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Environmental Protection and the Role of the Court of Criminal Appeal

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Introduction

The role of the Court of Criminal Appeal (CCA) in the protection of the environment is an important one. Its decisions are binding on the Land and Environment Court and set important precedents. Given the reticence of the High Court to grant special leave in environmental matters, the judgments of the CCA will frequently be the final authority.

It is therefore of concern that the CCA recently upheld two appeals challenging the severity of fines imposed by the Land and Environment Court, despite the latter's role as a specialist Court.

These and other recent decisions of the CCA evidence an increasing reliance upon general legal principles commonly confined to traditionally criminal proceedings. This article highlights these problems and suggests that such an interpretation will continue to impede the protection and enhancement of environmental quality.

Magnitude of fines fail to meet expectations

A quick survey of the magnitude of fines imposed by the judiciary upon polluters indicates that although fines are increasing, financial penalties are still small. In the past a maximum fine of $40,000 existed for serious pollution offences under the *Clean Waters Act* 1970 (*CW Act*) and *Clean Air Act* 1961 (*CA Act*).

The *Environmental Offences and Penalties Act* 1989 (*EOP Act*) dramatically increased the range of fines available to the judiciary and prompted expectations of a tougher stance being taken toward polluters.

Amendments to the *EOP Act* in 1990 created 3 tiers of offences. Tier 1 offences are the most serious and require proof of negligent or wilful acts which have harmed the environment. Tier 2 offences are of a less serious nature and impose a standard of strict liability. A maximum fine of $125,000 may be imposed upon conviction. Minor penalty notices can be issued pursuant to Tier 3.

Under Tier 1 a company is now liable to a maximum one million dollar fine for the most serious offences and $250,000 in the case of an individual. Director's liability and the possibility of goal sentences are also introduced under Tier 1.

This dramatic increase in penalties on the statute books has not resulted in a corresponding rise in the level of fines imposed under the new legislation. This is clear from a simple comparison of the relative amounts imposed.

Prior to the *EOP Act* the highest fine imposed was $35,000 (87.5% of the maximum, then $40,000): *SPCC v Shoalhaven Starches Pty Ltd* (unreported, 4.4.90, 50106-50111/89, Stein J). Fines of $30,000, amounting to 75% of the then maximum, have also been imposed by the Land and Environment Court: *SPCC v Boral Resources (NSW) Pty Ltd* (unreported, 23 May 1991, Hemmings J) and *SPCC v Caltex Refining Co Pty Ltd* (unreported, 5 June 1991, Hemmings J)). On a third occasion the CCA reduced a fine of $30,000 imposed by the Land and Environment Court to $20,000: *Shoalhaven City Council v SPCC* (1991) 52 A Crim R 291.

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To date fines imposed under the *EOP Act* have not reached similar proportions, however they are increasing. In *SPCC v T.J. Bryant Ltd & Anor* (unreported, 11.6.91, 50240-3, 50252/90) the company pleaded guilty to a Tier 1 offence and was fined $75,000. A director of the corporation was fined $15,000.

A similar penalty of $75,000 was recently imposed in *EPA v Pitman-Moore Australia Ltd* (unreported, 8 June 1994, 50037/93, Pearlman J). The defendant pleaded guilty to a Tier 1 offence which occurred as a result of an estimated 11,600 litres of xylene leaking from an underground pipe. The source of the pollution was not detected for some time and led to considerable soil contamination and the spread of xylene into the Parramatta River.

In the case of *EPA v Capdate Pty Ltd* (1993) 78 LGERA 349 the defendant was fined $50,000 for a Tier 2 offence (40% of the maximum). A similar fine of $50,000 was imposed by Talbot J in *EPA v Axer*, although this penalty was significantly reduced on appeal. Also of note, in *EPA v Shell Refining* (unreported, 9.3.94, 50035/93, Stein J) a fine of $42,000 was imposed for a single Tier 2 offence.

The effectiveness of a fining strategy has been widely debated and it is beyond the scope of this article to address this point.[1] However, clearly if such a strategy is chosen its effectiveness relies upon the imposition of a penalty which reflects the severity of the offence. Otherwise fines lose their coercive power and are viewed simply as a cost of business to be passed on to the consumer.

In this context any short term, meaningful increase in fines will be impeded whilst appeals regarding the severity of a penalty are allowed and the fine reduced. It is for this reason that two recent Court of Criminal appeal decisions are of concern.

The decisions

In *EPA v Axer* (unreported, 17.11.92, 50008/92) Talbot J at first instance imposed a fine of $50,000 following the spraying of a chemical which killed a significant number of fish. The defendant had pleaded guilty to a charge under Tier 2 of the *EOP Act*.

On appeal the fine was reduced to $20,000: *Axer v EPA* (unreported, 22.11.93, CCA). The incident was described by Badgery-Parker JA as

> a serious one... of a kind which generates massive public concern and which has enormous potential for harm (at 13).

The offence had however occurred as a consequence of an unprecedented error, despite the company taking considerable precautions to avoid pollution.

In a case decided shortly thereafter, *Camilleri Stockfeeds v EPA* (unreported, 17.12.93, CCA), the fines imposed by the Land and Environment Court were reduced. The case related to Tier 2 offences arising from the defendant's operation of fat processing plant.

On appeal the individual penalties of $35,000 imposed for each of the 3 offences ($105,000 in total) were held to be excessive. The CCA held that fines of $35,000, $14,000 and $7,000 ($56,000 in total) were more appropriate.

Applying general legal principles from the criminal law

The second of these decisions, *Camilleri Stockfeeds*, is worthy of more detailed examination as it raises the issue of the applicability of traditional principles of criminal law to environmental litigation.

Whilst the use of general legal principles is no doubt desirable in the interests of consistency and certainty, in some circumstances the unquestioning acceptance of these broader legal principles may not be entirely appropriate.

Firstly, it must be remembered that environmental offences are essentially quasi-criminal, in that they have not traditionally been perceived as morally reprehensible.[2] Pollution law has developed as an aspect of public welfare law aimed at controlling socially harmful activities.[3] Characteristic of this is the application of strict liability.

