IMPACT

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NEWSLETTER ON PUBLIC INTEREST ENVIRONMENTAL LAW

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The Earth Summit — A Brief Report

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Green Drinks

20 August 1992
5pm at the Environmental Defenders Office

RSVP Dorothy Davidson 18.8.92

ALL VOLUNTEERS, CLIENTS & FRIENDS WELCOME!

From 3-14 June the world's largest international conference on the Environment and Development was held in Rio de Janiero, Brazil. The United Nations Conference on the Environment and Development (UNCED), or the Earth Summit, brought together over 170 governments, thousands of delegates, members of non-government organisations (NGOs) and journalists in Brazil.

The Australian government delegation was about forty strong. Unlike most world leaders the Prime Minister, Mr Keating, did not attend, a very disappointing decision. Leader of the delegation was Mrs Ros Kelly, one of the very few women heads of delegation. Other Federal Ministers who attended were John Kerin and Alan Griffiths. Fred Chaney from the Opposition and Susan Lenehan, SA Minister for the Environment also attended.

Over 70 Australian NGOs attended or had representatives at the Global Forum, the non-government organisation conference held at the same time as the Earth Summit. NGOs who attended included ACF, ACFOA, Green Youth Action, United Nations Association Australia, the Wilderness Society, Environment Institute of Australia, Rainforest Information Centre, the Australian Automobile Association and the Business Council of Australia. A number of Aboriginal groups were also represented including the National Coalition of Aboriginal Organisations, the Unrepresented Nations and Peoples Organisation and the Provisional Aboriginal Government. A large number of Australian media representatives were there.

Much has been made in the Australian media of the failures of the Conference but the event is highly significant in international terms.

Why have the Earth Summit?

UNCED was the attempt by governments to agree on measures to achieve sustainable development. The term has become used internationally, although with different implications and consequences for developed and developing countries, following publication of the Brundtland report 'Our Common Future' in 1987.

The preparations for the Earth Summit commenced some 2 years ago. There have been four preparatory committee meetings held in the lead up to the conference. In addition negotiations were conducted for the Climate Change Convention and the Biodiversity Convention. The UNCED conference follows the Stockholm Conference on the Human Environment in 1972 and the Nairobi Conference also on the environment in 1982.

What the governments did

There were four documents which were partially negotiated and agreed to by governments at the Earth Summit held twenty kilometres out of Rio de Janiero at a place called Rio Centro. Documents included the Rio Declaration (a statement of general principles) and Agenda 21 (an action plan).

Two conventions, the Climate Change Convention and the Bio-diversity Convention were also signed by most countries present.

A statement of forest principles was also hotly debated in the preparations and at UNCED but was not finalised.

Rio Declaration

The Rio Declaration sets out 27 principles which are supposed to guide the international

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community in achieving global sustainable development. This document is not the strong set of guiding principles envisaged for the Earth Charter many had hoped for. The Earth Charter concept is now being discussed as something which should be ready for the 40th anniversary of the United Nations in 1995.

Despite some of its vague language the Rio Declaration holds some promise. The right of nations to exploit their natural resources is confirmed but is subject to the responsibility of ensuring that activities within their jurisdiction do no harm to other states (Principle 2). The right to development is also confirmed but this is stated to be fulfilled "so as to equitably meet developmental and environmental needs of present and future generations" (Princ.3). Principle 4 confirms that sustainable development requires that environmental protection must constitute an integral part of the development process. Other important issues referred to are

- the need to eradicate poverty (Princ.5)
- the special needs of developing countries (Princ.6)
- the need to reduce unsustainable patterns of production and consumption (Princ. 8)
- the need to provide access to information about environmental issues at the national level (Princ.10)
- a commitment to enacting effective environmental legislation (Princ.11)

Important principles included in the Rio Declaration are the precautionary principle, although a weakened version (Princ.15) and the polluter pays principle (Princ.16). There is specific reference to the importance of women and youth but in vague language. There is also recognition of indigenous people but with weak wording which only requires States to enable their effective participation in achieving sustainable development. This does very little to satisfy the demands of indigenous people for the recognition of their fundamental rights to control their own environment. References to war and trade issues are also made but are very weak.

The Declaration is a carefully drafted consensus document. Unlike the Stockholm Declaration, signed by many countries in 1972, the Rio Declaration does not have any reservations placed on it by governments, as did the Stockholm Declaration. Because of its acceptance by governments there is potential for incorporation of its principles into customary international law. Customary international law is law which is recognised as binding by governments but is not formalised into any convention or treaty.

Agenda 21

A huge action plan was also agreed at UNCED, known as Agenda 21. It is over 500 pages in length and consists of approximately 40 chapters dealing with various aspects of the agreed action plan. A comprehensive analysis is well beyond the scope of this report.

In a useful guide to Agenda 21 prepared by the office of the Secretary-General to UNCED the plan is described as "a blueprint for action in all areas relating to the sustainable development of the planet, from now until the 21st century." All sectors are to be involved in the implementation of the programmes, both government and non-government. There are six themes. These are

- the revitalisation of growth with sustainability
- the achievement of sustainable living
- the efficient use of resources
- management of global and regional resources includes action programmes dealing with the atmosphere, oceans and seas, as well as with living marine resources
- managing chemicals and waste
- the management of human settlements

These combine to create, in theory at least, a prospering, just and habitable world.

Agenda 21 deals with many of the "cross-sectoral" issues such as finance, technology transfer and institutional issues.

In order to implement Agenda 21 several means are identified, as follows:

- developing and using data and information systems for planning, implementing and monitoring
- environmentally sound technology
- international legal agreements and instruments
- institutional arrangements to integrate environment and development issues
- new and additional financial resources to developing countries.

Institutional Change

Significant developments may well occur as a result of the Earth Summit in terms of institutional change and reform of the UN system. The role of UNEP and UNDP were considered and it is expected that their roles will be strengthened. They are also to be better co-ordinated in the future.

