IMPACT

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Environmental Defender's Office Ltd

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"The Environmental Defenders Office — Three Years On"

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In October this year, the EDO was 3 years old. The author, whilst working at the EDO during her recent sabbatical leave, has reviewed the office's files to evaluate the progress of the office. This article provides a useful insight into the growth and success of Australia's first and only legal centre specialising in public interest environmental matters.

The EDO commenced operation in October 1984 with the employment of its first solicitor. Originally managed by a committee of the Environmental Law Association of N.S.W., the Office was incorporated as a company limited by guarantee in January 1985[1]. From 1984 until November 1986 the Office was staffed by one solicitor and a secretary/co-ordinator; in November 1986 a second solicitor was employed and in July 1987 a clerk was employed. In addition to the employed staff of the Office the EDO has had the assistance of several volunteers, students and solicitors, who have been able to assist with research, filing and other administrative tasks.

The policy of the EDO has been to provide legal advice in response to inquiries on environmental and related matters as often as resources permit; to take on matters involving detailed research in which a significant public interest is involved; and to refer inquiries raising private interest matters to private solicitors. In its first three years of operation until October 1987 the EDO has dealt with some 360 inquiries. Most have been dealt with briefly on the telephone, usually where advice on matters of procedure is required. Some 103 of these inquiries have required more substantial research and have involved clients obtaining and providing background material, such as the relevant environmental planning instrument and council documents, to the Office. Detailed written advice has been provided or a conference in person or by telephone has been held to explain that advice to the client. An indication of the scope of activities which have prompted inquiries requiring detailed advice appears from the table below.

As is clear from this table, a significant proportion of the EDO's time has been involved with advice on activities which are classified as designated development under the *Environmental Planning and Assessment Act*, in particular some 18% of matters requiring detailed advice have concerned mines, quarries and other extractive industries. In addition, marinas and certain factories and industrial activities, such as chemical blending and concrete batching plants, are designated development.

There are four reasons for the preponderance of inquiries concerning designated development. First, public awareness of proposals for such activities is usually high given the requirement for publicity and exhibition of an environmental impact statement and the opportunity for public submissions; secondly, the right of third party appeals from approval of designated development applications means that individuals may be more likely to contemplate legal action; thirdly, activities are designated because of their likely impact on the environment, and individuals may be more likely to seek advice in respect of a proposal which they consider will significantly affect their local environment than others which they feel they can live with; and fourthly, the requirement that a significant public interest be involved before the Office can act means that detailed investigation and research work will only be undertaken when it is clear that the issue is of significance. The importance of designated development proposals for the Office's work is demonstrated by the fact that one third of all the matters in which the EDO has been involved in legal proceedings have been in Class 1 of the Land and Environment Court's jurisdiction, that is, in ap-

Abattoir	1	Hotel	5	Rezoning	7
Airport/heliport	2	Housing	3	Road	6
Amusement Park	1	Industry	5	School	1
Army Base	1	Marina	4	Sewage	3
Caravan Park	2	Mining	7	Speedway	1
Coal Loader	1	Oval/sportsground	2	Subdivision	3
Commercial	3	Parking	2	Theatre	2
Drainage	1	Pesticides	1	Tourist Facility	2
Dredging	1	Pollution	1	Towers	2
Extractive Industry/ quarry	9	Public Transport	1	Traffic Management	1
Factory	6	Residential	3	Trees	4
Forestry	3	Retirement Village	1	Water Resources	2
				Wildlife	5

peals by objectors to designated development, or representation of objectors appearing in appeals by the developer against refusal of consent to designated development proposals.

The EDO is able to act in legal proceedings only where legal aid is granted. Legal aid is available for environmental matters where a substantial interest is at stake meriting assistance. In deciding whether or not a substantial interest is at stake meriting assistance the Legal Aid Commission considers[2]:

"(1) Whether or not the proposed undertaking is likely to have a significant impact on the physical environment or to substantially affect public perception, use or enjoyment of the environment. In judging this, the following elements are taken into account:

(i) the extent of the environment affected:
  — natural
  — built

(ii) scarcity of environment in the locality and in the broader geographical area;

(iii) the quality of the environment affected:
  (a) natural environment affected:
    — diversity of species
    — intensity of concentration of members of species
  (b) built environment — heritage value:
    — historical or cultural significance
    — rarity or uniqueness of item or precinct
  (c) humans as environment and the health of people:
    — social/cultural significance, for example traditions in farming community; Aboriginal culture
  (iv) degree of modification of environment potentially to be affected by the subject matter of the proceedings:
    — effect on ecology;
    — effect on scientific, archaelogical, anthropological, historical, spiritual, aesthetic, cultural or recreational value.

(2) The likely cost to the Commission of providing legal aid.

(3) The benefit that is likely to accrue to the public from the proceedings.

(4) The merit of the applicant's case.

(5) The means of the applicant or applicant group; and

(6) The possible benefit to the applicant or applicant group."

