IMPACT

A QUARTERLY NEWSLETTER ON ENVIRONMENTAL LAW

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A VICTORY FOR SEPP 14 - AND FOR COMMUNITY INVOLVEMENT

by James Johnson, Solicitor, EDO

REMEMBER
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The Environmental Defender's Office, acting on behalf of the Myall Koala and Environmental Support Group, recently won an important appeal in the Land and Environment Court of NSW. The decision strengthened the provisions of SEPP 14, sending a clear message that the consent authority and the Department of Planning, whose concurrence is required to any decision affecting a designated wetland, must give real consideration to the objects of the policy.

The Group

The group is an unincorporated association predominantly comprising residents of Winda Woppa. The group exists to promote the long term viability of koalas in the area by maintaining or establishing koala corridors, by encouraging the planting of appropriate koala food-tree species and by community education.

The Site

The site in question is a crown reserve comprising an area of eighteen hectares. The whole of the site was designated as wetland 753 under State Environmental Planning Policy 14 which deals with coastal wetlands. The vegetation communities vary from salt marsh and mangroves where the site adjoins the Myall River to woodland on the elevated ground at the rear of the site.

Some sand has been deposited on part of the wetland at some stage in the past as a result of dredging of the Myall River. Additionally some illegal motor vehicle use had created some tracks through the vegetation. The Respondent council sought to rely on these two factors as making the site not worthy of protection under SEPP14.

The Development

The precise nature of the development changed several times before and during the case. Essentially the Council wished to construct a two lane boat ramp with parking for approximately 70 cars and 50 trailers, together with picnic tables, barbecues, boat washing areas and amenities blocks. The proposal involved substantial clearing of the wooded dune land and was to be flood lit at night.

The Council were concerned that the boat ramp come within the guidelines produced by the Public Works Department for a "regional boat ramp". The Department had promised to provide 75% of the funding for the project if the boat ramp met these guidelines, allegedly with personal assurances from Mr Wal Murray, Minister for Public Works.

Because the proposal involved the clearing and filling of a designated wetland, it was a "designated development". While the development was consistent with the zoning which was 6(a), "open space" under Great Lakes LEP number 10, the development was not compatible with the purpose of the existing reserve for public recreation and environmental protection, and so the Department of Lands, as owner, proposed to notify a new reserve for "public recreation" over the site.

The Applicant's case

The basis of the Applicant's challenge was:

- there would be an adverse effect on the flora of the site including the wetland;
- there would be an adverse effect on the fauna of the site, including migratory birds;
- there would be an adverse effect on the hydrology of the river adjoining the site, which contains substantial oyster leases
- the development was contrary to the aims of SEPP 14;
- there was no need or justification for the development.

Dr Paul Adam was called to give evidence on behalf of the Applicant as to the effect on the flora of the site. Dr Adam wrote the first six chapters of the NSW government's wetlands policy and is a renowned authority on the subject of wetlands.

Contents:

Michael Rowe presented evidence as to the extensive range of migratory birds including waders he has observed in approximately 13 years of living close to the site.

Andrew Kelly, lecturer in Town Planning at the University of NSW, prepared a report examining the town planning aspects of the development.

Ralph Suters, himself a member of the group, prepared a study and report on the use of existing facilities, the availability of alternative sites and the feasibility of upgrading those sites.

The office briefed Ms Jenny Blackman of counsel to present the case of the hearing which lasted from the 2nd to the 5th of October, 1990.

Funding

Application was made to the Legal Aid Commission of NSW and a lump sum grant of $6,000 was made to the group. Further application was made to review the size of the grant in view of the strength of the case and the means of the group, although the amount of the grant was not increased upon review.

The group, via a variety of avenues including street stalls and raffles, have been able to raise approximately $6,000 in addition to that sum allocated by Legal Aid.

All of the experts agreed to provide their assistance virtually on a pro bono basis. Ms Blackman and the Environmental Defender's Office have proportionately split the available funds which will cover approximately 50% of their costs.

The Decision

The overall view of the case taken by His Honour was summarised at page 9 of his judgment:

"Having carefully considered all of the evidence I have reached the very clear and firm conclusion that the case made out by the Applicant for refusal of development consent is overwhelming and that in consequence the appeal must be upheld and development consent refused."