As a result pollution has been regulated in a permissive manner rather than prohibited by criminal sanctions. This quasi-criminal character of environmental law makes it inappropriate to apply principles usually associated with truly criminal proceedings.

Secondly, the special qualities of environmental litigation give weight to the argument that environmental law is unsuited to principles imported from genuinely criminal prosecutions. Instead environmental litigation is best approached as a distinct category of litigation. For example, distinctive features of environmental litigation include irreversible environmental impacts and irreconcilable value conflicts.[4]

At a policy level some acknowledgment is given to the distinctive character of environmental law. Now cautiously embodied in legislation, albeit in embryonic form, a discrete set of ecological principles is beginning to develop.[5]

For these reasons any attempt to unquestioningly apply general legal norms to environmental litigation may not be appropriate.

The concept of environment litigation, as a distinct category of litigation, is seldom recognised by the CCA. As the following examples highlight the CCA appears all too ready to apply general criminal principles to quasi-criminal matters of a strict liability nature. In two particular areas the uncritical acceptance of general legal principles has impeded the impact of environmental laws.

The principle of totality

In *Camilleri Stockfeeds v EPA* the principle of totality was accepted by Kirby P as a general sentencing principle applicable to environmental law. The principle of totality has been applied in general criminal law when sentencing an offender for 2 or more offences arising out of a single event or a series of inter-connected incident.

The principle is described by Street CJ in *R v Holder* [1983] 3 NSWLR 245 at 260:

> Not infrequently a straight-forward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a very broad sense, the overall criminality involved in all the offences and, having done so, will determine what, if any, downward adjustment is necessary.

In that case the defendant had been convicted of break and enter, robbery and rape. The offences were all committed within a few hours of each other.

The application of the principle of totality to the facts of *Axer* is questionable. In *Axer* the offences occurred on 3 separate occasions, on 16 and 29 January and 8 March. These charges clearly relate to individual, distinct offences occurring some 7 weeks apart. They do not arise, for example, out of a single incident, such as a breach of the *Clean Air Act* which also constituted a breach of a licence condition under the *Pollution Control Act*.

Accordingly the outcome of the appeal in *Axer* is, with respect, of dubious legal merit. Such reasoning trivialises the fact that serious pollution offences were committed on separate occasions and disregards the quasi-criminal nature of pollution law.

Interestingly, following *Axer* the principle of totality was applied in *EPA v Pezzimenti & Sons Pty Ltd* (unreported, 9.2.94, 50021-22/93, Pearlman J) to yield the opposite result. In that case the defendant pleaded guilty to 2 offences occurring on consecutive days which arose from inadequate containment procedures during drilling work.

Although in the past the principle of totality has been applied in mitigation, it was held that the aggravated circumstances of the second offence justified the imposition of a greater fine. The defendant was fined $10,000 for the first offence and $20,000 for the second. This decision has been appealed.

The privilege against self-incrimination

The uncertain application of traditional criminal law concepts to environmental law is aptly illustrated in the long running dispute between Caltex and the Environment Protection Authority, formerly the State Pollution Control Commission. This case concerns the right of Caltex to withhold its self-monitoring data collected as a requirement of its licence. Caltex had been requested by the EPA to produce this data following the commencement of legal proceedings for an alleged breach of the *CW Act*.

This notice to produce was originally made pursuant to the *Land and Environment Court Rules* 1980 with a second notice being given under s29(2)(a) of the *CW Act*. The documents called upon were identical in each notice.

Caltex claimed that it was permitted to withhold the documents and claim the privilege against self-incrimination. At first instance Stein J held that the company was required to produce the documents: *SPCC v Caltex Refining Co Pty Ltd* (1991) 72 LGRA 212.

On appeal, the CCA reversed this decision, holding that the common law privilege against self-incrimination applied to corporations: *Caltex Refining Co Pty Ltd v SPCC* [1991] 25 NSWLR 118. After a lengthy examination of the historical justification for the privilege Gleeson CJ concluded that the privilege exists in a modern society, inter alia, because

> it assists to hold a proper balance between the powers of the State and the rights and interests of citizens (at 127).

Given the dominance of corporate entities in modern society such a conclusion appears questionable.

Despite this conclusion, Gleeson CJ offers some hope to the cynical. Upon consideration of the purpose behind the enactment of s29(2)(a) Gleeson CJ refers to the legislature's intent that the regulator be empowered to deal with emergencies and police compliance with the laws. However this power does not include purposes for the gathering of evidence for use in current legal proceedings. The Chief Justice concluded that in the present case the notice to produce issued under s29(2)(a) was not for a proper purpose.

The conclusions reached by the Court of Appeal were overturned by the High Court, which held by a majority of 4-3 that a corporation cannot claim the privilege against self-incrimination: *EPA v Caltex* (1993) 118 ALR 392.

This example is indicative of the increasing reliance by defendants upon protections available in criminal proceedings. This is not surprising, as the liability for significant penalties is a powerful incentive motivating defendants to seek the best legal advice.

As a consequence cases which in the past may not have been fought are now vigorously contested, and recourse made to more innovative or untested arguments. This in itself is not a negative outcome, however it may have a deleterious effect on the environment if the Court repeatedly accepts these arguments as applicable to environmental litigation. Of particular concern is the readiness of the CCA to apply traditional criminal principles in strict liability proceedings.

Conclusion

These brief examples of the Court of Criminal Appeal's response to pollution offences are not encouraging. This response by the Court of Criminal Appeal may inhibit the increase of fines imposed by the Land and Environment Court at first instance. The status of the Land and Environment Court as a specialist court must not be overlooked.

The decisions in *Axer* and *Camilleri Stockfeeds* illustrate the reluctance of the Court of Criminal Appeal to impose higher monetary penalties as demanded by the *Environmental Offences and Penalties Act*. This undermines the impact of the law and allows companies to treat fines as simply a factor to be included in the cost of doing business. The role of the Court of Criminal Appeal in the enforcement of pollution laws is crucial and deserves close monitoring in the future.

