IMPACT

A QUARTERLY NEWSLETTER ON ENVIRONMENTAL LAW May 1990.

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SOME DEVELOPMENTS ON THE STANDING FRONT - RECENT CASES.

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On 20 December 1989 Mr Justice Davies of the Federal Court of Australia handed down his decision in proceedings taken by the Australian Conservation Foundation and Michael Harewood, a farmer living near Eden in Southern N.S.W., against Senator Cook, the Commonwealth Minister for Resources and Harris-Daishow (Australia) Pty Ltd[1]. At issue was whether Senator Cook had complied with section 30 of the Australian Heritage Commission Act 1975 (Cth) in reaching his decision to grant a licence for Harris-Daishowa to export 850,000 tons of woodchips annually for 17 years. The A.C.F. and Harewood sought an order of review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the AD(JR)Act"), alleging that the Minister had not made this decision lawfully.

Section 5(1) of the AD(JR) Act allows "a person who is aggrieved by a decision..." to seek an order of review under s 16 of that Act. A preliminary but important point raised against the application by the Minister and Harris-Daishowa was that the applicants lacked standing to sue - i.e. that the A.C.F. and Harewood were not "aggrieved" within the meaning of the Act and were therefore not entitled to take proceedings at all. The Minister applied to the Court asking that this be dealt with as a preliminary matter prior to hearing of the substantive issue of whether the Minister's decision was lawful. This application was rejected by the court in line with other cases which have held that where the applicant's claim to have standing is not "merely colourable", the court has a discretion to deal with the issue of standing as part of the substantive proceedings[2]. The final hearing of the matter took about five days, approximately half of which was taken up with the issue of standing.

This is illustrative of some of the difficulties that environmental groups face in public interest litigation. As the law now stands, the applicant will often have to demonstrate that it has a right to assert its claim irrespective of the merits. In English and Australian law this normally means that the applicant has to demonstrate a "special interest" in the subject matter of the litigation, and this is so whether the applicant is seeking an injunction under the common law or an order of review as a "person who is aggrieved" under the AD(JR) Act[3].

Standing at Common Law

The test for the right to sue for breach of a public duty at common law was laid down by Buckley J in **Boyce** v. **Paddington Borough Council**[4].

> "A plaintiff can sue without joining the Attorney General in two cases: first, where the interference with the public right is such that some private right of his is interfered with...; and, secondly where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right."

This statement of the law derives from a series of public nuisance cases stretching back to Restoration England which held that it was the prerogative of the Crown to sue for beaches of public rights[5]. Where the Crown refuses or neglects to sue, public interest litigants usually have to depend on the second limb of Buckley J's test. This information of the test, with its emphasis on "private rights" and "special damage", is inappropriate in a social environment where groups with no proprietary interest in the subject matter of an Act of Parliament seek redress in the courts for breaches of public rights.

In 1980 the High Court of Australia in the case of **A.C.F** v. **Commonwealth** [6] was called upon to apply this test in the environmental field. The A.C.F sought injunctive and declaratory relief in challenging decisions which led to the building of a tourist development in Queensland. Gibbs J. reformulated the old rule,

> " It is quite clear that an ordinary member of the pubic who has no interest other than that which an ordinary member of the public has in upholding the law, has no standing to prevent the violation of a public right or to enforce the performance of a public duty."[7]

Gibbs J. envisaged that a person may "have a special interest in the preservation of a particular environment" [8], and Mason J. was prepared to allow standing to applicants whose "social or political interests" were damaged [9]. Although this is some basis for the recognition of non-pecuniary interests, all members of the court, with the exception of Murphy J. denied the A.C.F standing on the grounds of insufficient interest.

Contents:

In **Onus** v **Alcoa of Australia Ltd.**[10], the High Court, considering a non-pecuniary interest , allowed standing to two members of the Gournditch-jmara Aboriginal Community who sought declarations and injuctions to enforce the provisions of a Victoria statute which made it a criminal offence to destroy or deface tribal relics[11]. Courts with civil jurisdiction are generally reluctant to grant injunctions to enforce criminal laws, but it appears that the test for standing to seek an injunction is the same whether the law to be enforced is civil or criminal[12]. In **Onus** the court held that the applicants had a special interest in the subject matter of the action, arising from their position in the community in relation to the custody and preservation of the relics. Mr Justice Brennan observed that,

> "A special interest in the subject matter of an action, being neither a legal nor an equitable right, nor a proprietory of pecuniary interest, will ordinarily be found to arise from modern legislation enacted to protect or enhance non material interests - interests in the environment, in historical heritage, in culture. Where such material interest a breach or the duty to protect or enhance a non material interest, ... A plaintiff in such a case, though he may be unable to show a special interest in what the statute seeks to protect or enhance, would be unable to show a private right or to prove that he has suffered proprietary or pecuniary damage. To deny standing would deny to an important category of modern public statutory duties an effective procedure for curial enforcement." [13]

Even this widened special interest test did not assist the applicant in **Coe** v. **Gordon**[14] . In this case the Supreme Court of NSW denied standing to an Aboriginal who sought to restrain a Minister from illegally revoking and alienating certain Aboriginal reserves. The court found that the applicant had no connection with the reserves and that he would not suffer any detrimental effects from the Minister's actions, and so he was denied standing on the basis that his interest was no greater than other members of the community. By way of contrast, in a case of environmental litigation the fact that an organisation operated a business of running tours for profit to Fraser Island which it promoted as an unspoilt wilderness, gave it standing to challenge a council development decision[15].

In the recent case of **Central Queensland Speleological Society Incorporated** v. **Central Queensland Cement Pty. Ltd.**[16], two of the three judges of the Supreme Court of Queensland denied standing to the Society. The Society was seeking an injunction to prevent the respondent company breaching the Fauna Conversation Act, 1974 (Qld) by destroying caves, in the course of its mining activities, in which a rare species of bat nested. Derrington J. applied a restrictive interpretation of **Onus**,

> "While it is true that the principal may be extracted from (Onus) that an interest that is non-material, non-proprietary, 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 within that description will do so. A special interest of the required quality must still be shown."[17]

Of **Onus**, Derrington J. said, " the relics were of cultural and spiritual importance to the plaintiffs as a special group"[18]. The Speleological Society, he said, had no greater non-pecuniary interest than the A.C.F had in the 1980 case. He characterised the Society's interest in the subject matter of the litigation as entirely emotional and/or intellectual, and denied a locus stand to the Society by relying on a statement of Gibbs J. in that case that such an interest will not suffice to ground standing[19].