There had been some initial argument that because part of the development application related to land which was not zoned, being that part of the land below high water mark which projected into the river, then that part of the development was not designated development, and was therefore not subject to the rights of the objectors to make objections and to appeal to the court. In considering this argument his Honour held that

"there is no indication that a `development application' in respect of development possessing some elements which are `designated development' and some elements which are **not** designated development, is in some fashion, to be dissected or otherwise distinguished in order to isolate the `designated development'".

Mr Justice Bignold then dealt with the concurrence of the delegate of the Director of Planning. He noted that the requirement of clause 7(2)(c) of SEPP 14, which requires consideration of whether carrying out the development would be consistent with the aim of this policy, appeared to have been ignored. While the decision was legally open, His Honour said

"I do not accept the soundness of the decision as a matter of planning merit and discretionary judgment..."

and later

"I find that the proposed development will have an adverse environmental impact on wetland 753 and that the carrying out of the development is not consistent with the express aim of the State Policy No.14 to preserve and protect the coastal wetlands in the environmental and economic interests of the State."

Dealing with the question of alternative sites, His Honour stated

"I decisively prefer Mr Kelly's opinions concerning the availability of alternative sites and the potential for upgrading existing boat ramps on the Myall River situated at Tea Gardens and Hawks Nest."

The most obvious weakness in the Respondent's case is the failure to justify the proposed development in terms of (1) need and (2) the availability of alternative sites.

The Consequences

As a result of this decision the effect of SEPP 14 has been substantially strengthened. The Department of Planning is on notice that it must take full cognisance of the matters for consideration under the policy.

The action by the group was a high profile action, with coverage in the local and Newcastle press and television. The victory served to highlight the fact that a well organised community group can involve itself successfully in planning appeals.

The Last Word?

Perversely the Great Lakes Shire Council have not allowed the matter to drop there. Rather than accept the umpire's decision, which was very strongly worded, the Council has resolved to meet with the Department of Planning and the Department of Public Works to have the site in question removed from the areas of designated wetland under SEPP 14. Unfortunately this could be achieved by the stroke of a ministerial pen with no public participation or review. We shall keep you informed of any further developments.

STOP PRESS

The Trades Practices Commission has recently issued a **Draft for Discussion on Environmental Claims in Marketing.** The potential for abuse of such claims is significant. Is it, for example, correct to label any disposable nappy as "environmentally friendly"? At least one brand is currently marketed under that claim as it is said to be manufactured in a dioxin free process, yet it remains a non-biodegradable, plastic, one-use-only product. Public comment is invited by the TPC. Copies of the draft are available from the TPC (contact Bill Dee, TPC, Box 19, Belconnen ACT 2616).

Rescheduled Workshop:

The weekend Workshop on Legal Aspects of Environmental Campaigning will now take place on 4-5 May 1991.

Parts 2 and 3 of "The Greening of Australia's Politicians" by Jill Vidler will now not be published. Part 1 appeared in IMPACT, June 1990. Events have rather overtaken the article as prepared and Jill and I have decided to withdraw it. Ed.

EDO SUBMISSION RESULTS IN POLLUTION LAW AMENDMENT

On 21 November 1990 the Minister for the Environment introduced an amendment bill to the Environmental Offences & Penalties Act 1989. The much publicised EOP Act had, in its first year of operation, not resulted in any successful prosecutions despite the number of spectacular acts of pollution, including the Diversey chemical fire in Western Sydney.

The draft amendment bill introduced definitions of "harm" and "environment" which the EDO welcomed as clarifying the elements of the "unlawful spills" and the "unlawful discharge of waste" offences under the EOP Act.

The EDO criticised the amendment bill for failing to grant standing to any person to bring proceedings to enforce a breach of the EOP Act and to bring civil proceedings to restrain breaches.

The new EOP Act contains all the penalty provisions for breaches of other pollution control enactments.

It introduces three tiers of pollution offences:

1. Tier 1 offences are the spills and unlawful discharge of waste offences contained in the original EOP Act.
2. Tier 2 offences are the mid-range offences under the the Clean Air Act, the Clean Waters Act, the Noise Control Act and the State Pollution Control Commission Act, for example for breaches of discharge licences. The penalties have been increased to a maximum of $125,000 for corporations and $60,000 for individuals plus further penalties for each day the offence continues. Littering offences under the Local Government Act have also been added to Tier 2.
3. Tier 3 offences relate to on-the-spot fines for minor breaches. Infringement notices can now be issued by a number of regulatory authorities.