Debate about the role of the principle of totality and the privilege against self-incrimination is certain to continue. In

the future other general criminal principles may be raised in argument before the Courts, for example in relation to cautioning and the admissibility of records of interview. Based on the issues identified above, it is hoped that the judiciary respond with greater caution.

Notes

[1] For discussion of punitive strategies in a corporate context see J.C. Coffee (1981) "No Soul to Damn, No Body to Kick: An Unscandalised Inquiry Into the Problem of Corporate Punishment" 79 *Michigan Law Review* 386.

[2] For examination of the rationale behind the introduction of criminal sanctions in environmental law see Farrier, D (1992) "In Search of Real Criminal Law" in Bonyhady, T. (ed) *Environmental Protection and Legal Change*, Federation Press, Sydney.

[3] For a general introduction to this historical perspective see Gunningham, N. (1974) *Pollution, Social Interest and the Law* Martin Robertson Publishing, London.

[4] These issues and others are raised in Johnson, J (1991) "Applying Mediation Techniques to Environmental Issues" *Impact*, September, 5-8 in the context of environmental mediation, but are equally applicable to environmental litigation.

[5] Ecologically sustainable development, intergenerational equity and the precautionary principle are included in the *Protection of the Environment Administration Act* (NSW) 1991 s.6(2).

The Micalo Island case

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In this article Maria Comino examines the recent decision of the Land and Environment Court on procedural fairness in Valley Watch Inc v Minister for Planning & Ors.

What constitutes a "fair" process in environmental decision making can be a difficult question. The issue arose recently in relation to development proposed on Micalo Island.

The Environmental Issue

Micalo Island is situated in the mouth of the Clarence River, the largest estuary on the east coast of Australia. It is an island of some 600 hectares and has already been partly cleared for grazing. However, it provides a major habitat for many birds, and essential habitat for many fish species.

In 1991, Kisochosa Kogyo Co Ltd lodged two development applications for a tourist resort development, golf course (including substantial artificial waterways) and marina on the island.

Construction of the proposed development was to involve disturbance of the acid sulphate soils on the site. These soils form free sulphuric acid when exposed to oxygen either by excavation or when drainage lowers the water table. These acids can subsequently be washed into the waterways. If the pH is low enough, the iron and aluminium in the soil are mobilised.[1]

Iron and aluminium released to receiving waters are highly toxic and have in some parts of the State caused extensive fish kills. In 1987, there was a fish kill in the Tweed River which rendered 15 kilometres of that river devoid of aquatic life.[2] Recognition of acid sulphate soil problems in Australia has only been recent. Methods of treating the soils are still being tested.

Kisochosa proposed to treat the acid sulphate soils by physically separating out the fine material, which contains the largest potential for acid sulphate.

The actual physical separation of the soil was to be done either by a dredge and sluicing technique or by use of a hydrocyclone, being equipment used in the mining industry.

Kisochosa proposed a pilot operation to determine the appropriate separation system. It stated that the pilot study was the means of determining the overall viability of the project. Its measured success was to be a condition precedent to be met before any other part of the project succeeded.

The proposed development raised an interesting environmental policy issue. Should untested methods of treatment of soils be tried in a sensitive environment where the possibility of environmental harm is extreme?

The main community advocate on this issue was a Clarence valley community-based group called Valley Watch Inc. Its objects include the promotion of development that is economically, socially and environmentally sustainable.

In its submission to the Council when the development applications were exhibited it stated -

> Manipulation of acid sulphate soils on this scale (two million cubic metres plus) has never been tried before as far as this association has been able to discover. In view of the potential damage any miscalculation could cause this association suggests that further studies be undertaken before even the pilot programme is allowed to proceed. We would call attention to a recent fish kill on the Tweed River where acid leaching from a golf course development produced Ph readings 30 times greater than the level which will cause damage to marine life.[3]

The political process – addressing the policy issue

The political process for addressing the policy issue took just under 12 months.

The development applications were called in by the Minister for Planning and a Commission of Inquiry convened. The

development application for the marina was withdrawn prior to the hearings of the Commission of Inquiry.

At its hearings the Commission of Inquiry conducted a special session on acid sulphate soils in recognition of the significance of the issue to the decision whether to grant development consent.

Valley Watch made submissions to the Inquiry, though it did not engage any of its own experts on the acid sulphate soils issue.

In its report, the Inquiry noted that all of the experts were agreed on the need for a pilot study as a means of proving the viability of the development. The report stated -

> Evidence before this Inquiry is inadequate to enable us to detail specific conditions which should be attached to the operations of the pilot project/ study, monitoring procedures necessary to determine success of same and data recording and reporting methods.
>
> In our view, and emerging from an appropriate condition of consent, the Applicant shall be required to submit for the approval of the consent authority, complete plans, methods of construction, time period involved and proposed date and monitoring procedures in respect of the proposed pilot study.[4]

These statements were reflected in the Commission's recommended conditions for approval of the development.[5] The conditions included the need for the applicant to consult with the Departments of Agriculture, Fisheries, Water Resources and the Environment Protection Authority about the draft guidelines for the preparation of the pilot study.

A further condition provided that in the event the test results from the proposed pilot study did not satisfy the objectives and results as detailed in the specifications approved by the consent authority, the development approval would be null and void.

The Commission of Inquiry report included an appendix being guidelines for the preparation of the acid sulphate soils pilot study. However, there does not appear to have been much discussion of the terms of the guidelines at the inquiry.

After the Commission of Inquiry reported in January 1992, the Minister for Planning declared his intention to grant consent to the development subject to satisfactory resolution of the conditions to be attached to the consent. The Minister asked the applicant to contact his Department to advise further on those conditions which should be properly imposed on the development consent.

Thereafter there was considerable liaison between the applicant and the Department on the proposed conditions. In April, the applicant forwarded to the Department what it described as "Amendments to the Proposal", and detailed specifications relating to the management and monitoring of the pilot study.

