IMPACT

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"An Introduction to the Wilderness Act 1987 (N.S.W)

by Brian J. Preston
of the N.S.W. Bar

Late in 1987 the N.S.W. Government introduced and passed without amendment the Wilderness Act 1987. In so doing, it became the first government in Australia to have a distinct Wilderness Act. This article will introduce the reader to the Act and explain its major provisions.

OVERVIEW

Starting on a positive note, *the Wilderness Act* is a bold new step for Australian governments and hopefully will start a trend of greater awareness and care for our diminishing wilderness areas. By employing a separate price of legislation to embody the provisions relating to wilderness, it brings the concept of wilderness into focus in the public's mind. This is referred to below. However, whilst the idea and the initiative are to be commended, the Act which has been passed suffers from a number of drawbacks which are not fatal but nevertheless are undesirable and could have been avoided.

Firstly, the *Wilderness Act* is a compromise piece of legislation. The Government felt constrained from the start by the compromise reached in the Wilderness Working Group's report, 1986 and by the further concessions given by Mr Unsworth to mollify private landowners and resource lobby groups who were concerned at the proposals in that report.

The result is a strange dichotomy between private and public lands and a perceptible lack of any statutory "action-forcing" provisions. Notwithstanding the open-standing provisions allowing public enforcement of the Act, the Act runs the risk of being a paper tiger if the Government of the day lacks the political will to implement its provisions. This is because the provisions, with one exception, do not require the Government to ever do anything. There is no statutory timetable for identifying wilderness; no requirement for declaration of an area as a wilderness area after the Director of the National Parks and Wildlife Service has identified it as such; no requirement to transfer the identified areas to National Parks and Wildlife Service control; and no requirement to protect an area identified as wilderness pending it being declared a wilderness area.

Hence, for all the Government's rhetoric about "protecting" wilderness, there is little in the *Wilderness Act* to actually require wilderness to be protected.

One may well ask: Are we any better off? If the Government has, as it says it has, the political will, could it not simply have used existing legislation such as the *National Parks and Wildlife Act* or *Heritage Act*? Notwithstanding the drawbacks of the *Wilderness Act*, I would still venture to suggest that having a Wilderness Act as such is preferable to using existing Acts such as the *National Parks and Wildlife Act* and *Heritage Act*. First, those Acts would have had to been amended to allow for the types of provisions the Government wanted. Legislation was therefore required under either route. If left unamended these Acts would have done little to motivate protection of wilderness. After all, the *Heritage Act* and *National Parks and Wildlife Act* have been on the statute books for over a decade and no real attempt has been made to protect wilderness by way of these Acts. The past failure to act was one of the principal motivating factors in the conservation lobby's push for wilderness legislation. Second, the concept of a separate Wilderness Act and a system of wilderness areas throughout the State has, in my opinion, important publicity and educational (consciousness-raising) value. This value would not be as significant if the concept of wilderness was subsumed by traditional heritage and national park legislation.

THE LEGISLATIVE SCHEME:

The scheme of the Act is as follows:

(a) Identify areas of land as wilderness;
(b) Negotiate with private landowners and public authorities for protection agreements for identified lands;
(c) If the negotiations result in agreements, declare the identified lands as wilderness areas;
(d) Manage the wilderness areas in accordance with the agreements and management principles in s.9 of the Act;
(e) Provide back-up protection for wilderness in the form of interim protection orders;
(f) Prevent revocation of declaration unless notice is given to each House of Parliament (in the case of private lands) or an Act of Parliament is passed (in the case of public lands);
(g) Allow public enforcement to remedy or restrain breaches of the Act;
(h) Require the Director of National Parks and Wildlife Service to report annually on the status of wilderness in New South Wales; and
(i) Provide a mechanism for inter-departmental dispute resolution by the Premier.

IDENTIFICATION OF WILDERNESS

The task of identifying areas of land that are wilderness or are suitable to be declared as wilderness areas falls on the Director of the National Parks and Wildlife Service (s.5(1)).

"Wilderness" as such is not defined. Rather the Act prohibits the Director from identifying land as wilderness unless the Director is of the opinion that –

"(a) the area is, together with its plant and animal communities, in a state that has not been substantially modified by humans and their works or is capable of being restored to such a state;

(b) The area is of sufficent size to make its maintenance in such a state feasible; and

(c) the area is capable of providing opportunities for solitude and appropriate self-reliant recreation." (s.6(1)).

In forming an opinion as to whether an area should be identified as wilderness, the Director may consider any relevant circumstance including;

"(a) the period of time within which the area of land could reasonably be restored to a substantially unmodified state;

(b) whether, despite development which would otherwise render it unsuitable, the area of land is needed for the management of an existing or proposed wilderness area; and

(c) any written representations received by the Director from any person (including a statutory authority) as to whether the area of land should be identified as wilderness." (s.6(2)).

It is clear that a wilderness area can, therefore, include areas of land which would not strictly fall within the traditional definition of wilderness. These areas might include buffer strips around a wilderness core or strips along a major waterway flowing into a wilderness area.

In the Second Reading Speech, the Unsworth Government committed itself to investigating at least two potential wilderness areas outside of the national park system per annum for as long as such areas exist. Whilst this shows commendable commitment for the Unsworth Government at the current time, it would have been preferable for that commitment to have been codified in the Act itself so that no matter which Government is in power for the next decade or two, the identification process would be required to continue.

In addition to the Director choosing areas to review, the Act provides that any person, body or organisation (including a statutory authority) whether or not that person body or organisation is the owner of the land concerned may submit to the Director a written proposal that an area of land be identified as wilderness, declared to be a wilderness area or added to an existing area (s.7(1) and (2)).