With regard to tier 3 offences, the EDO was concerned that a well meaning officer may issue an infringement notice for a seemingly minor pollution offence, only to discover later that the environmental damage was substantial. As drafted, a serious pollution offence which would otherwise be punishable under Tier 2 by a fine of tens of thousands of dollars could be disposed of by a fine of only a few hundred dollars under Tier 3, with no further action possible. Accordingly, the EDO issued a press release and discussion paper on the day the bill was launched advocating that section 8G(5) be changed so that further Tier 2 proceedings could follow where environmental damage was more than originally assessed, notwithstanding that a penalty notice had been issued under Tier 3 offence.

On 29 November Environment Minister Tim Moore telephoned the EDO to advise that section 8G(5) had been amended to enable infringement notices to be withdrawn within 28 days should it be discovered that prosecutions under Tier 2 were warranted.

While welcoming the decision to amend section 8G(5) of the EOP Act, the EDO looks forward to the NSW Government's initiatives in 1991 with regard to the establishment of the Environmental Protection Agency and the broadening of standing to obtain civil enforcement of pollution control laws.

Criminal prosecution is important but is not necessarily the best means of achieving pollution control. As Chief Justice Cripps of the Land & Environment Court noted in an address to solicitors at the Lexpo conference in October 1990, emphasis should lie on the due enforcement of environmental protection laws rather than on the question of who enforces them. The time is ripe for broadening the standing provisions to obtain observance of pollution control laws by means of civil enforcement in which citizens, as well as regulatory authorities, are free to approach the Land & Environment Court where breaches occur.

Don't forget that the **Second International Conference on Environmental Law** will be held in Bangkok, Thailand from 8–10 April 1991. The Conference is a joint NELA/ LAWASIA production and promises to be superb.

"TOWARDS A NEW FORESTRY ACT"
EDO Seminar
March 1991

The NSW Forestry Commission has been involved in many conflicts over logging in native forests over the last two decades. During these disputes the Commission has claimed that its actions are undertaken with the concurrence of the Forestry Act. Focus has inevitably turned to the adequacy of the Act to meet community expectations about the management and protection of native forests.

Public attention on the Act and the Commission was further increased with the release of the draft report of the NSW Parliament Public Accounts Committee investigation of the Commission. Serious criticism was levelled at administration and forest management.

The EDO Seminar will examine in depth the options for reform of the Forestry Act with a view to bringing about a better blending of the economic and environmental objectives of the Act. Currently environmentalists argue that the Commission's concentration on economic factors (the long term supply of timber) adversely prejudices its ability to protect flora and fauna over the long term. On the other hand forest products groups argue the need to ensure a supply of cheap and environmentally safe timber.

Can new legislation bring about a balance that will reduce the level of forest conflict in future years? 'Towards a New Forestry Act' will address this key question for conservationists, industry, foresters and government officials.

LEGISLATING FOR ENDANGERED SPECIES

By Maria Comino, Solicitor, EDO

On Monday 10 December,1990, the Environmental Defender's Office conducted a seminar on endangered species legislation. The seminar was opened by Tim Moore, Minister for the Environment, and chaired by Jeff Angel, EDO Board member and Assistant Director of the Total Environment Centre.

Participants were reminded that Australia's record on the extinction of mammals is the worst in the world. Approximately 209 species of plants and 59 animal species are classified as endangered and many more are vulnerable.

No one disputed the need to prevent further extinction of plant and animal species. As David Papps from the New South Wales National Parks and Wildlife Service summized, extinction is wrong in principle with all species having the right to exist. Moreover, if a further reason is required to justify action in this area , it is foolhardy in the extreme to condone further extinctions which are an indication of the collapse of systems around us.

There was also little dispute on the need for legislation to attempt to address the problems. Michael Kennedy, Co-ordinator of the National Threatened Species Networks and Senior Project Officer with the World Wide Fund for Nature Australia, strongly endorsed a legislative approach.

Differences became apparent however in the type of legislative approach required. Phillip Sutton, responsible for overseeing implementation of the Victorian Flora and Fauna Guarantee Act, described that legislation as the first biodiversity Act in the world. It attempts to provide a complete flora and fauna conservation programme whereby the survival of all native species is sought to be guaranteed. The Act provides a framework that requires an overview of the species that are endangered rather than the extensive detailing of data on individual species.

