IMPACT

No 28 JANUARY 1993

NEWSLETTER ON PUBLIC INTEREST ENVIRONMENTAL LAW

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LEGAL AID AXED

James Johnson

Director, Environmental Defender's Office

On 17 December 1992 the Legal Aid Commission resolved that as of 1 January 1993, no grant of legal aid would be given in environmental matters. This is part of a general resolution to axe legal aid in civil matters.

These cuts came into force on the 1 January 1993 in a decision which was made without adequate consultation with concerned groups and organisations, without adequate financial information and without any assessment of the social impact of such a decision.

The decision to axe legal aid in environmental cases is even contrary to the NSW Government ministerial inquiry into the administration of legal aid in environmental matters carried out in recent months. The ministerial committee recommended that no changes be made to the legal aid policy.

Effect on the EDO

These cuts have direct consequences for the EDO because most of our clients who bring environmental litigation in the public interest receive funding from the Commission. Some of the cases that the EDO has fought with legal aid funding include *Jarasius v Forestry Commission, Australian Conservation Foundation v Minister for Resources, Vaughan Taylor v David Mitchell Melcann, Malcolm v Newcastle City Council.* None of these important cases would have been possible without legal aid.

The decision to axe aid completely places at risk the viability of the EDO.

It has never been easy to get legal aid for environmental matters; only the most deserving cases with strong prospects for success and involving environments with unique qualities have succeeded in the past. Grants made by the Commission are the result of an exhaustive application by the solicitors for the applicant, the consideration of the application by a consultative committee meeting specifically on environmental public interest matters, and a final determination by the Commission staff, or in exceptional cases by the commissioners themselves.

The criteria for eligibility were amended in 1991 to take into account economic factors in determining whether to grant aid. Further, additional members were appointed to the consultative committee including representatives of the forest industry, the mining industry and various regulatory authorities.

The Commission's determination of 17 December 1992 has effectively meant that there is no longer in NSW a legal avenue open for people concerned about enforcing environmental protection laws to protect the environment.

Contingency Fees

A proposal the barristers and solicitors be paid only where they win in civil environmental matters does not address the problem of the possibility of adverse costs orders. If you challenge the legality of a development consent, or way a public authority is acting, the usual rule is that the loser pays. This, more than any other factor, is the disincentive to concerned citizens. Citizens can raise 5, 10 or 20 thousand dollars where the issues are important enough. But having the uncertainty of a costs order against them if they lose is the death blow to environmental protection through public interest litigation.

What does it cost the Commission

The tight guidelines described above have played a part in ensuring that the EDO has won every case funded by the Legal Aid Commission over the last twelve months.

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ISSN 1030 - 3847

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The EDO recovers most of the costs from the losing parties and pays this money to the Commission. In addition substantial contributions to costs have to be made by the applicants.

Legal aid in environmental matters could even earn the Commission money. The fact is that the Commission has no idea how much is spent or recovered in environmental matters. This vacuum of financial management is to be contrasted with the detailed analysis of finances and activities which Community Legal Centres are obliged to provide each year.

Below is an extract from correspondence from the Combined Community Legal Centres Group (NSW); which explains the recent decision of the Legal Aid Commission to cut funding.

"History

In September 1992 it was discovered that the State government had failed to provide to the Legal Aid Commission of NSW $3.2M which had been allocated as a result of the Commonwealth State funding agreement. The failure to pass this on to the Commission has contributed to the current budgetary crisis.

It has been estimated that the Commission requires recurrent funding of $3.6M per year simply to maintain current services at current costs. Without this additional funding the Legal Aid Commission will accumulate a deficit of $9.4M by 1994.

The Government has consistently failed to examine the implications of its legislative and policy initiatives for the provision of legal aid services.

Demands for legal aid services and the costs of legal services have increased in recent years. Budget allocations for the Legal Aid Commission have decreased.

Impact of the Decision

This decision will prevent many people from enforcing or defending their legal rights.

• Solicitors and barristers may be reluctant to act without a guarantee of payment

• People may not be able to commence or defend court action because they cannot afford the upfront fees (for example court filing fees and costs of medical reports etc) or may have an order for legal costs made against them.

• An increase in the number of unrepresented people within the legal system will contribute to greater delays in the administration of justice

• Greater demand will be placed on already overburdened legal advice services, such as community legal centres

• Other services will be limited in their ability to provide legal assistance. The provision of a solicitor through a community legal centre, *pro bono publico* offered through the private legal profession, contingency fee or other schemes will have limited value where a client cannot afford to pay for disbursements (for example doctor's reports, court filing fees, search fees)

• People who will no longer be able to gain a satisfactory resolution through the legal system, will turn to other community and government agencies for assistance

People who receive support from the Legal Aid Commission in civil law matters have already proved that their case is worthy of assistance and have attempted other alternative methods of resolving their problem prior to seeking a legal solution, or making application for legal aid.

The Commission's decision means that whilst legal aid in criminal, family, and administrative law will continue, almost all legally aided civil work will stop. It is simplistic and unfair to assess legal need in terms of the area of law. People with civil law problems are bearing a disproportionate burden in this

Community Legal Centres demand that:

1. the decision of the Commissioners be deferred so that adequate consultation and consideration can be given to what, if any cuts, are required and if so, in what areas;

(Consultation must include community groups whose clients will be affected by the cuts)

2. the State Government make up the shortfall of $3.211M, already agreed for 1992-1993, which would resolve the immediate crisis and allow for more considered decision making;

3. the State Government allocate the $3.6M in recurrent funds already agreed to meet the Commission's budget deficit for 1992-1993; and

4. the State Government introduce a system of legal aid impact statements for all proposed legislative and administrative changes."

What you can do

The well being of society includes clean air, sustainable planning decisions and adherence by government to society's laws. Mature society must provide access to justice in environmental cases too.

If you believe that funding through the Legal Aid Commission of NSW should, in appropriate cases, be made available for public interest environmental protection, write to:-

Mr Brian Rayment QC,
Chairperson,
Legal Aid Commission
Daking House
11-23 Rawson Place
SYDNEY NSW 2000

Send a copy of your letter the EDO and to:

Mr John Hannaford
Attorney-General
Level 20
Goodsell Building
8-12 Chifley Square
SYDNEY NSW 2000

Express your concern that—

• during the period of highest unemployment since the Great Depression,

• at a time when legal costs have risen greatly and

• when demand for advice in civil matters has increased by 60% in the last twelve months

the government has seen fit to cut legal aid for civil matters.

