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A win for the EPA is a loss for the environment

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Introduction

On Friday 28 May New South Wales Parliament passed the *Protection of the Environment Administration (Amendment) Act* 1993 (''PROTEA Amendment Act''). The effect of the Act is to exempt the Environment Protection Authority (''EPA'') from compliance with Part 5 of the *Environmental Planning and Assessment Act* (''EP&A Act'') when renewing licences to pollute.[1] That this extraordinary piece of legislation could be passed is a matter of grave concern to all those seeking to promote informed environmental decision making.

The legislation inserts section 12A into the *Protection of the Environment Administration Act* 1991. This provides that the EPA is not a determining authority for the purposes of Part 5 of the EP&A Act when granting an approval that consists of a renewal of a license or a renewal of a certificate of registration. This applies to renewal of approvals already in force as well as those granted after the commencement of the section.[2]

Part 5 of the EP&A Act requires that public authorities, when determining whether or not to give approval to, or undertake, an activity have a duty to consider, to the fullest extent possible, the impact of that activity on the environment.[3] In addition, if the activity under consideration is ''likely to significantly affect the environment'' then the authority must consider an environmental impact statement before determining whether or not to proceed with the activity.[4] Included in this is a public process of disclosure and consideration of the environmental impact of the activity.

Activities for which development consent has been obtained pursuant to Part 4 of the Act do not fall within the scope of Part 5. Part 5 does, however, cover activities which rely on existing use rights for their lawfulness.[5]

Existing uses are activities which lawfully commenced prior to the EP&A Act and hence have not been required to obtain development consent under that Act. Without special dispensation existing uses would be prevented from operating because they do not have the required development consent.[6] The Act, in a limited way, gives them the special dispensation that they require to continue.[7]

It is in accordance with the policy of the Act that existing uses be covered by Part 5 of the Act since it ensures that those activities that have not been subject to environmental impact assessment pursuant to Part 4 are subject to environmental impact assessment when government authorities grant permissions to carry out activities involved in the existing use.[8]

Background to the Legislation

It appears that the reason that the PROTEA Amendment Act was proposed was the litigation in *Brown v Environment Protection Authority and North Broken Hill Ltd*.[9] That case related to pollution licensing of the APPM paper mill on the Shoalhaven near Nowra. One of the arguments put forward by the applicant was that the EPA had failed to comply with Part 5 of the EP&A Act when renewing the pollution licences

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for the mill.

At the hearing, the EPA argued that when issuing licenses under Part 3A of the *Pollution Control Act* it was not bound by the provisions of Part 5 of the EP&A Act. This was because, it argued, Part 3A was inserted into the *Pollution Control Act* after the EP&A Act came into force and that there was an inconsistency between Part 5 and Part 3A.[10] Thus, it was argued, the provisions of the *Pollution Control Act* should prevail.

The Court held that there was no inconsistency as both sets of statutory provisions were capable of simultaneous compliance.

In the result the Court found that although the EPA was bound to comply with Part 5 of the EP&A Act, in the circumstances of the case, the operation to be licensed was not an "activity" for the purposes of Part 5.[11] This was because the discharge of pollution into the river adjacent to the mill was held to be ancillary to the operations of the mill.[12]

The applicant in that case, Brown, appealed to the Court of Appeal against the decision of the Land and Environment Court and, having been expedited, the hearing of the appeal was set down for 17-18 June.

One of the key questions in the appeal was whether or not the discharging of pollution from the APPM paper mill into the Shoalhaven river constitutes an "activity" within the meaning of Part 5 of the EPA Act.

The Passage of the Legislation

The PROTEA Amendment Act was passed on the last sitting day of Parliament prior to the hearing of the appeal in the *Brown* case and it must be concluded that the intention of the legislation was to preempt the decision of the Court of Appeal.

The undue haste with which the legislation progressed through the Cabinet and Parliamentary process gives some indication of its nature.

The proposal to be exempted from Part 5 was developed by the EPA and took the form of a Cabinet Minute. The EPA's proposal to be exempted from Part 5 went before Cabinet on Monday 17 May. On Tuesday 18 May notice was given of the Bill in the Legislative Assembly. No copies of the Bill were available at this stage.

On Thursday 20 May James Johnson, Director of the EDO, and Tim Robertson, barrister, met with the Minister for theEnvironment, Chris Hartcher, the Member for South Coast, John Hatton, and the Director-General of the EPA, Neil Shepherd. At this meeting the Minister indicated that action would be taken to address the concerns raised by Mr Johnson and Mr Robertson. He also said that there would be time for alternative legislation to be drafted because the amending legislation would not be debated that week, but the week after.

The legislation was debated on the evening of Friday 21 May and passed through both houses of Parliament within a matter of a few hours. The legislation was supported by both the Government and the members of the Opposition. In the Legislative Assembly only Dr Peter Macdonald, Member for Manly spoke against the legislation. In the Legislative Council, Mr Jones, spoke against the legislation.

Dr Macdonald proposed an amendment to the legislation which would have addressed the concerns of the EPA about administrative difficulties arising from licensing as well as maintaining the environmental impact assessment requirements of Part 5.[13]

The EPA's dilemma

In the wake of the decision in the *Brown* case and with an appeal imminent the EPA was obviously faced with a dilemma. If the decision in the appeal in *Brown* determined that the discharge of pollution into the Shoalhaven River was an "activity", the EPA has said that approximately 600-700 licences would require environmental impact assessment pursuant to Part 5 of the Act. This means that it considers that there are currently 600-700 activities significantly affecting the environment for which no environmental impact assessments have been done.

Clearly, given the annual licence renewals required under the *Pollution Control Act*, a requirement that the EPA consider 600-700 environmental impact assessments would be difficult, if not impossible, to manage. It is here that the EPA had clear choices about the approach to take to its dilemma.

First, there is the procedural question of when, if ever, it should propose legislative change. The choice was whether or not to act before or after the decision of the Court of Appeal. The choice was between pre-empting the decision by rushing legislation through Parliament or waiting until the decision was handed down and then giving consideration to legislation that would specifically address any problems that arose. If the latter approach was taken it would be possible to adopt a consultative approach to any amendments. This is the approach that other government departments have taken in similar situations.[14] Instead, the EPA chose to rush at legislation without the benefit of full consideration of what its legal position was.

There was a second, more substantive choice that the EPA had to make. It could either propose legislation that specifically addressed the administrative difficulties in which it found itself or it could propose legislation that provided a blanket exemption for licence renewals. The choice here was between remaining within a system of disclosure of environmental impacts or reverting to the closed licensing process that was the practice of its predecessor the State Pollution Control Commission. Unfortunately the choice made by the senior officers of the EPA was to return to the closed and unaccountable practices of the past.

It is probably not drawing too long a bow to suggest that the problems associated with the EPA's approach to the PROTEA Amendment Act are not dissimilar to the problems with the licensing process generally. First there is marked reluctance to adopt a policy of openness and an underlying hostility to public involvement. Pollution licensing is

currently a closed process involving private negotiation between polluters and the EPA. The development of the PROTEA Amendment Act was similarly marked by secret meetings and every effort to avoid either consultation or public scrutiny of the merits of the proposal.

Second, is the failure to fully consider all relevant issues. This is obviously related to the first issue since consultation and public scrutiny require full consideration of the issues and result in better final decisions. The EPA has demonstrated its unwillingness to be bound by the mandatory provisions of s.111 of the EP&A Act which requires full consideration of environmental impacts. Similarly, in rushing the proposal for the PROTEA Amendment Act through there was a high degree of misinformation circulated and a failure to fully consider the implications of the first broad based exemption from the environmental impact assessment provisions of Part 5.[15]

Both of these issues reflect underlying malaise in environmental administration and are matters of serious concern.

Environmental Policy

The effect of the PROTEA Amendment Act is to create an anomalous exception to rational environmental assessment law for what are often older and dirtier industries.

All government departments and authorities are bound by Part 5 of the EP&A Act, although some have fought hard against it. The NSW Forestry Commission, for example, has been subject to much litigation questioning its compliance with the requirements of Part 5.[16] The application of Part 5 to existing uses and operations under mining legislation was established by *Vaughan Taylor v David Mitchell Melcann*.[17]

In terms of environmental policy the legislation is an aberration. It applies to those operations that rely on existing uses for their lawfulness. In the context of licences to pollute this means older industrial operations and sewerage treatment works. These are undertakings which have never been fully assessed for their environmental impact and in many cases discharge more pollution operations than similar ones constructed since the modern planning laws have come into force.

Should these be exempted from the requirement for public disclosure of environmental impacts? The only justification for doing so is for the administrative convenience of the EPA and its reluctance to publicly disclose the impacts of what it is licensing. These matters are not so weighty as to justify such radical action.