This is to be contrasted with the New South Wales proposals which do not place the same importance on the need for protection of the habitat. The proposals generally favour a more "legalistic" approach to the issue by seeking to regulate the threatening activities and processes. They build on the existing National Parks and Wildlife legislation.

Dr. Paul Adam provided useful insight into some of the problems of definition that arise which the legislation must address. For example, there are various meanings of "rare", which may require different management strategies. Dr. Adam also argued that the most desirable approach to species conservation is through habitat conservation which must involve conservation of habitats off reserves as well as a stronger park and nature reserve system.

Dr. John Clulow provided an interesting case study on problems posed in trying to conserve and manage the koala in New South Wales. He identified some of the key issues that arise in trying to conserve a species.

The Seminar served the valuable purpose of defining the problem and the various legislative possibilities. The urgency of the problem was not denied. However the word from Minister Tim Moore, responsible for introduction of the legislation in New South Wales, is that the New South Wales proposals are not yet ready for debate by parliament. This is of particular concern if one looks at the Victorian experience where it took eight years from the time the policy was first drafted to proclamation of the legislation, with adequate time required for circulation of discussion papers and the draft legislation. If more time is to elapse we hope it is at least used to ensure there is full and open debate on the various legislative alternatives.

Conference papers are available from the EDO for $12.00.

PROPOSED REFORM OF THE CLEAN WATERS ACT 1970

David Robinson, Solicitor, EDO

On 9 November 1990 the State Pollution Control Commission (SPCC) published for public discussion two documents supporting the SPCC's proposal to change the classification system under the Clean Waters Act 1970 (CW Act). A "water quality goals and objectives for New South Wales" document provides the background to the proposal and includes details of its intended implementation and operation. A "water quality criteria for NSW" document provides technical, biological and other scientific criteria in order to quantitatively measure water for cleanliness.

Background to the Water Reclassification Proposals

The underlying philosophy of the Clean Air Act 1961 and the Noise Control Act 1975 is worthy of mention because that philosophy was, until the proposed re-classification, in contrast to the philosophy evident from some sections of the Clean Waters Act 1970.

The Clean Air Act 1961 constituted the first legislative attempt to protect the commons from the pressures of industrialisation, urban sprawl and motor vehicle emissions. Under s.5(1) air pollution is defined as emission into the air of any impurity The Clean Air Act embodies two approaches to reduce air pollution. The first approach is to set specific limits on the composition of certain emissions.The second applies to emissions not quantitatively regulated. For these emissions, operations must be conducted in "by such practicable means as may be necessary to prevent or minimise air pollution" (s.15(2) and s.19(2)).

A similar philosophy embodying quantitative limits on certain emissions with a catch-all "best practicable means" requirement to limit other emissions also applies under the Noise Control Act 1975.

Under the Clean Waters Act 1970, however, the pollution of any waters, as broadly defined in s.5, is absolutely prohibited. The significant exception to the rule is that pollution pursuant to a licence is permitted.

The principal guide in the granting of water discharge licences was to be the classification of waterways. By notification in the Gazette, the SPCC was to classify the state's waterways according to their use and nature. The waterways to be kept pristine were to be classified as specially protected waters. In decreasing order of protection other waterways were to be classified as controlled, restricted or ocean outfall waters. A fifth classification was to be underground protected waters.

Only 25 waterways in the NSW have been classified, however. The SPCC claims it did not have the resources necessary to test water quality and pollution pressures in order to proceed with the classification process. Point-source water pollution licences are thus formulated without regard to any identifiable ambient standard.

A major effect of the Clean Waters Act has been to divert liquid waste from canals, creeks, rivers and harbours into the sewerage system pursuant to trade waste agreements which industry negotiates with the Water Board (1).

SPCC Discussion Paper on Water Quality, Goals and Objectives for NSW

The discussion paper identifies the problem of diffuse source pollution in both rural and urban areas as having a substantial impact on water quality. The Clean Waters Act licensing system is inappropriate in mitigating diffuse-source pollution. Recognition of the diffuse source problem combined with what the SPCC saw as the impossible task of classifying all the State's waterways under the existing scheme prompted the new water classification proposals.