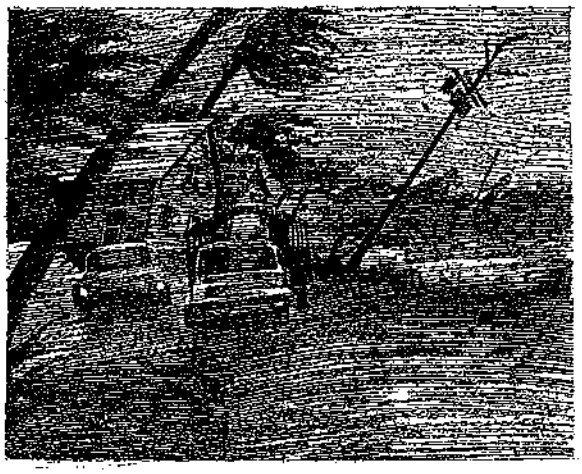
The EDO has applied for legal aid in 24 matters. Aid has been granted in 15 matters and refused in 7; a decision is pending for two applications. One refusal was in respect of an application made to the Australian Legal Aid Office before its merger with the Legal Aid Commission, and was refused on the Office's "means and needs test". The applications refused by the Legal Aid Commission of New South Wales have been refused on a variety of grounds; one was refused because it was not an "environmental matter", and on the applicant's means; another was refused on the ground that the Commission was not satisfied that there were reasonable prospects of success; and the others were refused on grounds relating to the Commission's assessment of the enhancement of the environment and impact on the environment. Of the matters in which legal aid has been granted, four involved Class 1 appeals against approval of quarry development[3]; one a challenge to forestry activities; one a challenge to the erection of radio transmitter towers on the North Coast; one an appeal to the Federal Court against refusal of access to documents under the Freedom of Information Act 1982 (Cth)[4]; one a Class 4 challenge to the granting of development consent to a gold mine; one a challenge to the decision to demolish the Wintergarden Theatre[5] and one Class 4 challenge to the granting of consent for a fireworks manufacturing plant. Clearly the Legal Aid Commission is applying the guidelines broadly: the above cases concerned both built and natural environment, and challenges both to the validity of decision-making and to the merits of particular decisions.

The results achieved by the EDO in litigation have been mixed. In two Class 1 appeals the matters have been settled with conditions acceptable to the appellant[6]. In an action challenging the adequacy of an environmental impact statement prepared for a development application for approval of extractive industry the matter was settled, with costs being awarded to the applicant. In another Class 4 action, a challenge to the validity of a consent granted to a gold mine based on a failure to comply with advertising requirements was upheld[8]. One action in the Administrative Appeals Tribunal for review of a refusal to supply information on wildlife numbers under the *Freedom of Information Act* 1982 was discontinued when the figures were supplied. The EDO has been unsuccessful in four cases: a Class 1 appeal against a crushing plant; an application for a declaration that a fireworks factory was designated development; an application for declarations that the Minister's decision under the *Heritage Act* to revoke an interim conservation order on the Wintergarden Theatre was invalid[9]; and an appeal to the Federal Court from a decision of the Administrative Appeals Tribunal[10]. Five cases were discontinued, two following refusal of legal aid.

The statistics evident from the previous paragraph need to be considered taking into account the fact that in at least three of the applications which were dismissed the courts clarified important points of law relevant to future litigation; the application of s.104A of the *Environmental Planning and Assessment Act*[11], the status of an unincorporated association in appealing to the Federal Court and the issue of security for costs in an action by an unincorporated association[12], and the discretionary factors relevant to the granting of an interlocutory injunction[13].

Another factor is that the matters in which the EDO has been involved in litigation have represented only a small part of the matters in which the EDO has been able to provide assistance. Advice provided by the EDO has assisted residents and environmental groups in lobbying for decisions which protect the environment. The EDO was, for example, able to advise a group of residents opposed to an amusement park that the proposal was not a "tourist establishment" for the purposes of the relevant environment planning instrument, and was therefore not permissible. After representations by the residents the council obtained legal advice which confirmed the view that the proposed development was not permissible and rescinded its previous consent[14]. In other matters in which the EDO has provided advice on procedure and opportunities for public involvement in the decision-

making process the ability of residents to make more effective representations has undoubtedly led to better decisions being made. The implementation of object 5(c) of the *Environmental Planning and Assessment Act*, the provision of "increased opportunity for public involvement and participation in environmental planning and assessment", depends on members of the public being aware of their rights and using them effectively, and the assistance which the EDO has been able to provide in increasing public awareness of the issues has contributed to the fulfillment of this object.