On receipt of any such proposal by a person who is not the owner of the land concerned, the Director is required to notify the owner of the area (s.7(3)). This requirement of notification of the owner for a public proposal stands in contrast to the complete absence of a notification requirement for proposals generated internally by the Director. Hence, an owner will only know that his or her land is being reviewed as to its wilderness qualities if there is a public proposal or if the Director chooses, in his discretion, to so notify the owner. The Director is required to consider a public proposal and advise the Minister within a period of 2 years from the date fo receiving the proposal (s.7(4)).

NEGOTIATION WITH LANDOWNERS

A precondition to declaration of an area of land as a wilderness area is that a wilderness protection agreement (for publicly owned lands) or a conservation agreement (for private lands) should have been effected.

WILDERNESS PROTECTION AGREEMENTS

Wilderness protection agreements can apply to land owned by the Crown or a statutory authority which means a government department, an administrative office, a city, municipal, shire or county council and any other body constituted by or under an Act (s.10(1), 2(1)). Aboriginal Land Councils could, for example enter a wilderness protection agreement.

Where the land is subject to a lease, residential tenancy agreement, mortgage, charge or positive covenant, the written consent of the affected person must be obtained before entering a wilderness protection agreement (s.10(2)).

A wilderness protection agreement cannot be made, however, in respect of land held under *Crown Lands Consolidation Act* 1913, the *Closer Settlement Acts* or the *Western Lands Act* 1901 or any Act replacing them unless that land is held by a statutory authority (s.10(4)). Special provisions apply to lands under these Acts (see ss.20 and 26). Where land has been identified as wilderness and notice of that identification has been given to the Minister administering those Acts, then that Minister cannot:–

(a) approve any change in use or

(b) approve the conversion, sale or disposal,

of land without consulting the Minister administering the *Wilderness Act* (s.20). This provision applies notwithstanding anything in any of the other Acts (s.26)

Where a wilderness protection agreement can be made under the Act, then the relevant statutory authority or Minister is given power to so enter the agreement notwithstanding any conflicting provisions in any other Act whenever made (s.10(3)).

After a draft agreement has been prepared, the Act provides for public comment before the Minister administering the Act can enter the agreement (s.11(1)). Any person may make submissions about the draft agreement during the period of public exhibition (s.11(3)). The Minister is required to consider these submissions as well as submissions by the National Parks and Wildlife Advisory Council before entering the agreement (s.11(4)).

The Act sets out the types of matters which a wilderness protection agreement may contain. These are set out in s.12(1) and (2). There is no necessity for the agreement to actually contain these matters. The terms are left, with one qualification, to the complete discretion of the parties to the agreement. The qualification is that s.12(3) requires that the terms of the agreement are not to be inconsis-

tent with the principles set out in s.9 for the management of wilderness areas. Section 9 provides that:

"A wilderness area shall be managed so as–

(a) to restore (if applicable) and to protect the unmodified state of the area and its plant and animal communities:
(b) to preserve the capacity of the area to evolve in the absence of significant human interference; and
(c) to permit opportunities for solitude and appropriate self-reliant recreation."

The wilderness protection agreement takes effect from a day, or on the happening of an event, specified in the agreement (s.13)1)). (Query whether the "event" can be the declaration under s.8(1) given that the prior existence of an agreement is a precondition to the Minister being able to declare an area of land a wilderness area). The agreement may be varied by a subsequent agreement between the parties to the agreement. However, before entering any such subsequent agreement the Minister must again comply with the procedures for public exhibition etc. in s.11.(s.13(2)). The agreement continues to have effect until the declaration of the land as a wilderness is revoked (s.13(3)).

The public can find out which areas of land are subject to wilderness protection agreements by inspecting the register kept by the Director (s.14(1) and (2)).

CONSERVATION AGREEMENTS

In stark contrast to the procedures applying to the entering of wilderness protection agreements, the procedures for entering conservation agreements are minimal. A conservation agreement bears the same meaning as it has under the *National Parks and Wildlife Act* 1974 (s.2(1)). The Minister can enter such an agreement with a private landowner whenever (a) the area of land is identified by the Director as wilderness and (b) the landowner consents. (s.16(1)).

The terms of the agreement are again left to the parties to negotiate. Some matters are suggested in s.16(2) but for some curious reason the matters enumerated for a conservation agreement are much more limited than those listed for a wilderness protection agreement. Again, the parties do not have an entirely free hand but are required to ensure that the terms of their conservation agreement are not inconsistent with the principles set out in s.9 for the management of wilderness areas (s.16(3)).

There is no requirement for public notification or comment on a draft of the conservation agreement. There is no statutory provision governing amendment or re-advertising of any such amendment. There is also no requirement that the Director keep a register of conservation agreements which could be inspected by the public. All in all, the public need never know anything about conservation agreements!

DECLARATION OF WILDERNESS AREA

Once a wilderness protection agreement or conservation agreement is effected, the Minister is required to declare, by notification published in the Gazette, the area the subject of the agreement to be a wilderness area (s.8(1)). This declaration must be published not later than 28 days after the agreement takes effect or at such later time as may be provided by the agreement (s.8(2)). A declaration does not affect any existing interest in the area concerned (s.8(5),(6)).

Section 59 of the *National Parks and Wildlife Act* 1974 dealing with declaration of the whole or parts of a national park as a wilderness area has also been revamped to bring it into line with the scheme of the *Wilderness Act.* (see Sch. 1 (7) of *Miscellaneous Acts (Wilderness) Amendment Act 1987).*

MANAGEMENT OF WILDERNESS AREAS

Wilderness areas are required to be managed:
1. in accordance with the relevant wilderness protection agreement or conservation agreement;
2. in accordance with the principles for the management of a wilderness area in s.9; and
3. in respect of land subject to a wilderness protection agreement only, in accordance with any plan of management which may have been adopted.

