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1993 Amendments to the Approvals Process – helping speculative developers

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Recent amendments to the Environmental Planning and Assessment Act have had significant impacts upon the development approval process. In this article John Connor examines the implications of these changes for the quality of environmental decision making.

An objective of the change is to provide greater flexibility in the forms of determination of applications to assist both consent authorities and applicants

Department of Planning Circular No.A21[1]

1. Introduction

Recent amendments to the *Environmental Planning and Assessment Act, 1979* (EP&A Act), passed in the shadow of reforms to local government law[2], have thrown into confusion the approvals process regulated by that Act. These amendments will aid speculative developers at the expense of virtually everyone with an interest in the operation and outcomes of this process.

The amendments fundamentally challenge a system which was founded on values of supporting public participation, rigorous environmental risk assessment and certainty and finality in decision making. Although some of these values have been demeaned in practice at certain times, these values were the foundation of the approvals system.

The amendments of greatest concern relate to four areas:

1. the extension of the period for which a development consent is valid;
2. the creation of new categories of purpose [of development] i.e core and non-core or peripheral;
3. "in principle" development approvals; and
4. "staged" development approvals.

The uncertainty that clouds the precise meaning of these changes, has not been clarified by either of the two publications released to explain the changes[3].

Before examining the implications of these changes, an examination of the state of the law before their introduction is necessary.

2. The law prior to 1 July 1993

2.1 The life of a development consent

The regime governing the life of a development consent focussed on constraining consents being granted but not acted upon.

Consents are an extremely valuable commodity, traded in their own right, and the law sought to restrain the mere granting of a consent not linked to actual intended development. This was done by limiting the life of a development consent granted where there was no "physical commencement".[4] Without commencement, development consents lapsed after two years (s.99(1)(a)(i)) or in special instances three years

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(s.99(3)).

In addition, the approval process was linked to the requirement imposed on consent authorities to keep their environmental planning instruments up to date, i.e relevant to the changing nature and attitudes of the local ecological and social communities[5]. Development consents lapsed one year after an updated environmental planning instrument prohibited development of the kind subject to the approval (s.99(1)(a)(ii)).[6]

2.2 The importance of purpose[7]

The control of development by local councils is, currently, principally effected by the identification of zones within a certain area in a local environmental plan (LEP). The zones will be shown by different colours or be marked out in lines on a map.

LEPs normally provide that to determine which category a particular development falls into, the *purpose* of the development is the relevant factor.[8]

The question that arises is, if a development is proposed which has more than one purpose, of which at least one is prohibited and one permitted (with or without consent), which prevails? The courts have held that the answer to that question can only be determined by *construction*, or interpretation, of the relevant instrument and by applying what is known as the doctrine of ancillary use.

As Grainger notes, this doctrine is really comprised of two principles: *the principle of inclusion* and *the principle of exclusion*. The principle of inclusion essentially means that if one of the purposes can be characterised as dominant then those that are ancillary to, and dependent on, it are disregarded in determining whether the development as a whole is permitted or prohibited.[9]

The principle of exclusion means that if the purposes can operate independently then they are judged according to the restrictions set out in the planning instrument.[10]

The doctrine has been criticised by Farrier who has said that the test that it provides:

> really does little more than beg the question, and as a result it seems that there is little predictability or principle in this area. Each case will depend on the particular facts of the matter and on the views of the individual judges which are frequently not spelt out.[11]

Although defending the application of the doctrine, Grainger does acknowledge that "well advised developers are increasingly seeking to rely on the doctrine with a view to achieving what would not otherwise be possible under applicable planning instruments."[12] His view is that the doctrine has developed a coherence such that these developers aren't necessarily succeeding.

2.3 Certainty and finality in consents

2.3.1 Background

Another issue has been the consideration of the extent to which a consent, either with or without conditions, to an application for an approval must be "certain and final".

Kitto J., in *Television Corporation Ltd v. Commonwealth of Australia*[14], said that the "condition" there in question constituted a specification of acts to be done or abstained from and went on to observe:

> A specification cannot, I think, fulfil this dual function [of telling a licensee how to regulate its conduct and on the other hand making clear to the Minister whether the licensee's conduct is or is not compliant] if it is so vaguely expressed that either its meaning or its application is a matter of real uncertainty.[15]

Samuels AP has recently stated that this case "more readily supports an argument aimed at linguistic uncertainty than want of finality."[16] In *City of Unley v. Claude Neon Ltd*[17], Wells J. addressed the question of finality and said:

> 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. A condition so annexed ought to be directed, and directed only, to circumscribing, with reasonable particularity, the acts of land use to which the authority or tribunal has given its consent, which would otherwise be unlimited in its generality and effect.[18]

2.3.2 Application in NSW

The question of whether a development consent in NSW was sufficiently final has been considered in a number of cases.[19] In relation to the EP&A Act the question has relied upon the interpretation of s.91(1) of that Act which states 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."

In *Mison v. Randwick*[20] the principle of finality was stated by Priestley JA and Clarke JA. Priestley JA said:

> ... if the effect of an imposed condition is to leave open the *possibility* [his 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 me that the Council has not granted consent to the application made.[21]

Clarke JA expressed himself in these terms:

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 that consent could be regarded as final.[22]

Once again, the consideration of whether a particular consent had the sufficient degree of finality was a question

of fact and degree and open to the same criticism that Farrier made of the doctrine of ancillary use.[23] The policy rationale for the principle of finality was, however, stated quite clearly by Samuels AP:

> 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 [emphasis added].[24]

3. The amended situation

The amendments contained in the *Local Government (Consequential Provisions) Act 1993* are said to bring the EP&A Act into line with the *Local Government Act 1993*. It should be borne in mind that the concepts of "ancillary to the core purpose" and "in principle" consents never formed part of discussion papers or draft bills released to the public. These concepts all appeared for the first time in the package of legislation tabled on the last day of the 1992 Budget Session.

3.1 The life of a development consent[25]

The regime relating to the lapsing of development consent has now been turned on its head. The regime now focuses, unabashedly, on keeping consents alive and has severed the links with the regular review of environmental planning instruments.

The time period for the lapsing of consent has been changed from two years, with the possibility of a one year extension, to five years (s.99(1)),*with the possibility of an unlimited life*. Section 99(2) allows the consent authority, in granting development consent, to vary the time period. Section 99(3) prescribes a minimum period of two years but no maximum period is prescribed.

In addition, consents granted before the first of July 1993, but not commenced, were *automatically* extended to five years[26] This was defended by the DoP in its public advertisements as a "recession buster"!

The DoP's Circular A21, explaining the changes, did not draw attention to the fact of the possibility of an unlimited time period but stated the rationale for the changes as follows:

> This recognises that projects, especially large or complex ones, may take some time to get started. It would be unreasonable to require developers to repeat the approvals process if they are unable to commence in three years. At present buildings are frequently demolished and minimum works undertaken in order to have commenced a development sufficiently for the consent not to lapse, with the site remaining vacant for some time.[27]

Just what is "reasonable" depends on your perspective of course but the amended situation does not change the definition of what constitutes the commencement of a development. That is, the same regime which allows the demolition of existing buildings and the excavation of sites prior to obtaining finance for actual construction continues. This "solution" does not address the real cause of the problem - developers speculating on obtaining finance after such demolition and excavation.

What the amendment does overcome however, is a meaningful obstruction to creating a market in development consents for speculative developers. It is possible that a consent for, say, a tourist development on the North Coast could be granted a consent which does not lapse for ten, fifty or two hundred years - without any requirement for work to commence![28]

Conclusion

The amendment dramatically skews the focus of the regime relating to development consents in favour of speculative developers with little or no justification and no significant critique of the previous regime which had the objective of controlling such speculation and properly linking consents to environmental planning.[29]

The amendments regarding the life of a development consent severely limit councils (especially subsequently elected councils) power to influence land management. The unlimited extension of time coupled with the removal

Benefits of the requirement for certainty and finality

Although requiring a rigorous approvals process the values of the requirement for certainty and finality are numerous. For example –

- effective and meaningful community involvement depends upon citizens being able to scrutinise development applications and their determination. In this context it is important to remember that s.5(c) of the EP&A Act states that an object of the EP&A Act is: to provide increased opportunity for public involvement and participation in environmental planning and assessment.
- the register of consents which a council is required to make available to the public, s.104, is an important reference point for potential purchasers of land and/or buildings. Inspection of the register under the regime of "finality" presents a clear picture of the state of current and imminent developments vital to such citizens.
- it requires applicants to be diligent in their applications and consent authorities to be rigorous in the consideration of the application – the issues are all considered at the one time and either dealt with by conditions or refused.

of the ability of councils to shorten consent periods when updating their local environment plans also weakens councils ability to adapt to changing social attitudes and ecological circumstances. The former regime should be restored.[30]

3.2 A new subset of purpose emerges

3.2.1 The Amendment

> 91(3A). 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 a person specified by the consent authority [emphasis added].

3.2.2 A phrase taken out of context

As discussed above[31], the courts have interpreted the language of s.91 of the EP&A Act as demanding a degree of finality and certainty in development consents. In asserting the benefits of such finality and certainty Samuels AP, in *Scott v Wollongong City Council*[32] noted that

> it is common to find that 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.[33]

Samuels AP found that the conditions challenged before the Court fell within such a category and that the conditions differed as to the extent of the detail left to be settled, "but arguably none of them is final."[34] He then went on to say:

> However, what distinguishes them is that the exercise of the decision making power they each contemplate will certainly not alter the development "in a fundamental respect", nor will the development be "significantly different" from that which the application for consent contemplated. They are all conditions which may be described as *ancillary to the core purpose of the application.* [emphasis added].[35]

Samuels words were lifted from the judgment and put almost verbatim into the new section. The question remains to be settled whether the doctrine of certainty and finality will continue to apply to those approvals which are not "in principle" or "staged".

