IMPACT

edo

No 38 JUNE 1995

NEWSLETTER ON PUBLIC INTEREST ENVIRONMENTAL LAW

Environmental Defender's Office
8th Floor, 280 Pitt Street, Sydney 2000 DX 722 Sydney Tel (02) 261 3599 Fax (02) 267 7548

Cite as
(1995) 38 Impact
ISSN 1030-3847

THE JUSTICE STATEMENT

– GOOD NEWS FOR EDOs

Maria Comino,
Solicitor, Environmental Defender's Office

On 18 May, 1995, the Prime Minister delivered the government's Justice Statement. As most of you will know the EDO (NSW) co-ordinated a submission on how the government could improve access to justice in environmental matters.

For those who didn't hear about it, the EDO submission had three parts -

1. The establishment of Environmental Defenders Offices in all states and territories. The total funding sought for this purpose was $1,801,000.00, calculated on the core funding base of $96,000 received each year by Sydney EDO.
2. That legal aid be made available for environmental cases through State and territory Legal Aid Commissions, and that there be improved availability of legal aid at the federal level. Total funding sought was $3,880,000.00 calculated on $200,000 per year per State or territory.
3. That State and Commonwealth environmental protection legislation be amended to include open standing provisions.

The goverment responded to the submission in the following ways:-

EDO Network Proposal

The government proposes to establish a national network of environmental lawyers - seven new positions to provide an environmental law service in every State and territory.

The funding is to be provided under the community legal centre program and it is hoped that where appropriate, administrative arrangements can be made with existing legal centres to minimise overall administrative costs.

For example, the existing arrangement in Adelaide, whereby ELCAS (the Environmental Law Community Advisory Service) shares premises with the Bowden Brompton Community Legal Centre, may be an appropriate model for other states to follow.

This network proposal falls within a list of community legal service initiatives that are to be funded from an allocation of $13.9 million.

The other initiatives include:

- nine new generalist community legal

Contents

centres in high growth outer urban, rural and regional locations
- specialist services for children and youth
- specialist litigation advocates in a number of existing community legal centres
- a national human rights and discrimination law centre
- a national community development worker, and
- improved national coordination and accountability for community legal centres.

Legal Aid for Environmental Cases

The Commonwealth is proposing to increase general legal aid funding by $16.8 million over the next four years to State Legal Aid Commissions, to enable them to deliver more services in civil and family law. This is proposed to ensure that assistance in criminal matters is not always at the expense of legal assistance in other matters. More particularly, it is stated that

> "Individual Commissions will be required to develop programs that address the Commonwealth's goal in bringing about real reforms in the way in which services are delivered. Commissions will also be encouraged to adopt innovation and efficiencies that enable the maximum number of people to benefit from the funding of legal aid."

With the latter objective, strong arguments could be made for the funding of more public interest litigation. Unfortunately, the further dollars to be made available to Legal Aid Commissions each year for legal aid is still small, once divided between each of the Commissions.

At the federal level, the Commonwealth proposes to extend the present test case fund to provide funding of $2.9 million over the next four years for cases of national importance that arise under State or common law, as well as cases arising under Commonwealth law. In particular, this will be in areas in which the Commonwealth has an interest, such as the environment, anti-discrimination, consumer law, banking law, company law and constitutional law.

In the past the Commonwealth's guidelines for legal aid funding have been highly problematic, and with new criteria not yet formulated, it is impossible at this stage to evaluate whether these problems will be addressed.

What can be said is that the Commonwealth has not recognised the need for funding of cases, arising under Commonwealth law, of a purely enforcement nature which can not additionally be categorised as test cases. However, at the State level at least, enforcement cases involving State laws should come within guidelines applied by State Legal Aid Commissions.

Standing

The government has referred the question of standing to the Australian Law Reform Commission for a further report. We had been hopeful of more action on this issue, as it is now ten years since the Australian Law Reform Commission made recommendations on open standing provisions.

In New South Wales, there are now many environmental protection statutes that have open standing provisions with many of these being introduced by Liberal governments. Most recently, there is the example of the Fisheries Management Act of 1994.

What this experience shows is that the issues are clear, and it is disappointing that there will be yet another investigation that will take some six to nine months.

There are many other aspects of the legal system relevant to environmental law which are the subject of initiatives in the Justice Statement. They should also be given close consideration at a future time.

In summary, the government's proposal for a national network of environmental lawyers is certainly a significant initiative for public interest environmental law in Australia. It is refreshing to see an initiative addressing public law issues to counter the overwhelming preoccupation of the legal system with private interest issues.

The proposal is also important in recognising the need to strengthen the expertise of regional lawyers and will ensure there is no undercutting of the development of more broadly based expertise.

The proposal also provides indirect recognition of the need to promote citizenship in the community which is, of course, a significant part of public interest environmental law. This is a counter to the strong consumer focus of many of the initiatives in the Justice Statement. It provides some acknowledgment of the value of a properly functioning broader political community, not solely limited to concerns about the market.

Action

It is now up to individual States and territories to take up the initiative in ensuring effective implementation of the proposals in the Justice Statement and for further advancing public interest environmental law in Australia.

Specifically there are three main issues that will need to be pursued. They are -

1. To work out the best administrative structures to support the new lawyer positions and to ensure there is adequate funding for the new positions.
2. To make further applications for funding from other sources to extend the capacity of the new services. This is to ensure there can be the full range of environmental legal services of representation, law reform and education.
3. To lobby State Legal Aid Commissions to ensure legal aid guidelines are created for legal aid and some of the further moneys to be available for civil matters are in fact applied to environmental cases.

There are many other issues, in particular, law reform issues like standing, that will require further immediate work. However EDOs should soon be in a better position to tackle

these issues as a broader network.

Finally, there is a need to say thank yous to everyone throughout Australia for anything and everything they did towards supporting the proposal.

In particular, thank you to each of the State and territory representatives, and their supportive committees in development of and lobbying for the proposal. We look forward to working with everyone in the future.

Amendments to the the Administrative Procedures

James Johnson,
Solicitor, Environemental Defender's Office

On 10 January 1995 the Federal Court delivered judgment in Tasmanian Conservation Trust v. Minister for Resources and Gunns Ltd. This was the first case to come to grips with interpreting the Administrative Procedures under the Environment Protection (Impact of Proposals) Act 1974.

The procedures have not worked well and environmental assessment at the Federal level is a sham. Many major projects avoid assessment. There is tremendous discretion as to what is assessed, which creates uncertainty for industry and fails to provide the "level playing field" necessary to avoid favoured treatment being given for political reasons.