In relation to the last mentioned matter, it needs to be noted that plans of management need not be prepared for private lands subject to a conservation agreement. Plans of management only need be prepared for areas of land subject to or proposed to be made subject to a wilderness protection agreement (s.17(1)). These plans must not be inconsistent with the principles of management is s.9.(s.17(2)).

Although there is no opportunity for the public to participate in the preparation and consideration of a draft plan of management, some external scrutiny is provided by the National Parks and Wildlife Advisory Council constituted under the *National Parks and Wildlife Act* 1974.(s.18(1).(2)). The Minister is required to consider the Council's comments before adopting the plan (s.18(3)). The plan can be amended or cancelled or substituted with the consent of the other party to the wilderness protection agreement (s.18(5)). Any alteration must also be consistent with the s.9 principles (s.18(6)). The Minister, Director and other party to the wilderness protection agreement are required to carry out and give effect to the plan once adopted (s.18(7)).

Plans of management made under the *National Parks and Wildlife Act* 1974 in respect of a wilderness area are also required to be not inconsistent with the s.9 principles (s.19).

Wilderness areas are also protected to a limited degree from the actions of statutory authorities. Statutory authorities are required, before carrying out a development in a wilderness area subject to a wilderness protection agreement or conservation agreement, to:–

1. give written notice of the proposed development to the Minister and the other party (or his or her successor) to the agreement; and
2. obtain the Minister's written consent to the proposed development (s.15(1)).

The Minister may consent to the development only if:

(a) he or she is of the opinion that the proposed development will not adversely affect the area; and

(b) in the case of an area subject to a wilderness protection agreement, the Minister for the other party has consented to the development (s.15(2)).

An example of the type of development this section would seem to cover is the construction of a power transmission line by the Electricity Commission through a wilderness area. The section does not, however, apply to all statutory authorities. The Soil Conservation Service and statutory authorities carrying out development in accordance with the terms of a wilderness protection agreement do not fall within the ambit of the section. (s.15(3)).

INTERIM PROTECTION ORDERS

As has been pointed out, the *Wilderness Act* does not provide or require any statutory protection of areas whilst they are being reviewed by the Director either on his own motion or as a result of a public proposal, or whilst wilderness protection agreements or conservation agreements are being negotiated or even after the area has been declared to be a wilderness area (although this is less serious than the other time periods since the agreement and s.9 should go a long way to protecting the area.)

Protection of the areas is left, largely, to the discretion of the parties. This may work where all parties concerned are well-intentioned towards protection and actually carry out their intentions but there is always a risk that this will not occur. To provide for this eventuality, the legislature has amended the *National Parks and Wildlife Act* 1974 to empower the Minister to make interim protection orders. (see Sch. 1(14) of *Miscellaneous Acts (Wilderness) Amendment Act 1987*). These orders can be made, not only in respect of proposed or declared wilderness areas, but also other areas of land meeting the criteria in section 91A. This section provides that:–

> "The Director may recommend to the Minister the making of an interim protection order in respect of an area of land —
>
> (a) which has, in the Directors' opinion, natural scientific or cultural significance;
>
> (b) on which the Director intends to exercise any of the Director's powers, authorities, duties or functions under this Act relating to fauna or native plants."

The Minister makes the order after considering the s.91A recommendation (s.91B(1)). The order can contain terms (s.91B(3). It takes effect on the date of publication in the Gazette or such later date is specified in the order (s.91B(2)) and continues to have effect for a period up to a maximum of 12 months (s.91D(1)). It ceases to have effect when revoked or when the area is dedicated under the *National Parks & Wildlife Act* (s.91D(2)).

Unlike interim conservation orders under the *Heritage Act* 1977, only one interim protection order may be imposed in respect of an area of land while it is owned by the same person. This presumably will motivate the Government to resume the land, if it is privately held, or to transfer the land to the National Parks & Wildlife Service, if public land, before the period of the order expires.

Notice need not be given to a person affected by the order before making the order (s.91C). However, the Minister is required to give notice of the order as soon as practicable after its publication in the Gazette, to the owner, the National Parks and Wildlife Advisory Council, the relevant local council and any other person the Minister thinks fit (s.91F).

Breach of an interim protection order is a criminal offence (s.91G). The breach can also ground civl proceedings brought by any person under the new standing provision (see below).

The owner or occupier of the land affected by the interim protection order can appeal to the Land and Environment Court (s.91H(1)). The Court on deciding the apeal may have regard to —

> "(a) any hardship caused to the owner or occupier by the imposition of the order or any of its terms; and
>
> (b) the purposes of the order" (s.91H(3)).

The Court has all the functions and discretions of the Minister under Part VIA of the *National Parks & Wildlife Act* and may make such order as it thinks fit (s.91H(4)). The decision of the Court on the appeal is final and shall be given effect to as if it were the decision of the Minister (s.91H(5)). Curiously, the appeal has been placed in Class 4 of the Court's jurisdiction. It may well be, if the usual practice in Class 4 is followed, that the unsuccessful party to the appeal will have to pay the successful party's costs (See Sch.2 to *Miscellaneous Acts (Wilderness) Amendment Act* 1987 which inserts a new paragraph, s.20(1) (cf) in the *Land and Environment Court Act*. 1979.

The Director is required to keep a register of copies of interim protection orders, which register can be inspected by the public (s.91I)

REVOCATION

A declaration relating to an area of land subject to a wilderness protection agreement can only be revoked by an Act of Parliament (s.8(3)). A lesser requirement applies to privately owned wilderness areas. A declaration relating to a conservation area can be revoked by a notification published in the Gazette provided the notification is laid before each House of Parliament within the prescribed time *after* its publication (s.8(4)).