The process of improving environmental administration by bringing government authorities within a framework of environmental impact assessment by forcing compliance with the EP&A Act has been a long one. However it is one that was apparently nearing completion although notable efforts have been made by some government authorities to be exempted from environmental impact assessment legislation.[18] Prior to the PROTEA Amendment Act none have been successful. Thus, ironically, the EPA, ostensibly dedicated to environmental protection, has been more successful than any other in avoiding government responsibilities for environmental impact assessment.

Are pollution control laws adequate by themselves?

A case could be made for the removal of the EPA from Part 5 if it could be demonstrated that the duties or objects of the *Protection of the Environment Administration Act* or the *Pollution Control Act* were so effective in achieving well considered environmental decisions that the further duties imposed by the EP&A Act were redundant.

This clearly is not the case. The objects of the EPA provide no clear duty comparable to s.111 of the EP&A Act.[19] Similarly, the functions of the EPA are cast in terms that do not impose obligations for environmental impact assessment in any particular case.[20] There is certainly no requirement for full consideration of environmental impacts.

Under the *Pollution Control Act* the EPA is required to "have regard to ... the pollution being or likely to be caused by the applicant and the impact of that pollution on the environment".[21] While this does provide a mandatory duty to have regard to the environment it is not nearly as strong as the duty under s.111 and 112. In addition there are other reasons why the provisions of the *Pollution Control Act* and *Protection of the Environment Administration Act* do not fulfil the same role as Part 5 of the EP&A Act.

As well as requiring decision makers to make well considered environmental decisions the EP&A Act also provides for public notification, public disclosure and public input into an authority's decision.[22] None of these features exist under the current pollution legislation.

In addition the EP&A Act provides easier access to remedy breaches of the law than exists under pollution laws. Section 123 of the EP&A Act allows any person to seek an order restrain or remedy a breach of the Act. In contrast, the only means by which third parties who fall outside the restrictive scope of the decision in *Australian Conservation Foundation v Commonwealth*[23] can enforce the public duties imposed by these pollution statues is s.25 of the *Environmental Offences and Penalties Act* 1989. Section 25 requires leave of the Land and Environment Court to be granted to bring proceedings to restrain breaches of statute. This means, in effect, that third party litigants will always be faced with strong opposition to the bringing of an application even before filing proceedings.[24]

It is for these reasons that at a legislative level the current pollution control laws provide no adequate substitute for environmental impact assessment laws.

Implications of the Legislation

The Role of the EPA Board

As with the EPAs opposition to third party enforcement of environmental laws, the proposal and passage of the PROTEA Amendment Act highlights the problems of accountability for policy within the EPA that have been outlined previously.[25] These problems are essentially that responsibility for policy is blurred because of the dual roles of the Director-General of the EPA and its staff because

both are subject to the Board of the EPA as well as being departmental functionaries of the Minister.

The relationship between the Board of the EPA and the Director -General was highlighted by the fact that the Board was not informed of such a significant proposal as exemption from Part 5 until after the proposal had been through Cabinet.

Such a peripheral role of the Board in major policy decisions emphasises the dominance of the executive of the EPA over the Board and brings into question once again whether the apparent independence of the EPA is more than a facade. Certainly the blurred accountability and roles of the various players in the control of the EPA remains an issue after the events surrounding the passage of the PROTEA Amendment Act.

Stage 2 legislation

The open rejection by the EPA of a public duty to disclose the environmental impact of the pollution that it licenses is significant in terms of the development of new pollution control legislation as part of Stage 2 of the reform of environmental laws.

To exclude members of the public from the pollution decision making process may be based on a recognition that pollution control is effectively a political rather than technical process. While technical investigations of environmental impacts and means of reducing that impact are essential ingredients in any decision, the decision as to what levels of pollution are acceptable is a political one in that it depends upon how much pollution the community is willing to tolerate. If information about levels of pollution is kept away from the public, or restricted to those people who make use of freedom of information legislation, the exposure of the community to information about pollution and its impacts is minimised. Community awareness of pollution as an issue is reduced and so too is the ability of members of the community to participate in the political process. This can only lead to more lax pollution controls since there will not be community pressure demanding that pollution levels be reduced.

Thus in Stage 2 legislation the degree to which public disclosure and involvement in decision making is allowed will be a clear indicator of the extent to which the legislation represents an improvement on current legislation. The new legislation must at least include rights equivalent to those in Part 5 of the EP & A Act if it is to be any improvement on the situation prior to the PROTEA Amendment Act.

Implications for Water Regulation

The passage of the legislation also has implications for the current debate about the division of responsibilities for the regulation of water. Currently there is a sub-committee of Cabinet examining the division of responsibilities for the regulation of water. This coincides with a report by the Government Pricing Tribunal on Water.[26] It has been suggested that the same authority that licenses water extraction should also licence pollution. This would integrate water management and eliminate the anomalous division between licensing of extraction from rivers and discharge back to rivers.[27]

There appears to be competition between the Department of Water Resources and the EPA for this role. Obviously environmental issues are central to the debate over allocation of responsibilities for water. The proposal by the EPA of the PROTEA Amendment legislation is an indication of its inability to sensibly accommodate both environmental impact assessment and public rights to information. Furthermore, the Director-General of the EPA has repeatedly asserted that there will be no public participation provisions in the revised pollution legislation to be introduced in the near future.

Such an approach will only strengthen the hand of the Department of Water Resources in the power struggle over responsibilities for water regulation if it can demonstrate a commitment to full consideration of environmental impacts and accountability through public involvement in environmental decisions.

Conclusion

The passage of the PROTEA Amendment Act reflects a failure in environmental policy making. Both in terms of the process by which the policy was developed and implemented and the substantive environmental policy which underlies it, the Act marks a low point in environmental policy in New South Wales. No player in the process comes out looking good. One might hope that it is an aberration in the policy development process, soon to be rectified. However there is every indication from both past conduct and statements of future intention that this is not the case. In terms of pollution regulation and environmental administration more generally the outlook is bleak if the passage of this legislation is any indicator of what is to come.

Notes

[1] The substantive section of the *Protection of the Environment Administration (Amendment) Act* 1993 is as follows

3. The *Protection of the Environment Administration Act* 1991 is amended by inserting after section 12 the following section:

> **Environmental assessment**
>
> 12A (1) The Authority is not a determining authority within the meaning of Part 5 of the Environmental Planning and Assessment Act 1979 in respect of an approval (within the meaning of that Part) under the environment protection legislation.
>
> (2) This section applies in respect of such an approval granted after the commencement of this section (including an approval granted by way of renewal).

[2] s.12A(2)

[3] EP&A Act s.111

[4] EP&A Act s.112

[5] *Vaughan Taylor v David Mitchell-Melcann Pty Ltd* (1991) 73 LGRA 366.

[6] EP&A Act s.76(2)

[7] ss.106-108

[8] *Vaughan Taylor v David Mitchell-Melcann Pty Ltd* (1991) 73 LGRA 366 at 377 per Meagher JA.

[9] Unreported, Land and Environment Court, 12 November 1992 (Pearlman CJ); see also (1993) 28 *Impact* 9.

[10] It is worth noting that well before the *Brown* case the EPA had

recognised that it was a determining authority for the purposes of Part V of the EP&A Act when granting pollution control approval to a feedlot development at Yanco in southern New South Wales in 1989.

[11] see EP&A Act s.110.

[12] see (1993) 28 *Impact* 9, 10.

[13] The amendment moved by Dr Macdonald was the insertion of ss12A-12B as follows:

Environmental Assessment

12A (1) To remove doubt, for the purposes of section 112 of the Environmental Planning and Assessment Act, where an approval for an activity is renewed by the Authority, there is no obligation to obtain or be furnished with an EIS if an adequate EIS has already been obtained by or furnished to the Authority (or another determining authority) for that activity and the Authority may consider that existing EIS prepared for the activity, providing there has been no significant change in:

(a) the environment of the activity, or

(b) the nature of the activity

since the preparation of the environmental impact statement.

12B (1) In so far as the EPA is obliged to comply with Part 5 of the Environmental Planning and Assessment Act, the application of Part 5 of that Act to approvals renewed by the Authority is suspended for a period of two years from the date of assent to the Protection of the Environment Administration (Amendment) Act 1993 (in this section referred to as "the suspension period").

(2) Where an environmental impact statement which has been obtained by or furnished to the Authority during the suspension period is not considered adequate the Authority may call for further information to supplement the environmental impact statement.

(3) If such further information is given, the Authority may grant approval to the activity.

(4) The Director General must within six months of the date of assent to this Act publish a program of environmental impact statements which the Authority will require to be completed during the suspension period.