The judgment clarifies the meaning of terms and the obligations of Ministers under the procedures. The result is that designation is required even where an EIS has been done in the past.

The Environment Department has stood on the sidelines wringing its hands helplessly, saying they are powerless to intervene, and that the Action Minister has the responsibility for initiating the environmental assessment process.

The Sackville decision gave recognition to the role the EPA could play. As soon as a new step was taken in relation to a proposal which could affect the environment to a significant extent, then the EPA was put in the driver's seat. It didn't matter that an EIS had been done in the past. It didn't matter that the Action Minister didn't consider a variation in the proposal to be significant; it is not that Minister's decision and that Minister does not have the expertise to make the decision anyway.

On 5 May 1995, the Commonwealth government gazetted an amendment to the Administrative Procedures made under the Environment Protection (Impact of Proposals) Act 1974. Far from assisting Action Ministers, industry and the community in understanding when environmental impact assessment should take place, the new procedures further muddy the waters.

In addition the procedures exempt several classes of proposals from the requirement to designate and are a reaction to roll back the principles established in Tasmanian Conservation Trust v Minister for Resources and Gunns Limited.

Industry had lobbied the government, saying that the sky was falling. The EPA went weak at the knees and has effectively handed the threshold determination of when a matter should be assessed back to the Action Minister. After twenty years waiting for the ball on the wing, they were passed the ball and didn't like the pressure; they ran into touch.

The Commonwealth's environmental assessment procedures may well be worse in terms of environmental assessment and public participation than before the Sackville judgment. The amendments have gone further than they need have gone to address the alleged problem of uncertainty as to when to designate and of proposals being designated too frequently.

An amendment to the procedures could have been made which would still require regular designation of existing developments for the purpose of reviewing any change to environmental impact, but not so frequently as to be absurd. The amendment could have been to the effect that, if there is no change to the proposed action having a significant effect on the environment, then only one initiative in any twelve month period need be designated in relation to a proposed action.

Annual referral is not excessive and there is precedent for this arrangement. The Australian Heritage Commission Act requires that advice be sought each year in relation to many approvals. An annual referral to the EPA would enable the EPA to keep a matter under review and for the Environment Minister to decide, based on the matters listed in clause 3.1.2, if and when further assessment should be done.

The burden on the Action Minister is negligible; one letter each year for matters affecting the environment to a significant extent. The EPA would need to update its information each year on these major projects; some might say this is an appropriate role for an EPA.

Application of the Procedures

Formerly, Sackville J had interpreted the procedures to mean that matters affecting the environment to a significant extent were subject to the procedures; ie the action on the ground, rather than any decision or permission.

The procedures now apply to **Commonwealth actions**. These are actions of the kind found in section 5(1)(a)(e) of the Impact Act. These subsections describe the formulation of proposals, the carrying out of works and other projects, the negotiation, operation and enforcement of agreements and arrangements, the making of or participation in the making of decisions and recommendations and the incurring of expenditure.

A **proposed action** has been redefined to mean a Commonwealth Action which has been designated.

An **environmentally significant action** is a Commonwealth action which will, or is likely to:-

a. affect the environment to a significant extent or to result in such an affect; or
b. have the effect of committing or causing an action by another person that:
   i would otherwise be unlikely to occur and
   ii will or is likely to affect the environment to a significant extent, or to result in such an affect;
   or,
c. have the effect of promoting or facilitating an action by another person that will, or is likely to, affect the environment to a significant extent to result in such an effect.

The Threshold Test for Assessment

Under the former Administrative Procedures, the Action Minister was obliged to designate a proponent as soon as there was any initiative in relation to a proposed action (a matter affecting the environment to a significant extent).

Under the recently gazetted procedures, the test for designation is whether an action is an **environmentally significant action**. The revised procedures go on to provide that the Action Minister is not bound to designate in two broad categories.

A. A proponent has been designated in relation to another Commonwealth action (the earlier proposed action) and the Action Minister considers that any relevant environmental effect of the later action;
   i has been fully taken into account in relation to the earlier proposed action; or
   ii where the earlier proposed action has been allowed before environmental assessment has completed, will be taken into account when assessment is done.
B. A proponent has been designated in relation to another Commonwealth action and the Action Minister considers that any relevant environmental effect of the later action;
   i. is an extension of the environmental effect of the earlier proposed action; and
   ii is not of a nature significantly different from that of the effect of the earlier proposed actions; and
   iii does not significantly add to the effect of the earlier proposed action.

These clauses represent a giant step backwards from the law as it was previously. Firstly, compliance with the procedures in the manner suggested by the Sackville judgement would mean that wherever there was a significant effect on the environment from a development such as logging for export woodchips, an application for a renewal of a licence would prompt a referral to the Department of Environment. This is subject, of course, to the exception that a matter need not be referred if it had already been designated recently.

The scope of the exception is uncertain, but a reasonable analysis would conclude that once a coal mine had been designated, for example, as a result of an export licence application, then it would be some time before it needed to be designated again.

This is hardly onerous for the Action Minister. It simply requires a letter to the Department of Environment. The Department of Environment would be kept regularly informed about the progress of matters affecting the environment to a significant extent and, at some stage after an environmental impact statement had been done, may conclude that further assessment was required.

The position under the new Procedures is that matters need only be referred to the Department of Environment where the Action Minister considers that the environmental impact is of a significantly different nature or significantly adds to the impact of the proposal which had been designated before. One must remember that designation leads to assessment in very few cases.

This change has the potential to lead to "death by a thousand cuts". Woodchip licences around the country could be increased by 20% each without designation. It would be a risky and expensive exercise for a conservation group to convince a Court that the Action Minister was totally unreasonable in saying a 20% increase was not significant.

The procedures leave open the capacity for incremental increase and change in a development. Each individual increase or change may not be significant but the aggregate around the country could in theory be at least as great as any of the initial Commonwealth actions which prompted designation.

The decision as to whether the nature or extent of an environmental impact has changed lies with the Action Minister. This perpetuates the problem of the Action Minister not being the Minister with the expertise to ascertain significance and being the minister with an interest in ensuring that the action takes place. It is also contrary to the EPA's own recommendations in the EIA review process.

The Resources Minister has already indicated the fashion in which such changes will be interpreted. In his reasons for not designating Harris Daishowa in relation to its woodchip licence application last year, he asserts that the additional logging of 172,000 tonnes from Victoria, which has not been the subject of environmental assessment, is not significant. While this may appear unreasonable to ordinary people, a court may not reach the same conclusion. It is quite a different matter to prove to a Federal Court judge that this conclusion was SO UNREASONABLE that it was not open to the Minister.