3.2.3 Practical Problems

Even with the requirements of certainty and finality, the phrase "ancillary to the core purpose" creates problems of interpretation. If the Court interprets the amendments as removing these requirements, in the interests of "flexibility", the potential for abuse is enormous. Take an extractive industry for example: the extraction will obviously be the core purpose but important environmental constraints such as tailings dams could be seen as ancillary to that core purpose. Approval of these can, as a result, be left to a later, less public, date.

Other instances will not be as clear cut as the above, the investigation of what is a core purpose is an entirely new investigation, once again a question of fact and degree[36], into a subset of the purpose of a development.

This process also opens the system to potential for abuse and corruption by councillors and officers. The removal of decisions on significant aspects of a development to a nominated officer poses serious questions about accountability.

Thus, rather than simply codifying current practice, which allowed for conditions allowing later scrutiny of minor issues not having the potential to alter the nature or impact of a development[37], the new s.91(3A) requires an entirely new investigation.

3.2.4 Conclusion

The doctrines of certainty and finality should apply to any use of this provision - unfortunately we will have to wait for interpretation by the courts. It is to be hoped that this interpretation or later legislative amendment will mean that this clause relates only to those minor issues not able to fundamentally, or significantly, alter a development.

3.3. "In principle" development consent

3.3.1 The Amendment

Other sections of the Act now provide -

> 91AA(1) A development consent may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority as to any matter specified in the condition. Nothing in this Act prevents a person from doing such things as may be necessary to comply with the condition.
>
> (2) Such a consent must be clearly identified as an "in principle" consent (whether by the use of that expression by reference to this section or otherwise).
>
> (3) An "in principle" consent must clearly distinguish conditions concerning matters as to which the consent authority must be satisfied before the consent can operate from any other conditions.
>
> ...
>
> (6) If the applicant produces evidence in accordance with this section, the consent authority must notify the applicant whether or not it is satisfied as to the relevant matters. If the consent authority has not notified the applicant within the period of 28 days after the applicant's evidence is produced to it, the consent authority is taken to have notified the applicant that it is not satisfied as to those matters on the date on which that period expires.

3.3.2. The end of finality or ghosts in the machine?

Consents granted under this section involve "granting approval on condition that a specified matter be resolved before the consent can operate."[38] This form of consent most clearly reflect the objective of the reforms, quoted at the start of this paper, to provide flexibility in the forms of determination of applications to assist both consent authorities and applicants. It provides flexibility in areas where the development application has not addressed, or not adequately addressed, certain issues for these to be "fixed up" and in a piece-meal manner. According to the Department of Planning:

> This form of consent will remove the need for a development application to be resubmitted where an issue (or issues) have not been fully addressed in the submitted application and the consent authority is clear on the performance standards which the development must meet.[39]

The responsibility formerly placed on applicants to identify and deal with issues prior to application for development consent has been dramatically slackened by in principle approvals. Applicants are able to apply for in principle approvals.[40]

The duty formerly imposed on the applicant, by the application of the requirements of certainty and finality, to fully consider environmental risks before lodging applications, can now be said to have disappeared. *The issues are now to be thrashed out between the consent authority and the applicant without public scrutiny.*

Did the NSW Legislature, by allowing in principle approvals, mean to end the requirement of finality in the approvals process or did it unwittingly approve its demise? Consideration of significant aspects, which have the possibility of fundamentally altering the proposed development, can now be left to a later date. This would seem to suggest the end of requirement for finality.

It could be argued, however, that what is created is a phantom approval - one that is not completely formed - a "ghost in the machine". Under this interpretation the requirements of certainty and finality would still apply, but their application would merely be postponed - allowing the "heat" to go out of the issue. As an in principle consent is not an operative consent until final satisfaction by council, this would seem to be the correct interpretation.

3.3.3 Undermining public involvement

Regardless of the above dispute, the major problem with in principle approvals is that they provide an avenue for the postponement of environmental assessment *and for this to be done out of the gaze of public scrutiny.*

Another important question regards the rights of objectors to appeal, under s.98, from the "determination of the consent authority". What is the determination? Is it the initial in principle approval? Or is it the final approval for operative consent? Or both?

If the period in which objectors to a designated development may appeal (28 days) runs from the date of "in principle" approval then this will mean that matters, having the possibility of significantly altering the development, will be determined *after* objectors appeal rights expire! In the example in DoP Circular A21, for example, a time period of three months was set for satisfaction of in principle conditions - longer than the appeal period.

Having consideration for the objects of the EP&A Act, it ought to be the case that s.98 appeal rights are from the final determination. However, this is not clear and, in any case, does not address the problems of removing the "patching up" of development applications away from public scrutiny.[41] For matters important enough to require an EIS, any additional material significantly altering the proposed development should, *at the very least*, be publicly exhibited with opportunity provided for public comment and objection[42].

3.3.4. Undermining rigorous environmental risk assessment and the precautionary principle

By allowing this flexibility, the Government has also, arguably, ignored the precautionary principle which has emerged in the last twenty years as a principle of great importance to decision making with environmental implications. [43] In *Leatch v NPWS*[44] Stein J commented:

> In my opinion the precautionary principle is a statement of common sense and has already been applied by decision makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. *Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision makers should be cautious.*[45]
>
> [emphasis added].

"In principle" approvals allow the postponement of some aspects of assessment and encourage approvals that assist deficient applications. It is difficult to see how this approach, removing decision making from public scrutiny, could be described as cautious.

3.3.5 The practical effect - "ghosthusters" and "well advised developers"

As noted above, Grainger has already observed that the doctrine of ancillary use has led to "well informed developers" attempting to subvert environmental planning instruments. It would be naive to assume that "well informed developers" would not take the opportunity provided by "in principle" approvals to manage their application so that significant issues could be dealt with under this less transparent process.

In addition, the practical effect will be to make a mockery of the process which notifies the community of development

applications. Rather than reacting to a concrete proposal, the community will be forced to deal with the very real possibility of a "plasticine proposal" which may not reflect the ultimate development.

In the case of objectors to designated development, the community will have one weapon in their armoury which may deter the indiscriminate use of in principle approvals. As noted above, the in principle approvals process may mean that objectors can appeal from the in principle approval or that the time for objectors to appeal a decision will expire before the final approval. Consequently they will be forced to exercise their appeal rights at this stage or lose them.

The effect of an appeal is, of course, that the council is replaced as consent authority by the Land and Environment Court. An appeal, if available from the first in principle approval, will force responsibility out of the hands of the council into the Court.

This shift in responsibility will (unnecessarily) increase the workload of the Land and Environment Court which will be forced to become, in effect, the administrator of "in principle" approvals.

3.3.6. Conclusion

Rather than recognising the value of allowing citizens and communities to participate in decision making, in principle approvals have the potential to subvert that objective. In this way it could be said to be contrary to the objectives of the EP&A Act, especially that relating to public involvement, and it remains to be seen how the Court will handle this conflict.

Any flexibility added to the approvals process should not come at the expense of public involvement or rigorous environmental assessment. In principle approvals, as they currently stand, are clouded with ambiguity. If they are not abandoned then they should be amended to require periods of public notification, allowing objections, to the refashioned development application. In principle approvals must not be allowed to further weaken the quality of environmental impact statements or assessment in general.

Under no circumstances should applications for "in principle" approvals be allowed. They should be, at the most, a device for councils to have some flexibility if unanticipated significant issues arise - but not a device that undermines public involvement or rigorous environmental assessment.

3.4. "Staged" Development Approvals

3.4.1 The Amendment

> 91AB (1) A development consent may be granted:
>
> (a) for the development for which that consent is sought; or
>
> (b) for that development except for a specified part or aspect of that development; or
>
> (c) for a specified part or aspect of that development.
>
> (2) Such a development consent may be granted subject to a condition that the development or the specified part or aspect of the development, or any thing associated with the development or the carrying out of the development, must be the subject of another development consent.

Under s.91AB a consent authority is able to grant development consent for staged development or to stage aspects of a development. The main benefit of this device to applicants is that an initial approval can form the basis for obtaining finance. Circular A21 gives two examples, one of a master plan for urban development of a "greenfields site" and the other for the building envelope of a proposed multi-storey building. For both of these examples subsequent development consents are required.

Although the difficulties of raising finance are recognised, the potential shortfalls in terms of environmental assessment and political reality are significant.

3.4.2 Inability to assess cumulative environmental impact

First of all, to what extent is the cumulative environmental impact of the final development relevant to the determination of a staged development application? During the passage of the amendments through the Legislative Assembly Dr Macdonald, MP for Manly, attempted to move an amendment to the provisions for both staged and "in principle" approvals that would have required adequate assessment of the cumulative environmental impact of the proposed final development before the granting of these consents. In a briefing note to the Minister it was asserted that such a requirement would destroy the effectiveness of these approvals, *i.e that there was no way the cumulative environmental effects could be assessed under the proposed regime.*

It is unclear why, for example, a master plan for subdivision of a "greenfields" site could not provide details on control of urban runoff, water recycling etc - indeed these are probably the most important considerations.

Although s.90 lists a wide range of matters to be considered in determining a development application, only those that are of relevance "to the development the subject of the development application" are to be considered. It remains unclear as to how broadly the Court will interpret this when faced with a staged development but it would certainly be argued by applicants that when considering an application for a building envelope, for example, that the consideration of other environmental impacts must be left till later.

3.4.3 Practical effect - "Well advised developers."

The problem with this is that the granting of the initial staged development approval will place immense pressure on the consent authority to approve the final stages. Social and economic effects and the circumstances of the case, relevant considerations under s.90, could include the fact of obtaining of finance, possible employment and a host of other reasons that an applicant will use to have applications approved.