(5) If an environmental impact statement is obtained by or furnished to the Authority, any approval granted subsequently by the Authority during the period of suspension must comply with the provisions of Part 5 of the Environmental Planning and Assessment Act 1979.

(6) The Director General must within three months of the date of assent to the Protection of the Environment Administration (Amendment) Act publish a discussion paper on the matters relating to the proposed program under subsection (4) including the classes of development which will require an environmental impact statement and the technical requirements to be addressed by the environmental impact statement.

[14] In the wake of the decision in *Vaughan-Taylor v David Mitchell-Melcann* a State Environmental Planning Policy to address the concerns of the Department of Minerals and Energy has been developed. In the development of the SEPP the Department of Planning has engaged in consultations with the various interest groups. The contrast between this approach and the approach of the EPA is clear.

[15] The briefing paper circulated to members of the government is a good example of the sparse and misleading information that was available on the legislation.

[16] For example *Jarasius v Forestry Commission* (1988) 71 LGRA 79; *Bailey v Forestry Commission* (1989) 67 LGRA 200; *Corkill v Forestry Commission* (1990) 71 LGRA 116.

[17] (1991) 73 LGRA 366

[18] see for example the proposal in cl.16 of the Forest (Resource Security) Bill 1992.

[19] see *Protection of the Environment Administration Act* 1991s.6.

[20] ibid, s.7

[21] *Pollution Control Act* 1970 s.17D(4)

[22] see s.113, 115 and *Environmental Planning and Assessment Regulation* 1980 cll.60-64.

[23] (1980) 146 CLR 493

[24] note also the approach of the EPA to this provision - *Brown v Environment Protection Authority* (1992) 757 LGRA 397; see also (1992) *Impact* 1; it is worth contrasting this approach to the stated intentions of the government in moving the amendment to s.25 in 1991 - see *Hansard*, 9 December 1991 p.6043-6061.

[25] see Mossop (1992) "Who is running the EPA?" 27 *Impact* 1.

[26] see Government Pricing Tribunal of NSW (1993) Water - An Interim Report, Government Pricing Tribunal, Sydney.

[27] see Mobbs (1992) Regulation of the Water Cycle in NSW - Options for ownership and management, Government Pricing Tribunal, Sydney.

A major mining project is fast tracked in the Northern Territory, but at what cost?

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Introduction

Two major development proposals have been approved in the Northern Territory in the past year which have focused community attention on the process of environmental assessment. The Mount Todd Gold Mine, near Katherine, and the McArthur River Zinc-Lead-Silver Project, near Borroloola, on the Gulf of Carpentaria, are both of sufficient size (worth in excess of $50 million) to have been eligible to seek assistance from the Major Projects Facilitation Unit of the Commonwealth Department of Prime Minister and Cabinet. This assistance was sought by the companies involved and meant that the environmental assessment and approval for both developments was "fast-tracked".

This article will examine environmental assessment procedures of the Commonwealth and Northern Territory and how they have been applied to the McArthur River Project, the first project in Australia to be fast-tracked by the Commonwealth. The fast-track approval of the McArthur River Project has cast doubt on the integrity of the environmental assessment process carried out under Commonwealth and Northern Territory law. The implications of fast-tracking are not clearly understood by the community. Further confusion has arisen as the environmental assessment process has been caught up in the complex and shifting interrelationship between Commonwealth and Territory responsibilities in the area of environmental law.

Recent developments in environmental impact assessment

The *Northern Territory (Self-Government) Act 1978 (Cth)* gives the Northern Territory Government a general grant of legislative power. The list of matters over which the Territory has executive power includes mining and minerals, land use planning and development, and environment protection and conservation.[1] The Territory has enacted a range of environmental legislation including the *Environmental Assessment Act 1982 (NT)*. Until recently, the Northern Territory Government administered this legislation independently with a minimum of interaction with the Commonwealth even in cases where Commonwealth legislation such as the *Environment Protection (Impact of Proposals) Act 1974 (Cth)* applied.

It is no longer the case that the Northern Territory and Commonwealth statutory requirements for environmental assessment[2] are dealt with independently. Although separate statutory requirements remain, since 1990 a Bilateral Agreement between the Northern Territory and the Commonwealth Ministers has sought to avoid the duplication of the environmental assessment process where one Environmental Impact Statement (EIS) will suffice to satisfy both authorities.

The accommodation of Commonwealth and State/Territory interests in regard to environmental assessment has now also been addressed under the Intergovernmental Agreement on the Environment (IGAE), signed in May 1992.[3] In Schedule 3 of the IGAE the parties agree:

> ...that it is desirable to establish certainty about the application, procedures and function of the environment impact assessment process, to improve the consistency of the approach applied by all levels of government, to avoid duplication of process where more than one Government or level of Government is involved and interested in the subject matter of an assessment and to avoid delays in the process.[4]

Schedule 3 sets out a list of principles upon which EIA processes should be based[5] and provides that a further "general framework agreement" will be negotiated between the parties to establish the detail of the division of responsibilities.[6] This framework agreement is currently being developed by a Working Group of the Australian and New Zealand Environment and Conservation Council (ANZECC).[7]

The key concept in the IGAE which allows for the accommodation of interests between the States/Territories and the Commonwealth is the approval or accreditation of the respective parties' processes. For example, if the Commonwealth approves or accredits the Northern Territory's EIA processes it must give "full faith and credit" to the results of such processes.[8] This means that the Commonwealth will accept and rely on the outcome of the Northern Territory EIA as a basis for decision-making under the Commonwealth legislation.[9]

The IGAE seems geared to allow the Commonwealth to minimise its responsibilities in relation to EIA, in order to "avoid duplication of processes" and yet, as Fowler points out,

> It is difficult to see how the acceptance by the Commonwealth decision-makers of the outcomes of State processes could be legally consistent with the independent and unfettered exercise of discretions created by Commonwealth legislation.[10]

The IGAE marks a significant political development in inter-governmental relations but it cannot affect the current legislative responsibilities of the governments concerned and does not affect existing intergovernmental agreements. Until the "general framework agreement" comes into place the existing Bilateral Agreement between the Commonwealth and the Territory remains in place.[11]

In the case of the McArthur River Project, the Commonwealth and Territory Governments have adapted the process of environmental assessment in order to accord

with both the changing intergovernmental relationship, and the desire to fast-track development approval without altering the relevant legislation or administrative procedures. The Commonwealth has not hesitated in handing over the "lead role" in the assessment of proposals to the Northern Territory.[12] The most significant effect of this has been to place reliance on the minimum requirements of Northern Territory procedures for environmental assessment. There appears to have been no consideration as to whether these procedures are consistent with the basic standards for environmental assessment, agreed upon in the IGAE, and expected by the community.

Issues concerning accountability, freedom of information and public participation under the Northern Territory procedures have been raised persistently by environmentalists for many years.[13] The procedures have been under review by the Territory Government since 1990[14] and attention has been drawn to their failure to meet the developing national standards.[15] The application of the Northern Territory procedures to a very significant resource development such as the McArthur River Project has further highlighted weaknesses which undermine the integrity of environmental assessment in the Northern Territory.