De Jersey J. was of the same opinion.

> "In this case the interest to the appellant in the preservation of the cave barely surpasses the " merely intellectual or emotional concern" which Gibbs C.J. held to be insufficient in **A.C.F.** v. **Cth** (at 530). If successful in preserving the cave, what advantage would this appellant secure, beyond the satisfaction of righting what it perceives to be a wrong, upholding a principle or winning a contest? In my opinion the plaintiff would gain no sufficient additional advantage."[20]

The concept of a "sufficient advantage" is crucial to this decision, for the Society had made small profits (about $4,000 over 5 years) from selling T-shirts and from the use of a camp that it had set up on private property with the permission of the owner. Derrington J. dismissed this by saying, "either there is no such interest shown, or ... the interest is so minute or remote as not really to constitute an interest of the necessary quality..."[21].

Therefore, in Queensland at least, a public interest litigant not only has to show a special interest in the subject matter of litigation, but also a "sufficient interest" as measured by the amount of a pecuniary interest or the nature of a non-material interest.

Jacobs J. in a recent case in the Land and Valuation Division of the Supreme Court of South Australia[22], took a different approach. The A.C.F. and the Conservation Council of South Australia sought relief in regard to a lease which the Minister for Environment and Planning had granted to Ophix Finance Corporation Pty. Ltd. to develop a part of the Flinders range National Park without reference to the Planning Act 1982 (S.A.). The standing of the applicant was challenged during the proceedings. Jacobs J. found that the Planning Act did not apply to the proposed development and so the applicants lost on the merits, but he considered the standing of the applicants in any event as it was clearly an important issue in the proceedings. The respondents argued that the 1980 A.C.F. case was the same in principle as the present case. While not deciding finally on the matters raised by the A.C.F. to support its claim of a "special interest", such as commercial activity in the sale of posters and publications concerning the Park, the use of the area by members of the A.C.F. and steps taken to promote interest in the park in general, Jacobs J. stated that whether these matters went far enough to distinguish the case from the 1980 A.C.F. case was arguable, but he considered that rights conferred by the Planning Act to make representations and to appeal against planning approvals would be relevant distinctions between this case and the 1980 A.C.F. case was partly an administrative action concerned with exchange control laws. As the A.C.F. had a special interest in the Park and the decision they sought to challenge was one of "grave public importance", it would be proper for the Attorney-General to raise the issue, and if he failed to do so there were strong public policy grounds for a representative body like the A.C.F. being accorded standing.

The approach of Jacobs J. in South Australia would appear to be a great deal less restrictive than that of the majority judges in the Supreme Court of Queensland. The decision of Jacobs J. is presently on appeal to the Full Court of the Supreme Court of South Australia and his comments on standing may therefore be reviewed.

Standing as "A Person Aggrieved" Under Section 5 AD(JR) Act

The common law test of standing has been reflected in those statutes like the AD (JR) Act which grant standing to "a person aggrieved" or "an interested person". The Privy Council in **Attorney-General (Gambia)** v. **N'jie**[23] held that "a person aggrieved" must have a "special interest" in the subject matter of the proceedings. The Federal Court of Australia interpreted these words liberally in a number of cases during the 1980's where s5(1) arose for consideration[24], and in U.S. Tobacco the Full Court went a long way towards a concept of public interest standing by adopting the following statement of Stephen J. in **Onus**,

> "...Courts necessarily reflect community values and beliefs, according greater weight to and perceiving a closer proximity in the case of, some subject matters than others. The outcome of doing so, however rationalised, will, when no tangible proprietary or possessory rights are in question, tend to be determinative of whether or not such a special interest exists as will be found standing to sue."[25]

In **Ogle** v. **Strickland**[26], the Full Federal Court held that an Anglican and a Catholic priest had sufficient interest to challenge a decision by the Censorship Board to grant an import licence to a film (Hail Mary) which the applicants considered should have been rejected for blashemy. This decision seemed to broaden the range of individuals who are likely to satisfy the relevant special interest test, and do away with any necessity for the interest to be material or proprietary. The recent A.C.F. case[27] consolidates the movement towards standing based on public interest under the AD(JR) Act that was foreshadowed in earlier Federal court cases.

Mr Justice Davies took as his starting point the passage in the judgment of Gibbs J in **A.C.F.** v. **Commonwealth** (1980) (cited above) which reflected the test for standing to seek an injunction at common law. He then reviewed precedent cases concerned with s 5(1) and determined that an interest need not be a "legal, proprietary, financial or other tangible interest"[28]. Nor must the interest be peculiar to the particular applicant[29], but the applicant must demonstrate "genuine affectation of an interest which attaches to him"[30]. He rejected the submission put by the respondents that **A.C.F.** v. **Commonwealth** (1980) laid down as a matter of law that the A.C.F. has no standing in a case such as the present. "What has to be examined," he said, "is whether or not A.C.F. has a special interest in the subject matter of the application."[31]

Davies J. adopted the words of Stephen J. in **Onus**:

> "As the law now stands (the criterion of 'special interest') seems . . . to involve in each case a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter." [32]

From this he concluded that "it is necessary in every case to examine the standing of the applicant in the light of the issue which is to be considered." [33]

He then proceeded to examine the interest that the applicants had in Senator Cook's decision.

> ". . . the present issue is not a local issue such as may have been involved in the **A.C.F.** case. And, in the decade that has been passed since **A.C.F.** was denied standing to protect the wetlands at Farnbrough in Central Queensland, public perception of the need for the protection of the environment and for the need of bodies such as the A.C.F. has noticeably increased . . ."[34]

He citied the facts that the A.C.F. is a major national conservation organisation which was established partly to reconcile "the use and exploitation of resources with the conservation of the natural environment", that the A.C.F has had a long and continuing interest in the National Estate areas of the South-East Forests which resulted in the production of reports and papers about the genetic diversity and the need to conserve the forests, and that it is a large enterprise which has received substantial funding from both State and Commonwealth governments. Davies J concluded that the A.C.F.,

> ". . . is pre-eminently the body concerned with that issue. If the A.C.F. does not have a special interest in the South East Forests, there is no reason for its existence. In my opinion, the community at the present time accepts that there will be a body such as the A.C.F. to concern itself with this particular issue and expects the A.C.F. to act in the public interest to put forward a conservation viewpoint as a counter to the viewpoint of economic exploitation."[35]

The result is that the A.C.F. was granted standing because of a combination of its involvement in the issue of the South East Forests, its funding and support from government, and Davies J's perception of public opinion. Davies J. did qualify his conclusion by saying that the A.C.F. would not have standing to challenge any decision which might affect the environment, but it does appear that environmental groups may now bring themselves within the group of those whose interests are affected by their activities.

