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NEWSLETTER ON PUBLIC INTEREST ENVIRONMENTAL LAW

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Access to Justice

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In May, 1994, the federal government released the report and action plan of the Access to Justice Advisory Committee for public discussion. In response, the EDO prepared a submission on behalf of the EDOs in Brisbane, Melbourne, ELCAS in South Australia, and steering committees for the establishment of EDOs in Wester Australia, Tasmania, the Northern Territory and the ACT. The submission noted how in environmental issues, there is serious inequality in access to justice between private or government interests and persons or groups seeking to protect the public interest. Private or government interests are well resourced and have access to legal advice and representation whilst protectors of the public interest have no or limited access to legal advice and representation. The effect of this imbalance on decision making is that solutions to environmental problems do not reflect detailed consideration of all interests and are predestined to be inadequate. Set out below is a summary of the recommendations for reform proposed in the submission.

The establishment of Environmental Defender's Offices

Need

Environmental Defender's Offices perform three

The NSW EDO is the only full time office in Australia. Other states and territories have no or very limited access to these services.

Inquiries received by existing offices show that the community has a changing expectation about its role in environmental protection as a result of the increasing seriousness of environmental problems and initiatives to implement the principles of ecologically sustainable development. The community is demanding greater involvement in environmental decision making.

These demands are leading to the creation of new rights and responsibilities in environmental laws.

There is significant unmet need for legal advice and community education about rights of the public to participate in decision making processes, and for the on-going formulation of participatory environmental laws.

There is a need for EDOs in all states and territories rather than in just some states. To perpetuate the imbalance is to imply there is a greater need for environmental protection in some states than in others.

Meeting the need

Over the next three years, the Commonwealth should provide funding to be administered by the Attorney General's Department, for the following purposes:

*To bring the services provided by the Queensland, Victorian and South Australian offices up to a minimum standard of service.

*To commence the establishment and operation of Environmental Defender's Offices in Western Australia, Tasmania, the Northern Territory, and the ACT.

*To enable members of the NSW EDO to assist and co-ordinate each of the new EDOs in their establishment, and for initial national co-ordination of EDOs once established.

Recurrent funding of up to $96,000 is sought for all states and territories except NSW. That amount is equivalent to the core grant received by EDO NSW and is based on the established community centres funding formula for two positions.

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Capital funding of $30,000 is sought for South Australia, Western Australia, Tasmania, the Northern Territory, and the ACT.

Legal aid for environmental cases

Need

Legal aid enables the remedying of serious breaches of environmental laws and the conduct of test cases.

Legal aid for environmental cases enables on-going advice and representation of community interests in individual environmental disputes. Ongoing representation is required to allow useful negotiation on an issue, even though litigation is seen as a matter of last resort and only few cases may proceed to a full hearing.

Legal aid is necessary because, as shown by the NSW EDO experience, the core grant permits no more than initial legal advice on particular issues.

Legal aid for environmental cases is only available in NSW. In other states LACs have no guidelines for the provision of legal aid in environmental cases. There are Commonwealth guidelines for legal aid only in matters of national significance.

There is a need for legal aid funding to enable members of the public to exercise the public rights provided in environmental legislation.

The public's ability to pursue litigation is also discouraged by cost indemnity rules.

It is an unacceptable requirement that public interest litigants have to undertake the risk of personal financial loss, when the benefit of enforcement of public environmental rights flows to the broader community and is not specific to the individual litigant, and when the conduct of the litigation involves voluntary donation of enormous personal time.

There is a need for special costs provisions in public interest environmental litigation.

Meeting the need

In its national plan for priorities for legal aid, the Commonwealth should identify public interest environmental cases as an area of law in respect of which LACs are to provide legal aid.

Guidelines for legal aid in public interest environmental cases should recognise the special needs of environmental cases and waive any requirements for a means test. Appropriate precedents are Section 35 of the *Legal Aid Commission Act* 1979 (NSW) and the NSW LAC legal aid guidelines in public interest environmental cases.

The Commonwealth should provide increased funding to LACs by way of tied grants for public interest environmental cases.

Courts should have the power to make an order that another party to proceedings indemnify the applicant in relation to costs incurred in an application, or that a party only bear its own costs to the proceedings regardless of the outcome of proceedings.

Criteria for identifying whether a matter is in the public interest should be listed. Reference can be made to guidelines of the NSW LAC in determining appropriate criteria.

Similarly, there should be provisions for costs indemnities as exist under Section 47 of the *Legal Aid Commission Act* 1979 (NSW).

Third party civil enforcement

Need

Enforcement of environmental laws is primarily the responsibility of government authorities. However, sometimes those authorities do not take proceedings where the law has been broken. That can be due to a lack of resources or lack of commitment to taking appropriate enforcement action.

The failure to enforce environmental laws means that public resources such as air, water, endangered species and heritage are not protected. That leads to frustration, contempt for government and the legal process, and eventually, functional breakdown of the system.

Third party civil enforcement provisions are now recognised by government departments, like the NSW Department of Planning, as essential to the proper administration of the environmental legal system.

> The right of any person to remedy or restrain a breach of the Act is a *fundamental safeguard* of the system's proper processes.