Development Before Assessment

Insertion of a new part in the Administrative Procedures, dealing with performing ongoing operations before complying with the procedures, formalises and attempts to legitimise a practice which has been going on for some time. That is, granting a Commonwealth approval before environmental assessment takes place.

On the face of the Procedures, the Minister for the environment can only exempt ongoing operations of a project; ie, where a project is already operational. What of projects which have commenced in breach of the Admin Procedures, such as the Gunns export operation? The EPA wrote on three occasions, imploring DOPIE to designate the proposal. The Minister for Resources has now designated the operation, acknowledging its impact, following the commencement of two sets of court proceedings. You can bet that the EPA have tossed in the towel and will consider this an "ongoing project" and eligible for an exemption from assessment, at least for a period of time.

"Ongoing projects" are likely to be allowed to continue therefore, often despite an Action Minister's earlier unlawful failure to designate, until some indeterminate assessment process takes place. In 1990 the Action Minister designated the export of woodchips from the north coast of New South Wales. It was not until 1994 that a final EIS was presented. During the entire time, the company concerned continued to carry out the "proposed action".

With the MacArthur River mining project, a "new" project, assessment was commenced and completed within 6 months. This is a somewhat different timescale, because assessment was a prerequisite to approval.

Any project operating at the state level which seeks to expand markets by exporting may well will be an "ongoing project". The exemption described above is thus not limited just to developments which commenced before the Impact Act or which have slipped through the lawful designation process in the past.

The introduction of the concept of assessment after the development has taken place makes a mockery of the process of assessment.

The question arises , what else could the government do? It is worth examining the approach taken on other occasions, because this is not the first time that a test case has created uncertainty as to how to put the law into practice equitably.

As a result of a Court of Appeal case brought by the EDO in NSW, many mines and quarries were found to be operating unlawfully because the Department of Mines had not considered an EIS when issuing leases for them. The COALITION government of the day didn't exhibit the same kneejerk reaction we have seen from the Commonwealth Government, changing the law to overturn the court decision..

Instead an amendment was drafted, in consultation with interested parties. This allowed those people operating without an EIS to register. They were given two years to prepare an EIS and comply with the law. During this time their production was limited to current production rates. That is, they couldn't increase extraction during the window they had been given.

This was a mature response to a practical problem presented by a declaration by the court of the meaning of the law which differed from earlier understanding.

Cabinet documents forwarded to the EDO show that there was an express intention not to consult before bringing in these changes. The Commonwealth government considers the alternatives to the new Administrative Procedures to have been either to exempt existing industry, or to shut down industry until an EIS was done.

This is either a failure to display an ounce of commonsense or imagination, or a deliberate attempt to mislead and create a climate of crisis.

The "Ongoing Project" exemption should be limited in time by a sunset clause. It implicitly acknowledges that there are projects operating which ought to have been designated and which have not, in breach of the law. It rewards these ongoing breaches by providing a mechanism for allowing the projects to continue if they are ever caught out at some stage in the future by a court ruling that there should have been an EIS.

Review and Assessment of Environmental Aspects of proposed action

Clause 10.1.1 gives the Department of Environment powers to review and assess the environmental aspects of a development at any time. Particular reference is made to assessing the effectiveness of safeguards and standards set for environmental protection and the accuracy of any forecasts of the environmental effects.

The Department has NEVER used this power in the past 20 years.

The changes to the Administrative Procedures would not be so important if the Department, or the EPA within the Department, could stand up for itself and use its existing powers of review.

The scramble to change the Administrative Procedures also defeats the purpose of the review which is currently taking place. Careful consideration has given way to cries that the sky is falling.

Current Litigation

Our clients are currently considering their positions in light of the changes. Proceedings in relation to the licence issued to North Limited in Tasmania have been discontinued.

The Administrative Procedures can be disallowed by either House of Parliament by motion within 15 sitting days of their tabling in the House. The Minister for Resources has agreed to discontinue his appeal, providing the Administrative Procedures are not disallowed.

The Australian Democrats have given notice of a motion to disallow the Procedures, but support from the coalition is unlikely.

SUBMISSION ON COSTS RULES

Maria Comino
Solicitor, Environmental Defender's Office

Set out below is an edited version of the submission, prepared by the EDO, to the Australian Law Reform Commission on its review of the litigation costs rules

1. INTRODUCTION

Costs rules can have different effects depending on the legal subject area involved.

This submission considers those issues raised in the ALRC issues paper that are most pertinent to public interest litigation in environmental matters.

The submission looks at the nature of public interest litigation in environmental matters, and how costs rules impact on that litigation. It also considers some current approaches to costs rules in these matters and proposes the costs structure required to address the specific needs of public interest litigation in environmental matters.

2. EFFECTS – DETERRING LITIGATION

Of the effects listed in the issues paper, the most obvious in the case of public interest environmental issues is the deterrence effect of the costs indemnity rule.

There is no dispute amongst public interest environmental lawyers that the risk of an adverse costs order deters litigation by prospective public interest environmental clients.

His Honour Justice Toohey stated extra-curially:-

> "The fear, if unsuccessful, of having to pay the costs of the other side, (often a government instrumentality or a wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to Court. In any event, it will be a factor that looms large in any consideration to initiate litigation." [1]

The point of difference between public interest environmental litigation and other litigation is that a public interest environmental litigant is bringing proceedings for the broader public benefit. There is usually no prospect of any personal gain but only the prospect of serious personal financial loss.

It is clear the deterrent effect of the costs indemnity rule is in addition to the costs of a party's own legal representation and related costs.

The nature of the undertaking is further heightened by the personal time and resources required in instructing lawyers, receiving advice and attending Court.

3. BACKGROUND TO REFORMS

It is necessary to consider the context for environmental legal issues to understand the effects of existing costs rules and to assess appropriate reforms. Environmental legal issues usually arise in the following legal contexts. (This overview is not limited to areas involving federal jurisdiction.)

i) Merits Review of Local Government or State Planning Matters

Local government or state planning matters, usually relating to the grant of a type of development approval, can generally be divided into two categories.

The first category concerns cases mainly about property, very local amenity issues, and and building and valuation matters, where there are appeal rights to a tribunal or Court by way of a hearing de novo being a review on the merits of a proposal. This includes appeals in some classes of jurisdiction before the Land and Environment Court in New South Wales, the Planning and Environment Court in Queensland, the Environment Resource and Development Court in South Australia, the Administrative Appeals Tribunal in Victoria, and other Courts or tribunals of similar jurisdictions in other states and territories.