How much does the amount saved work out as a proportion of the cost of the Eastern Creek Speedway?

Rivers in Crisis

> In November 1991 the great Darling River in western New South Wales painted itself a bright poisonous green...it was the greatest algal bloom ever recorded on any river in the world.

This quote is from a recent article in the Independent, by Eric Rolls which describes the scope and complexity of the problems facing the management of the Murray-Darling basin. He outlines the various historical, scientific and economic causes and factors in the continuing breakdown of the river system, suggesting that this may be called "the most serious malfunction of the Australian environment."

> All the plants that grew profusely in the northern waters of the Murray-Darling basin only 15 years ago are now almost gone and with them their associated life. Wondrously built rivers are now barren irrigation channels...Our rivers cannot live without the plants, we cannot live without our rivers.

On the question of blue-green algae, Rolls claims that

> even if all phosphorus influx were stopped tomorrow there is enough in the beds of all our dams, rivers and creeks to feed massive bloom for up to 20 years. There can be no quick fix for our rivers.

Environmental scientist Kate Boyd, writing in the National Parks Association Journal described the concerns in the following terms:-

> The native plants and animals of Australian floodplains are adapted to and dependent on a highly variable natural water regime of floods and droughts.
>
> The regulating of inland rivers and the use of them for irrigation was the European approach to living in this unpredictable environment. This approach has had a serious impact on the native plants and animals which have otherwise survived clearing, grazing, cropping and timber harvesting.
>
> Most of the inland floodplains are semi-natural ecosystems used for grazing, but, even within national parks or nature reserves, these ecosystems remain at the mercy of catchment and water managers. The extraction of water for irrigation upstream has also adversely affected graziers and rural townspeople.
>
> A new approach to water management for the inland rivers, aimed at maintaining riverine ecosystems, is needed to safeguard our native wildlife and to ensure a clean and adequate water supply to rural communities and the residents of Adelaide.

Political Recognition of the Crisis

On 3 and 4 December 1992, a national water quality conference was held in Adelaide to discuss the issues raised in the draft national water quality strategy.

The conference was addressed by Simon Crean Minister for Primary Industries and Energy, Ros Kelly Minister for Arts, Sports, Environment and Territories and Ian Causley, NSW Minister for Natural Resources.

In his opening address Simon Crean acknowledged:-

"We have given ourselves some enormous problems to manage. For example, diversion of water for developments such as irrigation schemes has dramatically reduced average annual flow rates in much of the Murray Darling Basin. Two thirds of the water that would have originally reached the sea is used. Total diversions of water from rivers in the Basin, excluding Queensland, now account for nearly 90% of the average natural flow."

On 21 December 1992, the Prime Minister in his Statement on the Environment acknowledged water quality as one of the major environmental problems facing Australians.

The statement stresses a general philosophy of clean production and pollution avoidance as central to any environmental policy.

It provides for a number of management and research initiatives to address a variety of problems associated with our rivers.

Time for scrutiny of our water laws and their administration

These movements at the political level serve to highlight the urgency of the problem. The EDO in its Inland Rivers Project is looking forward to playing a role in the development of improved water law and its administration. In this way, the office hopes to play its part in the resolution of the rivers crisis.

Inland Rivers: Regulatory Strategies for Sustainable Management

The EDO is investigating the problem of declining inland river quality. The Law Foundation of New South Wales is funding the "Inland Rivers - Regulatory Strategies" project.

Rivers running west of the Great Dividing Range are polluted. The toxic algal blooms in the inland rivers of NSW in recent years are symptoms of unsustainable practices. Put simply, the problems are "salt, silt, sewage and superphosphate".

The problem is water quality. However water quantity issues - how the resource is shared between competing users such as irrigators, dry land farmers, towns and natural ecosystems - are inextricably linked to water quality. The engineering conception typified by the Snowy Mountains Scheme that rivers "ran to waste" if they discharged into the ocean is now realised to be inadequate.

In a preliminary paper, available from the EDO, David Robinson outlines the regulatory framework, trends in the regulatory approach and the planning, water management and pollution issues surrounding inland water use.

Areas for further research identified in the paper are:

1. The DWR should publish prosecution guidelines with regard to illegal pumping occurrences and other breaches of the water legislation. All reports of breaches, and the results of investigations or reasons for not taking action should be kept in an enforcements register accessible to the public.

2. Education of some local councils, particularly in smaller, more remote inland shires, of environmental impact assessment requirements under the *Environmental Planning and Assessment Act* 1979 NSW is necessary.

3. Education of DWR field officers and regional branches of environmental law requirements is necessary. A disparity exists between head-office policies and the day-to-day operations of some officers and branches.

4. CALM should implement the "protected land" provisions of the *Soil Conservation Act.*

5. NSW should make a stronger stand against water harvesting by Queensland cotton farmers and irrigators through the Border Rivers Act and the Murray-Darling Basin Commission. Pressure should be placed on Queensland to implement the "designated area" provisions of the *Water Resources Act* (Qld) with regard to the Lower Balonne floodplain.

6. Enact and implement endangered species legislation at Commonwealth and NSW levels.

7. Introduce measures, such as tax rebates, education initiatives or measures partly funded by taxes exacted upon livestock sales, to control stock access to watercourses. Murray Draft REP requires plans to include provisions on stock access, but this relates only to new developments. A timetable and catalyst for action is required. Consider "catchment management audits", including agricultural practices and natural vegetation retention initiatives, to to determine eligibility for benefits or exemption from taxes.

8. Investigate the adequacy of part 8 of the *Water Act* with regard to removal of illegal levee works.

9. Is the Water Resources Council (NSW) providing sufficiently strong advice to government? Has it lifted its game since criticisms made by the DWR regarding 1991-92?.

10. Increase the effectiveness of the Catchment Management Act by increasing the independence and activism of committees, and by appointing more trusts.

11. Investigate the possibilities for mandatory, legislative requirements that management plans to be prepared regarding national parks (National Parks and Wildlife Service), valleys (DWR) and run-off problem areas (DWR and local councils), and rights for citizens to put forward draft plans in the event of agency inaction.