A UN Sustainable Development Commission is likely to be established which is supposed to ensure the integration of environment and development will continue at the international level. The Commission will oversee the implementation of Agenda 21 at national, regional and global levels. The actual arrangements for the Commission are not yet finalised. This will be considered at the 47th session of the UN General Assembly which will meet again in August 1992 in New York. Options are being discussed for the membership of the Commission and how a role for NGOs can be provided.

Other possibilities being discussed include a new role for the Secretary General, a co-ordinating committee of UN Agencies concerned with any aspect of environment and development and a high level advisory committee for the UN Secretariat.

NGO Participation

Not surprisingly, one of the major issues for NGOs has been the level of NGO access provided to the UNCED process. Probably more than for any other conference of its kind, there has been support for increased NGO participation within the UNCED process. The Secretary-

General of the conference, Maurice Strong, was in favour of greater participation and encouraged this. Given that the UN is a government body and many of its members are reluctant to involve NGOs in their own affairs, greater participation in a meaningful way is difficult to achieve.

Agenda 21 contains a number of statements which confirms the significant role that NGOs can play in implementing Agenda 21 at national level. Although many developed country NGOs take for granted their access to government, in many developing countries this is unavailable. Recognition of the role that NGOs can play in areas such as monitoring and enforcement is therefore important.

The Sustainable Development Commission is an interesting and hopefully worthwhile proposal for non-government organisations if it can be opened up to non-government organisation participation to a greater extent than is usually the case with United Nations agencies.

What the NGOs did

Prior to the Earth Summit a conference organised by indigenous peoples was held in Rio de Janiero, the Fourth Conference of Indigenous Peoples on Territory, Environment and Development which concluded on May 31 1992. That conference produced the Kari-Oca Declaration concerning the rights and responsibilities of indigenous peoples and their relationship to their environment.

From 1-14 June the Global Forum was held in Flamengo Park in Rio de Janiero. This was a huge non-government event with an amazing range of organisations participating in a very wide range of workshops, seminars and dramatic and musical events.

An important part of the NGO activity was a treaty making process. About 30 treaties on a wide range of topics such as forestry, oceans, atmosphere, NGO resourcing and a code of conduct for NGOs were developed. If you are interested in getting copies of the treaties contact David Turbayne at the Australian Council for Overseas Aid in Canberra.

The NGOs at UNCED handed out their own "Ostrich Award". The "winners" were the USA, Saudi Arabia and the UK for their environmentally unsound negotiating positions.

Beyond UNCED

Looking to the future of UNCED in Australia, there is a need for information about the process and its achievements to be made available to the community. Responsibility for this lies with both the Federal Government and the media in Australia. It is important for local and state governments to realise its significance and their role in implementing sustainable development. The public must also be made aware of UNCED's importance so that they can put demands on governments at all levels in Australia. We will need to devise appropriate mechanisms for implementation in Australia. There is already discussion about this occurring.

At a report back seminar on UNCED held at Sydney University Law School by the Australian Conservation Foundation and the International Environmental Law Centre on 4 July, about 60 people heard from several speakers who had attended the Earth Summit. In follow up discussion it was agreed that the networking of environment and development groups needed to continue and that mechanisms for monitoring the implementation of UNCED in Australia which involved all sectors needed to be established.

Martin Khor of the Third World Network based in Penang Malaysia, (one of the major NGOs in the Asia-Pacific region and a strong advocate of the needs of people in developing countries) has issued nine key tests by which to measure the success of UNCED at the international level in the coming years. These are

1. Achieving international and national equity between countries and people
2. Tackling poverty and affluence
3. Achieving global economic reforms
4. Regulation of transnational corporations
5. Avoid strengthening the World Bank
6. Prevention of toxic exports and biohazards
7. Providing finance and technology to developing countries
8. Basic economic and social change at the national level
9. Recognition that we live in one world ecologically and socially.

Whether the UNCED process can deliver all this remains to be seen. The UNCED process is as much about attitudinal change to environment and development as anything else. Martin Khor's tests at the international level can only be achieved with real and fundamental changes at the local, national and global levels. It is important to keep in mind that UNCED is really the beginning of a long process rather than the end of one.

Nicola Pain attended as an accredited NGO representative at the Earth Summit and the Global Forum from 2-14 June 1992.

SUMMARY OF NELA-EDO CONFERENCE 18-19 JUNE 1992

The biennial conference of the NSW Division of NELA was held in association with the NSW Environmental Defender's Office, at the Earth Exchange, Sydney on 18-19 June 1992. The conference was also supported by the Environment Institute of Australia (NSW Division).

The Conference was well attended by approximately 170 delegates representing a cross-section of backgrounds - the legal profession, government departments, members of the conservation movement and other interested persons. A summary of the conference follows.

DAY 1 SUMMARY BY ZADA LIPMAN, LECTURER IN LAW, MACQUARIE UNIVERSITY

The papers presented on day 1 reflected the heightened environmental concern in all sectors of the community and the recognition of the need for action at all levels: international, national and local.

The shortcomings of our traditional institutions were highlighted in the Brundtland Report, "Our Common Future," which stressed the need for major institutional development and reform.

> The objective of sustainable development and the integrated nature of the global environment/ development challenges pose problems for institutions, national and international, that were established on the basis of narrow preoccupations and compartmentalised concerns. Governments' general response to the speed and scale of global changes has been a reluctance to recognise sufficiently the need to change themselves. The challenges are both interdependent and integrated, requiring comprehensive approaches and popular participation.
>
> Yet most of the institutions facing those challenges tend to be independent, fragmented, working to relatively narrow mandates with closed decision processes...The real world...will not change; the policies and institutions concerned must.

The papers provided a forum to evaluate two new institutional initiatives for pollution control in Australia: the proposed Federal Environmental Protection Agency and the New South Wales Environmental Protection Authority.

These proposals can best be evaluated by examining how they measure up to the principles for environmental protection in the Brundtland Report. These principles enjoy wide international acceptance and were been accepted as a yardstick at the Conference.