However, Michael Harewood who was concerned that his property and therefore his interests would be affected by logging the forests, was denied standing on the basis that "these proceedings are not concerned with the effect of logging inside the National Estate on property outside the National Estate."[36] This is a curious decision, especially as s 3(4)(i) of the Act includes a person whose interests are adversely affected by the decision in the definition of "a person who is aggrieved". It may mean that it is the immediate effect of a decision rather than the consequences which go towards a person being aggrieved, but this reasoning is artificial given that is often difficult to separate a decision from its consequences. One could be forgiven for thinking that if Harewood's land would be affected by the decision to log National Estate forests, then his interests would be affected.

Conclusion

There is a perceptible movement under both the common law and the Administrative Decisions (Judicial Review) Act towards according to environmental litigants standing on the basis of public interest. The traditional restrictions as to standing appear to be breaking down, and cases like **Speleological Society** may be anachronistic.

Notes

1. Australia Conservation Foundation & Harewood v. Minister of Resources & Harris-Daishowa (Australia)

Pty. Ltd.: Federal Court of Australia, G326/89, 20 Dec 1989.

2. e.g. Robinson v. Western Australia Museum (1977) 149 CLR 283, at 302-3.

3. The exception are statutes like the Environmental Planning and Assessment Act, 1979 (NSW), s123 of which grants standing to "any person".

4. [1903] 1 Ch. 109, 114.

5. Hart v. Bassett (1681) 4 Vin. Abr. 519; Iveson v. Moore (1694) 1 Ld. Raym. 48

6. (1980) 146 CLR 493.

7. id. at 526.

8. id 530-1

9. id. at 547.

10. (1981) 36 ALR 425.

11. Archaelogical and Aboriginal Relics Preservation Act 1972 (Vic), ss 2, 21.

12. Peek v. New South Wales Egg Corporation (1986) 6 NSWLR 1; Onus v. Alcoa (1981) 36 ALR 425, at 453 per Wilson J.

13. Onus (note 10 above), at 461.

14. [1983] 1 NSWLR 219.

15. Fraser Island Defenders Organisation Ltd. v. Hervey Bay Town Council [1983] 2 Qld R. 73.

16. Unreported. Appeal No. 10/89, 7th March 1989.

17. id. Judgment of Derrington J. at 10.

18. id. at 9-10

19. id. at 9.

20. id. Judgement of de Jersey J., at 5.

21. Derrington J., at 11.

22. Australia Conservation Foundation Inc & Conservation Council of S.A. Inc v. State of S.A & Ophix Finance Corp. Pty Ltd. Supreme Court of South Australia, 2946/88, Jacobs J. 11 May 1989.

23. [1961] A.C. 617, 634-5.

24. Tooheys Ltd. v. Minister for Business and Consumer Affairs (1981) 36 ALR 64, at 79; United States Tobacco Co. v. Minister for Business and Consumer Affairs (1988) 83 ALR 79: Re Aust. Institute of Marine Engineers (1986) 71 ALR 73

25. U.S. Tobacco Co v. Minister for Consumer Affairs (1988) 83 ALR 79, at 87.

26. (1987) 71 ALR 41.

27. ACF & Harewood (above, note1)

28. id, at 5.

29. id, at 6.

30. Re Hatton and Collector of Customs (NSW) (1977) A.L.D. 67, per Brennan J., quoted at id., 5-6.

31. ACF & Harewoood, at 7.

32. Onus 36 ALR 425, at 436; quoted at ibid.

33. ACF & Harewood, at 6.

34. id. at 8.

35. id., at 8-10

36. id., at 12-13.

Authors' Note

The Full Court of the Supreme Court of South Australia recently heard the appeal from the decision of the single judge in **ACF & Conservation Council of S.A. Inc. v State of S.A. & Ophix Finance Cor. Pty Ltd.** No 2946 of 1988 (unreported). The Full Court held that ACF did have standing because of the participatory rights accorded to ACF under the planning legislation in question. The Full Court handed down its decision on 5 April 1990.

HAZARDOUS AND OFFENSIVE DEVELOPMENT
A COMMENT ON THE DRAFT STATE ENVIRONMENTAL PLANNING POLICY

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The author prepared the submission by the EDO made to the Department of Planning on the draft SEPP on offensive and hazardous industry exhibited for public comment recently. The EDO's submission was presented jointly with the Australian Conservation Foundation and the Public Interest Advocacy Centre.

A. Introduction

Two days after the closing date for submission of comments on the draft State Environmental Planning Policy - Hazardous and Offensive Development the Boral LPG storage plant in inner Sydney exploded sending a fireball 500 metres into the sky.[1]

The incident was a stark reminder to the risks associated with hazardous development. Boral obviously considered the design and location of the plant to be suitable at the time of building but the people who made the decision to develop the site, and the authority (if any) which allowed the development must be wondering what could have gone so wrong.

In the search for suitable principles, standards and practices in the decision-making processes for such industry the Minister for Planning has released the draft Policy on Hazardous and Offensive Development.

This article examines the draft policy and its implications.

B. Summary of the Draft State Environmental Planning Policy

New definitions of hazardous and offensive industry will, in the draft State Environmental Planning Policy (Hazardous and Offensive Development) ('the draft SEPP'), replace existing definitions in all environmental planning instruments ('EPI')[2]. One of the policy's aims is to amend the definitions of hazardous and offensive industries[3].