12. With regard to the DWR, implement the Industry Commission recommendation that "environmental monitoring by an agency or authority other than the service provider is necessary to ensure that failures to meet standards are made public. Summary results to monitoring should be released in a form readily accessible to the media".

13. Educate regulatory agencies in appropriate community involvement strategies.

14. Seek better implementation of DWR, EPA and CALM initiatives, for example with regard to controlling the clearing of native vegetation, through the *Environmental Planning and Assessment Act* 1979 NSW. This could be done through environmental planning instruments, directions by the Minister for Planning under s. 117 and Department of Planning circulars.

15. Gazette Murray Draft REP No. 2 and exhibit the draft SEPP on Wild and Scenic Rivers.

16. Make REPs for better planning management of catchments.

17. Other planning issues for consideration include:

• Should on-farm storages of water beyond a certain volume be designated development?

• Should further on-farm storage be embargoed until the valley management planning proposals currently being developed by the Department of Water Resources for Cabinet approval are implemented?

• Is sufficient direction and assistance available to local councils regarding the content and focus of environmental impact assessment, development control plans, development

INLAND RIVER PROBLEMS

ISSUE	EXTENT	CONSEQUENCES
Eutrophication (build up of nutrients including nitrogen and phosphorus)	Most storages and in many streams	Stock deaths, sickness, recreational loss, low flow due to water weeds
Turbidity (muddiness)	Predominantly in western NSW streams and domestic supplies	Alteration to ecosystems, water unsuitable for stock
Salinisation	Areas in south-western NSW	Loss of farm productivity, damage to land users and ecosystems
Toxicity	Intensive cropping and horticulture areas, abandoned mine sites	Contamination of stock and crop, fish kills, danger to people and ecosystems
Bacterial pollution	Water bodies near major towns	Risks to human life and health

Source: NSW Water Resources Council, State Water Quality Policy and Discussion Paper, June 1992, p.5

standards and the manner in which development applications in sensitive areas are considered?

• Should EPIs include zones in which development consent is required before riverine vegetation can be removed, thereby overcoming the anomaly in many rural areas that land clearing and the removal of trees does not require development consent?

• Can tree preservation orders be made more workable and effective in rural areas?

18. The regulatory system must remove the expectation that "surplus" or "unregulated" flows can be increasingly harvested by irrigators, and that water rights accrue from investment in irrigation infrastructure. Water efficiency and sustainable agricultural practices should be important criteria for allocating unregulated flows, rather than mere scale of investment and historic water usage patterns.

19. "Pricing reform and increased cost recovery are crucial to improving the efficiency and sustainability of Australia's water use. Making water, sewerage and drainage service providers more accountable is necessary to ensure that cost recovery targets are not achieved by exploiting water users or by a loss of environmental amenity".

20. In privatisation and corporatisation, ensure that clear environmental objectives and performance indicators exist in order to prevent short-term, financial indicators becoming the most important factors in decision-making.

21. Consider the potential for the approach taken in the *Water (Central Management Restructuring) Act* 1984 (Vic) to allow the regulatory body to apply to the Minister for direction as to which of conflicting statutory objects to pursue. Does this increase Ministerial accountability, and enable greater understanding of what policies have been technically arrived at by agencies, as distinct from those set at a political level?

22. Improve urban sewerage systems; ensure public involvement in planning and implementation.

23. Licence any unlicensed abattoirs, piggeries and feedlots pursuant to the *Pollution Control Act*.

24. Reduce phosphorus pollution from detergents by legislated timetable for phasing-out and "Environmental Choice" (DASET/ANZEC) packaging initiatives.

25. Reduce urban run-off pollution by enforcing the *Dog Act* owner clean-up provisions by tier 3 *Environmental Offences and Penalties Act* infringement notices.

26. The Decade of Landcare draft plan for New South Wales, April 1991, section 12.4.1 also recommended:

• better protection of groundwater and promotion of the treatment of waste on-site.

• enforcement of legislation regarding stocking rates in the Western Division.

• a review of the adequacy of noxious weed and animal legislation.

• legislation for appropriate testing of any species regarding its relation with existing ecosystems before its introduction.

During 1993 the Environmental Defender's Office will continue its research into regulatory strategies for the protection of inland rivers. The EDO hopes to forge closer contacts with affected communities, drawing on contacts and suggestions of the Inland Rivers Network.

Natural Resources Package Promotes Environmental Disputes

After many months of consideration the NSW government decided not to proceed with its proposals for reform of NSW's environmental laws contained in the Natural Resources Package. The package comprised a collection of bills reflecting a stark philosophical divergence from previous landmark environmental legislation in NSW.

Set out below are some short extracts from the EDO's submission to the legislation committee that considered the package. The extracts serve to illustrate this new direction taken by the government.

The submission drew upon a detailed paper on the package written by Brian Preston.

"Natural Resources Management Council Bill 1992

The underlying philosophy of the package of cognate legislation is that of utilitarianism, which in practice focuses on the consequences to humans. One of the consequences of this philosophical basis of the package is that the assessment and review process to be carried out by the council will most likely result in a weighting in favour of resource use over conservation. This occurs because the techniques employed under a utilitarian approach such as cost-benefit analysis, favour those values which are readily quantifiable, which is always the economic, financial and resource values, over those values such as ecological or intrinsic values, which are not readily quantifiable. The problems generated by this philosophy are exacerbated by the resource oriented composition of the Council. The result may well be that the government's desired object of striking a true balance between conservation and resource use may prove illusory.

The proposals unnecessarily duplicate much of what can already be done by instruments like Regional Environmental Plans provided for under the Environmental Planning and Assessment Act.

Also, a further underlying criticism of the package is that it only addresses the issue of resource use on public land. It does not consider the use of resources on private land, in respect of which many resource use disputes arise. By way of example, in North Eastern New South Wales, more timber comes from private land than from State Forests.

Endangered and Other Threatened Species Conservation Bill 1992

The Bill does not tackle the broader problems of preserving

biological diversity. Indeed, by focussing only on the limited number of species and taking little or no action in relation to all other species and their habitat, there is a risk that the desired stated goal of protecting biological diversity may not be achieved.

Heritage (Amendment) Bill 1992

The Bill omits the word "natural" from the definition of environmental heritage and provides expressly that environmental heritage does not include anything excluded by s.4A. Such an amendment is at odds with the comprehensive and integrated approach to the protection of heritage which has characterised international, national and state approaches over the last twenty years.