PRINCIPLES FOR ENVIRONMENT PROTECTION

1. Sustainable Development;
2. pollution prevention:
   a) clean production;
   b) the precautionary principle;
3. integration of environmental controls; and
4. citizen participation.

As yet there is no Federal EPA legislation. The principles to be adopted appear from a Position Paper released for public discussion in July 1991 and from the Intergovernmental Agreement on the Environment. The first stage of the NSW EPA legislation is set out in the *Protection of the Environment Administration Act* 1991. The Federal and NSW proposals adopt most of the principles for environment protection outlined above, but view these measures as policy objectives rather than as legally enforceable standards.

1. Ecologically Sustainable Development

"Our Common Future" stresses that human survival and well-being could depend on success in elevating sustainable development to a global ethic.

Both Federal and State EPA's have set ecologically sustainable development as an objective. The NSW legislation spells out how ecologically sustainable development can be achieved: through application of the precautionary principle, inter-generational equity; conservation of biological diversity and ecological integrity; and improved valuation and pricing of environmental resources. A similar approach is adopted in the Intergovernmental Agreement.

Integrating environmental considerations into Government decision-making processes is likely to be one of the most challenging problems facing both the Federal and NSW Governments and was one of the most controversial issues at this Conference. Several speakers expressed the view that an EPA should not have regard to economic considerations in its decision-making and that this should be left to market forces. The Government view was that economic considerations should play a central role in the decision-making process. Clearly, it will be important to determine where the line should be drawn.

Implementation of the recommendations of the Working Groups on Ecologically Sustainable Development and translating them into policy should be a priority for both Governments.

2. Pollution Prevention

The necessity to prevent harm before it occurs involves two separate issues:

(a) Where it is known that pollution will arise then ideally the process causing the pollution must cease and must be replaced by *clean production.*

(b) Where it is uncertain that the process will cause pollution then the *precautionary* principle should apply.

(a) Clean Production

The Federal Position Paper refers to clean production as a means of achieving sustainable development but gives no indication of how this objective is to be achieved.

Significantly, the NSW legislation does not mention clean production. Although pollution prevention is an EPA objective, current and proposed strategy appears to be directed towards ensuring that end processes are satisfactory. Recycling, waste minimisation and other measures are expressed as EPA objectives, but these

have not been prioritised to provide for pollution prevention as the primary objective.

The adoption of the "best practicable measures" in s 7(2)(a) of the *Protection of the Environment Administration Act* as a yardstick of environmental protection is unfortunate since it is not appropriate to a policy of pollution prevention.

b) The Precautionary Principle

The adoption of the precautionary principle by both the Federal and NSW EPA's is a significant advance in environment protection. The precautionary principle could operate as a guiding principle requiring decision-makers to consider the likely harmful effects of their activities on the environment. Application of this principle could effectively reverse the burden of proof and require decision-makers to show that their activities will not have an adverse effect on the environment. However, speakers expressed concern that the formulation of the principle in the NSW legislation and the Intergovernmental Agreement requires a higher threshold of environmental damage than other formulations of the principle.

3. Integration of Environmental Controls

Effective pollution control requires a holistic approach in relation to the scope of protection, the various media in question and to the internal structuring of the institution which is set up to manage the problem. Both Federal and NSW EPA's have recognised this need and include diverse aspects such as biodiversity within their ambit.

Several speakers expressed concern that the *Environmental Planning and Assessment Act 1979* is not under the control of the NSW EPA. Ideally, pollution licences and development approvals should be decided contemporaneously so that suitable conditions can be imposed. This would also assist developers with long term planning.

Steps have been taken in the *Protection of the Environment Administration Act* to synthesise licensing and approvals in order to provide better co-ordination with the development control process under the *Environmental Planning and Assessment Act*. In particular, the EPA is required to advise the Government on methods to achieve the integration of the pollution control and licensing processes with the development consent process.

The EPA should also liaise with planning authorities so as to ensure that pollution prevention considerations are built into the environmental impact assessment process.

4. Citizen Participation

Though not strictly speaking a strategy for pollution management, citizen participation is fundamental to the effectiveness of any environment protection program. The critical role of public participation was recognised in "Our Common Future" and enjoys general acceptance in both Federal and NSW proposals. However, the extent of its practical implication is problematic.

The role of citizen participation was one of the most controversial areas at the Conference. Concern was expressed that the public have no input into decisions to grant licences or as to conditions which should be imposed. The Government view that this might "open the floodgates" has not materialised in relation to development proposals under the *Environmental Planning and Assessment Act* and there seems no reason why the situation should differ in the case of pollution legislation.

Public participation provisions are to be built into the standard setting process and into the development of environment protection policies. However, it remains to be seen whether citizens will be given a meaningful role or whether they will be confined to consultation and making submissions.

Several speakers expressed the need for open standing for citizen enforcement such as is provided in s 123 of the *Environmental Planning and Assessment Act*. The amendments to ss 13 and 25 of the *Environmental Offences and Penalties Act* 1989 which allow any person to bring an action with the leave of the Court are an improvement on the previous situation, but still fall short of conferring open standing.

The need for allocation of resources for community education became especially apparent during the course of the Conference. The *Protection of the Environment Administration Act* provides for the establishment of an Education Committee to advise the EPA on the development of "effective education and public awareness programs": s 27. Other educational aspects to be pursued by the EPA include grants for educational programs under the Environmental Trusts. These programs need to be vigorously pursued and adequately funded.

THE NEW SOUTH WALES EPA

Structure of the NSW EPA

The NSW EPA is a statutory body subject to control and direction by the Minister. The Director-General is the chief executive officer and has the responsibility for managing and controlling the EPA in accordance with the policies determined by the Board, but subject to directions of the Minister: s 19.

Ideally, an EPA should be free from political interference and this could be vital to its ultimate success. The separation of the role of the Board from that of the Director-General is apparently directed to ensuring the viability of the EPA. However, concern was expressed by speakers that this structure could result in the Board not having an effective input into EPA decision-making and that the structure does not guarantee accountability.