The classification process proposed in the discussion paper is summarised as follows (p.8):

1. Protection Categories are selected for waters.
2. The selected Protection Categories become the Goals for the waters.
3. Water Quality Criteria corresponding to the Protection Categories which represent the Goals are derived.
4. The most restrictive Water Quality Criteria derived from the Goals become the Objectives for specific pollutants for the waters.

The first step of selecting protection categories for waters is merely identifying the uses to which water is to be put. The proposal includes thirteen protection categories including potable water supply, agricultural water supply, industrial water supply, recreation, production of edible fish and crustacean and navigation and shipping.

Having identified the beneficial uses to be made of a body of water, or, in the jargon of the proposal, having selected a number of the protection categories, scientific water quality criteria are then used to derive goals for the water body. For example, if a dam was to be used for both swimming and for industrial plant cooling, the most stringent criteria, relating to swimming, would override the less stringent criteria identified for cooling industrial plant.

Water quality goals would refer to quantitative water quality indicators including biological, physical, aesthetic, chemical and radiological indicators and upper toxic concentrations compatible with the protection categories.

Staged Implementation

In order to avoid the problem with the Act as presently administered, namely the failure to actually classify waterways in the State as envisaged in the legislation, in Stage I of the proposed reclassification general water quality targets for geographic zones of the State would be set. Urban areas, coastal estuarine areas, tableland and western slope zones, for example, would all be allocated specific water quality targets. The assumption is that within each water quality zone (such as the tablelands of NSW) uniform protection categories might be expected. Within each water quality zone specific surface and groundwater protection categories will apply.

Stage II will involve a review of the Stage I classification at the catchment or sub-catchment level. Once a water body is definitively classified under Stage II as a result of catchment specific consideration of goals and objectives, the relevant Stage I classification would cease to apply.

Catchment managers including local councils would assist in the identification of the protection categories and a definition of goals for the particular catchment after a public consultation process. The SPCC or its successor the EPA would notify its intention to classify a particular body of water and objectors would have a right of appeal to the Land & Environment Court against any proposed classification (see below p. 16). After any appeals were determined, classification would take place upon notification of the new categories in the Gazette.

It is anticipated that a considerable period would elapse between the "broad-brush" Stage I classification and the definitive catchment specific Stage II classification.

The incentive for conservationists to proceed to Stage II is that the zonal classification in Stage I may establish protection categories which are insufficiently stringent to protect some important waterways within the zone (for example creeks in the Nattai Wilderness catchment in the Southern Tablelands). The incentive for polluters to proceed to Stage II is that within any zone the protection categories may, conversely, be too stringent for a particular body of water into which the polluter seeks to discharge (for example, a creek running through an industrial estate in Mittagong).

Licences

The licensing system will continue to operate for point sources of pollution.

The SPCC will require best available technology economically achievable (BATEA) with respect to waste water treatment or pollution control equipment. Parallel to the Clean Air Act procedure, as the BATEA for specific processes is determined, it will be incorporated into regulations under the Clean Waters Act.

Upon classification under Stage II, councils and other catchment managers will be placed under the obligation to ensure that water quality will not deteriorate as the result of granting approvals or licences or agreeing to changes in land use.

Compliance with licence conditions will cease to be by measurement of effluent at the point source, but shall be assessed at the edge of the designated "mixing zone" (being the water within a certain distance downstream of or within a specified radius of the discharge source).

Classifications under the existing system will continue until Stage II classification has been completed.

