# IMPACT

No 31 SEPTEMBER 1993

NEWSLETTER ON PUBLIC INTEREST ENVIRONMENTAL LAW



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Cite as
(1993) 31 Impact
ISSN 1030-3847


# Legal Aid Cuts – The effect on public interest environmental law


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## The History of Legal Aid

To understand the effect of legal aid cuts on public interest environmental law in New South Wales, it is necessary to briefly consider the history of the provision of legal aid for environmental cases.

It was about the same time as introduction of the *Legal Aid Commission Act 1979*, that Parliament introduced the *Environmental Planning & Assessment Act* 1979 (EP & A Act). For the time and in some respects even now, the EP & A Act is one of the most significant pieces of environmental legislation in Australia.

One of its three objects is the promotion of public involvement in environmental decision-making. Consistent with that object, the Act provides for open standing for any person to bring proceedings to remedy or restrain a breach of the Act.

In the second reading speech on the Legal Services Commission Bill 1979 Minister Landa, referring to Clause 35, said:

> The Bill makes specific provision for the Commission's power to grant legal aid and to relax any stated means tests in environmental litigation....

The relevance of this history is that in 1979 - over a decade ago - there was a very clear understanding that specific provision needed to be made for legal aid in public interest environmental cases. It was recognised as an essential part of the package of the public's rights contained in the new environmental legislation.

Legal aid made enforcement of the legislation a reality. The public could exercise their rights.

## Positive Effects of Legal Aid

Over the years the provision of environmental legal aid has enabled the public to express and attempt to define the public interest, and the Courts have developed public interest environmental law principles.

Citizen actions have played a key role in the cultural change that has occurred in the decision-making of many environmental agencies. It is now taken for granted that most government agencies have to consider the environment and public submissions when making their decisions.

This would not have occurred without citizen actions. For example, the Forestry Commission has been slowly educated about the need for environmental impact statements and the contents of those statements.

The Department of Mineral Resources must now require miners to consider the environmental impact of their activities.

Some may argue that this change would have happened in any event. However, in many cases, it is only litigation or its threat, that provides the important trigger and focus on an environmental issue, for change to occur. That is not to say that litigation isn't seen as a last resort.

## Ensuring Accountability for the Public's Money

The process for obtaining a grant of legal aid sought to ensure accountability for the public's money.

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The Commission provided an open system of grants for which any practitioner could apply. Applications were scrutinised by an independent advisory committee of experts. The committee weighed up applications for aid against strict public interest environmental law guidelines.

Consideration by the committee ensured that only cases with important legal and environmental issues were funded.

The cases usually had strong prospects of success, because clear breaches of the law could be established. The committee didn't have much time for public interest "test" cases which, due to their test case nature, did not have good prospects of success.

A usual condition of a grant of aid was to provide an indemnity to the client that in the event of the case being unsuccessful, the Commission would indemnify the legally aided client and pay the costs of the winning party up to $12,500. This was irrespective of whether the client received a full or lump sum grant. That indemnity was crucial to the applicant's ability and willingness to undertake the proceedings.

There was also usually a requirement that the applicant make some monetary contribution to the costs of the proceedings. The contribution was determined having regard to the means of the applicant, and was important in showing the good faith of the applicant.

## How the system worked in practice

To illustrate the types of cases that were funded through this process, reference is made to the cases that were funded during 1991 - 1992 and conducted by the EDO. This is not to overlook the conduct of many landmark environmental cases by other legal offices.

For the most part, the cases conducted have been administrative law actions reviewing environmental decision-making processes.

The cases included *Vaughan-Taylor v David Mitchell-Melcann Pty Ltd*[1], which concerned a mining company mining without a mining lease in an area listed on the national estate. *Malcolm v Newcastle City Council*[2] related to construction of a major waste management facility near Newcastle. *Irongates Developments Pty Ltd v T.R.E.E.S*[3] involved the attempted clearing of rainforest for residential development. Public advertisement requirements were considered in *Canterbury Residents and Ratepayers Association v Canterbury City Council*[4].

The cases had significant public interest aspects. For example, the mining case was a test case for the application of the environmental impact assessment requirements of the EP & A Act to mining operations. The case made it clear that mining operations were subject to the state's environmental planning laws. The decision prompted a thorough review of mining and quarrying operations in NSW and a State Environmental Planning Policy has been developed as a result of the case to facilitate environmental assessment.

The case concerning the waste management facility determined that the Council had to prepare an environmental impact statement prior to proceeding with its decision on the development application. There was little doubting that the public interest required more detailed consideration of potential environmental impacts.

## Cost to the Commission

In all, during 1991-192, the office acted for nine legally aided clients, winning all nine cases with orders for costs in eight, the ninth case was successfully mediated.

During that year the Commission paid out $203,098.60 for environmental law matters. Presently, because of the costs orders obtained, approximately $270,000.00 is being recovered from the other parties. That figure will no doubt be reduced on taxation or settlement, but the fact remains that the Commission is likely to recover more than it has spent on environmental matters.

## The Decision to Abolish Legal Aid

As reported in our December issue of *Impact*, the decision to abolish aid was taken on 17 December 1992.

It came without warning and without explanation. As proceedings of Commission meetings are kept private, nothing is known about whether the Commission had information about the effect of the abolition of aid. If it had information it certainly did not give persons likely to be affected by its abolition the right to be heard on the issue.

It is ironic that in a system attempting to assist the public in obtaining justice, the public is denied natural justice.[5]

## The Future

Our first hand experiences make it clear that without legal aid many parties cannot afford to exercise their rights.

In spite of increasing inquiries and requests for representation, our case load is reducing because clients cannot afford to go to court. We are not funded to conduct major litigation and out of pocket expenses in such cases can be significant.

By way of example, the applicant in *Malcolm v Newcastle City Council* received legal aid in 1991 and was successful in requiring the Council to prepare an environmental impact statement for the proposed waste management landfill facility. After the EIS was prepared and the Council made its decision to approve the development, there were still concerns about issues raised in the EIS. The group were unable to exercise their rights to a merits appeal on those issues because there was no legal aid.

Even if groups do decide to stake it all and commence proceedings they are much more exposed to procedural antics intended at all costs to avoid a determination of the substantive issues. In particular, parties usually have to be able to stave off a security for costs application, because they no longer have the protection of an indemnity. Several of these applications have already been made this year.

Public interest litigants are vulnerable to these tactics in what are usually David and Goliath battles, big companies against small groups.

Public interest environmental issues inevitably involve controversy, often because of the significant differences in

values of the players - bureaucratic government agencies, profit seeking developers, and ecocentric conservationists.

However, there is no justification in seeking to avoid this controversy by denying funds, and therefore the exercise of bona fide rights. The weakening of the voices of some of the players in environmental debate will impoverish, if not avoid the opportunity for any debate at all. Such avoidance will not resolve the issues.

The decision to abolish legal aid repudiates the participatory ethos which was established and developed since 1979 through the *Legal Aid Commission Act* 1979 and the *Environmental Planning and Assessment Act* 1979.

It means that, New South Wales, in spite of some progressive environmental legislation, will be no different to other Australian states, like Queensland better known for its history of environmental vandalism. (Need we forget the ghost bats at Mt Etna?) [6] Having practised in Queensland at a time when there was no legal aid in environmental cases, it is clear the situation will be no different in New South Wales. There will be minimal public interest environmental law apart from some pro bono efforts by lawyers and experts. Although public interest environmental litigation should always be a matter of last resort, the possibility of third party legal action performs a useful watchdog function. The possibility of review of decisions is usually strong motivation for ensuring proper performance of functions.

The loss of public interest environmental litigation is particularly regressive when the pace of change in environmental law is ever increasing. Environmental law debate needs to be balanced by resourced, participatory communities, otherwise predominantly commercial interests will prevail. The loss of legal aid perpetuates the lack of recognition that exists in Australia of public interest environmental law, and its part in public law generally.

No doubt it suits many that there is such minimal recognition of this area of the law. However, that view is very short-sighted. Whatever the difficulties in weighing up competing public interests, it is no solution to deny access to forums that have experience in, and can effectively consider the public interest.