Valley Watch, on obtaining a copy of those specifications, wrote to the Minister for Planning asking him to place the specifications on public display and to reopen the Inquiry. Its reasons for the request were that in its opinion the pilot study had only been described in the most general terms at the Inquiry. The terms of the study could not be described as differing only in minor respects from that discussed before the inquiry.

It also made summary comments on some of the details of the specifications, in particular the lack of provision for on-going testing to ensure the long term viability of the proposal.

Valley Watch received no response to its letter and the Minister granted consent in June 1992. The consent incorporated the detailed specifications for carrying out the pilot study forwarded by Kisochosa in April.

The consent conditions identified performance standards which the development, and the pilot study were to meet. There was no condition that if the standards weren't met, the development consent would be null and void, as recommended by the Commissioners.

Such a condition would of course have been invalid for lack of finality, deferring decision on the issue to a later time.[6]

The Minister received legal advice to that effect.

Valley Watch's concerns about the development consent were based on the lack of an opportunity for input into the details of the specifications for the pilot study. Such an opportunity was seen as important particularly as the terms of that study would determine whether or how the development would proceed, and therefore be one of the key determinants of the environmental impact of the development.

There were differences between the general guideline document comprised in the Commissioners report and available at the inquiry, and the more detailed specifications contained in the consent. Some changes related to amplification of the guidelines. There were also changes in relation to the monitoring requirements, with the final specifications providing for a forty day report back period. The guideline document before the Commissioners provided for the submission of test results at weekly and monthly intervals, but there was no identification of the final report back period.

Valley Watch also had concerns that only the EPA had had any input into the final terms of the specifications. There had been no discussions with the Departments of Agriculture, Fisheries or Water Resources, in spite of the serious concern expressed by those agencies at the Inquiry hearings. These included the following views expressed by the Department of Agriculture in its submission to the Inquiry -

> The two million cubic metres of dredge material even with low oxidisable sulphur of less than 0.1% sulphur has the potential to generate up to two million litres of sulphuric acid.
>
> An important aspect which has not been well detailed in the Environmental Impact Statement is the need for evaluation of the pilot project over a considerable length of time before full

impacts can be assessed. For example, it may take several years for salt water to be leached by rainfall from the coarse dredged material used for land fill. Oxidation and acid formation after the removal of salt may be a quite significant problem in latter years. Only through monitoring over an extended period will this be able to be fully assessed.[7]

Testing the fairness of the political process through the legal process

Valley Watch decided to pursue its concerns about the development and instituted legal proceedings to challenge the Minister's consent.

To substantiate its concerns about the pilot study, Valley Watch engaged two experts to review the further specifications for the pilot study.

A key conclusion of the review by Valley Watch's experts, although it did loom large at the hearing, was that the methodology of the pilot study was flawed because it had failed to even acknowledge the possibility, and therefore the potential effects, of bioturbation - the reworking of the sediment by burrowing organisms, particularly crustaceans. According to Valley Watch's experts, bioturbation could result in the pyritic material, which was to be buried underneath the surface of the lake, being brought to the surface of the lake bottom, and thereby possibly exposing the material to oxidizing conditions.[8]

A further related issue was that the time scale for review of the pilot study was only forty days from completion of the study. That was not long enough for the natural biological and biochemical systems to become established and therefore to allow an assessment of the potential effects of bioturbation.

Some concerns were also expressed about possible practical problems in relation to use of the hydrocycloning equipment.

The Minister's experts put in issue some of these contentions.

The legal proceedings comprised a challenge to the Minister's consent by way of class 4 proceedings in the Land and Environment Court.

The legal issue raised by the proceedings was whether the Minister was entitled to consider the material, being the specifications submitted by Kisochosa after the Inquiry reported, prior to making his decision on the consent. Could he do so without either reopening the public inquiry or at least giving those who participated in the inquiry an opportunity to consider and make submissions upon that new or different material?

In the case of Valley Watch this would mean an opportunity to make submissions in relation to the specifications, including in particular, submissions along the lines of those made by its experts.

A related question was whether or not Valley Watch in writing to the Minister requesting the reopening of the inquiry, had in any event made further submissions on the proposal when in the same letter it made preliminary comments about the specifications.

The legal issue was argued in the context of sections 89, 119 and 101 of the *Environmental Planning and Assessment Act* 1979.

Under Section 119, the Minister may at any time direct that an inquiry be held by a Commission of Inquiry with respect to the environmental aspects of any proposed designated development. The Council is then precluded from determining the application. Rights of appeal to the Land and Environment Court are removed.

Under Section 89, the Minister is required to determine the application after the Inquiry has been held, and after he has considered the findings and recommendations of the Commission of Inquiry. Section 89(2) incorporates the provisions of Section 101(8) which provides that the Minister may determine the application by granting consent either unconditionally or subject to such conditions as the Minister thinks fit, or by refusing consent.

Section 101(8) also requires the Minister to consider the list of factors set out in Section 90 of the Act, which any consent authority must consider when making its decision on an application, and Section 91 which describes the types of conditions that may be imposed.

The effect of Sections 89 and 101 is to require the Minister to consider both the recommendations of the Commission of Inquiry and any submissions made by members of the public at the time the development was first exhibited.

As the proceedings were judicial review proceedings it was not possible to call evidence on the merits of the development. However, affidavit material was filed which went to what the applicant's experts would have said if there had been an opportunity for comment on the further specifications relating to the pilot study. Conflicting evidence was filed by experts for the Minister. It was agreed that it was not necessary for the Court to express any preference for any of the conflicting opinions expressed in the expert evidence.

It was also agreed by the parties that the affidavit evidence of Valley Watch reflected adversely on the merits of the proposal.

"Procedural fairness" as defined by the courts

Valley Watch relied on the principles of procedural fairness to support its claim that the Minister was required to give Valley Watch an opportunity to make submissions in relation to the further specifications for the pilot study.