Although it will be said that the developer will always be taking the risk of a subsequent refusal, any student of

environment and local government affairs will be aware of the social and political reality. The fact that the EPA has never refused a single pollution licence can be said to illustrate this reality.

3.4.4 Conclusion

When the practical dangers are combined with the apparent inability of consent authorities to consider the cumulative environmental impact of the final development, staged development approvals have the very real potential to undermine environmental assessment and, to the extent that a development will come together in pieces, public involvement.

The provisions relating to staged development must be amended to allow for assessment of cumulative environmental impacts, otherwise there can be no justification, in environmental planning terms, for these approvals.

4. Conclusion

As Shakespeare once said, ''sweet are the uses of adversity''. The above amendments were able to be passed in the shadow of the *Local Government Act 1993* partly because legislators were overwhelmed by the considerations of that Act and because the economic downturn was cynically exploited to justify the amendments. In doing so, however, the Legislature has managed to undermine community involvement and rigorous environmental risk assessment whilst granting significant benefits to speculative developers and the legal profession.

The changes were unashamedly targetted towards allowing developers to gain approvals of sufficient value to impress potential financiers. Without amendment significant pressures will be brought to bear on councils as consent authorities to be an accomplice to a devaluing of the approvals process. Many councils will rise to this challenge. Others may not.

Notes

1. Issued 30 June 1993, Changes to the *Environmental Planning and Assessment Act* under the *Local Government (Consequential Provisions) Act* 1993.
2. *Local Government (Consequential Provisions) Act* 1993.
3. DOP Circular A21 supra n.1 and DOP & Dept Local Government and Co-operatives (1993) Approvals Guidelines.
4. Section 99(2) provides for the erection of buildings and work on subdivisions development commences when ''building, engineering or construction work relating to that development is physically commenced.'' Unfortunately this includes, for example, site excavation which is often carried out before the finance for actual construction is committed - hence the proliferation of empty black holes on construction sites across Sydney, all with valid development consents.
5. Section 73 of the EP&A Act requires that environmental planning instruments shall be kept ''under regular and periodic review for the purpose of ensuring that the objects of this Act are, having regard to such changing circumstances as may be relevant, achieved to the maximum extent possible.''
6. see, for example, *Vaniga v. South Sydney City Council* (1989) 74 LGRA 86.
7. see also Grainger C. (1993) ''The Doctrine of Ancillary Use'' 10 *EPLJ* 267.
8. see *Warringah Shire Council v. Raffles* (1978) 38 LGRA 306 for a useful summary of the earlier cases relating to the distinction between the nature of a purpose and the nature of a use. See also Glass J.A. in *Ku-ring-gai Municipal Council v. Geoffrey Twibill & Associates* (1979) 39 LGRA 154 at 160.
9. For example, in a zone which allowed ''country dwellings'' with consent, the use of part of that site for the landing and launching of a private helicopter for personal uses has been held as an ancillary use and allowed. *Warringah Shire Council v. Raffles* (1979) 39 LGRA 154.
10. This principle was recently confirmed by Pearlman J. in the case of *Ashfield Municipal Council v. Australian College of Physical Education* (1992) 76 LGRA 151. Use of a boarding house for students and staff of the College was ancillary to the use for the provision of education in a building across the street. However, it was not shown that the boarding house use (which was prohibited) was dependent on the educational use of the main building. Accordingly, though the boarding house was ancillary, it was also independent and thus remained prohibited.
11. Farrier D. (1993) *Environmental Law Handbook - Planning and Land Use in New South Wales* (2nd ed) Redfern Legal Centre Publishing, Sydney, pp. 116,117.
12. op cit, p267.
13. Apart from the cases cited above, other important cases include: *Penrith City Council v. Waste Management Authority* (1990) 71 LGRA 376; *Webb v. Warringah Shire Council* (1989) 68 LGRA 105; *Jungar Holdings Pty Ltd v. Eurobodalla Shire Council* (1989) 70 LGRA 79; and *Lizzio v Ryde Municipal Council* (1983) 155 CLR 212 (in which Gibbs C.J. held at 217, that the question of whether one purpose is ancillary to another is ''one of fact and degree'').
14. (1963) 109 CLR 59.
15. ibid at 70.
16. *Scott v. Wollongong City Council* (1992) 75 LGRA 112 at 117.
17. (1983) 49 LGRA 65.
18. ibid at 68.
19. see, inter alia, *Randwick Municipal Council v. Pacific-Seven Pty Ltd* (1989) 69 LGRA 13 and *Lend Lease Management v. Sydney City Council* (1986) 68 LGRA 61.
20. (1991) 73 LGRA 349.
21. ibid at 351.
22. ibid at 354.
23. supra n11.
24. supra n.16 at 118.
25. see 2.1 above for the comparative discussion.
26. see cl. 1 of Schedule 3 ''Savings, Transitional & Other Provisions''.
27. supra n.1, p.4.
28. s.103 of the EP&A Act 1979 allows for revocation or modification of consents by either the Director-General or the council, having regard to draft environmental planning instruments. The section also requires compensation to consent holders for expenditure incurred pursuant to that consent.
29. I have been informed that many councils, aware of the problems inherent in long consents, are using the two year time period. This only begs the question - why the need for change?
30. The problems with ''physical commencement'' discussed at n.3 might be overcome by replacing those words with ''substantial commencement''. Substantial commencement could be defined negatively as ''not including, for the purpose of erecting a building, the mere demolition and excavation prior to commencement of erection''.
31. see discussion at 2.3.
32. supra n.16.
33. ibid p.118.
34. id.
35. ibid at p.119.
36. See the comments of Farrier on such investigations supra n.11.
37. Such as the nature of work to be carried out in an adjoining park, *Scott v. Wollongong C.C.* op cit.
38. DoP Circular A-21 Aupra n1 at p.3.
39. id. It is difficult to understand the reference to ''performance standards'' in light of the DoP's active resistance to allowing standards to be part of Environmental Planning Instruments. The inference is that Councils can impose higher standards than those set by the EPA, this would be a welcome development, but I am not aware of any situation where this exists.

40. See s.75 and s.95 LG Act 1993 and p. 7 "Approvals Guidelines" supra n.3.
41. For a criticism of planning by Environmental Management Plans see *CSR v. Wingecarribee S.C.* (10372/90 Unreported) 17/12/90 at pp.15,16.
42. Councils could, if concerned by this aspect, currently use s.91 EP&A Act to set conditions requiring, at least, further exhibition.
43. Internationally the principle has been incorporated in, inter alia, the 1992 Rio Declaration on Environment and Development [Principle 15], the 1992 UN Framework Convention on Climate Change [Art. 3(3)], the June 1990 London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer [preamble, para 6] and the 1992 Convention on Biological Diversity. In Australia, the principle has been incorporated in, inter alia, the 1992 Intergovernmental Agreement on the Environment (IGAE), as well as in state legislation such as the *Protection of the Environment Administration Act* 1991 (NSW).
44. *Leatch v. Director-General National Parks and Wildlife Service & Shoalhaven City Council* Land and Environment Court, Unreported, 10376 of 1993.
45. ibid at p.20. Even though the precautionary principle was not specifically mentioned in the legislation relevant to the matter before the Court, the *National Parks and Wildlife Act* 1974, Stein J. held that it was relevant "...where a matter is not expressly referred to consideration of it may be relevant if an examination of the subject matter, scope and purpose shows it not to be an extraneous matter (*Minister for Aboriginal Affairs v. Peko-Wallsend* (1985) 162 CLR 24)" ibid at p.21.

SEPP 37 – The government responds to *Vaughan–Taylor*

Maria Comino
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A recurrent issue when considering whether to proceed with public interest environmental litigation is the need to assess the government's likely response to a favourable court decision.

Will the government change the law before a matter comes on for hearing thereby making the legal issue moot? This happened in *Brown v EPA* where the Government intervened to exempt the EPA from the provisions of Part V of the *Environmental Planning and Assessment Act* (EP & A Act). [1]. Alternatively, will the government change the law after judgment has been handed down, and once the full implications of a decision are understood.

The case of *Vaughan-Taylor v David Mitchell-Melcann Pty Ltd and the Minister for Minerals and Energy* fell into the latter category.

This article will look at the response of the New South Wales government to the Vaughan-Taylor case.

Vaughan–Taylor v David Mitchell Melcann Pty Ltd and Minister for Minerals and Energy[2].

Judgment in the Court of Appeal was handed down on 15 November, 1991, some 20 months after proceedings were instituted. Unlike many public interest environmental law cases there had not been much publicity, prior to judgment being delivered, about the legal or environmental issues the subject of the appeal.

However, immediately after judgment was delivered, discussion of the court's findings was stimulated by front page and editorial articles in the Financial Review. [3] In particular, discussion had been stirred by the prospects of the Minister for Mineral Resources being subject to the provisions of the EP & A Act when granting mining leases.

The Court Decision - Background

The Court decision included interpretation of the existing use provisions - Sections 107 and 109 - of the EP & A Act. Those provisions had been "rationalised" by amendments to the EP & A Act in 1985. The amendments related to the right to continue an existing use but were intended to limit the extent to which such uses could be intensified or expanded without development consent. [4].

Prior to the amendments, the existing use provisions enabled the spread of mining activities across land or the intensification of mining activities.

The new Section 109 (2) provided that a use can be continued in the area "actually physically and lawfully used" immediately before the relevant planning controls come into existence.

The Area of an Existing Use

In its judgment, the Court of Appeal adopted the literal meaning of the words "actually physically and lawfully used". Applying that to the facts in Vaughan-Taylor, the land in actual physical use included the land actually dug or otherwise physically used. (For example, for roads, stockpiles and buildings) It did not include land undisturbed by any current mining activity and held in reserve for some future activity. [5]

With this interpretation, the Court recognised that the existing use provisions of the Act are an exception to the planning laws, and that any enlargement of such uses should come under the planning controls imposed by the Act. That is, the exception should be strictly interpreted.