PUBLIC ENFORCEMENT

Continuing the trend established by the *Environmental Planning and Assessment Act Heritage Act,* and *Environmentally Hazardous Chemicals Act,* both the *Wilderness Act* (s.27) and the *National Parks and Wildlife Act* (s.176A) now provide for citizen enforcement of breaches of the respective Acts. They are essentially identical to s.123, *Environmental Planning and Assessment Act.* Such proceedings fall within Class 4 of the Court's jurisdiction (s.20(1)(cg), (ch) of *Land and Environment Court Act).*

ANNUAL REPORT ON STATUS OF WILDERNESS

Perhaps the best way that the ordinary member of the public is going to find out about the status of wilderness in New South Wales is through the Director's annual report (s.24).

DISPUTE RESOLUTION BY PREMIER

The *Wilderness Act* also provides for a mechanism of inter-departmental dispute resolution by the Premier. Where a dispute arises between the Minister administering the *Wilderness Act* and another minister or a statutory authority, one of the parties to the dispute may refer the dispute to the Premier for settlement. (s.21(1)). The dispute may be in relation to the negotiation of a proposed wilderness protection agreement or the carrying out of the provisions of a wilderness protection agreement. It may be concerning leases of Crown Lands or Western Lands. It may be about a proposal to carry out development in a wilderness area or it may be about any other matter arising out of the Act (s.21(1)(a)-(d)).

The Premier can do one of two things before settling the dispute:

1. He can appoint a Commissioner of Inquiry to hold an inquiry and make a report to the Premier; or
2. He can hold an inquiry into the dispute (s.21(2)).

The first would seem appropriate for the more major disputes whilst the latter would apply to minor disputes. After completing the inquiry and considering any report, the Premier can make such order with respect to the dispute, having regard to the public interest and to the circumstances of the case, as the Premier thinks fit (s.21(3)). He can also direct payment of any costs or expenses of or incidental to the holding of an inquiry (s.21(4)). This may permit the Government to pay the costs and expenses of intervenors such as the relevant conservation groups concerned with wilderness preservation for their attendance and assistance at the inquiry.

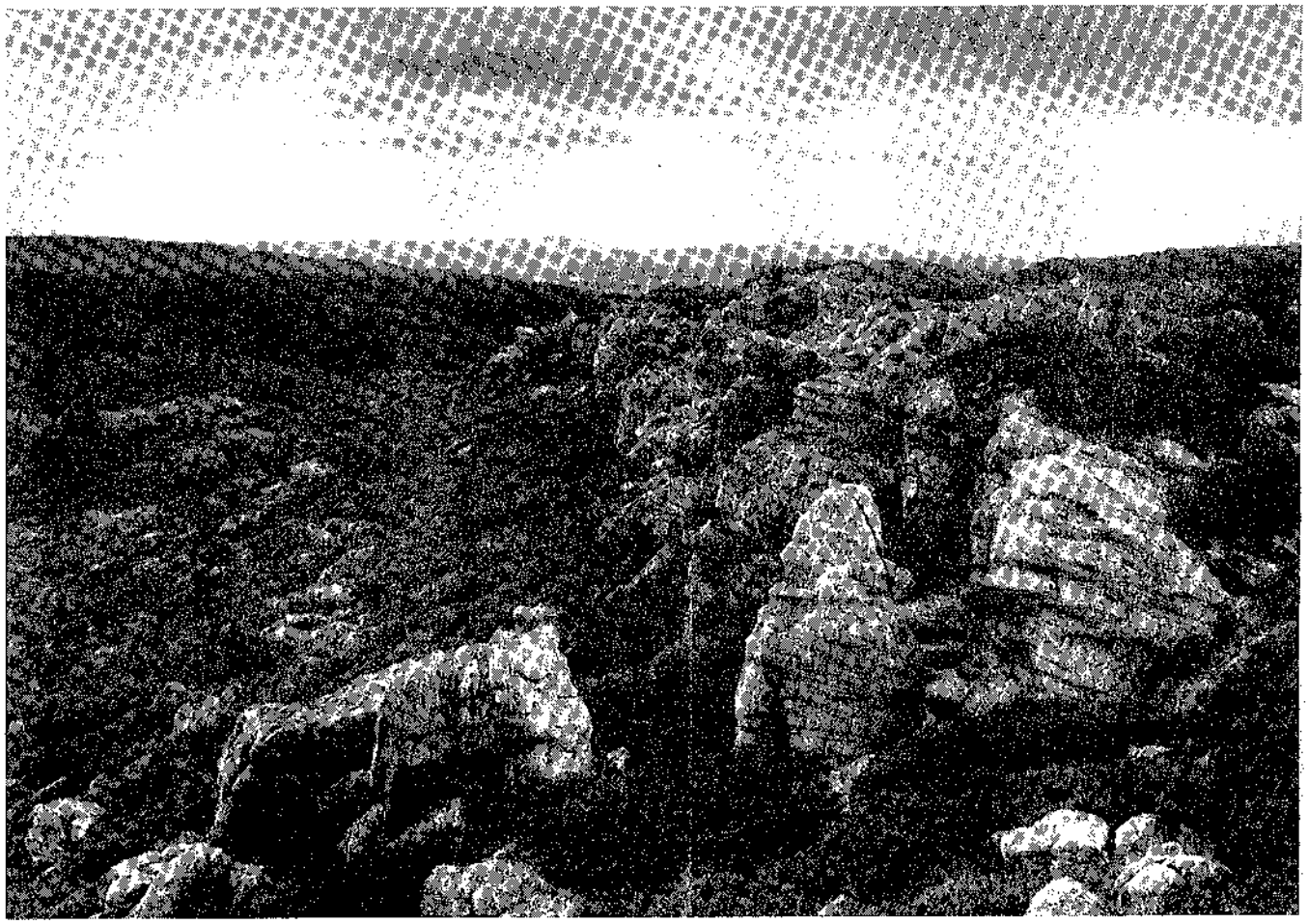
Once the Premier has made an order, the Minister or statutory authority affected must comply with the order notwithstanding any other provision in any other Act (s.21(5)).

