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REGENT THEATRE CASES AN ACCCOUNT OF THE BATTLE TO SAVE AN ITEM OF ENVIRONMENTAL HERITAGE

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In the September issue of the Impact a summary of the legal challenges to save the Regent Theatre appeared in the legal briefs sections. Below the author details the history of the battle by the Save Our Stages Committee comprising Actors Equity of Australia the National Trust, the Royal Institute of Architects and others to save the Theatre which culminated in a protracted legal battle in which the EDO represented Actors Equity of Australia in this year.

"I would express the strong view that the Regent should not be lost to Sydney as a live theatre. Sydney is a large and growing city of international fame with great tourist potential. To lose a building which as a complete entity is part of the city's historic architectural fabric as well as part of its social and cultural record would, in my view, be most unfortunate."

This is how William Simpson, deputy chairman of the Office of Commissioners of Inquiry summed up his report on the Inquiry under the Heritage Act into the future of the Regent Theatre, George Street, Sydney held in June to September 1986.

As I write this article the Regent Theatre is being demolished despite the fact that several people have offered to buy and preserve the Theatre.

HISTORY

The Regent Theatre was designed by the architect C.H. Ballantyne and built in 1928. It is a major example of the ornate cinema palace popular in the 1920s and 30s. It is one of only three comparable buildings remaining in Sydney still largely unaltered, the other two being the State and Capitol Theatres.

The Regent Theatre was first protected by 'green bans' in 1972. In 1975 it was sold to the present owner, Bevelon Investments, for 5.1 million dollars. It continued being operated as a theatre until May, 1984 when it closed after a successful season of "Pirates of Penzance". Following the closure of the Theatre, the Save Our Stages Campaign commenced. The theatrical unions were concerned to save the Regent Theatre because it and the Capitol Theatre are the only two 2,000 seat lyric in Sydney, both presently closed. As a result of the lack of lyric theatres in Sydney large musical productions, which are becoming more popular, are forced to stage shows in the Theatre Royal or Her Majesty's Theatre, both theatres being too small. Ballet productions, when the Opera House is unavailable, are forced to perform in the Entertainment Centre, a building better suited to rock concerts and circuses.

The Royal Institute of Architects and National Trust were concerned to save the Theatre because of its heritage importance, its architectural merit, and its streetscape value to the George Street/Town Hall precinct, heightened in recent times by the refurbishment of the Town Hall and the Queen Victoria Building.

THE LEGAL PROCESS

In 1977 the Heritage Act (NSW) was passed. The object of the Act was to facilitate the preservation of heritage buildings and precincts in private ownership without the necessity of the government acquiring them.

An interim conservation order (ICO) under the Heritage Act was placed on the Regent Theatre on the 16 March, 1979. Following an objection by the owner, a Commission of Inquiry was held in 1980 which resulted in a permanent conservation order (PCO) being made over the foyer, grand stairway, facade and upper foyer of the Theatre. An extensive campaign to preserve the whole Theatre by Actors Equity and others followed, and an order preventing demolition under s.130 of the Heritage Act was placed in the Theatre in August, 1984. An ICO over the auditorium of the Theatre was made later that year.

The owner objected to the making of the ICO over the auditorium. At about the same time the National Trust urged the Minister to place a PCO over the auditorium . Mr. Carr, then Minister for Planning & Environmental, decided to hold a Commission of the Inquiry so that the future of the whole of the Regent Theatre could be considered. The decision followed a recommendation by the Heritage Council in March 1986 to the Minister to place a PCO over the whole of the Theatre.

Several parties were represented at the Commission of Inquiry who favoured the preservation of the Regent Theatre. The only party opposed to its preservation was the owner. Submissions were heard by the Sydney City Council, Actors Equity, Australian Theatrical and Amusement Employees Union, Musicians Union, Royal Institute of Architects, Heritage Council and the National Trust , as well as private individuals. The Commissioner of Inquiry recommended in a report to Mr. Carr in November 1986

that the whole of the Regent Theatre should be preserved. He also stated that as the City Council declined to make available to him documents relating to the future of the Capitol Theatre, he was not in a position to say whether or not both the Regent and Capitol Theatres were necessary to be opened as Theatres in Sydney. He recommended that the question of whether or not the Regent Theatre should be re-opened as a live theatre should be postponed until the future of the Capitol Theatre was clear.

The recommendations of the Commission of Inquiry were viewed by Save Our Stages as a great victory in a long battle. Mr. Carr responded by placing another s.130 order over the auditorium of the Theatre thus protecting the whole of the Theatre from demolition until October 1988. At about the same time tentative negotiations began between local entrepreneurs, producers and the government relating to leasing or buying the Theatre for use as a live venue. This coincided with the increasing trend in the industry towards large musical productions and the increased interest by the public and tourists in the arts and entertainment industry in Sydney.