Comparison between Northern Territory and Commonwealth procedures

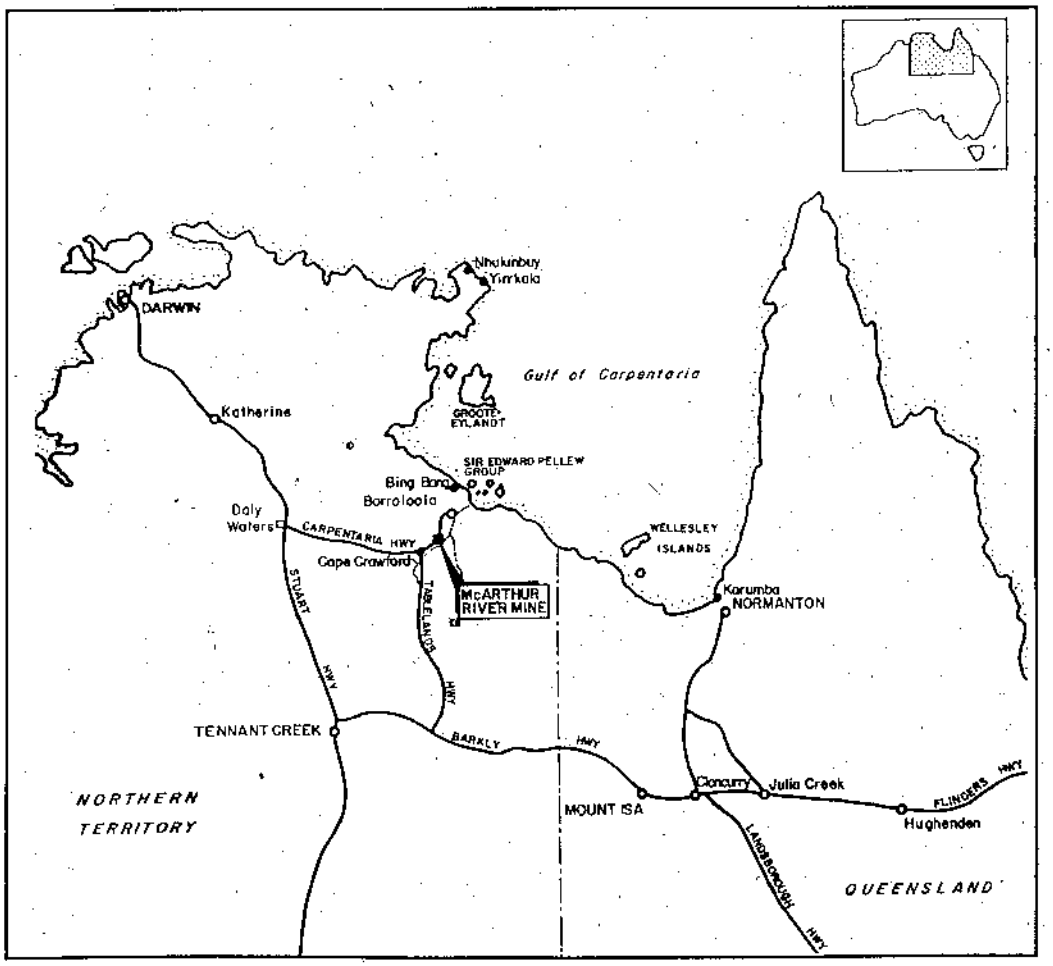
The long title of the *Environmental Assessment Act 1982 (NT)* states that it is an Act, "to provide for the assessment of the environmental effects of development proposals and for the protection of the environment". The objects of the Act are set out in section 4 stating that "matters" (which are not specified) "capable of having a significant effect on the environment", shall be taken into account in relation to certain decisions and actions, namely, the formulation of proposals, the carrying out of works, the negotiation of intergovernmental agreements, the making of decisions and the incurring of expenditure in both the private and the public sphere. As this provision highlights, the potential for the application of this Act is extensive. However, in practice it is only invoked in relation to major development proposals.

The *Environmental Assessment Act* does not contain substantive provisions to achieve its objects. Rather, it authorises the preparation of Administrative Procedures. The placing of the substantive provisions in Administrative Procedures mirrors the Commonwealth *Environmental Protection (Impact of Proposals) Act 1974*.

The enforceability of Administrative Procedures under the Northern Territory Act has never been tested. The unsuccessful attempt by the Australian Conservation Foundation to seek enforcement of the Commonwealth Procedures at common law[16] provides a discouraging precedent for such actions in the Northern Territory.

Mirroring the Commonwealth Procedures, the EIA process in the Northern Territory only proceeds if the Minister responsible for giving approval to the proposed action (the "responsible Minister"), decides to trigger the assessment procedures. The responsible Minister will only trigger the assessment procedures where he or she decides that the proposal is capable of having a significant effect on the environment. The only check on this decision is a provision which allows the Minister for Conservation to invoke the procedures after consultation with the responsible Minister.[17]

If the Northern Territory process is triggered the Administrative Procedures require that a report, referred to as a Preliminary Environment Report (PER), be prepared by the proponent.[18] After receiving a PER the Minister for Conservation may direct the preparation of a draft EIS.[19] A draft EIS must be made available for public comment.[20] Having received public comment the proponent then prepares the final EIS and submits it to the Minister for Conservation who must examine it and may make comments or recommendations. In practice this assessment is carried out by the Conservation Commission of the Northern Territory who have 35 days in which to prepare an assessment report. This assessment is available only to the



"responsible Minister" who must make the decision as to whether the development should proceed and, if so, under what conditions.

The only opportunity for public participation in the Northern Territory process is public comment on a draft Environmental Impact Statement. Even this is qualified, as a proponent may request that parts of the draft statement not be released.[21] The Procedures provide that members of the public be given at least 28 days in which to submit written comments.[22] The public has no access to the assessment of the final EIS made by the Conservation Commission, and there is no way that the public can know whether their comments have influenced this assessment or the outcome of the final decision. No rights of appeal are provided for under these procedures.

In the history of the administration of the environmental assessment process in the Northern Territory only a small number of Environmental Impact Statements have been prepared compared to the number of proposals that have been considered under the Northern Territory Procedures.[23] The great majority of proposed actions are assessed on the basis of the initial notification document which is referred to the Minister for Conservation. This is known as the Notice of Intent. In a relatively small proportion of cases a PER is requested by the Minister. These documents are not available to the public. There is no provision in the Act or Procedures for the public to be notified that an environmental assessment is being carried out in relation to a proposed development, unless a full EIS is requested.

The fact that the Northern Territory has no freedom of information legislation compounds this lack of public access to information. The result of this situation is that many developments which may be detrimental to the environment are in the construction phase before the public finds out about them. For example, a number of large mining developments in the Top End were approved on the basis of a PER which was not made public.[24] The only other provision which may allow some public participation is an inquiry held under section 10 of the Northern Territory Act, at the direction of the Minister. This provision has not yet been used.

The Commonwealth EIA process is contained in the *Environment Protection (Impact of Proposals) Act 1974* and the Administrative Procedures made under that Act. There are a number of significant differences between the Commonwealth Procedures and the Northern Territory Procedures. For example, the Commonwealth Procedures set out a number of factors that must be taken into account by the Commonwealth Environment Minister in making the decision as to whether an EIS or Public Environment Report (PER) is required.[25] This comprehensive list of factors enhances the accountability of decision-making under these Procedures. This is coupled with the requirement in clause 3.1.5 of the Commonwealth Procedures that the Minister must issue a public statement of reasons as to why an EIS or PER has not been requested.

The PER was introduced by amendments to the Commonwealth Procedures in 1987 and is essentially a watered down version of an EIS, providing a less in-depth coverage of the potential environmental impacts of a proposal. Under the Commonwealth Procedures a PER is treated in much the same way as an EIS. This is in sharp contrast to the Northern Territory approach. The choice of the description "Preliminary" rather than "Public" Environment Report in the Northern Territory is significant. Under the Commonwealth Procedures a draft PER must be released for public comment.[26] However, unlike an EIS, a PER does not have to be revised following exhibition.

The provisions relating to the public comment on a draft EIS are very similar in the Northern Territory and Commonwealth Procedures. However, the availability of information to the public has been restricted in the Northern Territory. While a final EIS prepared under the Commonwealth Procedures must be distributed to anybody who has made written comments and be available to the public generally,[27] in the Northern Territory distribution is entirely at the discretion of the Environment Minister.[28]

Unlike the assessment carried out by the Conservation Commission, the assessment of an EIS or PER by the Commonwealth Environment Protection Agency (CEPA) has to be made public. Within 48 days after receiving the final EIS, or 28 days after receiving a PER, CEPA must prepare a report and make it available to the Environment Minister, the Action Minister, and the public.[29] The Environment Minister then makes recommendations about the proposal, including any conditions which should be applied to the proposed development or action, and these too must be made available to the public.

The Commonwealth Act imposes a general duty to ensure that the final EIS or PER, together with the Environment Minister's recommendations are taken into account in the final decision made by the responsible Minister, whereas no such requirement exists in the Northern Territory Act.

A procedural comparison illustrates that the Commonwealth decision to entrust the Territory with the lead role in the environmental assessment process, and to give full faith and credit to the outcomes of Northern Territory environmental assessment involves an acceptance of unfettered Ministerial discretion, reduced public participation, and less public access to information. All of these factors act to diminish accountability and undermine the integrity of the process. The impact of the decision is demonstrated by the controversy arising out of the McArthur River Project.

Issues arising out of the environmental assessment of the Macarthur River project

The McArthur River zinc-lead-silver deposit discovered 40 years ago, contains an estimated reserve of at least 220 million tonnes of ore. Mount Isa Mines Ltd (MIM Ltd) and its Japanese joint venture partners propose to mine this deposit from underneath the bed of the McArthur River in a 20 year mining operation. The ore will be processed at the mine site and then transported by road to a barge loading facility at Bing Bong Station on the Gulf of Carpentaria. The barges will transport the ore 30km offshore and into

the hold of an export ship.[30]

EIA procedures were first triggered under the Northern Territory legislation in 1992. An EIS was requested by the NT Minister for Conservation on 11 March 1992.