Furthermore, the amendments that have been made have a far wider effect than addressing the stated aim of the amendment, of avoiding duplication of existing statutory provisions in relation to interim protection of conservation orders.

The amendment eliminates the possibility of protecting public land by means other than by formal dedication or reservation. It needs to be recognised that it is not always possible or desirable to preserve those parts of the natural environment which form items of environmental heritage by way of dedication or reservation as a national park, nature reserve or other protected public land. The placement of a permanent conservation order was one way in which these important areas could be preserved without the necessity of dedication or reservation as a national park, nature reserve or other protected public land.

Conclusion

It is necessary to return to where we began, and to appreciate the implications of the underlying utilitarian philosophy of the proposals.

Although it has been attempted to present the proposals as being a rational approach to land use decision-making, the utilitarian approach is in fact highly political.

The proposals by-pass the impartial and objective processes that allow for public participation in the decision-making process. They are processes which enable participation by all interest groups, and which are extremely useful in diffusing confrontation or an issue. Denial of these processes will engender a lack of confidence in the process, and will lead to more confrontation rather than reduce confrontation.

From our observations of the environment movement, the approach runs contrary to the resolution of conflict.

Even if, on face value, some of the proposals may appear to be rational, the utilitarian theme permeates all of the provisions, and thus undermines and destroys the integrity of the package.

Clearly, as these concerns are of a fundamental nature, we submit that the whole package should be rejected, and the reform process commenced anew."

Conferences

Biodiversity Seminar

The seminar on legislating for biodiversity, organised by the EDO in conjunction with the Australian Centre for Environmental Law, was both informative and entertaining. Guest speakers, Associate Professor Susan Smith and Dr Gary Meyers, exposed some of the inadequacies in the proposed Australian threatened species legislation and provided an interesting comparison with United States legislation (primarily the *Endangered Species Act 1973)*

Definition of Biodiversity

Gary Meyers clarified what is meant by biodiversity. Popular misconception often equates biodiversity with species diversity (the variety of living organisms on the earth). However, such a narrow definition of biodiversity does not take into account genetic diversity or ecosystem diversity.

Genetic diversity (the variety of genetic information contained in the total genes of individual plants, animals and micro-organisms that in habit the earth) is fundamental to maintaining biodiversity. Gary Meyers was critical of the NSW bill (now withdrawn) because it proposed not to preserve endangered species in NSW to the extent that they were abundant in other states. This does nothing to protect genetic diversity or distinct population groups. He was similarly critical of the "Noah's Ark" concept as a means of preserving biodiversity for the same reasons.

Ecosystem diversity relates to the variety of habitats and ecological processes and is also fundamental to the preservation of biodiversity. Dr Meyer's point that legislation that does not encompass genetic, species and ecosystem diversity within its definition of biodiversity is fundamentally flawed and as about as useful in protecting biodiversity as a "lace condom is for safe sex". Neither the Commonwealth nor the NSW bills define biodiversity as such.

Listing Provisions

Dr Meyers stressed the importance of strong listing provisions as the cornerstone of endangered species legislation. In this regard, the *Endangered Species Act* 1973 (ESA) has "teeth"! It provides for listing of endangered species on the basis of scientific data only and for the designation of that species' critical habitat at the time of listing. Once listed, the Act provides for the development of protective and recovery programmes and for the prohibition of actions which will jeopardise that species or ecological community.

The legislation provides for executive review of decisions to list. Listing can only be avoided if, in the opinion of the Endangered Species Committee, it is impractical or not prudent to list.

To its credit, the proposed Commonwealth legislation has a wide definition of "species". It provides for the listing of endangered, "vulnerable" and presumed extinct native species, ecological communities and key threatening processes. When listing or delisting, the Minister must consider advice from a scientific subcommittee and is required to consider only matters relating to the survival of the species or ecological community concerned.

Public Participation

Dr Meyers pointed out the lack of citizen involvement provisions in both the Commonwealth and NSW bills. Decisions to list or delist, or to issue a permanent conservation order are not reviewable on application by third parties. The ESA on the other hand, allows for citizen involvement at the point of listing and this provision has been successful in protecting species in the past.

Co-operative Federalism

Despite a recognition on the part of the Minister Ros Kelly that biodiversity does not respect political boundaries and therefore the need for a national approach to preserving biodiversity, the proposed legislative framework does little to achieve this. The Commonwealth bill applies to Commonwealth lands and waters, and to Commonwealth actions and decisions. It applies to private actions only so far as they affect Commonwealth areas. Co-operative federalism advocated in the Intergovernmental Agreement on the Environment results in situations whereby NSW will not list a species if it abundant in other states. Dr Meyers urged the Commonwealth to "bite the bullet" and provide comprehensive national legislation so that these loopholes do not occur.

Associate Professor Susan Smith's paper, a case study of wetlands in Columbia, U.S.A., provided a valuable example of how federal, state and local laws can interact to the detriment of wildlife survival. Lessons drawn by Prof. Smith from this case study were:

1) Not every ecologically significant area contains threatened and endangered species. Even if it did, those species may not be protected under the legislation at the time the development is proposed. Professor Smith acknowledged the Commonwealth attempts at dealing with this problem by designating endangered ecological communities. Prof. Smith noted however that no such communities have been listed and that any such listing will be highly contentious.

2) Some areas are ecologically significant only when viewed in the context of cumulative impacts or only when considered with respect to local environmental conditions. For example, a wetlands area may be significant because 90% of wetlands in the surrounding area have been destroyed. Prof. Smith suggests finding an effective means to evaluate the cumulative impacts of proposed activities upon biodiversity so as to afford effective protection.

3) Even within a comprehensive program for the protection of biodiversity, there is a danger that ecosystem elements that are afforded only procedural protection are sacrificed in the effort to save those ecosystem elements afforded substantive protection. In the Columbia South Shore case, a decision to allow the development spelled firstly, the destruction of the Columbian wetlands and secondly, the creation of new wetlands to mitigate the loss of the original wetlands. The substantive protection given to wetlands resulted in significant uplands being sacrificed to the creation of new wetlands and ultimately a net loss of fish and wildlife.

The E.D.O. would like to thank Susan Smith and Gary Meyers for their time and informative papers. The E.D.O. has played a role in helping to draft NSW biodiversity legislation since 1990 and value their comments on the subject.

Papers will be available in February from the EDO for $15.