The second are those local government planning matters that relate to broader public interest environmental issues. For example, these could include natural public resource issues relating to forestry, water, open space, or endangered fauna where there are legal rights to hearings de novo (merits review) before a tribunal or Court.

For example, a hearing into whether a five star resort should be the first major development on the north shore of the Noosa River raises major public interest issues.

ii) Merits Review of Planning or Approval Matters of Federal Bodies

These cases involve decisions made by federal or other agencies like the Great Barrier Reef Marine Park authority, where there are appeal rights to a tribunal or Court by way of a hearing de novo being a review on the merits of a proposal. The form usually taken at the federal level is by way of a right of appeal to the Administrative Appeals Tribunal.

Such cases can similarly be divided between those that do not have a public interest character, and those that have broad public interest implications.

iii) Judicial Review of Decision making Processes Affecting the Environment

Environmental issues that may relate to the grant of other types of approvals, like export control licences that affect the environment, heard by way of judicial review proceedings to the Federal, Supreme or High Courts.

There are those matters that raise predominantly public interest environmental concerns. For example, the issue of an export woodchip licence that affects large forest areas.

There may also be substantially commercial matters, for example, under the Trade Practices Act, that raise some environmental issues incidentally.

4. THE NATURE OF AND NEED FOR PUBLIC INTEREST LITIGATION IN ENVIRONMENTAL MATTERS

Review of administrative action is the means whereby a government may be held accountable for its actions. Justice McHugh in Attorney General (UK) v Heineman Publishers Pty Ltd 1987 [2], stated that "governments act or, at all events, are constitutionally required to act, in the public interest". It is, therefore, inevitable that review of administrative action will involve some element of public interest, though some matters can be assessed to have greater public interest significance than others.

In Ratepayers and Residents Action Association Inc v Auckland City Council (1986) [3] Richardson J said:-

> "as the development of public law in common law jurisdictions amply demonstrates, compliance with the law by those acting under statutory powers is itself a matter of public interest, and the availability of judicial review under the Judicature Amendment Act 1973 (NZ)... is a statutory recognition of the need to provide adequate procedures for testing the purported exercise of statutory powers. Finally, the freer approach to standing reflects... the feeling that the law must somehow find a place for the disinterested citizen in order to prevent illegalities in government which otherwise no one would be competent to challenge."

Governments, instrumentalities and departments have a limited ability to ensure that the legislation they administer is really alive. Community participation through litigation is therefore important. Examples of this are seen in the litigation which has clarified the applicability of requirements for environmental impact statements under the NSW Environmental Planning & Assessment Act (Jarasius v. Forestry Commission of NSW (1990) [4] and Prineas v. Forestry Commission of NSW (1984)[5] and Vaughan Taylor v. David Mitchell-Melcann & Anor (1973) [6].

The effectiveness of environmental protection legislation is enhanced by members of the community seeking to apply and enforce that legislation, and members of the public should therefore be encouraged, and not deterred, from undertaking litigation. This approach is still consistent with the principle that litigation be a matter of last resort only.

Where action is successful, environmental protection is accorded where it might not otherwise have been. Even where unsuccessful, such litigation may highlight inadequacies in the regime for environmental protection. The prospect of litigation is a factor in keeping enforcement agencies alert and in preventing capture by the commercial interests they supervise. Commercial interests, whose action may detrimentally affect the environment, can be relied on to test environmental protection legislation and enforcement agencies for their own interest. This can lead to capture over time, or a caution, which avoids offending commercial interests at the cost of environmental protection. Public interest litigation needs to be encouraged to provide a counter balancing force in the interests of environmental protection and good administration.

5. THE REFORMS NEEDED

i) In courts and tribunals which are expected routinely to involve environmental issues, the primary rule should be that each party pay its own costs subject to provisions regulating misconduct of the parties. These would include the Land & Environment Court (Class 1 jurisdiction) in New South Wales, the Planning and Environment Court in Queensland, and appeals from the Great Barrier Reef Marine Park Authority to the AAT at the federal level.

The Court or Tribunal should have a discretion to provide one way fee shifting in favour of a party where that party's involvement contains a public interest element. The Judicial Review Act 1991 (Qld) (Section 49) orders should also be available early in the litigation.

One way fee shifting in favour of a party pursuing a public interest involvement should be available even where that party has not been successful in the litigation.

ii) In courts and tribunals where the litigation does not routinely involve environmental issues, the primary rule that costs follow the event should give way when a matter raising environmental issues occurs. The primary rule in such matters would be that each party will pay its own costs. In such cases, where a party's involvement contains a considerable public interest element, a discretion to make one way fee shifting orders should also arise and include the availability of section 49 orders.

These rules would apply whether or not the public interest environmental litigation related to proceedings by way of merits or judicial review. These rules are equally applicable to Courts exercising State or federal jurisdiction.

For example, a hearing on the merits of an approval granted by the Great Barrier Reef Marine Park Authority in respect of a resort development on Lindeman Island which involved significant public interest aspects would be subject to one way fee shifting provisions, as would judicial review proceedings brought in the Federal Court challenging the issue of an export woodchip licence.

iii) The provisions of the Judicial Review Act 1991 (QLD) are friendly to public interest environmental litigation. However, it is necessary to draft further criteria, which a public interest litigant is likely to satisfy, to overcome the cautious approach that has been adopted by the Queensland Supreme Court in its interpretations of the the fee-shifting provisions of that legislation to date.

iv) The objects section of costs legislation should be expressed to refer to the desirability that the costs regime does not discourage litigation taken in the public interest. It is in the

community interest to encourage, rather than discourage, community involvement through litigation.

6. WHY FEE-SHIFTING PROVISIONS?

In public interest litigation in environmental matters fee shifting provisions would overcome the serious deterrence consequences of the costs indemnity rules. It would also overcome the deterrence factor in the rule that each party bears its own costs, where many significant public interest matters go uncontested because there is no prospect of engaging lawyers and experts on a speculative basis.

Fee shifting provisions are likely to encourage appropriate public interest litigation in environmental matters, to properly test the purported exercise of statutory powers and thereby make government accountable for its actions. They are likely to achieve the other beneficial effects discussed in 4.

7. PUBLIC INTEREST TRIGGER FOR FEE-SHIFTING PROVISIONS

The key criterion for determining the application of fee-shifting provisions is "the public interest".

Further reference should be made to the points identified in Darlinghurst Residents Association v Elarosa Investments Pty Ltd and South Sydney City Council, and Cooper Wilton v Maitland City Council.