It referred to *Kioa v West*[9], which is the landmark authority on procedural fairness. Mason J outlined the principles as follows.[10]

> There is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention... The duty depends to a large extent on the construction of the

> statute ... The statutory power must be exercised fairly in accordance with procedures that are fair to the individual concerned in light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate expectations ... The need for a strong manifestation of a contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?

Reliance was also placed on the *Minister for Aboriginal Affairs v Peko-Wallsend Limited*.[11] That case involved a Commission of Inquiry appointed under the Aboriginal Land Rights (Northern Territory) Act into whether a land claim should be made. The inquiry concluded and the Commissioner reported to the Minister recommending that a grant of certain land be made. Peko, which had been a party to the inquiry, made certain representations to the Minister after the Inquiry reported, to the effect that the land the subject of the Commissioners recommendation contained a valuable uranium deposit. Peko's representations contained new facts and matters not presented to the Commissioners. All members of the High Court agreed that the other parties to the inquiry should have been given an opportunity to make comment in relation to the representations.

In applying the principles of procedural fairness to the *Environmental Planning and Assessment Act* it was argued that the "interests and purposes" which the Environmental Planning and Assessment Act "seeks to advance" include the participation of persons such as the applicant and the other objectors.[12]

It was therefore argued that there was a duty to act fairly.

The key question was what did the duty to act fairly require on the facts of this case.

In support of its claim that the duty included the right to be heard in relation to the further specifications for the pilot study, Valley Watch relied on the following factors -

(a) the statutory framework which required the Minister to determine the application after the inquiry had been held and he had considered the findings and recommendations of the Commission of Inquiry pursuant to section 89;

(b) the inquiry procedure, including the Minister's direction calling the inquiry, public notice of the inquiry, the conduct of the inquiry, the submissions made by 42 persons to the inquiry, and the findings and recommendations of the Inquiry;

(c) the nature of the further technical submissions as they related to the treatment of potential acid sulphate soils and the pilot study.

His Honour Mr Justice Talbot dismissed Valley Watch's application finding that what was required to provide a fair process was that -[13]

> (1) the Minister would act legally and consider submissions made by objectors pursuant to Section 90(1)(p);
>
> (2) that interested persons would be given the opportunity to give evidence to a Commission of Inquiry; and
>
> (3) that the Minister would take the report of the Commissioners into account pursuant to section 89.

His Honour further found that

> The policy of the EPA Act is that the range of persons who have an expectation that their submissions in respect of designated development will be taken into account should not be limited. At least 62 persons exercised their right in the present case. None of them have been shown to be parties with a right or interest in the relevant sense.
>
> The Minister in considering the further submissions was doing no more than carrying out his duty pursuant to section 90. That duty did not create an obligation to give objectors a further opportunity to comment on the additional material. To do so would create an interminable administrative system that could not operate efficiently having regard to the exigencies of the process involved in the referral of any additional information to every person who had seen fit to make a submission or to give evidence and possibly then again any responses to that reference.
>
> Even if there could be circumstances giving rise to an entitlement to a further hearing as claimed, I am not satisfied ... that the Minister took into account a new subject matter that was not already encompassed in the report of the Commission of Inquiry.[14]

His Honour also stated that the course adopted by the Department of Planning in establishing a regime that incorporated appropriate standards, was in pursuit of the interests of the objectors rather than to their detriment.

Additionally, Valley Watch had in any event made a further submission when it wrote to the Minister requesting the reopening of the Inquiry, even though there had been "no formal opportunity" to do so.[15]

Making the process "fairer"

The Court's findings show that application of the principles of procedural fairness comes down to some very precise questions of fact. If it can be established that the principles apply, it will then be a question of what the duty to act fairly requires in the context of the particular statutory framework on the particular facts of the case.

From a practical perspective, the opportunity to be heard on the further material could have been limited. The review could have been contained to commenting upon the

differences between the original guidelines and the final specifications. In an area of science where there are only a handful of experts on acid sulphate soils in Australia, it may not be prudent in the long term to deny input from some of those experts and other members of the public.

It may be argued that even though decision makers may be able to justify in a Court of law that the process has been fair, they may do better to ensure that decision making processes for extremely sensitive environmental issues are particularly open and receptive to public input. There are at least two reasons for doing so.

There may be a missed opportunity for invaluable input. Strict compliance with legal obligations may only provide mediocre results in relation to environmental issues having a high risk of serious environmental harm.

An opportunity for further input is also likely to assist in gaining public confidence in the decision making process.

In this case therefore, the question remains as to whether the Minister should have provided an opportunity for Valley Watch to put forward further material in relation to the specifications for the pilot study, taking into account that the detail of those specifications was pivotal to whether the environment will ultimately be protected.

A full analysis of the legal issues and the legal implications of the decision will be provided in the next issue of *Impact*.

Notes

[1] Simpson & Carlton (1992) Commission of Inquiry Report: Proposed Development of a Golf Course and Tourist Resort Micalo Island, Shire of Maclean, Commissioners of Inquiry Office, Sydney.

[2] ibid page 45

[3] Submission of Valley Watch to Maclean Shire Council, 14 August 1991.

[4] supra note1 page 53.

[5] ibid pages 96-106.

[6] *Parramatta City Council v Hale* (1981-1982) 47 LGRA 269, *Jungar Holdings v Eurobodalla Shire Council* (1989) 70 LGRA 79, *Mison v Randwick City Council* (1991) 73 LGRA 349.

[7] Submission by Department of Agriculture and Commission of Inquiry, November 1991.

[8] The issue of bioturbation has now been specifically considered in relation to a canal estate development proposed for Dunbogan. Previously, this issue had not been addressed.

[9] (1985) 159 CLR 550

[10] ibid at 583-4.

[11] (1986) 162 CLR 24.

[12] Section 5 of the *EPA Act*.

[13] *Valley Watch v Minister for Planning Ors*, (unreported 40176 of 1992) 24 February 1994.

[14] ibid pages 18-19.

[15] ibid page 20.