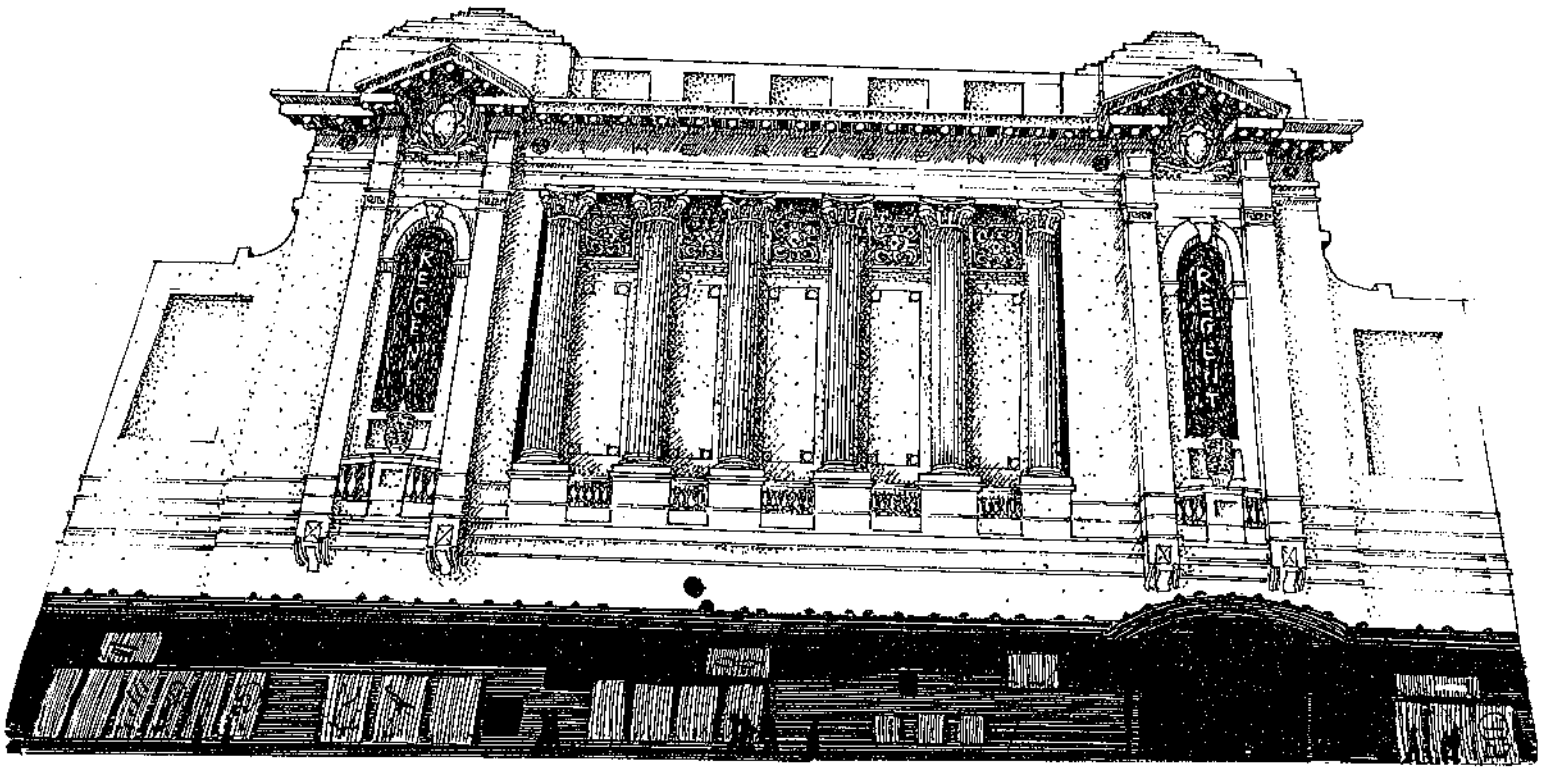
COURT PROCEEDINGS COMMENCE

On the 12th April, 1988 the new Minister responsible for the Heritage Act, the Minister for Planning & Local Government, Mr. David Hay, revoked the PCO and the s.130 order protecting the Theatre thus allowing the Theatre to be demolished. The decision was gazetted on the 15th April, 1988.

Save Our Stages approached the EDO soon thereafter and on the 22nd of April, 1988 action was commenced in the Land & Environment Court seeking declarations and injunctions for breaches of the Heritage Act by the Minister. On that day an injunction was granted by Mr. Justice Hemmings to Actors Equity on an ex parte basis. When the matter came before the Court on the 26th April, 1988 the injunction was continued and expedition of the hearing was granted.

NO UNDERTAKING AS TO DAMAGES

No undertaking as to damages was offered or required by the Court because the matter involved questions of breaches of public law. In this regard Hemmings J. following the decision of Cripps CJ in **Ross v State Rail Authority**



Unreported, LEC, 40200 of 1987,9 December, 1987. In that case Cripps CJ granted an injunction to the applicant who was attempting to prevent a breach of the **Environmental Planning & Assessment Act** despite the fact that she would not give the usual undertaking as to damages. Cripps CJ observed that Ross had "a good arguable case that she will obtain relief "and that" the breaches alleged were not technical." (See page 21 of the judgment) In the decision he distinguished the earlier cases **Ellison v Warringah Shire Council** 55 LGRA 1 at 17, and **Godfrey v Minister for Planning & Environmental** Unreported, LEC, 40208 of 1986, 14 January 1987 in that in Ross "a strong facie case has been made out that a significant breach of an environmental law had occurred. "In **Ellison** and **Godfrey** obiter comments had been made by Bignold J as to the importance of undertakings as to damages. (See "Interlocutory Injunctions: Lessons to be Learned form the Wintergarden Case" by Peter comans in "Impact" May 1987) In both cases the injunctions were refused on other grounds. In **Ross,** Cripps CJ followed the reasoning of Bqwen CJ in **Commercial Bank of Australia Ltd v Insurance Brokers Association** 16 ALR 161 at 169.

> *"The Court ought to inquire from an applicant whether he or she is willing to give an undertaking as to damages. The Court should then take into account on the balance of convenience the presence or absence of such an undertaking as one of the factors to be considered in the exercise of its discretion." (See page 21 of the judgment)*

Cripps CJ also referred to the position in relation to environmental law plaintiffs in the United States:

> *"In the United States it is provided that except at the suit of the government, no restraining or preliminary injunction should issue except upon the giving of security in such sums as the Court thinks proper for the payment of costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. In a number of American decisions, it has been held that the Court should be wary against requiring the posting of a bond to indemnify an ultimately successful defendant in such amount as would operate to stifle the intent of the legislation and deter potential challengers."*

He distinguished **F.Hoffman La-Roche and Co. A.G. v Secretary of State of Trade and Industry** 1975 AC 295 by saying that an applicant for an injunction under section 123 and 124 of the **Environmental Planning & Assessment Act** is different to the relator described by Diplock LJ as an "officious, though well meaning by-stander".

THE LEGAL CASE

The legal action to save the Regent Theatre was based on the allegation that the decision of the Minister to revoke the PCO was invalid because be breached s.55 of the **Heritage Act** (a section which provides for the procedure to be taken by the Minister when he decides to revoke a PCO), in that inter alia the Minister had not read the report of the Commission of the Inquiry or a summary of it or any submissions in relation to that report. It is the Minister's duty to consider the Commission of Inquiry's report before he decides whether he will revoke a PCO. The Commission of Inquiry's report was published and available in November 1986 following the completion of the Inquiry in September 1986. The decision by Minister Hay was made some eighteen months later. Actors Equity claimed that the Minister was obliged to take into account any changed circumstances.

A great deal of evidence was heard by the Court as to the circumstances that had changed. There was evidence about the offers to purchase and restore the Regent Theatre, about the increase in the rarity value of the Theatre because of the demolition of other theatres, (such as the Wintergarden Theatre in Rose Bay) about the increase in demand in live lyric theatres in Sydney, the reduced supply of such venues, the changes in the nature of theatre productions with a trend towards large scale productions, the growth in audience numbers. There was also evidence that the likely estimates of restoration costs were far cheaper than those that the Minister considered at the time of making his decision.

Actors Equity alleged that the Minister took into account irrelevant matters. In making his decision the Minister had relied on an inaccurate memorandum purporting to summarise the relevant events and facts pertaining to the Regent Theatre prepared by a junior town planner and signed by Mrs. Gabriele Kibble, Director of Planning. (see p. 14 of judgment)

Another contention was that Actors Equity and other persons were denied natural justice in that they were not given an opportunity to make further submissions to the Minister before he made his decision (despite the fact that the report which was before him was seventeen months old). Also the Minister had received additional submissions since the Commissioner's report from the owner of the building and did not give Actors Equity and other parties an opportunity to reply to those submissions.