OTHER PROVISIONS

The *Wilderness Act* 1987 and the *Miscellaneous Acts (Wilderness) Amendment Act* 1987 contain a number of other changes, some of which are more important than others. One of the more important ones is the provision in the *National Parks & Wildlife Act* for stretches of rivers which lie within a national park to be declared a wild and scenic river (ss.5(1),61,61A).

Another change has been to insert references to wilderness in the *Environmental Planning and Assessment Act*, 1979. Prior consent under the *Wilderness Act* is now required (a) before a development application can be made in respect of land that is, or is part of, a wilderness area (s.77(3A)) or (b) before a determining authority can grant an approval for an activity under Part V (s.112(1A)). The effect of a development on any wilderness area in the locality is now a head of consideration under s.90 by a consent authority for developments under Part IV (s.90(1)(C1) and under s.111 by a determining authority for activities under Part V (s.111(3)).

In his Second Reading Speech, Mr. Carr also said that he is considering a proposal to ensure further protection of wilderness areas by classifying development likely to affect wilderness as "designated development" for the purposes of Part IV or a "prescribed activity" for the purposes of Part V of the *Environmental Planning and Assessment Act*. (p.9).



"Some Observations on Section 111 Environmental Planning and Assessment Act 1979"

by John G. Taberner, Solicitor
of the Supreme Court of New South Wales

The Environmental Planning and Assessment Act *1979 (N.S.W.) requires determining authorities to consider the environmental impact of those activities which fall under Part V of the Act prior to carrying out those activities. This asessment may need to be done formally by way of an environmental impact statement or less formally by in-house review. The concept of environmental impact assessment derives from the* National Environmental Policy Act *1969 (US). It is particularly instructive, therefore, to keep watch on developments in the case-law in the United States to see what changes may be likely to occur in New South Wales. In this article, John Taberner looks at the process of tiering environmental assessments. This process has been judicially approved in the United States and now also by the Court of Appeal in New South Wales.*

The concept of environmental impact assessment derives from the *National Environmental Policy Act* 1969 (US). It is particularly instructive, therefore, to keep watch on developments in the case-law in the United States to see what changes may be likely to occur in New South Wales. In this article, John Taberner looks at the process of tiering environmental assessments. This process has been judicially approved in the United States and now also by the Court of Appeal in New South Wales.

A. GENERAL

Section 111 of the Environmental Planning and Assessment Act 1979 ("EPAA") requires a determining authority, in its consideration of an "activity" as defined in Section 110 of EPAA, to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.

The meaning of Section 111 EPAA has been considered in several principal cases in the Land and Environment Court. In *F. Hannan* v. *Electricity Commission of New South Wales* (51 LGRA 353, 364-5) and *Prineas* v. *Forestry Commission of New South Wales* (49 LGRA 402, 406 and 412) Cripps J., and in *Newton* v. *Wyong Shire Council* (unreported, 6/9/83, No. 40135/82, 103-4) McClelland J., made statements in relation to section 111 the effect of which may be summarised as follows:

(a) Section 111 of EPAA is mandatory.
(b) Regulation 56 of EPAA "is directed to the performance of" the obligation contained in section 111.
(c) The determining authority must look to an activity's purpose when deciding whether or not the activity would affect the environment within the meaning of section 111.
(d) Section 111 requires an ultimate decision based on identification and investigation of all potential significant environmental consequences whether or not examined in detail in an EIS.
(e) "The purposes of attaining the objects of" EPAA are not served by placing the consideration of an activity by a determining authority within a straitjacket.

B. THE POLICY OF SECTION 111

Those principal cases left unresolved the following question with section 111: whether a decision by a determining authority to allow the identification and investigation of potentially significant particular environmental consequences of an activity as they arise fails to meet the duty of consideration "to the fullest extent possible". Typically, such a question arises when a determining authority decides to approve an activity on the basis of an "initial" or "concept" EIS and to provide pursuant to its approval for subsequent "reviews of environmental factors" in respect of specific issues as they arise.

The question arises because section 111 does not specify any particular administrative framework in which its mandate is to be carried out other than that it be carried out by the determining authority "in its consideration of [the] activity". Subject to that, the section contains no temporal mandates in or qualifications on the requirement of consideration "to the fullest extent possible".

In *Prineas* v. *Forestry Commission of New South Wales* ([1984] 53 LGRA 160, at 164), Hutley J.A. said, in respect of the obligation under section 112 EPAA, that:

> "The limit of responsibility for the preparation of an EIS is governed by a determination of what is a 'proposed activity' . . . As the impact of developmental work may be of indefinite duration, and afford opportunities for further activity, no planner could prepare a statement which exhausts the possibilities of all development. The proponent must have the privilege of selecting what he proposes to develop. It may be an issue for consideration where the EIS fails to give a full account of likely environmental impacts and it may be submitted that the proposal, as formulated, is a sham and a mere cover for a quite different type of development but, barring such a challenge, it does not seem to me that the fact that what is proposed could be seen as, possibly, part of a wider proposal is a relevant challenge to the EIS."

Similar considerations have, arguably, to bear upon the construction of section 111. The determining authority must have the privilege of selecting the manner in which it will give consideration "to the fullest extent possible" of a particular activity, having proper regard to the purposes of that section and barring the challenge that the activity, as formulated, is a sham or a mere cover for a quite different type of development.

Such a construction of section 111 would accord with the interpretation given in the United States to the similar provisions of section 102(1) of the National Environmental Policy Act 1969 (US) ("NEPA") which require that, "to the fullest extent possible", the "public laws of the United States shall be interpreted and administered in accordance with the policies set forth in section 101" of that Act.

