IMPACT

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NEW FREEDOM OF INFORMATION LAW IN NSW

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New South Wales now has a Freedom of Information Act, but was it worth the long wait? In this topical article, Peter Prineas gives an easily readable introduction to the Act which should assist both lawyers and non-lawyers alike.

The New South Wales Parliament has recently enacted a **Freedom of Information Act** which fails to broaden the scope of Freedom of Information ("FOI") legislation, which retreats from the draft legislation proposed by Dr Peter Wilenski in his 1982 Report "Unfinished Agenda" and which give less opportunity to the public to seek out information in the hands of government than either the Commonwealth or Victorian freedom of information Acts. The new Act commenced operation on 1 July 1989.

Legislative Council Opposition Leader, Jack Hallam, expressed a widely held view of the legislation when he said "the bill is filled with impediments to true freedom of information. It will lead the innocent into many a blind alley only to be met by a stone wall masquerading as yet another exemption. The bill is a triumph for bureaucrats...Unfortunately, the Premier and the Cabinet have been snowed by these talented, charming and influential people." Just as widely held is the view that Hallam and the ALP have nothing to be proud of in their record of FOI. Former Premier Neville Wran commissioned Dr Peter Wilenski in 1977 to comprehensively review the administration of government in NSW and then proceeded to ignore most of his recommendations. Wilenski doggedly pressed his proposals for more open government and at last in December 1983 the Wran Government introduced a Freedom of Information bill. It was allowed to lapse after Parliament rose that year and was never revived.

One of the most criticised shortcomings in the new Act is that it misses the opportunity to extend general FOI principles to the administration of local government. Local councils will only be required to respond to applications for documents where they concern the applicant's personal affairs. An amendment proposed by Democrat Elizabeth Kirkby in the Legislative Council which would have generally extended the operation of FOI to local government was defeated by the opposing vote of the Government, ALP and Call to Australia parties.

Amendments to the bill by the Legislative Council corrected only a few of its more objectionable features, such as the proposed inclusion of scientific research papers in the list of exempt documents, and the denial of any right of appeal when an application for access is refused by an agency on the basis that it will "substantially and unreasonably divert the agency's resources".

EXCEPTIONS MORE PREVALENT THAN THE RULE

The passage of this Act could even been seen as a contraction of access to information in the hands of government administrations because for the first time it codifies in law all the information for which access may not be given to the public. The number and scope of the exemptions create a very large gap in the general scheme of FOI.

Documents you are not likely to get under the NSW Freedom of Information Act:

Restricted Documents

1. Cabinet documents;
2. Executive Council documents;
3. documents exempt under FOI Acts of the Commonwealth or of another State;
4. documents affecting law enforcement or public safety;

Documents requiring consultation

1. documents affecting relations between the NSW Government and the government of another State or the Commonwealth;
2. documents disclosing information on the personal affairs of a person other than the applicant;
3. documents affecting the business affairs of a person other than the applicant;
4. research documents

Other documents

1. internal working documents;
2. documents subject to legal professional privilege;
3. documents relating to judicial functions;
4. documents the subject of secrecy provisions under another Act;
5. documents containing confidential material;
6. documents affecting the economy of the State;
7. documents affecting the financial or property interests of the State or an Agency;
8. documents the disclosure of which could constitute contempt of court, contravene an order or direction, or infringe the privilege of Parliament;
9. documents arising out of companies and securities legislation;
10. private documents in public library collections;
11. documents disclosing matter relating to an adoption; and
12. information contained in the Register of Interests kept by the Premier pursuant to the Code of Conduct for Ministers adopted by Cabinet.