It is worth quoting those definitions from the draft SEPP, and two other important new definitions:

"hazardous industry"
means an industry which, when in operation and when all measures proposed to minimise its impact on the locality have been employed (including measures to isolate the industry from existing or likely future development on other land in the locality), would pose a significant risk in relation to the locality: (a) to human health, life or property; or (b) to the biophysical environment;

"offensive industry"
means an industry which, when in operation and when all measures proposed to minimise its impact on the locality have been employed (including measures to isolate the industry from existing or likely future development on other land in the locality), would emit a polluting discharge (including noise) in a manner which would have a significant adverse impact in the locality or on the development;

"potentially hazardous industry" means an industry which would be a hazardous industry if it were to operate without employing any measures (including isolation from existing or likely future development on other land) to reduce or minimise its impact in the locality or on the development;

"potentially offensive industry"
means an industry which would be an offensive industry if it were to operate without employing any measures (including existing or likely future development on other land) to reduce or minimise its impact in the locality or on the development;

Part 2, 6(2) of the draft SEPP states that in determining whether an industry is a **hazardous industry** consideration must be given to the Department of Planning's circulars and guidelines.

The Policy applies to all the State[4] and if there is an inconsistency between the draft SEPP and an EPI the draft SEPP prevails[5]. The draft SEPP prevails over EPI s made before it[6].

A consent authority[7], in determining an application to carry out **potentially offensive** or **potentially hazardous** development, must consider matters in Part 3, 8 of the draft SEPP[8].

These matters include circulars and guidelines published by the Department of Planning, whether any public authority should be consulted concerning any environmental and land use safety requirements, an applicant's preliminary hazard analysis, feasible alternatives for the location of the development, and likely future use of the land surrounding the development[9].

Advertising of potentially offensive and potentially hazardous development is governed by the Environmental Planning and Assessment Act, 1979 (the 'EPAA') in the same way the Act governs designated development[10].

C. Power of Local Councils

Prior to the draft SEPP Councils could prohibit potentially hazardous and potentially offensive industry by applying their own definitions of hazardous industry and offensive industry and then prohibiting that industry by the power of s 76(3) of the EPAA (see **ACR Trading Pty. Limited & Anor. v. Fat-sel Pty. Limited and Anor**. Appeal No. 216 of 1985, Court of Appeal).

In this way if Councils felt they could not deal with such industry they avoided doing so.

In the **Fat-sel** case the defendant operated what is a "potentially offensive industry" by the draft SEPP because the industry dealt with the separation of fatty substances which produced rancid odours. Since the odours were controlled, the industry is not an "offensive industry" by the draft SEPP because it had no significant adverse impact in the locality when measures used to minimise its impact were employed.

The draft SEPP did not exist at the time, so the Liverpool Planning Ordinance Scheme was used to determine that the industry was an "offensive industry" and was thereby prohibited.

In **Fat-sel**, Kirby P, with whom Samuel JA and Hunt AJA agreed, said that in the Liverpool Planning Ordinance Scheme:

> the concern of the planner is the classification of 'industries', not of the particular ways in which activities within those industries may inoffensively be carried out. Such inoffensive conduct may attract other forms of relief, for example, refusal of injunction under s 124; relief by the Minister under s 100A or relief upon application to the council under reg 54 of the regulation

Now, Councils cannot use their own definitions of hazardous industry and offensive industry because Part 2, 6(1) of the draft SEPP states that in an EPI (no matter when it was made), any reference to a hazardous or offensive industry is a reference to a hazardous or offensive industry defined in the draft SEPP, and the draft SEPP definitions prevail to the extent of any inconsistency with an EPI (Part 1, 5).

In other words, Councils can prohibit such industries but the draft SEPP determines what makes an industry hazardous or offensive.

D. Implications of the Draft SEPP

The Department's guidelines for development of hazardous industries are in the **Hazardous Industry Planning Advisory Paper No. 3.**

The guidelines are for abnormal and atypical hazardous events and conditions.[11] These events and conditions and their causes and consequences are to be identified in qualitative terms[12]. A probability/frequency analysis of each event is to be undertaken and used to estimate the "likelihood of each incident scenario occurring and the likelihood of those scenarios being translated into particular outcomes, having regard to all the proposed technical, organisational and operational safety controls."[13]

The "off-site residual risk - i.e. risk to people, the environment and other land uses - while accounting for the effectiveness, as well as the limitations, of technical hazards control"[14] is to be identified.

Councils must consider safety requirements for a hazardous facility at siting, the feasibility study, design, construction and operation. Safety requirements are to consider equipment and organisational safety measures.[15]

During operation, plant safety and operations must be ensured by periodic hazard auditing. Such audits must be based on a detailed and comprehensive review of all operational and organisational safety systems and practices. Monitoring the operation's critical safety parameters and recording outputs is recommended.[16]

Because of these guidelines Councils must perform all these tasks if they are to properly assess, monitor and control potentially hazardous industry. In fairness to industry Councils will need to establish objective measures of performance to satisfy industry that they are performing their duties reasonably.

It is difficult for Councils to use consultants to undertake many responsibilities prescribed by the **Hazardous Industry Advisory Paper No. 3** because many tasks are ongoing, ad hoc and may require enforcement action.

When Councils do take enforcement action they may not have realistic options to enforce conditions of development consent. For example, Justice Stein of the Land and Environment Court recently criticised as "wholly inadequate" the maximum fines that can be imposed on corporations and persons who fail to comply with fire safety notices[17].

E. Legal Force of the Draft SEPP

Pursuant to s 90(1)(a)(ii) of the EPAA the **draft** SEPP must be considered in determining a development application. In view of the range and scale of tasks Councils face, they needed to plan before implementation of the draft SEPP.

"Locality", used in the definition of both "hazardous industry" and "offensive industry", limits the geographical area of consideration of the risk or adverse impact posed by such industry. Consideration is limited either "in relation to the locality" or "in the locality".

Hazardous wastes of an industry could be transported outside the "locality" of the Council and make that industry not a "hazardous industry". Such a policy could lead to the export of wastes to third world countries or to an incident similar to the "Seveso" disaster in Italy, which involved the crossborder transfer of wastes[18].

Wastes are reduced in the air in some industries by dissolving them in water and by pouring the polluted water into streams or the ocean. A coal-burning electrical power plant could reduce sulphur dioxide emissions by forming large quantities of either solid or liquid wastes[19]. Such industries are polluting industries but not strictly "offensive industries" because they transport waste away from their locality.

These types of problems could be reduced if the word "environment" were substituted for "locality" in the definitions.