The importance of these provisions was further illustrated in the parliamentary debates on s.25 of the *Environmental Offences and Penalties Act*, allowing any person to bring proceedings to restrain a breach of any Act which is causing or is likely to cause harm to the environment except with leave of the Court. Then Premier, Nick Greiner stated:

> There could be little debate that the provision of third party rights in a number of statutes has increased the accountability of environmental decision-makers and increased public participation in environmental decision-making generally.
>
> I advise some members on my side of the Chamber ... that third-party rights should not be built up into some form of mythological beast. They have been part of various statutes for a considerable time and have not caused the end of civilisation as we know it.
>
> Some members who are broadly supportive on my side of the Chamber have developed the view that such rights are a Trojan horse for all matters that are deemed undesirable. But the record just does not indicate that. It would be less than honest of me if I spoke to the contrary.

Third party civil enforcement provisions enable resources to be directed to substantive questions of breach of environmental laws and not exhausted on procedural issues. It is a waste of resources, legal aid or other, to require those seeking to represent environmental interests in environmental proceedings to establish their special interest in doing so.

This is particularly so, considering that it is no longer disputed that environmental interests should be represented and count in the decision making process.

There is a need for third party civil enforcement provisions in environmental legislation to ensure that government is accountable.

Meeting the need

The Commonwealth should amend its environmental protection legislation to include third party civil enforcement provisions and recommend that states amend their environmental protection legislation to include such provisions.

Conclusion

These reforms will promote achievement of the objectives of the Access to Justice Action Plan.

The establishment of EDOs will lead to greater equality of access to legal services for persons having legitimate interests to protect the environment, regardless of their place of residence.

Legal aid for environmental cases will meet the need for the Commonwealth to provide resources for legal aid to those who have legitimate interests to protect the environment, and in respect of matters for which there is an increasing demand for legal services.

Third party civil enforcement provisions will enable the Commonwealth to improve access to justice in relation to areas of law within Commonwealth power, and to formulate "best practice" principles for matters affecting access to justice but which require implementation by the States.

If these reforms are implemented government decision making will benefit and there will be costs savings in the long term. That this will happen is supported by the findings of the Fraser Island Commission of Inquiry, into public issue disputes. In May 1991, the Commission reported:-

> "Effective community involvement may require not only access to information, opportunities to participate and representative participation, but also the expenditure of public funds on financial support for appropriate community organisations to enable them to act within and contribute to, rather than oppose and seek to circumvent, the making and implementation of decisions. The ... Legal Aid Commission already provides some financial support in relation to environmental disputes to the Environmental Defender's Office.
>
> One instinctive reaction to such a proposal is that it will promote disputes and obstruct land and resource use. However, provided that appropriate controls are implemented, public funding should have exactly the opposite result....Effective public participation is likely to improve and expedite the decisions which are made."

Resourcing community interests is necessary to give expression to those community interests and to ensure that outcomes of environmental disputes are determined on merit rather than according to means and that processes set down by law are followed. Otherwise private interests will always dominate, and the expression of the broader public interest perspective will be forever inhibited.

National Pollutant Inventory

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After three months, the Commonwealth EPA has closed public discussion on its proposal for a National Pollutant Inventory (NPI). The proposal is part of a global move towards registering pollutants which resulted from recommendations made in Chapter 19 of Agenda 21. The EDO sees the need for a co-ordinated approach and has made a number of responses to the recent Commonwealth's discussion paper centering on the need for community access to information. The basic assumption is that an NPI should fundamentally change the relationship between those polluting and those affected by pollution.

Below are edited extracts from the EDO's response to the Commonwealth NPI discussion paper.

How should information from an NPI be presented?

In addition to state legislation which allows community access to information, we suggest that the United States Federal legislation on toxic release inventories and pollution prevention would be a useful model for Australia. The underlying goal must be to make information readily and freely accessible to the public.

Information from the NPI should be provided in both electronic and hard copy formats. This will enable the widest possible audience to be reached including those with limited computer skills. We deal specifically with computer access below.

In addition, information should be available on microfiche and placed with all statutory deposit libraries together with an annual report summarising the data and some its most useful applications.

The government could establish an access centre within the Commonwealth EPA which would enable staff to research and mail out information requested by members of the public.

The public should play a role in shaping the way that information is disseminated. It is difficult to foresee the different questions that people might want to ask and ways that the information could be used. A representative committee ought to be established by legislation to provide advice on the following areas:

*Any additional information resources which should be made publicly available.

*Gaps which exist in information collected.

*Changes needed in trade secrecy policies.

*Approaches for making information available through computers and telecommunications and other means including system design, user interface and public outreach and training.

*A method of monitoring the progress of making such information publicly available. (Bass and Maclean, 1993)

What benefits might you expect from access to information about pollutant releases into the environment?

Community awareness

The principal benefit of the NPI is to the community at large. We note that the position of NSW government representatives at NPI public workshops has been that the main benefit of the Inventory should be in assisting better awareness, accountability and tracking of waste products for government and industry. However the EDO believes that the principal benefit should in fact be public access to information on environmentally harmful substances. Other benefits such as reductions in use and emission of toxic substances are likely to flow from the community awareness and action that follows disclosure of information on these substances.

An informed "market"

One way to characterise the NPI is as a mechanism to promote an informed market. Once the market is defined so as to include those affected by pollution, market forces will act to ensure that "consumer" preferences are expressed. The effect of an NPI is to make previously invisible conduct by corporations visible and hence expose such conduct to market forces.

In this respect an NPI would be a gentle regulatory tool, with few of the features of direct regulation of emissions. Through an NPI, reductions in emissions and use of toxic chemicals arise either as a result of initiatives of companies to increase their efficiency and reduce wastage or as a result of disclosure and public scrutiny. The effects of an NPI will not be uniform across all companies although the overall impact will be a reduction in the use and emission of toxic materials.