CASE NOTE: Caltex Oil (Australia) Ltd v Kempsey Council and ors

40005 of 1994, Stein J, 27 April 1994

Facts

Until recently Caltex operated a petroleum storage and handling terminal at Trial Bay near South West Rocks. As a result of those operations contamination of the soil has occurred and ground water contamination now extends well beyond the site. In particular, ground water beneath nearby reserve 82364, gazetted for the purposes of public recreation in 1960, is contaminated.

Caltex proposes to carry out decontamination work on the site which involves air "sparging", soil ventilation and ground water pumping from recovery wells. A large number of vertical pipes will need to be installed from the ground surface into the water table which will necessarily involve clearing and removal of vegetation and disturbance of the soil.

On 8 August 1969, IDO No 1 Shire of Macleay was gazetted. Caltex claimed that as at that date the reserve was lawfully used for the purpose of public recreation, that this was an existing use and that the lawful existing use has continued at all relevant points in time. Thus the reserve may continue to be used for the purpose of public recreation without consent from the council.

The reserve is designated as a wetland under State Environmental Planning Policy No 14, gazetted in 1985. Kempsey LEP 1987 zoned the reserve 8A, existing national parks, nature reserves, and land available for recreation. Within this zone development for purposes authorised under the National Parks and Wildlife Act may be carried out without development consent and all other development is prohibited.

The decision

Stein J held that the remediation works promote the use of the land for the purpose of public recreation and are therefore permissable without development consent. His Honour relied upon *Coffs Harbour Environment Centre v Coffs Harbour City Council* (1991) 74 LGRA 185, Clark J A at 191, in which judgment His Honour referred to Gleeson C J in *Woollahra Municipal Council v The Minister* (1991) 23 NSWLR 710.

Having found the land had been continuously used for the purposes of public recreation since 1960 without being abandoned Stein J held that the provisions of s.109 of the *Environmental Planning and Assessment Act* apply and that Caltex is entitled to carry out the works in the wetland without consent because of the continuation of the lawful use for the purpose of public recreation.

Observations

Characterisation of the Use

In our opinion the appropriate way of viewing the clean up is as the continuation of an unlawful use of the land. Caltex was using the adjoining wetland for the disposal of hydrocarbons from its own site. The proposed works are properly characterised as ancillary to the disposal of

hydrocarbons, rather than promoting public recreation.

This is an independent use. The disposal of hydrocarbons took place as part of an operation conducted for profit. The clean up ancillary to that disposal is ancillary to that source of private profit.

The reader may disagree with this analysis. The fact is that the court did not have the benefit of it or other possible arguments for the reasons set out below.

Right to be Heard

The application before the court was not contested. Both the Council and the Reserve Trust supported Caltex's case. Earlier in the proceedings, Chrisbeck Pty Ltd, a landowner adjoining Crown Reserve No 82364, had sought to be joined and allowed to be heard in the proceedings. Chrisbeck Pty Ltd proposes and has development consent for the construction of a tourist facility at a cost of $20 million on the adjacent land. The development approval process took approximately six years and involved rezoning and development applications, an environmental impact statement and two reviews of environmental factors.

Bannon J refused to let Chrisbeck Pty Ltd be joined. At the hearing of the matter, at the invitation of the court, the Minister for Planning intervened pursuant to section 64 of the *Land and Environment Court Act* 1979.

We are concerned that when the two parties came to the Court substantially in agreement seeking declarations, the Court was left without a party to put a contrary argument and to assist the Court. It is disappointing to see the application of a party with an apparently legitimate interest in the proceedings being denied a right to be heard. His Honour Justice Bannon did note that it was proper for the Department of Planning to be joined, however he made no directions to the parties to notify the Department of Planning, commenting that it was "a matter for Caltex". The Department of Conservation and Land Management was also joined as a party.

It has been made clear on many occasions that the task of the Court is more than simply to do justice inter partes. As His Honour Street C J in *F. Hannan Pty Ltd v Electricity Commission (NSW) (No 3)* held,

> the task of the court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice inter partes.

Environmental protection

The decision makes clear that many areas which appear at first glance to have protection because of their zoning may not in fact be protected. Where an area had been used for "public recreation" prior to the imposition of an environmental protection zoning, developments which promote public recreation are allowed without development consent. For example, clearing part of a wetland for a carpark, constructing a kiosk to assist picknickers, clearing a football field to promote those games of touch football.

The only restriction is that there be no intensification of the use.

The future

The proposal will of course be examined pursuant to Part 5 of the *Environmental Planning and Assessment Act*. The Minister for Land and Water Conservation is a determining Authority. We await with interest the Minister's determination as to whether the activity, involving clearing of some of the States remnants of wetland vegetation is likely to have a significant effect on the environment. If not, Caltex will be spared the expense and publicity of a public examination of its dirty history.

James Johnson

CASE NOTE: Broken Head Protection Committee and Peter Helman v. Byron Council and Batson Sand & Gravel Pty Ltd.

10314 of 1993, Pearlman J, 10 May 1994

What are the requirements for a fauna impact statement and its public exhibition? A recent decision of the Land & Environment Court has dramatically reduced the threshold for adequacy and requirements for obtaining, exhibiting and allowing public participation in this relatively untested area of the law.

In the recent case *Broken Head Protection Committee Anor v. Byron Council & Anor* Her Honour considered the question of whether failing to exhibit a fauna impact statement was fatal to the development approval process. The analogy was drawn with the environmental impact statement process.

The Law

An environmental impact statement (EIS) must comply with clause 34 of the Environmental Planning & Assessment Regulation 1980. Clause 34 provides that the contents of an environmental impact statement shall include various matters including

(a) a full description of the designated development proposed by the development application, and

(c) a full description of the existing environment likely to be affected by the proposed designated development, if carried out.

The adequacy of an environmental impact statement in complying with the requirements of clause 34 has been canvassed in the Court on many occasions before. Her Honour considered these authorities in *Schaffer Corporation Limited v. Hawkesbury City Council* (1993) 77 LGRA 21. The principles which she derived include

1. An EIS must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible environmental consequences of the proposed development.

