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Environmental Defenders Office Ltd
8th Floor, 280 Pitt Street, Sydney 2000 DX 722 Sydney Email peg:edo Tel (02) 261 3599 Fax (02) 267 7548

Environmental policy making – insiders, outsiders and other tales

Stephen Keim
Barrister

Stephen Keim is a barrister and President of the Queensland Legal Aid Commission. This article is drawn from a paper delivered at a seminar on "Greening of Government - Ideals and Reality", sets out some rules for interaction between conservationists and government, including those in government who were once on the "other side". This is very pertinent to the Queensland context where there were major changes to government personnel after the 1989 state election.

Stephen goes on to look at the broader picture of the scope and adequacy of the public's participation in environmental decision-making in Queensland.

While I cannot claim to be an environmental activist, some of them are my best friends and a significant amount of my legal experience (indeed the most exciting part) has involved working with environmental activists in those unfortunately rare bits of space and time when social conflict concerning the environment has for a brief period had its expression through the pursuit of legal remedies.

It is from that cross-over area where lawyer meets environmental activist that I draw the focus of this article.

The first part of this article will be in the form of a homily setting out rules of behaviour for people inside and outside of the key decision making positions of government that affect hopes for environmental change.

The second part picks up from the first and looks at the importance of third party standing and the availability of legal aid to environmental reform.

The Homily

I shall try to express myself in general, neutral, and non-partisan terms.

There are people who have hopes of government, perhaps a particular government, that it can and will deliver reforms and changes which lead to better protection of the environment. Some of these may have worked to achieve a change to the present government inspired by these hopes and desires. These people remain outside the key decision making areas of government and they continue to want and work for such change. I call them the "outsiders".

There is another group of people, probably significantly smaller in number. They have ascended to key decision making positions in government. They also have hopes and desires that the government can deliver environmental reform. These hopes and desires constitute a significant reason for their wish to be in government in the first place. These people are called the "insiders".

There are, of course, cross-over groups. Members of the government who have some influence but who do not occupy the key positions. Public servants who have significant input into decision making but who do not have the final say. For the purposes of the discussion, however, it is only necessary to consider "insiders" and "outsiders". The cross-over groups will, from moment to moment, be able to see themselves as falling more into one group or the other and will experience their own personal frustration accordingly.

It is an inevitable result of the political process

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that there will be tensions, frustration and even conflict experienced by these two groups of people. Even though members of the two groups share many objectives, there will be a very strong tendency for conflict and friction to develop. Those in government will find their ability to deliver constrained in a way that they may well not have expected. They will find that, even when they do deliver, they will not meet the expectations of those outside. Those outside will find the government less sympathetic than they expected to even quite moderate proposals for reform; their helpful suggestions misunderstood and misinterpreted. The situation creates very strong potential for the complete breakdown of previously strong personal relationships and for both sides to forget how much they have in common and how similar their ultimate objectives are.

It is because of this potential that I have prepared this homily. I have attempted to develop a set of guidelines for participants in this political process. I have called the guidelines (with a striking degree of originality) "The Ten Commandments". They come in groups of five: five for the "outsiders" and five for the "insiders".

Outsiders

1. Imagine what it is like to be on the inside

Imagine inheriting a large, unwieldy broken-down piece of machinery called a bureaucracy. Imagine a million interest groups pulling in different directions on every issue. Imagine a press easy to manipulate on "happy news" that means nothing, but likely to be carping, critical and facile on any issue of importance or which generates conflict. Imagine the unwieldiness of all processes of policy development and law making.

2. Criticise when appropriate but avoid unnecessary vindictiveness or destructiveness

Apart from anything else, it would probably be unethical to hold back on criticism of a government because of any general sympathy with its make-up or direction. Bad decisions or indecision require criticism and should receive it. Criticism of government decisions is part of the broad on-going policy making process of government and cannot be avoided. However, criticism should not be self-indulgent. It should be made against the background of the broad objectives of what is ultimately desired to be achieved in the medium and long-term. Vindictiveness and self-indulgence also betray a lack of the understanding that the first commandment requires.

3. Acknowledge and praise good things that the government has done

One of the greatest frustrations of government is that its achievements demand but few paragraphs while its controversies and failures command miles of news space. Those in government always feel that those who owe them gratitude never display it. On the other hand, interest group outsiders have limited resources and are unable to run a public relations campaign for the one or two decisions they are happy with. However, within those resource limitations, outsiders should try to express a degree of acknowledgment and of praise when this has been deserved.

4. Remember the broad political process

It is easy for "outsiders" to think of the lobbying process as a test of wills between me the "outsider" and you the "insider". It is seldom like that. There are other forces and constraints. Politics is often described as the art of the possible. The decision making process is an on-going one. Outsiders must not direct their efforts only towards government but must help to build the support and the majorities to transform some decisions from the impossible to the possible.

5. Keep talking, keep loving

The structural divisions between "outsiders" and "insiders" have enormous potential for previous close friendships to break down. The bun fights, the hurts, the disappointments and the misunderstandings can lead one to write off one's old friends. Even the belief that the "insider" is now too busy or too important can insidiously develop. The informal contacts can break down so that only the formal contacts with all their difficulties remain. Avoid this. Take the "insider" to lunch; for a walk; or on a camping trip. You know that interest groups which do not share anywhere near the same objectives will be doing all this and more.

If this commandment is obeyed, it will be so much easier to maintain the other four.

Insiders

1. Remember what it used to be like

The "insider", coping with all the new frustration of being an insider, can easily forget that it is just as frustrating being on the outside. Remember how passionate one felt about the process of advocating good decisions by government. Remember the vision and remember that those who remain on the outside have a duty to pursue the whole of that vision. Never forget that you were once on the outside standing shoulder to shoulder with your friends.

2. Remember that "outsiders" not only have a right to criticise but a duty to do so

Of course, you have to answer and defend yourself against the criticisms. This is a political necessity. But it is easy to take criticism personally and to feel that any criticism of you is wrong and illegitimate. Each of these must be resisted strenuously. Even ill-informed criticism is legitimate. You must remember that many "outsiders" are not as well informed as you even if you have done your best to provide information. But, if you allow yourself to take criticism personally, these perspectives will be irretrievably lost.

