhibition, objecting to a proposed quarry development. Subsequently, the local Council considered the application and the submissions and determined to grant consent. One of the residents who was concerned about the proposed development lodged an appeal against the Council's decision within the statutory period of 28 days. However, that resident had not personally made a submission objecting to the development whilst it was on public exhibition. The court held that that person was not an "objector", as that term is defined in s.4 of the *Environmental Planning and Assessment Act* 1979 (N.S.W.) and hence was not entitled to appeal under s.98 of that Act. The court held, therefore, that the proceedings were wholly vitiated by the lack of capacity of the applicant. Hence, a subsequent application to substitute another person who fitted the statutory description of an "objector", made after expiry of the time for a third party appeal, could not be granted as there were no valid proceedings on foot.