Comments on the Proposed Classification Scheme

1. The scheme is complex and departs from the simple but powerful prohibition against water pollution that no water pollution without a licence is permissible (s.16).
2. Implementation of the new classification scheme is simple with regard to Stage I but complex and complicated with regard to Stage II.
3. The active involvement of regulatory authorities and land owners and land users in furtherance of the objectives of the Catchment Management Act 1989 is a prerequisite to proceeding with Stage II.
4. The classification scheme places a premium on technical assessment of the maximum pollution levels acceptable for the desired uses of any body of water. The Discussion Paper states that "not all values and uses will be desired or needed in all water environments" (pp. 2 and 12). For example, water used for passive recreation need not be as pristine as water used for swimming or drinking. There is cause for concern if passive waterways will not be kept as clean as possible merely because the values and uses ascribed to it are less exacting than those set for potable waters.
5. The proposal is to do away with *"black letter" classification* of waterways, the standards of which dictate the terms of any licences. Instead *goals*, rather than standards would be introduced. Goals and objectives would be achievable. In selecting protection categories, the cost/benefit implications of protection would be assessed (p.23).
6. With regard to Stage II, where water quality in a particular water body is better than the Stage II objectives, no approval would be granted which would cause the quality of receiving waters to fall below objectives at the designated point (p.27). Why maintenance of the existing level of water quality should not be preferred to a permissive approach in which the upper pollutant limit could be reached without concern is unclear. The Discussion Paper refers to "incentives" to progressively reduce pollution levels, yet what incentive would exist in practice in the above example is unclear.
7. It is proposed that the goals and objectives would only apply during water flows between the 16th and 84th percentiles (one standard deviation either side of the mean of the normal distribution), with the result that in floods and droughts the goals and objectives would not apply. Whilst the report states "this does not mean, however, that any management or control mechanism imposed by catchment managers would cease to apply at flows outside this range", the discussion paper does not elaborate. In extreme events such as floods and droughts, licence conditions and catchment management operations should surely be required to adapt to those events. Extreme flood or drought events require extreme mitigation measures.
8. Upon Stage II classification no activity causing water to deteriorate below the goals and objectives would be permitted without implementation of offsetting pollution reductions "that at least equal the additional pollution produced" (p.12). The Discussion Paper anticipates but does not describe how the "open market approach to pollution control" (offsets, pricing mechanisms, pollution charges and markets for environmental rights) could apply.

Classifications, Planning and Court Challenges

Catchment and land-use managers (including local councils in exercising their planning and development functions) will be required to "**take account**" of Stage I classifications (p. 11).

An exciting possibility for public interest groups to lead the way in improving water quality standards will exist provided that the proposed changes to the Clean Waters Act do not take away the right of *any person* to object to the Court with regard to the classification of waters (CW Act s. 13). The appeal right currently exists, but has been largely irrelevant because of the failure of the Government to proceed with classification of the great majority of waterways in the first place. Under the proposed classification scheme, however, the SPCC anticipates land-users and conservationists dissatisfied with the zonal protection categories set under Stage I will take steps to initiate the Stage II, catchment-specific protection categorisation process. As noted, these protection categories will be binding on catchment managers including local councils in their determination of planning and development matters. **Objectors to a particular Stage II classification will have the right to a merits, de-novo, hearing** before the Court under Class 1 of the its jurisdiction. Conservationists will thus have some scope to express concerns about lax water quality protection categories proposed by any catchment management committee, or to initiate their own appeals. The scope of possible appeals will remain unclear until the amendments have been drafted. Appeals will only be possible once the SPCC or EPA has notified its intention to classify particular waters in a catchment. Incentives for the regulatory authority to do so are unclear.

Once waters have been classified, however, **goals**, rather than enforceable standards apply to water quality, however. It is unclear whether the current right to seek SPCC permission to prosecute for polluting without a licence would continue to apply, given that the thrust of the proposals away from pollution prohibition except with a point-source licence towards permission for diffuse-source pollution so long as goals are met.

Catchment Management Act 1989

Fundamental in achieving the transition from Stage I to Stage II under the Clean Waters Act reclassification is the role of catchment managers pursuant to the Catchment Management Act 1989. Catchment management committees in regional and local catchments would be a driving force behind the establishment of goals and objectives for the Stage II classification. Landowners aggrieved under the Stage I classification would have an incentive to create a less stringent set of protection categories applicable to their particular billabong through participation in the local or regional catchment management committee. Conversely, "a different situation would arise if requirements under Stage I were not considered adequate to protect pristine waters...the views of the community would be sought. This would include conservation interests, which must be represented on catchment management committees and trusts" (Discussion Paper p.11)

Main Provisions of the Catchment Management Act 1989

The Catchment Management Act (CM Act) 1989 came into effect on 7 March 1990.

The Act establishes a Catchment Coordinating Committee at a State level. That committee coordinates and monitors total catchment management strategies and reports to the Minister administering the Soil Conservation Act. At a local and regional level, the creation of Catchment Management Committees is provided for in the Act. Those committees promote and coordinate the implementation of total catchment management within their respective catchment areas and report to the State Catchment Management Coordinating Committee. The third and final body provided for in the Act are Catchment Management Trusts. These corporations may be established at a local level by the Minister with powers of levying contributions from land owners in order to pay for the cost of implementing catchment managing policies.