3. Remember that "outsiders" are not only legitimate but valuable

It is important to remember that government is not about implementing last year's or last decade's policy platform. The policy development process is continuous. Problems

continue to emerge and to become more clearly defined. Solutions need to be developed and refined all the time. The main source of ideas for this process will come from outsiders. A couple of students with the *Freedom of Information Act* in their hands will always tell you more about your Department than the Auditor - General or any other public servant. It is always easy to see "outsiders" as nothing more than a source of criticism and irritation and not as a valuable resource. This must never happen.

4. Assist "outsiders" to assist you.

The corresponding commandment for "outsiders" was about the political process being about building support and majorities for crucial decisions. It is much more likely that the "insider" will know where the log-jams and opportunities are. Windows of opportunity are in time as well as space. An "insider" requires help from outside and sufficient communication and backgrounding must take place to ensure that the assistance is provided at the right time and place.

5.Keep talking, keep loving.

This commandment is the same for the "insider" as the "outsider". However, it bears a different focus. The "insider" must be aware of the great dangers of isolation. The "insider" must be aware that others fear to approach you in your newly important position. The "insider" must communicate the desire to keep the old informal contacts going and to do things in the old way. There will be plenty of people keen to be new friends of an "insider" but they may not share the same broad objectives, the same world view. The "insider" must keep time and space for old friendships. The "insider" needs the old friendships more than anyone else so the onus is on the "insider" not to allow the healthy exchange of views in public to affect personal feelings and the even more healthy exchange of views in private.

These are the ten commandments. I believe they are a key to the greening of government. It is only through keeping the ten commandments that both sides can ensure that their light green tinges are not swamped by the yellow of personal indignation and the public service blur of the grey bureaucracy.

Further homily disguised as discussion of substantive law

I stressed in the previous section the importance of outside input into the on-going process of the greening of government. There are very many models by which this public participation can take place.

In the balance of this article I will look at various aspects of public input through the judicial process. Although I do not feel that judicialising a problem is always the best way of solving it, there will be increasing incidents where participation through the judicial process will have the potential to give a great impetus to the greening of government. I want to illustrate this by looking at some practical examples.

The land use planning system - access without remedy

Since the Local Government Court came into existence with the commencement of the *City of Brisbane Town Planning Act* of 1964, there has been a substantial opportunity for the ordinary citizen to participate in land use planning decisions. This is because, both in applications for town planning consent and in applications to re-zone land, there has been the requirement to advertise inviting objections and the right of any person lodging such objections within the required time to appeal to the Local Government Court (now the Planning and Environment Court) against an adverse decision or to participate in a developer's appeal as respondent by election.

One would have thought that this very open process would have led to a great deal of satisfaction among the community environmental activists. In fact, the reverse has been the case. The very widespread dissatisfaction has lead to a strong feeling that the judges who have staffed the courts are, by their training or nature, unsympathetic to environmental matters and should be replaced by some system of expert assessors.

This feeling has been sufficiently powerful to cause a great deal of effort of the Department of Housing and Local Government and Planning to be directed to conducting a review in order to decide, *inter alia*, what is the appropriate tribunal for land use planning decisions. This review has occupied much of the last four years.

In many respects, I think this concern is misguided. The fault is not so much with those who have staffed the court, but with the lack of provision for effective remedies in the legislation and subordinate legislation that the court has had to administer. It is not the fault of the judges that the doctrines of town planning for the last hundred years or so have essentially been concerned with questions as important as whether or not it is appropriate to put a performance theatre beside a silversmith's shop.

The short point is that to get the appropriate values from judges who hear cases, one must write appropriate values into the law.

Sporadic legislative attempts have been made to write ecological values into the legislation that affects land use planning decisions. For example, s.32A was inserted into the *Local Government Act* in 1973. *Inter alia*, the section required a local authority, when considering an application for approvals and consents, to take into consideration whether any deleterious effect on the environment would be occasioned by the implementation of the proposal the subject of the application,

This process has continued. Not only is impact of a proposal on the environment a relevant criterion for both re-zoning and consent application, there is a very lengthy section s.8.2, entitled "Environmental Impact" providing a strict regime with regard to environmental impact statements; there are references to the environment scattered throughout the Act and even the title of the Act and the title of the court contain the word "environment".

If my thesis was correct, one would expect your local community and environment activist to be now quite satisfied. However, the dissatisfaction continues and the

judges who staff the Court continue to be the focus of discontent. The review process continues.

I persist with my view that it is the substantive law not the tribunal which needs to be the focus of any analysis or review.

In support of my view, I wish to look briefly at a case I recently argued in one of the Sunshine Coast shires. The application was to rezone land from a rural zone to a rural-residential zone. As with the *Local Government (Planning and Environment) Act*, both the strategic plan and the various intents of the various zones were dotted with references to the desire to preserve scenery, ecology and the environment. It was acknowledged by the technical experts on both sides that the land which was the subject of the application was ecologically very important and sufficiently special to be worthy of a considerable degree of protection and preservation. One might have thought an application to break it up into small rural-residential lots would have had no chance.

However, all of the fine words in the Act and all of the fine words in the planning scheme were faced with the reality that, in its present zoning, uses such as piggeries and goat-farming were as of right uses and the shire's tree preservation by-law did not apply to the rural zoning. All parties and the court were faced with quite strong argument that, because of the details of the subordinate legislation, the only way of giving any effect to the fine details of the Act and the planning scheme were to take the pristine woodland and to break up a considerable amount of it into backyards and to try to provide some protection within the limits of reasonable and relevant conditions.

If one looks at this case, it is easy to see why the dissatisfaction with the court lingers despite very generous access provided to the tribunal for ordinary members of the public. I hope it is also easy to see that, in this particular case at least, it was the substantive law that left much to be desired and not the values brought to the case by the particular judge.