Application of the Environmental Assessment Provisions of the EP & A Act to Existing Uses

The existing use provisions are found in Part IV of the EP & A Act, which part deals with the requirement for development consent.

The effect of being able to claim the benefit of an existing use is that no development consent is required. As Part V of the Act deals with environmental assessment requirements

when no development consent is required, the Court found that a miner who can claim the benefit of an existing use under Section 109, is under an obligation to comply with Part V of the Act.

Mining was found to be an "activity" for the purposes of Part V. His Honour Mr Justice Meagher said:-

> .....it would be ludicrous to pretend that an activity does not need environmental control simply because a Local Council's consent was unnecessary. [6].

The consequence of that finding is that an environmental impact statement will be required whenever a mining operation is likely to have a significant effect on the environment.[6A]

Implications of the decision

The finding that existing uses did not include areas in reserve, and that development consent would have to be obtained for expanding operations certainly raised concerns in the mining industry. [7].

The reason for concern was that in spite of the 1985 amendments to the existing use provisions of the Act, practice had not changed from the pre-1985 position. Practice apparently differed substantially to the proper interpretation of those provisions.

A further reason for concern was the potential impact on longstanding procedures to be followed by the Minister for Minerals and Energy in the granting of mining leases. No mining lease was to be granted unless and until Part V had been complied with or development consent had been obtained under Part 1V.

Inevitably, reaction to the decision was strong. This was apart from any possible political discontent that these changes had been effected by an individual speleologist.

There were significant interests in protecting current practices even though those practices didn't reflect long standing laws.

It is obviously impossible to know what lobbying occurred after the decision was handed down. However, by 17 March, 1992, newspaper reports quoted Minister Causley, the Minister for Mineral Resources, as saying:-

> ... technically, the Court's Yessabah Caves decision could temporarily close the 1800 sand and gravel quarries in NSW and bring the state to a grinding halt.
>
> (He) and Mr Webster (Minister for Planning) would, if necessary, consider ways of introducing legislation to counter the court ruling.[8]

The next day the Ministers issued a joint press release stating that:

> The Minister for Planning had ordered the preparation of a State Environmental Planning Policy (SEPP) to protect some quarry operators from unintentionally acting illegally. .....The decision by the Court threatened the viability of the State's sand and gravel quarries which was unacceptable in the present economic climate.
>
> A State Policy... could legitimise those quarry operations which have occurred since 1986. It would also allow for their continued operation..... Consideration will have to be given to the period to which any policy might apply, as industry would clearly need sufficient time to adjust to the changed circumstances.
>
> Naturally we wish to avoid a situation in which quarry owners are perceived as acting against the public interest by avoiding contemporary environmental and planning requirements.
>
> The aim of this Policy will simply be to allow existing use while giving sufficient time to comply with environmental planning requirements. [9]

By October, 1992, the Government had formulated its intention to apply a moratorium period of two years.

At that time, Minister Causley repeated his concerns about the decision before a parliamentary Estimates Committee:

> We believe that while the judgment in that (Vaughan-Taylor) case might or might not have had some merit, the implications across Australia and the State are quite horrific, because in fact possibly all quarries are now illegal, and it could have serious implications on mines as well. In early October, 1992, the Cabinet Office circulated a draft State Environmental Planning Policy prepared by the Department of Planning which proposes a moratorium period during which mines and quarries operating as existing uses would obtain development consent. The moratorium period is a period of two years to give them time to do environmental impact statements in those areas. The Department of Mineral Resources is not happy with it on a number of grounds. Of course, as you realise in government there are differing areas, not the least being the onerous restrictions placed on mining lease renewals that could have some serious implications".[10]

"Consultation" on the proposed SEPP

The Minister had asked the Department to proceed with the preparation of the SEPP as a matter of urgency.

Public exhibition of a draft of the SEPP therefore became an issue. The Department expressed concerns that public exhibition of the SEPP may delay the process, and that in the current circumstances such delay was undesirable because it would only postpone commencement of the moratorium period. Conservationists argued that it was nevertheless important for there to be broader public consultation, and the need for speed could be accommodated by expedition of the process. [11]

Ultimately the Minister decided not to publicly exhibit the SEPP.

In lieu of exhibition, the consultative process undertaken by the Department involved representatives from key interest groups meeting separately with Department staff.

This included a couple of meetings with representatives from the peak environment groups. It is not known how many meetings were held with other interest groups. However, the Department indicated it would be meeting with Councils and obtaining input from the regions. Again, it is difficult to know to what extent conservationists and the broader community may have been involved in any regional meetings.

A summary of the intended provisions of the SEPP was circulated to conservationists. However, no draft was ever circulated.

SEPP 37 - Continued Mines and Extractive Industries, and a regulation amending Schedule 3 of the Environmental Planning and Assessment Regulation 1980 were gazetted on 18 June, 1993.

SEPP 37 – What does it provide?

What can be done without development consent?

SEPP 37 allows a person to carry out a "continued operation", and enlarge, expand or intensify such a continued operation at any time during the two year moratorium period, subject to the requirement to register as a "continued operation", and to limitations on area and quantity. [13]

The SEPP applies to all land in the State, excluding the mine the subject of the *Vaughan-Taylor* litigation, and land to which SEPP 14 relating to Coastal Wetlands or SEPP 26 relating to Littoral Rainforests apply.[14]

A "continued operation" is defined to mean development for the purpose of a mine or extractive industry that:

(a) was lawfully commenced before the coming into effect of an environmental planning instrument that permitted the carrying out of that development only with development consent; and

(b) has not been abandoned within the meaning of section 109 (2)(e) and (3) of the Environmental Planning and Assessment Act 1979; and

(c) has not, before the commencement of this Policy, been granted development consent for the purpose of a mine or extractive industry; and

(d) would, but for this Policy, be prevented from extending, having its area increased, or enlarging, expanding or intensifying, because of section 109 (2) of the Environmental Planning and Assessment Act 1979.

A "continued operation" only gains the benefit of the moratorium if it registered with the consent authority within three months of commencement of the SEPP 15, and the consent authority has not cancelled the registration. 16.

Clause 12 provides that a consent authority can cancel a registration if it is of the opinion that the information given to the consent authority does not comply with the requirements of Clause 10, the information does not confirm that the operation is a "continued operation", or that the operation is in breach of the limitations attaching to the carrying out of the operations set out in Part 4 of the policy.

The consent authority is required to keep a register of continued operations which may be inspected by any person free of charge. [17]

Registration is effected by providing the information required by Schedule 1. [18]

This includes provision of details of the operation prior to planning control, including the quantities of materials produced in each year of operation and the method of operation. 19. Details to be provided of the "continued operation" after planning control include the area and depth of the operations. [20]

Operators must also provide details showing the expansion of operations during the period 1 July 1986 to 30 June 1991. This includes details of the additional areas of land actually physically used in carrying out the "continued operation" for each year during that period, and specifying the amount of all material produced from the "continued operation" for each year during that period. [21]

The yearly expansions are then used to determine how far a "continued operation" may expand during the moratorium period.

During any twelve month period of the moratorium, a "continued operation" may expand by the area of its average annual expansion over land actually physically used. The average is taken over the five year period from 1 July 1986 to 30 June 1991.

Alternatively, an operation may expand by the area of its expansion over land actually physically used during the year 1 July 1990 to 30 June 1991, if that area is greater. [22]

There is a further requirement that the annual amount of material produced from a "continued operation" during any twelve month period must not exceed the average annual amount of all materials produced from the operation. The average is taken over the five year period from 1 July 1986 to 30 June 1991.

Alternatively, the annual amount must not exceed the amount of all material produced from the operation during the period from 1 July 1990 to 30 June 1991, if that amount is greater. [23]

At three monthly intervals throughout the moratorium period, a "continued operation" is required to submit written information about each area of land actually physically used by the expansion of the operation during the previous three months and to specify the amount of all material produced from the "continued operation" during the previous three months.[24]

Carrying Out Development With Development Consent

The purpose of the SEPP is to provide a two year period during which existing operators can make application for development consent if they want to continue their operations after that period. [25]

The process for obtaining development consent differs depending on whether or not development is designated.

Prior to gazettal of the SEPP and regulation, all extractive industry was generally classified as designated development, thus requiring preparation of an EIS.

The SEPP and regulation changed this by differentiating between types of extractive industry. The combined effect is to amend the list of designated development prescribed in Schedule 3 to the EP & A Regulation and to set thresholds for determining whether a particular mine or extractive industry will comprise designated development.

There are three circumstances in which a "continued operation" may be declared to be designated development:

(1) In the case of a mine - there is a proposed minimum increase of 25% per annum in the amount of all materials produced from 1 July 1990 to 30 June 1991; or

(2) In the case of an extractive industry - there is a proposed minimum increase of 50 000 tonnes per annum in the amount of all material produced from 1 July 1990 to 30 June 1991; or

(3) If the carrying out of the development is, in the opinion of the consent authority or the Director of Planning (on a reference under sub clause 20(3)), likely to significantly affect the environment, taking into account only the matters listed. [26]

The matters to be taken into account include current impact of the operation on the surrounding locality, future impact of the development, having regard to existing vegetation, scenic character or special features of the land, and any guidelines published by the Department of Planning.[27]

Notably, the final date for establishing the past area used or volumes produced is 30 June, 1991, recognizing that otherwise, operators could stand to benefit by having increased their operations from the time the Court of Appeal decision was handed down in November 1991.

Where a consent authority forms the view that a development is designated it must notify the applicant of its opinion. If the applicant disagrees with that opinion, the application must be referred to the Director of Planning for determination. [28]

The provisions of the EP & A Act relating to advertised development apply to development which is not designated.