The 1992 Public Interest Law Conference - Who is responsible? Accountability in the 1990's

Chris McElwain BSc LLB†

Introduction

The seemingly forgotten notions of public participation, accountability and social justice, so important to the social movements of the 1960's and early 1970's were swiftly discarded as unnecessary and uneconomic ideals in the 'free-for-all' of the 1980's. Yet, they are increasingly recognised as not just 'nice' ways of doing things, but absolutely essential to the way Australian society should operate in the 1990's and beyond. The need for the return to these notions is hard to deny. State Government corruption and mismanagement across Australia, the growing calls for environmental and consumer protection, redressing social, racial and sexual inequalities and the trend towards deregulation, privatisation and self-regulation have all contributed to this need.

The 1992 Public Interest Law Conference, held at the University of New South Wales from 8 to 10 October, heralded a return to these notions. Over 300 speakers and participants took part in the search, over two and half days, for new ways in which the legal system could be made to reflect and achieve these goals. The 1992 PILC also continued in its primary role of bringing together public interest advocates from across Australia. A strong message emerging from the Conference was the call for advocates from the wide range of so called 'minority special interest' groups to begin to work together to achieve common goals. These groups so often face the same difficulties and challenges, whether institutional or political, and a pooling of resources and talents can only improve the ability of all groups to meet these challenges.

The third annual Public Interest Law Conference built upon the strong foundations laid down by the first two PILCs. The first Australian PILC was held in 1990 at Sydney University, being primarily organised by Matthew Baird and John Connor. They were greatly assisted by law students at Sydney University, through both the Sydney University Environmental Law Society (SUELS) and Communeco, a beast of their own making. In 1991, the PILC was held at Macquarie University, with John Connor, Matthew Baird and Jeff Smith playing important roles in the organisation of the conference, with guidance, support and encouragement from the members of Macquarie Law Students Radio Collective and SUELS.

The ideas and impetus for the Australian PILC came from the Public Interest Environmental Law Conference held in Oregon, USA every year. That conference is also run by students, has been running for more than a decade, and recently has been attracting more than 1000 participants over four days of panels and workshops. As you can tell from the title, the focus of the American conference is upon environmental issues, in the broadest sense. So far, the organisers of the Australian PILCs have chosen to follow a broader notion of the public interest, a trend which I hope continues.

Accountability and the Law

Over 60 speakers from around Australia presented papers on more than 20 panels , with some of Australia's leading public interest advocates discussing the various aspects of the conference theme of 'Accountability and the Law'. Opening the conference, Justice Elizabeth Evatt, President of the Law Reform Commission, addressed the growing 'privatisation' of aged care through the promotion of superannuation schemes. Her paper highlighted the dangers of too much discretion being placed in the hands of fund managers and mentioned the inherent discrimination against women found in existing schemes. Other speakers included:

• Greg McIntyre, solicitor in the *Bropho*, *Koowarta* and *Mabo* cases, who discussed the implications of the *Mabo* decision for Aboriginal peoples around Australia;

• Dr Margaret Allars, who provided a stinging critique of the recent majority decision of the Court of Appeal regarding the ICAC/Metherell affair;

• Aiden Ridgeway, who called for greater recognition of the need for the management of aboriginal heritage to be given to aboriginal people and for the environmental movement to support aboriginal groups in this goal;

• Dr Jocelynne Scutt emphasised the fact that the legal system is still closed to women's experiences, being not only ignored but positively excluded from the legal decision-making process; and

• Justice Paul Stein, who addressed the conference on the difficult concepts of 'public interest' and 'accountability', whilst offering some advice on the way forward.

As we hoped, many used the conference as a forum for raising new ideas and suggesting new directions for public interest groups. A strong contingent of public interest advocates presented papers on the way forward for public interest legal centres, their advocates and support groups. PILC is continuing to provide a forum in which public interest lawyers can take stock and plan the way ahead.

In another first for the PILCs, the launch of the first Australian Public Interest Environmental Law Directory by Justice Murray Wilcox, took place at the reception held in the UNSW Law School, on Thursday 8 October. Some 60 people attended the launch of this innovative document. Produced by David Mossop of Environmental Law Alliance Worldwide, it is a guide to the expertise of contacts around Australia and as such, an important part of every public interest advocate's library. Annual updates are planned to coincide with PILC as more public interest advocates seek a listing. It places an emphasis upon the use of electronic mail as an effective and paperless means of communication around the Asia-Pacific region, a technique of information exchange whose time has come.

Outcomes

As was clear from Justice Stein's address and , indeed, from much of the discussion that took place over the two and half days, notions of 'public interest' and 'accountability' are difficult to define, and even harder to harness. However, there were several themes that developed throughout the conference, some that were raised for the first time at this conference, all contributing to our understanding of this year's theme, 'Accountability and the Law'. In short, there were several take home messages:

1) Public Interest Advocacy is not only for lawyers.

The range of people taking part in this conference, not only as speakers but as participants, has demonstrated that if the broad issues of social justice and environmental protection are to be advanced, then the skills offered by all members of the community have to be called upon. Of special importance is the understanding that students can and do make a vital contribution to public interest and community groups, but this energy needs to be harnessed for the benefit of all involved.

2) Self Determination and Participation

These notions are pivotal to an understanding of the public interest, and are related in that they espouse the right to have a say in your own destiny, without being affected by prejudice or discrimination.

3) Removal of Barriers to the Legal System

There is a continuing and growing need to change the legal system to allow individuals and groups fair access to the law and legal remedies. Removing procedural barriers that were entrenched at a time when private interests were afforded the greatest protection is a priority, hence issues such as Costs, Standing and Class Actions must be addressed.

4) Law will not solve all Problems

Related to all of the above, is the recognition that law and law reform will not solve all problems faced by groups in our community and by our society as a whole. We must be looking to all possible avenues of redress, and not focus solely, or in other cases, at all, on law and law reform.

5) "Working Together"

Finally, we must learn to work together more effectively, and this is part of what conferences such as the Public Interest Law Conference are all about. We have had many examples of how this can work with the launch of the first Australian *Public Interest Environmental Law Directory* and the announcement by John Corkill of the joining together of local aboriginal and conservation groups on the North Coast of New South Wales to protect and conserve sacred sites and areas of wilderness. Indeed, the spectrum of groups that have taken part in this conference, and the fact that the conference happens at all is testament to the growing realisation that many so called minority groups are going to have to work together to ensure that they are heard and heeded.