I fear that the land use planning provisions in Queensland remain a case, as far as the environment is concerned, of access without effective remedy.

How can this be attacked? I think it is important firstly to understand the depth of the problem. Throwing a few fine words into the strategic plan will not be sufficient to protect the environment. The whole of the scheme has to be looked at including the traditional categorisations and the long lists of as of right uses (and consent uses) contained in the tables of uses for the various zones. I think it is also important to recognise that local authorities are hampered in the extent to which they can attack the inertia of the past by the possibility of large and significant claims for injurious affection if and when they do attempt to address the problem. Part of the remedy, and an effective one, is to raise taxes for the special purpose of acquiring much of the sensitive land. However, even that strategy is hampered by the large compensation that one has to pay because of values placed on the land because a private individual might, because of the deficiencies of the system, be granted permission to despoil the land sometime in the near future. That strategy also has the disadvantage of taking time and much valuable land may well be despoiled in the meantime.

The legislation now contains provisions for State Planning Policies and a couple have been issued. State Planning Policies remain one of the most useful tools for writing into the land use planning system as a whole the important ecological values that are required to prevent the small remnants of environmentally important land from being turned into comparative ecological deserts.

Whatever strategies are employed, it is important that the land use planning system be changed from a state of ready access without effective remedy. It is only when that is done that the community disquiet with the tribunals that administer that system will be diminished.

The Judicial Review Act - remedies without access

The Queensland government has recently released a draft for public consultation of an environmental protection bill and commentary. One of the Acts to be replaced by the proposed legislation is the *Clean Waters Act* 1971.

One of the reasons why the *Clean Waters Act* is to be replaced is the broad feeling both in the community and in government that it is an inadequate vehicle for achieving the clean waters on which the Act receives its name.

The Act proceeds by way of a licensing system. People may not discharge wastes into waters without a licence. The licence is subject to conditions and to breach a condition constitutes an offence. Similarly discharge without a licence constitutes an offence.

The public officials who deal with applications for licences are required by law, among other things, to have regard to the character and flow of the receiving water, the best available practicable methods of treating wastes, the present and future requirements for quality and quantity of such water, any prescribed water quality plans, water quality standards, water quality criteria and water quality objectives, any policies or requirements of the government of the state regarding conservation of the environment, any policies of the state government regarding location of industries, the combined effects of the discharge in question and any other discharges of wastes to such water, the effects of periods of no-flow in a water course, tidal effects, the effects of changes in weather, the desirability of recycling or reusing wastes, alternative means of disposal and any other relevant information available to it.

Among the conditions that may be imposed are requirements that technology be upgraded to improve the quality of wastes; a program for progressive compliance with water quality standards; and installation and operating of monitoring equipment.

One would have thought that legislation of this kind was a very effective tool for insuring the highest possible achievement of clean waters. And yet the feeling of dissatisfaction is such, and so wide-spread, that the Act is being completely replaced along with a number of other acts.

The touted reason for failures of legislation like the *Clean Waters Act* is the cliche - "Lack of political will". Lack

of political will is, I think, a collection of much more complex and diffuse concepts and contains many of the factors that I spoke about in the first half of this talk. However, imagine what a valuable infusion to political will might have been an injunction by the courts requiring that the public officials, including politicians charged with the administration of the Act actually take into account all of those important factors which they are required to take into account by the law of the land. Such an action taken in 1986 or 1991 might have transformed the administration of the *Clean Waters Act* and might have saved that Act from its present fate of going under. Could such a thing have happened? The answer is that it is most unlikely.

In 1991, the Queensland parliament passed the *Judicial Review Act*. The purpose of that Act is to make it easier for citizens to ensure that decisions made pursuant to Acts of parliaments are made in accordance with the law; in compliance with the appropriate standards of natural justice or procedural fairness; and taking into account those things which the law requires them to take into account.

The *Judicial Review Act* was based on a report by the Electoral and Administrative Reform Commission (EARC), part of the Fitzgerald reforms.

One of the matters that EARC had to decide was who, it would recommend, might be able to make use of the procedures and remedies contained in what was to become the *Judicial Review Act*. EARC was urged to adopt the very broad standing test, that is, that every person is entitled to bring actions in the public interest unless it could be shown that they were not able to properly represent the public interest.

EARC decided to stick with a formula that had been used in an earlier piece of Commonwealth legislation addressing the same concerns. EARC considered "that the judicial interpretation of the standing requirement in the ADJR Act [*Administrative Decisions (Judicial Review) Act* 1977] ... removes most of the major concerns relating to the technical restrictions on standing at common law, while still retaining a legitimate limiting function for a test of standing".

Therefore, under the *Judicial Review Act*, a person must be "a person aggrieved by a decision". This is defined to include a reference to a person whose interests are adversely affected by the decision.

As we shall see, the decision to use that formulation has, to a large extent, as far as the environment is concerned, constituted the *Judicial Review Act* as an Act with remedies to which there is no access.

The Queensland parliament passed the *Queensland Heritage Act* in 1992. The Act sets out a number of statutory objects the principle one of which is to make provision for the conservation of Queensland's cultural heritage. It provides for the establishment of the Queensland Heritage Council, for the maintenance of a register of places of significance to Queensland's cultural heritage, for heritage agreements to encourage the conservation of registered places and for the regulation of development of registered places.

The North Queensland Conservation Council nominated, as it was entitled to, Castle Hill in Townsville, for consideration for entry in the Heritage Register. After consideration, and with some amendment, the Queensland Heritage Council acceded to the request and entered Castle Hill in the Register. While this was going on, a company, A.I.S. Investments Pty Ltd., applied for approval by the Queensland Heritage Council of a development that included a number of luxury apartments, a restaurant and a cable-car transport system to be built on certain freehold land on Castle Hill.

A group of people, who felt that such a development was not appropriate to Castle Hill and would destroy or substantially reduce the cultural heritage significance of Castle Hill, organised themselves into an incorporated body called "Friends of Castle Hill Association Incorporated".