The functions of the NPI

The discussion paper refers to enabling "more informed public participation in relevant decision making processes". We would point out that in NSW at least, the public is excluded from pollution licensing decisions which take place as a result of private negotiations between the polluter and the Environment Protection Authority. Therefore mechanisms like the NPI – that allow free access to specific and comparative pollution information – are required if licensing decisions are to be opened up to public scrutiny and accountability.

Which aspects of overseas models should be adopted in Australia?

Discussion of NPI focusses on the potential for public pressure to reduce emissions from polluting industries. However adoption of a positive program such as the US EPA's 33/50 program would in addition allow environmentally progressive companies to benefit from positive publicity.

One overseas initiative that should be adopted is disclosure of pollution reduction measures. This is discussed further below.

The US system can attribute its success to:

*Requiring facilities to report regularly the amounts of specific toxic chemicals that they release and transfer to the environment. Confidentiality claims are limited.

*Using a standardised reporting form that serves as the basis for a structured computer data base to aggregate data by chemical, region and sector, and to compare company performances.

*Actively disseminating the data to the public, including to local communities, investors, business, government, the media and environment groups (World Wildlife Fund Report 1994).

There are some aspects of the US system that should not be adopted, and others that can be improved on. For example the US EPA does not require companies to verify the data that they submit. Greater emphasis should be placed on verifying this data.

Another US past experience that should be avoided is the problems that have been experienced because of the absence of clear instructions on how to fill out the reporting form (Abell 1994).

It would also be unwise to adopt the uncertainty that surrounds mixtures and trade name products in the US. Companies are only obliged to use the "best information available" to determine whether the components of a mixture are above the de minimus concentration or not. The instructions for reporting in the US provide that:

> "...if you know that a mixture contains a toxic chemical but no concentration information is provided by the supplier, you do not have to consider the amount of the toxic chemical present in that mixture for purposes of threshold and release determinations."

This can only increase suppliers' incentive to keep the identity of their products secret, which is completely contrary to the philosophy behind the establishment of a National Pollutant Inventory.

A supplier should be required to notify its customers about the presence and composition of listed toxic chemicals in the product.

If the scheme of the NPI is not to be subverted, there must be an obligation on suppliers to provide information about listed chemicals. The US EPA itself has:

> "...determined that the most effective and least burdensome approach is a supply notification requirement" (Federal Register Volume 53 No 30 Rules and Regulations).

How should responsibilities for the NPI be divided between Commonwealth, State and Territory Governments?

A national approach to the NPI is essential. There should be Commonwealth legislation establishing the NPI consultation between the Commonwealth, State and Territory governments about the form of the data to be collected.

The proposed inventory modules

We support the proposed modules and the order in which they are proposed. We note that the New South Wales government has previously taken the position that greenhouse gas emissions should be incorporated in the initial module (Corbyn n.d.). While a greenhouse gas emission inventory is important and the discharge of these pollutants needs to be addressed, the principal innovation of the NPI proposal is the disclosure of toxic and hazardous materials. Given the limited funds available this initiative should have priority as indicated in the Commonwealth's discussion paper.

First Module – Hazardous and Toxic Materials

Disclosure of toxics use reduction

A feature that has not been included in the proposed first module is a requirement to disclose initiatives being implemented to reduce the use of toxics, and the success of those programs. This would not be as desirable as mandatory pollution reduction legislation but would be a step in the right direction. This strategy has been adopted in a number of states in the US including Massachusetts and New Jersey.

In New Jersey each company is required to complete a Release and Pollution Prevention Report for each substance detailing:

*throughput of the substance;

*air and water discharges;

*details of on site management; and

*pollution prevention activities including projected reductions in use of toxics (World Wildlife Fund Report 1994).

Such disclosure requirements obviously do not force companies to engage in pollution reduction activities but the requirement to disclose forces them to consider and in some cases adopt pollution reduction programs.

Education to ensure compliance

A further element of the first module should be education of those covered by the scheme about their obligations to report and in identifying their use of listed chemicals. It may be, for example, that organisations will not recognise they are using listed chemicals unless their attention is specifically drawn. This is especially so because product brand names rather than generic chemical names are used. This is linked to the above discussion (Point 4) of supplier notification.

Criteria for reporting

The principal criterion for reporting should be, as in the US, the manufacture, use or discharge of one or more listed chemicals.

The use of a "number of employees" criterion will mean that small businesses are excluded from reporting requirements. There may also be high technology industries or highly polluting industries that also fit this criterion and are excluded from the reporting requirements. These industries could be caught by:

*an alternative criterion relating to volume of use of listed chemicals; or

*identification of particularly polluting industries, for example by using the US Standard Industry Codes classification.

We suggest that a combination of all the factors listed in the discussion paper be used so as to most effectively target polluting industries.

Materials sent off site for recycling should also be disclosed, as should the nature of the recycling. This is obviously necessary to ensure that poor forms of recycling are not used as a means to disguise the extent of pollution.

In establishing criteria for reporting, the definition of the various terms will obviously be critical. Again, we can learn from the debate which has gone on in the US and adopt the interpretations eventually adopted by the US EPA.

"Manufacture"

The term should include:

*Coincidental production of toxic chemicals where they are produced as a by product or impurity during manufacture or use.

*Importing toxic chemicals. Only one facility should be considered to have imported the shipment. Otherwise there could be double counting for each shipment.

"Full time employee"

Some facilities may have large seasonal variations in employment. Further, facilities with large numbers of contract employees should not escape reporting because of different employment arrangements.