The TCM Act has been appraised elsewhere (2). The following comments, however, are relevant to the catchment management scheme upon which Stage II of the water licensing classification proposals are predicated:

1. Government Control

The TCM Act is characterised by a large degree of government control of the membership and activities of the coordinating committee, the local committees and the trusts.

2. Coordination Functions Only

A key word in the Act is "coordinate" which is specifically defined to mean "to bring together or liaise with authorities, groups or individuals to ensure effective total catchment management, but does not include the control or direction of the activities of those authorities, groups or individuals" (s.3(1)).

The Act thus formalises the liaison which currently takes place and ought to take place to a greater degree between authorities such as the Soil Conservation Service, the Water Board, local councils and the State Pollution Control Commission.

The three-tiered structure of the Act is worthy of comment with regard to the relationship between Catchment Management Committees and Catchment Management Trusts. Both bodies are responsible to the state coordinating committee. However, there is no necessary coordination between a local Catchment Management Committee and the trust counterpart. Section 27(2) provides that a trust may also exercise within its trust area any or all of the functions of a Catchment Management Committee. If a separate committee and trust exists, however, the committee may well develop different attitudes and policies to catchment management than the trust. The Minister ultimately approves the trust. The conclusion is that by having the committee and trust separate, the legislator intended to have a parliament and an executive. The committee talks while the trust ultimately acts.

Following on from the coordinating rather than coercive nature of the Act, there are few obvious possibilities for community enforcement of the Act's objects.

3. Power with Trust, not Committee

Only one of the three bodies established by the Act has any real power. This is the CM Trust. Section 30 provides that a corporate plan as prepared by a CM Trust and approved by the responsible minister "must be given effect to by the trust". Yet s.27(4) provides that no action or proceeding may be brought to compel a Catchment Management Trust to carry out its functions or to recover any penalty or damages from a Catchment Management Trust in respect of a failure to carry out its functions, defined in s. 3(2) to include its duties.

4. Possible Part 5 EPA Act Implications

The EPA Act applies to the functioning of CM Trusts (TCM Act s30(2)). Subject to the "purpose" test under the amended definition of "activity" in s. 110 **(Kindergarten Union of NSW v Sydney City Council (1984) 51 LGRA 381 at 387)**, the granting of a consent to a trust corporate plan by the Minister may constitute an activity for which environmental effects would have to be considered under s.111 and an EIS prepared under s112 in the case of significant impacts. Any person could seek to enforce those requirements under s 123 of the EPA Act, on the grounds that the immunity from suit provision in s.27(4) of the TCM Act does not relate to EIA, but merely to particular operations defined in the functions section 27 of the new Act. In other words, no actions can be brought with regard to the functions of the Trust, such as carrying out works and entering into contracts, but they could be brought with regard to the EIA obligations under Part V of the EPA Act. The effect in practice may be to require EIA at an earlier or additional stage of catchment management activity - when a trust proposes a corporate plan, rather than later on when the Soil Conservation Service, a local council or any other instrumentality proposes a particular activity being part of the corporate plan.

Conclusion: Water Reclassification and Catchment Management Proposals

The proposals could be criticised because they substitute water protection goals for legally enforceable standards. They introduce a technocratic flavour to what some would argue should be fundamentally the moral concern of keeping water clean. On the other hand, use of the catchment management committee structure and greater opportunity for the land-using and broader community to help set goals and objectives is a positive initiative. Further, the requirement that local councils and other decision-makers consider clear objectives and goals, and in a more analytical way than at present, before approving pollution-producing development is positive.

In balance, whether the proposals will lead to better quality water or, put differently, whether this complex and complicated reclassification proposal will ultimately be embraced by the community remains to be seen. If the proposals embodied active community participation (as distinct from mere consultation) in standard setting and enforcement, the proposals would surely have a greater chance of success. As it is, the SPCC and the Minister exercise the key functions of objectives setting, deciding upon licence conditions, appointment of members to catchment management committees and, all importantly, initiation of enforcement actions for breaches.

1. Beder S,
   Toxic Fish and Sewer Surfing,
   Sydney 1989, Allen & Unwin.

2. Environmental Defender's Office ed.,
   Total Catchment Management in Urban Areas,
   Proceedings from Seminar held 5 June 1990.

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