The Queensland Heritage Council gave public notice of the application and invited representations from interested members of the public within the time period provided in the Act. The Council had a statutory duty under the Act to consider any representations made in response to the notice.

After considering the representations and information provided by the developer, the Council formed a view that the development would not destroy or substantially reduce the cultural heritage significance of the registered place.

Friends of Castle Hill sought and were granted, under the *Judicial Review Act*, a statement of reasons for the Council's decision to approve the development (subject to the normal conditions). After examining the reasons and obtaining legal advice, Friends of Castle Hill were of the view that the Heritage Council had made certain errors in coming to its decision and had taken certain things into account which should have been, under the legislation, irrelevant and had failed to take into account certain matters which the statute required them, in the circumstances, to take into account. These are some of the grounds for judicial review set out in the *Judicial Review Act*.

Accordingly, Friends of Castle Hill brought an application for a statutory order of review pursuant to the *Judicial Review Act*. The Association argued that as a body which had been entitled to make representations to the Council and who had in fact made such representations and who had; accordingly, the statutory right to have those representations considered, as it was a body whose interests were adversely affected by the decision to approve the development. That is, the Association was not claiming a right of appeal but simply a right to have the court consider whether in fact the Heritage Council had made its decision to approve the development in accordance with the legal requirements arising from the *Queensland Heritage Act*.

However, the developer and the Toowoomba City Council brought an application that the application of Friends of Castle Hill should be dismissed without looking at its merits because Friends of Castle Hill had no standing to bring the application. The court agreed with this application

and so the application of Friends of Castle Hill was dismissed without ever looking at whether or not the Queensland Heritage Council had complied with their legislation when deciding to approve the development.

Mr Justice Dowsett who made the decision said the following:-

> Members of the public are given the right to make representations and there is an express obligation to consider those representations. There is no suggestion that that was not done in the present case. There is nothing in the Act to suggest an intention that a person making representations thereafter has any right to participate in the outcome of proceedings.

My interest in the decision is to look at the realpolitik that now faces the Queensland Heritage Council. The Castle Hill application was a difficult matter to decide. Part of this difficulty resulted from the fact that the Townsville community was split down the middle with regard to the proposed development and there were strong differences of opinion about it. This is likely to be the case with many decisions where preservation of the environment comes into conflict with a proposal of some mighty new employment-creating development. These situations of social conflict always place increased pressure on decision makers.

Now the Act specifically provides for the dissatisfied developer to apply for a review. And if dissatisfied with the results of that, to appeal to the Planning and Environment Court. The Planning and Environment Court would seem to be required to decide the application by looking at it completely anew.

The result is that, every time the Queensland Heritage Council comes to make a difficult decision on whether or not to approve a development application, it does so knowing that if it decides against the developer, the developer has a guaranteed right of appeal. The Council also knows, as a result of the decision in the Friends of Castle Hill case, that any error in law that it might make in deciding in favour of the developer is very unlikely to be the subject of any review. It seems to me that, with even the most conscientious membership, the balance of the pressures in the difficult case must be all one way. In those circumstances, it must be very difficult for Council members not to be at least subconsciously influenced by such pressure.

The situation under the *Queensland Heritage Act* is but an example. The restrictions on the rights to bring an application under the *Judicial Review Act* is likely to have an impact on the administration of all environmental legislation including the *Clean Waters Act* which I discussed earlier.

An interstate example - when remedy and access coincide

An example which has some relevance to my earlier discussion of the *Clean Waters Act* is that of the case of *Brown v EPA*. In 1992, Alexander Brown formed a view that the NSW State Pollution Control Commission had improperly followed an internal policy when issuing licences to a pulp and paper mill to discharge effluent in the Shoalhaven River. Accordingly, it was argued that the licences were invalid and that the actions of the pulp and paper mill were therefore in breach of the *Pollution Control Act*. Under the *Environmental Offences and Penalties Act* 1989, any person was entitled to bring proceedings to restrain a breach of that or other acts if the breach was causing or is likely to cause harm to the environment. The only restriction on such a person was that leave must be obtained from the Land and Environment Court and that, before granting leave, the Court must be satisfied of three things. Firstly, the Court must be satisfied that the proceedings are not an abuse of the process of the Court; secondly, that there was a real or significant likelihood that the requirements for the making of an order would be satisfied and, thirdly, that it is in the public interest that the proceedings should be brought.

The Environment Protection Authority, which had by now taken over the role of the State Pollution Control Commission, opposed the granting of the leave on the grounds that the proceedings were not brought in the public interest. The words of Stein J in response to that argument are instructive:-

> The other requirement of satisfaction is that the proceedings are brought in the public interest. The Environment Protection Authority disputes that they are so brought. This bold submission of Ms Murrell seems to suggest that the breach alleged is a not a serious one and therefore the proceedings are not in the public interest. I have difficulty in comprehending how the Environment Protection Authority can seriously submit that a proceeding which alleges a serious breach of the *Pollution Control Act* 1970 (NSW) by the Environment Protection Authority's issue of an invalid pollution control licence is not in the public interest. I would have thought that it was very much in the public interest to have the issue determined, not to speak of the interests of the Environment Protection Authority and large numbers of licence holders.

The case in fact proceeded and was heard on the merits. Pearlman J found that any adherence to the internal policy was not such as to prevent all of the necessary requirements of the Act being properly considered and accordingly the issue of the licence was held not to be invalid.

Accordingly, this is a case where the public interest litigation was ultimately unsuccessful. This does not, however, prevent the case having a very significant and valuable input into policy making and administrative processes. The determination on the merits resolved the questions as to the lawfulness or otherwise of the way in which the Commission approached its role of issuing licences. This is a much better result than if the lawfulness had, through prevention of any hearing on the merits, been left in doubt. Additionally, the process of litigation provided a means by which the authority could address the appropriateness or otherwise of its approach to issuing licences in a much more focused and critical way than could have been achieved by internal processes such as an internal review.