When considering an application for advertised development, a consent authority must take into account a statement of environmental effects prepared in accordance with any Department of Planning guidelines, and any mining rehabilitation and environmental management plan or draft plan prepared for the site in relation to a mining lease under the Mining Act 1992.[29]

Once development consent is obtained and comes into force, the Policy ceases to apply to the operation.[30]

Where a development application has not been finally determined by the consent authority by the end of the moratorium period, the Policy will continue to apply to continued operations until the application is finally determined or if determined by the granting of consent, the consent comes into force. [31] If an appeal is lodged, the Policy continues until the appeal is finally determined or if determined by the granting of consent, until the consent comes into force. [32]

Criticisms of the SEPP

Amendments to Schedule 3 of the EP & A Act

A central criticism of the SEPP and regulation is the change to the existing thresholds for designated mining or extractive industry development.

Arguments presented by the Department of Planning to justify the changes were that a merits based approach for deciding whether there is a requirement for an environmental impact statement is more appropriate than the current non-discretionary requirement in Schedule 3 of the EP & A Regulation. It was said: - "A consent authority will have a clear right to require an EIS where that is appropriate having regard to both past and future operations." [33]

The problem with a discretionary approach is that councils may equally choose not to exercise the right to require an EIS in circumstances where an EIS should be required. In such circumstances, even though there may be strong argument that an EIS should be required, Council's decision not to require an EIS will not necessarily be considered manifestly unreasonable in the sense required to found judicial review of the decision. [34]

Exercise of the discretion is subject to minimum thresholds. However, the thresholds set - 50 000 tonnes per annum for the year from 1 July, 1990 to 1 July, 1991 - would not provide a guarantee of protection for mines like the mine the subject of the *Vaughan-Taylor* litigation, with its threatened rainforest, rare bats and important caves, which fall below that threshold. Such a mine would be subject to a much lower standard of environmental impact assessment. There would also be no possibility of a merits appeal on significant environmental issues.

The SEPP and regulation go beyond providing for a moratorium to give time to operators to do an EIS. The amendment to Schedule 3 effected by the regulation has changed the criteria for when an EIS is required.

Changing the criteria has exposed the risk that potentially harmful operations will not require detailed environmental assessment. Such risk is unacceptable when compared with the costs of requiring, out of caution, preparation of an EIS. If operations are not likely to cause serious harm to the environment, the EIS process will correlate to the level of potential environmental harm and therefore not be unduly burdensome.

Other environmental controls

The SEPP and regulation essentially preserve the outcome of the Court of Appeal decision with respect to Part V.

The Minister for Mineral Resources is bound to consider an EIS in the course of deciding mining lease applications or applications for renewal of mining leases, made every twenty-one years, where the mine is likely to have a

significant effect on the environment.

This process will apply where development consent is not required. For example, if a mine is operating within the area of its existing use.

A practical concern about application of the Vaughan-Taylor decision, has been the processing of mining lease renewal applications since judgement and for which it was not anticipated EIS's would be required. The Department informs us that mining lease renewal applications are being processed in accordance with Part V requirements. However it is plain the Department has perceived administrative difficulties in complying with Part V.[35]

Overview of the SEPP

The need for, and provisions of the SEPP and regulation must be judged in the context of the history of the 1985 amendments to the EP & A Act.

Those amendments were intended to rationalise the existing use provisions of the Act and curtail the excesses and anomalies associated with such uses. However, in spite of the amendments, mining and extractive industry have apparently not carried out their operations in accordance with those provisions.

The government's decision to legitimize illegal operations must therefore be considered in that light.

It was that history of legislative amendments and practice on the ground that gave greater weight to the argument for broader consultation about the government's response and for public exhibition of the SEPP and regulation. Concerns about delay could have been overcome by expedition of the process.

A broader consultative process may have revealed that a SEPP or at least a SEPP in the form of the present SEPP and regulation were unnecessary. To make that suggestion is still consistent with acknowledgement that the decision has had practical implications for operations on the ground and that there needed to be an orderly transition of those practices whilst mining and extractive industry undertook the requisite level of environmental impact assessment.

With the SEPP and regulation now gazetted and the moratorium in place, there will be a need to ensure that the "moment" is not lost altogether. Any pressures in two years time to extend the moratorium and further postpone the proper application of the law will have to be resisted.

At that time there will be a need to consider the effect on the environment of operations where there was never any intention of seeking development consent or where operations expanded as permitted under the SEPP and regulation, without any environmental impact assessment.

Implementation

Implementation of the SEPP and regulation should have some positive outcomes, though there are questions as to whether these will eventuate.

Firstly, it is no doubt hoped that operators will apply for development consent, thereby resulting in more operations complying with environmental controls than was the case prior to the SEPP and regulation. However, the price of compliance has been the weakening of the environmental controls themselves. Any assessment of whether the policy has met its stated aim of seeking to obtain compliance with environmental planning controls must take account of that loss.

Secondly, the policy requires the provision of information on mining and extractive industry development, which information would not have been obtained if the operations continued illegally. It will be important to follow what will happen in practice as regards the adequacy of the information to be provided at three monthly intervals, about the expansion of operations. As the policy does not go on to provide that provision of the information is a precondition to obtaining the ongoing benefit of the moratorium, the unenforcability of these information requirements may have significant environmental consequences which are not subject to scrutiny.

At the time it was decided to introduce a SEPP, the Minister for Planning stated that he was wishing to avoid the situation whereby operators were "perceived as acting against the public interest by avoiding contemporary environmental and planning requirements". Having now considered the effect of the SEPP and accompanying regulation, including the potential for significant environmental harm during the moratorium period and the weakening of environmental planning controls, it may be argued that the issue of whether operators were perceived to be complying with the law was given greater importance than the need to secure the strength of the environmental planning requirements.

Conclusion

To address the initial question of anticipating government's response to public interest litigation, regard must no doubt be had to the broader political environment.

Specifically, in more recent times in NSW and less so at the time proceedings were commenced in *Vaughan-Taylor*, concern has been expressed that:

> NSW is not as attractive a location in which to invest in exploration, mining, smelting and processing as other states. Other states have been ranked more highly in terms of laws relating to mining, to national parks and wilderness,and to planning and approval processes.[36]

This context was clearly relevant to the approach taken by the government during the formulation of the SEPP and regulation.

That context resulted in the government's decision to weaken the effect of the Court decision by the introduction of the SEPP and regulation.

However, in spite of this, the SEPP and regulation should provide better environmental outcomes to those occurring before the *Vaughan-Taylor* decision.

For this reason there is little doubt that the case resulted in some positive movement in the direction of requiring mining and extractive industry to comply with environmental laws. The case provided an essential reminder to politicians and the public that compliance matters.

Notes

1. See Mossop, D. (1993) "A win for the EPA is a loss for the environment" 30 *Impact* 1.
2. *Vaughan-Taylor v David Mitchell-Melcann Pty Limited and the Minister for Minerals and Energy* (1991) 73 LGRA 366
3. "Court decision opens up minefield" *Australian Financial Review*, 18 November 1991 and "Time to untangle mine red tape" *Australian Financial Review*, 19 November, 1991.
4. Hansard, 26 November 1985 p.10638
5. see Meagher JA in *Vaughan-Taylor v David Mitchell-Melcann Pty Limited and the Minister for Minerals and Energy* (1991) 73 LGRA 376
6. ibid at 377
6A. s. 112 EP & A Act
7. "New Obstacles for Industry in NSW", Australian Environment Review, 1 January 1992 p.9.
8. Lewis, D. "Mines Law Threat to All Construction", Sydney Morning Herald, 17 March 1992, p. 2
9. Minister for Planning and Energy " State Policy to Protect Quarry Owners", Media Release, 18 March 1992.
10. Hansard, 23 October, 1992 at 90 - 91
11. If a SEPP is exhibited, the usual exhibition period is three months. There is further time taken to consider the submissions.
12. Government Gazette, 18 June, 1993, p. 2907
13. cl.8.
14. cl.3.
15. cl.7.
16. cl.10.
17. cl.11.
18. cl.12.
19. Schedule 1 clause 4
20. Schedule 1 clause 5
21. Schedule 1 clause 6
22. cl. 13.
23. cl 14.
24. cl. 15.
25. cl. 2.
26. cl. 20(1((a))
27. cl. 20(1)(b)(i)(ii)(iii))
28. cl. 20(3))
29. cl. 22
30. cl. 23
31. cl. 24(1))
32. cl. 24(2))
33. Letter of Department of Planning to EDO, 26 May 1992.
34. see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223
35. *NSW Aboriginal Land Council v The Minister Administering the Crown Lands Act* (1992) 78 LGERA 1, *The Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (1992) 80 LGERA 173
36. Extract from an invitation to a speech by Ian Causley, Minister for Mineral Resources, to the Australasian Institute of Mining and Metallurgy entitled "The Minerals Industry in NSW and the Government Agenda", Sydney, 19 April 1993.

Why are environmentalists afraid of property rights?

Gary L. Sturgess
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By and large, Australian environmentalists have been uncomfortable about property rights. There was an absoluteness about the common law doctrine of freehold title which seems to militate against sound environmental management. The maxim of the law was 'cujus est solum ejus usque ad coelum' (whose is the soil, is also that which is above it), and lawyers imagined an inverted pyramid, beginning in a point at the centre of the earth and extending out through the biosphere into the eternity of space.[1]

Throughout the nineteenth century, this Lockean notion was popularised in Australia in the agrarian ideal of the yeoman farmer: the small selector struggling with common sense and perseverance to 'grow two blades of grass where one was grown before'. It survives to this day in rural Australia and in the philosophies of the National Party.