The interest in and energy of the 1992 PILC was, of itself, an indication of the reawakening of the notions of accountability, access to justice and public participation.

As is always the case, many individuals, groups and institutions gave their strong support to the Conference and it is not here possible to list all those whose contributions made the it a success. However, several merit special mention.

The University of New South Wales Faculty of Law and the New South Wales Division of the National Environmental Law Association, as the major financial backers of the Conference, provided the financial and institutional support so essential to the success of any conference. This is doubly so for PILC, with the pricing policy of free registration for most participants impossible to sustain without their support. The Continuing Legal Education Office in the Law School and the University Union must also be thanked for their support in providing equipment, staff and venues.

Thanks must also go to the speakers, chairs and participants. Several of them are veterans of all three Australian PILCs, and we hope to see you at many more. We are grateful to those of you who managed the journey from overseas, as well as from all over the continent.

Finally, after almost a year of planning, eight weeks of endless meetings, missed meals and long hours, it will be nice to get back to a normal life of essays and exams. Here, I'm speaking of the organisers, and their efforts, energy and achievements in conducting the 1992 PILC. It is just one illustration of the contribution that students can make to any cause.

The 1993 PILC is already moving ahead, tentatively arranged to return to Sydney University. Using the experience gained from the organisation of this year's conference, the prospects are that the 1993 PILC will be the best yet, cementing its position on the public interest calendar.

For more information about or a copy of the Australian Public Interest Environmental Law Directory, contact ELAW (Australia) electronically on elawoz@peg.apc.org or by mail at Suite 82, 280 Pitt St, Sydney, 2000, Australia.

For a copy of the 1992 Public Interest Law Conference Proceedings, contact Continuing Legal Education, Faculty of Law, University of New South Wales, PO Box 1, Kensington New South Wales 2033, Australia.

Telephone 02 697 2267
Facsimile 02 313 7209

[1] *Chris McElwain was one of the convenors of the 1992 PILC.*

Green Drinks

There will be drinks for all EDO volunteers and potential EDO volunteers on 18 March 1993 at EDO at 5.00pm.

Environmental Law Workshop

Blue Mountains

Saturday 27 March 1993

For more information contact Jackie Wurm on (02) 261 3599 or Robin Corringham on (047) 586 561 (Upper Blue Mountains Conservation Society).

EDO NEWS

NEW SOUTH WALES

BROWN REVISITED

On 12 November 1992 Justice Pearlman handed down judgment in Brown v EPA and North Broken Hill Ltd. The judgment dealt with several important questions relating to standing under the *Environmental Offences & Penalties Act* and to the way the Environment Protection Authority issues pollution control licences.

The Construction of s.25

As was reported in the last issue of *IMPACT*, Mr Brown was granted leave by Stein J to bring proceedings pursuant to s.25 of the *Environmental Offences and Penalties Act*. At trial, Counsel for the EPA and North Broken Hill argued strenuously (almost every day) that the applicant did not have standing. Her Honour held that the proper place to argue that the applicant has no standing under s.25 is in the proceedings for leave under that section. Once leave has been granted "the door has been unlocked" and the hearing should ensue. This means that the question cannot be revisited unless there is fraud or some fundamental mistake.

Her Honour went further and stated that an applicant for leave could alter the grounds upon which his or her case is based as facts emerge through the discovery and interrogatory process.

> To hold otherwise would mean that the leave proceedings would amount to a full hearing of all issues and that would render otiose the preliminary procedures this court requires prior to hearing.

The respondents had also argued that there was no harm to the environment caused by the alleged breach by the EPA in unlawfully issuing a licence. Her Honour stated:

> It is the issue of the licence which controls the harm to the environment. If the licence is granted in breach of the provisions of the statute which governs the issue of such a licence, then there has been a breach which permits the pollution of waters, which is clearly likely to cause harm to the environment.

The respondents also argued that s.25 only allowed the applicant to seek injunctive relief and not to seek declaratory relief or to make orders by way of mandamus. Had this argument, (which had been foreshadowed by the Solicitor-General in the Court of Appeal in *Minister for Minerals & Energy v Vaughan-Taylor & Anor*) succeeded, it would have severely limited the effectiveness of s.25.

Her Honour held that:

> If this court adopts a purposive interpretation (as s33 of the *Interpretation Act* 1987 (NSW) requires) then the word "restrain" should not be interpreted in a technical and narrow sense, meaning only an order for injunctive relief. Rather, it must be interpreted in its wider and ordinary sense of "to prevent" or " to hold back".

Part V of the Environmental Planning & Assessment Act

The respondents argued that the matters set out in s.17D(4) of the *Pollution Control Act* which the Environment Protection Authority must take into account, constitute a code which had autonomous application to its own subject matter - the issue of pollution control licences. It was further argued that there was an irreconcilable inconsistency between Part V of the

Environmental Planning & Assessment Act and Part 3A of the *Pollution Control Act*. The respondents argued that the *Environmental Planning & Assessment Act* is concerned with the environmental effect of development as a matter of planning. (They did not acknowledge that environmental assessment is also a distinct and legitimate purpose of the Act).

Her Honour held that there was no irreconcilable inconsistency and that Part V of the *Environmental Planning & Assessment Act* and Part 3A of the *Pollution Control Act* could co-exist.

Her Honour went on to hold that the EPA is bound to comply with Part V of the *Environmental Planning and Assessment Act* when granting a licence under Part 3A of the *Pollution Control Act*. However, in this particular case Her Honour found that the discharge of effluent into the Shoalhaven river was not a "use of land" (land is defined in the Act to include a river stream or water course whether titled or non-titled). Her Honour held that the discharge of effluent was not a separate or distinct use of the river, that the activity was an integral part of the activity of the paper mill. Therefore the discharge of effluent was merely ancillary or incidental to the paper mill. Upon this determination, Mr Brown's claim under Part V failed.

The characterisation of a "use of land" is often important to determine whether a particular use may be permitted, or is prohibited. However, the argument is generally confined to a single piece of land. For example, a tourist resort might have a kiosk or a souvenir shop. These uses are ancillary or incidental to the use as a tourist resort. It would be unfair to characterise the resort as a shopping complex. Similarly, the resort may have a swimming pool or squash court, but this would not render it a sporting complex.