* This is an edited version of a speech delivered at the opening session of the *Public Interest Law Conference* held at Sydney University from 27 to 29 August, 1993.

## Notes

[1] (1991) 73 LGRA 366.

[2] (1991) 73 LGRA 356.

[3] unreported, Court of Appeal,

[4] (1991) 73 LGRA 317.

[5] for further discussion of the decision to abolish legal aid see Johnson, J. (1993) "Legal Aid Axed" 28 *Impact* 1.

[6]. See Comino, M. (1989) "Batting for non-pecuniary interests", *Impact*, June 1989.

### Stop Press

The Legal Aid Commission has announced that legal aid for most civil matters will be restored from 1 November 1993. Legal aid for environmental matters has not been restored..

Write to Colin Neave, Managing Director of the Legal Aid Commission (DX 5 or 11-23 Rawson Pl, Sydney) asking why environmental legal aid was not restored and asking when it will be restored.

# *Finality and Certainty of Development Consent Conditions*

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## Introduction

Section 91(1) of the Environmental Planning and Assessment Act 1979 (NSW) permits conditions to be applied to a development consent. However, the power of the consent authority to impose conditions is not unlimited.

A condition must be imposed for a planning purpose. In addition, it must fairly and reasonably relate to the development or use for which the consent is granted. Other requirements of a valid condition are that it not be reasonable, uncertain or lacking finality[1]. It is the last two of these requirements which will be examined in detail in this article.

The other issue to be addressed in this paper is the question of when an invalid condition can be severed from a development consent. An examination of severance is crucial to an understanding of the consequences of challenging a condition for uncertainty or lack of finality.

## The Environmental Planning and Assessment Act 1979

Section 91 (1) of the Environmental Planning and Assessment Act 1979 provides that :

> "A development application shall be determined by -
> (a)the granting of consent to that application, either
> unconditionally or subject to conditions; or
> (b)the refusing of consent to that application"

The types of conditions which may be annexed to an approval are set out in ss.91(3), 91(3A) and 94.[2] Clearly the granting of consent under s.91(1) of the Environmental Planning and Assessment Act is intended "to exhaust the issues raised by the development application"[3]. Stein J said in *Randwick MC v Pacific-Seven*:

> "Section 91(1) specifies that a development application shall be "determined" by the granting of consent either conditionally or unconditionally, or be refused. Notice of such a determination must be given under s.92. Appeal rights are granted to applicants under s.97... The whole tenor of Pt V imparts the notion of finality of the determination by the consent authority"[4].

The Environmental Planning and Assessment Act, however, goes no further in prescribing when conditions attached to development consents will be sufficiently final or certain. Nor does the statute give guidance on when an invalid condition can be severed from the consent. An examination of the relevant case law is therefore necessary.

## The Requirement of Finality

The New South Wales Court of Appeal has recently had cause to examine this area of planning law and has conveniently outlined two tests to determine when a condition lacks finality. Arguably a single test (ie., endorsed by three members of the bench) would have been simpler to apply, but fortunately by Priestly JA and Clarke JA lead one to much the same conclusion.[5]

In *Mison v. Randwick MC* (1991) 23 NSWLR 734, LGRA 349 the Council granted development consent for a proposed two storey home and garage subject to a condition that the "overall heigh of the dwelling-house being reduced to the satisfaction of the Council's Chief Town Planner".

Priestly JA (with whom Clark JA and Meagher JA agreed) said (at 738, 351):

> "If the effect of an imposed condition is to leave open the *possibility* [original emphasis] that development carried out in accordance with the consent and the condition will be significantly different from the development for which the application was made, then again, it seems to met that the Council has not granted consent to the application made."

Clarke J.A. (with whom Meagher JA agreed) expressed the test of finality in these terms (at 740; 354)

> "Where a consent leaves for later decision an important aspect of the development and the decision on that aspect could alter the proposed development in a fundamental respect it is difficult to see how the consent could be regarded as final."

These two tests were recently affirmed by the Court of Appeal in *Scott v Wollongong C.C.*[6] Sammuels AP (with whom Meagher JA and Handley JA agreed) said "[i]n my respectful opinion the principle [of finality] is correctly stated in *Mison* by Priestly JA...and by Clarke JA"[7] Samuels AP expressed the view that the two tests "convey much the same conclusion; perhaps that of Priestly JA submits a conditional consent to more rigorous scrutiny"[8].

To apply the tests outlined in *Mison* one must, therefore, determine whether the condition attached to the consent could alter the development in "a fundamental respect". The next question to ask is whether the development could be "significantly different" from that which the application for consent contemplated.[9] In *Scott v Wollongong CC* Sammuels AP answered both of these questions in the negative and held that the condition being challenged was valid[10]

## The Policy Behind the Finality Requirement

The principle of finality was developed because development consents may directly and indirectly affect "the rights and interests of a potentially wide range of parties"[11] A condition in a consent "binds not only the consent holder but all persons who later acquire benefit thereof"[12]

Sammuels AP in *Scott v Wollongong CC* described the basis for the finality principle in this way:

> "The principle of finality is intended to protect both the developer and those in the neighbourhood who may be affected by the proposal, against the consent authority's reservation of power to alter the character of the development in some significant respect, thereby changing the expectations settled by the consent already granted. That consent may, of course, be subject to conditions, and those conditions are subject to the principle."[13]

Stein J in *Randwick Municipal Council v Pacific-Seven Pty Ltd* outlined the policy reasons for the principle in the following way:

> "The granting of a development consent is intended to have an element of finality, subject to appeal rights and modification under s.102. A consent authority is not able to reserve itself the right to impose further conditions at a later point of time. Such a purported condition is contrary to the scheme of the Act and avoids its appeal provisions."[14]

These policy objectives are undoubtably important and desirable. Were it not for the finality principle consent authorities would be free to impose further conditions after they had purportedly consented to the development application. In addition, councils could reserve rights to re-assess the consent or some aspect of it at a later date. (See for example *Randwick M.C. v Pacific-Seven Pty Ltd*[15].) The principle assists not only those developing land, but also others affected by the development consent.

However, the finality does not mean that every minute detail must be determined at the time that consent has been granted. The principle itself has been necessarily restricted by the courts. These restrictions will be explored in greater detail below.

## When will Consent Conditions be Void for Lack of Finality?

Although *Mison v Randwick MC*[16] and *Scott v Wollongong CC*[17] have recently clarified the tests to apply when determining whether a consent condition is void for lack of finality,[18] it is necessary to consider other cases on finality of consents to examine in what circumstances a condition will be held to be void.

It appears that the cases can be separated broadly into two situations (although they overlap somewhat). The first is where a condition is held to be void because the consent authority reserves the right to itself to make a future or further assessment. The second is where the condition is held to be void where the consent authority has abrogated its responsibility by postponing or delegating the task of determination of an essential matter.

To be valid, a development consent condition must be final in the disposition of the application.

In *Unley City Council v Claude Neon Ltd*[19] Wells J when addressing a similar provision to the NSW legislation stated that:

> "...it is essential to bear in mind that the granting of a consent is an act in law that is final in the deposition of the application: the consent must be either refused, or granted unconditionally, or granted subject to conditions. A condition which imparts to a consent a quality in virtue of which it ceases to be final is not one, in my judgement, that falls within the structure of the Act."

Wells J held in that case that an approval granted subject to a condition that no signs be erected or displayed without prior consent of the council:

> "...lacks finality, it is wanting in particular; it does not define or limit in any way the acts of land use that are permitted. It, in effect, purports to reserve the right to pronounce on these matters when the questions of erecting a sign is later raised"[20]

In *Unley v. Claude-Neon* [21] the condition was held to be void and severable.

White J in *The Queen v. District Council of Berri* [22] held that a condition imposing a time limit for substantial commencement was final. A council resolution purporting to extend the time limit was null and void as the developer had not lodged a fresh development application. White J said "[t]he conditions agreed upon and fixed finally ought to be compiled with once fixed. They should not be lightly departed from."[23]

In *Unley*[24] the council had attempted to reserve its rights for the future. In *Berri*[25] the council had attempted to re-assess the situation at a date after conditional consent had been granted. In both cases the actions of the council were ultra vires.