BUT DON'T ABANDON HOPE

There are some qualifications to this daunting list of exemptions.

a) If a Cabinet document contains only factual or statistical material that doesn't disclose Cabinet deliberations or decisions, access can be given to it. The same applies to Executive Council documents.

b) After the Act has been in operation for 10 years, old Cabinet and Executive Council documents will begin to become accessible because of the 10 year cut off which applies to their exempt status.

c) The internal working document exemption similarly does not prevent access where the document contains only factual or statistical material.

d) The business affairs exemption is limited to documents which disclose trade secrets, or which contain information of commercial value that could reasonably be expected to be diminished by disclosure, or which if disclosed could be expected to have some adverse affect or prejudice the future supply of information.

e) An agency cannot refuse access to a document which is exempt (even the the class of exempt documents which is 'restricted' and the subject of a Ministerial certificate) if it is practicable to give access to a copy from which the exempt matter has been deleted.

f) The Act expressly gives a "legally enforceable right" to access under its limited terms to Ministers' documents but draws back from giving any power of review of a Minister's determination to the Ombudsman. There is, however, a right of appeal to the District Court.

AND DON'T BOTHER THIS LOT AT ALL

As well as exempting classes of information from FOI, the Act specifies certain codes and offices which will be immune from the operations of the Act. These are the offices of Auditor-General, and of Director of Public Prosecutions, the Government Insurance Office, the Independent Commission Against Corruption and the State Bank.

Certain other bodies will have limited immunity against FOI access. They are the office of the Public Trustee (for functions exercised in the capacity of executor, administrator or trustee), the State Authorities Superannuation Board (investment functions) and the Treasury corporation (borrowing, investment and liability and asset management functions).

All documents created by the State Intelligence Group of the Police Force, the former Special Branch or the former Bureau of Criminal Intelligence are also exempt from FOI access.

Courts and tribunals exercising judicial functions are outside the scope of the Act.

MORE REASONS NOT TO ASK

An agency can also refuse access to a document on the grounds that it came to existence more than 5 years before the commencement of the FOI Act. However, the five year limit does not apply in the case of a document relating to the personal affairs of an applicant, or where access to an old document is necessary to enable another document, to which access has been given by the agency, to be understood.

In addition to applications relating to the exempt documents and exempt agencies, FOI applications can be refused if the document sought can be inspected on a public register, is usually available for purchase, or is held in the agency's library.

An agency can also defer access to a document sought under FOI on the grounds that it is required to be published, is to be presented to Parliament or is to be submitted to a particular person or body.

A potentially severe restriction on FOI applications under the NSW Act is contained in section 22 which permits an agency to refuse to deal with an application on the grounds that "it appears to the agency that the nature of the application is such that the work involved in dealing with it would, if carried out, substantially and unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions." It is not clear how much work or how many documents are needed to bring section 22 into play or whether it will be applied to an aggregation of applications from the same party or even from different parties applying for different documents concerning the same or related subject matter.

While there must be a reasonable limit to an agency's obligation to comply with requests for voluminous or numerous documents, this section seems to mean that we will have FOI in NSW only to the extent that it does not inconvenience government departments.

It can be predicted with some certainty that section 22 will be the centre of heated disputes between non government organisations seeking to use the FOI Act as a means of getting a clearer picture of agency operations, and the agencies they are trying to examine.

WHERE TO START LOOKING

The Act assists people intending to lodge an FOI application by requiring each agency to which it applies to prepare a Statement of Affairs. This Statement should contain a description of the agency's structure and functions, how its operations affect the public, its arrangements for public involvement in the formulation of its policies and the exercise of its functions, a description of the various kinds of documents usually held and an outline of the procedures for gaining access to those documents. The Act allows 12 months after its commencement for the preparation of a Statement of Affairs. In additions, the Act requires a Summary of Affairs to be published in the Government Gazette and to be regularly updated. The Summary is required to identify each agency's policy documents, the most recent Statement of Affairs and the officers to whom FOI enquiries and applications should be made.

DON'T BE IN A HURRY

Anyone seeking access to information under the FOI Act should expect to wait at least the 45 days allowed for an Agency response. Unlike the Commonwealth and Victorian FOI Acts, the NSW legislation does not require an agency response "as soon as possible" within a set maximum period. The Commonwealth Act sets a 30 day limit. In the USA a 10 day limit applies in routine requests under the federal FOI Act, with provisions for a 10 day extensions in special circumstances.