These points included the following:-

i) An important aspect of public law is to be determined.
ii) The case concerned a project that would affect a large number of people and as a matter of public notoriety, that is the subject matter of the application which cannot be ignored.
iii) The claims brought were not without substance.
iv) The aims and objectives of the person or group who brought the application.

Further points that can be added on the basis of the points emerging from the caselaw include:-

v) The primary reason for the action is not for the personal gain of the applicant.
vi) The applicant seeks to uphold environmental and planning laws.
vii) The case is designed to effectuate strong public policies.
viii) Whether the litigation furthers the goals of the Act and not whether the plaintiff must prevail before its entitled to costs.

8. CONCLUSION

For the reasons outlined above, we submit that the most appropriate course for remedying the disparity of resources between litigating parties, avoiding the current deterrent effect of the existing costs indemnity rules and enabling necessary and worthwhile public interest environmental litigation, is the provision of the two rules summarised in Point 5.

---

[1] 1979 cited in Oshlack
[2] 10 NSWLR86 at 191
[3] 1 NZLR746 at 750
[4] 71 LGRA 79
[5] 54 LGRA 160
[6] LGRA 178

Who Regulates Helicopter Noise?

James Johnson,
Solicitor, Environmental Defender's Office

The new Carr Government has stopped the proposed Heliport at Pyrmont.

The EDO gave extensive advice to the Inner City and Foreshores Community Action Group, examining the legality of the various approvals for the project.

Amendments to schedule 2 of the Environmental Planning and Assessment Regulation require an environmental impact statement to give reasons justifying a proposal, having regard to the principles of ecologically sustainable development. We await the court's interpretation of this requirement. Given the chance, we will be arguing that a cost/benefit examination should be undertaken. This is because one of the principles of the ESD is improved valuation and pricing of environmental resources or "cost internalisation".

EIS to Consider ESD

This may provide an opportunity to overcome the restrictive interpretation given by the Courts to the former requirement for an EIS to discuss the justification of a proposal.

Regulation 57 of the Environmental Planning and Assessment Regulation provided that a justification in terms of social and economic factors must be provided in an EIS. Samuels J A dealt with the interpretation of this clause in Guthega Developments Pty Ltd v Minister Administering the National Parks and Wildlife Act 1974 (the Blue Cow case).

In that case, it was contended that the Blue Cow Environmental Impact Statement was defective because it failed to comply with the terms of Regulation 57. It was there submitted that what ought to be supplied was something in the nature of a feasibility study.

Samuels J.A. expressed the view that the regulation is sufficiently complied with if the environmental impact statement contained material relating to each of the three considerations, that is environmental, economic and social, which provides a satisfactory reason in each case for

undertaking the activity. He said:

> "since each of the considerations must be satisfactorily accounted for, a proposal wholly innocuous in environmental terms and socially desirable would probably fail to comply if the environmental impact statement did not reveal the reasonable prospects of a sound economic future. In other words, paragraph (f) requires that the environmental impact statement should include material from which it may be reasonably inferred that the proposed development is not only environmentally tolerable and sociably desirable, but is likely to survive for its allotted time span".

In our view, it is not sufficient simply to look at whether a proponent can make money from a project. If the loss to the general community is far greater that the gain to a proponent, this is a relevant matter to be taken into account.

Does the CAA regulate noise?

The CAA, through the Civil Aviation Act 1988 (the CA Act) and the Air Navigation Act 1920, regulates many aspects of flying in Australia. Section 9 of the CA Act gives the CAA the power to carry out certain functions relating to the regulation of the safety of civil air operations in Australia, the provision of air routes etc.

Section 9A provides that the authority must endeavour to perform its functions, other than those in Section 9(1)(a), which are regulatory functions to do with safety, in a manner that ensures that as far as is practicable, the environment is protected from the effects of and associated with the operation and use of aircraft. We are advised by the CAA that the only functions that they consider require consideration of the environment are those involving the provision of facilities, such as airports and aerodromes. We agree with their interpretation of the law.

Functions of the authority include carrying out activities to protect the environment from the effects of and associated with the operation of (most) aircraft(9AA(2)). However, this last function is performed at the discretion of the authority (9AA(6)).

Section 12 of the CA Act provides that the Minister may give the CAA written directions as to the performance of its functions or the exercise of its powers.

A direction was made on 28 August 1991 requiring, inter alia, that the CAA ensure compliance with these noise standards and establish and ensure compliance with noise abatement procedures in performing its functions under section 9(1A)(Annex 9). Section 9(1A) was inserted in 1991 and repealed later that year. It is in similar terms to the current section 9AA. We consider that the direction was impliedly repealed or revoked at the same time as section 9(1A) was repealed. In any event, the direction cannot require consideration of environmental matters in the exercise of any regulatory functions because the CA Act prohibits this.

ENVIRONMENTAL ASSESSMENT AND REGULATION

When establishing transit lane R409, the then Department of Aviation conducted environmental assessment of the noise, apparently based on calculations and not measurements. This was done to assess whether the impact would be significant, thus triggering obligations under the Environment Protection (Impact of Proposals) Act 1974. The levels were not deemed to be "significant" and there was therefore no Commonwealth EIS.

Even if the flight path were now designated under the Administrative Procedures under the Impact Act, the Minister for Transport would not be able to take into account the recommendations from the Minister for the Environment because s.9A, which was added in 1991, effectively prevents the taking into account of environmental considerations and would override the Impact Act.

AIR NAVIGATION REGULATIONS AND REGULATION OF NOISE

The Commonwealth has ratified the Chicago Convention (s.3A, Air Navigation Act 1920). This means that the provisions of Volume 1 of Annexure 16 ("the Annex") to the convention have effect in Australia. The Air Navigation (Aircraft Noise) Regulations provide that an aircraft must comply with the noise standards set out in Chapter 3 of the Annex and must have been granted a noise certificate, unless it is used for testing purposes or a special permission has been given.

The Annex regulates noise from an aircraft as measured at various points. It does not regulate how closely that aircraft may fly to dwellings or individuals. It does not regulate how many aircraft may fly in a particular area or how frequently they may fly there. The Commonwealth regulations are to do with certification of an aircraft and have nothing to do with its operation. There is no regulation of environmental noise effects in transit lanes and, therefore, no inconsistency with Commonwealth laws. Nor has the Commonwealth "covered the field" in protecting the environment.

In short, it appears that the CAA cannot and does not regulate environmental noise from helicopters over Sydney.

Can the EPA regulate noise of helicopters in flight?