The meaning of section 102(1) of NEPA was considered by the United States Supreme Court in *Vermont Yankee Nuclear Power Corporation* v. *NRDC* [1978] 435 US 519). There it was held that section 102(1) "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action" and that the role of a Court in reviewing compliance with section 102(1) is to "ensure a fully informed and well considered decision" by the agency. Provided that that standard is met by the agency, a Court should set aside the agency's decisions only for "substantial procedural or substantive reasons (and) not simply because the Court is unhappy with the result reached" (at 555). In *Strycker's Bay Neighbourhood Council* v. *Karlen* [1980] 444 US 223, at 227), the Supreme Court per curiam reiterated its decision in *Vermont Yankee Nuclear Power Corporation* v. *NRDC* saying that "NEPA,, while establishing significant substantive goals for the Nation, imposes upon agencies duties that are essentially procedural. As we stressed in (*Vermont Yankee*), NEPA was designed "to ensure a fully informed and well considered decision", but not necessarily "a decision the Judges of the Court of Appeals or of this Court would have reached had they been members of the decision-making unit of the agency"." Most recently, in *Baltimore Gas and Electric Company* v. *NRDC* ([1983] 76 L Ed 2d 437), the Supreme Court expressed the same words and concepts.

US Courts have not seen that the duties under section 102(1) of NEPA, so formulated, hamper an agency from making its own administrative arrangements to discharge it.

In *Baltimore Gas and Electric Company* v. *NRDC* ([1983] 76 L Ed 2d 437, at 449), it was held by the US Supreme Court that, Section 102(1) of NEPA "does not require agencies to adopt any particular decision making structure" and that matters of "administrative efficiency and consistency of decision", consistent with the duty imposed by Section 102(1) and with the requirement imposed by 5 USC 706(2) (A) ("The Administrative Procedure Act") that a reviewing Court set aside agency action which is "arbitrary or capricious", are to be left to the discretion of the agency.

The dispute in that case concerned the adoption by the Nuclear Regulatory Commission of a series of generic rules directed at regional licensing boards for the evaluation of the environmental effects of a proposed nuclear power plant's fuel cycle. It was held by the US Supreme Court that "the generic method chosen by the agency is clearly an appropriate method of (complying with) NEPA. The environmental effects of much of the fuel cycle are not plant specific, for any plant, regardless of its particular attributes, will create additional wastes that must be stored in a common long term repository. Administrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings . . . The Court of Appeals recognised that the Commission has discretion to evaluate generically the environmental effects of the fuel cycle and require that these values be 'plugged into' individual licensing decisions . . . The Commission's decision . . . would violate NEPA . . . only if the Commission acted arbitrarily and capriciously in deciding generically that (the rule would not apply) to any individual licensing decision."

The Supreme Court in *Baltimore Gas and Electric Co.* v. *Natural Resources Defence Council* approved a process of agency decision making which has come to be known as "tiering". The particular aspect of the approach which arose in that case was the application of a generic rule to decisions (as they arose) for individual licenses. "Tiering" also properly describes a widespread and typical practice of US agencies to prepare a "program EIS" and to state that subsequent, site specific EIS's will be prepared as matters ripen for review.

The practice of preparing a "program EIS" and later site specific EIS's is now encouraged by Regulations 1502.20 and 1508.28 of the Council on Environmental Quality [40 CFR 1502.20, 1508.28]. A unanimous Supreme Court in *Andrus* v. *Sierra Club* ([1979] 442 US 347) declared that "CEQ's interpretation of NEPA is entitled to substantial deference". By Regulation 1502.20:

> "agencies are encouraged to tier their environmental impact statements . . . to focus on the actual issues ripe for decison at each level of environmental review".

By Regulation 1508.28 tiering is described as:

> "the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses (such as regional or . . . site specific statements)";

and is said to be appropriate:

> "when the sequence of statements or analyses is . . . (b) from an environmental impact statement on a specific action at an early stage (such as need and site selection) to . . . a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps (the agency) to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe".

US Courts have not only endorsed the concept of "tiering" but have also begun to formulate principles for when the step from general to specific "tiers" is to be made. A number of cases, the leading one among them being *California* v. *Block* ([1982] 690 F.2d 753), state that "when a programmatic EIS has already been prepared . . . site specific impacts need not be fully evaluated until a 'critical decision' has been made to act on site development . . . this threshold is reached when, as a practical matter, the agency proposes to make an 'irreversible and irretrievable commitment of the availability of resources' to a project at a particular site".

The concept of "tiering", and the encouragement given to it by US Courts and the Regulations of the Council on Environmental Quality, arise in the view held by the US Supreme Court that section 102(1) of NEPA, notwithstanding its requirement of consideration "to the fullest extent possible" of environmental matters, does not require agencies to adopt any particular decision making structure.

In light of:

(a) the fact that section 111 of EPAA directs a determining authority to "examine and take into account" certain matters without specifying any particular administrative framework by which that should occur other than that it occur "in [the determining authority's] consideration of the activity"; and

(b) the view of Cripps J. in *Prineas* v. *Forestry Commission of New South Wales* (49 LGRA 402, at 417) that "an environmental impact statement is not a decision making end in itself — it is a means to a decision making end", and the view of McClelland J. in *Newton and The Council of the Shire or Wyong* (unreported, at 103) that, if it were otherwise "section 111 would hav no place in the Act"; and

(c) the view of McClelland J. in *Newton's* Case that section 111 requires the "identification and investigation of all potential significant environmental consequences whether or not examined in detail in the EIS", and that section 111 is not be read as requiring "straitjacketed" consideration;

the principal cases referred to allow the agrument that section 111 of EPAA, like section 102(1) of NEPA, does not require a determining authority to adopt any particular decision making structure and that matters of "administrative efficiency and consistency of decision", consistent with the duty imposed by section 111, are to be left to the discretion of the determining authority.

They allow it to be said, in other words, that a decision by a determining authority to approve an activity on the basis of an "initial" or "concept" EIS and to provide pursuant to its approval for the identification and investigation of potentially significant particular environmental consequences of the activity as they arise does not necessarily fail to meet the duty "to consider to the fullest extent possible."