There is a natural tendency for governments to be opposed

to open standing provisions in legislation. Governments have a natural tendency to think that they are the font of not only all wisdom but all good will. Governments have a tendency to focus on the short-term embarrassment of the accountability that comes through the judicial process as in the case just looked at. Governments talk about the danger of opening "the floodgates". They are not worried about a flood of baseless litigation. They are worried about one or two very soundly based cases. They are not worried about a flood of cases. They are worried about a flood of accountability.

However, the benefit that derives not only to the community as a whole, but to the government itself, from the process of accountability far outweighs any short term embarrassment. Any member of a government that is concerned with the greening of that government must, as a point of faith, support open standing procedures in its environmental legislation.

Legal aid

In 1991 and 1992, the Legal Aid Commission (Qld) was prepared to consider granting legal aid in certain environmental cases. This was done on a case by case basis and a small number of grants were made. Some steps were taken to prepare guidelines for assessing those applications on their merits.

Shortly after that period, the money available to the Commission diminished dramatically as a result of a number of factors. The recession hit and so there was much less activity in solicitors' trust accounts. At about the same time, interest rates rapidly declined and so the money in solicitors' trust accounts earned less income for those funds which found their way to the Commission. Possibly too, with the increasing availability of electronic transfer, people have tended to leave their money in trust accounts for shorter periods of time. The decline in money available to the Commission was in excess of $10 million, something in the region of 25% of its budget.

Some of these shortfalls have been replaced by increases in government funding for the Legal Aid Commission. However, at the same time, there have been increasing demands from the Commission's traditional constituency. For example, there was a surge in the demand for legal aid in criminal matters.

As a result of these processes, the Legal Aid Commission had to cut back on the legal aid it gave in civil matters, in family law matters, and to some extent in criminal law matters. These events have made it practically impossible for the Legal Aid Commission to make any significant grants in the area of public interest environmental matters.

I think this is regrettable. For the same reason, that I think governments benefit from open standing proceedings, the public policy making process benefits greatly from community groups having the financial wherewithal to use the increasing range of environmental statutes to test and strengthen the administration and enforcement of those statutes. The New South Wales experience indicates that many of the cases brought are successful and in all cases important matters of public policy are raised and critically examined.

Legal aid in the environmental area should not just be the concern of the Department of Justice and Attorney-General. The environmental departments; the Department of Environment and Heritage; the Department of Local Government, Housing and Planning; and the great resource departments like Primary Industries and Mineral Resources all have an interest in aid being provided in these areas.

I strongly suggest that consideration be given to an initiative sponsored broadly within and without the bureaucracy by which a specific and substantial amount of consolidated revenue is allocated for the purpose of finding public interest actions with an environmental focus. Not only should individual actions be capable of attracting legal aid but such an initiative should also be directed to ensure that the Environmental Defender's Office (Qld) is properly funded with full-time staff to ensure that the issues are addressed on a continual as well as a continuous basis.

Leave applications under s.25 of the Environmental Offences and Penalties Act

David Mossop
Solicitor, Environmental Defender's Office

Section 25 of the *Environmental Offences and Penalties Act* 1989 now provides that any person may bring an action to remedy or restrain a breach of any statute if the breach is causing, or is likely to, cause harm to the environment. However, proceedings may only be brought with the leave of the Land and Environment Court. When considering whether or not to grant leave the Court must be satisfied that the proceedings are not an abuse of process of the Court, that there is a real or significant likelihood that the requirements for making an order will be satisfied and that it is in the public interest that the proceedings be brought.

In 1989, when it was first enacted, there were only restricted provisions for civil enforcement in the *Environmental Offences and Penalties Act* 1989. Proceedings could only be brought by the Minister, the State Pollution Control Commission (as it then was), an authorised officer of the Commission or any other person if that person had the consent of the Commission.

The reason that this was an inadequate provision was that it made third party enforcement action subject to the permission of the State Pollution Control Commission. Whether or not the Commission granted permission was a political rather than a legal decision. Furthermore, there was the inevitable delay while the Commission considered the application for consent to bring proceedings. Both these factors reduced the effectiveness of the provision as

a means of third party civil enforcement.[1]

The primary rationale behind third party civil enforcement is that citizens are granted the right to enforce laws because the enforcement of those laws is in the public interest.

The primary focus of public law is creating, protecting and enforcing public rights and duties. Environmental law is one of the best examples of law that regulates public rights and duties for the benefit of society as a whole. It is the recognition by the parliament that, for reasons of political expediency or simply lack of resources, executive government will not adequately protect these public rights that lead it to adopt third party civil enforcement.

Without specific provisions the restrictive rules of standing prevent third parties who seek to vindicate public rights from even getting in the door of the court.[2] Consequently special provision needs to be made if civil enforcement is to be possible.

It was because of the perceived inadequacies of s.25 as a mechanism for civil enforcement that it was amended by the *Protection of the Environment Administration Act* 1991. The amendment removed the requirement for the consent of the State Pollution Control Commission or Environment Protection Authority. The requirement was replaced by the need to obtain the leave of the Land and Environment Court to bring the proceedings.

This amendment arose from the agreement between the Premier of the day, Mr Greiner, and the three non-aligned independent members of the Legislative Assembly (Members for Bligh, Manly and South Coast) known as the Charter of Reform. The amendment was introduced by the Minister for the Environment, Mr Moore, and supported by the government.

In introducing the amendment during the committee stage Minister Moore stated -

> The Government believes that the amendment it has proposed will bring a measured and balanced approach to that process and will not provide onerous hurdles that are not capable of being overcome by applications.[3]

The Minister suggested that applications for leave would proceed much in the way that the High Court deals with many applications for special leave to appeal - hear both the application for leave and the merits at once and decide the two issues simultaneously.[4]

In fact the amendment was voted against by the opposition and some of the independent members of the Legislative Assembly because it was too restrictive. The requirement for gaining the leave of the Court was foreshadowed as being too great a hurdle. Such requirements were not imposed under tried and tested provisions such as s.123 of the *Environmental Planning and Assessment Act*. Fears of requiring a "mini trial" at the leave application were raised. As a result the government's amendment was defeated.