G. Significant Risk and Significant Adverse Impact

To be a "hazardous industry" an industry must pose a "significant risk" and to be an "offensive industry" an industry must pose a "significant adverse impact".

These standards allow the development of industry which, for example, poses a risk to human health. The test is to look at a proposed development with its measures to minimise its impact and then predict if that development poses a significant risk[20]. If the industry poses a risk to health the development may be approved. Only when the industry poses a **significant** risk must development consent be refused. Similarly, "offensive industry" must have a **significant** adverse impact to be prohibited development.

H. Advertising

When Councils determine development applications for "potentially hazardous industry" or "potentially offensive industry" the public cannot protect their interests in the Land and Environment Court unless the development is designated.

Part 3 of the draft SEPP says that potentially hazardous and potentially offensive development shall be advertised as

though it were designated development and objections by the public must be considered by the Council, but the public has no standing in the Court unless the development is designated development, because ss 95 and 98 of the EPAA do not apply to the draft SEPP.

This gives rise to a situation where relatively "inoffensive" development such as marinas or quarries, for example, which are designated development can result in third party appeals, whereas major risk decisions on hazardous and offensive development will not be appealable by objectors.

I. Conclusion

The implications of the policy are far reaching. It is clear that:

- Councils will have no power to make and use their own definitions of "hazardous industry" or "offensive industry";
- Councils will have no power to prohibit potentially hazardous or potentially offensive industry and thus will have to consider some applications which currently can be excluded under broader definitions in Local Environment Plans ('LEPs');
- Councils will need to acquire expertise in assessing, monitoring and policing potentially hazardous and potentially offensive industry;
- hazardous industry can be developed if the risk from that development can be transferred away from its "locality" (eg. by exporting dangerous waste); and
- the public has no standing in the Land and Environment Court with respect to their objections to hazardous or offensive development unless it is designated development.

Three suggestions with respect to the draft SEPP are put forward as follows:

1. A preferred approach for decision making for development of potentially hazardous and potentially offensive industry is to have development consent determined by properly funded central environmental authorities in conjunction with Councils.
2. Objector appeal rights under ss 95 and 98 of the EPAA should apply to allow designated development rights of appeal.
3. The definitions of hazardous, offensive, potentially hazardous and potentially offensive industry should be changed so the limitation with regard to the "locality" is removed.

In conclusion, the draft SEPP is inappropriate because it has imposed on Councils decision-making processes for which they are not equipped and which, in the past, many have chosen to avoid by defining such industries broadly and **then excluding them in LEPs.**

J. Footnotes

1. Sydney Morning Herald, Monday April 2, 1990.
2. Clause 6 of the draft SEPP.
3. Clause 2 of the draft SEPP
4. Clause 4 of the draft SEPP.
5. Clause 5 of the draft SEPP.
6. Clause 5 of the draft SEPP.
7. For the remainder of this article the word "Council" includes "consent authority" within the meaning of the Environmental Planning and Assessment Act, 1979.
8. Clause 8 of the draft SEPP.
9. Clause 8 of the draft SEPP.
10. Clause 9 of the draft SEPP.
11. Department of Planning, 1989, Hazardous Industry Planning Advisory Paper No. 3, p.4
12. Department of Planning, 1989, Hazardous Industry Planning Advisory Paper No. 3, p.5
13. Department of Planning, 1989, Hazardous Industry Planning Advisory Paper No. 3, p.8
14. Department of Planning, 1989, Hazardous Industry Planning Advisory Paper No. 3, p.7
15. Department of Planning, 1989, Hazardous Industry Planning Advisory Paper No. 3, p.7
16. Department of Planning, 1989, Hazardous Industry Planning Advisory Paper No. 3, p.12
17. McCann, Ray Sydney Morning Herald Saturday, March 17, 1990. p.31.
18. Johnson, S.P. and Corcelle, G. 1989 The Environmental Policy of the European Communities Graham & Trotman p.159
19. Wark, K. and Warner, C.F. 1981 AIR POLLUTION Its Origin and Control, Second Edition. Harper and Row, New York. p.13
20. See the definitions of "potentially hazardous industry" and "hazardous industry".

K. References

Department of Planning, 1990 Draft State Environmental Planning Policy - Hazardous and Offensive Development.

Department of Planning, 1989 Hazardous Industry Planning Advisory Paper No. 3 Environmental Risk Impact Assessment Guidelines.

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1990 Public Interest Law Conference University of Oregon, Oregon U.S.A.

The only international public environmental law conference in the world was held on 1-4 March 1990 at the University of Oregon. Nicola Pain, Principal Solicitor of the Environmental Defender's Office, was very pleased to attend and speak at the conference about Australian environmental law. The conference proved an excellent opportunity to network with like-minded lawyers and environmentalists.

During its four days, the conference covered a huge range of topics ranging from practical issues such as hazardous chemicals and toxic waste disposal to the more philosophical end of the environmental spectrum with panels on ecofeminism and deep ecology. Lawyers from most continents attended, including lawyers working in the public interest environmental field from countries such as India, Sri Lanka, Indonesia, Ecuador, Chile, Canada, the U.K., the Netherlands, Russia and, of course, the U.S.A. It is always fascinating to hear of experiences in other countries and to compare notes with lawyers in the public interest field. It was an opportunity to learn about how the legal systems in developing countries are coping, or are not coping as the case may be, with the protection of the environment and increasing demands for development.

Speakers at the conference included the very inspiring Lalananth da Silva, a public interest lawyer from Sri Lanka. He emphasised the need for co-operation and understanding of the position of developing countries by their wealthier cousins and the need to work closely with the developing countries in determining the kinds of environmental policies which should be attached to aid packages, for example.

A very interesting and thought-provoking speaker from India was Dr Vandana Shiva, a scientist who has worked closely with issues concerning women and development in India for much of her working life. Dr Shiva recently spoke on the ABC's Coming Out Show on Monday 16 April 1990. Dr Shiva has written extensively on the problems of development in lesser developed countries and how the push for development particularly affects women. She spoke of the Chipko movement in India. This refers to a practice whereby women in some communities in northern India literally hugged trees in threatened forests in order to protect those forests from logging. One interesting aspect of this issue was that the men in the relevant communities were often in favour of the logging practices but the women perceived that in the long-term it was better for the communities that the forests remain.