Regulation and Standard Setting

The NSW Minister for the Environment has made it clear that the EPA is a different body with a different ethos from its predecessor, the SPCC. However, several of the speakers expressed doubts as to whether this is the case. The EPA still seems to view its role primarily as regulation. The emphasis has been on standard setting and improving the regulatory system, rather than seeing it as a temporary measure until pollution prevention measures can be introduced. Speakers welcomed the EPA decision to require logging licences for diffuse source pollution, and expressed a hope that "prosecutable reality" will mean that licence standards will be tightened and not watered down. The introduction of mandatory goals for improvement into licensing conditions is a welcome step.

Industry has stressed the need for clarity and consistency in standard setting and licence conditions. The

relationship between State standards and Federal standards will require careful consideration.

Local Government

The role of local government in environment protection needs to be clarified. The *Protection of the Environment Administration Act* gives enormous power to the EPA to regulate local government in the exercise of their statutory duties. This not only has resource implications but also raises questions about the division of responsibility between State control of environmental matters and local government control.

Risk Assessment

The Diversey case highlighted the deficiencies in our environmental protection legislation. In the US the *Emergency Planning and Community Right-to-Know Act*, 1986 requires plant operators to notify state emergency services of the substances held and the procedure to adopt in an emergency. Clearly, legislation along these lines is required in all Australian jurisdictions so as to ensure community awareness and an integrated approach between plant operators and emergency services to avoid deficiencies highlighted in the Diversey case.

THE FEDERAL EPA

The introduction of the Federal EPA is long overdue and has been welcomed by conservation groups, industry and the community. The Federal EPA will represent the Commonwealth internationally and will participate in international debate on a range of environmental issues.

Another important function of the Federal EPA will be to achieve uniform national standards on pollution protection. Several issues arise here.

Federal Power Over the Environment

The extent of Commonwealth power over the environment is particularly relevant to the proposal to establish a Federal Environment Protection Agency. Since the Constitution does not confer a specific head of power on the Commonwealth in relation to the environment, the States were traditionally considered to have primary responsibility for environmental matters. However, the broad interpretation which the High Court has placed on the Constitution has expanded the powers of the Commonwealth to such an extent that lack of a specific head of power in relation to the environment is of little practical significance.

Clearly, the Commonwealth has power to act to protect the environment in all significant areas. The real issue will be whether it has the political will to do so.

The Relationship Between the Federal EPA and the States

The second stage of creating the EPA is part of the Inter-Governmental Agreement on the Environment, which also covers environmental protection. The relationship between the Federal EPA and the States is crucial to its potential effectiveness in achieving national environmental protection standards. The relationship currently envisaged by the Federal Government is based on collaboration and co-operation.

The speakers emphasised that the Commonwealth does not intend to rely on its constitutional powers to force decisions on unwilling States. Decisions by the National Environment Protection Authority (NEPA), the body consisting of all the relevant Ministers from state and Federal government, will be made by a two thirds majority.

However, if NEPA is to play an effective role, there must be some means of ensuring that the States co-operate and comply with measures that have been adopted. Although NEPA decisions will become law in each State, implementation and enforcement is firmly in the hands of the State Government concerned. It is unfortunate that the Intergovernmental Agreement does not give the Commonwealth EPA a supervisory role or provide for it to take over State functions where States are unwilling to carry out their obligations. It is clear that the Federal Government has the constitutional power to fulfil this role; however it clearly lacks the political will. If the Commonwealth EPA is unwilling to take on a supervisory role and impose its will on recalcitrant States, it is in danger of degenerating into a "paper tiger".

Funding by the Federal Government could provide an important incentive to persuade unwilling State Governments to co-operate. The Federal Government could use its financial powers with respect to special purpose grants, taxation and other expenditure to encourage the participation of the States. However, bearing in mind the limited budget that was allocated to set up the first stage of the EPA, it does not seem that the new body will be able to dispense funds too generously.

CONCLUSION

There has been general acceptance at the Conference that the Federal and NSW EPA's are an important initiative in environment protection. The success of the Federal EPA will depend on its relationship with the States. In the absence of State co-operation, the Federal Government must be willing to use its constitutional power to achieve its objectives. Measures to be taken in the second stage of the NSW legislation will be crucial to the success of the EPA. To date, there appears to be little to distinguish the NSW EPA from that of its predecessor. Both Federal and NSW EPA's must provide a meaningful role for public participation in order "to meet the valid aspirations of an increasingly vigilant community - a community that is seeking and expecting true environmental protection."

DAY 2 SUMMARY BY LOUISE BYRNE, LAW STUDENT, EDO VOLUNTEER

SESSION 1:THE LOCAL GOVERNMENT ACT, 1992: REFORM OR DISASTER?

Beverley Forner, Manager, Policy and Research Branch, Dept of Local Government,opened the session with a detailed chronology of the development of the Exposure Draft Local Government Bill 1992. In looking at the process of local government legislative reform, her paper included comments on the policies, themes and structure of the Bill and noted the major differences between it and the present Act. She emphasised that the Bill is fundamentally different to the present Act and reflects a more appropriate way for a modern public sector organisation to be managed. She also sought to correct some misunderstandings about the Draft Bill, such as that it retains or extends a prescriptive system for council's functions. The grant of power is as general

as it is possible to be without making local government into a full plenary level of government.

As the president of the Local Government Association, the next speaker, Ald Peter Woods, commented that the LGA is strongly committed to the idea that Local Government receive constitutional recognition. As far as the Draft Bill is concerned, the two main concerns of the LGA are with the organisational and operational structures it sets up. For example, it doesn't adequately address the division of responsibility between the Mayor and the General Manager (see clauses 188 & 286). The concern is that the Mayor, who is popularly elected, has little power whereas those who do have the decision making power are unaccountable to the people.