MIM Ltd wrote to the Commonwealth Government indicating that it would be offering participation in the project to a consortium of international mining companies. This would in due course require the approval of the Foreign Investment Review Board. On this basis, the Commonwealth Minister Assisting the Treasurer designated MIM Ltd as the proponent of the McArthur River Project under the *Environmental Protection (Impact of Proposals) Act 1974 (Cth)* on 3 April 1992.[31] At this stage the Commonwealth also granted the project "major project status". This indicated that the project would be fast-tracked, with the Department of Prime Minister and Cabinet coordinating a liaison between MIM Ltd and the Commonwealth.[32]

On 16 April 1992 the Environment Minister, Ros Kelly, issued a statement in which she "agreed that the Conservation Commission of the Northern Territory (CCNT) would take the lead role in the assessment of the proposal and that the Commonwealth legislative requirements were to be met by the Northern Territory assessment process." Guidelines for the draft EIS were then formulated following close consultation between CCNT and CEPA.[33] The Draft EIS for the McArthur River Project, prepared under the Northern Territory Procedures, was released for public review on the 23 May 1992 for a period of 30 days. Following this the proponent then undertook a revision of the Draft EIS having regard to the comments received. In July, MIM Ltd released a "Supplement to the Draft Environmental Impact Statement"[34] which, together with the Draft EIS, constitutes the Final EIS. The proposed date for the release of the Supplement suggested by the Conservation Commission had been 10 July 1992, allowing a 3 week period for the revision process.[35]

The Supplement makes clear that several of the respondents to the Draft EIS were critical of the time available for public participation, particularly participation by affected Aboriginal communities, the haste with which the EIS was prepared and the overall standard of the impact assessment.[36] The Supplement acknowledges the need for further studies and consultation in a number of areas of concern. However, none of these factors were deemed significant enough to stall the fast-tracking long enough to allow these concerns to be addressed as part of the EIA process.

Under the Northern Territory Administrative Procedures the Minister for Conservation has 35 days from the receipt of the Final EIS to prepare an assessment report. The Supplement is simply dated "July 1992", but if this Final EIS for the McArthur River Project was released on the 10 July, as planned, the Conservation Commission had until 13 August to complete the assessment report for the project.

At the same time as the Conservation Commission was preparing its assessment report the Commonwealth Environment Protection Agency (CEPA) prepared a "Review of Environmental Impacts" of the McArthur River Project to assist the Commonwealth Environment Minister to determine the need for a PER or EIS under the Commonwealth EIA procedures. The review considers the EIS prepared by MIM Ltd and also claims to consider the assessment report prepared by CCNT.[37] The CCNT assessment report has never been made public. There is no evidence to suggest that it was completed prior to the 13 August 1992 and, yet, the Commonwealth was relying on the outcome of the Northern Territory procedures to meet the Commonwealth EIA requirements. The CEPA report was released on the 13 August 1992.

Ros Kelly, the Commonwealth Environment Minister, wrote to the Minister Assisting the Treasurer, Peter Baldwin, advising that no EIS or PER would be required under the Commonwealth Administrative Procedures on 14 August 1992. The timing of the process was so tight that the Commonwealth Minister considered the environmental impact assessment of both Territory and Commonwealth authorities for only one day, before making a decision.

The haste of the Minister's decision is remarkable in the context of the concerns that had been raised in relation to the project. The CEPA Review highlights some serious issues regarding the extent and quality of the information upon which this decision was made. Major issues of concern identified include the water management regime for the mine, the lack of baseline environmental data, the potential impacts of the mine on the marine environment in the Gulf of Carpentaria, and the impact of the development on the local Aboriginal population. The CEPA Review agrees with the conclusions of the EIS that further studies are necessary to properly assess the impact of the project in these areas[38] and, yet, none were required under the Commonwealth EIA procedures.

The Commonwealth Administrative Procedures specifically authorise the Minister or CEPA to require the proponent to provide further information necessary for the purpose of determining the necessity for a PER or EIS[39] and, yet, none was called for in this instance. It is arguable that this is a decision which is quite inconsistent with the object of the Commonwealth Act which is to ensure that, "to the greatest extent that is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account...".[40]

Following the Minister's decision that no Commonwealth EIS was necessary, the final Commonwealth approval needed for the development to proceed was granted on 25 August, 1992. Following this decision the environmental management of the project reverted back to the Northern Territory Government. The Northern Territory Minister for Mines and Energy issued 25 year mining leases to MIM Ltd on 5 January 1993. In the Northern Territory the conditions attached to a mining lease cannot be obtained by a member of the public. There is no way for the public to know whether these leases contained conditions regarding a requirement for further environmental studies, prior to construction commencing, or sufficient environmental management planning.

Not surprisingly, public concern about the McArthur River mine has continued in 1993. In particular, there seems to be significant discontent among theAboriginal population in the Borroloola area. Media releases issued by the Northern Land Council claim that although the four clans affected are all anxious to participate fully in the mine, they are "upset at the lack of information, disinformation and unfulfilled promises of the mining company and the government to date",[41] and have expressed concern that the fast-tracking process has led to a development which is, "poorly planned, both environmentally and from a social impact point of view".[42] Certainly, the CEPA "Review" commented on the lack of baseline data on the Aboriginal population that would be affected[43] and the need for further studies to adequately determine the social impact of the project on these people.[44]

A study of the impact of that McArthur River mine on the aboriginal population of Borroloola and the Region was released by the Northern Land Council in March 1993.[45] One of the issues this report raises is the inadequacy of mechanisms for public input into the EIA process for McArthur River as these two extracts from the Northern Land Council report show:

> While every effort was made by the local Council to provide for public input (with the DEIS and associated materials being made available for viewing in the local library premises) many people in the town appeared to have little or no idea what would be involved.[46]
>
> Efforts seem to have been made by the mining company to explain and show Aboriginal people what was being planned, by arranging bus trips to the site of the mine and ancillary infrastructure at McArthur River and to the proposed barge loading facility at Bing Bong. Nevertheless there was much uncertainty and confusion among them as to what the mine might involve, and what their possible role might be.[47]

The report strongly criticises the handling of Aboriginal issues in the Draft EIS and the Supplement to the Draft EIS, particularly the fact that no social impact assessment was called for as part of these documents.[48] It also points out the difficulty of assessing the social impact of the proposal when negotiations between MIM and the local aboriginal people regarding employment and training were being kept largely confidential:

> Because of the degree of secrecy surrounding the relations between MIM (chiefly through a consultant) and the local Aboriginal people, it is impossible for the present report to assess the adequacy of the proposals or the social impact of whatever is being devised.[49]

One conclusion that the report does make on the limited information available is that:

> the extent of the employment and training prospects as a significant benefit for the Aboriginal people in the region has been greatly overestimated.[50]

The fact that such a significant conclusion has been reached well after the project has been approved reveals the inadequacy of the EIA process. The final report of this consultancy and a further study commissioned on employment and training related matters[51] have not yet been completed.

Other issues raised during the environmental assessment process have not yet been addressed. The Environment Centre of the Northern Territory has drawn attention to the inadequate attention given in the EIS to the impact of the barge loading facility and concentrated transport on the marine environment in the Gulf of Carpentaria. There is particular concern that the project threatens populations of dugong and sea turtle.[52] No further studies have been completed which provide adequate environmental data on the marine environment or the potential impacts on the project in this area.

Conclusions

It is undoubtably desirable to eliminate duplication of environmental assessment of particular projects by the Commonwealth and the Northern Territory governments. However, reliance on the Northern Territory process effectively represents the adoption of the minimum standards possible. When this is coupled with a stated objective of achieving environmental assessment in the minimum possible time, the integrity of the process suffers.

In remote areas of the Northern Territory the inadequacy of baseline environmental data should be a major concern of developers and the government. Environmental assessment is meaningless without this data, and, yet, both the Territory and the Commonwealth government refused to respond to this inadequacy by requesting further studies to be undertaken as part of the environmental assessment process.

The most significant casualty of the current arrangements for environmental assessment in the Northern Territory is accountability in decision-making. Public participation is an important component in achieving a degree of accountability and yet, again, only the minimum requirements of Northern Territory law were applied. In the case of McArthur River these minimum requirements proved to be totally inadequate for an appropriate program of public consultation and participation for the community to be most affected by the proposal, the local Aboriginal community and the traditional owners of the area.

The other essential requirement for accountability in government decision-making is access to information. The lack of public access to information relating to environmental assessment is one of the most notable features of the Northern Territory procedures. It is not appropriate for the Commonwealth to base its decisions on a report of the Conservation Commission of the Northern Territory which has never been made public. Although serious concerns were raised in relation to the environmental impact of the McArthur River project, members of the public have not been reassured that these concerns have been or will be addressed.