And yet John Locke - the most trenchant of the seventeenth century property rights theorists - was never quite so absolute. There is little in *Civil Government* to suggest a modern understanding of the interdependence between humankind and its environment, and yet there is room enough, in my view, for latter-day property theorists to accommodate notions of biodiversity. Central to Lockean theory is the notion that individuals acquire rights to property that was formerly held in common by humankind by mixing their labour with it:

> For this 'labour' being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, *at least where there is enough, and as good left in common for others*.[2]

Locke explained this limitation further:

> But how far has (God) given it to us - 'to enjoy'? As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others. *Nothing was made by God for man to spoil or destroy.*[3]

Locke's concern was not with equity ("the largeness of his possession"), but with the despoilation of something which still belonged to humanity in common. So, property rights are far from absolute and we are justified in speculating what John Locke would have made of global environmental issues such as greenhouse and biodiversity.

The point is somewhat academic, since all but the purest libertarians accept the right of the state to "unitise" property

rights in the pursuit of common social ends. ("Unitisation" is a term invented by the petroleum industry in the 1920's to refer to the amalgamation of interests in an oil field to enable exploitation at a controlled rate.) The "taking" of private property for common purposes such as road construction and environmental preservation is now an accepted fact of social life, although debates continue (and, in my view, *should* continue) over questions of compensation where there is less than a complete acquisition of title.

Having said that, it has never been clear to me why environmentalists have such antipathy towards absoluteness in property rights. On one interpretation, it was introduction of the notion of the public interest into the English law on private property which opened the door for the worst excesses of the Industrial Revolution. In a series of cases last century, the English courts read down the law of nuisance in favour of a doctrine of 'public necessity'. By importing notions of reasonableness, refusing to grant injunctions and excluding liability for physical discomfort, the courts read down the common law to the point where it was all but useless.

In a landmark case, *St Helen's Smelting Co v. Tipping*, in 1865, the House of Lords upheld the plaintiff's claims for compensation for physical damage, but not for "trifling inconveniences" such as health or comfort. To make it clear how severe Mr Tipping's circumstances were, this is from a royal commission two years earlier describing the neighbourhood of St Helen's:

> "Farms recently well-wooded, and with hedges in good condition, have now neither tree nor hedge left alive; whole fields of corn are destroyed in a single night...orchards and gardens, of which there were great numbers in the neighbourhood of St Helens, have not a fruit tree left alive..."

And yet, Lord Wensleydale opined:

> "where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, 'I will bring an action against you for this and that, and so on.' Business could not go on if it were so."[5]

In some quarters, at least, conservationists have begun to see 'extreme rights' as a bulwark against the arbitrariness of the political process. The Nature Conservancy in the United States now operates a 'private' park system of some 1.5 million hectares of protected lands. Here, the Australian Bush Heritage Fund, founded by Bob Brown in 1991, has purchased 241 hectares in the Liffey Valley in Tasmania and last year bought a further eight hectares in the Daintree.

When I was Director-General of the Cabinet Office in NSW, I raised the possibility of water rights being allocated to environmental organisations to ensure they were not expropriated during dry years. (The example I used was the Macquarie Marshes in NSW.) I understand that some work has been done on this within government, although it is far from becoming a reality. [6]

Environmentalists don't need to be afraid of property rights. If, as I would argue, they are nothing more than decision-making entitlements to defined time and space, then they have the potential to be an extremely useful instrument in the environmentalist's toolchest.

Notes

1. *Blackstone's Commentaries*, Book II, Cap 2.
2. John Locke, *Civil Government*, Book II, Cap v, 27.
3. ibid., Book II, Cap v, 31.
4. ibid., Book II, Cap v,46.
5. See Joel Franklin Brenner, "Nuisance Law and the Industrial Revolution", (1974) 3 *Journal of Legal Studies* 403-433.
6. Gary L. Sturgess and Michael Wright, *Water Rights in Rural New South Wales: The Evolution of a Property Rights System*, Sydney: Centre for Independent Studies, 1993, p.31.

Book Review: Water Rights in Rural New South Wales: The evolution of a property rights system

Gary L. Sturgess & Michael Wright, 39pp, Centre for Independent Studies Ltd, 1993.

Allocation of water, particularly in inland New South Wales is an area of intense conflict. There are conflicts between states (New South Wales, Queensland, South Australia in particular), conflicts between extractive users (for example, between upstream and downstream users) and conflicts between extractive users and all those others who make use of riverine resources. The social, economic and environmental difficulties over allocation of water are made more acute by fact that for inland Australia water means money.

For those with some knowledge of water issues the book by Gary Sturgess and Michael Wright *Water Rights in Rural New South Wales - The Evolution of a Property Rights System* makes interesting reading. There has been much talk at a political level of the value of property rights and the use of market mechanisms as a means of allocating water. This has penetrated the debate about river management and water allocation although at this stage it appears as though no firm initiatives have been taken.

As the title suggests, *Water Rights in Rural New South Wales* aims to promote the concept of property rights and market mechanisms as a means of allocating the inland rivers resource. Put simply, it applies neo-classical economics to the management of water allocation. In doing so it provides a useful overview of some of the regulatory changes in rural water management over the last 10 years.

As with most such texts the central theme is the maximisation of "wealth" and the removal of

"unnecessary restrictions" on natural resources so as to increase "total State efficiency". However the fundamental objection to this approach is that wealth and efficiency maximisation are not, and should not be, the goals for the management of publicly owned natural resources. There are two reasons for this.

The first is that this conception of natural resource management ignores or downplays public values in natural resource management. These are values which the community as a whole has for natural resources. Most environmental values in relation to inland rivers, such as the preservation of native fish species, the maintenance of water quality, the preservation of wetlands and the bird species that depend on them fall outside the neo-classical view of "wealth" or "State efficiency".

Shifting water use to the use which creates most "wealth" or "State efficiency" essentially means transforming publicly valued environmental assets to private assets. When in public hands these assets are not considered to be "wealth". Once in private hands they are considered "wealth". Thus "wealth", as defined, is increased although at the expense of the community and the environment.

The second reason that wealth and efficiency are not adequate notions to guide natural resources management is that they ignore the complexity of relationships between natural resource systems. It is all very well to look at water and decide that wealth maximisation requires moving water to its highest value use, but this is essentially a one dimensional view of water resources, focussing on the water alone as a resource that can be extracted without regard to its relationship with other elements of the environment. It ignores the complicated effects of water extraction on other aspects of the environment and ignores cumulative and long term effects which are not adequately taken into account by market or property based mechanisms.

These difficulties have often been pointed out. Indeed the neo-classical visions have been forced to accommodate them, to some extent, by recognising the need to build into market and property based regulation the protection of public values.

However, not surprisingly, the response is usually to create more markets and property rights in order to cure the defects of the original scheme. Sturgess and Wright suggest the creation of markets to regulate environmental allocations, pollution and salinity discharges. These markets in turn must be qualified so as to protect public values just as the principal market in water allocation must be so qualified. The result, one would imagine, is a complex web of market mechanisms, each aimed at offsetting the defects of the others.

If public values are to be protected and the integrated nature of natural resource management is recognised there soon becomes a point where markets and property rights are no more "efficient" means of resource allocation than more traditional forms of regulation. This is because

(a) they become so qualified by mechanisms designed to protect those public values which would otherwise suffer; and

(b) there are difficulties in producing the desired policy outcomes indirectly through market regulation rather than through direct regulation.

As a result, any benefits that would arise from a simple market based system are lost. If on the other hand, the broader policy objectives of water allocation are forgotten, then market and property based mechanisms will always represent a transfer of wealth from public to private hands.

Sturgess and Wright aim to draw together a number of policy initiatives over the past ten years and indicate that these are indicators of a bipartisan shift towards property and market based mechanisms. The book is essentially an advocacy document through which the authors hope to influence the development of government policy in the near future. Given that at the time of writing both authors were working in the NSW Cabinet Office (one as Director General, one as the Senior Policy Officer in the Natural Resources Branch) it is an interesting insight into policy formulation within that organisation.

While in a number of areas, the authors are justified in viewing shifts in government policy as indicating a trend towards the use of market mechanisms the authors try, at times, to force some decidedly square pegs into decidedly round holes.

The most glaring example of this is the case of total catchment management. This is the cooperative approach to land management involving cooperation between government and the community that is established under the *Catchment Management Act* 1989. Whilst in reality total catchment management has nothing to do with market based mechanisms, it is seen by the authors as "in effect, an embryonic property rights system". Such an amazing proposition is an awfully long way from reality.

Despite such minor lapses the book makes interesting reading and being less than 40 pages is easy to read and digest quickly. For those interested in rural water issues the book is well worth reading to provide some context to a debate which, in the area of rural water, has only just begun.

David Mossop

Case Note: Re Minister for the Environment (WA); Ex parte South West Forests Defence Foundation (Inc)[1]

Introduction

This case raises important issues about the management of the forests of south-western Western Australia and the legal requirements of public participation in the forestry planning procedures and environmental impact assessment procedures in Western Australia. Essentially, the case concerns the adequacy of information supplied by the Department of Conservation and Land Management (CALM) for the public review and the assessment by the Environmental Protection Authority (EPA) of two forestry management proposals. The applicant, the South West Forest Defence Foundation Inc, sought certiorari against the Lands and Forests Commission and the Minister for Environment to quash decisions made in the course of the planning procedures and a writ of prohibition against the Minister to prohibit him from approving the proposed forest plans under the Conservation and Land Management Act 1984 (WA). On 25 November Mr Justice White of the Western Australia Supreme Court refused even to issue the orders nisi which would have seen the full case argued before a bench of three judges. The applicant has lodged an appeal against the decision of White J. The purpose of this note is to explain the issues in the case and report briefly on the decision of White J.