Where an agency fails to make a determination under the NSW Act within 45 days this is a deemed refusal giving rise to appeal rights in the applicant.

WHAT IT WILL COST...

The Act does not prescribe fees to be charged for FOI applications and leaves it to each Agency to set its own fees (subject to guidelines to be published by the Minister

administering the Act, that is the Premier).

Guidelines issued by the Premier for government charges under the Freedom of Information Act to commence in July have set a basic charge of $30.00 for applications. However a rate of $30.00 an hour is to be charged for the time spent by public servants in searching out documents and deciding whether they can be made available. This is higher than the rate charged by the Commonwealth for searching ($15.00 per hour) and decision-making ($20.00 per hour). Applicants for access to personal document will get 20 hours free processing time for their $30.00 fee.

The fee for an internal review of a decision to deny access to documents will be $40.00, with provision for a refund if the decision is "significantly" altered. Some concessions will be available, including a 50% reduction in charges for applications where public interest can be demonstrated.

Premier Nick Greiner in announcing the charging guidelines said an element of "user pays" was necessary "to recover some of the substantial costs likely to be incurred by government agencies and to minimise potential abuse of the system".

Under the Federal FOI Act, basic charges are set by Regulation at a flat fee for applications of $30.00, a search fee of $15.00 per hour and a decision-making fee of $20.00 per hour. The Senate Standing Committee on Legal and Constitutional Affairs recently recommended an upper limit on charges under the Federal FOI Act of $85.00 for personal records and $540.00 for other documents.

An FOI application must be accompanied by the fee determined by the agency. In addition, an agency is able to ask for an advance deposit from an applicant where it is of the opinion that the costs to the agency of dealing with the application will exceed the usual fee. An amendment which was proposed by the Democrats in the Legislative Council would, if accepted, have brought FOI fee setting within the purview of Parliament by making it a matter for regulations, but this failed to receive the support of the other parties.

WHO TO COMPLAIN TO

Where an FOI application is determined adversely to the applicant, or adversely to any party required to be consulted about the application (such as another state government, the Commonwealth, or another person whose personal or business affairs would be affected) the Act gives the applicant, or that affected party, a right of appeal.

Appeal in the first instance must be by way of internal review by the principal officer of the agency unless the determination was made by the principal officer, when the appeal would be made to the Ombudsman or the District Court. Such appeals are required to be heard "de novo", that is, as if the application had not previously been made and determined. A fee may be charged for an internal review. The internal review must be determined within 14 days failing which there is a deemed refusal giving the appellant further appeal rights.

The Ombudsman's power to review an FOI determination is quite limited. The role of the Ombudsman is confined to the investigation of complaints of wrong conduct under the Ombudsman Act, 1974 and is not extended in any sense by the FOI Act. Indeed if the complainant has previously complained against an agency under the Ombudsman Act, this precludes a further complaint in respect of a determination by the same agency under the FOI Act. There is no recourse to the Ombudsman until the applicant has first sought an internal review, and no recourse at all where a Ministerial certificate has been issued or where the subject matter of the appeal is the Minister's determination.

A right of appeal to the District Court (after internal review) is given to aggrieved applicants and is required to be pursued in accordance with the rules of the Court. Those rules provide for costs to be awarded against an unsuccessful party, which could operate as a considerable deterrent to applicants wishing to pursue their rights under the NSW FOI act. Under the Commonwealth and Victorian FOI Acts, the costs of an appeal are usually borne by each party. Costs in those jurisdictions can be awarded in favour of a successful applicant but not against an unsuccessful one.

It currently takes about two years to get a matter heard by the District Court which will further discourage applicants from challenging an unreasonable determination by an agency or Minister. It seems that the District Court can opt to hear an appeal "de novo" as if making an original determination, or treat it as an appeal from such a determination.