Once the decision has been made that the project can proceed, the only legally enforceable means to ensure

adequate environmental protection in such a case is through the conditions attached to the mining lease. These are not available to the public. The Northern Territory Government also had the opportunity to include requirements regarding the protection and management of the environment in the franchise agreement for the Project which was ratified in the *McArthur River Project Agreement Ratification Act 1992 (NT)*. This did not occur despite the fact that environmental concerns occupied much time during the debate of the Bill.[53]

A final barrier in the way of accountability is the total absence of merits review in relation to environmental assessment in the Northern Territory and Commonwealth jurisdictions, and the difficulties associated with judicial review. Quite apart from the cost of challenging decisions in the courts, standing and the enforceability of Administrative Procedures provide significant hurdles to a legal challenge.

The Northern Territory government plans to amend the *Environmental Assessment Act 1982 (NT)*. However, there has been no public consultation to date on these proposals, nor has there been an indication of when these proposals will be put before Parliament. Freedom of information legislation has not been proposed.

Mining Projects of national significance such as McArthur River and Mount Todd should attract the most critical national attention. It is important to ensure that one of the least developed areas of the nation, the Northern Territory, is not irretrievably degraded before we have even examined its environmental resources. Environmental assessment law will be modified as the Intergovernmental Agreement on the Environment is implemented. Close attention must be paid to ensure that the integrity of environmental assessment is enhanced, rather than compromised, and that the lowest common denominator does not become the benchmark for determining intergovernmental responsibilities.

Notes

[1] id. cl.4(1)

[2] *Environmental Protection (Impact of Proposals) Act* 1974 and Administrative Procedures (Cth), *Environmental Assessment Act* 1982 and Administrative Procedures (NT).

[3] Agreement between the Commonwealth Minister for the Arts, Sport, the Environment, Tourism and Territories, and the Northern Territory Minister for Conservation concerning arrangements for cooperaion in environmental assessment of proposals of 4 February 1990

[4] Intergovernmental Agreement on the Environment, May 1992 Schedule 3, cl.1

[5] id.cl.3

[6] id.cl.4

[7] A draft Agreement entitled *Basis for a National Agreement on Environmental Impact Assessment* was circulated to peak national interest groups in December 1992.

[8] Supra, n 4, clause 5

[9] id, Section 1.5

[10] Fowler, "Implications of Resource Security for Environmental Law", paper presented at The Challenge of Resource Security; Law and Policy Conference", Perth, September 1992, p.31.

[11] Supra, n 3, Section 4

[12] This is stated in the *Review of Environmental Impacts, McArthur River Zinc-Lead-Silver Project*, prepared by the Environmental Assessment Branch, Commonwealth Environment Protection Agency, August 1992.

[13] Particularly by the Environment Centre of the Northern Territory Inc

[14] Anderson, *Review of the Northern Territory Environmental Assessment Act and Administrative Procedures*, Report for the Conservation Commission of the Northern Territory, February 1990.

[15] Dawson, F, "Environmental Assessment and Planning Law in the Territory: Is there a need for law reform?", in Moffat, I and Webb, A, (eds), *Conservation and Development Issues in Northern Australia*, NARU, Darwin 1992

[16] *Australian Conservation Foundation v Commonwealth* (1980) 28 ALR 257.

[17] Environmental Assessment Administrative Procedures (NT) cl 7

[18] id, cl.6

[19] id. cl.8

[20] id. cl.10

[21] id. cl.10

[22] id. cl.1(1)(d)

[23] Conservation Commission of the Northern Territory, *Annual Reports*, 1984-1990.

[24] ibid

[25] Environmental Protection (Impact of Proposals) Administrative Procedures cl.3.1.2

[26] id, cl.6.3

[27] id, cl.8.2

[28] Environmental Assessment Administrative Procedures (NT), cl.13

[29] Environmental Protection (Impact of Proposals) Administrative Procedures (Cth) cl. 9.1.4 and 9.3.2

[30] Northern Territory Parl. Debates, 25 Nov. 1992, p 7107

[31] Minutes 84/1864, Commonwealth Department of the Arts, Sport, the Environment and Territories, 7 April 1992

[32] ibid

[33] supra, n.12

[34] Hollingsworth Dames and Moore for Mount Isa Mines Ltd, *McArthur River Project, Supplement to the Draft Environmental Impact Statement*, July 1992.

[35] Minute 92/2923 Commonwealth Department of the Arts, Sport, the Environment and Territories, 25 May 1992

[36] Supra, n 34, p 14.1

[37] Supra, n.12

[38] id. p 3-5

[39] Environment Protection (Impact of Proposals) Administrative Procedures (Cth) cl. 2.3

[40] *Environment Protection (Impact of Proposals) Act* 1974 (Cth) s.5,

[41] Media Release, Northern Land Council, Darwin NT. 18 February 1993

[42] Media Release, Northern Land Council, Darwin NT. 24 February 1993

[43] Supra. n.12 p.32

[44] id. p.3

[45] Northern Land Council, *Borroloola Comunity Development Planning Study, Interim Report and Reccommendations, The MIM McArthur River mine development: Assessment of the Impacts on the Aboriginal Population of the Borroloola Township and Region*, January 1993.

[46] id. p.5

[47] ibid

[48] id. p.8, 37

[49] id. p.6

[50] id.p.45

[51] A consultancy called for under the imprimatur of the Commonwealth Office of Labour Market Adjustment

[52] Pittock in *Environment*, Newsletter of the Environment Centre of the Northern Territory, Darwin, September 1992.

[53] Northern Territory Parl. Debates, Nov.1992, p.7102-7120.

Case Note: Hancock Byatt & Associates Pty Limited v Wyong Shire Council

State Environmental Planning Policy No. 14 - Coastal Wetlands ("SEPP 14")has received judicial consideration in only a handful of cases. The recent decision in *Hancock Byatt and Associaties v Wyong Shire Council* (unreported, Land and Environment Court (Stein J), 15 April 1993) provides a useful discussion of the interpretation and weight to be given to SEPP 14.

The applicant (''Hancock Byatt'') proposed to develop a 157 unit retirement village at Toukley on the NSW Central Coast partially within a wetland designated under State Environmental Planning Policy No.14 - Coastal Wetlands (''SEPP 14''). The land was zoned 2(b) Residential, and the applicants argued that the development was therefore permissible by virtue of State Environmental Planning Policy No.5 - Housing for Aged or Disabled Persons.

Over 1100 objections had been lodged with the Council in relation to the proposed development.

A draft local environmental plan, to rezone part of the subject site as 7(g) Wetland Management, had been submitted and withdrawn by the Wyong Council. The Council submitted that it was likely this draft LEP would be submitted again in the future for approval. In addition, the Council adopted a Wetlands Development Control Plan (13 September 1989) and a large proportion of the site was designated under SEPP 14 as part of wetland 895b (26 June 1987). Under the terms of SEPP 14 such land cannot be cleared, drained or filled without council consent and the Director of Planning's concurrence.

Wyong Shire Council submitted that the site was a high quality wetland area with extensive native flora (including the poorly conserved *Melaleuca quinquenervia*) and swamp forests contiguous and integral to the Toukley wetland. The vegetation was ''relatively undisturbed'' according to experts, but the proposed development would clear 70% of vegetation and remove important faunal habitats. The wetland had a high conservation value and development would cause ''loss of a considerable proportion''.

Consistent evidence existed of the quality of the wetland on the site and it was submitted that the aims of SEPP 14 could not be met if the development proceeded.

It was also argued by the applicants that the matters listed under Clause 7(2) of SEPP 14 for the Director's consideration are not matters the court can consider on an appeal. The Court rejected this argument since the matters in cl.7(2) simply more specific reflections of the consideration of environmental impact under s.90 of the Act. The Court held that it should have regard to the matters listed in cl.7(2) as well as whether the development would be consistant with the aim of the policy.

The Court held that in determining the issue it should take into account SEPP 14. In this regard -

> The express aim of the Policy is important - ''to ensure that the coastal wetlands are preserved and protected in the environmental and economic interests of the State'' (clause 2). The operative parts of the Policy must be read in the light of this. The words utilised - ''ensure'', ''preserve'' and ''protect'' - are strong words of intent. Words with lessor force could have been chosen for the Policy.
>
> In my opinion the Policy aim raises an inference that the natural values of coastal wetlands should be retained and not lost or damaged unless there is a countervailing need. A good case must be made out to sanction wetland loss if its quality is high. The keynote of the Policy is protection and to ensure that loss of weltand is permitted only after careful and comprehensive assessment and balancing. (p.17-18)

The decision is important because, like the *Myall Koala* case (*Myall Koala and Environment Support Group v Great Lakes Shire Council*, unreported, Land and Environment Court (Bignold J) 17 October 1990) it gives weight to the objectives of the Policy in determining merit appeals over SEPP 14 wetlands.