To complete the discussion on changes to local government legislation in NSW, NELA President, Stephen Austin QC, presented David O'Donnell's (solicitor, Malleson Stephen Jacques) paper on the 'legal ramifications' of the proposed changes. This paper echoed earlier comments that the Draft Local Government Bill cannot be described as an amendment of the current Act but rather as evidencing a fundamental shift in the philosophy underpinning the management of local government in NSW - best described as a shift from the prescriptive to the permissive. This reform is of such a nature as to render redundant much of the old law. In particular, David suggests that:

> ....the greater transparency of councils' operations and their accountability to the community established in the Draft Bill, combined with a broad grant of power, will, in some respects, reduce the relevance of the doctrine of ultra vires insofar as it applies to councils as statutory corporations and, in others, increase the number of applications for judicial review of councils' decisions and actions.

SESSION 2: AN UPDATE ON THE LAND AND ENVIRONMENT COURT

The first paper was by Mr Justice Bignold on 'Recent Developments in the Land and Environment Court' and was intended as an update on a similarly titled paper presented by Mr Justice Hemmings at the Association's last Biennial Conference. In Justice Bignold's comprehensive survey of developments in the court in the last two years (including a summary of recent cases), his Honour observed that generally speaking, there has been a substantial decrease in development and building appeals, but a pronounced increase in prosecutions for environmental offences and increased civil enforcement. His Honour notes that the Court has responded to this increase in workload by implementing an apparently successful pilot programme of court mediation and by simplifying its rules and procedures to facilitate early disposal of development and building appeals.

This led on to the next paper by Tina Spiegel (solicitor, Speigel & Associates) which examined not only mediation in the Court but the use of the mediation process in all aspects of development, planning and the environment to try and prevent a dispute reaching the Court.

SESSION 3: LAND ACQUISITION - COMMONWEALTH RIGHTS v STATE INJUSTICE

Mr Justice Wilcox, Federal Court, opened the final session with an appraisal of the *Lands Acquisition Act 1989* (Cth), concentrating on three aspects of the Act: pre-acquisition procedures, the assessment of compensation and the procedures for compensation claims in the Federal Court. His Honour concluded by noting that only one compensation claim under the Act has so far reached a hearing in the Federal Court - it came before Morling J and was settled early in the hearing.

The NSW land acquisition legislation - the *Lands Acquisition (Just Terms Compensation) Act 1991*, was examined by the next speaker, John Webster (Barrister-at-Law). He outlined provisions of the Act which create new and potentially 'unjust' results to an owner who has had his land resumed) and a summary of the Act is attached as an Annexure). In this way the Act falls short of what was really needed to overcome the many inadequacies of the previous system. To illustrate his point, John Webster looked at particular objectives of the Act that are not fulfilled in its implementation - such as the method of assessment of market value and the commitment to ensure compensation on 'just terms'. He concluded that merely calling the legislation 'Just Terms' cannot overcome its many inadequacies and noted that Justice Wilcox's paper on the Commonwealth Act further highlights the inadequacies of the NSW land acquisition legislation.

The NSW Act was also the focus of the next paper on 'the difficulties of the valuer in taking resumption legislation into account' by Charles Woodley (Valuer, McGee Fuller Flanders). With over 30 years experience in respect of compensation under the *Public Works Act*, he noted that the process of adequately compensating the dispossessed owner of land could well be more difficult under the new legislation which echoed the comments of the previous speaker.

NOTE: Conference papers are for sale from the Environmental Defender's Office (NSW), telephone 261 3599.

New Logo for EDO

The Environmental Defenders Office (NSW) has adopted the above design as its logo to appear on EDO publications and publicity. The logo was designed by Leonie Lane from Antart.

Environmental Law Community Advisory Service (SA) Inc.

The SA Division of the National Environmental Law Association has joined forces with the Environmental Law & Policy Unit at the University of Adelaide to establish the Environmental Law Community Advisory Service (SA) Inc. ("ELCAS") with the hope of it one day developing into a fully funded Environmental Defender's Office.

A Brief History

For years the SA Division of NELA (formerly the SA Environmental Law Association) and the Director of the Environmental Law & Policy Unit, Rob Fowler explored options for the establishment within South Australia of an environmental law advisory service or an Environmental Defenders Office. Despite considerable effort nothing permanent was put into place, due mainly to a lack of funding.

A meeting of people interested in furthering the development of Environmental Defenders' Offices around Australia, held in Adelaide on 25th July 1991 in conjunction with the National conference of Community Legal Centres, proved to be the turning point in the establishment of the environmental law advisory service known as ELCAS.

After that meeting it was decided that the best option to pursue was to first establish a free environmental law advisory service which, if successful, could develop into a fully funded Environmental Defenders Office. It was decided that we needed to develop a greater knowledge of the Community Legal Centre network and to try to work in with it to establish such a service.

An informed steering committee that drew on people from a wide variety of areas was formed which worked hard at making contact with the Community Legal Centres. Contact was also made with the Legal Services Commission and an application was made for funding to the Law Foundation. The Community Legal Centres and the Legal Services Commission greeted us with a great amount of enthusiasm. Unfortunately the same could not be said for our application for funding to the Law Foundation. That application was not successful but further attempts are being made.

Rather than allow the lack of Law Foundation funding to delay or prevent the establishment of ELCAS the SA Division of NELA and the Environmental Law & Policy Unit decided to fund it themselves. That decision was made easier by the offer of considerable administrative support from the Bowden Brompton Community Centre. The Minister for Environment & Planning also agreed to a request to provide ELCAS with a free copy of the Development Plan (which is our zoning document which would have cost us $120,000.).

With the full support of the Bowden Brompton Community Centre it was decided that ELCAS would provide its service from the Bowden Brompton Community Centre, and in particular the offices used by the Bowden Brompton Community Legal Centre. On 12th May 1992 ELCAS was admitted as a member of the South Australian Council of Community Legal Services.

What ELCAS Is

ELCAS is an advisory service. Advice will be given by a lawyer assisted by a law student from the University of Adelaide on Thursday evenings between 6 - 8pm commencing on 11th June 1992. We received a fantastic response from the legal profession to the proposal and have a list of 24 lawyers experienced in environmental law who have agreed to volunteer their time to give free advice. Likewise we have had an enthusiastic response from students at the University of Adelaide who will assist the duty lawyer, and hopefully at the same time gain valuable experience in how to deal with clients.