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1. See B. Boer "Legal Aid in Environmental Disputes" (1986) 3 *Environmental and Planning Law Journal 32 at pp.35-39.*
2. *Legal Aid Commission of New South Wales Legal Aid Policies* April 1987 pp.3-4.
3. For discussion of one of these cases, see N. Pain "Wyan Quarry Case: Some Gains, Some Losses" *Impact* September 1987, pp.1-2.
4. Discussed in E. Kirillova "Freedom of Information: The Costs and Difficulties" *Impact* July 1987, pp.1-4.
5. Discussed in P. Comans "Interlocutory Injunctions: Lessons to be Learned from the Wintergarden Case" *Impact* May 1987, pp.1-7.
6. Discussed in B. Preston, "Community Participation in Monitoring: A Precedent" *Impact* February-March 1986, pp.102 and B. Preston, "Monitoring — The Neglected Aspect of Environmental Impact Assessment" Vol. 13 No. 6 *Habitat* 6.
7. Discussed in B. Preston, "Proposed Nature Reserve Saved But For How Long?" *Impact* February-March 1986, p.3.
8. *Broomham & Owen -v- Tallaganda Shire Council & Anor.*, Land and Environment Court, Stein J., 31 October 1986; Discussed in B. Preston, "Court's Discretion Limited Where Mandatory Public Interest Requirements Breached" *Impact* December 1986, p.1.
9. See note 5 above.
10. See note 4 above.
11. *Priestley -v- Kempsey Shire Council*, Land and Environment Court, Cripps J., 15 August 1986.
12. See note 4 above.
13. See note 5 above.
14. See also "Legal Briefs" *Impact* July 1987 at p.9 for a discussion of enforcement of a tree preservation order.

"Future Demands on Environmental Legislation"*

by Peter McClellan Q.C. of
the New South Wales Bar

Environmental law, particularly in New South Wales, has undergone a period of dramatic change in the last decade and there is every indication that such change will continue as legislators, developers, councils and the public strive for the optimal system of environmental and planning law. With a view to encouraging debate on this important issue, Peter McClellan Q.C. puts forward his thoughts as to the changes he suggests should occur.

It is readily apparent from the results of Federal and State elections of recent years that the management of the environment is now an issue which concerns a great many people in our community. This is perhaps inevitable in an industrialised society with an almost universally educated population many of whom are not dependent for their personal well-being on their own or their employer's exploitation of some natural resource. This perception of the wisdom of logging is very different for the timber getter whose livelihood depends on it than that of the history teacher at St. Leonards High School who may occasionally visit the forest from which the timber comes. The value structure of many people has changed significantly in recent years. I have little doubt that it will continue to change. Environmental legislation must respond to these changes in a balanced way.

It was apparent that the legislative package which came into force in New South Wales on 1 September, 1980 was an attempt to rationalize the competing interests in and perceptions of the environment and provide a total framework for environmental decision making. It sought to impose a graduated regime for the evaluation of projects depending upon the significance of the likely environmental consequences. Importantly, it sought to impose a formalized public evaluation process with respect to projects to be undertaken by government.

I understand one of the objects of this seminar is to seek to discover whether the legislation is effective in practice and, if not, what if anything should be done about it. Inevitably a person's view of these difficult questions will depend upon the perspective brought to the evaluation process. My perspective is, of course, that of the lawyer.

The problems of Part V of the Act

The greatest advance made in 1980 was the introduction of a formal and public process of evaluation of government projects. Regrettably, it has been beset by problems. From my own experience the most significant problem was an almost complete lack of awareness by many government officers of the need for environmental evaluation of government projects under the legislation. The situation was not made easier by an almost incomprehen-

*This article is substantially based on a paper of the same title presented by the author to the Seminar on Environmental Legislation and its Impact on Management, Sydney, 22-23 October 1987.

sible legislative framework based upon the concepts of "activities" and "determining authorities". See *Guthega Development Pty. Ltd. v. Minister Administering National Parks and Wildlife Act (N.S.W.) 1974* (1986) 2 N.S.W.L.R. 353. This lack of awareness was, for some government departments, radically cured by litigation which attracted great publicity. See *Newton v. Wyong Shire Council and the Minister for Public Works and Ports* — (unreported McClelland J. 1982); *F. Hannan Pty. Ltd. v. Electricity Commission of New South Wales* (1983) 51 L.G.R.A. 353; and 51 L.G.R.A. 369; *Kivi v. Forestry Commission of New South Wales & Anor* (1982) 47 L.G.R.A. 38; *Prineas v. Forestry Commission of New South Wales & Anor* (1982) 49 L.G.R.A. 402. The legislative deficiencies have in part been cured by amendments to the Act which came into force on 1 January, 1986. However, I still perceive that there are many problems.

Part V was no doubt intended to provide an effective adjunct to the management processes of government. However in one respect it has proved a hindrance. Commonly a government body (and I have in mind the Electricity Commission but it could be the Department of Main Roads or some other) has a project to run a transmission line from A to B. Now the route which could be taken may have a variety of options — if you like through virgin forest or through a residential estate. In most such cases an environmental impact statement will be required (s.112). In my view such a statement is required to assess the activity by reference to a route which can be identified as the route proposed by the determining authority. I know there is a view to the contrary which says you can prepare an impact statement which sets forth a variety of alternatives and after you have received submissions you can then decide which route you are actually going to take.