For an Australian lawyer it was noteworthy to hear about systems which exist in countries such as Malaysia where the constitution of the country in question does provide basic rights to the people. It is possible these rights can be invoked in a court of law in some attempt to stop the government of the day allowing the abuse of resources which are the basis of the cultural heritage and livelihood of a particular indigenous people. In Australia we do not enjoy constitutional protections of quite basic rights and this obviously applies beyond the environmental law area.

Another issue which received much attention at the conference is the considerable development in Ecuadorian rainforests at present. There is great difficulty preserving areas of rainforest in national parks as it is the policy of the government to allow development within national parks. One particularly damaging form of development is the extraction of petroleum. This is taken from the national parks by pipelines which are poorly maintained and which therefore leak petroleum. The scope for public interest litigation in Ecuador is extremely limited. There is only one small public interest law practice called Corporacion De Defensa De La Vida. This has two lawyers Dr Byron Lopez and Ms Marcela Vasquez and is based in Quito, Ecuador.

Many of the comparative law sessions were the most interesting with lawyers from different countries giving their perspective on legal and environmental issues in their own country. For example, the Australian situation was discussed in conjunction with a lawyer from Japan and a lawyer from Peru.

It was not all serious discussion at the conference however. The conference is run by an extraordinarily energetic and competent student body called Land Air Water in the University of Oregon. In addition to the main conference, which the student convenors organised, there are other affiliated activities. One of these is a photographic contest and exhibition entitled "That ain't a Wetland that's a Swamp!". Another event that was held specifically for the conference was a Run for the Rainforest on 3 March 1990. The aim of the run was to highlight the degradation of Ecuadorian rainforests. The action was in part sponsored by the Rainforest Action Network. The proceeds of the run which amounted to $US1500 were donated to Dr Byron Lopez and Ms Marcela Velasquez to assist them in their work in Ecuador.

Regional Green Aid: Environmental Law and Awareness Project

The EDO is anxious to extend its international environmental protection initiatives in an outreach programme aimed at South East Asian and Pacific Island Countries.

The Senate Environment Committee has called for Australia's aid programme to be more environmentally orientated.

On one hand, Australia cannot reasonably demand from less wealthy countries more stringent environmental protection standards than we impose on our own development. On the other, it is clearly the only way forward for developing countries to make sure that aid projects do not facilitate environmentally rapacious development at the expense of key environmental resources and amenity and long term development. In this light, there is no subtitute for increased awareness in South East Asian and Pacific Island countires of environmental problems and of the inter-related nature of development, pollution, population pressure and demands upon resources.

The EDO has thus proposed to AIDAB in response to this need, a **Regional Green Aid: Environmental Law and Awareness Project** aimed at increasing the personal awareness of lawyers and decision-makers in the South East Asian and Pacific Regions with regard to environmental aspects of development, and of the broad range of possible regulatory options.

EDO NEWS

• A new face at the EDO is **Tamira Stienessen**, our project officer, employed three days per week thanks to the generous donation of Anne & Peter Reeves last year. Tamira is working on a project aimed at producing teaching material for secondary schools throughout N.S.W. Another project is related to rural education.

• The office has handled an increasing number and variety of **inquiries** in recent months, and a number of these are now part of our litigation caseload. Inquiries in March numbered 149, up from approximately 80 in February. A graphic overview and breakdown of the inquiries the EDO has responded to in the first quarter of 1990 is found on page 11 of this issue of Impact.

• Our thanks to the **Law Foundation of New South Wales** for a $2,500 grant for the purpose of purchasing library books. Our library is fundamental, and a number of recent Australian publications, as well as some leading publications from the United States and other countries on environmental law can now be purchased thanks to the Law Foundation grant.

• Thanks also to Board Member, **Judith Preston**, who assisted us in obtaining the Law Foundation grant. Judith was the first employed solicitor of the Environmental Defender's Office in 1984, and has been a Board Member of the EDO for a number of years. Judith submitted her resignation from the Board in April to concentrate on her new child and her LLM studies and we thank her for her ongoing contribution to the development of the EDO.

• Due to a rapidly increasing case load, the EDO has just employed a third solicitor. Indicative of the growing awareness of environmental law in the legal community and of the role EDO plays in public interest litigation, the number and quality of job applicants was high. **James Johnson** has now accepted the position. James is a graduate of science and law at the University of New South Wales. He commenced practice in 1985, and has worked in private practice in general litigation. As well, James has worked in the adventure tourism field around Australia and in Nepal. He most recently returned from a 12 month assignment in Nepal as a trek leader and mountain bike guide.

• Our inquiries statistics also indicate **pollution control** as a growing area of public concern, and constituting almost 20% of our inquiries in the first quarter of 1990. The office now responds to an increasing number of requests for information from the media on changes to pollution laws. On 16 March EDO solicitor David Robinson appeared on "Good Morning Australia" television with regard to an oil spill by an Iranian ship polluting Sydney beaches, and the proposed prosecution by the Maritime Services Board under the Prevention of Oil Pollution to Navigable Waters Act, NSW.

• The **NSW Pulp & Paper Industry Task Force**, established by the Department of State Development, made recommendations in 1989 including as a "first step into expansion into higher value added paper production... the establishment of a world scale, bleached eucalypt kraft mill". In its submission prepared with the assistance of solicitor Chris Clancy, the EDO criticised the composition of the task force, in which the experts and representatives of environmental groups were not included. The EDO submitted that the cost of public relations should be borne by industry, not the government, as proposed, and that priorities were misplaced in recommending mill construction before an expanded eucalypt plantation policy is implemented. On behalf of EDO clients the Total Environment Centre, the Wilderness Society and Friends of the Earth, which also made submissions on the Task Force Report, we requested the opportunity for involvement in pulp and paper industry proposals at an earlier stage. In May the EDO was advised by the State Pollution Control Commission that the Government had resolved not to pursue the immediate development of the industry, due in part to the unresolved questions concerning resource and ecological sustainability, a question currently being researched by the Commonwealth Resources Assessment Commission.

• The EDO **Environmental Law and Policy Group**, comprising client groups including the Australian Conservation Foundation, the Total Environment Centre, the Wilderness Society, Friends of the Earth and Greenpeace, met on 27 March to consider use of the **Freedom of Information** Act, NSW. Alexis Hailstones, of the Premier's Department, offered a comprehensive and practical overview of procedures.