"De Minimus Concentrations"

The US EPA has determined that it is reasonable and appropriate to adopt a De Minimus Concentration limit for toxic chemicals in mixtures. The EPA adopted a 1% limit or .1% in the case a defined carcinogen.

Which chemicals should be reported

Obviously it appears that, initially at least, the determining factor in the number of chemicals subject to reporting requirements is the amount of money available to establish the scheme and process the data. We note that the proposed list of 50–70 chemicals subject to reporting requirements is considerably less than in either Canada or the United States.

Although initially the number may have to be limited by questions of cost it is important that processes be built in to the scheme to ensure that the list of chemicals subject to reporting requirements can be changed. These processes should be defined to ensure that the criteria for listing of chemicals are clear and that the process for determining additions or deletions from the list of chemicals is clear.

There should be an obligation on the administering agency to regularly review the list. These measures will ensure that the public has confidence in the list and that listing or delisting takes place on grounds that can be publicly disclosed.

Pesticides that are known or suspected human carcinogens, should obviously be included in the chemicals which should be reported. The estimation techniques are simple because all of the chemical which is purchased is released into the environment. While we recognise that there may be political difficulties in including pesticides in the list of chemicals, the fact remains that information about the level and location of pesticides introduced to the environment is crucial.

How should the information be made accessible to the public?

In the context of the discussion paper, we assume that this question relates to computer access, as distinct from the broader discussion above.

Given that the principal purpose of the NPI is to make information about use and emissions available to the public, the form of access is important. The aim must be to make the information as readily accessible as possible and to remove any barriers to that access.

We suggest the following methods:

*Standard manipulations of the data be provided as a report on an annual or six monthly basis.

*NPI data be made available on diskette or CD ROM at cost.

*Data be made available online at nominal cost by CEPA or another organisation.

In the US, data is made available through the National Library of Medicine Toxnet national computer database as well as on computer disks and datatapes. In addition a non government organisation known as RTKNET makes the data available on a computer bulletin board which is accessible to citizens groups at no charge (Lewis 1993).

Concern has been expressed at the Sydney NPI workshop, that information on chemicals may be misused for political purposes. This concern is understandable and has also been expressed in the US:

> "Taking a Form R out of context is like judging a persons character from his drivers licence. But that is just what the environmental activists do. They spot arsenic in the inventory and imagine that the reporting company serves it for lunch in the employee cafeteria." (Brown 1991)

Without specific information on the health and environmental effects of each chemical, the numerical information contained in the data base will not help communities.

The US Toxic Release Inventory National Report in 1989 highlights the problems:

> "this report contains aggregate information... which alone does not indicate the risk these chemicals pose to human health or to the environment... small releases of highly toxic chemicals may pose greater risk than very large releases of less toxic materials."

The risk posed by an individual release is a function of several of the factors mentioned above, together with type and frequency of the release, environmental conditions at the time of the release and the extent of public exposure.

The answer is to provide as much context for the information as is reasonably possible. On-line access to existing information on each chemical's potential effects, potential nature and degree of toxicity, route of release and exposure and degradation information as well as other factors, should also be provided.

As a minimum, the National Pollutant Inventory ought to enable people to do the following tasks:

*Determine how much of each chemical went into the air, water and ground in a specific geographic area;

*Compare releases from different facilities in different parts of the country;

*Compare releases among different kinds of facilities;

*Check facilities are meeting emission standards; and

*Find areas with a high number of releases.

More lessons can be learned from the problems experienced by the US Toxic Release Inventory Access System. This on-line system is optimised for text retrieval but the key data are numerical form. People will want to know for example where toxic releases occur on a map. We support the suggestion made in the discussion paper that the data be linked to a geographic information system (GIS).

What should be the features of NPI legislation?

National legislation

A combination of state and Commonwealth legislation – or Commonwealth legislation allowing for the approval of state procedures – would render the framework complicated and ineffective. Thee scheme must be established by national legislation to ensure the uniformity and effectiveness of the reporting system.

Consideration will obviously have to be given to the limits placed on the legislation. For example if the scheme is to cover state government instrumentalities and the legislation is based on corporations, then consideration will need to be given to what extent the legislation refers to them. For example, even though many polluting government instrumentalities may be have a corporate structure, they may not necessarily be trading or financial – and thus may not be covered by the law.

Enforceable requirement to report

In order that the scheme be effective the penalties for non-compliance should be significant and be based on a daily penalty for non-compliance. In the United States these penalties are up to $25,000 per day.

Third party enforcement

Although the only obligations on polluters may be the requirement to report, it is essential that there be provisions in the legislation allowing third party enforcement of this requirement. It is particularly important that intended beneficiaries of the scheme who have a small operational budget are not excluded from assisting with this enforcement.

There should be "one way" fee shifting provisions in the legislation to encourage third party enforcement of the provisions. This would allow third parties to enforce the provisions of the legislation without the fear of an adverse costs order if the court case was unsuccessful. In such a situation the unsuccessful applicant would still have to bear their own legal costs.

These measures would be consistent with the Commonwealth's Access to Justice Action Plan.

Voluntary phase in period

The discussion paper raised the possibility of a voluntary two year phase in period. There would appear to be little benefit in a voluntary phase in period other than for those companies which do not want to comply with NPI requirements. If the intention is to iron out any initial difficulties with the scheme in this initial period then there is no benefit in voluntary reporting. Problems will only arise when the full load (including those who are reluctant to report) is placed on the reporting system.