However attractive and practical that view may be, it seems to me untenable. The whole of regulation 57 is dependent upon the identification of the proposed activity and an assessment of *that activity's* environmental consequences. It seems to me impossible to define and evaluate the activity if you merely describe it by alternatives. Perhaps you may legitimately have some internal options (small route deviations) but even that is doubtful. What is clear is that you cannot just say that your activity is to run a transmission line from Penrith to Broken Hill and then provide, say, four alternative routes without identifying which route constitutes the preferred route and hence the proposed activity. Unless you state your preference you cannot commence an evaluation of the proposal's impact. You may go to Broken Hill by a variety of routes each having markedly different impacts.

In my view the difficulties faced by many government bodies arising from the present structure of the regulations can be removed. All that would be required would be to provide that the impact statement should set forth and consider not only the activity but also, if the determining authority decides, any alternative means of carrying out the activity. The statement may choose either means so as to avoid any misunderstanding by those who might be affected and who might believe that they did not have to make a submission because the preferred option did not affect them.

In talking about Part V I should raise another concern which I have with both the present and the future state of the legislation. My experience has been, and the history of the decided cases has shown, a considerable misunderstanding of the purpose and effects of Part V of the legislation. There have, of course, been a number of celebrated actions for injunctions (mostly unsuccessful) based upon an allegation of a failure to comply with Part V. (I have referred to these cases above.) Such actions are normally brought by concerned environmental groups.

At the same time, many proceedings for injunctions have been brought claiming a breach of some aspect of Part IV of the Act. Such proceedings are normally promoted and often instituted by commercial rivals. Many have involved shopping centres. Even the threat of an injunction can have devastating consequences upon the viability of such projects. (see *Burns Philp Trustee Co. Ltd v. Wollongong City Council* (1983) 49 L.G.R.A. 420; The Pagewood Litigation which was terminated by legislation; *Devon v. Lake Macquarie Shire Council* (1984) unreported.)

No doubt the fear of delay and its consequences especially for employment has prompted the State Government to give legislated immunity to a number of major projects. Parramatta Park, Pagewood, Leura Resort, Darling Harbour (which includes the monorail) and the Harbour Tunnel have all benefited from special legislation giving immunity from challenge. It may be such is the right of government which stands for re-election at regular intervals. But is that really the case?

The government was applauded, and rightly so, for enacting the present legislation and, in particular, for making government projects the subject of environmental assessment in a public manner for the first time. However, it is disheartening, in the least, to see that applause exploited to allow major government projects and some of private enterprise to escape the ultimate scrutiny which is required of "less important projects" or most private enterprise ambitions. Can there be any wonder that developers nurture a somewhat cynical view of the legislation when the government which introduced it legislates to remove its impact when it may hold up or affect a major state project? I am commonly asked by some beleaguered investor who faces proceedings which might destroy his project: "How is it that government can do these thing?" The answer is of course "the government can pass acts of parliament — you can't."

There can be no doubt in my view that the making of special legislation to protect particular projects is having very damaging consequences for the continued viability of the present legislation. Not only does it make private enterprise cynical but it weakens the resolve of government, especially the bureaucrats, to pursue the correct course and carry out a proper environmental assessment of major projects. It is not yet too late to redress the situation but I have no doubt that the system will eventually collapse if any significant further pressures are imposed on it.

From the problems of Part V I turn to an equally significant problem and one which, in my opinion, and I believe that of many others (not exclusively lawyers), needs early attention. When the legislation first appeared in Bill form, a committee of barristers made submissions to the then Minister (the late Paul Landa). One of the submissions was that the Land and Environment Court should not be a separate court but rather should be a division of the Supreme Court. In my view this holds true today.

I mean no discourtesy to the members of the present court when I say that the fact that it is a separate and small court has the consequence that it will prove more difficult to attract people of experience and suitable eminence to accept an appointment. This is because the opportunity for development and variety of judicial experience, not to mention every day contact with judicial (and former) colleagues, is severely limited in contrast with those who hold office in the Supreme Court.

[Since writing the paper Mr Justice Hemmings has been appointed to the Court. In his case the fears I express did not eventuate. He has great experience and ability and was a leading practitioner before his appointment.]

Another major factor is that so long as the court remains separated from the judicial mainstream, governments may be pressured to make appointments out of political favour or because of a perceived bias on environmental issues in a particular person. If the court is to maintain an effective role, and this is true of any court, its judicial members must be appointed primarily because of their eminence and experience as lawyers and for no other reason. Let me hasten to add that I do not suggest that any present appointments have such a basis nor that the incumbent Attorney has or would ever be influenced by such pressures. However, it is inconceivable that overtures have not at times been made and that they will not continue to be made to the Attorney of the day. The work of the Court which is of the greatest importance to the community not only requires the best available lawyers as its judges but also people with a broad experience of that community and the problems which may affect the environment. It was never right to separate the court and accept the risk that the best qualified persons might for that reason refuse to become its judges. That error should be corrected at the earliest opportunity.