The other major contention of Actors Equity was that the Minister could not have revoked the PCO unless he had before him a recommendation from the Heritage Council to do so. The recommendation from the Heritage Council in this case was not to revoke the PCO.

The **Heritage Act** had been amended in April 1987. Actors Equity's submission was that, under the construction of the transitional provisions, the new Act applied to this particular revocation and that the new Act plainly provided that the Minister could not revoke a PCO unless he was recommended to do so by the Heritage Council under s.48 or 49 of the Act. The respondents argued that Actors Equity's construction of the new Act was a typing error or a legislative bungle and in the alternative that on the construction of the transitional provisions, the old Act applied. Under the old Act the Minister did not require a recommendation from the Heritage Council prior to revocation of the PCO.

Clause I of Schedule 5 of the **Heritage (Amendment) Act** 1987 (NSW) provides as follows:

> *"The Principal Act, as in force immediately before the commencement of this Act, continues to apply to and in respect of the making or revocation of a conservation instrument, the making or revocation of which commenced before that commencement, as if this Act had not been enacted."*

Actors Equity argued that the revocation does not relevantly "commence" until such time as the Minister turns his mind to the question of revocation. In this case, the Minister did not turn his mind to the question whether he should revoke the PCO until a date after the commencement date of the Amendment Act. In fact, the then Minister wrote to Mr. Fink, the owner, late in 1987 that he was still deciding what to do with the Regent Theatre, and had, in

the meantime, imposed a 12 month anti-demolition order on it under s130 of the **Heritage Act.**

On this interpretation, the validity of the second decision was to be judged by reference to the Act as amended, not as it stood prior to April 1988. Relevantly, this would mean that the Minister could not exercise his power to revoke a PCO until, inter alia "notice of a recommendation to revoke" the PCO had been given (s.55(1)). It was common ground that no such notice had been given (although notice had been given in terms of s.55(1) as it stood prior to April 1988).

As to the revocation of the 130 order Actors Equity argued that it stood or fell together with the revocation of the PCO. It was clear from the documents before the Court and the evidence of the Minister's advisors that the Minister thought about the Regent as a Theatre and that his decision to revoke was partly because of his belief that the Capitol Theatre was sufficient to meet Sydney's theatre needs. He did not in his mind distinguish between the facade and the need to preserve it and the auditorium and the need to preserve it. Therefore, Actors Equity argued, if he failed in discharging his duty when he revoked the PCO he must have necessarily failed in his duty in revoking the s130 order

THE COURT'S DECISION

The Court hearing, which commend on the 4th July, 1988 and ran for two weeks was preceded by several interlocutory applications by Actors Equity for subpoenaed documents from the Department of Planning and the Sydney City Council. The disclosure of these documents was opposed on the basis that they were confidential. The Court finally ruled that, to preserve confidentiality, the documents would only be looked at by legal persons. The hearing was lengthened because despite an order for discovery against the Department several important documents were not discovered until midway through the hearing and the Minister through his advisors gave some contradictory answers to interrogatories.

Consideration by the Minister

Cripps CJ accepted Actors Equity's submission that the matters which the Minister was bound to take into account in making a decision under s.55 to revoke the PCO are not expressly stated in s.55. They must be determined by implication from the subject matter, scope and purpose of the Act. (**See Sean Investments v MacKeller** 38 ALR 363 and **Minister for Aboriginal Affairs v Peko Wallsend** 162 CLR 24). He found that, although the Minister was not obliged to read the report in its entirety, he did have to read a summary of the report which provided the substance of those matters in the report which he was required to consider and an accurate summary of the submissions to the Inquiry. He stated:-

> *"If he is in ignorance of any relevant part of the report by reason of that matter not being brought to his attention by his advisors, his ignorance, in my opinion, cannot protect his decision. Furthermore, I am of the opinion that if a departmental summary fails to bring to his attention correct and accurate material within the department's own knowledge of significant relevance to the question he has to determine, the Minister has failed to take into account relevant material or has taken into account material that is erroneous or incorrect." at p. 30-31*

He also found that the nature, scope and purpose of the **Heritage Act** required that the Minister consider whether or not there is any new material or changed circumstances between the date of the report and the decision which he makes. The Minister's legal representatives had submitted that the Minister was free to select any criteria in reaching his decision. Cripps CJ rejected that submission in stating that:

> *"....the matters to be taken into consideration must relate to the subject matter before the Minister and he is not free to ignore significant and credible material within the knowledge of his department."*

In this case, there was evidence that the Minister did not have regard to material within the posession of his Department concerning the future of the Capitol Theatre. Cripps CJ found that he was obliged to have regard to this material.

Denial of Natural Justice

Cripps CJ found that Actors Equity had not been denied natural justice. It was no different to any other member of the public who was concerned about this public interest matter. He also observed that had the Minister properly understood the report of the Commissioner he would have known almost everything that was in the submission by Actors Equity and therefore no separate, further opportunity need have been given to Actors Equity.

He went on to examine in some detail the circumstances in which natural justice or procedural fairness should be afforded. It is clear form his decision that where new or fresh material arises as a result of a communication by a person appearing before an Inquiry, other persons to such an Inquiry should be given an opportunity to be heard before a decision is made. The decision-maker's obligation cannot be avoided by getting the same information from a different source.

Recommendation from the Heritage Council

The Court found that the effect of the amendments to the **Heritage Act** in 1987 were relevantly that a Minister cannot revoke a PCO unless he has a recommendation to do so from the Heritage Council. In this regard Cripps CJ rejected the submissions of the respondents that such an interpretation was not available to him because there were legislative errors in the **Heritage (Amendment) Act** 1987 (NSW). He found however, that in the present case the transitional provisions were to be construed so as to mean that the revocation commenced at a time before the new Act, probably at the time the notice of the revocation was given by Mr. Carr in 1986 (which was the first step in the process of the Commission of Inquiry). The effect of this is that a Minister will no longer be able to revoke a PCO against the recommendation of the Heritage Council as happened in the case of the Regent Theatre.

s.130 Order

Actors Equity was unsuccessful in its submission that the validity of the revocation of the s.130 order depended on the validity of the revocation of the PCO. Cripps CJ found that although the Minister's revocation of the PCO was invalid, he was not bound by the same duties to consider prior to revoking the s.130 order. The revocation of the s.130 order was valid.