Example of recent successful applications for access to information concerning environmental matters include documents released by the State Pollution Control Commission on a proposed piggery at Albury and sandmining at Geroa, and documents released by the Forestry Commission in various matters.

As discussed in the June 1989 issue of Impact, the FOI laws only extend to the personal affairs of applicants with regard to information held by local councils. The EDO is experiencing the restrictive approach taken by some councils on FOI in acting for resident groups complaining of the stench produced by large scale **mushroom composters** in the Hawkesbury Council municipality. The stench affects the amenity of residential areas near the compost ricks, and as a result Hawkesbury Council issued notices to some of the composters under s. 289 (b) of the Local Government Act, directing that emission of offensive fumes cease within 12 months of the notice. Upon request by the EDO for a copy of the notices, Hawkesbury Council maintains that "any action which a Council may take against a third party is not a personal affair of any other party", even though the value of residents' homes and their immediate neighbourhood is at stake.

• **Volunteers** have continued to provide tremendous assistance to the EDO in recent months.

Outstanding in this regard has been botanist and law student **David Mossop**, who provided 35-45 hours of invaluable help to the office each week between January and April. During that time David assisted in the development of our new computer and word processing system, in the archiving of several years of old files, in research on tree preservation orders and on the Wildlife Protection (Regulation of Exports and Imports) Act, 1982. He also wrote a commentary on the Planning, Heritage and Land Use (Inquiries and Environmental Assessments) Bills 1990 (ACT) prepared for the Conservation Council of the South East Region and Canberra. David is currently assisting on a research vessel engaged in atmospheric testing in the Southern Ocean. The EDO looks forward to his return!

All unpaid workers and friends are invited to our next **green drinks** gathering at the Office, on Wednesday 8 August at 5.15 pm. This follows on the success of the social evening on 23 May, in which the EDO launched its new Unpaid Workers' Manual, and James Johnson presented some recent cycling and trekking slides from Nepal and Tibet.

CURRENT EDO CASES

The Office recently took over the carriage of a major matter due for hearing before the Land and Environment Court in September. The case relates to a chemical plant at North Wyong owned by Kemcon (Mfg) Pty Limited, a subsidiary of **Bayer Australia Limited**. The Applicant, Mr Linus Kummer, a resident of the Central Coast, is seeking a declaration that chemical factory works carried out since 1987 constituted designated development, and that the consents granted to the development are invalid as no environmental impact statement was published for public comment.

On behalf of the **Myall Koala and Environmental Support Group Inc**, the EDO has appealed against the approval granted by Grant Lakes Shire Council to its own proposal for a boat ramp and a 91 vehicle car-park and associated facilities on a protected wetland on the Myall River at Hawkes Nest. One of the major points of the Applicant Group in the rehearing of the merits of the development by the Land and Environment Court, set down for 2 - 5 October 1990, is that inadequate consideration of the possibilities for upgrade of existing boat-ramps in the vicinity has been made. The proposed development will entail construction of stone groynes 70 metres apart and projecting 30 metres into the river, and clearing and filling of some of the mangrove and saltmarsh wetland.

Again on the koala theme, the EDO is acting for the Hunter **Koala Preservation Society** and **TEC Inc** in challenging sand mining on the Tilligerry Peninsula, Port Stephens. Class 1 proceedings have been commenced and a preliminary point of law may have to be decided as to whether TEC Inc will be allowed to join as a party.

On behalf of a **Blue Mountains group Concerned Residents for the Environment (CORE)**, the EDO has challenged the consent of Blue Mountains City Council to a tourist park development at Wentworth Falls. CORE submits that the Council postponed consideration of matters significantly affecting the environmental impact of the development such as to render its approval void, and that insufficient regard to s. 90 of the EPA Act was made by Council, particularly with regard to the flora and hydrology of the area, which contains hanging swamps directly upstream of the Blue Mountains National Park.

The Office is acting for Mr Keir Vaughan-Taylor, a member of the **Sydney University Speleological Society**, in Land and Environment Court proceedings concerning possible mining activity at Yessabah Caves, near Kempsey. The caves are the home of rare bat colonies.

The EDO successfully settled litigation in the NSW Supreme Court in April on behalf of the **Wildlife Preservation Society of Queensland**. The case concerned an intended bequest to a now defunct environmental organisation. The Court found that a general charitable intention had been expressed by the testator, and approved the cy-pres scheme proposed by the parties, being three landcare and conservation groups. As a result, the Wildlife Preservation Society will receive approximately $10,000 from the estate for its general purposes.

ENVIRONMENTAL DEFENDER'S OFFICE PUBLIC SEMINARS 1990

Venue: Sydney University Law School corner King and Phillip Streets Sydney

Time: 5pm - 7pm.

Further information: telephone 261 3599.

Total Catchment Management in Urban Areas

Tuesday 5 June 1990 – World Environment Day

Hon Kevin Rizzoli MP, Speaker of the Legislative Assembly, Member for Hawkesbury, "The Hawkesbury River Authority Bill, 1984".

Mr David Robinson, Solicitor, Environmental Defender's Office, "The Catchment Management Act, 1989".

Mr Alan Dodds, Manager, Works Investigation and Planning Branch, Water Board, "The Hawkesbury Nepean Rivers System and the Water Board".

Dr David Hughes, Chairperson, Coalition of Hawkesbury and Nepean Groups for the Environment (CHANGE), "Options for the Future Management of the Hawkesbury - Nepean Catchment and Rivers System".

Round Table Discussion and Questions.

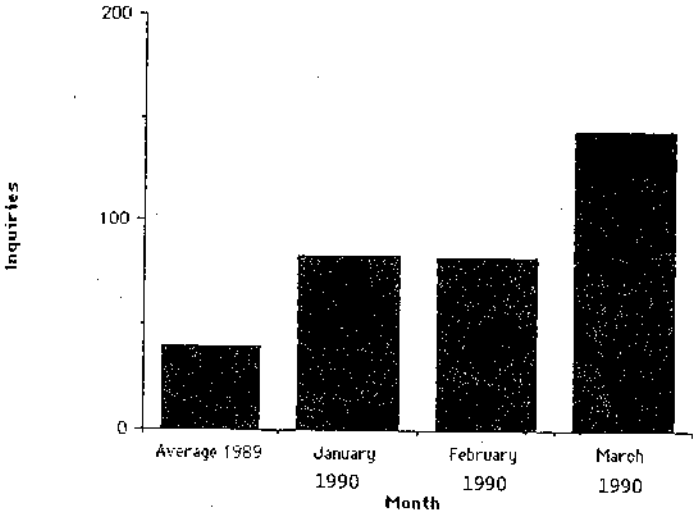
Admission Free.