An equally significant problem with the court, which has daily implications is the present system by which, for the most part, single assessors determine appeals from council decisions. From time to time attempts have been made to have two assessors hear an appeal. This is not always entirely successful; see *Westfield Ltd. v. Sutherland Shire Council* unreported (1987).

In most appeals of any significance, a large portion of the decision making process will turn upon the subconscious reactions of individuals to the basic characteristics of the development proposal. How high or bulky a particular building should be are not matters of immutable law or inherited wisdom. Whether a picture theatre should be located in one suburb or another is a matter which may be determined differently depending upon the inherited value which one individual possesses.

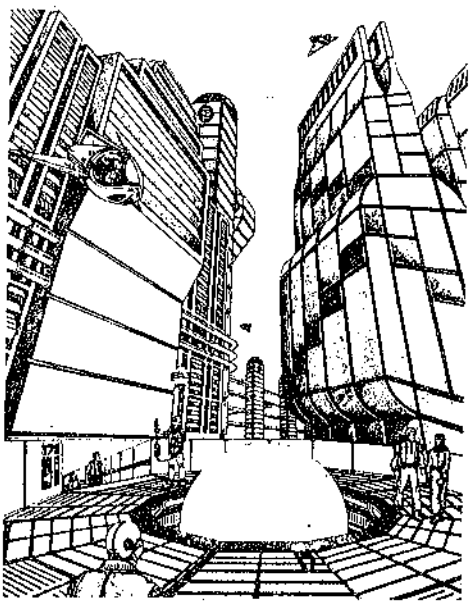
Furthermore, the extent to which an individual's values should be imposed on the particular decision will differ from one assessor to another. The law appears to be that even a totally unreasonable decision of an individual assessor is immune from appeal (see *Tesoriero v. Leichhardt Municipal Council* (1983) 51 L.G.R.A. 46.) As a consequence and provided no "error of law" has been made, an individual assessor may make a totally unreasonable decision which the aggrieved party has no capacity to have reviewed. (See *Coles v. Woollahra Municipal Council* (1986) 59 L.G.R.A. 133.)

In my view the need to restructure the assessor system of the court is a pressing requirement. I have little doubt that almost all of the regular practitioners in the court and many of the regular litigants share this view. The system should be reformed to require major appeals, or appeals where the parties require it, to be determined by panels of assessors, with part time assessors drawn from an expert panel made available from the appropriate professional bodies. How much better will a decision about the impact of a development on a major river system be if at least one member of the assessing panel has real expertise in the functioning of rivers. Can there be any question that a decision whether or not to allow a particular develoment which it is alleged may have a severe economic impact upon its neighbours will be better evaluated by a panel which includes a person with real expertise in assessing economic impacts. And why not have an experienced and practising architect to help assess the visual impact of a proposed major building upon its prospective surroundings.

In my opinion the only contrary argument is that of cost. *But* can it seriously be suggested that when it comes to assessing the impact of major development proposals on our community a few extra dollars spent on part time assessors is too much for society to accept. Surely not.

The penultimate matter which needs to be raised today is a problem extending beyond the initial perspective of this conference. It is the ever present problem of the relationship between state and federal powers and their relationship to environmental controls. Nowhere is this more acutely revealed than in the use and control of the water in our river systems many of which traverse two or three States before discharging into an ocean. The problem of the salinity of the Murray/Darling system is acute and has been partly addressed by some governments. However, a great deal more needs to be done to ensure that a uniform system of assessment of impacts both within and outside a particular State is undertaken before a development is allowed to proceed.

Recently a case arose in the court where a proposed quarry was to be located almost precisely on the border between New South Wales and the Australian Capital Territory. Many of the impacts including the traffic impact would be imposed entirely on Australian Capital Territory



roads and properties although the quarry pit was to be located in New South Wales. The case was settled and left unresolved the appropriate mechanism, if any, to evaluate these impacts.

I am aware of certain agreements between the Commonwealth and the States with respect to some environmental matters. None of these, I am aware, cover these problems. Surely it is time such problems were addressed and co-operation between the States realized to achieve a national resolution of any conflicts, hopefully by reciprocal legislation.

There is one other matter which causes concern and must be addressed. It has become increasingly apparent to me that the different methods and approaches to environmental assessment of the various States is leading in some cases to decisions as to where a particular major undertaking will be located to be determined on the basis of where it will be easiest to obtain approval. There is also evidence to suggest that competition for new development influences the approach which government takes to the formation and application of its environmental laws. Surely it is time that all governments responded to these pressures by accepting an agenda which provides for uniformity of environmental assessment and a consistency of legal controls. Is the control of the environment in which major development is pursued to be left to the jealousies and political rivalries which exist between the various States? Surely when it comes to the exploitation of the nation's major resources the evaluation of the merit of individual projects should be undertaken under a legislative regime which protects the interests of all Australians whether they be citizens of any particular municipality, territory or State.