THE SECOND REGENT CASE

On the first day of the hearing of the above case, 4th July 1988, the Minister's legal representatives announced that he had made a second decision revoking the PCO and the s.130 order. This decision was made despite the fact that the Minister thought his earlier decisions were valid. It was made to dispel doubts which had arisen about the earlier decisions. (see p.6 of the judgment).

The Minister's legal representatives initially argued that the two cases be heard together, or that the existence of the second decision be taken into account by the Court as a matter of discretion when deciding whether or not to grant a remedy in the first case, assuming that Actors Equity was successful. This submission was not later pursued. Cripps CJ ordered that he would hear the first case and make all the necessary findings before embarking on to the testing of the second decision.

Actors Equity challenged the second decision on the basis that it was made for a purpose outside the ambit of the **Heritage Act**, namely to thwart the Court proceedings. It also submitted that the Minister was outside his power to make a contingent decision (that is, a decision which would only begin to have effect upon the first decision being found to be invalid by the Court) and that the Minister was functus officio in regard to the second decision, having discharged his duty by making the first decision to revoke. The argument that the Minister was unable to revoke the PCO because he did not have a recommendation to do so from the Heritage Council which had been unsuccessful in Nettheim No.1 was formally put again.

Improper Purpose

The second case was heard by Cripps CJ on 6th September, 1988. The Minister's advisors gave evidence that the second decision was made quickly to co-incide with the first day of the Court hearing, that it was a "patch-up job" made to "plug up the holes" which were evident in the first decision (See page 16 of the judgment).

Actors Equity argued that the Minister could not exercise his power for the purpose of thwarting the Court case, nor could he, in making the decision which he made take into account that his first decision was before the Court, that being an irrelevant consideration.

According to Actors Equity, the Minister did not approach the second decision with an impartial and open mind. The decision was preceded by an invitation made to Actors Equity and other parties by way of a letter sent by facsimile at 6.30p.m. on Thursday, 30th June, 1988 to attend a meeting with the Minister the next morning. Actors Equity declined to attend such a meeting on the basis that insufficient time was given to prepare submissions but the Minister proceeded to hold the meeting with his legal and policy advisors. He was told by the advisors that his decision had to be made over the weekend, no submissions were requested from the Heritage Council by the Minister or his staff. It was clear from the evidence of his legal advisors and documents before the Court that the Minister thought the first decision was valid. (see p.5 of the judgment)

The applicant was unsuccessful in the second challenge. Cripps CJ stated:

> *"In Nettheim No.1, I expressed the opinion that the making of the decision on 4 July 1988 did little to promote public confidence in good administration. Nothing that has emerged in these proceedings has persuaded me to change that opinion or my reason for arriving at it. It would have been open to the Minister to revoke his earlier decision to revoke PCO No. 151 and to make a new decision to revoke PCO No. 151 . . . or he could have waited the outcome of the legal challenge before taking any further steps. If, as was proposed, the revocation decision on 4 July 1988 was gazetted, there would have been two revocations, one in April 1988 and one in July 1988, both apparently valid. However, as I am reminded, it is my function in these proceedings to determine whether it was open, in law, for the Minister to make the decision on 4 July and if it was, whether the decision was vitiated by bad faith, improper purpose and/or the taking into account of irrelevant matters."*
> *(see p.10 of judgment)*

Cripps CJ was not prepared to find that the Minister had acted in bad faith or that he was motivated by an improper purpose.

In this regard, he took into account that the Minister had taken the material given to him by his advisors home to consider over the weekend, and that he was advised that he had to make up his own mind on the material before him.

Cripps CJ assumed that the Minister's advisors had acted in the hope of frustrating Actors Equity's legal challenge, although he did not make a finding to that effect.

He rejected Actors Equity's submission that the Minister could not have approached the making of the second decision with an open mind because he thought the first decision was valid.

He ruled that the Minister's personal belief about the validity of his first decision was not relevant to his ability to make a proper decision. He stated that:

> *"It is not difficult to understand the suspicion of Mr. Nettheim and Actors' Equity that the Minister was endeavoring, on advice, to give an appearance of rectitude to an action which lacked it. But this issue is to be determined upon the evidence before the Court and not upon the applicant's suspicion. On the material before me, I am not prepared to come to any conclusion other than that the real purpose, or at least the dominant purpose of the Minister, was to consider the matter afresh taking into account those matters which Mr.Nettheim and Actors' Equity said he ought to have taken into account."*

Functus Officio

Actors Equity also argued that the Minister has discharged his function by making the first decision to revoke the PCO and was barred form exercising the function again until and unless the first decision was declared invalid by the Court. According to Actors Equity for the second decision to be valid, the first decision had to be invalid retrospectively, thus rewriting history.

Cripps CJ rejected these submissions. He took the view that the Minister could exercise his decision-making power "from time to time". He followed the reasoning of Glass JA in Parkes Rural Distributors Pty Limited v Glasson & Anor (1987) 7 NSWLR 332 that a person capable of exercising a power from time to time is never functus officio. He did not elaborate on what basis he had decided that the Minister could exercise his power from "time to time".

COURT OF APPEAL

Actors Equity appealed to the Court of Appeal.

It submitted that Cripps CJ had erred in law on all three points argued before him.

Recommendation from the Heritage Council

Actors Equity submitted that Cripps CJ's reasoning on this point in Nettheim No.1 (which applied to Nettheim No.2)

was wrong. The question before the Court of Appeal was what the words "commencement of revocation" meant in the transitional provisions to the Act which amended the **Heritage Act** in 1987.

Actors Equity argued as it had unsuccessfully below, that the applicable law was the **Heritage Act** as amended in 1987 and that:-

(1) revocation commenced when a decision to revoke was made (that there were no"degrees" of revoking)
(2) that notice of a proposal to revoke was not an act which constituted a commencement of a revocation as a revocation was not complete and effective until and unless there was a publication of it in the Government Gazette.

Improper Purpose
Actors Equity submitted that the Minister had acted beyond the power bestowed on him by s.55 of the **Heritage Act** and made a contingent decision. (i.e. a decision whose use was contingent on his earlier decision being declared invalid by the Court)

Alternatively, Actors Equity argued that the Minister had acted for an improper purpose by taking into account an irrelevant consideration (namely, that his first decision was before the Court)

The third argument before Cripps CJ that the Minister was functus officio was not pursued by Actors Equity in the Court of Appeal.

INJUNCTION GRANTED BY COURT OF APPEAL.
As the injunction given by the Land & Environment Court had expired with the judgment of that Court, Actors Equity had to seek an injunction from the Court of Appeal to prevent demolition of the Regent while the case was before the Court of Appeal. The Court of Appeal, Kirby P presiding, issued an injunction and set down the matter for hearing the following week. As in the Court below no undertaking as to damages was required.