In *King v. Great Lakes Shire Council*[26] Cripps CJ held that to grant consent to a development still under discussion and to have left for future consideration determinations that affected environmental impact meant that the council in effect adjourned consideration of that aspect of the proposal by means of a condition. The council had abrogated its responsibility by postponing determination of an essential matter should have been settled at the time consent was granted. The consent was declared to be void.

Similarly in *Lend Lease Management v. Sydney City Council*[27], Cripps CJ held that a development consent was void as it deferred an essential topic of consideration for future determination by the city planner (i.e. the floor space ratio) and was subject to unspecified "standard conditions".

The conditions which allowed the planner to alter the floor space ratio at a later date could "significantly alter the development in respect of which consent was granted"[28] Cripps J also held that a "consent with conditions attached that may operate to significantly change the development, the subject of the consent is, in my view, no consent in law."[29]

In *Randwick MC. v. Pacific-Seven*[30] Stein J explained the validity of a development consent for a 24 hour convenience food store with self service petrol facilities which included a condition that "the council reserves the right to restrict the hours of operation should cause nuisance occur". His Honour held that the condition was void for lack of finality on the basis that a consent authority is not able to reserve itself the right to impose further conditions at a later point of time.[31]

Hemmings J in *Jungar Holdings v Eurobodalla SC* held that a condition reserving council's right to restrict the operating hours in the future if complaints were received about a by-product plant lacked finality.[32]

In *Mison v Randwick MC*[33] the New South Wales Court of Appeal held that a condition which allowed the overall height of a house to be reduced to the satisfaction of the Chief Town Planner was void for lack of finality. The council had deferred an essential topic of consideration for future determination. Applying the test outlined above, Priestly JA concluded that the condition was not sufficiently final as it was capable of significantly altering the development. Clarke JA concluded that the development could have been altered in a fundamental respect by the condition. The consent was consequently held to be valid.

In *Malcolm v Newcastle City Council*[34] Stein J examined conditions of a consent where the council had approved its own development application for a waste management facility. The consent was subject to several conditions which were held to defer essential topics of environmental consideration to later determination by a committee. Stein J held that the condition left open for later decision "fundamental, important and significant aspects of the development such that it may be concluded that the consent was not final"[35].

Finally, *Scott v Wollongong CC*[36] the New South Wales Court of Appeal had to determine whether a condition attached to a consent to build a five storey motel was sufficiently final.[37]

Applying the tests outlined in *Mison*[38], Sammuels JA (with

whom the other members of the court agreed) held that the condition was not capable of altering the development in a "fundamental respect", nor would the development be "significantly different" from that which the application for consent contemplated. The court regarded the conditions as "ancillary" to the core of the application.

In summary, it is apparent from these cases that a consent is likely to be held void where the council attaches conditions either which defer consideration of an essential matter to a later date, delegate the responsibility of crucial matters to some other person, officer or body, or reserve the council's right to re-assess the condition or the consent at some point in the future.

## Limits on the Finality Principle

It should briefly be noted that there are limits to the principle that conditions attached to development consents must be final.

In *Weigall Constructions v Melbourne & Metropolitan Board of Works*[39] Pape J called for a flexible approach in construing consent conditions. He agreed with Richmond J's comments in *Turner v. Allison*[40] that there is no requirement for the planning authority to settle every last detail of the conditions which it sought to impose.

These remarks were supported by the New South Wales Court of Appeal in *Scott v. Wollongong CC*[41]. In that case Samuels AP (with whom the other members of the court agreed) said ..."in my view the attachment of conditions of this kind, which leave final details to be settled, should be approached with the degree of flexibility indicated, for example, by Pape J in *Weigall Constructions* ..."[42].

Samuels AP also said:

> "...it is common to find that a development consent is subject to conditions which provide for some aspects of the matter stipulated to be left for later and final decision by the consent authority or by some delegate or officer to whose satisfaction, for example, specified work is to be performed. Such provisions are inevitable since it cannot be supposed that a development application can contain ultimate detail or that a consent can finally resolve all aspects of the proposal with absolute precision."[43]

Clearly some matters can be delegated or deferred for later consideration, but these matters cannot be crucial conditions that would significantly or fundamentally alter the development.[44] Although the minutiae of a development proposal does not need to be before the decision-maker at the time of determination, conditions cannot leave open for later decision "fundamental, important and significant aspects of the development...".[45]

## When will a Condition of Consent be Void for Uncertainty?

The starting point when determining whether a condition annexed to a development consent will be void for uncertainty is *Fawcett Properties Ltd v. Buckingham County Council*[46]. In *Fawcett*[47], Lord Denning (in the majority) said:

> "For I am of the opinion that a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them."[48].

Lord Denning's test was applied by the Court of Appeal in *Hall and Co v. Shoreham-By-Sea Urban District Council*.[49] There the plaintiffs claimed that conditions attached to a planning permission which required them to construct an ancillary road were void for uncertainty and were ultra vires.[50]

Willmer L.J. said:

> "Conditions imposed by a local authority, like by-laws, should be benevolently construed ... The duty of the court, as I see it, is to give a meaning to the words used, if that is at all possible ...
>
> ... where uncertainty is alleged, the true question, as it seems to me, is whether the language of the condition makes sense, that is, is capable of reasonable construction. This is in accordance with the view expressed by Lord Denning in *Fawcett Properties* ..."[51]

In the same case Pearson LJ said:

> "Mere ambiguity would not render a condition void, because it is the duty of the court to resolve any ambiguity if it can be resolved. On the other hand, if the wording of a condition is so vague that no precise meaning can be attributed to it, such a condition is void for uncertainty."[52]

Although the High Court of Australia had earlier expressed doubts about whether uncertainty was a separate head of invalidity (see *King Gee Clothing Pty Ltd v. Commonwealth*[53]), it appears from Kitto J's judgment in *Television Corporation Limited v. Commonwealth*[54] that the approach in *Fawcett Properties*[55] has been followed. In the *Television Corporation*[56] case, Kitto J held that proposed conditions of a television licence were invalid in that they were too uncertain[57]. He expressly considered and applied the judgments delivered in *Fawcett Properties*[58].

Although the other judges in the majority in the *Television Corporation*[59] case find the conditions are invalid because they are inconsistent with the relevant legislation, they briefly address the issue of uncertainty and conclude:

> "... [t]he conditions ... are expressed in extremely wide and uncertain language and this circumstance was seized upon to found an argument that they were invalid. There may be much to be said for this proposition but we find it unnecessary to consider it ..."[60]

Lord Denning's test of uncertainty[61] was followed by the Victorian Supreme Court in *Weigall Constructions v. Melbourne & Metropolitan Board of Works*[62]. There the

plaintiffs alleged that a condition requiring them to provide water and sewerage to land they intended to subdivide was unreasonable, uncertain, ambiguous and ultra vires. After citing the test formulated by Lord Denning, Pape J said:

> "I am content to take the passage from Lord Denning's speech as laying down the tests which should guide me in determining whether this condition is void for the uncertainty. They were adopted and applied by the Court of Appeal in *Hall & Co Ltd v. Shoreham-by-Sea Urban District Council* ..."[63]

Pape J then concluded that the condition under challenge was not uncertain.[64]

Unfortunately, the New South Wales courts have not so readily adopted the test of uncertainty in *Fawcett Properties*[65].

Priestley JA in *Mison v. Randwick MC*[66] agreed with Bignold J's conclusion at first instance that "a consent must be final and certain" in order to be a valid consent. Priestley JA then set out his test for finality of a consent condition and concluded that the consent is not certain or final without specifically exploring the authority on the principle of uncertainty.[67]

Clarke JA in the same case began his judgment by saying "...[t]he principle that a valid consent must be final and certain is established and was accepted by the parties."[68] He, however, preferred to rest his decision on the lack of finality in the consent, despite concluding "... I agree generally with what Priestley JA has said on the other ground ..."[69]

As the principle of uncertainty was not outlined or clarified by any of the judges in the case, it is unfortunate that Priestley JA concluded that the condition lacked certainty[70]. At no stage did any of the judges outline how the condition in question was uncertain. If one were to apply Lord Denning's test to the facts in *Mison*[71] it is obvious that the condition cannot be said to lack any sensible or ascertainable meaning. On the contrary, the meaning of the condition was patently clear. The Council was attempting to delegate to its planner the power to make a future decision about the height of the dwelling.