"Environmental Law: The Year in Review"

by David Farrier
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In this article, the author summarises some of the major legislative changes to environmental laws in the year ending June 1987. These changes, although important, have been little publicised elsewhere.

The flurry of New South Wales legislative activity has continued in the past year (July 1986 — June 1987) and there is the promise of more to come in the next parliamentary session. There have been significant changes to the Heritage Act, 1977 and the Soil Conservation Act, 1934, legislation quite clearly concerned with environmental protection. But equally important are changes which have been made to the water supply legislation, imposing environmental responsibilities upon bodies which in the past have perceived themselves as being primarily concerned with economic and social development rather than conservation of the environment.

Taking the environment into consideration

The Water Administration Ministerial Corporation, operating through a new Department of Water Resources, has replaced the old Water Resources Commission, following the enactment of the Water Administration Act, 1986. A second stage of reforms to the administration of wate resources saw the enactment of the Water Board Act, 1987 to replace the Metropolitan Water, Sewerage and Drainage Act, 1924 and the Water Supply Authorities Act, 1987, which mirrors the Water Board Act and provides common legislation for the Hunter, Broken Hill and Cobar Water Boards. From the perspective of those concerned with environmental protection the most significant initiative has been the inclusion in all three pieces of legislation of a common objects section. The allocation and use of water must now be "consistent with environmental requirements" and provide maximum long term benefits.[1] There is now a clear obligation on these bodies to consider the need to allocate water for in-stream purposes, such as the preservation of wetlands, as well as undertaking their more traditional function of ensuring the equitable distribution of water for domestic and irrigation purposes.

It is true that these bodies already have environmental assessment responsibilities in many situations, under Part V of the Environmental Planning and Assessment Act, 1979. But this is at the level of project control rather than forward planning. Moreover, it has always been easy to give environmental factors a lower weighting when it came to actual decisions, given that all that the law requires is that environmental factors be "taken into account". Now, the bodies responsible for water supply, at least, are legally required to give a very substantial, if not an overriding, weight to "environmental requirements". It is important that other public bodies be given a similar responsibility under their own legislation. The Western Lands Commission, the Maritime Services Board and the Electricity Commission spring immediately to mind.

Public accountability

It is, however, one thing to fix these bodies with conservation responsibilities. It is quite another matter seeing to it that they carry them out in practice. New South Wales environmental legislation is quite erratic when it comes to dealing with the question of the public accountability of Government bodies. The Environmental Planning and Assessment Act, 1979, with its broad standing provision and limited opportunities for objector appeals, is relatively generous in allowing opportunities for judicial scrutiny of administrative decision-making. Equivalents of section 123, which allows anybody at all to bring proceedings to remedy or restrain breaches of that particular piece of legislation, are now to be found in a number of other contexts: the Heritage Act, 1977 s.153, the Environmental Hazardous Chemicals Act, 1985 s.57 and now the Uranium Mining and Nuclear Facilities (Prohibitions) Act, 1986 which prohibits all uranium mining and prospecting in NSW, as well as the construction and operation of a wide range of nuclear facilities, including new reactors

and reprocessing plants.

There is no equivalent of section 123 in the new package of water legislation, but the old Water Act of 1912 was always very generous when it came to giving rights of merit appeal to objectors to licensing decisions.[2] These were substantially cut down in 1981,[3] but they still survive in a limited form and provide some opportunity for public scrutiny of the licensing decisions of the Water Corporation and the extent to which it is fulfilling its environmental responsibilities.

So far as increased opportunities for public participation in the decision-making process are concerned, 1986-87 contained no landmarks in New South Wales law, although there has been one useful initiative. As a result of amendments to the Heritage Act, 1977, by the Heritage (Amendment) Act, 1987, all public bodies and Government departments now have the responsibility of keeping a Heritage and Conservation Register covering not only items under their control which are subject to an interim or permanent conservation order but also those which could be made subject to an order in accordance with Heritage Council guidelines. Registers can be inspected by members of the public.[4]

On the other hand, members of the public have no right to participate in the new procedure under the Heritage Act which has been created to speed up decisions on the making of permanent conservation orders. Landholders can now object to interim conservation orders on a limited number of grounds within six months of their having been made, and if they do so an inquiry must be held. They can for example, argue that permanent conservation is not necessary or that it would cause financial hardship. Members of the public can, however, only appear at the inquiry with the Commissioner's permission. Once the Commissioner has reported, it is up to the Minister to decide whether to make a permanent order or to revoke the interim order. If there are no objections, the Heritage Council itself carries out an investigation in order to provide advice to the Minister and it must do this within twelve months.[5] What this means is that there is going to be a twelve month ceiling on interim conservation orders, to replace the former one of two years.