An objectionable feature of the District Court appeal procedure is the power of the Court to receive evidence and hear argument in the absence of not only the public and the appellant but also the appellant's solicitor or barrister, where it is of the opinion that it is necessary to do so in order to prevent the disclosure of any exempt matter. Under a similar secrecy procedure, FOI appeals to the Commonwealth Administrative Appeals Tribunal are now characterised by strange scenes in which legal representatives for an appellant attempt to cross examine witnesses using copies of affidavits with almost all the words blanked out.

The District Court can examine the reasons why a "restricted" classification has been given to a document (notwithstanding that it is the subject of a Ministerial certificate) and may require the document to be produced and make an order to the effect that the Court is not satisfied that there are reasonable grounds for the claim. However, where the Minister administering the FOI Act (the Premier) confirms a Ministerial certificate access to the restricted document will continue to be denied to an applicant notwithstanding a contrary order by the District Court.

If experience with the Commonwealth FOI is any guide, it may not be long before those hoping to use the NSW legislation for the purpose of advancing some social or political objective find themselves pitted against powerful opponents in an unequal paper war. Not many will survive the heavy barrages of red tape and the withering machine gun fire of fees laid down by the administrators from the well prepared fortifications; and the few who do may linger for years in the muddy trenches of the appeal process with perhaps a fading memory of the Ombudsman's brief and erratic flyover to cheer them.

IMPACT Comment

Environmental groups who may consider making FOI applications to government agencies should exercise some caution from the point of view that multiple requests may give the agencies an excuse to claim their resources are being unreasonably diverted by the multiple requests. We would suggest that where possible some co-ordination between groups on FOI requests would be a good idea.

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The NSW Freedom of Information Act in Summary

Who can apply?
Any person. You must give an address for the service of notices and lodge the application with the agency holding the information you want.

Does the application have to be in writing?
Yes.

Should I say it's an FOI application?
Yes. The application must state that is made under the FOI Act.

Can I only apply for access to paper documents?
No. You can apply access to information held on video and audio tapes and computer disks.

Do I have to pay?
Yes. The Agency to which the application is made sets the fee. The fee must accompany the application. In the case an application for a lot of documents you may be asked to pay considerably more than the basic fee.

Can they charge whatever they like?
No. The fees must be in accordance with the guidelines of the Minister who administers the Act. These will be in the Government Gazette.

Do I have to identify the document I want?
Yes, but the Agency should assist you.

How do I find out what documents they are likely to have?
Ask the Agency for a copy of their Statement of Affairs. Request the help of the person designated as the agency's FOI officer.

Can I ask for any amount of information?
Yes, but your application may be refused if the Agency determines that responding to it will involve an excessive amount of work.

If they do that, can I appeal?
Yes.

How long do I have to wait for my application to be determined?
Up to 45 days for the first determination.

What if they do nothing for the 45 days?
That is deemed refusal and you can appeal.

What if they say no?
You can ask for an internal review of the decision. That determination must be made within 14 days.

What if they still say no?
You can ask for a review by the Ombudsman if you think there may have been wrong conduct by an agency, or you can appeal to the District Court from a refusal by a Minister, or if you consider a decision by an agency to be unreasonable.

Can I apply for documents held by a Minister rather than by his department?
Yes. An in the event of a refusal you can appeal, to the District Court but not to the Ombudsman.

Can I apply to see my personal records?
Yes.

Can I have documents to which I have been given access under FOI amended or made subject to a notation?
You can request this and if your request is refused you may appeal.

Are all documents available under the FOI Act?
No. There are many categories of exempt document. You can appeal to the District Court against a claim for exemption, or even against a Minister's certificate that a document is restricted. You cannot appeal against a Minister's certificate that has been confirmed by the Minister administering the FOI Act (ie: the Premier).

BATTING FOR NON-PECUNIARY INTERESTS IN QUEENSLAND

by Maria Comino
Solicitor of the Supreme Court of Queensland

The recent Queensland case of Central Queensland Speleological Society Inc. v Central Queensland Cement Pty Ltd not only involved a site of immense scientific and geological value but also brought into relief the stultifying effect traditional rules of practice and procedure can have on public interest litigation. In this case, the plaintiff was at first tripped by the rules of locus standi then knocked out by continual orders that the plaintiff lodge up front security for costs. Maria Comino recounts the battle.