Confidentiality provisions

In any provisions designed to protect trade confidentiality the onus should clearly be on those claiming confidentiality to substantiate their claim. In the US, companies claiming that information is confidential are required to show that:

*the information has not already been disclosed;

*the information is not required to be disclosed under other laws;

* the information is not readily discoverable through reverse engineering so that it is a fact widely known through the industry; and

* disclosure would cause competitive harm (Superfund Amendments and Reauthorisation Act section 322).

In addition there should be penalties for false claims and requirements for disclosure of generic information where specific information is claimed to be confidential (the process for this disclosure is at 40 CFR 370.5(e)). This will ensure that claims to confidentiality are not made routinely so as to frustrate the objects of the scheme, and that genuine claims do not jeopardise the integrity of the scheme.

Costs of the NPI

We have no comments on the costs of the NPI other than to point out that World Wildlife Fund (1994) contains estimates of time involved in completing Form R of the US EPA for facilities in the US. We note that a participant at the Sydney NPI workshop, currently employed by Caltex, has worked as a consultant in the US and has assisted numerous small businesses to comply with the TRI requirements. He recounted his experience that, without exception those businesses recouped their compliance costs in increased savings on chemical use.

Benefits of the NPI

We are of the view that the discussion paper identifies the important benefits of the NPI.

Conclusion

Companies and governments that adopt publicly acceptable approaches to pollution control and reduction will have nothing to fear from the disclosure contemplated by the proposed NPI, and overseas experience points to the potential savings to be made.

As has been pointed out on a number of occasions, pollution regulation is an area that has traditionally been surrounded by secrecy and private negotiations between polluter and regulator. The NPI is an initiative which will ensure a uniform national level of public disclosure of polluting activities. We are of the view that the NPI is a useful Commonwealth initiative which should be supported.

The OECD's Pollution Prevention and Control Group is currently developing guidance for governments on toxic chemical inventories. Most countries, however, are only now starting to develop inventories of pollutants. Because of this there is an opportunity to build a global network of compatible national databases. Future workshops on implementation strategies will be held in Paris in 1995 and Egypt may host one in early 1996.

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EP&A Act Regulation review

James Johnson

Director

Environmental Defender's Office

The Department of Planning recently reviewed the Regulation made under the Environmental Planning and Assessment Act 1979. As part of its involvement in legislative review and reform, the EDO participated in Department workshops and prepared a written submission, extracts of which appear below.

We are pleased that the Department has taken on board our suggested changes regarding advertisements in newspapers and exhibition periods.

Schedule 3

On page 5 of the regulation review, it is noted that:

> "...the revised Schedule (Schedule 3 to the regulation) will not be discussed in the consultation phase of the proposed regulation because an extensive consultation program has already been undertaken prior to its gazettal in June 1994."

We have reservations about the process which was involved with Schedule 3. The "extensive consultation program" was at the initial discussion paper stage. Consultation was on a very selective basis once the Regulation took shape. There was no "public consultation program" when the Schedule had taken shape, in contrast with the current regulation review.

Authorisation to Charge Fees

Discussion of the method of setting fees and charges set out in Part 9 of the Regulation is dealt with in approximately a page and a half. It is overly simplistic and fails to deal with the range of available methods which combine a regulated fee structure with flexibility to cover the work required to assess the application.

The discussion fails to take into account the additional costs in assessing a Development Application, for example where endangered fauna are involved. The estimated cost of the development is a blunt measure of the cost to a Council of assessing the development.

The discussion of the BIS Shrapnel report on p.42 of the Review compares the price movements of various indices from 1980 to 1993. Again, this fails to take into account the additional obligations mentioned above which have been imposed on councils to assess factors such as heritage, flora, fauna and contamination factors. The community expects more now than it did in 1980 and the law has changed to reflect this.

Some developments which cost very little can have significant impacts which a council is obliged to assess.

The councils who replied to the question:

> Are there development control functions for which no fee is currently charged and that council believes a fee should be imposed?

noted most frequently the giving of complex advice as the function for which they sought a fee. (Section 4.5.3)

The fear is expressed that councils are unable to allocate overhead expenses. However BOMA's members were willing to pay for the cost of consultants necessary to supplement council's resources. HIA also supports the division of assessment costs into:

*common or base core of assessment elements with a standard scale of fees; and

*user pays for elements outside the core. (Section 2.5)

Elements outside the core would include assessment where endangered fauna may be involved, heritage items, potentially contaminated land, etc. (See the recent case against Armidale Council in the Federal Court imposing liability for granting development consent over contaminated land).

We suggest that the Regulation provide for user pays for those functions which fall outside standard or base core elements, as described above. This would meet the needs and concerns of councils and developers, while at the same time enabling proper assessment of environmental impact.

The BIS Shrapnel study equates assessment and regulation of a development's impacts with a "public good" which the public should pay for. We consider this at best a curious and unusual way of approaching development control. We see it from another perspective. The service is provided to the developer.

The "polluter pays" principle is widely accepted and is another example of a policy which supports our perspective. Under this policy, the polluter is responsible for assessment, monitoring, control and clean-up costs of pollution. The BIS Shrapnel approach would see pollution too as a God-given right, with any control of it a "public good". This is nonsense.

Where a developer seeks to impose impacts on the environment, then the developer should pay for the assessment and regulation of those impacts. There is not and has never been an absolute right to do whatever one likes on one's land. (See Sturgess, Gary in Impact, No 33 March 1994).

The NSW Treasury document entitled "The Classification and Control of User Charges Activities within Inner Budget Sector" classifies government services according to their nature. We suggest that the assessment of development applications falls more properly within Category C3 – goods or services provided without competitive alternatives with funding by a combination of user charge and budget subsidy.