In the Commonwealth arena the opportunities for members of the public to acquire information about, and to participate in, the environmental assessment process under the Environment Protection (Impact of Proposals) Act, 1974 have been substantially extended by amendments to that Act and the Administrative Procedures made under it. These came into operation on June 1 1987. The Minister can now order a public environment report (PER) instead of a environmental impact statement (EIS) in relation to activities carried out by Commonwealth bodies or private developers who require Commonwealth approval.[6] A PER is essentially a watered-down version of an EIS, providing a more selective treatment of the environmental implications of a proposal. It is likely that in practice PERs will be required much more frequently than were EISs prior to the amendments, providing a valuable source of basic information for objectors.

There are a number of other points in the Administrative Procedures where the information flow to members of the public has been substantially upgraded. Previously, members of the public only had the right to require the environment Minister to supply information about the action taken or proposed for ensuring consideration of the environmental aspects of a proposal. This has now been reinforced by requiring the Minister to reply within a period of three months.[7] In addition, after the amendments:

- The environment Minister must give reasons why he or she has not directed an EIS or PER to be prepared, within three months of being requested to do so.[8]
- The environment Minister must give reasons if there is a change of mind and a direction to prepare an EIS or PER is revoked.[9]
- The environment Department must make available to the public the environmental assessment report which it makes to the environment Minister after examining the final EIS or the PER.[10]
- The environment Minister must let the public know what advice has been given to the Minister who is responsible for making the decision on the proposed activity (the action Minister).[11]
- The environment Department must make available to the public any further review or assessment of the action which it makes while it is being carried out or after it has been completed.[12]
- The environment Minister must let the public know of any advice he or she gives to the action Minister following any further review or assessment by the Department.[13]

PERs, like draft EISs, must be placed on public exhibition and comments invited. The department may then decide to hold discussions with selected members of the public, including conservation groups.[14]

On the other hand, nothing has been done to facilitate scrutiny of these procedures by the courts and it now seems extremely unlikely that the courts will be prepared to get involved in supervising their operation. Apart from this, there is the problem of obtaining standing to sue, which is very restricted under these provisions. In these two respects, therefore, the Commonwealth legislation still falls considerably short of the equivalent New South Wales provisions found in the Environmental Planning and Assesment Act, 1979. In practice, the operation of the Commonwealth and New South Wales provisions sometimes overlap — the proposal to continue logging of forest for woodchip around Eden on the south coast, is a case in point. In these situations, the requirements of both pieces of legislation must be met and the provisions should complement each other. The Commonwealth Minister can, however, decide not to order the preparation of an EIS or PER if he or she thinks that adequate assessment has been carried out under NSW legislation.[15]

Overlapping powers

The past year has seen further developments in what has now become a recurring phenomenon: new powers to protect the environment being granted to public authorities in fields where other bodies already have legal responsibilities, with little attempt in the legislation being made to clarify the relationship between them. Amendments to the Soil Conservation Act, 1938, made in 1986, are a case in point.

Prior to the Soil Conservation (Further Amendment) Act, 1986, there were provisions in both the Water Act, 1912 and the Soil Conservation Act, 1938 which regulated the

removal of trees in areas which were especially sensitive so far as soil erosion was concerned. The Water Act covered trees within, or within twenty metres of, the bed or bank of all major watercourses and a large number of other streams and lakes. The Soil Conservation Act covered trees on steeply sloping land in catchment areas. Following the amendments, both sets of provisions have been consolidated in the Soil Conservation Act, with the Catchment Areas Protection Board continuing to function as the regulatory authority.[16] However, their potential scope has been increased dramatically. They can now be extended to cover land identified by the Board as "environmentally sensitive or affected or liable to be affected by soil erosion, siltation or land degradation".[17] Environmentally sensitive land can include such areas as arid or semi-arid lands, saline areas, land containing rare or endangered fauna or flora, land containing areas of achaeological or historical interest, land containing bird breeding grounds, wetlands and areas of scenic beauty.[18]

The potential impact of this is dramatic. It is specifically provided that consent for removal of trees under the provisions relating to environmentally sensitive land will be required regardless of the position under other legislation.[19] Th provisions apply to privately owned as well as Crown Land.

We have recently seen increasing efforts to control land clearing under environmental planning instruments made under the Environmental Planning and Assessment Act, 1979, notably SEPP 14 — Coastal Wetlands, but also a number of local environmental plans. The Forestry Commission regulates the clearing of Crown land in the Eastern and Central Divisions[20] and the Western Lands Commission in the Western-Division, through the issue of clearing licences.[21] The provisions allowing the Catchment Areas Protection Board to regulate the removal of trees on land mapped as environmentally sensitive now overlay these other provisions. Their impact will depend on how active in practice the Board is in identifying such land — and, indeed, how active it is allowed to be by its political masters.

This overlay or duplication of powers has some short-term advantages in situations where public bodies were previously dragging their feet when it came to environmental protection, and the new powers have been given to those who are likely to prove more sympathetic and active. But in the long-term this approach can all too frequently lead to certain bodies becoming identified as being concerned with environmental protection, leaving others to abdicate their responsibilities. In addition, where ultimate responsibility is not spelt out in the legislation, political accommodation soon became the order of the day and members of the public are left with no clear indication as to where pressure should be applied.