Facts of the Case

The case arose out of two forestry planning proposals which have, during 1992-93, been subject to the planning procedures under the *Conservation and Land Management Act* 1984 (WA) (the CALM Act) and the environmental impact assessment procedures under the *Environment Protection Act* 1986 (the EP Act). The first proposal was by the Lands and Forest Commission,[2] acting through CALM, to amend the ten year Regional Forest Management Plans for the Northern, Central and Southern Regional Forest Regions. The current (1987) plans still have five years to run. The second proposal was by CALM to explain how it would manage certain parts of the State forests (roads, river and stream reserves, old growth areas, and salt risk zones) for the supply of timber to the WA Chip and Pulp Co Pty Ltd (WACAP) under a State agreement with the company.

Planning for the two proposals became integrated and, in February 1992, CALM released two documents pertaining to these two proposals. The first document purported to be a proposed amendment to the Forest Management Plans under the CALM Act and the second document purported to be an environmental impact statement for both proposals prepared in compliance with the EP Act.

The challenge in the case centred on the adequacy of the information provided in these two documents. The alleged inadequacy of the information in the documents only emerged bit by bit over the next 12 months.

Both the planning procedures under the CALM Act and the assessment procedures under the EP Act required a period of public review and comment on the proposals. During the course of the public review period, the applicant acquired from CALM a document signed by a CALM officer stating the area of karri and jarrah forest and non-forest areas which were to be added to the new conservation areas under the proposed amended Forest Management Plans. The applicant alleges that this information is not contained in the two proposal documents and had not been published elsewhere and so would not have been generally available to the public. The applicant also asserts that the information was important for comparing the conservation reserves system under the existing and proposed forest plans. The applicant made submissions to the two public review processes, arguing in its submissions that there were various other deficiencies in the documents, including that the documents contained no information comparing the amounts of logs to be taken as sustainable (allowable) cut under the 1987 plans and the proposed amended Forest Management Plans.

From June to October 1992, the EPA made its assessment of the proposals, releasing its report in October. The report endeavoured to provide a comparison of the amount of logs available as sustainable cut under the 1987 and proposed amended Forest Management Plans. Although CALM failed to provide this information in the public review documents, the EPA constructed a comparison from other information it obtained from CALM. As the EPA was completing its assessment, it learned informally about a discrepancy in the proposal documents and CALM's actual intended operations in relation to the management of temporary exclusion areas in jarrah forests. The proposal in the review documents for temporary exclusion area was that, in the jarrah forests of the intermediate and low rainfall zones, 30% of the catchment being logged would be "retained uncut" for ten years.

This seemed to suggest that thinning operations would not be conducted in these areas but, very late in the assessment process, the EPA learned informally that CALM did intend to conduct thinning operations in these areas. The EPA felt bound to assess the proposals as they understood the statements in the proposal documents, but it made a very clear recommendation against such thinning operations in the interests of trying to prevent the spread of jarrah dieback and to provide better habitat for hollow dependant species.

Following publication of the EPA's report in October 1992, there were a number of appeals against the EPA's recommendation. During the conduct of the appeals, certain information was acquired by the applicant for the first time, including a CALM document, apparently produced for the Appeals Committee, giving areas of karri and jarrah forest by sawlog cutting status within the tenure categories for the proposed amended Forest Management Plans. The applicant alleges that this information is not in the public review documents, had not been published elsewhere and is important for understanding the apportionment between conservation reserves (where logging is not allowed) and

State forest (where, of course, logging is permitted) of the areas of unlogged forest of various species.

The applicant also asserts that CALM has withheld from public scrutiny information, in the form of research reports of CALM's own scientists, relevant to the public review and EPA assessment of CALM's proposals. In November 1992 (ie during the appeal period) CALM published a set of occasional scientific papers (dated July 1992) which reported the research conducted by CALM scientists. The applicant asserts the importance of four of the papers in the volume for the forestry planning decisions being considered, especially in relation to hollow dependant species and the impacts of forest management practices on karri forest, especially on wildlife. One of the papers was actually named in the bibliography of the public review period but was not made available by CALM to the applicant during the public review period, even upon specific request of the applicant.

On 24 December 1992, the Appeal Committee reported on the appeals and the Minister for Environment issued a statement giving approval to the proposals on various conditions. One of those conditions permitted logging and thinning operations in the jarrah forest temporary exclusion areas provided that a certain basal area of forest was maintained for a period of 15 years. This condition effectively rejected the EPA's recommendation on the temporary exclusion areas and permitted CALM to conduct in the areas the thinning operations they intended. Another of the ministerial conditions required the establishment of an expert scientific committee to review and report on the implementation of the proposals, particularly with regard to the determination of the sustainable cut. The expert committee was appointed in early 1993, after the election of the Liberal/National Party Government, and reported to the new Minister for Environment on 5 August 1993. On the same day, the Minister completed the environmental assessment process by announcing the final determination of the sustainable cut and the conditions in the ministerial statement of 24 December 1992.

The Notice of Originating Motion for the application was lodged on September 1993. The applicant had begun seeking legal advice on the matter in March 1993 but had not been able to retain the services of counsel until May 1993. It received the initial legal advice in June 1993 and was advised that it needed expert evidence to support its action. What really made the application possible was the turmoil created in the membership of the EPA by the new State Government.[3] In July 1993, Mr Barry Carbon (the former chairman of the EPA) and Dr John Bailey (a former part time member of the EPA) agreed to provide affidavit evidence in support of the application. Mr Carbon's affidavit states that the EPA faced three particular issues affected by the information not made publicly available by CALM during the course of the public review and inadequately dealt with in CALM's public review documents:

(a) the significance of tree hollows for the conservation of wildlife;

(b) the significance of the temporary exclusion areas in the proposals for extensive logging of the native jarrah forests;

(c) the environmental impact of dieback in jarrah forests.

Mr Carbon also states that, during the course of the EPA assessment of the proposals, it was suggested to him that CALM had research results on the effects of its logging and thinning practises on jarrah forests and that he requested his staff to obtain that information from CALM. He was not successful in obtaining the information until after the EPA completed its assessment. Dr Bailey supported the statements in Carbon's affidavit and stated his opinion that, in relation to the temporary exclusion areas, the difference between CALM's proposed treatment described in the public review documents and CALM's actual intended treatment was so significant as to warrant a new assessment with public review.

In response to the application, a CALM officer filed an affidavit in reply to various of the applicant's allegations. The effect of most of CALM's responses, however, was to affirm the applicant's allegations about when the various pieces of information were made available to the applicant. The only real defences asserted by the CALM officer were that:

(1)the scientific papers mentioned were not published earlier because they had not completed the process of internal scientific review for publication; and

(2)in relation to the temporary exclusion areas in jarrah forests, the intended thinning operations were apparent if one read the document as a whole.

Further, the CALM officer raised the problem of delay, asserting the need for the proposed amendment to the forest plans to be approved soon in order to avoid a shortfall in timber supply under the 1987 forest plans when contracts were renewed by CALM in 1994. Most of the factual allegations made by the applicant were not controverted.

The Decision of White J

White J was faced with three issues in hearing the application:

(1) the standing of the applicant to bring the action,

(2) an argument by the Crown that the application should be refused because of undue delay, and

(3) whether the applicant had an arguable case.

Applying the liberal test of standing for prerogative writs adopted by the Supreme Court of WA in *Re Smith; Ex parte Rundle*[4], White J held that the applicant had standing to seek the writs of certiorari and prohibition but "might well not have standing sufficient to enable it to move for declaratory relief or relief by way of injunction". His Honour gave little reasoning as to why the applicant satisfied the liberal standing test, other than to say that the applicant was not a "mere busybody" interfering in things which do not concern it.

White J found against the applicants on the question of undue delay. His Honour emphasised the discretionary nature of the prerogative writs and found that the applicant had not explained the periods of time taken in the various stages of preparing the case during 1993. His Honour gave no explicit response to the applicant's arguments about the difficulties, such as lack of finance, faced by a voluntary public interest group in preparing for litigation.

On the third issue, whether the applicant had an arguable case, White J found against the applicant but the reasons are very sparse. His Honour held that the first application for certiorari to quash the decision of the Lands and Forests Commission to publish the proposal to amend the Regional Forest Management Plans was misconceived because it would achieve nothing - "the fact that public notice was given will remain". He suggested that an application for declaration may have been more appropriate, but that would raise problems of standing.

The writer acknowledges that this application was a little unusual because the applicants could not even identify in the application a specific record of decision of the Lands and Forests Commission to release the proposed amendment to the Forest Management Plan. However, with respect, His Honour failed to grapple with the essence of the challenge; namely, that the document released for public review was inadequate.

White J next turned to the applicant's submissions about the duty of CALM to make publicly available information which it held. He acknowledged the applicant's submissions that the procedures for public notification and consultation are intended by Parliament to enable the decision-making authority to obtain the informed views of those who are interested in the subject matter of the proposals, and that CALM was obliged to disclose to the public sufficient and adequate information concerning all matters of significance to the management of the forests in question. However, the only reason His Honour gave for rejecting the applicant's argument was that CALM had no duty to disclose information in papers prepared by its staff which papers were in draft form only and not finalised for publication. With respect, His Honour did not analyse at all whether that information, if known to CALM at the time it prepared its public review documents, should have been included in those documents, even if the scientific papers were not published. Nor did His Honour analyse the effect of the alleged inadequacies of the public review documents; ie

(a) the discrepancy in CALM'S proposals for treatment of temporary exclusion areas in jarrah forest;

(b) the absence of information enabling a comparison of the area of forest species and non-forest area which would be in conservation reserves and forest reserves and the amount of logs to be taken as sustainable cut.