C. GUTHEGA DEVELOPMENTS PTY. LIMITED V. THE MINISTER ADMINISTERING THE NATIONAL PARKS AND WILDLIFE ACT

Such a decision by a determining authority fell for consideration in *Guthega Developments Pty. Limited v. The Minister Administering The National Parks and Wildlife Act* (unreported, 5/11/85, No. 40110 of 1985 in the Land and Environment Court, 23/12/86, No. 443 of 1985 in the Court of Appeal, (1986) 61 LGRA 401).

The case concerned the grant by the Minister administering the National Parks and Wildlife Act of a lease for the construction of a part of the "Skitube" under the Australian Alps on terms which (inter alia) required evaluation of particular aspects of construction before their implementation.

In the Land and Environment Court, Cripps J. (at 47) characterised the effect of section 111 of EPAA as follows:

> "The expression 'to the fullest extent possible' must be read as incorporating a concept of reasonableness and practicality. The purpose of s.111 is to impose on determining authorities an obligation to consider to the fullest extent reasonably practicable, matters likely to affect the environment. I reject the submission that, in order for the Minister properly to have 'considered to the fullest extent possible' all matters affecting or likely to effect the environment, he was required to be aware of every matter every expert believed relevant. As I have said (at page 45), he was relevantly aware of all the material contained in the hundreds of pages of exhibits including the submissions of the objectors which, in turn, included the matters raised in these proceedings. I accept the submission that s.111 is an important provision in the Environmental Planning and Assessment Act and that the obligations imposed by it are legally enforceable and are capable of being carried out. But those obligations must, in their application, be those that are reasonable and practicable in the circumstances".

In the Court of Appeal, Samuels J.A., with whom Mahoney and Priestley J.J.A. concurred, agreed with Cripps J.'s characterisation of Section 111 and went further to remark as follows ((1986) 61 LGRA 401 at 415-416):

> "(Section) 111 does not require its provisions to be carried out before a final decision to undertaken an activity is made or, indeed, at any other specific time. It is to be applied by a determining authority 'in its consideration of an activity'. It may therefore be designed, in a case such as the present, to entail a continuous monitoring of the development . . . The decision-making sequence which section 111 may be designed to implement is well described by the United States Court of Appeals for the Ninth Circuit in the *State of California* v. *Block* ([1982] 690 F 2d 753) . . . where the court observed [at 761]: 'when a programmatic EIS has already been prepared, we have held that site-specific impacts need not be fully evaluated until a 'critical decision' has been made to act on site development'. And, a little earlier: "The critical enquiry in considering the adequacy of an EIS prepared for a large scale, multi step project, is not whether the project's site-specific impact should be evaluated in detail, but when such detailed evaluation should occur'. . . . It may be proper compliance with (section 111) for a determining authority to satisfy itself that approval of a development proposal involves the subsequent undertaking of what may be called site-specific assessments. . . . It is worth noting that in the report by the determining authority the following appears: 'The EIS was aimed at the general concept of the proposal rather than the detail of the site-specific impact of individual structures and activities. It was stated that if approval to proceed with the development is given, then the developer would be required to prepare detailed designs accompanied by a 'Review of Environmental Factors' . . . for each development aspect. If the Review of Environmental Factors indicated that a significant environmental impact may occur then an EIS would need to be prepared on that aspect'."

From these judgments its appears that a decision by a determining authority to approve an activity on the basis of an "initial" or "concept" EIS and to provide pursuant to its approval for the identification and investigation of potentially significant particular environmental consequences of the activity as they arise does not fail to meet the duties imposed on the determining authority by section 111 of EPAA.

It remains to be decided whether section 111 of EPAA *requires* such a decision, particularly (for example) in the case of a large scale activity or an activity in an environmentally sensitive area.

LEGAL AID IN ENVIRONMENTAL MATTERS

By
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New South Wales is unique in making provision, in a comprehensive and articulated way, for the grant of legal aid in environmental matters. The author sets out the relevant statutory provision and the guidelines adopted by the Commission to assist it in determining legal aid applications. Where the grant is sought not on the ground that the applicant satisfies the means test but rather where there is a substantial public interest at stake, the Commission is assisted in this task by an Environmental Consultative Committee. The author concludes with a brief review of the application of the guidelines in cases to date.

In July, 1985, the Legal Aid Commission resolved to create an Environmental Consultative Committee to provide advice to senior members of the Commission staff when determining applications for legal aid in environmental matters.

Applications for aid in these matters arise from such statutory provisions as s.123 of the Environmental Planning and Assessment Act which empower individuals to take proceedings. These provisions are somewhat unique to New South Wales.

Prior to this resolution, which not only created the Committee but set out the procedure to be adopted in determining applications for legal aid in environmental matters, most matters of this nature had been dealt with by the Commission at its formal meetings.

The Commission's policy reflects the provisions of Section 35 of the Legal Aid Commission Act which state

> 35. (1) The Commission shall not, unless it is of the opinion that there are special circumstances relating to the property or means of the applicant or otherwise, grant an application unless the applicant satisfies such means test or other test as is determined by the Commission in respect of applicants generally or the class or description of applicants to which the applicant belongs and is applicable as at the date on which the application was made.
>
> (2) A means test determined by the Commission for the purposes of subsection (1) shall be determined having regard to the ability of an applicant or an applicant of the class or description of applicants in respect of whom the means test is determined to meet the ordinary professional cost of the legal services sought by the applicant.
>
> (3) For the purpose of subsection (1), special circumstances may include–
>
> (a) that the applicant is a party to proceedings as a member of an unincorporated association; or
>
> (b) that the applicant is a party to–
>
> (i) proceedings relating to environmental matters;
>
> (ii) a relator suit; or
>
> (iii) a test case.