The opposition then introduced an amendment that would allow standing in similar terms to s.123 of the *Environmental Planning and Assessment Act*. On being put to the vote this amendment was defeated by the casting vote of the Speaker.

The government then reintroduced the original amendment.

Indicating the government's position on the amendment the Premier said -

> I advise some members on my side of the Chamber ... that third-party rights should not be built up into some form of mythological beast. They have been part of various statutes for a considerable time and have not caused the end of civilisation as we know it.
> Some members who are broadly supportive of my side of the Chamber have developed the view that such rights are a Trojan horse for all matters that are deemed undesirable. But the record just does not indicate that. It would be less than honest of me if I spoke to the contrary.[5]

Both the Minister and the Premier gave an undertaking that the operation of the amended section would be reviewed over a period of twelve months to ensure that it did not provide too great a hurdle for applicants.[6]

On this basis the amendment was then agreed to.

In the two years since the passage of the amendment there has only been one case where leave of the Court under s.25 has been sought. This case was *Brown v Environment Protection Authority and North Broken Hill Ltd*[7]. It appears that His Honour Justice Stein was not referred to the full debates over the amendment to s.25. Reference is made in the judgment to the limited comments in second reading speech in the Legislative Council. Based on the legislative history, namely the fact that the amendment to s.25 was only introduced in the committee stage, it is understandable why the second reading speech of the Minister in the Legislative assembly was of little assistance. However, in the result, the approach of the Court was consistent with the clear intention of the legislature evident in the debates. The approach of the Court was to consider the leave application as a summary matter "rather than a formal hearing with detailed evidence and cross examination".

Although s.25 has been under-utilised to date, the approach taken in *Brown* appears to have established an approach consistent with Parliament's intent.

Notes

[1] see Preston, B. (1991) "Public enforcement of environmental laws in Australia", *J. Environmental Law and Litigation* 39 at 40-41.

[2] see *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; Keim, S. (1993) "Environmental policy making - insider, outsiders and other tales", 32 *Impact* 1 at 4-6.

[3] *Hansard*, 9 December 1991, p.6044.

[4] id.

[5] *Hansard*, 9 December 1991, p.6060.

[6] id.

[7] (1992) 78 LGERA 119.

EDO NEWS

New South Wales

South East Forests endangered fauna case

The EDO recently acted for the South East Forests Conservation Council in an appeal against the decision of the Director of National Parks & Wildlife to grant a licence to "take" endangered fauna in Compartment 1381, Cathcart State Forest which is part of the South East Forests of New South Wales.

The requirement for licensing for the taking of endangered fauna was inserted by the *Endangered (Interim Protection) Act* 1991 which arose after the decision in *Corkill v Forestry Commission* (1991) 73 LGRA 126; 73 LGRA 247. "Taking" includes any substantial modification of the habitat likely to affect the essential behavioural patterns of endangered fauna. Therefore, most forestry operations require endangered fauna licences. The licence granted for Compartment 1381 was a general licence in that it allowed the taking of any endangered fauna that was affected by logging in that compartment. Most notable amongst the endangered species present was the koala. The appeal was the first to be lodged under the provisions allowing for a merits appeal against the decision of the Director to grant a licence.

Compartment 1381 is located between two areas proposed as national parks under a draft agreement between the Commonwealth and New South Wales. In these areas, known as Special Prescription Areas, forestry operations were to take place subject to special prescriptions aimed at protecting the habitat values of the areas. This is because the Special Prescription Areas provide a link between the proposed national parks.

In May 1993 after pressure from the Minister responsible for the Forestry Commission, Mr West, and a direction from the Minister for the Environment, the Director of National Parks and Wildlife granted a licence to take endangered fauna in the compartment without imposing any special prescriptions on that licence.

The South East Forests Conservation Council commenced class 1 proceedings in June 1993.

Prior to the trial, but after the applicant had prepared its evidence, the Forestry Commission of NSW requested that the licence for Compartment 1381 be withdrawn. The Director of National Parks and Wildlife complied with that request. As a result the subject matter of the trial disappeared.

In these circumstances the applicant discontinued on the basis of certain undertakings but applied for costs against the Forestry Commission (now trading as State Forests of NSW). In a judgment delivered on 19 November 1993 Justice Stein awarded costs against the Commission.

Both parties submitted that the Court should follow its practice direction in class 1 planning and building appeals, that is that there should be no order for costs unless exceptional circumstances are proved. The applicant argued that the Commission's Fauna Impact Statement was hopelessly inadequate and that it should not have been put to the trouble and expense of lodging the appeal. It said that because of the late withdrawal of the licence costs had been thrown away in the preparation of its case. The respondent argued that the decision to grant the licence was that of the Director of National Parks and Wildlife and that it was to the Director that the applicant should look for costs.

In the result the Court had no hesitation in concluding that the applicant was entitled to its costs up to and including the filing of expert reports.

Victory in Blue Lagoon case

The EDO acted for the Save Blue Lagoon Action Group Inc. in a challenge to the validity of a development consent for the redevelopment of a caravan park/tourist resort at Blue Lagoon, Bateau Bay, just east of Gosford. The proposed redevelopment was of a caravan park located on land zoned for coastal land protection immediately adjacent to Wyrrabalong National Park. The applicant argued that the development consent was void in that it permitted development that was prohibited in the zone.

The applicant's case rested on two main points. First was whether or not some of the buildings proposed for the site were "cabins" within the meaning of the Local Environmental Plan. The buildings in question were two storey duplex constructions with room for car parking underneath. Each had two bedrooms, kitchen facilities and living area. The second point was whether the proposed use of the land for small conferences during the off season (when there was only a limited demand for accommodation by tourists) was permitted within the zone. It was argued that this use was independent of the use for camping or caravan sites. On 6 August 1993 the applicant successfully sought an injunction to prevent bulldozing works on the site. This injunction was continued by the Court on 13 August when expedition was granted.