The appeal was dismissed on the grounds that the development was ''clearly inconsistent with the aim of SEPP 14 and should be refused''.

Case Note: Citizens Airport Environment Association Inc v Maritime Services Board and Anor

On 16 April 1993 the Court of Appeal handed down judgment in *Citizens Environment Association Inc v Maritime Services Board and Anor*. This was an appeal from the decision of the Land and Environment Court (Stein J) dismissing an application brought by an incorporated association against the Maritime Services Board (''the Board'') and the Federal Airports Corporation (''the Corporation''). The subject matter of the appeal was the dredging of a section of Botany Bay for the purposes of the construction of the third runway at Sydney's Kingsford Smith Airport.

The applicant had sought a declaration that the Maritime Services Board was in breach of s.111 and 112 of the *Environmental Planning and Assessment Act* 1979 (''EP&A Act'') in relation to the dredging of a part of Botany Bay by the Federal Airports Corporation.

The claim was, in essence, that the Maritime Services Board was a ''determining authority'' within the meaning of s.110 of the EP&A Act. Included in the definition of ''determining authority'' is a ''Minister or public authority by or *on whose behalf* the activity is or is to be carried out'' (emphasis added). The applicant and appellant argued that the dredging activity, although being carried out by the Federal Airports Corporation was being carried out ''on ... behalf'' of the Maritime Services Board. Therefore, it was argued, the Board was required to comply with ss.111-112 of the EP&A Act. In the circumstances this would require the preparation of an environmental impact statement prior to the carrying out of the dredging.

In the Land and Environment Court, Stein J had held that the dredging activities were not carried out ''on behalf of'' the Board. By a two to one majority the Court of Appeal upheld this decision.

Also discussed in the judgments of the Court of Appeal is the impact of the decision in *Botany Municipal Council v Federal*

Airports Corporation (1992) 66 ALJR 821 and discretionary considerations relating to the refusal of relief where a breach of environmental law has been found. This note however will examine only (a) the different approaches of the judges of the Court of Appeal to the issue of whether the dredging was undertaken "on behalf of" the Board (b) the comments of Justice Mahoney on environmental litigation involving incorporated associations.

Of the three judges of the Court of Appeal Justices Mahoney and Cripps held that the dredging was not carried out "on ... behalf" the Board while the Justice Kirby held that it was.

Although the judges reached different conclusions it worth examining the reasoning that they followed.

For Justice Mahoney, who held that the dredging was not carried out on behalf of the Board, it was clear that the phrase "on behalf of" extended the meaning of determining authority beyond servants or agents of a Minister or public authority to a more general relationship. The real question was to determining the extent of that more general relationship which was encompassed by the phrase.

It had been held in other cases that where the essential purpose in doing an activity was what a party wished to be done then the activity was being undertaken on behalf of that party. However in the current case that the dredging would (a) serve the interests of the Board (b) would be of financial advantage to the Board and (c) it would be a waste of public resources to do otherwise was not sufficient to establish that the activity was being undertaken on behalf of the Board. Although it is possible that an activity is undertaken on behalf of both one party and another, this was not such a case since the evidence was that although the dredging may serve the interests of the Board, the Corporation was not acting other than on its own behalf. Further, the assumption behind Part 5 was that the consideration of the environmental impact of an activity would lead to modification of the activity to reduce the detrimental affect on the environment. This would only be possible if the determining authority could control how the activity was undertaken. However in this case it was clear that the Board had no legal power to control what the Corporation did. Although the Board could seek to influence by non-legal means it was to legal power to influence the nature of the activity that Part 5 had regard.

Cripps JA agreed with this conclusion essentially for the reason that the Board had "no control or supervision over the dredging work". As did Mahoney JA, he examined the purposes of the legislation and concluded that if there was no supervision or control over the work then imposing the duties under s.111 and s.112 would be of no utility. This was because the Board could not determine the bounds of the activity the environmental impact of which it had to assess since those bound were totally outside its control. As a result the preparation of an environmental impact statement would be near impossible because of the uncertainty of what it was required to assess and the requirement for exhibition and consideration of public submissions would be of little use since the Board had no power to modify the activity to accommodate environmental concerns.

Kirby P on the other hand held that the activity was being undertaken on behalf of the Board. He concluded that the ambiguity surrounding the application of s.112 should be resolved by avoiding a narrow construction that circumscribed or limited its construction.

He agreed that if the benefits accruing to a party were accidental, unexpected or fortuitous then it could not be said that the activities were carried out "on ... behalf" of that party. However, in this case, Kirby was willing to look beyond the strictly legal obligations that Mahoney had said were necessary. He looked at the whole background of the arrangements between the parties to determine that while the activities were undertaken on behalf of the Corporation they were also "on ... behalf" of the Board. An additional factor weighing in this conclusion was the possibility that if the Board was not a determining authority the "beneficial and socially worthwhile objects of the State Act" could be circumvented in the future in projects having no real federal element.

As a result the appeal was dismissed.

It should be noted that as a result of the decision in the *Botany Municipal Council* case, which was handed down during the hearing of the Association's application in the Land and Environment Court the Court, s.109 of the Constitution would have prevented any obligations imposed upon the Board by the EP&A Act from hindering the operations of the Corporation in carrying out dredging operations. Because of this the Associations appeal was said to be doomed from the start.

It was perhaps this fact and the fact the applicant Association had apparently formed "to protect its members from personal liability for legal costs in the event that their action failed" that lead Mahoney JA to make some rather cryptic comments about the appropriateness of the use of incorporated associations as vehicles for litigation.

His Honour expressly made no criticism of the acceptance by the Land and Environment Court that such corporations are appropriate parties to litigation.

However he comments that proceedings may be abused and that the power to bring proceedings must be used responsibly. The current case, brought by an incorporated association, turned essentially on the construction of legislation "which, on one view, was of the nature of a technicality." Without directing criticism at either the Association or its advisers he comments that where such legal challenges for the protection of the environment "are to involve such expenditures of public and private resources, it may be appropriate for consideration to be given to the adoption of other procedures."

What precisely this means it unclear. It is, for example, difficult to find a judicial review case of any sort that could not be characterised as turning on a matter "of the nature of a technicality." Without technicalities there would be no lawyers.

Similarly if it is frustration at the lack of an order for security for costs it is unclear what His Honour's suggestion was. Orders for security for costs are available in both the Land and Environment Court and the Court of Appeal. Indeed an application for security for costs was made unsuccessfully in the Court of Appeal (see *Maritime Services Board & Anor v Citizens Airport Environment Association Incorporated*, Court of Appeal, unreported, 23 December 1992).

If, more radically, the comments are aimed at limiting the access of certain persons or corporations to judicial review of government decisions, the comments are rather unhelpful since they present no clearly articulated criticism or proposal.

While one must wonder what the subtext for such cryptic comments are, it should be apparent that the comments arise from a dissatisfaction with the current situation. It can only be hoped that in the future when judges venture off into discussions of appropriate policy or make suggestions for law reform they are bold enough to do so in ways that are understandable to those mere mortals who have to make sense of their comments.

New South Wales

Development officer appointed

The EDO is pleased to announce the appointment of Robin Dougherty as our Development Officer. Robin will be working to develop contact with and expand our membership in a range of ways.

We are not so pleased to announce that Dorothy Davidson has broken her knee cap and has been away from work for 6 weeks. She is now recovering and the office is looking forward to her return.

Security for costs decision in Court of Appeal

The Court of Appeal ruled on an application for security for costs brought by North Broken Hill Limited (trading as APPM) against Alexander Jonathan Brown on 1 April 1993. Mr Brown is appealing to the Court of Appeal against the decision of Pearlman J in *Brown v Environment Protection Authority & North Broken Hill Ltd* (Land and Environment Court, unreported 12 November 1992).

The application was brought under Pt 51 r11 of the Supreme Court Rules and sought that security be provided and that the appeal be stayed until security was given. The general rule of r11 is that no security for costs of an appeal to the Court of Appeal shall be required (r11(2)). However if there are special circumstances the Court may order that security be given (r11(1)).

The principal contention advanced by APPM was that Mr Brown was bringing the proceedings on behalf of others, such as the Australian Conservation Foundation, Greenpeace and the Wilderness Society. Priestly JA noted that if this had been proven then he would order the security as asked.