Nor did His Honour consider the effect of the assertion by Mr Carbon that certain information he requested from CALM was not made available for the EPA's assessment. In short, there were numerous important allegations about the adequacy of the public review and EPA assessment which were not canvassed at all in the judge's reasons. Finally, the irony of CALM's predicament in being constrained by the 1987 Forest Management Plan appears to have been lost on the judge.

Conclusion – a landmark case

The problem of the inadequacy of environmental impact statements has been asserted in a number of major environmental assessments in Western Australia, and commented upon by the EPA in several of its assessment reports. The applicant's challenge, whether or not it ultimately succeeds on appeal, represents a landmark case in natural resources planning and environmental impact assessment law in Western Australia. This is because it is the first time that any party has endeavoured to mount a legal attack on the inadequacy of an exercise in the resources planning and environmental impact assessment procedures. It is to be hoped that the Supreme Court gives a careful analysis of the issues raised because the point of legal principle argued by the applicants is a sound one, as White J acknowledged.

For another reason, the case is a special one for Western Australia. It is one of the few times that the Supreme Court of Western Australia has had to deal with an environmental case involving complex intertwined issues of social values, scientific fact and opinion and legal decision-making procedures. It is suggested that there cannot be a proper resolution of the case without a clarification of the factual allegations made by the applicants and not effectively controverted by CALM in the initial hearing. Should the Court find that there is an arguable case, there would need to be some form of trial of the facts in the case; the current affidavit evidence being too meagre to determine the case. The challenge for the applicants will be to prove that the information not made available by CALM is sufficiently material to significantly change the proposals, or aspects of them.

Finally, should it be found that there were significant inadequacies in the public proposal documents, the Court will be faced with the task of fashioning a remedy which is proportionate to the deficiencies identified in the process. Would the whole process be invalidated and all aspects of the Minister's decision on 24 December 1992 be invalid? Notwithstanding that CALM can continue to operate under the 1987 Regional Forest Management Plans (which still have five years to run), it may well be that the Court will baulk at invalidating all of the proposed amendments to the Regional Forest Management Plans and CALM's operations to supply timber to WACAP unless it can be shown that the information not made public was fundamental to understanding the whole of the two proposals.

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Notes

[1] Decision of White J of the Supreme Court of Western Australia delivered on 25 November 1993; No.2040 of 1993.

[2] The Lands and Forests Commission is in the statutory authority in which the *Conservation and Land Management Act* s.19, vests control

of the State Forests.

[3] For an account of the changes made to the Environment Protection Authority by the new State Government, see A Gardner, "Reforming the Environment Protection Authority of WA (1993) 3 *Australian Environmental Law News* 40-44.

[4] (1991) 5 WAR 295 at 305, per Malcolm CJ.

Stop Press

On Monday 7 February, White J handed down his decision on the award of costs for the proceedings. His Honour rejected the submission of the South West Forests Defence Foundation that, although its challenge had failed, it should not have to pay the costs for the case because the action was brought in the public interest. White J agreed that the court had a discretion not to award costs against an unsuccessul party which had brought an action in the public interest, but he was not convinced that the Foundation's action fell into this category. He limited the costs awarded against the Foundation to three quarters of the State's costs because it had successfully argued that it had standing to bring the action, but had lost on the other two issues.

No date has yet been set for the hearing of the appeal against the decision of White J. It is expected to be in about April 1994.

EDO NEWS

New South Wales

Water legislation

The office recently made a submission in relation to the proposed stage three water legislation. The proposed legislation comprises a Water Licensing Bill, the Water Administration (Amendment) Bill and a Private Water Boards Bill.

The legislation has been proposed for a number of years but is expected to be passed in the Autumn Session of Parliament. Whilst the legislation is a welcome rationalisation of a number of areas of the State's water legislation (most notably the Water Licensing Bill) the EDO submission pointed out that improvements could be made in a number of areas.

These included improving the objects of the Water Licensing Bill in order to more clearly define the purpose for which new powers are granted to the water Ministerial Corporation, providing better access to government information relating to the administration of licensing, allowing third party merits appeals against water licensing decisions and providing for civil enforcement of the water licensing legislation. In relation to the Water Administration (Amendment Bill) the main submission was that the objects of the Act should be amended so as to strengthen the environmental obligations of the Ministerial Corporation.

The Office will monitor the extent to which its submissions are reflected in the Bills that are ultimately presented to the Parliament.

SEPP 33 Application Guidelines

The Office recently made a submission to the Department of Planning in relation to the draft discussion paper on the application of SEPP 33 - Hazardous and Offensive Development. The Office has had an ongoing interest in SEPP 33, having made submissions to the Department prior to the making of the policy (see (1992) 25 *Impact* 8).

The EDO's submission was principally in relation to the application of SEPP 33 to further development of existing offensive or potentially offensive industry.

Upon the interpretation of "potentially offensive industry" adopted in *Hawkesbury Council the Mushroom Composters Pty Ltd* (1992) 80 LGERA 30 the policy would not apply to existing developments where proposed additional development did not itself "emit a polluting discharge". The EDO's submission argued that in the light of this judgment the application of SEPP 33 to existing industries was a matter that should be addressed by the Department and that the policy rationale behind the SEPP would suggest that it should apply to further development on the site of existing hazardous or offensive industries.

Further details of the EDO's submission will be provided in the next edition of Impact.

AIDAB Ecologically Sustainable Development policy

The office made a submission on the review of AIDAB's interim Ecologically Sustainable Development Policy. The submission was critical of the current policy in that the policy did not restrict the operation of Australia's overseas aid organisation in any way. Rather than define what activities AIDAB would not support, it merely espoused the environmental virtues of the programs that the organisation did fund. Thus it provided absolutely no guidance as to what Australia's overseas aid policy was. Furthermore the policy made absolutely no reference the *Environment Protection (Impact of Proposals) Act* 1974 which applies to AIDAB's activities.

The draft policy contained few references to the role of non-government organisations which, it is generally recognised, play an important role in insuring environmental protection and ecologically sustainable development.

In relation to the document's discussion of priorities within Papua New Guinea the submission was critical of the fact that no reference was made to AIDAB's policy in relation to, for example, rainforest protection while considerable

emphasis was placed on its role in strengthening security services in PNG as a means to achieve ecologically sustainable development.

Property rights and fisheries legislation

The Office made a submission to NSW Fisheries in relation to its proposals to introduce property rights as a means of regulating the State's fisheries. The thrust of the EDO submission was that if property rights were to be introduced as a means of regulating fisheries, care needed to be taken to ensure that the process whereby total allowable catches of any particular species of fish were set was open, accountable and based on ecological principles.

It should be free from political influence and based on scientific and environmental considerations rather that economic factors.

The office will be closely monitoring any subsequent changes to fisheries legislation to ensure that they reflect these principles.

Sydney Regional Environmental Plan No. 26 – Bays Precinct

The Department of Planning recently released draft Sydney Regional Environmental Plan No 26. The EDO made a submission on the plan because it has serious concerns about the nature and content of the plan. Some of these are outlined below.

When regard is had to the permissible uses within the various zones it becomes clear that almost any development is permissible at the discretion of the Minister. The draft SREP provides no real guidance as to what will be allowed or prohibited. A useful exercise is to take a random cross section of commercial, industrial and residential development and see whether they may be allowed in each of the zones. It would be almost impossible to challenge the granting of consent to any development in any area covered by the plan.

That the discretion of the Minister is largely unfettered and unaccountable is ensured because there is no obligation for the Minister to give reasons for a decision. With the abolition of legal aid for environmental matters, the picture becomes even worse because the means to judicially examine whether a Minister's discretion has miscarried is effectively removed.

"Public Recreation Zone"

The rezoning of land currently zoned public open space as public recreation zone paves the way for the erosion of public open space. This is due to

(a) the ability to build "facilities which accommodate or are ancillary to recreation opportunities relating to the use of the public domain", which may include car parks, restaurants, clubhouses, amusement arcades, fairgrounds, rifle ranges and many more developments

(b) allowing an intrusion of up to ten metres for a commercial, residential or other development.

(c) providing that development must be only "generally consistent" with the objectives.

In short, nothing is prohibited in a public recreation zone. All developments can be assessed and may be allowed at the discretion of the Minister. All areas zoned under the Public Recreation Zone allow development up to fourteen metres in height.

Summary

Far from providing a picture of what development will take place in the area, the draft SREP removes almost all controls on use of land covered by the plan. The protections contained in LEP 20, including the foreshore protection policy, have been removed with no other protections put in place.

We have been made aware of growing community concern about this SREP. After a preliminary inspection of the matters contained in it we can fully understand this concern.

Commonwealth Environmental Impact Assessment

The Commonwealth Government is currently renewing its environmental impact assessment process and has put out an initial discussion paper. We see the most important issues as relating to initiating the EIA process.

Firstly, under the current system the EIS process is initiated by the "Action Minister", the minister responsible for permitting or carrying out the activity, deciding that something is likely to have a significant effect on the environment. There is a clear conflict of interest here with the Action Minister often being responsible for the successful implementation of the proposed activity. Further the Action Minister does not necessarily have an expertise in EIA or environmental impacts.

In our opinion, far too many major projects avoid even preliminary assessment by the Department of the Environment. We have researched several cases where the Department is reported to be anxious to examine a proposal but considers its hands tied because the Action Minister has not formally "designated" a proposal.

In short, the Environment Minister ought to be responsible for initiating assessment and the test ought to be an objective test as to impact. Perhaps guidelines could be set out in the regulations setting out the size and/or nature of developments which must be assessed.

Linked with initiating the EIA process is the assessment of environmental impacts of government programs and policies and the assessment of cumulative, incremental and regional impacts. There ought to be a mechanism for ensuring that assessment of these matters is triggered. This is because policies and programs often precede individual developments. Further, policies and programs may lead to a series of developments which, individually may be below the threshold for environmental impact assessment but cumulatively may have tremendous impact.

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