Another, albeit less substantial, example of duplication of powers is to be found in the area of heritage protection, following amendments to the Heritage Act, 1977 by the Heritage (Amendment) Act, 1987. Permanent conservation orders can now be made so as to cover precincts as well as individual items of the environmental heritage.[22] Prior to this, the method of ensuring long-term protection of precincts containing items of the environmental heritage was through environmental planning instruments. The State Government's policy was to encourage local councils to include conservation provisions in local environmental plans. Now there is a great deal of potential overlap between these two types of regulatory instrument. Apparently this does not indicate a change of heart by the State Government. In practice, it seems that we are likely to find permanent conservation orders and heritage conservation provisions in local environmental plans operating alongside each other as dual systems of project control in particular heritage precincts. A permanent order will not only represent a clear indication that a precinct is of heritage significance for the State, as distinct from being of purely local significance, but also leave with the State Government a power to veto any council decision to give development consent. Again, to appreciate the significance of this amendment we must wait to see how frequently the new powers are exercised. At least here, however, there is no doubt about where ultimate power lies.

My final example is to be found in the Water Administration Act, 1986. Most of the functions of the new Water Corporation relate to water supply rather than water quality. However, it is also given the power to take such measures as it thinks fit for "the protection of water from pollution and the improvement of its quality".[23] Indeed, it has an even wider power to "coordinate the activities of persons with respect to water resources".[24] At the same time, the State Pollution Control Commission, which is responsible to the Minister for Planning and Environment rather than the Water Corporation, has broad powers under section 13 of the State Pollution Control Commission Act, 1970 to direct other public authorities to do anything within their powers which will "contribute to the prevention, control, abatement or mitigation of the pollution of the environment". What may happen is that the Water Corporation will assume responsibility for diffuse agricultural pollution, using land management techniques, leaving the SPCC to concentrate on regulating point source pollution. But the legislation is silent on this. Moreover, however attractive such a division may be in theory, it makes little sense in practice. We already have a situation where most of the point source pollution control in urban areas is carried out by the Metropolitan Water Sewerage and Drainage Board,[25] under the supervision of the SPCC. Under the Water Board Act, 1987, the new Water Board, which will take over these functions, is clearly brought under the control of the Water Corporation rather than the Minister for Planning and Environment.[26] Once again, major decisions will be negotiated by politicians behind closed doors.

Conclusion

New South Wales environmental law is gradually maturing. The Government seems now to have accepted the principle that all public bodies whose activities impinge upon the environment should have legal obligations to protect it in the form of statutory provisions setting out their objectives. Environmental protection is not something which can be hived off to specialist agencies

such as the SPCC. On the other hand, primarily for historical reasons, the hierarchy of powers and responsibilities amongst these bodies is often legally unclear and administratively unsatisfactory. In this situation, much more needs to be done to make these bodies publicly accountable for their activities. It is unclear whether broad standing provisions which allow access to the courts are a complete answer. Even where they exist, there are still tremendous financial and evidentiary obstacles standing in the way of effective judicial supervision. What may well prove more helpful in the long run are provisions which require public bodies to provide information about their activities, such as those contained in the amendments to the Commonwealth environmental impact assessment legislation, discussed above. With such information, individuals and groups can play a much more effective role at the political level. And it is here, not in the Land and Environment Court, that the major decisions will continue to be made.

ENDNOTES

1. Water Administration Act, 1986, s.4; Water Board Act, 1987, s.4; Water Supply Authorities Act, 1987, s.4.
2. Water Act, 1912, Parts II and V.
3. Water (Amendment) Act, 1981.
4. Heritage (Amendment) Act, 1987, Schedule 4, clause 14.
5. Heritage (Amendment) Act, 1987, Schedule 1.
6. Environment Protection (Impact of Proposals) Amendment Act, 197 s.3.
7. Ibid., s.4.
8. Administrative Procedures, cl. 3.1.5.
9. Ibid., cl. 3.5.2.
10. Ibid, cl. 9.1.4.
11. Ibid., cl. 9.3.2.
12. Ibid., cl. 10.1.3.
13. Ibid., cl. 10.2.2.
14. Ibid., cl. 6.6.1.
15. Ibid., cl. 3.1.2.
16. Soil Conservation (Further Amendment) Act, 1986, Schedule 1, cll.3-6.
17. Soil Conservation Act, 1983, s.21B(1)(c).
18. Ibid., s.21B(6).
19. Ibid., s.21A.
20. Forestry Act, 1919, s.27G.
21. Western Lands Act, 1901, s.18DB.
22. Heritage (Amendment) Act, 1987, Schedule 1, cl.9.
23. Water Administration Act, 1986, s.12(3)(d).
24. Ibid., s.11(4)(i).
25. By-Law 15 made under the Metropolitan Water, Sewerage and Drainage Act, 1924.
26. Water Board Act, 1987, s.10(1)(b).