According to the EPA, it can only regulate noise generated "from the premises". The EPA argues that once helicopters lift off, they are no longer "on the premises" and they cannot restrict the noise generated by the helicopters. In its determination report, the EPA states that it "has no direct control over noise from helicopters whilst flying in the transit lane and/or hovering over residential premises".

Under the Noise Control Act 1975, the EPA appears only to have the power to regulate "scheduled premises". Section 18 provides that:

> "A person who is the occupier of any scheduled premises in a part of the state to which this division applies and who is not the holder of a licence issued in respect of those premises is guilty of an offence..."

Scheduled premises are premises listed in the schedule to the Act and include any premises used for the arrival and departure of helicopters.

In regulating the premises, the EPA must have regard to the pollution being caused by the applicant, (not the premises), and the impact of that pollution on the environment (see s.17D, Pollution Control Act 1970, set out above). It could be argued that, but for the heliport, no flight would be undertaken below 500ft in this area, and the pollution is "caused" by the applicant in the same way that a mine "causes" heavy traffic.

Could it be that the EPA, in licensing premises, has the power to set conditions to regulate noise generated beyond the premises, as a result of the use of the premises? The sensible approach would be to amend the law to allow the EPA to regulate helicopter noise in flight, rather than force the next unfortunate victims of their noise to run a test case.

Is the current 500 ft flight path legal?

A further question is whether the current 500 foot flight path along Sydney Harbour is legal. Regulation 157(1) of the Civil Aviation Regulations says that an aircraft must not fly over any city, town or populous area at less than 1000 feet. The CAA apparently believe that the Harbour is not part of the city. We think it is a strange interpretation of the city and that the city doesn't simply stop at the edge of the Harbour, at the edge of football fields or on the edge of railway lines. It could well be that the current flight path is illegal.

Section 18 of the Civil Aviation Act provides that the CAA shall publish Aeronautical Information Publications (AIPs) relating to air traffic and navigation. Regulation 87 makes it clear that this relates to the designation and use of air routes.

The CAA has published an AIP which defines Air Space Restricted Area 409 (**AS R409**). The southern boundary of this area basically follows the southern shore of the harbour, including Darling Harbour. Within this area, there are helicopter access/transit lanes to provide transit without needing air traffic clearances. The minimum height for flying in the transit lane is 500ft. The relevant transit lane is called **R409**.

Regulation 157(1) of the CA Regulations provides that an aircraft must not fly over

(a) any city, town or populous area at less than 1,000 ft;
or (b)any other area at a height lower than 500 ft.

By allowing helicopters to fly at 500ft, the CAA have apparently proceeded on the basis that the Harbour is not part of the city It is arguable that "the city" does not simply stop at the edge of the harbour, over football fields or railway lines etc. and that current practice is unlawful.

International Treaties and Legitimate Expectations:

Minister for Immigration and Ethnic Affairs
v
Ah Hin Teoh

Angus Finney , *Volunteer Solicitor, EDO*

Teoh raises important questions on the relationship between international law and Australian law. As Australia has signed many international conventions relating to environmental concerns this decision has wide ramifications for executive decision-making in this area in Australia.

Facts:

The respondent, Mr Teoh, was a Malaysian citizen who came to Australia on 5th May, 1988. He was granted a temporary entry permit and later married Ms Jean Lim, an Australian citizen. Ms Lim already had 4 children and, since their marriage, they have had a further 3 children.

In November 1990, whilst the respondent's application for permanent entry was being processed, he received custodial sentences for importation and possession of heroin. The Minister's delegate refused his application for permanent entry, giving greatest weight to his failure to meet the good character requirements. She informed him of this, and of his right for review of this decision. He sought this review, which was dismissed, along with subsequent Federal Court proceedings before French J. under the Administrative Proceedings (Judicial Review) Act 1977(Cth).

Full Court of the Federal Court

Black C.J. held that the Minister's delegate was bound to take the effect of the break-up of the family into account, and her failure to do so, was an error of law.

Lee J. and Carr J. looked to Australia's obligations after ratification of the United Nations Convention on the Rights of the Child ('the Convention'). They both held that, even though a Convention did not have the effect of municipal law, it would provide the affected person,

> "with a legitimate expectation that such actions would be conducted in a manner which adhered to the relevant principles of the Convention."[1]

Article 3 of the Convention states:-

> "1.In all actions concerning children..., the best interests of the child shall be a primary consideration."

Lee J. and Carr J. held that the delegate's failure to initiate appropriate inquiries as to the future welfare of the children involved an error of law concerning procedural fairness; and the delegate's decision should, therefore, be set aside and the

application be referred to the Minister for reconsideration according to law.

High Court Decision
The main concerns of the appellant were Lee J. and Carr J.'s findings relating to the rights of children and the Convention.

"Convention" at Municipal Law
All the Justices agreed that the Convention, neither at the time of signing nor at ratification, acquired the status of municipal law, and cannot operate therefore as a "direct source of individual rights and obligations under that law."[2]

Status of the Convention
The majority of Justices are best summarised by Mason C.J. and Deane J.[3]:

> "...Parliament, prima facie , intends to give effect to Australia's obligations under international law."

McHugh J.,in his dissenting judgement disagreed with this, saying[4]:

> "The ratification of a treaty is not a statement to the national community."

To give the Convention some status in Australian law the majority then used the doctrine of "legitimate expectations", initially espoused by Lord Denning M.R. in Schmidt v Secretary of State for Home Affairs[1969][5]. This represented an expansion of the field of natural justice.

Legitimate Expectations
This doctrine permitted the courts to overturn decisions made without hearing a person who had a reasonable expectation, but no legal right, to the continuation of a benefit, privilege or state of affairs.

McHugh J. claimed that the High Court decisions in Kioa v West (1985)[6] and Annetts v McCann (1990)[7] replaced this doctrine with :-

> "What does the duty to act fairly require in the circumstances of the particular case?" [8]

McHugh J's interpretation of this was, "What does fairness require in all the circumstances?".

However, the majority in this case and in others since Kioa and Annetts (Haocher v Minister of Immigration and Ethnic Affairs (1990)[9]), have continued to use the concept of "legitimate expectations":-

> "The question rather is whether Australia's ratification of the Convention results in an expectation that those making administrative decisions under the aegis of the executive government of the Commonwealth will act in accordance with the Convention wherever it is relevant to the decision to be made." [10]

The majority also held that it was not necessary to show that the affected person had knowledge of the Convention, nor to " personally entertain the expectation" [11]. The expectation only has to be reasonable from the wording of the Convention.

Procedural Fairness
Once the expectation has arisen, it must be seen whether there has been procedural fairness in dealing with that expectation.