Introduction

This is the final chapter in the story of the longest conservation battle in Australia, a battle between a mining company named Central Queensland Cement Pty. Limited and 150 ghost bats found at Mount Etna in Central Queensland, an area listed on the Register of the National Estate, a battle where not only the bats lost but where only conventional interests quantifiable in monetary terms were heard.

It is the longest battle because in 1967 the Queensland Government granted mining leases over Mount Etna to Central Queensland Cement. At the time the leases were granted Central Queensland Cement and the State Government had reached an agreement in the following terms:-

(a) A barrier of not less than once chain in width shall be left between the mine workings and known major cave entrances of habitat caves of the rare bat, Macroderma gigas.

(b) The mine workings shall be so directed that intersection with branches of the habitat caves of the rare bat, Macroderma gigas is unlikely.

(c) The leaseholder shall notify the Inspector of Mines, Rockhampton of the discovery of any previously unknown major cave of the lease.

That agreement encapsulates the essence of the dispute which was the subject of legal proceedings 22 years later, namely should the company be prevented from mining within 50 metres of any entrance of Speaking Tube cave, a habitat cave of the ghost bat.

Background to Legal Proceedings

In December 1987 Premier Mike Ahern and several National Party M.P.s visited Bat Cleft on Mount Etna to witness the emergence flight of thousands of little bent winged bats. Their tour guides up to the cleft were members of the Central Queensland Speleological Society Incorporated. The visit to the mountain was necessitated by the considerable public pressure being exerted on the very new Premier and which called for the protection of Mount Etna. The result of the visit - declaration of part of the mountain as a scientific reserve. Central Queensland Cement was able to continue mining on the remainder of its leases. The reserve protected the maternity site of bent winged bats but excluded Speaking Tube and Elephant Hole caves.

The conservationists argued for the protection of those caves. They referred to a report written in December 1987 by John Toop, a Queensland National Parks and Wildlife Service Officer. He described Speaking Tube Cave as "... an essential biological site. Its destruction would undoubtedly cause increased mortality to the ghost bat colony, in particular the over-wintering pregnant female." It should be mentioned there are only 150 ghost bats at Mount Etna of a total population of 2.000 in Australia. The bats are unique to Australia. The species has been listed as vulnerable by the International Union for the Conservation of Nature. Their importance for scientific research is shown by a $3.9m grant by the Commonwealth Government to the University of Queensland's Centre for Sight and Hearing run by Professor Jack Pettigrew. An important part of the research involves research on the ghost bat which has the most sensitive hearing of any land mammal on earth.

Discussions with the mining company had proceeded to the stage the company had agreed to a six month moratorium on mining in the vicinity of the caves during which time the conservationists were given the opportunity to prepare a scientific report on the importance of the area. A report was produced containing, inter alia, a contribution from eminent bat scientist Dr. Les Hall. The report was rejected by the company and the moratorium lapsed.

On the 2nd and 4th of November the company blasted Speaking Tube and Elephant Hole caves. Protesters immediately entered and resided in the caves up until early December when they were forcibly evicted by the company. The company had placed sirens into the cave causing serious pain and injury to the protesters. It then spent several days dumping earth and fill into both caves.

The company believed it had destroyed the caves. However a film crew from the Derryn Hinch programme went underground in late January of 1989 and subsequently broadcast a programme which showed the cave to be substantially intact. On the same programme the mine manager was interviewed and stated that as far as he was aware the caves had been destroyed. Work immediately recommenced in the vicinity of the cave and the conservationists sought relief from the Court. Within four days of the programme going to air proceedings were commenced before Justice Demack in the Supreme Court of Rockhampton.