In *Malcolm v. Newcastle CC*[72] Stein J continued down the path taken in Mison. When summarising the applicant's case, Stein J said "... [p]ut another way, the decision granting the consent is void for uncertainty because of it's lack of finality."[73] Clearly a condition is not uncertain because it lacks finality. It is uncertain if it can be given no sensible or ascertainable meaning.[74] Stein J then followed the tests set out by Priestley JA and Clarke JA in *Mison* (tests of finality) and concluded that the condition lacked finality without further addressing whether the condition also lacked certainty.[75]

The issue of certainty of a consent condition came before the New South Wales Court of Appeal again in *Scott v. Wollongong CC*[76]. There, Samuels AP, with whom the other members of the court agreed, complained that senior counsel for the appellants had not been clear about whether he was challenging the condition for lack of linguistic uncertainty" ... or that the proviso rendered the operation of the condition uncertain, in the sense that it lacked 'finality'"[77]. The case was ultimately argued only on the issue of finality and Samuels AP noted that the suggestion that the condition was "... void for uncertainty or linguistic ambiguity was not pursued."[78]

Finally, the issue of certainty of consent conditions was raised in the Land and Environment Court in *Cooper & Wilton v. Maitland City Council*[79]. There the applicants were seeking a declaration that a development consent for a waste disposal depot was void. They claimed that the consent and some conditions annexed to it were void for uncertainty or lack of finality. Again the issue of uncertainty was raised when the facts of the case involved only a potential lack of finality[80]. There was no question that the conditions under challenge could not be given a sensible or ascertainable meaning. Stein J applied the tests outlined in *Mison* and concluded that there was no lack of certainty or finality.

In my respectful opinion, the New South Wales courts (with the exception of Stein J in *Pacific-Seven*)[81] have displayed a failure to appreciate the concept of uncertainty of consent conditions. The test was outlined by Lord Denning in *Fawcett Properties*[82]. It was followed by the Court of Appeal in England in *Hall & Co Ltd v. Shoreham-By-Sea Urban District Council*[83] and by the Victorian Supreme Court in *Weigall Constructions v. Melbourne & Metropolitan Board of Works*[84]. In New South Wales the term "uncertainty" is used interchangeably or synonymously with finality. The cases demonstrate that the judiciary is confused about the meaning and extent of the concept of uncertainty.

In my view the Court of Appeal should endeavour to clarify this area of the law. The test outlined by Lord Denning in *Fawcett Properties* should be adopted. Only those conditions which can be given no sensible or ascertainable meaning should be void for uncertainty.

## Severance

When a consent condition is held by a court to be void (ie., because it lacks finality or is uncertain), the development consent as a whole will either stand or fall with the void condition. The courts have adopted two approaches to decide this issue.

The first approach is to examine whether there is

> "... a possibility that development carried out in accordance with the consent and the condition will be significantly different from the development for which the appreciation was made ... [and if so] ... then council has not granted consent to the application."[85]

When this approach is followed, no issue of severance arises as the whole consent is seen to be void. Council, it seems, has failed to grant consent to the application in question.

This approach was taken by Cripps J in *King v. Great Lakes Shire Council*[86]. In that case, His Honour held that the development application was "not assessed according to law"[87] as the council left for future consideration a determination which was critical to the environmental impact of the proposal. Consequently the development consent granted to the proposed project by the council was

void.[88]

Cripps CJ took a similar approach in *Lend Lease Management v. Sydney CC*[89]. There His Honour held that:

"... a consent with conditions attached which may operate to significantly change the development, the subject of the consent is, in my opinion, no consent in law. In my opinion, no question of severability arises."[90]

Hemmings J in *Jungar Holdings v. Eurobodalla SC*[91] examined the validity of conditions that allowed the council to defer to the future considerations of experts. His Honour held that "... [a] development consent subject to the above conditions, in my opinion, is not the granting of a consent at all."[92] Again, the issue of severance was regarded as irrelevant as there was, in law, no consent from which to sever the offending condition.

A similar approach was taken by Priestley JA and Clarke JA in *Mison v. Randwick MC*[93], and by Stein J in *Malcolm v. Newcastle CC*[94].

The second, and more established, approach is to accept that approval was legitimately given by the consent authority. When a condition of that consent is held to be invalid the whole consent also will fall unless the condition is severable because it is trivial or unimportant.

The starting point here is the English case of *Hall v. Shoreham-By-Sea Urban District Council*[95]. In that case Willmer J said it would be difficult to justify the failure of an entire development consent if only a few trivial conditions were held to be void. Where, however, the conditions objected to are fundamental to the whole of the planning permission then the whole consent must fail.[96] Pearson J in the same case said that there "might be ... cases in which severance would be possible if the invalid conditions were trivial or at least unimportant."[97]

The leading case on the severance of consent conditions is *Kent County Council v. Kingsway Investments (Kent) Ltd*[98]. In that case the House of Lords concluded that severance of an invalid conclusion was permissible if the condition was trivial, unimportant or incidental[99].

Lord Morris said:

> "There might be cases where permission is granted and where some conditions, perhaps unimportant or perhaps incidental, are merely super-imposed. In such cases if the conditions are held to be void the permission might be held to endure just as a tree might survive with one or two of its branches pruned or lopped off. It will be otherwise if some condition is seen to be part, so to speak, of the structure of the permission so that if the condition is hewn away the permission falls away with it."[100]

The Kingsway Investments case was referred to and Lord Morris' test repeated in the New South Wales Supreme Court in *Parramatta City Council v. Kriticos*[101].

Similarly in *Greek Australian Finance v. Sydney City Council*[102] Holland J held, applying Lord Morris' test in the Kingsway case, that "... the condition was part of the structure of the permission."[103] It was therefore inseverable.

In *Coulson v. Shoalhaven SC*[104] Helsham J noted that

> "the Court of Appeal in New South Wales in *Parramatta City Council v. Kriticos* seems to have set the seal of approval upon a severance test such as that adopted in *Kingsway Investments* ..."[105]

In *Coulson* it was held that the condition in question was not severable from the approval.

In *Weigall Constructions v. Melbourne & Metropolitan Board of Works*[106] Pape J applied the principles enunciated in *Kingsway* and concluded that the condition being challenged was not severable from the planning permit as a whole.

Finally, the issue of severance was examined, and in my respectful opinion somewhat confused, by Stein J in *Randwick MC v. Pacific-Seven Pty Ltd*[107]. His Honour stated:

> "The issue of whether the invalid condition can be severed is not, in my view, as clear cut as the issue of invalidity of the condition. This is partly because it is difficult (at least for me) to seize upon the 'true test' of severability in *Kingsway Investments*."[108]

Stein J then reviewed the decisions and 'tests' expanded in Kingsway, and examined the Australian case law on the point (ie. *Kriticos*[109], *Greek Australian Finance*[110] and *Coulson*[111]). His Honour then concluded by stating:

> "In my opinion the issue of the operation of the development and whether they should be restricted was fundamental and went to the very root of the consent. The issue cannot be seen as unimportant or incidental. Applying the tree analogy of Lord Morris, it is not a question of losing a branch. Rather the issue goes to the structure of the consent which must fall with it. The issue of hours froms an integral part of the approval ..."[112]

Despite earlier uncertainty, Stein J appears to have embraced the test of severability with precision. Void conditions can only be severed if they are not fundamental but are trivial or unimportant.[113]

It is clear that planning consents rarely stand when a condition of a consent is held to be invalid. Few conditions are so trivial or unimportant that they can be severed without affecting the structure of the consent as a whole.

In my view, it is unsatisfactory to have two distinct approaches to determine the validity of a consent. I prefer the second approach because applying the *Kingsway* test of severance is less cumbersome than attempting to decide whether there has, in law, been a failure to consent to the development application as a whole. As the consent authority has purported to consent to the application, the issue should be one of severance rather than the approval not being a "true approval". Although the two approaches are likely to lead one to the same conclusion, the second is preferable and should be followed.