COURT OF APPEAL DECISION
The Court of Appeal unanimously dismissed Actors Equity's appeal. The leading judgment was by McHugh JA, Samuels JJA and Needham AJA concurring. McHugh and Samuels JJA's judgments were prefaced with statements about the limits of their powers in the case. Samuels JA stated:

> *"Neither the Land and Environment Court nor this Court has any power to consider the merits of the case. They therefore have no jurisdiction to examine whether any part of the fabric of the Regent Theatre should be conserved, or whether the building ought to be preserved for use as a theatre or demolished and the site developed for some other purpose. These are all decisions which Parliament has decreed are to be made by the Minister. The task of this Court is the limited one of reviewing the Minister's exercise of his function, by examining, as McHugh Ja has explained, whether the Minister had power to revoke the order and, if he had, whether in using that power he committed any legal error. Under Federal and Victorian statute law there is jurisdiction for a tribunal to set aside an administrative decision and to substitute its own. But there is none in New South Wales."*

Recommendation from Heritage Council
Mc Hugh JA rejected Actors Equity's argument that revocation commenced upon the Minister revoking an order. He accepted the respondents' arguments that a revocation consisted of a series of steps and commenced with the commencement of the first of those steps.

Improper Purpose
McHugh JA found that on the facts before the Court there was no direct evidence, (presumably meaning evidence from the Minister himself) that the Minister took into account a matter he was not entitled to take into account.

He examined the evidence heard in the Court below and distinguished the motives of the Minister's advisors from the Minister's own exercise of power under s.55 of the Heritage Act. Although he stated-

> *"No doubt the motive of the Minister's advisors in recommending that he reconsider the matter was that they believed that he would probably reach the same decision and that would render futile the appellant's challenge to the decision of 15 April 1988."*

he was not prepared to find that these motives extended to the Minister.

He did not consider in his judgment whether an inference could have been drawn about the Minister's state of mind from the evidence of the advisors.

He stated that the purpose of thwarting the litigation must be a "substantial" purpose for a challenge to a decision to succeed on that ground.

He concluded that in the present case there was "no evidence of a purpose of thwarting the litigation". (see p.11 of the judgment.)

The appellant's alternative submission was that the Minister made a contingent decision, something s.55 of the **Heritage Act** did not empower him to do.

McHugh JA rejected this submission but stated, obiter, that s.55 did not prevent the making of decision conditional on an earlier decision being declared invalid.

APPLICATION TO APPEAL TO THE HIGH COURT
Actors Equity sought special leave to appeal to the High Court. No application for an injunction was necessary as the owner of the Regent Theatre gave an undertaking to Mason CJ that the Theatre would not be demolished until the application for special leave could be heard.

Actors Equity applied to the High Court for special leave on several grounds:- It submitted that the Court of Appeal, while finding that there was no direct evidence of the Minister taking into account any improper considerations, had failed to consider whether an inference was open on the evidence that the reasons of the Minister included the likely impact of his decision on proceedings before the Court.

The Minister did not choose to give evidence in Court. In Actors Equity's submission an adverse interference could be drawn on the basis of his failure to give evidence on the principles in **Jones v Dunkel** (1959) 101 CLR 298.

Since there was no denial by the Minister that one of his reasons for making the second decision was to thwart the Court proceedings, it could be assumed that it was a reason. Actors Equity also submitted that the "substantial purpose" test (discussed in **Thompson v Randwick Corporation** (1950) 81 CLR 87 106) expressed by McHugh JA as the correct test for improper purpose, was wrong.

It submitted that to say that a power was used for an improper purpose was just to specify a particular kind of irrelevant consideration and that the Court of Appeal had applied too onerous a test.

Contingent decision
It submitted that the Court of Appeal was wrong in ruling that s.55 conferred a power on the Minister to make a contingent decision.

The application was heard by Mason CJ. Brennan J and Gaudron J.

The Court refused Actors Equity special leave to appeal on the basis that "there was not sufficient doubt" about the decision of the Court of Appeal to warrant the granting of special leave.

The decision ended the legal battle to save the Regent Theatre.

The EDO wishes to acknowledge the significant contributions of Mr.B.S.J. O'Keefe QC, Mr.R.P. Meagher QC, Mr P.G. Hely QC, Mrs. P.Flemming QC, Mr P.D. McClellan QC, Mr.P. Comans, Mr. B.J. Preston, Ms Suzanne Davidson, Mr Geoff Dawson, Mr George Fairfax, Mr. Stephen Harris, Ms. Jacqueline Huie, Mr. Greg Jones, Professor Max Kelly, Mr. Wilton Morley, Mr. Chris Pratten, Mr. Harvey Sanders, Mr. Peter Sarah, Mr. Ian Stapleton, Professor Ross Thorne and Mr. John Walker in these proceedings.

The Lemonthyme and Southern Forests Case

by Josephine Kelly of the New South Wales Bar

In this case note Josephine Kelly reviews the important High Court decision in Richardson v Forestry Commission and places the case in the context of the earlier decision in the TASMANIAN DAMS CASE and the State of Queensland to the nomination of the Wet Tropics Area in far North Queensland to the World Heritage List

HISTORY
In the last five years the Commonwealth Government has fought and won two major High Court battles against the Tasmanian State Government. The first occasion was the **Tasmanian Dam Case** (**The Commonwealth v Tasmania** (1983) 158 CLR 1).The second was the **Lemonthyme and Southern Forests case** (**Graham Frederick Richardson v The Forestry Commision and another** (1988) 77 ALR 237, (1988) 62 ALJR 158). The results of both have been to extend the Commonwealth's "external affairs power" under s51(xxix) of the Constitution.In essence, the High Court has held that the Commonwealth can legislate on domestic matters where those matters are the subject of an obligation pursuant to an international treaty to which Australia is a party.

The **Tasmanian Dam Case** concerned parts of western Tasmania which had been **nominated** as World Heritage areas pursuant to the Convention for the Protection of the World Cultural and National Heritage ("the Convention"). The Convention was adopted by the General Conference of the United Nations Education, Scientific and Cultural Organization in 1972.

In the **Tasmania Dam Case** the High Court considered the validity of the **World Heritage Properties Conservation Act** 1983 (Cth) that gives effect to the Convention which is a schedule to that Act.

The High Court held that the external affairs power enabled the Commonwealth Parliament to give effect to the Convention as an international treaty to which Australia was a party. The majority of the judges (Justices Mason, Murphy, Brennan and Deane) determined that when Parliament acted to give effect to the Convention, it was for Parliament to choose the means by which it was capable of being reasonably considered appropriate and adapted to that end. The Court held that the legislation under consideration implemented obligations which the Convention imposed on Australia.

The majority of the Court also expressly recognised that the power was **not** limited to the implementation of obligations imposed on Australia by a treaty which Australia was **bound** to implement.