The Plaintiff

The Plaintiff in the action was the Central Queensland Speleological Society Incorporated a body incorporated in 1987. Its predecessor, an unincorporated body was formed in 1967. Legal standing of the plaintiff to sue was founded on the fact it had for several years conducted tours to Bat Cleft when that cave was still subject to the company's mining leases. On the tours the group would pass by the entrances to Speaking Tube and Elephant Hole Caves and the plaintiff's members would give a short

briefing on the ghost bat. It was acknowledged that the particular value of the cave was not known to the plaintiff until publication of the report by John Toop. No fee was charged for the tours, however at the end of the tour one could purchase T-shirts bearing the words "Save Our Caves", stickers and other memorabilia. Sales of the items over the previous five years totalled $3,575.00. Additionally the Society had the use of a camp site set up on private property adjoining the mining leases. The Society provided facilities at the camp site and charged its members $1.00 for use of the camp site. Moneys raised from this source were in the sum of $434.00.

The Company - Transgressor?

The action brought against the company was founded on the Fauna Conservation Act 1954 (Qld). Section 54 of the Act provides:- "A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a ...permit...issued under the Act". "Take" is defined to include "disturb or destroy..." and "fauna" includes the "nest" of the mammal. It was alleged that the company breached Section 54 of the Act when it blasted the caves on the 2nd and 4th of November, 1988. More importantly it was argued that there would be continuing breaches of the Act if the company were allowed to carry out further blasting and so damage the aven in the cave which was the winter roosting site of the pregnant female ghost bats and that that would constitute a disturbance of the "nest" of the ghost bat.

Additionally the Society sought a mandatory injunction requiring the company to remove the fill from the cave so that the cave could be restored to its original condition and again be used as a roosting site for the bats.

Justice Demack in the Rockhampton Supreme Court took the view the purpose of Section 54 was to prevent people exercising proprietary claims over wild creatures. The definition sections although wide had to be read with that in mind, and therefore "not every set out facts that could be arguably brought within these wide definitions is brought within the clear intention of the section." In his view there had been no attempt to take fauna.

Justice Demack also found against the Society on the question of standing. However, in spite of these findings the action was not dismissed.

Appeal to the Full Court

On appeal, a majority of the Full Court found there was serious case to be tried concerning the Fauna Conservation Act. Justice Thomas found, "the evidence raised at least two serious questions to be tried:-

(i) whether the defendant would by the activity sought to be restrained disturb or damage any living ghost bat; and
(ii) whether in relation to any living ghost bat the defendant would by the activities sought to be restrained, disturb or damage its nest."

Justice Derrington agreed that the second question was an arguable point for trial on the material advanced, because it may be shown the cave was a nest even if it was not presently occupied or even if it remained unoccupied for a couple of years.

A majority of the Full Court found against the Society on the question of standing. Justices Derrington and de Jersey found there was no reason to delay dealing with the issue. In particular Justice de Jersey found the Society's interest to be "plainly insufficient" and stated "the Court should say so clearly now, rather than let the case go on with its substantial consequential invasion of private property rights".

Justice Derrington relied on **Australian Conservation Foundation Incorporated -v- the Commonwealth of Australia and Others (1980) 146 CLR 493** for the proposition that "where the interest of the relevant group is purely conservation of the natural environment, that alone is insufficient to invest standing". Reference was also made to **Onus -v- Alcoa of Australia Ltd.** (1981 149 CLR 27 from which His Honour extracted the following principle: "While it is true that...an interest which is non-material, non-proprietary and non-pecuniary does not lose its power to justify standing because it may be so described, that does not mean that other interests which are also within that description will do so. A special interest of the required quality must still be shown." In his view the Society had shown no greater non-pecuniary interest than that which was shown by the Australian Conservation Foundation in its case. So far as the pecuniary interest of the Society was concerned His Honour found there was either no such interest or the interest was so minute as not to constitute a pecuniary interest at all.

Justice de Jersey, found the appellant "would gain no sufficient additional advantage" "beyond the satisfaction of righting what it perceives to be a wrong, upholding a principle or winning a contest". The Society's interest in his view "barely surpassed 'the mere intellectual or emotional concern' which Gibbs C.J. held to be insufficient in Australian Conservation Foundation and the Commonwealth page 530".