2. The purpose of an EIS is to alert the decision maker and the public to the inherent problems of the proposed development, to encourage public participation, and to ensure that the decision maker takes a hard look at what is

proposed.

3. The EIS is not required to be perfect: it need not cover every topic or explore every avenue.

These principles demonstrate that an environmental impact statement can be quite a minimal document and technically comply with the requirements of the legislation. While legally sufficient, an EIS might not be adequate to convince a Court on appeal on the merits that a development should go ahead.

Section 77(3)(d1) of the *Environmental Planning and Assessment Act* 1979 ("*EP&A Act*") provides that where a development is likely to affect the environment of endangered fauna, a development application must be accompanied by a fauna impact statement (FIS).

The requirements for a fauna impact statement are set out in section 92D of the *National Parks & Wildlife Act* 1974. These requirements include,

(1)(i) A full description of the fauna to be affected by the actions and the habitats to be used by the fauna.

(ii) An assessment of the regional and statewide distribution of the species, the habitat to be affected by the actions and any environmental pressures on them.

(2)The person preparing the statement must consult with the Director and must, in preparing the statement, have regard to any requirements notified to him or her by the Director in respect of the form and content of the statement.

Section 92D(4) provides that where an EIS has been prepared which addresses the matters in subsection (1), no separate FIS is required.

Finally, s.86 of the *EP&A Act* provides for public inspection of the DA and documents which accompany it, including any EIS and FIS.

In the *Batson case*, an EIS had been prepared, together with a flora and fauna survey, and exhibited. Prior to the proceedings, a FIS had been prepared but not exhibited.

The Decision

Her Honour held that a FIS was required to be prepared, as the development is likely to affect the environment of endangered fauna. She held that the survey was not an FIS as there had been no consultation with the Director. There had also not been the assessment required by s.92D(1)(ii).

Her Honour further held that the EIS had not addressed the matters in s.92D(1). Therefore s.92D(4) had not been complied with and the EIS could not fulfil both roles. This meant there was a breach of ss.77((3)(d1) and 86 of the *EP&A Act*.

Her Honour next considered the effect of these breaches of the law. Her Honour held that the information contained in the EIS and survey was adequate to enable the public to become aware of the potential impact of the proposed development on endangered species and that the potential fauna impact problems were able to be perceived. Because of this, the purpose of the law had been achieved.

> What ss 84, 86 and 87 require is that the public be alerted to the impacts of the proposed development, and so long as the development application and the documents which did in fact accompany it are adequate for that purpose and are on exhibition, the object of those provisions is met.

The decision is of major concern. It follows logically that in future an EIS need not be exhibited to the public, providing the public is made aware of the impacts of the proposed development. In the case of an FIS, there appears to be no obligation to make serious inquiry about what the endangered species are. The public need only be alerted that there are potential fauna impact problems; that habitat is being removed and there may be endangered species.

Her Honour's judgment means that providing the substance of the requirements of the law is complied with, the form need not be complied with. This is a dangerous step in the erosion of public participation. The Court has previously jealously guarded the minimum requirements set out in the Act (for example see *Curac v. Shoalhaven City Council & Anor* Stein J 24 September 1993, unreported, where advertising of a development application for less than the required 28 days was held to be a fatal defect in the approval process.)

The legislative framework discussed above mandates a minimum format for the process. The decision in *Batson* is a foot in the door for those who would see that minimum framework degenerate. The decision is on appeal.

James Johnson

EDO NEWS

New South Wales

EPA settles freedom of information case

The EDO recently acted for the Inner City and Foreshores Community Action Group Inc. against the Environment Protection Authority in relation to the EPAs failure to comply with the *Freedom of Information Act* 1989. The EDO has now written to all members of the EPA board concerning the matter. Below are extracts of the letter which explains the background to the case.

Dear [Board Member]

Re: Freedom of Information Application - Inner City and Foreshores Community Action Group Inc.

We advise that we act for Inner City and Foreshores Community Action Group Inc.

Section 28(2)(e) of the *Freedom of Information Act* 1989 provides that the written notice which is to be given to an applicant, if the determination is to the effect that access to a document is refused, must give the reasons for the refusal and the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based.

On 10 February we made application to the Environment Protection Authority under the *Freedom of Information Act* 1989. Our clients were seeking access to various documents related to the approval for the heliport at Pyrmont. On 14 March 1994 we received a letter dated 10 March from the EPA which advised we may be supplied with copies of requested documents "as discussed". That determination excluded the draft approval conditions from the documents provided. No reasons were provided in the determination.

On 14 March 1994 we requested a review of this decision. As provided for under the legislation the application was made to the Director General. Specific reference was made to the failure of the EPA to comply with the fundamental provisions of Section 28(2)(e) discussed above.

On 15 April 1994 we received a letter dated 12 April 1994 from the EPA which simply advised that the original decision had been confirmed. This letter again failed to give reasons for the decision.

On 29 April 1994, we forwarded a further letter to Mr Yates, again requesting that the determination be reviewed. Mr Johnson of this office also spoke several times with Mr Yates explaining the deficiencies in the EPA's response and requesting compliance with the law. On one occasion Mr Yates advised that the EPA's legal section had said that his reply was sufficient.

On Friday 20 May 1994 we commenced proceedings against the EPA in the Supreme Court for an order to compel the EPA to comply with the *Freedom of Information Act* and provide reasons. On Monday 23 May, the document in question was provided and the matter was settled in Court on 24 May with an order for payment of the legal costs of Inner City and Foreshores Community Action Group by the EPA.

It is of grave concern to this office that senior staff of the Environment Protection Authority do not comprehend their obligations under the *Freedom of Information Act*. This is despite the fact that the specific provisions were pointed out to staff of the Authority. Of even greater concern is the suggestion that the response given to our client had the sanction of the EPA's legal section.

We request that you advise what training is given to staff to enable them to comprehend their obligations. Further, what system is in place to ensure the supervision of responses to freedom of information applications?