In addition to providing an advisory service ELCAS will assist disadvantaged clients in obtaining either free or fee reduced legal representation where that client is involved in a matter that should be pursued in the public interest. A list of barristers and legal firms prepared to consider taking on such work has been prepared.

Membership of ELCAS

Membership of ELCAS is open to any person who supports its objectives and is willing to commit to the achievement of those objectives. A membership fee of $5.00 per annum has been set. The objects of the ELCAS are:-

(a) To provide legal advice and assist with access to legal services on environmental law matters for disadvantaged persons and for classes of persons for those needs the services of lawyers in private practice are inadequate;

(b) To promote and procure the provision of legal services for disadvantaged persons or classes of persons without fee or on a fee reduced basis in relation to environmental problems;

(c) To encourage the solution of environmental problems in a way which is compatible with the principles of ecologically sustainable development;

(d) To increase awareness within the community concerning legal remedies in relation to environmental problems;

(e) To promote forms of alternative environmental dispute resolution;

(f) To promote the establishment within South Australia of an Environmental Defender's Office (EDO);

(g) To carry out and publish research on the administration of environmental law.

Anyone who would like to become a member of ELCAS or would like more information about it can contact me on (08) 414-3333 or Penny Wright, our Advisory Service Co-ordinator on (08) 346-2445 who is responsible for the day to day administration of ELCAS.

Summary

Assistance in the establishment and ongoing management of ELCAS has come from representatives of NELA, the Environmental Law & Policy Unit, students of the University of Adelaide, the Community Legal Centres,

Conservation Movement and other interested lawyers and non lawyers. It has been a truly communal effort that has generated a great deal of enthusiasm.

One of NELA's stated objectives is "to promote the understanding of the role of environmental law in regulating and managing the conservation and usage of the environment." This is another example of the practical implementation of that objective.

ELCAS was officially launched by the Attorney-General on 4th June 1992 (World Environment Day eve).

John Scanlon
Chairperson, ELCAS

ENVIRONMENTAL LAW WORKSHOPS

The Environmental Defender's Office (NSW) is holding a series of regional workshops in 1992. The Forbes workshop is a Law Week activity.

Dubbo	Saturday 25 July
Forbes	Sunday 26 July
Nowra	Saturday 8 August
Wagga Wagga	Saturday 5 September

AIMS

- to provide an introduction to environmental law
- to give people confidence to participate in the legal process
- to hear the concerns of people in rural areas

OUTCOME

- participants will understand how to use environmental law and find relevant information

WHO SHOULD ATTEND

- TCM and Landcare committee members, farmers, teachers, Aboriginal people, elected councillors, lawyers, young people and others interested in the environment

COST

$20.00/$10.00 (unwaged/concession)

Assisted by NSW Government Environmental Trusts and NSW Law Week (Forbes Workshop).

For a brochure contact

Jackie Wurm
Tel:02/261 3599, Fax:02/267 7548
Suite 82, 280 Pitt St, Sydney NSW 2000

THE UNEXPECTED BATTLE - EDO QUEENSLAND SEEKS OPEN STANDING PROVISIONS IN NEW ENVIRONMENTAL LEGISLATION

The Environmental Defenders Office (Qld) Inc. in Brisbane is now operating on a full time basis since the appointment of solicitor Jo-Anne Bragg in March this year. On 27 May, 1992 the Queensland Attorney-General The Hon. Dean Wells officially launched the office before representatives of the media, government, academics, private law firms and conservationists. At the launch EDO Queensland called for insertion of open standing provisions in all legislation that impacts on the environment.

The Queensland Parliament this year passed the Queensland *Heritage Act* and the *Nature Conservation Act*, and the Government is proposing new legislation to deal with environment protection, coastal protection and other environmental matters. A feature of both these Acts is the absence of open standing provisions for civil litigation.

Open standing provisions for civil litigation enable any person to be recognised by the Court as an appropriate person to initiate a Court action to remedy or restrain a breach of the legislation. The Queensland *Local Government (Planning and Environment) Act (1990)* includes this type of open standing provision in section 2.2.4.

In response to the passage of the Nature Conservation Act, EDO Queensland made a submission entitled "Standing and Public Interest Litigation" to the Queensland Department of Environment and Heritage on 15 May, 1992.

The main argument by industry against open standing provisions in Queensland has been they will lead to a flood of "vexatious litigation". "Vexatious litigation" is a legal proceeding which on its face is clearly without reasonable grounds, and which no reasonable person could describe as genuine.

In 1990 the Honourable Mr Justice Cripps of the New South Wales Land and Environment Court described this argument as completely discredited in relation to the operation of section 123 of the New South Wales *Environmental Planning and Assessment Act (1979)*. As industry has not bothered to produce any evidence to back up the argument one can only describe their opposition as irrational and emotional which are terms commonly thrown at conservationists.

PRESERVING YURAYGIR NATIONAL PARK

On 19 June 1992 Bignold J handed down his decision in the Land & Environment Court on the case *National Parks Association v. Minister for the Environment & The Director of the National Parks & Wildlife Service*, LEC No. 40155/91. The Court ordered that the direction of the Minister to the Director on January 1991 to re-open the existing track in Yuraygir National Park between Wooloweyah Village and Shelley Beach is null and void. The EDO acted for the National Parks Association in the case.

The NPA was challenging a decision of the Minister to require the re-opening of a former access road through the Yuraygir National Park to 4WD vehicles. The re-opening concerned a closed road of about 5 kilometres in length in the northern section of Yuraygir National Park linking Wooloweyah Village to Shelley Beach. The Park is located near Yamba on the north coast of NSW.