## Conclusion

The New South Wales Court of Appeal has recently clarified the principle of finality in relation to development consent conditions. The tests outlined by Priestly JA and Clarke JA in *Mison v. Randwick MC*[114] are relatively clear and simple to apply to any given fact situation.

However, the area of invalidity of a consent condition due to uncertainty is most unsatisfactory at present in New South Wales and should be clarified at the next opportunity. The test of uncertainty outlined by Lord Denning in *Fawcett Properties*[115] should be followed and the New South Wales judiciary should, in my respectful opinion, refrain from using the terms "finality" and "uncertainty" interchangeably. They are separate and distinct from legal concepts[116].

Fortunately, the issue of validity of a development consent once a condition of the consent has been held to be invalid has not been so muddied in New South Wales. Despite the unsatisfactory position that the courts have taken by adopting two separate approaches to the problem, both approaches in reality lead one to a similar conclusion. In my view, the *Kingway Investment*[117], *Greek Australian Finance*[118] line of authority is preferable to the *King v. Great Lakes*[119], *Jungar Holdings*[120] and *Mison*[121] approach. In the end, however, little turns on which line of authority is adopted as few development consents are allowed to stand if a condition of consent is held to be invalid.[122]

## Notes

1. See Morris, S (1991) *Planning permit Conditions in Planning Law: conditinons and requirements of planning permits*, Leo Aussen Institute, Melbourne.
2. It should be noted that s.91 was amended in July 1993. Section 91(3a) which was inserted in the Act provides that:

> A consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction of the consent authority or to a person specified by the consent authority.

To date this section has not been judicially interpreted. However, as it is specifically limited to conditions which are "ancillary to the core purpose of the development" it appears to have little or no affect on decisions such as *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734; 73 LGRA 349.
3. see Stein J in *Randwick Municipal Council v Pacific-Seven Pty Ltd* (1989) 69 LGRA 13 at 16.
4. ibid.
5. see the remarks of Samuels AP in *Scott v Wollongong City Council* (1992) 75 LGRA 112.
6. (1992) 75 LGRA 112.
7. ibid at 118.
8. id.
9. ibid at 119.
10. id
11. see White J in *R v Berri District Council* (1982) 52 LGRA 137 at 139.
12. id.
13. (1992) 75 LGRA 112 at 118.
14. (1989) 69 LGRA 13 at 15
15. supra n.3.
16. (1991) 23 NSWLR 734; 73 LGRA 349.
17. supra n.6.
18. Despite the unecessary confusion caused by the creation of two tests instead of one.
19. (1983) 32 SASR 329 at 332; 49 LGRA 65 at 68.
20. id. Note also that Samuels AP's questioning of Wells J's conclusions in this case in *Scott v Wollongong*, supra n.6 at 117.
21. supra n.19.
22. (1984) 52 LGRA 137.
23. ibid at 142.
24. supra n.19.
25. supra n.22.
26. (1986) 58 LGRA 366.
27. (1988) 68 LGRA 61.
28. ibid at 85.
29. ibid at 86.
30. supra n.3.
31. ibid at 15.
32. (1989) 70 LGRA 79. In addition the Council had deferred to the expertise of others in many maters that it should have determined. As such, it had abrogated its responsibility. Hemmings J also held that the conditions had postponed determination of essential matters for the assessment of environmental impact and the consent was therefore void.
33. (1991) 23 NSWLR 734; 73 LGRA 349.
34. (1991) 73 LGRA 356.
35. ibid at 365.
36. supra n.5.
37. The condition in question stated "the applicant shall, at its cost, carry out the work in Belmore Basin and Osborne Park specified in the attached document entitled "Wollongong Foreshore Development" and in the attached plan entitled "Wollongong Harbour Precinct", subject to final determination by Council of that document and plan or relevant sections thereof."
38. supra n.32.
39. (1972) 30 LGRA 333 at 351-352.
40. Richmond J in *Turner v Allison* [1971] NLR 833 at 857.
41. supra n.5.
42. ibid at 119.
43. ibid at 118.
44. see the tests of Priestley JA and Clarke JA in *Mison v Randwick Municipal Council*, supra n.16.
45. Stein J in *Malcolm v Newcastle City Council* (1991) LGRA 356 at 365.
46. [1961] AC 636.
47. id.
48. ibid at 678.
49. [1964] 1 WLR 240.
50. ibid at 243.
51. ibid at 245.
52. ibid at 258.
53. (1945) 71 CLR 59.
54. (1963) 109 CLR 59.
55. *Fawcett Properties Limited v Buckingham County Council* [1961] AC 636.
56. supra n.54.
57. ibid at 70-73. He said (at 70) that "The Minister's power to impose conditions is to be understood as limited to the imposition of conditions that are reasonabbly certain ... Such certainty includes both certainty of expression and certainty in operation."
58. ibid at 73.
59. supra n.54.
60. ibid at 75.
61. see *Fawcett Properties Limited v Buckinham County Council* [1961] AC 636.
62. supra n.39.
63. ibid at 351.
64. ibid at 355.
65. [1961] AC 636.
66. supra n.16 at 352.
67. ibid at 352-353. Note that Bignold J did not define "uncerrtainty" in Mison v Randwick MC, Land and Environment Court, unreported, 29 August 1989.
68. ibid at 353.
69. ibid at 354.
70. see *Fawcett Properties* supra n.61.
71. supra n.16.

72. supra n.34.
73. ibid at 362.
74. see *Fawcett Properties* supra n.61.
75. This approach is particularly curious when two years earlier in *Randwick Municipal Council v Pacific-Seven Ltd* (1989) 67 LGRA 13 at 16 Stein J cited the *Fawcett Properties* decision and said:

> It is not a question of the condittion being given no meaning. The meaning is clear. It says - we reserve the right to restrict the bars operation later on if any nuisance occurs.

76. supra n.5.
77. ibid at 116.
78. ibid at 119.
79. unreported, Land and Environment Court (Stein J), 19 May 1992.
80. see *Fawcett Properties* supra n.60.
81. see n.75.
82. supra n.46.
83. supra n.49.
84. supra n.39.
85. Priestley JA in *Mison v Randwick Municipal Council*, supra n.15 at 351.
86. supra n.26.
87. ibid at 25.
88. id.
89. supra n.27.
90. ibid at 86.
91. supra n.32.
92. ibid at 89.
93. supra n.16.
94. supra n.34.
95. supra n.49.
96. ibid at 252.
97. ibid at 361.
98. [1971] AC 72.
99. Morris supra n.1.
100. supra n.98 at 102.
101. [1971] 1 NSWLR 140 at 144. The conditions in question were held not to be severable (although that conclusion was not strictly necessary as the conditions were held to be valid) as they related to matters fundamental to the development.
102. (1974) 29 LGRA 130.
103. ibid at 144.
104. (1974) 29 LGRA 166.
105. ibid at 173.
106. supra n.39.
107. (1989) 69 LGRA 13.
108. ibid at 16-17.
109. supra n.101.
110. supra n.102.
111. supra n.104.
112. supra n.107 at 19.
113. see Morris supra n.1 at 1.15.
114. supra n.16.
115. supra n.61.
116. see for example *Cooper & Wilton v Maitland City Council*, supra n.79. The term is erroneously being used in argument when it appears that often the true challenge is based on the lack of finality.
117. supra n.98.
118. supra n.102.
119. supra n.26.
120. supra n.32.
121. supra n.16.
122. Note that some conditions have been held to be severable. See for example *Unley City Council v Claude Neon Ltd* (1983) 32 SASR 329; 49 LGRA 65.

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# *ICRAF – Papua New Guinea's first environmental and human rights legal office*

The Individual and Community Rights Advocacy Forum Inc. is Papua New Guinea's first completely independent human rights and environmental defender. ICRAF is an office of lawyers and educators concerned with human rights, land rights, and the environment.