Category C4 – services of essentially a public good nature – are suggested to be of the nature of hospital beds, TAFE fees and National Park fees. Development is clearly a commercial activity of a qualitatively different nature, not a "public good".

Councils should have the power to levy additional fees in circumstances where additional expertise is to be called on, for example where endangered fauna, heritage, hazardous industries etc are involved.

Advertisement in two newspapers

Regulation 4 provides that public notice is taken to be given when the notice first published in a local newspaper, even if the notice is required to be published in another newspaper as well. This is required in Regulation 73.

In order to provide good public notice, the Regulation ought to provide that publication should be in both newspapers at the same time or alternatively to require time to run from the date of publication in the second newspaper.

There is no policy reason to have the time run from the date of the first publication. This would defeat the purpose of publication in the statewide paper, because publication 27 days after the original local publication, when time began to run, would be legal.

The second newspaper circulates daily and could therefore match the publication date of the local newspaper.

The Report by Determining Authority

Clause 64 provides that the determining authority must prepare a report of its examination and consideration of an EIS and its consideration of findings and recommendations and advice and shall make public the report *as soon as practicable after those examinations and considerations have been completed.*

Clause 75 now provides that the report must be made public *as soon as practicable after the report has been completed.* The former means that the determining authority must prepare a report immediately after the examinations and considerations have taken place. The latter means that a report can virtually linger for ever. The only obligation is to release it as soon as the report has been completed. This changes the meaning of the clause.

Reduction in exhibition times

There is proposed a contraction in the length of time for exhibition of a Draft DCP from 21 days to 14 days. (Regulation 17(2)). This is an erosion of the right to public participation. To argue that it is not significant is equally an argument to allow the original 21 days.

It was put by the person conducting the workshop we attended that:

> "The regulation says exhibition must be *at least* 14 days. They can do more if they want to. If a council wants to rush things through they will be out on their ears".

This demonstrates a naive lack of appreciation of the interactions between councillors and council staff and the functioning of a democracy. Why have any minimum proscription if the ballot box cures all?

Even though most councils are aware of their responsibilities in this area most of the time, the community needs adequate minimum times for public participation in all areas of operation of the planning and development system. People participate and make submissions in their spare time, after work, outside holidays, after they have taken the kids to sport etc.

No convincing argument has been advanced in favour of reducing the period to 14 days, other than this will now be the same as the period in Clause 11 of the Regulation for exhibition of a Draft LEP. Our experience is that people often find this time period too short. A more appropriate response would be to increase the time for participation in these two areas to be uniform at a minimum of 21 days.

CASENOTE: Alec Finlayson P/L v Armidale City Council & Anor, Burchett J, 13/7/94 (1994) 123 ALR 155

[note: all page references are to the unreported decision]

Action

The applicant sued the council in negligence and under s. 52(1) of the *Trade Practices Act* 1974 (Cth) for deceptive and misleading conduct. The case pleaded under the *Trade Practices Act* was not pursued at the hearing and was dismissed. By consent, the hearing in the Federal Court before Burchett J was concerned only with the question of liability, damages were to be assessed at a later date.

Facts

The case concerned residential rezoning and development approvals in respect of certain land in Martin St, Armidale contaminated by prior industrial use. Between the years 1968–1980, the land was used for the operation of a timber treatment plant, utilising creosote and Tanalith (a copper chrome arsenate compound).

Burchett J recounts in detail the history of the operation of the timber treatment works and the involvement of the council with the use of the land.

Council zoned the land for industrial uses in 1967 and granted development consent for the operation of a timber treatment plant utilising creosote.

Drawing from the evidence of Council officers and Council records, from the outset there were problems with inadequate provision of spillage of creosote from the operation on site and as early as June 1969 creosote was finding its way into Martins Creek nearby.

In October 1970 Council approved further plans for the installation of additional tanks to contain Tanalith for the treatment of timber. Despite Council's attempts to impose conditions related to the disposal of waste water from the operation, the evidence pointed to the inadequacy of measures at the plant. According to Burchett J:

> "Any anticipation which may have been engendered of pollution free operations was soon dissipated by the reality" (at p. 8)

Correspondence between Council and the operators of the plant indicates effectively nothing was done, and in 1972 Council granted development consent to an expansion of the activity despite local objections.

As early as 1973 there was talk of rezoning the land residential and formal application was made in October 1974 to the then State Planning Authority.

Burchett J notes:

> "Minutes and reports which are in evidence show that this was regarded by the State Planning Authority as controversial in view of the existing industrial use" (at p 12)

From the state of knowledge and planning principles and guidelines of that time Burchett J concludes:

> "It is quite clear that Council's attention was firmly drawn to the implications for the proposed change of zoning of the presence of the impregnation plant on the land in question" (at p 12)

Nevertheless Council continued its resolve to rezone the land and in September 1975 an IDO was gazetted providing for the land in the vicinity of Martin St to be included in a residential zoning.

The timber treatment plant continued operating until 1980 and Council records oral evidence of a former employee indicating continual problems with the escape of pollutants.

In 1976 there was a major spill of copper chrome arsenate, flooding the whole area and heavily contaminating a section of Martins Creek.

The SPCC issued a notice for the operators to construct earth bunds, however Burchett J concludes:

> "there is nothing to suggest that the features of the operations which had produced these spillages in the past were remedied in any way, and the inference is that continuing spillages were absorbed in the treatment area.."