The hearing ran for 2 days on 22 and 23 September 1993. Judgment was delivered by Her Honour Justice Pearlman on 21 October 1993. The Court held that the development consent was void because the constructions proposed were not cabins and the consent purported to permit a use which was prohibited within the zone, namely restaurant and conference facilities. The Court granted an injunction preventing work being undertaken pursuant to the void consent but it did not grant an injunction to restrain certain dune restoration works on the site. These works had been subject to a successful application by the first respondent to vary the injunction granted on 13 August 1993 on the ground that unless the works were completed the site would not be safe.

The second respondent, Wyong Shire Council, has appealed from the Court's decision to the Court of Appeal.

Consultation on inland rivers report

Since the release of the EDO's Inland Rivers Interim Report and Issues Paper the EDO has been receiving submissions and undertaking consultation with government and members of the public. On 23-24 October David Mossop of the EDO travelled to Moree to attend a meeting of the Inland Rivers Network. This meeting involved farmers graziers irrigators and environmentalists from the north west of the state. On 10 December David travelled to Wagga Wagga to meet with the Murrumbidgee Catchment Management Committee and discuss the issues raised in the Issues Paper.

Environmental legal aid raised in Parliament

On 27 October 1993 the failure of the Government to restore legal aid for environmental matters was raised in Parliament by Upper House MLC Jan Burnswoods. Four members of the Legislative Council spoke on the matter, Jan Burnswoods, Attorney-General John Hannaford, Richard Jones and Fred Nile. The Government's ongoing failure to respond to the issues raised in the speeches by Ms Burnswoods and Mr Jones is a matter of continuing concern.

Endangered fauna case raises precautionary principle

The Land and Environment Court recently delivered judgment on the first appeal against the granting of a licence to kill endangered fauna. The appeal was successful, with the precautionary principle playing a major role in the reasons for decision. In the first partnership of this nature, the EDO prepared much of the case and Mr Ian Dodd, of Bartier Perry and Purcell, finalised and presented the case on a *pro bono* basis.

The EDO first commenced acting for May Leatch in her capacity as one of the members of the Shoalhaven Branch of the Australian Conservation Foundation. Shoalhaven City Council gave itself development consent to construct a road at North Nowra in March 1992. Our client was concerned that the alternative chosen was environmentally damaging in the sensitive Bomaderry Gorge area.

Originally our case that the Council had failed to comply with the *Endangered Fauna (Interim Protection) Act* which came into existence in late 1991.

Our application for legal aid was considered by the Legal Aid Commission at its meeting in August 1992. A lump sum grant of legal aid of $5,000 was awarded. However no indemnity was granted with this award. This meant that ACF Shoalhaven Branch could not commence proceedings because they are an unincorporated body and the assets of its members would be at risk if the court case were lost.

Sadly (but predictably) this last grant of legal aid by the Legal Aid Commission before legal aid in environmental matters was abolished altogether was futile and had to be "left on the shelf". It is hard to resist the conclusion that the members of the Commission either did not know of the importance of the section 47 indemnity or that the grant was calculated to be one that was never used.

In June 1992 the Council asked the National Parks & Wildlife Service for the requirements for a fauna impact statement. In February 1993 the Council granted itself conditional development consent providing it obtained a licence from the National Parks & Wildlife Service.

The NPWS advertised and exhibited the impact statement and licence application and Ms Leatch made an objection during the advertised period.

The FIS was deficient in a number of aspects and the Service requested more information from the Council. A supplementary FIS was prepared. However this was not advertised and indeed our client was refused access to it by the Service.

The Service resolved to grant a licence for the road. The endangered fauna which would be impacted include the Yellow Bellied Glider, the Diamond Python, the Tiger Quoll and the Giant Burrowing Frog.

One of the reasons advanced for granting the licence was that

> It is also considered there is uncertainty as to the long term viability of the local endangered fauna populations which are likely to be affected by this road. Long term development plans for the locality indicate increasing pressures on existing populations which may become locally extinct irrespective of whether or not the road is constructed.

Clearly the Parks Service was taking into account assertions by the Council and proposals for future development about which it had no evidence. The Court later commented on this "defeatist" attitude.

Our client's appeal was heard in November. Stein J examined references to the precautionary principle found in international agreements, the Commonwealth Intergovernmental Agreement on the Environment and the NSW *Protection of the Environment Administration Act*. Simply stated -

> if 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.

After an examination of Part 7 of the *National Parks & Wildlife Act* he concluded that the purpose of these provisions is the protection and care of endangered fauna. From this it is readily apparent that the precautionary principle is not an extraneous matter and its adoption is consistent with the subject matter scope and purpose of the Act. With almost no evidence before him of the material relevant to the Giant Burrowing Frog His Honour concluded that -

> In this situation I am left in doubt as to the population, habitat and behavioural patterns of the Giant Burrowing Frog and am unable to conclude with any degree of certainty that a licence to "take or kill" the species should be

granted.

His Honour went on to say -

> ... the Council's case suggests that their long term survival is threatened in any event by increasing residential development and the possibility of the construction of the Nowra by-pass in 15 to 20 years time. These prognostications are difficult for the Court to place great store in because they seem to be assuming that the endangered fauna may die out anyway at some future point in time so why worry about conserving them now.

His Honour laid important guidelines for the issuing of future fauna licences. He suggested that a licence should not in most circumstances be "general" in its coverage of endangered species but should specify the species which it permits to be taken.

His Honour was satisfied that there was a need for a link road in the area. However, one of the critical factors to be balanced is the alternatives and it was here also that the Council's case was deficient. An alternative route examined by the Council was much less environmentally damaging. Environmental factors had not been included in the cost benefit analysis done on behalf of the Council. A purely economic analysis of the alternatives neglected to include natural values in the balance.