Dissenting Judge, Justice Thomas, expressed the view the Society had shown a case fit for trial on the question of standing. It did not have "to make out a more substantial case than it had for the purposes of obtaining an interlocutory injunction."

Other issues in the appeal related to whether the proceedings should have been brought in the Mining Warden's Court rather than the Supreme Court, whether all proceedings prior to the filing of an affidavit on the 10th of February, 1989 were a nullity under the Association Incorporation Act 1981 and whether the balance of convenience favoured refusal of an interlocutory injunction. The Court found in the Society's favour on these points.

It should be noted the Full Court heard the appeal within a week of the appeal being lodged. It was accepted the matter should be expedited having regard to the company's allegations of loss it was suffering as a consequence of the injunction granted by the Full Court two days earlier restraining it from mining in the vicinity of the cave entrances. Upon Judgment being delivered the Society made application for and was successful in obtaining leave to appeal to the High Court. Leave was granted by their Honours Justices Toohey, Deane and Gaudron on the ground the case raised important issues concerning standing. The Court granted an injunction on the same terms as that granted by the Full Court. The appeal to the High Court was set down for hearing on the 10th and 11th days of May before the Full Court of the High Court. Just a few days prior to that date the company offered the Society an undertaking, on the same terms as the existing injunction, pending the trial of the matter. This was the first time the company had offered an undertaking not to destroy the cave. On two separate occasions the Society had to make application to the Full Court for an injunction to ensure the subject matter of the action was protected.

On the day the appeal was due to be heard the company brought an application for rescission of the special leave. In its view the appeal was unnecessary because it only related to evidence presented at the hearing of the inter-

locutory injunction. There was no need for determination on the question of standing at this stage when the Society had already shown by its particulars it would be adducing further evidence at trial on that question. The company was successful in its argument though it did have to concede the trial judge in making his finding would not be bound by the Full Court decision on standing. The Society had indicated it was prepared to have the question of standing finally determined solely on the evidence presented in special leave and the application for special leave was stood over.

The further evidence on standing that would have been adduced at trial was to the effect the Society had over many years assisted Queensland National Parks and Wildlife Service with scientific research on bats. The Society's documents showed that they had, since formation of the unincorporated body in 1967, taken a keen interest in the ecology of the caves including the rare Ghost Bat. The Society had tagged bats and kept records of those activities. The Service relied on the Society's expertise in accessing the caves for that purpose and entrusted the Society with keys to the various gated caves. Members of the public could only gain access to those caves upon written authorisation of three members of the Society. It is not unreasonable to say the nature of the activities carried out by the Society were more conveniently performed by the several members of the group sharing responsibility for the various tasks rather than by any individual. If those activities showed a special interest the Society should have been an appropriate plaintiff.

Security for Costs

After leave to appeal to the High Court was granted on the 17th of March the company brought an application before one of the commercial causes judges, Justice de Jersey for an order that the action be listed as a commercial cause but accepted the matter should be expedited.

The trial was set down to commence on the 13th of June. Further orders were made requiring the parties to comply with a practice direction applicable to commercial causes and allowing for the supervision of the matter until trial by Justice de Jersey. This included the hearing of application for inspection of the cave required by the Society to enable its biological, geological and engineering experts to prepare reports for the trial. Such application was refused on the grounds of safety even though the individuals concerned were prepared to accept responsibility for any injury they may have suffered. The Society was subsequently successful before the Master in its application for an inspection of the surface area in the vicinity of the cave.

Throughout the proceedings the company asserted it was suffering serious economic losses as a consequence of the injunction granted preventing it form mining in the vicinity of the cave entrances. It alleged it needed to mine in those areas because they contained high grade limestone required for the production of off-white cement which constituted an important part of the company's sales. Specifically it was stated that even if the company was able to resume mining activities on the 15th of May the company had already incurred losses in the sum of $180,000.00 made by His Honour Justice Demack. The Society queried whether the company had sought alternative supplies of off-white cement so as to mitigate its damage. Evidence subsequently adduced showed the company had not sought alternative supplies available from its competitor Sunstate Cement.