The NPA argued several issues in the case. One was that the Environmental Planning & Assessment Act had not been complied with because there had been no environmental impact statement prepared for the re-opening of the road. An EIS is required if an activity is likely to have a significant impact on the environment. Bignold J held that the direction by the Minister to the Director of the National Parks & Wildlife Service to re-open the road was manifestly unreasonable and that no real or genuine consideration had been given to the environmental consequences of re-opening the access road. The NPA also argued that there was a breach of the National Parks & Wildlife Act (s.72), because there was a duty on the National Parks & Wildlife Service to prepare a plan of management "as soon as practicable". Yuraygir National Park was reserved as national park in 1975 and no plan of management had been prepared for it. As 17 years had elapsed the Court held that no plan of management had been prepared "as soon as practicable". However the Court did not make any orders against the Service and did not specify what that expression means.

T.R.E.E.S. CONTINUED

Court of Appeal decision

In the last issue of IMPACT we told you about an action brought by the EDO on behalf of TREES Inc. to restrain the developer Iron Gates Pty Ltd from carrying out work without a development consent. The developer appealed from the Land & Environment Court to the Court of Appeal and the matter was heard on 27 March 1992. Judgement was delivered on 12 June 1992. The Court was unanimous in rejecting the appeal by the developer. The Court held—

1. The work found by the Land and Environment Court to be engineering work (because it was done with a bulldozer, which has an engine - Bannon J) was prohibited by Condition 2 of the Development Consent.

2. Because the work was prohibited by the consent it was not work "relating to that development" for the purposes of section 99(2)(a) and was not "the subject of that consent" within section 99(1)(a). Because of this the subdivision consent lapsed on 21 October 1991.

The Court's judgment was written by Mr Justice Handley. In his opinion, the work relied upon by the developer to save its consent from lapse was prohibited and illegal and the persons offending against that prohibition were guilty of offences against the Act.

Wetlands

The developer, Iron Gates Developments Pty Ltd has also commenced work illegally on a proposed compensatory wetland site adjacent to this development. Mr Al Oshlack on behalf of the Lismore Greens has lodged an appeal in Class 1 proceedings in the Land & Environment Court. In November 1991 Mr Oshlack filed a Notice of Motion seeking to restrain the developer from carrying out work before the appeal had been heard.

In a disastrous decision, Bannon J. said that he could see no reason why the developer should be restrained from carrying out work. Mr Oshlack, who represented himself in this application, tried in vain to draw His Honour's attention to section 93 of the Environmental Planning & Assessment Act. His Honour said "I am not here to explain the law to you." His Honour then awarded costs against Mr Oshlack.

The developer later agreed to give the undertaking sought to vary the Orders of the Court and that costs would be reserved.

Mr Oshlack is continuing his challenge. Upon a search of the title of the land, it appears that part of the land is Crown Land. No consent has been granted by the Crown to the lodging of a development application over the land. Further the concurrence of the Director of Planning under SEPP 14 has not been obtained. Curiously the Department of Planning maintains that the concurrence is not required. While it is not the first time the Department of Planning has taken a warped view of SEPP 14, this one really has us stumped. The Department appears to have decided that the land is not "true wetland" and to be trying to override the law.

Lastly, there is serious doubt whether the compensatory wetland would ever survive. The levy bank which is to be removed to provide the wetland has built up naturally over time. There is every chance that over time the bank would rebuild thereby destroying the wetland.

This is the first compensatory wetland development to our knowledge in NSW. While it might seen strange that a person acting on behalf of a group because of environmental concern might challenge the establishment of a compensatory wetland, there are solid environmental reasons for not blindly accepting a proposal from a developer who incidentally obtains many thousands of cubic metres of free fill for another development.

The EDO is currently examining the prospects of bringing a prosecution under the Environmental Planning & Assessment Act against the developer. We will keep you informed of further developments next IMPACT.

EPA LICENCE UNDER SCRUTINY

The EDO currently acts for Mr A.J. Brown in proceedings against the Environment Protection Authority and North Broken Hill Limited. On 26 June Mr Brown sought leave

under section 25 of the Environmental Offences & Penalties Act to restraint the EPA from breaching both the Pollution Control Act and the Environmental Planning & Assessment Act.

There are several grounds for the case, including

- failure of the EPA to consider an EIS when deciding to grant a pollution licence to APPM
- inflexibly following the Minister for the Environment's policy of "prosecutable reality"
- setting licence conditions which were unreasonable in the circumstances

His Honour Judge Stein delivered judgement on 2 July 1992, granting leave to Mr Brown to bring the proceedings. The judgment was significant because it was the first application under the new section 25 and there were widely differing views as to how the provisions of the section were to be interpreted.

Section 25(3)(b) provides that before granting leave the Court must be satisfied that

> there is a real or significant likelihood that the requirements for the making of an order under this section will be satisfied.

The EPA argued that this meant a prima facie case had to be shown. This would mean the equivalent of proving your case before the hearing and in our case the EPA estimated two weeks for the hearing of the leave application! In our submission, this would have been a step back to the dark ages and an inappropriate interpretation of the section.

His Honour held that the word requirements in the context leads to an inference that

> the Court has to be satisfied on the probabilities of the case sought to be brought as within the jurisdiction of the Court; seeks a remedy within the power of the Court; alleges an actual, threatened or apprehended breach of the Environmental Offences & Penalties Act or any other Act and that the breaches alleged to be causing or likely to cause harm to the environment.

Section 25(3)(c) provides that the Court must also be satisfied that it is in the public interest that the proceedings should be brought. Counsel for the EPA submitted that "the question of breaches of statutes should be matters that are primarily for the EPA."

In his Judgment Stein J said

> this bold submission of Ms Murrell seems to suggest that the breach alleged is not a serious one and therefore the proceedings are not in the public interest. I have difficulty in comprehending how the EPA can seriously submit that a proceeding which alleges a serious breach of the Pollution Control Act by the EPA's issue of an invalid pollution control licence is not in the public interest. I would have thought that it was very much in the public interest to have the issue determined not to speak of the interest of the EPA and large numbers of licence holders.

It is a matter of serious concern to our office that the EPA is approaching the application of section 25, purportedly an open standing provision, in the manner that it has demonstrated so far.