In a choice between conspiracy and a mix up, we often advise our clients to assume there has been a mix up. In this case, in view of the lengths to which our office went to explain to the EPA its obligations under the Act, which obligations ought to be self explanatory, the inference arises that the EPA has deliberately refused to comply with the law.

In the course of assisting dozens of clients each year, we make frequent Freedom of Information applications. While we may not always agree with the substance of the agency's determination, the agency involved invariably knows its obligations and provides reasons for refusing access to documents. The enables our clients firstly to know that they have been refused access to documents and secondly to make an assessment of whether they might challenge such a determination on its merits in the District Court.

The EPA's recent response is the poorest this office has witnessed. The matter has been referred to the Ombudsman for further investigation. We are particularly concerned by the EPA's approach in view of the EPA's objectives which include promoting community involvement in decisions about environmental matters.

National Pollutant Inventory

The Commonwealth Environment Protection Agency has recently released its public discussion paper on the National Pollutant Inventory (NPI). The NPI will provide baseline information on the amount of pollution being discharged into the environment in Australia. A workshop program will be held between 20 June and July 1994. Attendance is free, but participants must register in advance.

The closing date for comments on the discussion paper is 8 August 1994.

The scheme of the NPI is that companies of a certain size using more than a certain amount of certain chemicals would be required to report on the amount of their discharge of these chemicals to the environment. Similar systems are operating in the United States, Canada and other countries. While in the United States, 321 substances are listed, it is proposed that between 50 and 70 hazardous and toxic materials will be the subject of reporting here. The discussion paper raises several key consultation issues. Given that the information is to fulfil the public's right to know about pollution, the manner in which the information will be presented is crucial. Some lessons can be learned from the United States Toxic Release Inventory Access System. The US system is optimised for text retrieval but the key data are numbers about places. People will want to know for example where toxic releases occur on a map. The discussion paper suggests that the data may be linked to a geographic information system (GIS).

The US system provides only raw data. It is important that the NPI in Australia also includes information about regulatory limits and standards in each jurisdiction in Australia. Users should also be able to get abstracts of toxicology articles and related information from the database.

It is also important that the system is capable of allowing certain queries to be made. For example; who are the most inefficient producers in each industry? People may want to

compare the toxic releases of local government areas, associated companies etc.

We see the establishment of a national pollutant inventory as a positive first step in moving towards pollution prevention in Australia. It will assist industry in identifying losses to waste and the public in knowing who is creating this waste. The hope is that a voluntary, financially driven reduction in pollution will result.

We think the next step should be legislation which assists industry to achieve pollution prevention. That is, putting in place policies that attach the root causes of pollution. There are several examples in the US such as the Toxics Use Reduction and Hazardous Waste Reduction Act in Oregon. This gives priority to toxics use reduction over hazardous waste reduction techniques. Companies are required to identify their chemical usage and trace these chemicals throughout their various processes, determining how much goes into the product, how much ends up as waste and how much gets lost to the environment. The company must then identify opportunities for use and waste reduction. Next, a schedule for implementation of the plan is developed. Techniques involved can be housekeeping measures which eliminate leaks and prevent spills or changes to production processes to improve efficiency or substitute raw materials.

Funding for the expanded technical assistance provided by the Government comes from two sources, an existing hazardous waste generator fee and a new hazardous substance user fee. The fees provide a strong incentive for business to reduce the amount of hazardous substances used and waste generated.

The EDO will be doing a full submission on the NPI discussion paper to CEPA by the middle of July. If you would like a copy of the submission, it will be available from the middle of July from the EDO for $10.00 including postage.

Contempt proceedings in Blue Lagoon case

The Office acted for the Save Blue Lagoon Beach Action Group Inc. (''the Group'') in proceedings in 1993 to obtain a declaration that a development consent relating to a tourist resort development at Blue Lagoon near Bateau Bay was void. The land the subject of the proceedings is zoned 7(d) Coastal Lands Protection and no development is permissible on the land without consent.

Those proceedings were successful and the Land and Environment Court granted the declaration and an injunction restraining any development on the land the subject of the proceedings without a valid development consent.

Following the Court's orders a number of cabins were placed on the land. Consequently the Group brought a motion for contempt in relation to the placement of those cabins on the land.

At the hearing of the motion on 22 March 1994, Her Honour Justice Pearlman retrospectively varied the terms of her injunction so that it only restrained development on the land pursuant to the consent declared invalid.

Following this retrospective variation the Applicant discontinued its contempt proceedings. Although the Applicant considered commencing separate Class 4 proceedings to seek removal of the cabins on the site the Respondent developer gave undertakings in relation to the removal of the cabins should retrospective development consent not be obtained.

Mushroom saga continues

The Office has acted for Peter Foster on behalf of the Ebenezer Concerned Residents Committee in proceedings commenced in 1991 relating to odour from a mushroom composting operation at Ebenezer. In 1993, following the hearing of the matter, the Land and Environment Court granted an injunction preventing the operation of the mushroom composting operation other than in accordance with certain development consent conditions.

The operation of this injunction was suspended for a period of one year until 20 May 1994. On May 2 1994 the Respondent, Mushroom Composters Pty Ltd, sought to have the operation of the injunction suspended for, in effect, a further two and a half years until its appeal to the Court of Appeal was heard.

In the alternative the company, Mushroom Composters Pty Ltd, sought a suspension of the injunction for a further ten months. Mushroom Composters admitted that the breaches of the development consents found by Her Honour in 1993 had continued to date.

Having heard the evidence called by Mushroom Composters, Her Honour ruled that the operation of the injunction should not be further suspended.

Wiley Park case concluded

In 1991 the Office acted for Canterbury District Residents and Ratepayers Association Inc. against Canterbury Council and the Department of Planning in an attempt to stop the development of a Sizzlers restaurant in Wiley Park.

Council had purported to make a new local environmental plan for the park which allowed the development. In April 1991 the Land and Environment Court declared this plan to be void because of failure to adequately advertise the plan. Canterbury Council appealed against the decision to the Court of Appeal.

In February 1994 the Council discontinued its appeal and paid the costs of the Association in the appeal.

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