However rather than concluding that Mr Brown was acting on behalf of other Priestly found that

> Mr Brown is rather rashly exposing himself to the possibility of suffering a costs order which could keep him poor for years to come, for the sake of carrying on an appeal for a cause in which he believes.

He found that Mr Brown was not acting on behalf of others. He also held that on the material before the Court the appeal was of sufficient significance to outweigh the prejudice APPM would suffer if the appeal was allowed to proceed. He noted that North Broken Hill Ltd is one of Australia's thirty five largest public companies with a market capitalisation exceeding 1.5 billion dollars. In this regard the failure to obtain an order for security of $15,000 would not be of great importance.

Furthermore the Court had regard to the fact that the provisions under which Mr Brown was bringing proceedings (s.25 *Environmental Offences and Penalties Act*, s.123 *Environmental Planning and Assessment Act*) were aimed at giving standing to persons to bring cases of this kind.

The decision is significant in that it recognises that it is the nature of public interest litigation that there will be a general community interest in the outcome of proceedings. Had security been granted in this case it would have had serious implications for the bringing of cases pursuant to the s.123 of the *Environmental Planning and Assessment Act* and similar provisions, and s.25 of the *Environmental Offences and Penalties Act*. This is because wherever a plaintiff did not have the direct private interest in the litigation but was acting to promote the public interest in compliance with environmental laws the claim would be made that the applicant was acting on behalf of others.

Brown case settled

On 17 June 1993 Mr Brown settled his proceedings against the EPA and Northern Broken Hill Limited. The Government's legislation had rendered his appeal academic in part. In the absence of legal aid, after a 12 month media and legal campaign Mr Brown decided to settle the case. The terms of settlement are not to be disclosed.

The many people who have assisted the EDO in the conduct of this case are too numerous to mention. These include members of the bar, scientific experts, volunteers and academics.

Special thanks go to Mr Malcolm Craig QC, Jonathan Simpkins and Patrick Larkin for their tireless and unstinting contribution in what was a long and complex series of matters.

We would like to thank Dr Alan Jones from the Australian Museum who gave his time freely and to Ian Irvine whose services were made possible by Ocean Watch.

Compost production case

Since 1989 the EDO has acted for Peter Foster. Mr Foster (on behalf of the Ebenezer Concerned Residents Committee) was joined as the second applicant in proceedings against Mushroom Composters Pty Ltd. Mushroom Composters operates a plant at Ebenezer that produces the compost that forms the substrate in which mushrooms are grown. The process involves mixing ingredients including straw, poultry manure, gypsum, protein meal and cotton hulls, soaking it with water and allowing the material to rot for two weeks.

Since 1981 residents have been expressing concern at the odour of the operations.

Finally, in March 1993 Justice Pearlman heard the case which was to restrain breaches of the development consent conditions under which Mushroom Composters were operating. Judgment was delivered on 20 May 1993. Justice Pearlman granted declarations that the current operations were in breach of development consent conditions

and granted an injunction preventing the operations from being used in a manner that interferes with the amenity of the neighbourhood in respect of smell. The injunction is suspended for 12 months from the date of the judgment.

Malcolm revisited

Readers of *Impact* will recall that in our December, 1991 issue (24 Impact p.9), we reported that Mr Justice Stein of the Land and Environment Court had found in favour of Mrs Nancy Malcolm on behalf of the Maryland Residents Group. Mrs Malcolm had brought Class 4 proceedings challenging the decision by the Newcastle City Council to grant development consent to a waste management facility at Summerhill without first requiring the preparation of an Environmental Impact Statement. It had been successfully argued that as the landfill operation was dependent upon the winning of material, the development was "extractive industry" within the terms of Schedule 3 of the Environmental Planning and Assessment Regulation 1980, and therefore designated development requiring the preparation of an environmental impact statement.

As a result of the Court's decision the Council prepared an environmental impact statement, and the development proposal was the subject of hearings before a Commission of Inquiry. The Inquiry recommended that the development proceed. However, it was also recommended that the proposal be staged. Instead of obtaining approval for the full life of the proposal being some 50 years, initial approval should be for 20 years representing the first stage of the proposal. Council granted approval in these terms.

The Group sought expert advice on the merits of the proposal as rights under the legislation included a right of appeal to the Land and Environment Court by way of Class 1 proceedings.

The expert advice noted that the site was unsuitable for a landfill facility. In fact the shallow and localized groundwater should have precluded the use of the site from the initial EIS site evaluation.

The Group will not be proceeding with Class 1 proceedings due to their inability to financially resource the action.

The case highlights how the availability of legal aid to support the Class 4 proceedings had been essential in correcting the decision-making process in the early stages. However, in relation to issues that have only become apparent since the recommendations were made by the Commission of Inquiry, the absence of legal aid has made it impossible to further investigate these concerns by way of a final scrutiny of the merits of the proposal.

Environmental Law Workshops – Orange and Bathurst

During Law Week the EDO ran environmental law workshops in Orange and Bathurst. These workshops were organised in conjunction with the Central West Community College. The Orange workshop on 6 May was attended by around 40 people and the Bathurst workshop on 7 May by around 20. EDO solicitor David Mossop also ran a workshop for the environmental officers of Uncle Bens Ltd at their factory at Raglan near Bathurst.

EDO NEWS

South Australia

The Environmental Law Community Advisory Service (SA) Inc., recently published its second newsletter reporting on its current activities. Here are some extracts.

ETSA Vegetation Clearance Challenge

At the initiative of the Mayor of the City of Kensington & Norwood, her Worship Mayor Vincenzina Ciccarello, a group of over 20 Councils have come together to pursue the contentious issue of the vegetation clearance provisions for non-bushfire risk areas within the *Electricity Trust of South Australia Regulations* 1988.

The collection of Councils has decided to call itself the Local Government ETSA Regulations (Vegetation Clearance) Review Committee and the number of Councils wishing to be represented by it is steadily increasing.

ELCAS has been providing free legal advice to the Review Committee. The Management Committee considered the issue to be one of genuine public importance and hence a greater level of advice is being provided to the Review Committee by ELCAS than would normally be the case.

On behalf of the Review Committee ELCAS has written an eight page letter to the Premier of South Australia, the Honourable Lynn Arnold, asking a series of questions regarding the vegetation clearance practices of ETSA in non-bushfire risk areas. We are awaiting a reply.

Banksia Environmental Foundation

ELCAS has been nominated for the 1993 Banksia Environmental Awards in the award category group, Metropolitan Community Groups. The awards will be presented on June, 1993.

The Advisory Service

The Advisory Service, provided on Thursday night from the Bowden Brompton Community Legal Centre has continued to be active. A wide range of enquiries have been made of the Advisory Service since our last newsletter and they have included enquiries in relation to contaminated land issues, planning law issues and issues relating to the objects and rules of an incorporated conservation association.

PEOPLE ◆ PLACE ◆ LAW

Wednesday 8 September-
Saturday 11 September 1993

Australian Museum
Sydney

A 3 Day Conference to discuss Aboriginal Culture, Heritage Protection, the Environment and the Law.

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NSW Aboriginal Land Council

1993 INTERNATIONAL YEAR FOR THE WORLD'S INDIGENOUS PEOPLE
'A NEW PARTNERSHIP'

During September 1993 we are holding a major conference on Aboriginal culture and heritage as part of activities during UN International Year for the World's Indigenous People.

The conference aims to bring together the wealth of knowledge and experience which exists among Aboriginal and other people around the themes of culture and heritage, sovereignty and government, land management and mining and conservation. Discussion of the Mabo decision will be a key feature of the conference.

We also hope to increase the capacity of organisations and individuals to work together with Aboriginal communities for the protection of the environment and the promotion of Aboriginal self-sufficiency.

The three-day conference will be made up of panels, plenary, performance and workshop sessions with discussion of national and international interest, but with a New South Wales focus.

This is a conference for the Aboriginal community and a cross section of other interested people from the conservation movement, mining and resource industries, as well as government and legal sectors. Some leading indigenous North American lawyers have been invited as speakers. We anticipate about 250 participants attending.

A Steering Committee of Aboriginal and non-Aboriginal people are overseeing the organisation of the conference by the Environmental Defender's Office, with the support of the NSW Aboriginal Land Council and the Australian Museum.

The Steering Committee members are Aden Ridgeway, Delia Lowe, Denis Maher, Phil Gordon, Kevin Cook, Andrew Chalk, Sue Salmon, Petria Wallace and Jackie Wurm.

Put the dates in your diary now and contact Jackie Wurm at the EDO on 261 3599 to receive a registration brochure.

Members of the National Environmental Law Association (NSW Division) will no longer automatically receive copies of IMPACT. If you wish to ensure that you keep receiving IMPACT, complete the enclosed subscription form.

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