Her Honour's ruling, that the use of land could be ancillary to the use of other distinct land, may have some far-reaching consequences. If APPM were to build a waste-treatment plant on land adjoining their paper-mill, this would clearly be incidental or ancillary to the use of the land upon which the paper-mill was built. It would appear that development consent would not be required. But why limit this to adjoining land? A waste paper storage depot in Sydney may be an integral part of the activity of the paper mill. Construction of a five kilometre access road crossing hundreds of properties might be ancillary to the paper mill and essential for its operation.

Mr Brown claims Her Honour has erred in holding that the discharge of effluent into the river is not a separate or distinct use of the river and is not therefore an activity.

Section 17D(4) Claim

A large amount of evidence was admitted which showed that the discharge levels set by the EPA, both in the licence under challenge and the licence issued during the court proceedings, were based solely on data collected by North Broken Hill Ltd for existing discharges. Policy documents disclosed that "the present and overriding criteria is realistic achievability". In Mr Brown's view this would suggest that the present and overriding criteria is to licence whatever is coming out of the pipes now.

For example, Mr Brown claims the policy allows the EPA to license APPM to discharge mercury at existing levels. This is even though the concentration of mercury on the Shoalhaven River water is already 480 times what the EPA regards as an acceptable level.

Her Honour was invited to hold that the effect of that policy was to cause the EPA to disregard the statutory criteria in s.17D(4) which include having regard to the impact on the environment of the pollution. Her honour held that

> I can find nothing in the policy that leads to the inescapable inference that it would have that effect.

Costs were reserved.

An appeal has been lodged to the Court of Appeal.

NOLEAD and the Newcastle Smelter

The EDO has represented North Lake Environmental Action Defence Inc (NOLEAD) on a range of pollution issues including sulphur dioxide, lead emissions and water pollution issues relating to the lead smelter at Newcastle. In our last issue of *IMPACT* we reported the thanks of two residents who had experienced difficulties in enrolling children at a nearby school, until the Boolaroo School was decontaminated.

A further difficulty NOLEAD has encountered is obtaining access to development consents. The planning law requires councils to keep a register of development consents (s. 104 *Environmental Planning and Assessment Act* 1979 NSW). However, Lake Macquarie City Council restrictively interprets that requirement. People cannot as of right obtain a photocopy upon payment of reasonable fees. The EDO wrote to the Department of Planning for its assistance in July. A circular could be issued instructing councils that copies of documents on the consent register available for inspection should also be made available upon payment of the copying fee. We have received no response to our suggestion however, and NOLEAD has applied for legal aid to have the matter determined in the Land & Environment Court.

Odours

Since 1989 the EDO has assisted residents in western Sydney with regard to odour problems caused by industrial scale manufacture of mushroom compost. The local council has taken proceedings against one of the composting companies. However the residents, advised by the EDO, seek additional and alternative remedies. In recent months the EDO has prepared evidence for the hearing to complement, not duplicate the council's evidence alleging breach of development consent conditions.

The case illustrates continuing opposition to legal aid. The solicitors for the developer have lobbied the Legal Aid Commission to reverse a grant of aid. The EDO is always willing to discuss legal aid policy, but not grants in specific cases.

What counts is that the environmental protection laws are enforced, not who does the enforcing.

Oshlack on behalf of the Lismore Greens v Irongates Pty Ltd

September saw the resolution of another aspect of the numerous legal proceedings arising in respect of the Irongates development near the Evans River.

The Lismore Greens had lodged a Class 1 appeal in respect of a development application for the construction of a compensatory wetland. As part of a development consent granted for the construction of the access road to the development site a condition was imposed requiring the construction of the wetland on nearby wetland.

The Greens claimed, amongst other things, that there had been inadequate archaeological and geomorphological studies of the subject site.

Rather than proceeding to a full hearing of the application, the parties agreed by consent that the Greens appeal be allowed, that development consent for the construction of the wetland be refused, and that there be no order as to costs.

Micalo Island

In late September, Valley Watch Inc., a group of concerned residents in the Clarence Valley, filed Class 4 proceedings in respect of a proposal by Shin-Ei Co. Ltd for a tourist development and golf course on Micaló Island located in the mouth of the Clarence River. The development proposal had been the subject of a Commission of Inquiry in January 1992. The Minister for Planning granted the consent subject to conditions in June, 1992. In late November, the Court made directions regarding particulars and discovery and other interlocutory matters.

Ballina Environment Society v Ballina Shire Council

The Ballina Environment Society has lodged Class 1 proceedings in respect of a proposal by the Ballina Shire Council for a sewerage augmentation scheme at Ballina and Lennox Head. In particular, the Society opposes the proposal to increase discharge from the existing ocean outfall. Also, there is only 5% re-use of effluent.

On 18 December, the Society was successful in defeating an application to strike out the Society's appeal. The Council had argued that the objection lodged by the Society did not meet the requirements of the Act, as it did not set out the grounds of objection. Accordingly, the appeal had not been validly instituted. In a lengthy judgment, His Honour dismissed the application, finding that in its objection lodged within the exhibition period, the Society had made it sufficiently clear that it objected to the proposal. The Society had also made the immediate objection about the process, namely that not enough time had been provided for the making of objections. It also indicated its intention to make a more detailed response at a later date, which it did some weeks later, though some seven months before the Council made its final decision on the application.

It should however, be remembered that for there to be no doubt about the validity of an objection, it must be in writing and set out the grounds of objection.

David Robinson Leaves the EDO

David Robinson left the EDO in mid- January. David commenced work at the EDO in late 1989. Since then he has been responsible for a wide range of litigation, advice and project work. Most recently he coordinated the production of the *Environmental Law Fact Sheet Kit* and developed the Inland Rivers Project discussed in this issue. He , his wife Susie and his young daughter Renata are moving to the United Kingdom where David will be writing a book on the EDO and looking after Renata. The EDO wishes him and his family well during their stay in England.

The third solicitors position at the EDO has been filled by David Mossop.

Queensland

The Wet Tropics World Heritage Protection and Management Bill was introduced into the Legislative Assembly on Thursday 26 November, 1992. EDO Queensland strongly supported the concept of the draft Bill, but has expressed a number of concerns in relation to the draft Bill in a previous submission to the State Government.