Extent of Contamination

Burchett J makes a number of observations from the scientific evidence identifying the extent of contamination:

* contamination of the site is patchy with particular hot-spots;

*arsenic and PAH (polyaromatic hydrocarbons) compounds, both toxic and carcinogenic, are present in the upper layer of gravelly ground which could have been removed and replaced before the land was subdivided; and

* turning over of the soil has revealed visible creosote, and the offensive smell has invaded homes on the land.

He explains that 'although the scientific evidence was not explored in full because of the deferral of the issue of damages, the applicant was obliged to show some damage had been sustained by it'. He continues.."also, the extent of the contamination was clearly relevant to any consideration of what (if anything) the Council ought reasonably to have done" (at p 25).

Having regard to various expert reports and in the light of the facts summarised above, Burchett J concludes;

> "that a careful Town Planner, who had ascertained those facts, would not have permitted the development of any of the land in question for residential purposes without prior investigation and remediation" (at p 25)

Subsequent Events

After the timber treatment plant ceased operation in 1980, in 1984 Council granted development consent for subdivision for residential development for 40 home sites.

The land which was the former plant site was conveyed to the applicant Finlayson in 1985 and further development consent was granted to Finlayson in late 1985 for a 27 lot residential subdivision. The land was considered by Council to be 'physically suitable for residential living' and there was no mention of any problem of contamination of the site by creosote or Tanalith in Council's consideration of both DAs.

There were subsequent dealings and further development of the land – the applicant constructed and sold homes in the first stage of the subdivision, and commenced selling blocks of land in the second stage of the subdivision.

The applicant first became aware the site of the former treatment works was contaminated in 1990 and has been unable to sell the remaing blocks in that site.

The Council admitted in evidence that the particular blocks of land were contaminated at the time of the subdivision applications at levels requiring some action and that the applicant suffered some damage.

The critical question of the case was "whether the Council owed to the applicant a duty of care the breach of which gave rise to the losses sustained".(p. 34)

Extent of Knowledge of the Applicant of Contamination

As regards the director of the applicant, Mr Finlayson, Burchett J found that his knowledge of the previous use of the land was only of a general nature and did not extend to the details of that use nor to the contaminating properties of creosote.

Burchett J states:

> "On the basis of his evidence, it is clear that he assumed the land was suitable for residential use, that is, suitable for human habitation, because Council had approved of its development as a residential subdivision and subsequently approved the subdivisional and building plans" (at p 30)

Extent of Knowledge of the Council

Before turning to the law of negligence, Burchett J expands on a further aspect of the facts – the extent of the knowledge attributable to the Council at the time of the change of zoning and at the time of the approval of the first DA.

He states:

> "In my opinion, there is powerful circumstantial evidence to show that the Council, through its officers, was well aware of the contamination of the site at both these times, and that these officers simply failed to apply their minds to the question whether the contamination ought to be investigated.." (at p. 35)

The state of knowledge at the time, including the passage of the *Environmentally Hazardous Chemicals Act* in 1985 lead to the inference that the possible effects of a prior industrial site should have reasonably been considered.

Considering all the evidence, Burchett J states:

> "I am satisfied that, in fact, the risk of persisting contamination was not taken into consideration at any stage of the determination of any of the development applications. If it had been, some action would certainly have followed, given the known history of the site" (at p. 49).

Elements of Duty of Care – Proximity and Reliance

In considering the duty of the council, Burchett J notes it can be vicariously liable for the negligence of its officers and can be directly liable in consequence of their knowledge which must be directly imputed to it (cf *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 31 (cited at p. 49).

The Council was in the position of having the relevant knowledge compared with persons, for example, prospective purchasers, to whom it may owe a duty of care and to whom it had a statutory duty under s. 90 (1)(g) *Environmental Planning and Assessment Act* 1979.

The question put by Burchett J was whether the necessary relationship of proximity was made out, taking into consideration the reliance by the applicant on the Council's approval as indicating the land was appropriate for residential purposes. Further, that reliance was firmly grounded in a laypersons expectations of a Council's legal obligations – as spelt out by s. 90 (1)(g).

The Council sought to rely on the decision of the majority of the High Court in *The Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, who held that, in the circumstances of that case, the council owed no duty of care in respect of pure economic loss of purchasers of a house with defective footings.

However Burchett J distinguished that case from the present in ultimately finding Armidale Council did owe a duty of care to the applicant arising out of the development approvals (being operational decisions) but the applicant's case failed on the rezoning approvals (being policy decisions). According to established authority (cf the High Court in *Heyman*, cited at p. 56) a public authority's policy–making decisions as distinct from operational decisions cannot be the subject of a duty of care.

Burchett was able to distinguish *Heyman* from the present case because in *Heyman* the plaintiffs could not make out a case of general or specific reliance. Also significant was the distinction between a mere omission, on the one hand, and an omission to consider, and if necessary guard against, a consequence of positive action – critical in the reasoning of Mason J and Brennan J in *Heyman*.

As Burchett J says:

> "The present case is quite different, if only because the council itself was responsible for the granting of the development approvals...not a mere omission but a positive act" (p. 63).

Relevance of Economic Loss

Similarly, the fact that Finlayson suffered economic loss (as in *Heyman*) did not, according to Burchett J, exclude the possibility of a duty of care existing. Of importance was 'the fundamental feature of the present case that the council took positive steps out of which the loss ultimately arose':

> "The assignment by the law of a duty of care to a party occupying a particular position should reflect a common sense evaluation of the situation, in the light of human experience, rather than a nice assessment of how a legal taxonomy might categorise the plaintiff's loss" (at p. 66).

In essence, once the council decided to grant the first development application it came under a duty of care in relation to that action (at p. 68).