The Full Court of Appeal found that, once the expectation arose, procedural fairness required the initiation of appropriate inquiries and the obtaining of appropriate reports as to the welfare of the children. Mason C .J. and Deane J. questioned this process[12]:

> "To regard a legitimate expectation as requiring the decision maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door."

However, if a "legitimate expectation" has arisen and there is then to be a finding by a decision-maker contrary to this expectation,

> "procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course." [13]

McHugh J. criticised this as none of the subsequent submissions are binding upon the decision maker. It is merely a matter of a procedural hoop being jumped through to his Honour.

This may be the superficial result but open government, or responsible government, depends upon much input that is not necessarily solicited by the government itself, nor is binding upon it, but which is nevertheless relied upon and sometimes acted upon.

The majority all found that the Minister's delegate didn't have to make further inquiries, but that she had failed to give Mr Teoh the opportunity to make submissions that the best interests of the children would be served by him remaining in Australia. The matter was to be "reconsidered according to law" by the Minister or his delegate.

Common Law Rights of Children
Obiter dicta in Gaudron J. and Mason C.J. and Deane J.'s judgements point to the possibility of there being a common law right of children in relation to their parents, which is to be taken into account in decisions which may affect the children. Gaudron J. [14] said that citizenship carried a common law right and, where discretionary decisions by government directly affect children, a primary consideration should be the effects on the children.

Mason C.J. and Deane J. [15] said that the principle enshrined in Article 3 of the Convention "may possibly have a counterpart in the common law as it applies to cases where the welfare of a child is a matter relevant to the determination to be made."

This avenue wasn't argued in this proceeding but, if Mr Teoh is refused again, it may provide grounds for a further review.

Effects on Government Decision Making
The Australian Government has signed many and varied International, United Nations, or Regional conventions. On the environmental agenda are treaties on Wetlands, Migratory

Species, World Cultural and Natural Heritage, and Biological Diversity amongst others. Unless there is a direct statutory or executive contradiction of the terms of those treaties then, depending on the wording of the treaty, a legitimate expectation may arise that the Commonwealth will abide by the treaty. Administrative decision makers, if they decide not to act in accordance with those treaties, must follow the rules of procedural fairness and give any "aggrieved" party [16] the chance to respond and to persuade them otherwise.

In practice this would require, at the time of signing treaties, a summary or guide of responsibilities to be issued to all affected decision-makers. This would be no more onerous than what is expected of many trades or professions in staying up to date with their employment responsibilities. And oversight merely requires the affected person be given an opportunity to make non-binding submissions.

The drawback to this is the increased cost of introducing, on some occasions, another tier to the administrative decision-making process. State decisions may also to be covered by this decision.

EXAMPLES

1: Jarosite Dumping

There has been an on-going dispute in Tasmania over the ocean-dumping of jarosite, a by-product of zinc-smelting processes.

The Environment Protection (Sea-dumping) Act allows for permits for sea-dumping to be issued. The Minister for Environment has to make a decision, before a permit is issued, as to whether an Environmental Impact Statement is necessary or not. The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (SPREP) provides for assessment of this type of project [17], for both public comment and for affected parties to be consulted and to then submit comments.

A legitimate expectation may properly arise in the minds of a body such as the Tasmanian Conservation Trust that it be allowed to make submissions on the benefits of undertaking an E.I.S.

2: The Tarkine

Various decisions relating to the construction of "The Road to Nowhere" may possibly be challenged using the principle outlined in Teoh. These can both be state decisions on construction of the road, and federal decisions on not intervening to protect areas or species covered by International Treaties.

Article 8 of the Convention on Biological Diversity provides that:

> "Each Contracting Party shall, as far as possible and as appropriate:
> (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;...
> (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;...
> (h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.

If a "legitimate expectation" that this treaty would be complied with had arisen, then neither State nor Commonwealth decision-makers can make decisions contrary to Article 8 without giving "aggrieved" parties the chance to make submissions on why the treaty should be followed. The decision would then be returned to the relevant authority to be made in accordance with the law.

Update

On 10th May 1995, there was a joint statement issued by the Minister of Foreign Affairs, Gareth Evans, and the Attorney-General, Michael Lavarch on "International Treaties and the High Court Decision in Teoh." The intent is obvious:

> "We state on behalf of the Government, that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevand provisions of that treaty have not been enacted into domestic Australian law."

This means that even though the Government may sign a document in front of the world stating it will do the right thing, the Australian people have no right to expect that it will do the right thing.

Legislation is to be introduced to Parliament in June 1995, with the expectation of being passed in the Spring sitting in September 1995.

Another opportunity of slightly more open, informed decision-making is to be quashed before the real effects are seen by the public. A more positive approach, which is still open, would include the preparation of a guide for decision makers to Australia's international obligations. It is a scandalous admission that our decision makers don't know Australia's international obligations are at the moment.

---

[1] per Mason C.J. and Deane J. at p.4
[2] Mason C.J. and Deane J. at p.10
[3] at page 11
[4] at page 46
[5] 2Ch 149 pp 170-171
[6] 159 CLR 550
[7] 170 CLR 596
[8] Kioa at p.585
[9] 169 CLR 648
[10] Toohey J. at p.24
[11] Page 15, Mason C.J. and Deane J
[12] page 15
[13] Mason C.J. and Deane J. at p.16
[14] page 31
[15] page 17
[16] Administrative Decisions (Judicial Review) Act s3(11) 5,6+7
[17] Article 9 paras 2, 3 a+b

Collateral Abuse of Process, Malicious Prosecution and Civil SLAPP suits

Chris Kelly,
Solicitor

This article discusses the related torts of collateral abuse of process and malicious prosecution, primarily as a means of response to civil SLAPP (strategic litigation against public participation) suits (for a discussion of SLAPP suits see Impact No 37[1]) and to highlight particular problems which may arise in an attempt to use these torts as a response to strategic litigation.

Collateral abuse of process

This tort has recently been the subject of review by the High Court: *Williams v. Spautz* 1992 174 CLR 509 and the NSW Court of Appeal: *Rajski v. Bainton* [1990] 2 NSWLR 125. This little known tort is a useful adjunct in the defensive armoury of the defendant to a SLAPP suit. However it is not without its problems. This is because the very nature of SLAPP suits is such that a quick and decisive response is the most effective response. On the current state of the authorities this tort will not necessarily lend itself to such a response.