One key concern is the failure of the Bill to prohibit all those uses of the Wet Tropics area which are inconsistent with its World Heritage status, such as mining and grazing. Secondly, the Bill permits short term political considerations to influence the content of the instrument designed to regulate activity in the Wet Tropics Area - the management plan. The reason is that after the draft management plan has been drawn up and objections from the public are considered by the Wet Tropics Management Authority, the final management plan still needs the discretionary approval of the State/Commonwealth Ministerial Council and finally, the Queensland Governor in Council.

Recently the EDO Queensland assisted the Toohey Forest Protection Society who were endeavouring to save a small but ecologically significant part of the Toohey Forest close to Griffith University which was earmarked for clearing by the Department of Business, Industry Research and Development. Despite representations by the EDO on behalf of the Society, the Minister ignored requests for a meeting to discuss the alternative locations for the building proposed for the site, and the bulldozers went in and cleared the land overnight.

Unfortunately, this case merely highlights the lack of any adequate land clearing legislation in Queensland, and that there is no obligation upon the Crown to even consider doing an environmental impact statement in relation to small scale clearing on Crown land.

In these type of cases, often the only legal remedies available are peripheral to the main issue. EDO Queensland can assist groups to request reasons for relevant government decisions under the *Judicial Review Act* (1991) Qld, or assist groups to gain extra information about the matter through use of the new *Freedom of Information Act* (1992) Qld.

The Department of Housing, Planning and Local Government is reforming the *Local Government Act* (1936). The Act presently deals with matters including council elections, local authority area boundaries and responsibilities for roads and other services as the *Local Government (Planning and Environment) Act* (1990) now deals with planning matters.

As a result of concerns by our clients, EDO Queensland is making submissions to the Department on the proposed bill, which includes requirements that:

- nominees for election to local authorities provide details of their pecuniary interests for public inspection upon nomination, and keep those details up to date;
- the public must have guaranteed timely access to routine council documents such as minutes of council meetings; and
- the objects of the proposed Bill should recognise the extensive environmental responsibilities of local authorities.

On a more general note, in Queensland this year passage of the *Reprints Act* (1992), has revolutionised methods by which legal practitioners perform basic legal research.

Traditionally in Queensland if you have wanted a consolidation of an Act or subordinate legislation for a specific time period there was no consolidation available, and you had 2 options. Either to 'cut and paste' up a copy, hoping that you have got everything, or to spread out the primary Act and amendments before you, flicking from version to version. Both of these processes are time consuming and risk errors.

To give an example, in May, 1992 the latest reprint of the Acts *Interpretation Act* (1954) which was available from the 'Goprint'. the Queensland government printers, excluded 10 acts passed between 1978-92 which amended the principal act, and these had to be purchased individually. All this for a basic act to which a practitioner must constantly refer!

Now under s5 of the new *Reprints Act*, if a law is amended, a reprint must show the law as amended by all amendments that commenced before the date specified in the reprint as the 'reprint date'. Parliamentary Counsel advise that their policy will be that every time a law is amended, a new reprint will be produced. This should make life a lot easier!

The Reprint may include wide ranging editorial changes to the text of the law, including updated citations and references to law, updated ways of expression and omission of obsolete and redundant provisions. S8 of the Reprints Act provides that editorial changes which change the effect of the law are not permitted, although the consequences of a breach of s8 are not set out.

Our stalwart administrator, Yasmin Gunn has now left on a exciting 2 year working holiday to Europe. Luckily we have found a worthy replacement in Kym Scantlebury, an experienced administrator who works with the Wilderness Society as a volunteer when not at EDO.

Jo-Anne Bragg
EDO Solicitor

South Australia

ELCAS Launches Pro Bono Scheme

The Environment Law Community Advisory Service known as ELCAS (see 26 *IMPACT* p.8) has launched a Pro Bono Scheme which has been made possible through the support of several legal firms and barristers.

One of the objects of ELCAS is:

> To promote and procure the provision of legal services for disadvantaged persons or for classes of persons for whose needs the services of lawyers in private practice are inadequate without fee or on a fee reduced basis in relation to environmental problems.

In furtherance of that objective, ELCAS has established a voluntary panel of legal firms and barristers who have agreed to consider taking on matters of public importance on a without fee or fee reduced basis. It has been agreed that there will be no more than one referral to any one firm or individual in any calendar year. A number of legal firms have been written to and as at that date of preparing this article the legal firms Mellor Olsson, Norman Waterhouse and Ward & Partners and Barrister Brian Hayes QC have all agreed to participate in the Scheme. We are also putting together a voluntary panel of potential expert witnesses.

If a matter comes to the attention of the Management Committee of ELCAS either through the Advisory Service or, directly to it, where more than preliminary legal advice is required it decides whether or not it should refer the matter on to a member of the panel. Given the limited resources available the Management Committee has imposed fairly strict guidelines upon itself about when it will refer a matter on.

The Management Committee does not engage the legal firm but merely refers the individual or organisation to it. The Management Committee when referring a matter on also makes a recommendation as to whether it considers the matter should be taken on without fee or on a fee reduced basis. However, the final contract for the provision of legal services is left to be negotiated between the client and the solicitor.

Essentially we see ELCAS as providing an important link between the community and the legal profession and in particular between the community and those members of the legal profession who are prepared to consider taking matters on without fee or on a fee reduced basis.

The Advisory Service - An Update

The Advisory Service provided on each Thursday night has been reasonably active. The enquiries that have been made of the Advisory Service to date have been varied and have included:

- advice on a development proposal placed before a local Council;
- advice on involvement in the re-zoning process known as the preparation of a Supplementary Development Plan;
- advice on the loss of inner urban open space and community gardens through re-development for housing;
- advice on the keeping of old cars on land;
- advice on contamination and hazardous waste;
- advice on land tenure regarding an inner urban farm project;
- advice on the objects and rules of an incorporated conservation association;
- advice on air pollution and noise pollution coming from a factory;
- advice on the movement of an existing educational establishment from one campus to another.

The funds of ELCAS are extremely limited. We are working at ways of generating further funds. These include a revised application for funding to the Law Foundation.

All in all ELCAS has got off to a successful start. However more work needs to be done to ensure the initial momentum is not lost and to ensure that the community is made aware of the existence of ELCAS.

We greatly appreciate the moral support coming from other EDOs around Australia and welcome the opportunity to submit articles for publication in IMPACT.

John Scanlon
Chairperson ELCAS