The principal factual distinction which arose in the **Lemonthyme and Southern Forests** case was that the legislation considered in that case applied to land which had **not** been nominated for inclusion in the World Heritage List nor declared pursuant to the **World Heritage Properties Conservation Regulations** to form part of the cultural or natural heritage.

The matters for determination were (a) whether it was a valid exercise of the Commonwealths external affairs power to give effect to the Convention by taking steps to identify whether the land the subject of the legislation was or contributed to a world heritage area, and (b) whether during that process of identification, the Commonwealth could exercise its legislative powers to protect that land.

The proceedings began when Senator Richardson, the Federal Minister for the Environment and the Arts, applied to Mr Justice Mason to restrain the first defendant, the Tasmanian Forestry Commission which managed and controlled the forests, and the second defendant, a timber miller, from continuing logging operations in the areas protected by the Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 (Cth) ("the Act"). The operations sought to be restrained were associated with road-works and involved 145 hectares in the Lemonthyme and 151 hectares in the Southern Forests area.

The Act provided for the establishment of a Commission of Inquiry into the Lemonthyme and Southern Forests areas of Tasmania (The "protected area"). The Inquiry became known as the Helsham Inquiry, after the presiding Commissioner, Mr Michael Helsham, a former Equity Judge from New South Wales.

The Inquiry was established to determine, inter alia, whether any part of the protected area was, or contributed to, a world heritage area. The Act also provided for the interim protection of the area until such a determination had been made and conferred jurisdiction on the High

Court and Federal Court to grant an injunction to restrict the doing of an act that was unlawful under the Act.

The application was successful, the Chief Justice granting interlocutory injunctions against the Forestry Commission and the timber miller on 30 July 1987 (see **Richardson v The Forestry Commission & Anor** (1987) 61 ALJR 528).

The Chief Justice reserved two questions for the consideration of the Full Court. The first was: " To what extent , if any, is the **Lemonthyme and Southern Forests (Commission of Inquiry) Act** 1987 (Cth) invalid?" The majority of the Court (the Chief Justice, Justice Brennan, Wilson, Dawson and Toohey) held the Act was valid in its entirety.

The second question was whether certain defences raised by the defendants were "an answer to the relief claimed" by the plaintiff. The Court dealt only with the defence based on economic hardship to the Forestry Commission and to the general economy of Tasmania contrary to the public interest. A majority of members of the Court (the Chief Justice and Mr Justice Brennan, Justice Dawson, Toohey and Gaudron agreeing, Justice Wilson not deciding) held that defence did not constitute a defence to the action, there being no claim of promises or assurance, and,in any event, the giving of such promises or assurance could not amount to a defence.

The Protected Area

The Lemonthyme and Southern Forests are located near, and to the east of, the world heritage area in western Tasmania known as the Western Tasmanian Wilderness National Parks. That area was included in the World Heritage List, maintained pursuant to the Convention,in 1983. The Western boundary of the Lemonthyme forms part of the eastern boundary of the world heritage area for about 220km of its length of 320km. However, the northern portion of the Southern Forests area is separated from the world heritage area by State Forest (not within the protected area), Lake Gordon and the South West Conservation Area.

The Lemonthyme has an area of approximately 14,300 hectares and the Southern Forests an area of approximately 269,000 hectares.Together both contain about 4.5 per cent of Tasmania's land area.There are about 155 hectares of privately owned land in the Lemonthyme and about 80 hectares in the Southern Forests area. The area is mostly forest in which forestry operations are carried on . A large part of the area is subject to Tasmanian legislation controlling forestry operations. Otherwise, the only significant activities carried out in the areas were grazing on the privately owned land.

The Provisions of the Act and the Convention

The object of the Convention, set out in its ninth recital,is to establish "...an effective system of collective protection of the cultural and natural heritage of outstanding universal value,organised on a permanent basis and in accordance with modern scientific methods".

The object of the Act was "to provide for measures that will enable effect to be given, in relation to the Lemonthyme area and the Southern forests area , to Australia's obligations under the Convention"and in particular to identify and delineate the natural heritage and cultural heritage and to take appropriate measures to protect and conserve that heritage.

In relation to areas which the inquiry found qualified for world heritage listing or contributed to the integrity of a world heritage area or a nominated world heritage area, the Inquiry was required to consider the availability and feasibility of exploiting alternative forestry resources in Tasmania without detriment to the forestry industry in that State and in relation to areas identified by the Inquiry by means which caused least damage to those areas.

The Inquiry was required to give priority to identifying any part or parts of the protected area that were definitely not qualifying areas and to report to the Minister as soon as practicable specifying the area concerned. On receipt of an interim report, the Minister was to publish a notice in the Commonwealth Gazette specifying the area to be an "excluded area", and thenceforth not subject to the interim protection provisions of the Act.

Part III of the Act provided for the protection of the areas during the inquiry period. Section 16 prohibited (a) killing, cutting down, damaging or removing a tree or part of a tree, (b) constructing or establishing a road or vehicular track, (c) carrying out any excavation works or (d) doing any other prescribed act capable of adversely affecting the protected area, without the written consent of the Minister. The provision also made unlawful the authorisation of such activities without the Minister's consent and imposed a duty on an owner or occupier of any part of the area to take reasonable steps to prevent any of the prohibited acts.

The "interim protection period" was defined to commence at the commencement of the inquiry period and ending 42 days after the end of that period or earlier in certain circumstances.

In determining whether or not to give a consent under section 16, the Minister was required to have regard only to Australia's obligations under the Convention.

The Act conferred a right to statutory compensation where a person refrained from doing an act made unlawful under s.16 or if an injunction was granted and the person suffered consequential loss or damage.

The following sets out the principle findings which emerge from the various decisions given. The Chief Justice and Mr Justice Brennan gave a joint decision; Justice Wilson, Dawson, Deane, Toohey and Gaudron gave separate decisions.

The Validity of the Act

The defendants' principal submission was that the Convention did not impose any obligations on Australia with respect to the protected area before Australia accepted that the land had world heritage values or until the land was entered on the World Heritage List. Therefore the Act was not a valid exercise of the Commonwealth's external affairs power pursuant to s 51 (xxix) of the Constitution.

All the members of the Court held Part II of the Act to be valid on the **Tasmanian Dam Case** although their reasoning differed.

For example, the Chief Justice and Mr Justice Brennan held that the **object** of the Convention was to **protect** the world heritage and that identification and delineation contribute to the attainment of the ultimate object of protecting the heritage, "indeed they are the means of achieving that object".

Mr Justice Wilson, however, concluded that an **obligation** rests upon Australia **to identify and delineate** the world heritage, if any, within the protected area.