This case also highlighted the failure of the NSW law to grant protection to endangered species other than fauna. A rare and endangered plant, the *Zieria baeuerlenii* (Rutaceae) occurs only in bushland around Bomaderry Creek. This means it is found nowhere else in the world. Some of these plants were growing a small distance to the north of the proposed road and it was proposed that they would be fenced off. The Australian Heritage Commission has placed a nearby area of the creek on the Register of National Estate because of the occurrence of this plant.

Water Board project

For six weeks over September and October, the EDO participated, along with representatives from the Total Environment Centre, the Nature Conservation Council of New South Wales, the National Parks Association and Friends of the Earth in briefings given by the Water Board overviewing its activities and operations.

The idea for the briefings came about under the Directorship of Bob Wilson. Originally, the briefings were to look only at the Board's Clean Waterways Program, and the priorities of that program. However, inevitably it became necessary to look more broadly at the Board's responsibilities to see where the program fitted into the Board's operations.

The purpose of the briefings was to give participants more detailed information about the Board's activities from which to prepare "work plans" for the coming year. The plans were to allow the researchers employed by the groups to look in a more detailed manner at those aspects of the Board's activities relevant to their particular research area. The outcome of the process was to provide a review of the Board's activities and to show what the Board could do to improve its operations.

The areas of research covered by the environment groups were based on a total water-cycle approach - starting with the outer catchment and tracing the cycle right down to the coast. For example, one researcher from the Nature Conservation Council was looking at the ecological and public health implications of the Clean Waterways Program for urban riverine systems. Another researcher from the Council was looking at supply, demand management and pricing issues.

The area for investigation by the EDO required examination of two matters - firstly, the decision making arrangements, including legislative and institutional arrangements which impact on the effectiveness of the Clean Waterways Program and the Board's activities generally, and secondly, looking at the Board's processes for involving the public in its decision-making processes.

The briefings given by the Board proved to be informative. They were not directed to the particular research areas of participants but rather were intended to provide an overview of the Board's activities so it could be seen how the Board approached the different environmental issues.

Work plans for further investigation of research areas during 1994 were prepared.

In considering the EDO work plan, the Board looked at the extensive political interest in water administration issues during the course of 1993. That interest was manifested in the parliamentary inquiry into the Water Board initiated by Peter Macdonald , a Cabinet sub-committee examination of water issues and investigations and hearings by the Government Pricing Tribunal.

In view of these various inquiries, the Board decided that there was no point in authorising further inquiry into these issues. The viewpoint was understandable.

What then remained of the EDO's proposed work plan was the question of the Board's processes for public involvement in its decision making. From the EDO's perspective, consideration of the Board's public participation processes was dependent upon a clear understanding and analysis of the Board's decision making in order to show where and how the public could be better involved.

Given that the Board was reluctant to authorise another review of its decision making it was decided not to proceed with the EDO work plan.

The work plans proposed by the other groups involved in the briefings were not affected by such broader considerations.

We are told that the groups are now proceeding on to Stage 2 with work on the projects to commence early in the new year.

We look forward to seeing the outcomes of the projects, and how the Board incorporates the groups' recommendations.

It promises to be an interesting process with environment groups working in such close proximity to the heart of one of Australia's largest statutory authorities.

EDO NEWS

Queensland

Proposed Environmental Protection Bill

On 3 November 1993 the proposed Environmental Protection Bill was released for public comment. This Bill, if enacted, would repeal and replace the existing *Clean Air Act*, *Clean Waters Act* and *Noise Abatement Act*, and represents a long awaited overhaul of Queensland's fragmented pollution law.

Some of the features of the Bill are -

(1) procedures for adoption of 'environmental protection policies' (eg noise, air, and water), which include an opportunity for members of the public to make submissions;

(2) a licensing system where members of the public have the right to make submissions with respect to an application for a licence. A person who has made a submission, as well as the applicant, may make an application for review to the administering authority, and then appeal to the Planning and Environment Court;

(3) adoption of 'environmental management programs' without public input where industry achieves compliance with the act for a particular activity by minimising environmental harm or detailing the transition to a new standard; and

(4) the absence of 'open standing' provisions whereby 'any person' could take a civil action to ensure compliance with the law.

The absence of 'open standing' provisions has provoked controversy, and questions have been asked as to whether the proposed new act would be adequately enforced.

This is in part due to reports that major companies are regularly breaching their licences and discharging toxic waste and sludge into the Brisbane River without prosecution. The reports have arisen out of the Criminal Justice Commission's current public inquiry into the improper disposal of liquid waste.

Restrictive interpretation of Judicial Review Act

A restrictive interpretation of the *Judicial Review Act* 1991 was recently handed down by Dowsett J. of the Queensland Supreme Court in *Friends of Castle Hill Association Inc. -v- The Queensland Heritage Council and Others* (93/625 SC unreported, 15 September 1993).

This case is discussed in the article by Stephen Keim in this issue of *Impact*.

The applicant was ordered to pay half the costs of the developer, A.I.S. Investments Pty Limited, and half the costs of the Townsville City Council.

The persuasive authority of this highly conservative judgment means that many environmental groups, consumer groups and other public spirited groups and individuals will be unable to use the Act to review decisions to which the Act applies. EDO is meeting with the Attorney-General, the Hon Dean Wells to discuss the case.

Office move

In September this year EDO Queensland moved from Edward Street, Brisbane to 2nd Floor, 133 George Street, Brisbane (near the government printers). The telephone number (07 210 0275) and facsimile number (07 210 0253) remain unchanged.

The Environmental Law Handbook – Planning and Land Use in New South Wales (2nd edition)

The second edition of David Farrier's invaluable book is now available from Redfern Legal Centre Publishing. Since the first edition in 1988 there have been many changes to environmental and planning laws in New South Wales. These have now been included in a revised and updated edition of Farrier's work.

For further details contact Redfern Legal Centre Publishing on (02) 698 3066.

People Place Law Conference Tapes Now Available

A limited number of sets of eight tapes of the People Place Law Conference in September 1993 are now available from the Environmental Defenders Office. The price of $45 per set includes a conference report as well as postage and packaging.

For further details contact the EDO on (02) 261 3599.

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