The case has been set down for hearing from 21 September 1991. Mr Brown has made application for legal aid although it was unsure whether his application will be successful. An earlier application on behalf of the Australian Conservation Foundation was refused by the Legal Aid Commission. This was despite a 26 page advice and support from Mr Preston, Barrister; two advices from Mr Craig, QC; two scientific reports in support and a recommendation from the Environmental Consultative Committee that aid be granted.

The decisions of the Commission are made in secret, no reasons are given and there is no appeal from the decision of the Commission. NSW lags every State in terms of the openness of the Commission's decisions. Statistics issued by the Office of Legal Aid and Family Services for the quarter ended 31 March 1992 show that of the national total of legal aid applications refused without reason, NSW had almost 90 per cent.

It appears that this case has touched a nerve. In view of the nature of the decision-making process one must wonder whether political influence was brought to bear in this case.

INVITATION FOR CONTRIBUTIONS TO PROPOSED PUBLICATION: PUBLIC INTEREST ENVIRONMENTAL LAW AND THE ENVIRONMENTAL DEFENDER'S OFFICE 1983-1993

Need

What cases has the EDO brought? What immediate and broader results have been achieved? Is public participation an impediment to efficient environmental administration in the 1990s? What roles have environmental organisations, volunteers, and lawyers played in EDO cases? What law reform and educational activities have been undertaken, and how effectively? Should public funding be available for organisations like the EDO? What relationship should exist between governments, the EDO and other public interest advocates?

As the EDO enters its second decade, and organisations in other States and overseas increasingly look to us for guidance, a public account of our development and outlook is timely.

Objective

The objective of the proposed collection of essays is to provide a history of the EDO and to suggest future directions for the public interest environmental law movement.

Readership

The target audience comprises Australian and overseas:

- environmental lawyers and law students
- environmentalists and environmental organisations with a particular interest in law
- public interest activists and policy makers
- public and private funding organisations

Writers

Contributions are invited from anyone interested including:

- past and present EDO clients, staff, friends and board members
- Australian and foreign academics and lawyers
- opponents of public interest environmental advocacy

Editors

David Robinson, with the assistance of other EDO solicitors Nicola Pain, James Johnson and Maria Comino and EDO project officer Jackie Wurm.

Contents

Contributions from individual authors are to be grouped in two parts:

- EDO experiences
- public interest environmental law issues

Contributions in both parts will be discussed in an introductory chapter.

Think Tank

Anyone interested in the publication is invited to attend a think tank at the Public Interest Law Conference on 9 October 1992, University of New South Wales, 1.30 - 5 pm.

To stimulate discussion, four brief papers will be presented, two on EDO's history, and two on the movement's future.

Further Information

If you have ideas for a paper, would like to attend the think tank or contribute in any other way, please write to or telephone David Robinson at the EDO (280 Pitt Street Sydney 2000, DX 722 Sydney, telephone 261 3599).

Environment and the Law to be Launched in Law Week

Our textbook for HSC students *Environment and the Law* is being launched in Law Week by the Attorney General the Hon. John Hannaford. It was written by the Environmental Defender's Office (NSW), funded by the Law Foundation of NSW and published by CCH Australia. Contact EDO for copies, a brochure or further information.

STOP PRESS

RADIOACTIVE PLANT ORDERED TO SHUT DOWN

Penang, 11 July 1992—The Malaysian High Court brought down a landmark decision when it ruled against the controversial Asian Rare Earth Company, partly owned by Mitsubishi Chemicals of Japan, in favour of the residents of Bukit Merah where the plant is located.

The court gave ARE 14 days to stop the factory from operating, producing, storing and keeping its toxic and radioactive waste on the grounds that the activities caused the escape of radioactive gases and rays to its neighbouring lands occupied by the plaintiffs (the residents of the town).

Full Details in the Next Issue of Impact

Keeping the Land Alive: Aboriginal People and Wilderness Protection in Australia by A.J.Brown

Book Review by Elaine Teoh, Solicitor - formerly of the Aboriginal Legal Service, Redfern

This book by A.J. Brown, Wilderness Society activist and final year law student, has been described as an "attempt to deal with the practical and legal implications of the relationship between Aboriginal land rights and "extreme" models of land conservation." This it does, interestingly and well, providing an overview and analysis of Aboriginal involvement in the management of protected areas to date. Were this all that the author had hoped to achieve this much alone would justify him a good reception in the usual audience-professionals and other interested parties in the field. The book is well researched and erudite, with an extensive bibliography. Of special interest are the three Appendices, (including "Leasebacks and Management Rights" and "Environment Group Policies on Aboriginal Land Right"), and the scholarly exposition of obstacles - historical, cultural and conceptual - to the mutual understanding between Aboriginal and non-Aboriginal peoples in regard to "the land".

However, on a closer perusal the book is more than the scholarly treatise which it appears to be at first glance. The author also, as might be expected, puts the case for a rapprochement between the respective proponents of the conservation and Aboriginal land rights movements.

In the earlier chapters, the reader is treated to a precise and fascinating exposition of the basic tenets and still-evolving philosophies of the conservation movement. In a more inferential but equally as effective way, the author attempts to delineate the Aboriginal land ethos of Aboriginal people. By degrees, one suspects that Brown's writing is in that tradition of scientific advocacy of which Rachel Carsons's "Silent Spring" is the clearest example. The spatial depiction (on the cover) of this southern Continent as a grid of family and tribal networks is, posssibly in the same way that Aboriginal art has been received by the international art world, a revelation and provides one with the first clue that this book is somehow special.

This book, then, is an essential resource and reference tool for conservationists lawyers and other professionals in the field, students and specialists who doubtlessly form his target audience. And it is more than that. The author well deserves to reach an even "wider circulation" to include anyone who has the slightest interest in the future or cultural development of this nation, Australia. The generalist reader who looks beyond the book's obvious "worthiness" will be amply rewarded by the insights it affords as a gateway to another culture. I commend it to you.

IMPACT is published by the Environmental Defender's Office Limited, an independent public interest legal centre specialising in environmental law. IMPACT is printed on 100% recycled paper.