## Monitoring

ICRAF monitors human rights violations, attacks on the land rights of individuals, of communities, and on the environmental heritage of Papua New Guinea. Date collected by monitoring is used in ICRAF's awareness and legal services functions. ICRAF is networked in Papua New Guinea through its membership fo NANGO, the National Alliance of Non-Government Organisations, and overseas through its participation in PACTOK. Pegasus, the Association of Progessive Cummunicators, and the Environmental Law Network Data collected through monitoring is available to people and organisations who share ICRAF's objectives.

## Training and Awareness

ICRAF believes that if people understand their constitutional and legal rights they will be empowered to stand up for themselves. ICRAF's training, education, and awareness work is targeted at workers in other organisations: NGOs, churches, and other social groups who have established grass-roots links. ICRAF's constitutional rights (National Goals and Directive Principles, human rights bill), rights under the criminal law, statutes, and the Underlying Law; land rights under land law, forestry law, mining law, petroleum law, and fisheries law. The object of this training and awareness is to give individuals and landowners the ability to protect their own rights through the legal system.

## Legal Services

With its employment of lawyers, ICRAF offers a legal aid service to Papua New Guineans who cannot get legal services from the Public Solicitor, the Law Society's Legal Aid Scheme, or from private practitioners. ICRAF will offer advice and will litigate, in appropriate cases arising from human rights violations, land rights and environmental cases. Two types of work is done. The defence of the rights of particular individuals or communities; and public interest litigation. Wherever possible ICRAF will seek to co-operate and complement services offered by the Public Solicitor, the Law Society or Papua New Guinea's Legal Aid Scheme and private practitioners.

## ICRAF's History and Organisation

ICRAF is an initiative of the Melanesian Solidarity Group (MELSOL).

ICRAF is an incorporated association registered under the incorporated Associations Act. The overall management of ICRAF is vested in a Board by ICRAF's Constitution. The Board is made up of Papua New Guineans who have a commitment to human rights, the rule of law and the environment.

## The Board

*Chair*

Powes Parkop (MELSOL)

*Members*

Josepha Kanawi (Law Reform Commission)
Anne Kerepia (PNG Council of Churches)
Fr. Robert Lak (Catholic Priest)
Mary Soondrewu (East Sepik Council of Women)
Young Wadau (Lawyer)

*Non-Voting Member*

Brian Brunton (Director)

## Funding

ICRAF is funded by grants from organisations with similar objectives and goals as ICRAF. ICRAF chooses its partners because of their genuine co-operative ideals and will not enter into relationships which allow others to set the agenda.

At present ICRAF's major funders are Brot f r die Welt (Germany), and ICCO (Netherlands); generous assistance is acknowledged from CUSO (Canada), Community Aid Abroad (Australia), and Greenpeace (United States of America).

ICRAF is seeking to widen its funding sources within a framework of ICRAF's independence and mutually agreed goals.

## The ICRAF Desks

Operationally ICRAF's work is done by its desks. Each desk has a Desk Co-ordinator and a desk Committee. The Desk Co-ordinator is responsible for co-ordinating the desk's activities in conjunction with their Desk Committee. The Desk Committee is made up of interests associated with the desk activity. The Desk Committees are responsible for the formulation of Desk policy and action. The ICRAF Desks are:

Landowners's and Environment Desk

Women's Desk

Refugees and Indigenous People's Desk

Worker's Desk

Human Rights Desk

## Staff

There is a small secretariat.

· The Director, who is the senior lawyer, and responsible to the Board for day to day operations.

· A lawyer, responsible for legal services for Land Rights and the Environment.

· A Training and Awareness Officer, responsible for the preparation and delivery of ICRAF's training, education and awareness programs.

· An office manager, responsible for the accounts and routine office administration.

## Future Plans

In 1993 ICRAF established a small office in Gerehu, Port Moresby, Plans are underway to begin activities in mount Hagen, Kundiawa and Lae. The medium-term objective is to establish a "South Pacific Human Rights and Environmental law Training Centre" either in the Highlands or Momase Regions, close to the main centres of the bulk of Papua New Guinea's population.

*Brian Brunton*
*Director, ICRAF*

## Forestry litigation in East New Britain

ICRAF commenced its first forestry litigation on 20 August 1993. In Rafflin & Ors v. Kerawara Pty Ltd & Ors (National Court at Rabaul No.40 of 1993) ICRAF acted for leaseholders in East New Britain Province against forestry companies and arms of the government. The plaintiffs were lessees of land from the state. The lease from the government contained no reservation of timber rights from the lease. Subsequently the state granted timber permits over the land and the first defendant commenced logging operations on the land.

Proceedings were commenced by the leaseholders against Kerawara Pty Ltd (the logger), Richard Gault Industries Pty Ltd (the permit holder), the East New Britain Provincial Government, the Papua New Guinea Forest Authority and the Independent State of Papua New Guinea. The proceedings allege trespass and breaches of the Forestry Act. On 20 August 1993 the plaintiffs sought and were granted ex parte orders in the National Court at Rabaul. These orders required the seizure and sale of the logs taken from the plaintiffs land and the holding of the proceeds of the sale in trust by the Papua New Guinea Forest Authority.

During the following days all of the plaintiffs other than the first plaintiff, Rafflin, were "convinced" after being approached by representatives of the first defendant to sign documents intended to put an end to the proceedings.

Following discussions between ICRAF lawyers and the lawyers for the first two defendants the claim by the first plaintiff was settled for an undisclosed sum. Following this settlement the house of the first plaintiff was destroyed. Two persons known to be associated with the first defendant have been arrested in relation to this action. In addition a number of the other plaintiffs and additional leaseholders have indicated their desire to continue their claim against the defendants.

The case is continuing.

# EDO NEWS

## *New South Wales*

### Farewells

The EDO is saying farewell to two members of staff. Jackie Wurm our conference organiser is leaving after three years at the EDO to move to Darwin. During her time at the EDO Jackie established the EDOs conference program and organised major conferences including ECO 92 Public Forum and the recent People, Place, Law Conference. The EDO wishes Jackie well in Darwin.

Denise Farrier, who has been with the EDO since 1990 is also leaving. She is moving to the United States with her family for six months. Denise has been a valuable worker for the EDO being principally responsible for the operation and maintenance of the office's database.

### Inland Rivers Report Released

The Environmental Defender's Office has just released an Interim Report and Issues Paper as part of its Inland Rivers - Regulatory Strategies for Ecological Sustainable Management Project. This project is funded by the Law Foundation of New South Wales and is examining the regulatory framework for the management of inland rivers.

The Interim Report outlines the legal framework for management of inland rivers at a Commonwealth and state level. It examines and discusses the issues surrounding the use of economic instruments for environmental management and the trend towards the allocation of river water for environmental needs. Having examined the current framework the report discusses the parameters for a legal framework that would promote ecologically sustainable river management. The report considers the need for integrated catchment planning and proposes mechanisms to achieve this.

The Issues Paper outlines in simple form issues raised in the Interim Report.

### People Place Law Conference

The People Place Law Conference on Aboriginal Culture and Heritage and the Law was held at the Australian Museum from September 8-11 September. The conference which was presented by the EDO was an outstanding success and was attended by over 250 participants. It was also sponsored by the NSW Aboriginal Land Council and the Australian Museum.

The conference was an historic occasion whereby, for the first time, a forum and opportunity was provided allowing Aboriginal people to interact with members of conservation groups, mining, government and overseas representatives.

Aden Ridgeway, Conference Steering Committee member said that in his view the success of the conference will not be measured by the quality of the presentations nor by the range of recommendations or resolutions. It will be shown more by how people translate these into meaningful, positive and substantive actions causing shifts in thinking, attitudes and views of Aboriginal culture, peoples and society.

The conference included talks from a large range of thought-provoking speakers, well represented and productive workshops, Aboriginal dance and theatre as well a host of social activities.

Tapes and a summary report of the People Place and Law Conference are available from the EDO office.

### Forestry Commission fails in attempt to stop protesters

The New South Wales Forestry Commission failed in its recent attempt to prevent protests in the Bulga and Dingo State forests near Taree on the mid north coast of the State. The Commission followed the unusual path of seeking injunctions in the Equity Division of the Supreme Court to restrain people from protesting against logging of old growth forests.