The Validity of the Interim Protection Provisions
The validity of Part III of the Act was upheld by the Chief Justice and Mr Justice Brennan, Justice Wilson, Dawson and Toohey.

Mr Justice Deane held that s 16 (1) (b) (c) and (d) were invalid and that on the material before the Court s 16(1) (a)'s proscription of removal of a tree or part of a tree was invalid. His Honour held that s 16(1) (b), (c) and (d) were not severable and were invalid.

However, his Honour held that the proscription in s 16(1) (a) was severable and valid.

His Honour held that ss 16(2) and (3) and the other provision of Part III were dependent for their operation upon s 16(1). Therefore, they remained valid and operative in relation to so much of s 16(1) as was valid.

On the material before the Court Justice Gaudron held s 16(1) (a), (b) and (c) invalid, and sections 16(2) and (3) invalid to the extent they operated by reference to those former sections.

Her Honour found s 16(1) (d) was invalid and sections 16(2) and (3) were invalid in so far as they operated by reference to that subsection.

Each of the Judges who upheld the validity of Part III of the Act found that interim protection of the areas was either an obligation under the Convention or incidental to such an obligation and that the measures enacted for that protection could be reasonably considered appropriate and adapted to the attainment of the object which impresses it with the character of a law with respect to external affairs. Their Honours applied a test laid down in the **Tasmanian Dam Case.**

Incorporation of Areas not of World Heritage Status
It is implicit in the upholding of the legislation that it is not fatal to Commonwealth legislation which gives effect to an obligation under the Convention, that it incorporates land which is not of world heritage status but which contributes to the integrity or values of such an area. Mr Justice Toohey and Mr Justice Deane dealt specifically with the question and held that the relationship between world heritage areas and adjoining areas is a question which is related to delineation and protection of actual and potential world heritage areas.

No Basis for Legislative Judgement that Area Possessed World Heritage Characteristics
A further submission supporting the claim that the Act was invalid that there was insufficient evidence before the Court to establish a reasonable basis for the legislative judgement that the area may possess world heritage characteristics which should be protected. The Chief Justice and Mr Justice Brennan specifically dealt with the submission, holding that there was such evidence before the court and therefore the legislative judgment was not invalidated.

Discrimination Against a State
The defendants also submitted that the interim protection provisions under Part 3 of the Act violated the implied prohibition upon discrimination against a State in that it singled out a particular area of a particular state in purported pursuance of an international obligation applying to the whole of Australia, in the absence of any special threat to that particular area.

The Chief Justice and Mr Justice Brennan, Justices Wilson and Toohey, the only judges who dealt with the submission, all held that those provisions did not invalidly discriminate against Tasmania. The Chief Justice and Mr Justice Brennan held that the defendants did not establish that the treatment of Tasmania was not occasioned by the subject to which the law relates. Their Honours also held that the law falls to be enacted in relation to particular properties and does not thereby discriminate against the State in which the property is located.

The Second Question for Consideration
Paragraph 17 of the first defendant's defence pleaded "The relief claimed against it if not appropriate relief sought would cause economic hardship to it and to the economy of Tasmania,whereby it would be contrary to the public interest.
The Chief Justice and Mr Justice Brennan held that the matters pleaded in paragraph 17 could not constitute a defence to the action and was not an answer to the relief claimed.

As to the defence raised by the second defendant, their Honours held at there was a difficulty of dealing with the matter in the absence of agreed facts and that therefore they could not answer the question in relation to that defence. (so 2(ii) and (iii) were not answered.)

Justice Wilson, Deane, Dawson and Toohey agreed with their Honours and the course they proposed, and although it was unnecessary for Justice Gaudron to answer the second question, her Honour stated she also agreed with the Chief Justice and Mr Justice Brennan.

It is of interest to note that while both Mr Justice Wilson and Mr Justice Dawson followed the **Tasmanian Dam** case, both stated that they did so because they were bound to do so. Both held the same views they expressed in their dissenting judgements in the **Tasmanian Dam Case** that the Convention does **not** impose an obligation upon Australia which would empower the Commonwealth to legislate pursuant to the external affairs power.

Conclusion
The majority of the Court (the Chief Justice, Justice Brennan, Wilson, Dawson and Toohey) held the Act was valid in its entirety. Mr Justice Deane and Justice Gaudron held at that Part II was valid, but parts of Part III providing protection for the area, were invalid.

The decision extends the power of the Federal Government to intervene to protect what may be a world heritage area, while a determination is being made of an area's world heritage status. The area does not have to have been nominated for world listing or declared to form part of the cultural or natural heritage before the Federal Government may intervene.

For example ,the Federal Government could have exercised this power to protect the Wet Tropical Rainforest area of North-East Queensland before any judgment was made as to whether or not it contained areas of world heritage value.

Following the publication of the Helsham report there was a very public and very damaging conflict between Senator Cook, the Federal Minister for Resources, and Senator Richardson and their respective supporters in Cabinet, over how much of the Lemonthyme and Southern Forests area contained world heritage values and should be nominated for World Heritage Listing.

Negotiations between the Prime Minister, Senator Cook, Senator Richardson and the Tasmanian Premier, Mr Gray, have culminated in an agreement which has resulted in the informal five-year alliance between the conservation movement and the Federal Government being shattered. Spokesmen for the conservation movement claim, inter alia, that the area to be nominated fails to protect 65 per cent of the tall eucalypts in the Lemonthyme and Southern Forests.

The Federal Government's legislative power regarding the Convention has been defined in the **Tasmanian Dams Case** and the **Lemonthyme and Southern Forests Case .** The High Court will consider other questions arising from the purported exercise of that power when it hears the case brought by the State of Queensland in respect of the Wet Tropical Rainforest of North east Queensland (for interlocutory judgement. (see **State of Queensland** v **Commonwealth of Australia** (1988) 77ALR 291) In that case, challenges have been made to the nomination of that area for the **World Heritage Properties Conservation Act 1983**, that the area forms part of the natural heritage.

How and when the Federal Government will use the legislative power it has arising from its obligations under the Convention in the future will depend upon the relative political strengths of conservationists and their opponents, and the political clout of the ministers responsible for the relevant portfolios.

COST ORDERS IN THE LAND & ENVIROMENT COURT RECENT DEVELOPMENTS

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ABSTRACT

The risk of an adverse costs order if a public interest plaintiff is unsuccessful is a daunting prospect for such a plaintiff.

In many cases it may deter persons from pursuing meritorious litigation which would advance the public interest.A trend has developed in the last year or so, however, which is helping to overcome this problem. This is that courts may decide to make no order for costs against an unsuccessful plaintiff where the litigation is properly characterised as public interest litigation. In this note, Nicola Pain reviews the important decisions which have initiated this trend.