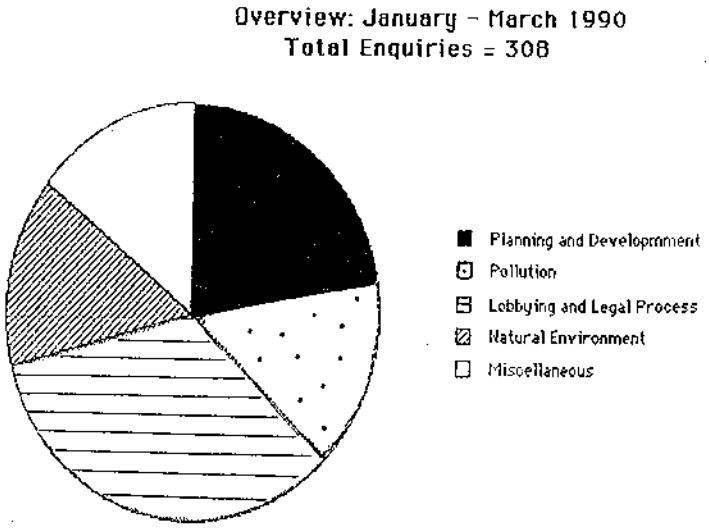
Water Conservation: Pricing Policies and Clean Waters

Tuesday 9 October 1990

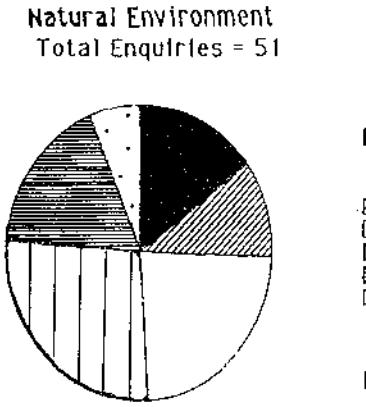
- Administration and Reform of Clean Waters Act 1989
- Role of the State Pollution Control Commission
- Conservation-based water pricing as a conservation tool
- Environmental implications of Sydney's growing demands for water

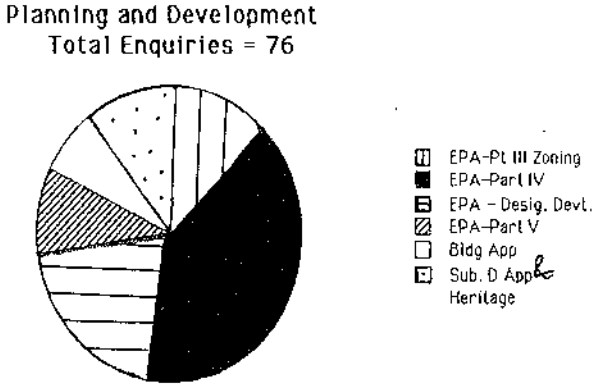
EDO Inquiry Statistics January – March 1990: Breakdown

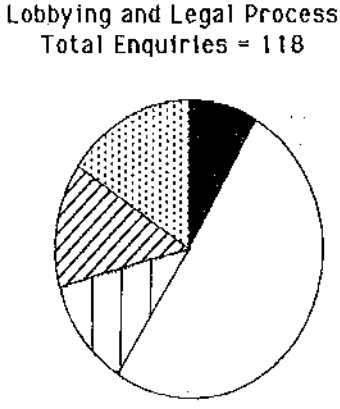


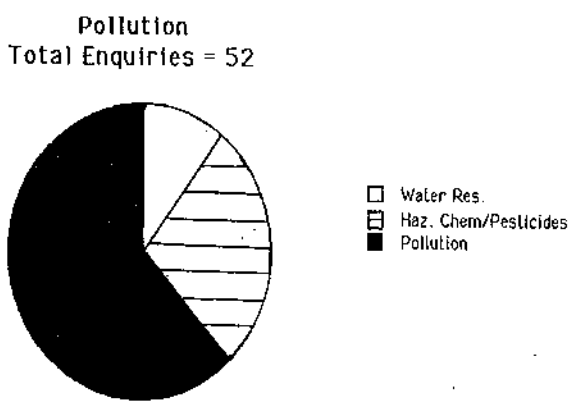


EDO Inquiry Statistics January – March 1990 Overview









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"I prefer that this donation be spent for the purposes of the EDO."

Signed

Name

Address

Cheque enclosed for $

FOLLOW WITH INTEREST

West Australian Environmentalists using S.52 Trade Practices Act (1974) CTH

In **South West Forests Defence Foundation Inc v Forest Industries Campaign Association Ltd** and **Bunnings Forest Products Pty Ltd** the Applicant is challenging claims made by the Respondents in a media campaign.

The Forest Industries Campaign Association issued television and newspaper advertisements during March concluding with the words "If more people knew the facts, no Australian would ever worry that our native forests might disappear". The advertisements stated that less than 30% (approximately 7 million hectares) of the public native forests in Australia are allocated for commercial forestry, and that in any single year, Forest Industries work in only 1% of that 30%.

The Australian Conservation Foundation has disputed the accuracy of the Forestry Industries advertising. An Australian Forestry Council publication indicates that in reality, close to 80% of public forests are available for harvesting. Forest Industries have chosen to ignore 8.6 million hectares of forest on crown land and a further 4.5 million hectares where harvesting is possible on a restricted basis. Privately owned forest, the source of up to 30% of native forest production volume in recent years, has also been excluded.

The Applicant has obtained an expedited hearing date in the Federal Court in Perth probably late June 1990.

IMPACT COPY DEADLINES

The EDO invites contributions, including letters, for publication in Impact. Type written contributions should be forwarded to the Editor, c/– The EDO by the following dates:

11 June 1990
3 September 1990
3 December 1990

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Contact the EDO with regard to the rates for advertising your professional services in Impact.

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