The Forestry Act 1916 gives to the Forestry Commission of NSW the care, control and management of state forests. The Forestry Regulation 1983 gives the Commission power to close areas of state forest to the public. Persons entering or remaining in those areas commit an offence punishable by a fine of up to $500.

On 3 May 1993 the Commission "closed" approximately one hundred square kilometres of forest surrounding its logging operations in compartment 22 of Bulga State Forest.

On 3 June the Commission commenced proceedings seeking orders restraining Christopher Sheed and "unknown persons" from entering the closed area of the state forests, engaging in protest activities or encouraging others from engaging in protest activities. In addition the Commission sought an order restraining the defendant and unknown persons from "conspiring with others in any conduct for the purpose of preventing the [Commission] from performing its statutory duty."

The interlocutory application was heard on 7 and 8 June 1993. Mr Sheed gave undertakings without admissions that were accepted by the Court in relation to entering the closed and encouraging others to do so. The real question in the proceedings was then whether or not the Court would grant orders against "unknown persons" that were, in effect, enforcing by civil means the provisions of the Forestry Regulation.

In a judgment delivered on 9 June 1993 Justice Windeyer refused to grant an injunction saying

> there can, I think, hardly be a serious issue to be tried against a person who is not named, and as I said I do not think there is power to make the orders sought. It follows that the claim for

interlocutory relief against unknown persons is dismissed.

The proceedings against unknown persons were dismissed in there entirety.

Following Justice Windeyer's judgment the Commission applied to Justice Meagher to convene a panel of three judges of the Court of Appeal to consider an application for special leave to appeal from the decision of Justice Windeyer. This application was refused although the Commission was permitted to apply for leave to appeal when the Court of Appeal was next sitting.

On 15 June 1993 the Commission made an application for special leave to appeal against the decision of Justice Windeyer dismissing the claim for interlocutory relief.

During the course of the application for special leave Justice Handley said

> This is a process by which you are seeking to expand the criminal law, through the process of contempt, by judicial means against an unascertainable, in the sense of unidentifiable, class in way which is quite contrary to the use of judicial power.

Later he said

> If the Executive took a serious view of this matter, they can pass a new regulation very quickly and if they are not prepared to create an imprisonable offence, I really do not see why the courts should be asked to stretch, bend their rules in a way which I think is quite contrary to principle, making an order which operates as legislation.
>
> There is no named defendant, there is not even an identified defendant. Nobody has been served. What you are really trying to do is to get this court to make a regulation. That is what it amounts to; make a regulation under which these people can be put in gaol ...

The application for special leave was refused.

Prior to the application for special leave being argued the Commission, on 11 June 1993, commenced fresh proceedings against thirty two named defendants seeking substantially the same orders against those persons.

The interlocutory injunction application was heard on 16 and 17 June 1993. The Commission sought injunctions against 10 of the named defendants. The EDO acted for five of the named defendant's and the Public Interest Advocacy Centre acted for a further three. One of the defendants appeared for himself and one was not represented.

During the hearing it emerged that the Commission had identified the defendants by using subpoenaed police records. A number of the defendants were named as defendants simply because their cars had been seen by police in the area of the state forests and computer records had indicated that they were the owners. Other defendants had no knowledge of why they were named, having never even known about the area until informed of the summons seeking orders against them.

When it became apparent that the Commission had no evidence against four of the defendants the proceedings against them were dismissed with costs.

In relation to the remaining defendants the Commission continued to seek injunctive relief. Judgment was delivered on 18 June 1993.

In relation to four of the remaining defendants Justice Windeyer found that there was no serious question to be tried and even if there was a serious question to be tried the balance of convenience did not favour the granting of an injunction. In relation to two of the defendants although there was some evidence against them the discretionary decision whether or not to grant an injunction was resolved in their favour and no injunction granted.

None of the cases continued to a final hearing. Both cases were discontinued on the application of the Commission. Logging of the compartment in question was completed and the forest "opened" one month after the proceedings were commenced. It would be very difficult to have a final hearing prior to the completion of logging. Given that the Commission would have known how long its logging operations would continue and that it made no attempt to have the matter expedited we think that the Commission had no intention to proceed to a final hearing where it would have had an even more difficult task to prove its case.

The most important issue raised by the litigation is the attempt to use civil remedies to enforce the criminal law. In this the Commission's actions were a resounding failure. Courts of equity are obviously reluctant to grant equitable relief to enforce criminal laws. This is because such an approach effectively bypasses the protections given to defendants in criminal trials. In these cases, where the maximum penalty for breaches of the Forestry Regulation is $500 the effect would be to allow imprisonment for contempt of court where the parliament had determined that the maximum penalty should be a fine.

Although the Commission's actions were unsuccessful they are a disturbing precedent in that they are one of the few civil actions taken by government authorities to restrain public protest. Given the approach of the Commission to these cases and the scattergun approach to naming defendants the intent of the litigation appears to have been to stifle the free expression of those with political views opposed to those of the Commission.

The Forestry Commission expended large sums of money on bringing these proceedings for very little return. We can only hope that in the future the Commission finds more constructive uses for the public's money.

# EDO NEWS

## *Queensland*

### Davis Gelatine Factory Approved

In *Impact* in March this year the issues in *G.F.W. Gelatine International Limited v. Council of the Shire of Beaudesert and Ors* (Planning and Environment Court Appeal No. 242 of 1992) (''Davis Gelatine Case''), EDO Queensland's first Court case, were discussed.

On 19th May, 1993 at Brisbane His Honour Judge Quirk delivered a judgement approving the Davis application, conditions to be determined.

The judgment gives the go ahead for construction and operation of a gelatine factory on the banks of the Logan River, south of Brisbane.

It also raises concerns about the adequacy of existing planning laws to protect our waterways from incremental degradation.

To recap, Davis, the applicant, had applied to the Beaudesert Shire Council for planning consent to operate a gelatine factory on the banks of the Logan River, south of Brisbane. When the Council refused the application, Davis appealed to the Queensland Planning and Environment Court, which has power to make a fresh decision on the merits of the application.

Opposing Davis in the Appeal were the Council, several individuals and three community groups. The groups were the Logan and Albert Conservation Association Inc., the Logan Village Residents Association Inc. and the Woodhill and District Progress Association Inc., which were represented by the EDO Queensland.

A hotly contested issue in the case was whether Davis' proposal for dealing with the waste water would work. That proposal involved treatment of waste water, followed by export of water and nutrients from the site by crops specially grown for the purpose.

Barrister Noel Nunan retained by EDO Queensland on behalf of the community groups, submitted that in the assessment of environmental issues, the Planning and Environment Court should adopt the 'precautionary principle' and the principle of 'intergenerational equity'.

(The 'precautionary principle' is that ''Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation''. 'Intergenerational equity' is the concept that ''the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations''.) (*Intergovernmental Agreement on the Environment*, May 1992 pages 13 and 14)

In summary, the Judge decided that the factory would not be in direct conflict with the strategic plan, and accepted the evidence of Davis' experts that their plan for treating the effluent would work.

His Honour also placed faith in Davis to refine and observe a detailed environmental management plan to avoid any damage to the environment through the operations of its factory. That document set 'performance objectives' rather than 'performance standards'.

This faith in Davis was unshaken by questions that the barrister for the community groups raised about the circumstances in which Davis left its factory in Botany, New South Wales.

In his Judgment, presumably in indirect reference to the 'precautionary principle', and the 'principle of intergenerational equity' Judge Quirk wrote that ''this Court is not concerned with the appropriateness or otherwise of any such 'philosophies'. Appeals are to be dealt with on facts established by evidence and by reference to relevant matters of law.'' (*G.F.W. Gelatine International Limited v. Council of the Shire of Beaudesert and Others* P&E Appeal No.242 of 1992. Unreported, page 26).

These comments do not acknowledge that within the context of the *Local Government (Planning & Environment) Act* 1990, including its objectives, the Judge has a large amount of discretion in weighing various factors which are relevant to his or her determination.

In my opinion His Honour has taken a short sighted approach in approving the proposal, and decisions like this will mean the slow degradation of Queensland's precious water supply.