Just over two weeks before the matter was due to go to trial an application was brought on before Justice de Jersey for security for costs. An application for security for damages was set down for hearing at the same time. The Society engaged an economist who provided evidence challenging the company's assertions about loss and it indicated its intention to cross-examine the general manager of the company at the hearing. However, on the morning the applications were due to be heard the company sought and was successful in obtaining an adjournment of its application for security for damages.

At the hearing of the application for security for costs it was submitted by the company that the Society should not be permitted to utilize its lack of means to resist providing further security. Individual natural persons promoting the litigation should support the plaintiff's position by providing the further security. The conservation secretary of the Society stated in affidavit material relied on at the hearing that he gravely apprehended that if an order for further security were made the Society would be unable to comply with the order and would be denied an adjudication on the merits. It was submitted for the Society that an order for further security would effectively stifle litigation because security would not be provided, the undertakings would disappear and the defendant would in all probability proceed to demolish the cave.

His Honour found that the Society had "in the past apparently been able to find money when required..." and did not "have an assurance that if security is ordered it will necessarily not be found". It was ordered that the Society pay $45,000.00 within fourteen days of the making of the order.

The Society despite a public fund raising campaign was unable to raise the money. Upon the company's application the action was dismissed for want of prosecution and the company was released from its undertakings. Four days later the company blasted the cave and the ghost bat aven.

Conclusion

This case must represent one of the most unfortunate examples of the collision of private proprietary rights and public interest rights. What makes the case even more unfortunate is that the party exercising its private rights was a leaseholder. There was the possibility that after the expiration of the leases that Society could have offered public tours to the caves. Moreover at the time the leases were granted there was an agreement preventing mining within one chain of caves knows to be habitat caves of the ghost bat. Perhaps it was the "defect" in absolute legal ownership which was responsible for the company's uncompromising vigorous assertion of its rights.

In exercising its rights as a private "land owner" the company excluded all manner of scientists, bat scientists and medical researchers alike. This attitude guaranteed the fund of information supporting the public interest remained small. Any arguments challenging the company's free exercise of its rights would accordingly suffer from a lack of hard evidence supporting those claims. The assertion of its legal rights gave the company the credibility to ignore the evidence of luminaries in such bodies as the International Union for the Conservation of Nature. Not entirely unaffected by public comment, the company engaged a scientist to report on the use of the caves by the ghost bats. His report which found the bats did not use the cave in the winter of 1988 was based on six weeks of research. Other scientists have been studying bats in the area for up to twenty years.

The final irony was provided by the company's assertions that it would not be in the public interest to grant a permanent injunction. The particulars of the argument

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were that some of the company's employees would lose their jobs as a consequence of the company not having access to the high grade limestone found in the vicinity of the cave and the consequential decrease in production of off-white cement. Loss of revenue to the company would have an impact on the Central Queensland economy and so reduce the company's role in community support and welfare in Central Queensland. This seems inconsistent with statements by the company manager that the company could continue its mining operations for at least another ten years without mining in the area covered by the injunction. Evidence also showed the total percentage of cement sales constituted by off-white cement sales was 7.38%.

The Society spent twenty-one days in court even before there was an opportunity for a full determination of the matter on its merits. The outcome after those twenty-one days – the rights of the private leaseholder, even though prima face a law breaker, prevailed over trespassers representing the public interest. The legal process allowed no scope for a value judgment on who had committed the more serious offence.

If there had been a final determination on the merits it would have occurred in a forum orientated to dealing with criminal, commercial and property law matters. In Queensland at least it is clear the law is a long way from recognizing the possibility that responsibilities may attach to the ownership of land requiring protection of its native inhabitants. In short, it is a long way from giving real recognition and protection to non-material, non-proprietary and non-pecuniary interests that were the subject of this action.

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A report about the project by Elena Kirillova will appear in the next edition of IMPACT.