There have been recent cases in the Land and Enviroment Court concerning costs in the situation where an unsuccessful applicant has sought to argue that it should not have to pay the respondent's costs because the applicant is acting in the public interest.

Each case has started with a consideration of the decision of the Full Court of the Federal Court of Australia in **Arnold on behalf of Australian for Animals** v **State of Queensland & Anor** 13 May,1987 73 FLR 61(reported in the July 1987 IMPACT).The applicant in that case was ultimately unsuccessful in the Federal Court on its appeal from the decision of the Administrative Appeals Tribunal concerning a freedom of information application. The decision not to award costs against the applicant was unanimous. Two judges Wilcox and Burchett JJ gave reason for their decision as follows:

1. The matter raised questions of interpretation of legislation the resolution of which was important for both the Commonwealth and Queensland.
2. The applicant successfully opposed interlocutory motions filed by the respondent, such as one seeking security for costs from the applicant.

Additionally Wilcox J relied on the facts that the applicant was a public interest group and that Queensland was an intervenor before the AAT. The decision was seen as significant by the EDO at the time because of the reasons relied on by the judges in not making the usual costs orders against the applicant.

In subsequent cases where applicants have ultimately been unsuccessful the EDO has sought to argue that the applicant should not be required to pay the costs of respondents in particular proceedings in variation of the usual costs orders that costs should 'follow the event'

In another case in which the EDO acted **Campbell v Minister for Planning and Environment** Unreported LEC 40061/87. 24 June 1988 involving a challenge to the making of the Lord Howe Island Regional Enviromental Plan, the applicant was ultimately unsuccessful. It was submitted on costs that costs should not follow the event because of the 'public interest' nature of the proceedings.

In **Campbell**, Cripps CJ considered that there could be special circumstances established to justify departure from the ordinary rules as to costs whereby the unsuccessful party pays the costs of the successful party. In this case, however he found no such circumstances existed.

Hemming J in **Fuller** v **Bellington Shire Council & Commercial Radio Coffs Harbour Limited** Unreported LEC 4071/1985,16 June 1988 referred to **Campbell** on the matter of costs. The applicant had unsuccessfully challenged the decision of the local council to grant development consent to two radio towers in the Bellingen Valley, N.S.W. In the circumstances , Hemming J found there was little to distinguish the applicant as a member of a local resident committee from the usual applicant in Class 4 proceedings of this nature and would not therefore refuse an order for costs on that ground alone. He did find that:

> *"I am satisfied that the applicant properly brought to this court public interest litigation to resolve a dispute which was made more complex by unusual procedures which had been adopted by Council in its determination of the application, and resolutions which were ambiguous and uncertain. Whilst ultimately the Court was satisfied that the obligations imposed by the provisions of the **Enviromental Planning and Assessment Act, 1979** for enviromental assessment had been observed, Council is now better informed as to its powers and duties, and will no doubt take steps to ensure that similar problems and uncertainties are avoided in future." (costs judgment p.3)*

Accordingly costs did not follow the event and no order for costs was made in relation to the first respondant. A limited costs order was made in respect of the second respondent.

More recently, the EDO has acted in proceedings concerning the Regent Theatre in George Street, Sydney. A review of this case is contains in the article "Regent Theatre Cases" by Elena Kirillova in this issue.

In Ne**ttheim** v **Minister for Planning & Local Government & Anor** Unreported LEC 40139/88, 28 September 1988 **(Nettheim No. 2)** the proceedings were commenced to challenge the validity of the second decision of the minister to revoke a permanent conservation order placed on the theatre . The applicant was unsuccessful in the proceedings. In his judgment on costs Cripps CJ referred to the **Arnold** case and the **Campbell** case.

The question in **Nettheim No.2** was whether special circumstances had been established to warrant a depature from the ordinary rules concerning costs.

The first determination required was whether the litigation could be characterised as "public interest" litigation. Cripps CJ concluded that it could. The fact that Actors Equity, represented by the applicant Nettheim, may have had an interest greater than other members of the financial benefit to actors from its continued existence did not gainsay the proposition that the litigation was "public interest' litigation

The second question to be determined was whether the circumstances surrounding the litigation were such that the court should depart from the ordinary rules concerning costs orders. Cripps CJ considered that the timing and circumstances surrounding the making of the second decision by the Minister to revoke the Permanent Conser-

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vation Order were matters to which he was entitled to have regard in the costs application. A further circumstance which was revelent was the extent **Nettheim No. 2** was maintained to prevent the frustration of **Nettheim No.1** (a challenge to the first decision of the Minister to revoke the permanent conservation order on the Regent Theatre).

In all the circumstances Cripps CJ held this was a case in which the Court would depart from its usual practice. Accordingly no order for costs was made.

LEGAL BRIEFS.

XMAS SEMINAR

The EDO in conjunction with the University of Sydney's Faculty of Law held a seminar on 8 December which was addressed by Dr. Charles Wurster, Associate Professor in environmental sciences at the State University of New York. Dr. Wurster gave a stimulating and thought provoking talk on the Topic "The development of environmental law in the United States-A scientists perspective".

Dr. Wurster is a founding member of the Board of trustees of the United States Environmental Defense Fund. This is a public interest organisation comprised of scientists and lawyers. It has done extensive work to protect the environment. The organisation has grown from a very small one over a fifteen year period to an organisation of having an annual budget of eight or nine million dollars. Dr. Wurster was in Australia working on a project for State Pollution Control Commission, Macquarie University and the University of Technology investigating the effects of endo sulphane, a cotton pesticide, on native birds in the Namoi Valley.

In the course of his talk Dr. Worster detailed the development of the Enviromental Defense Fund, which was heavily involved in the fight against the use of the pesticide DDT in America. Over the ifteen year period the office haa grown substancially and now has offices in Washington, New York, Richmond, Virginia and San Francisco. It employs numerous lawyers and scientists. Dr Wurster is on the Board of Directors of the fund, a position he has filled since its inception.

The seminar provoked much interest and discussion from the audience.

FOREST BILL STOPPED.

A Forestry (Enviromental Protection) Amendment Bill was introduced into the New South Wales legislative assembly in November by the Minister for Natural Resources, Mr. Ian Causley. The Bill was criticised by enviromental groups and by the President of the Enviromental Law Association of NSW, Mr Peter McClellan QC. The criticism was in part directed to the fact that the Bill appeared designed to circumvent the Enviromental Planning & Enviromental Impact Statements for forest activities.

The Bill provided for the preparation of forest management plans in areas chosen by the Forestry Commission. When an area was designated as the subject of a forast management plan it was taken outside the provisions of Pt.V of the Enviromental Planning & Assessment Act.

The Bill was defeated in Legislative Council with a block vote of the A.L.P., Democrat and Mrs Bignold of the Call to Australia Party.