The *Local Government (Planning and Environment) Act* 1990 should be amended so that decision makers under the Act, whether Judge or Council, are expressly obliged to take into account the precautionary principle, the needs of future generations to use our resources, and the need to avoid irreversible damage to the environment at all costs.

This would restrict the large discretionary element local authorities and the Planning and Environment Court currently possess in making planning decisions in Queensland.

*Jo-Anne Bragg*
*Solicitor*

**Written on environmental law recently?**

The EDO needs your wisdom on environmental law for its library. If you have written essays, articles or books on environmental law please send a copy to the EDO for inclusion in the EDO library.

# EDO NEWS

## *Victoria*

Published below are extracts from EDO Victoria's newsletter.

It is just over 12 months since the Environment Defenders Office was forced by financial constraints to scale down to a two day per week operation. During this period the office has maintained its regular Wednesday afternoon volunteer-lawyer advice service where individuals or groups can receive free advice from private solicitors practising in the field of Environment and Planning Law.

### Helping the Public

Assistance provided to community groups by the EDO includes: the drafting of objections to planning permits, the preparation of appeal notices, assisting with Freedom of Information requests and providing access to non-legal expert advice on both urban and rural environmental matters, ranging from industrial pollution to ocean pollution, forest conservation and ground water contamination.

Because of the severe constraints imposed by the current part time operation of the office, issues of environmental policy or law reform have generally been beyond our capacity. Nevertheless, by adopting service to clients as our principal object, we hope to achieve a position of credibility from which to contribute forcefully on issues of law reform and environmental policy.

### Fighting Cases

In the last year the EDO for the first time provided representation in the Administrative Appeals Tribunal on behalf of a number of community groups fighting to defend the natural environment. One of these cases has led APM to fund a flora and fauna survey and publicly exhibit a logging plan for an area of privately owned land. This is the first time a logging company has agreed to such accountability in relation to its private land. The other three cases were unfortunately not so successful. However, both the Smythsdale Progress Association and the Carrum Residents Association have expressed their appreciation for the EDO's efforts by giving donations to help us to continue our work. Also, through the EDO's involvement with the Kerrup Jmara Elders Association in the Portland sandmining case, our office has been requested by Koorie elders to establish and Aboriginal Environmental Officers para-legal traineeship scheme, based at the EDO.

The EDO has received instructions from a number of organisations including the South Eastern Peninsula Residents Association, the Western Port Protection Council and the Surfrider Foundation concerning the proposed development of a major oil storage facility at Crib Point in Western Port Bay. The development was approved by the State Government without an Environment Effects Statement, and will result in the introduction of super tankers into Western Port Bay.

The Western Port marine environment includes significant fish breeding grounds, internationally protected wetlands and the Phillip Island penguin colony, which could all be lost in one oil spill. In granting the project planning approval, the State government has required only that there be an "oil spill response plan" to the satisfaction of the Port of Melbourne authority. Beyond that, it claims that any risk of marine pollution is an issue of international shipping and therefore comes within federal jurisdiction. The federal Minister for Environment, however, asserts that the opportunity for any Commonwealth action to require an environmental impact statement lapsed when the project gained federal approval via the Foreign Investment Review Board. The project as therefore been approved without either State or Federal governments requiring an environmental assessment. Because of this lamentable lack of environmental responsibility by governments, the case is being given high priority in our office. Our clients have called for the Federal Minister for Environment to direct a statutory public inquiry pursuant to her powers under the Environment Protection (Impact of Proposals) Act 1974. It will be too late to cry over spilt oil when the damage is done.

*Chris Lourham*

### Law Students at the EDO

Sixteen Melbourne University law students are studying cases being handled by the EDO and will write essays about them for assessment. Many of the students have become further involved as volunteers in varied capacities at the office.

Law of Planning and Environment is a new one semester optional subject being offered to undergraduate students in the Law Faculty at Melbourne University. A major part of the assessment for the subject is a research essay on a topic of the students' own choice. Many students are undertaking theoretical or policy-oriented topics, or conducting empirical studies, but others have seized the opportunity to research and analyse a practical problem. Practitioners will agree that the range and complexity of planning and environmental problems hatched by "real life" are beyond the imagination of anyone who might set out to design a problem. The cases studied by this year's students prove the point.

The EDO provides an opportunity for students to exercise their enthusiasm for the subject in real life applications. This widens their experience and extends their abilities in a field which is not only burgeoning in practice but exerting a major new influence on jurisprudential conceptions of property and the relationship between the human world and its environment.

*Murray Raff*
*Lecturer in Law of Planning and Environment*
*Faculty of Law, University of Melbourne*

# EDO NEWS

## *South Australia*

Environmental Law Community Advisory Service (SA) Inc (ELCAS) held its AGM on 15 June 1993. Set out below are extracts from the Chairperson's Report for 1992/93.

The South Australian Parliament has recently passed legislation, and will consider legislation in its next sitting, which recognises the concept of ecologically sustainable development and the need to have all sectors of our community participate in decision making. If that process is going to be successful the whole community, including people who cannot afford to pay for a lawyer, requires access to legal advice so that it can effectively and constructively participate in the process.

ELCAS exists to promote ecologically sustainable development, and to promote public awareness of, and participation in, the development and implementation of environmental law.

### The Advisory Service

We have provided a free advisory service to the community since 11th June 1992. We received a fantastic response to our call for assistance from the legal profession. We now have a list of 27 experienced environmental lawyers who volunteer their time to give free advice from the Bowden Brompton Community Legal Centre each Thursday night between 6-8 pm. Our lawyers continue to be assisted by law students from the University of Adelaide who gain valuable experience in how to deal with clients.[1]

The matters on which ELCAS has advised, were reported in the January and June issues of IMPACT.

### Pro Bono Scheme

We launched a Pro Bono scheme during the year which was made possible through the support of several legal firms and barristers.

The support for the Pro Bono scheme came from the legal firms; Mellor Olsson, Norman Waterhouse and Ward & Partners and barristers Jack Costello, Brian Hayes Q.C. and Stephen Walsh Q.C.

The Management Committee considered several requests for it to refer matters for Pro Bono assistance to a member of the panel. One matter was referred to a member of the Panel and that was the issue of ETSA's vegetation clearance practices in non-bushfire risk areas. The Management Committee considered the issue to be a matter of genuine public importance warranting further legal assistance beyond that provided through the Advisory Service.

In addition many members of our Advisory Panel volunteered to give follow up advice to users of the Service.[2]

### Membership

Membership of ELCAS has been available to any person who supports its objectives and is willing to commit to the achievement of those objectives. A membership fee of $5.00 per annum was set at our first AGM. We currently have 38 members.

### Funding

ELCAS obtained its initial funding through donations from the SA Division of the National Environmental Law Association and the Australian Centre for Environmental Law - Adelaide. The two donations, each of $500.00, were enough to get us started.

However, it was never going to be enough money to enable ELCAS to continue and to grow.

As a result we actively pursued other sources of funding and have this year received funding in the sum of $3,000.00 from the Law Foundation of South Australia.

### Where to from here

ELCAS will continue to provide its Advisory Service and to administer the Pro Bono scheme. We are constantly looking at ways to improve those services and hope to expand them to better serve the northern, southern and eastern suburbs.

One of our objects is to promote "environmental dispute resolution" and we hope to either develop our own mediation service or to participate in one of the existing services being offered by the Community Legal Centres.

A large part of our task is educating the community in environmental law and in promoting public awareness and participation. We hope to provide community groups with the opportunity to have a member of ELCAS speak to them about environmental law and how they can effectively and constructively participate in the decision making process.

I see ELCAS as providing an extremely important and necessary voluntary community legal service. The service offered by ELCAS is available to any person at no cost and I believe that it has made, and will continue to make, a very positive contribution to the community of our State.

*John Scanlon*
*Chairperson, ELCAS*

### Notes

[1] The matters, on which ELCAS has advised, were reported in the January and June issues of IMPACT.

[2] The pro bono scheme was discussed at greater length in the January '92 issue of IMPACT.

IMPACT is published by the Environmental Defenders Office Limited, an independent community legal centre specialising in environmental law. IMPACT is printed on 100% recycled paper.