This duty of care in relation to a claim for economic loss was enhanced by the council's statutory obligation under s. 90 *Environmental Planning and Assessment Act* 1979. (Burchett J cites a number of Canadian, US and Australian authorities – see reported decision)

Decision

In conclusion, Burchett J considered that the 'existence of a relevant duty of care has been established in respect of each of the decisions upon the development applications involved in this case' and, on the facts, the Council was 'guilty of a breach of that duty of care' (at p. 72). A *Limitation Act* defence was not allowed, on the grounds of prejudice to the applicant and the public interest.

Postcript

The case highlights the real concerns involved in the rezoning of industrial land for residential uses when the prior industrial use indicates a possibility of both on–site and off–site contamination. Councils are clearly the repository of a wealth of knowledge in respect of the prior industrial use of the land, critical to ascertaining the suitability of the land for human habitation.

Back in 1991 the Department of Planning issued a Circular (No C20) alerting councils to their responsibilities in minimising the impact of land contamination and their duty under s. 90 (1)(g) *Environmental Planning and Assessment Act* 1979.

In reaction to the decision in *Finlayson*, the Local Government and Shires Association have issued certain guidelines to its members, including that they not approve development on land suspected of being contaminated without obtaining an independent expert report, and that reference be made in s. 149 certificates about the status of land suspected of being contaminated (see **Weekly Circular** 21, 5 August 1994).

Louise Byrne

BSc(Hons)LLB(UNSW)

CONGRATULATIONS TO JOANNE BRAGG OF THE BRISBANE EDO OFFICE ON THE BIRTH OF HER BABY BOY. IT'S GOOD TO SEE THE NEXT GENERATION OF ENVIRONMENTAL DEFENDERS IS GROWING FAST.

EDO NEWS

New South Wales

Tasmanian Conservation Trust Case

The EDO acts for the Tasmanian Conservation Trust in a case against the Minister for Resources and Gunns Ltd. The case relates to the granting by the Minister of a woodchip export licence to Gunns. Issues raised in the proceedings include the standing of the Tasmanian Conservation Trust, compliance with the requirements of the *Environment Protection Impact of Proposals) Act* and compliance with the requirements of the *Australian Heritage Commission Act* in relation to the granting of the woodchip export licence.

Vincentia Ratepayers and Residents Association Case

The office acts for the Vincentia Ratepayers and Residents Association Incorporated in relation to the granting of a development consent by Shoalhaven Council in and area where two endangered species, the Eastern Bristle Bird and the Ground are located. The Association contends that the development consent that was granted is void because the Council failed to consider a fauna impact statement prior to granting development consent.

Bush Fires Coronial Inquiry

The Coronial Inquiry into the bushfires throughout New South Wales in January 1994 commenced on 8 August 1994 and is currently continuing. The office is acting for the Nature Conservation Council of New South Wales in relation to that inquiry. The Council appeared at the commencement of the inquiry and sought leave to appear at the inquiry. The Coroner proposes to undertake a number of inquiries into individual fires and then to undertake an inquiry for the purposes of making recommendations pursuant to s.22A of the *Coroners Act*. The office is currently negotiating with the Coroner the degree of representation that the Council will be allowed at that inquiry.

North Coast workshops

James Johnson with some assistance from volunteer Mark Teutsch recently toured NSW north coast giving workshops on environmental law for laypeople. The workshops were co-ordinated by the EDO's information officer, Anna Salleh, who was assisted by local environment groups. They were held in Forster, Port Macquarie, Coffs Harbour, Lismore and Armidale. They were well attended and feedback has been very positive, showing that they are fulfilling a much needed service to those people wishing to participate in the process of environmental decisionmaking. Once again, thanks to the Law Foundation for financial assistance, and Coffs Harbour City Council which contributed $850 to the workshop in their city.

North Coast Environment Council Case

The office acts for the North Coast Environment Council Incorporated in a case against the Minister for Resources. The Council is seeking a declaration that it is a person aggrieved under the *Administrative Decisions Judicial Review Act* and that it is entitled to a statement of reasons for the Minister's decision to grant a woodchip export licence to Sawmillers Exports Pty Ltd in June 1994.

The export licence that was granted allows export of woodchips derived from forests in north eastern New South Wales from Wyong to Grafton.

Inland Rivers Report and Conference

On June 28, the EDO released it's report *Inland Rivers: Regulatory Strategies for Ecologically Sustainable Management*. The launch at Parliament House by Professor Ian Lowe of Griffith University was covered by the *Sydney Morning Herald, Sun Herald*, and the ABC. David Mossop appeared on the *Lateline* on Tuesday 19 July discussing the use of market mechanisms to regulate water. Following the enthusiastic response to the report, the EDO is organising a conference to discuss this vital issue in more depth. It will be held on Tuesday, 8 November at the Holme Refectory at Sydney University. Speakers on the day will include administrators, environmentalists, academics, and private sector representatives. Topics to be covered include water allocation, property rights, inland wetlands convservation, a case study of the Gwydir River, native title, an environmental perspective and institutional reform.

Farewell to David Mossop

David Mossop left the EDO this month but he won't be having much of a rest. David is now the proud father of a healthy baby girl. He will commence as associate to Justice McHugh early next year. The EDO wishes to thank David for his contribution to the work of the office which started with his voluntary work in 1990. During his time at the EDO, David's work included conducting legal workshops for land owners in Papua New Guinea, undertaking extensive research on legal reform of the laws affecting inland rivers, and conducting a range of public interest litigation. His dedication and desk top publication skills (especially in producing Impact) will be sorely missed.

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