The Committee is chaired by a former member of the Supreme Court , and includes an alternate Commissioner and seven persons (including two alternates) who were nominated by various groups interested in the area. These groups are the National Parks and Wildlife Service, the Nature Conservation Council of N.S.W., The National Parks Association of N.S.W., The National Trust, The Environmental Defender's Office Ltd. and the Australian Conservation Foundation. The Assistant Director, Civil Law, was formerly a member of the Committee and still attends Committee meetings.

Guidelines

The Commission has published policies in relation to areas where legal aid is available. Aid is available in proceedings in the Land and Environment Court for proceedings before a Judge.

When an application for legal aid is received in relation to proceedings in that court, the matter is first identified as being one either of a private nature or of a group/environmental nature. Matters falling within the first category include appeals by private individuals against council orders relating to their land, appeals against compensation for resumptions and so on. Matters of this type are determined within the Commission's overall policies in civil matters and the standard tests as to means, merit and other guidelines are applied.

However, those matters which appear to involve wider issues and can be classified as possibly coming within the Commission's guidelines on environmental matters, are referred to the Assistant Director of the Civil Law Division for consideration. These guidelines for determining environmental matters are as follows–

In respect of legal aid applications for *Environmental matters* in deciding whether or not a substantial interest is at stake meriting assistance the Commission shall consider:

(1) Whether or not the proposed undertaking is likely to have a significant impact on the 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;
(ii) scarcity of environment in the locality and in the broader geographical area;
(iii) the quality of the environment affected;
(iv) degree of modification of environment potentially to be affected by the subject matter of the proceedings.

(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.

In practice, the Assistant Director seeks the assistance of the Committee in most matters. The Committee meets and makes a recommendation on whether legal aid should be granted or refused. If refused, the Committee indicates the reasons for refusal. If the recommendation is to make a grant of aid the Committee recommends the form that the grant should take.

S.30(4) of the Legal Aid Commission Act provides for lump sum grants. This section also allows for permitting the assisted persons' legal representatives to receive payment for professional services in addition to amounts received from the Commission (cf. s.41 of the Legal Aid Commission Act). Lump sum grants do not necessarily provide indemnity under s.47 of the Legal Aid Commission Act.

S.47 provides that the legally assisted person is not liable for costs awarded against that person for the period that the person is an assisted person and the Commission indemnifies the assisted person to a prescribed amount. This is presently $7500.00 for each party that, in the opinion of the Commission, has a separate interest.

Alternatively, legal aid may be granted on more standard terms which results in the Commission meeting all of the fees and expenses of the proceedings and providing an indemnity for adverse costs orders. Persons receiving grants of this nature may, however, be required to make a contribution towards both the fees paid by the Commission and its liability in relation to adverse costs orders (s.36 Legal Aid Commission Act).

The Committee may defer making a recommendation to permit the obtaining of additional material, including counsel's opinion (s.33 Legal Aid Commission Act).

Recommendations by the Committee were referred to the Senior Deputy Director. The Assistant Director now determines the applications on the basis of the Committee's recommendations. To date, all recommendations have been adopted with only some minor amendments.

Applicants dissatisfied with the final determination are entitled to a review of the determination by the Legal Aid Review Committee (s.56 Legal Aid Commission Act).

The Environmental Consultative Committee has met on nine occasions to October, 1987, and has made seventeen recommendations that aid be granted and seven that aid be refused. In relation to recommendation of grants of aid three have been by way of lump sum grants.

The Commission has also received several applications for legal aid for assistance in inquiries under the Environmental Planning and Assessment Act. These matters are always dealt with by resolution of the Legal Aid Commission which has made lump sum grants where aid has been granted. This course has been adopted as such inquiries do not come within the general matters for which legal aid is available and the Commission staff has therefore sought the Commission's guidance.

Applications for legal aid

Persons applying for legal aid in environmental matters are required to supply to the Commission such information as is necessary to permit a determination in accordance with the guidelines set out above.

Where aid is sought by a group–

(1) details of the group's membership and finances must be provided

(2) if the group is unincorporated a legal aid application must be completed by a representative or representatives of the group. This is necessary to identify the assisted person or persons for the application of the provisions of the Legal Aid Commission Act.

(3) the person or persons referred to in (2) must be qualified to represent the group, not only for legal aid purposes but for all matters that will arise as a result of the proposed litigation.

Aid is also available to individuals who are not representing a group and some grants of legal aid have been made to individuals where their applications for legal aid have fallen within the Commission's environmental guidelines. However, it is generally more difficult for an individual to establish the public benefit criteria.

Nature of applications received to date.

As has been indicated, staff of the Commission have referred matters to the Environmental Consultative Committee wherever possible. However, interim grants are made in urgent situations by staff members. The Committee is then required to advise on whether aid should be continued and/or extended.

The matters in relation to which grants of legal aid have been recommended by the Committee are principally for Class 4 proceedings before the Land and Environment Court. There have been few grants of legal aid for Class 1 matters.

No particular category for development or activity has predominated. Proceedings relating to quarries would be the largest single group of matters but these still form only a small proportion of the total matters which the Committee has considered.

Criticisms

The most common criticism of grants of aid in environmental matters and the most common theme from persons making representations that aid should not have been granted relate to the alleged means of the assisted persons. It is sometimes further asserted that certain assisted persons have a private interest which they are seeking to protect.

The Commission replies that determinations in environmental matters are made in accordance with the Commission's guidelines and the Legal Aid Commission Act. Those provide that compliance with the means test is not essential for a grant of aid and require that proper consideration is given to the public benefit and to any private benefit that might flow to the applicants.

Review

The Commission's resolution of 1985 which set up the present mechanism for determining legal aid in environmental matters requires that the Commission receive periodic reports on its application in practice and it will continue to monitor the provision of legal aid in environmental matters.