Collateral abuse of process is just that: abuse of process. For a defendant to succeed on such a plea, he or she must show that the plaintiff is using the process of the court to achieve a purpose not within the legitimate scope of the proceedings. That purpose need not be the only purpose for which the plaintiff is pursuing the action, but must be the predominant purpose. The case of *QIW Retailers v. Felview* 1989 2 Qd R 245 is a good example. In that case, winding up proceedings were brought against a company on the ground that the directors were not acting for the benefit of the company as a whole. The Court found that in fact the proceedings were brought for the ulterior purpose of forcing the directors to negotiate for the transfer of control of the company to the petitioner and accordingly the tort was made out.

By its very nature the tort raises very significant theoretical and evidential problems. It is, in effect, the tort to use when you want to sue those who are suing you because they are suing you! A number of questions arise. Firstly, when is a purpose outside the legitimate scope of the process? It seems clear that the improper purpose need not be accompanied by an improper act (*Williams v. Spautz* @ 527), but how does one characterise a purpose? This difficult question was raised in the case of *Goldsmith v. Sperrings* [1977] 1 WLR 478 where, in the English Court of Appeal, it was said that if a litigant had a genuine cause of action which he/she would wish to pursue in any event, that it would be doubtful whether, notwithstanding any ulterior purpose he or she may have, the tort could be made out. The High Court (Mason CJ, Dawson, Toohey, McHugh JJ) agreed that such a case would be problematic. Where does that leave the tort? In the context of SLAPP suits it presents difficulties. Defamation is defamation. If you defame someone, they have a legitimate expectation that they may be able to sue you, notwithstanding that, so far as they are concerned, the happy by-product of such an action is to stifle debate and participation.

That being so, the High Court then went on to say that it is the purpose for which the plaintiff institutes proceedings they are of crucial importance. This accords with the approach taken by Isaacs J. in the earlier case of *Dowling v. Colonial Mutual Assurance Society* (1915) 20 CLR 509. That purpose must be **outside** the lawful scope of the process. If the purpose the plaintiff seeks to achieve is within the lawful scope of the process, then there can be no abuse notwithstanding that the plaintiff has instituted those proceedings maliciously or even, in the words of Isaacs J., fraudulently.

Secondly, evidence. How do you prove that someone is suing you for an ulterior purpose? To a large extent intentions are hidden and only manifest themselves in actions which are equivocal. Therefore, save in exceptional cases, the defendant will be asking the court to impute intention (albeit from evidence). Therefore, **all** the surrounding circumstances are relevant and must be placed before the court. It becomes critical to ensure that the information gathering process is comprehensive and comprehensible to a court. If someone threatens you with a suit on the telephone and in so doing adverts to an ulterior purpose, how are you going to prove it[2]?

Remedies

One would have thought that if the defendant can show that the plaintiff is using the process of the court for the predominant purpose of, for example, oppression, then he/she would be entitled, without more, to a stay of the main action. However, this is not the case. This is because a finding of collateral abuse of process is not destructive of the plaintiff's legal rights: it is not a defence to the main action but is instead merely a cause of action in the defendant. Thus on the analysis provided by the NSW Court of Appeal in *Rajski v. Bainton,* the plaintiff may succeed in his/her action for damages yet this is no bar to the defendant succeeding in his/her action for damages for the tort of collateral abuse of process.

The Court of Appeal did however in that case canvas the possibility of the court granting a temporary stay or some other appropriate procedural order. *Rajksi v. Bainton* was not discussed in *Williams v. Spautz* and indeed the majority judgement in that case leant support to this view when, at 520, it was said that, at best, the action is an indirect means of putting a stop to the abuse. Gaudron J. may have got closest to the matter when she said (at 555) that a purpose which is wrongful in itself[3] is an improper purpose justifying a stay. Similarly the minority judgment of Mahoney JA. in *Rajski v. Bainton*

refers to this distinction and goes so far as to suggest that if the collateral purpose is illegal or illegitimate, the plaintiff's otherwise proper cause of action will not be litigated.

Such an approach is to the contrasted with that of the majority in *Rajski v. Bainton* where the headnote records that proceedings may be dismissed as being an abuse of process where there is no appropriately arguable case in fact and in law: but of course if there is no arguable case in fact or law, the proceedings could have been properly terminated using any of the usual interlocutory remedies (i.e. summary determination/strike out application).

Damage

The question of damage is also likely to exercise the judicial mind in any such action. Specifically, does damage have to come within one of the three categories identified in *Saville v. Roberts* (see below) or is any special damage enough? Further, need the special damage be pleaded and **proved** or, can the plaintiff be awarded an amount by way of general assessment? The authorities are not clear in this respect. In *Hanrahan v. Ainsworth* (1985) 1 NSWLR 370 @ 374-375, Hunt J. thought that damages had to be pleaded and proved, even though the categories of loss might be wider than those available for malicious prosecution. Conversely, Macrossan J. in *QIW v. Felwiew* thought not, accepting that an award could be a matter of general assessment. In so doing, Macrossan J borrowed from the approach of the English Court of Appeal in the nineteenth century case of *Quartz Hill Gold Mining Co. v. Eyre* 1883 11 QBD 674, where an award was made notwithstanding that no pecuniary loss or special damage could be proved (this was a malicious prosecution case).

Inherent jurisdiction

This tort is also related to the Courts inherent jurisdiction to stay proceedings which are, in any event, an abuse of process. It seems clear, that, after the judgment of Mason CJ, Dawson, Toohey, McHugh JJ, in *Williams v. Spautz*, a Court can move to protect itself (under the inherent jurisdiction) from an abuse of its process where, notwithstanding that the plaintiff has a prima facie case, the Court is satisfied that the proceedings are being used as a means of oppression at 522). This applies whether the proceedings are criminal or civil. Clearly, any pleading which avers to one of these two matters, should also aver to the other, as whilst it is no doubt the case that there are material differences between the two jurisdictions, for practical purposes they are very similar. It may be that the problems identified above mean that greater reliance will have to be placed on an application under this jurisdiction, save where the collateral purpose is illegal or illegitimate.

Malicious prosecution

This tort exists as a means for those improperly prosecuted primarily under the criminal law, and also in a number of limited civil proceedings, to seek redress against those who instigated such proceedings provided, inter alia, that they can show that the prosecution has been brought without reasonable and probable cause.

Civil or Criminal Proceedings?

The proposition that this tort is available to those prosecuted under the criminal law is uncontentious. Recent Australian authority (*Little v. Law Institute of Victoria* [No. 3] [1990] VLR 257 Appeal Div.) has, however, opened up this tort for discussion so far as it relates to civil process. It is, however, unlikely that so far as civil proceedings are concerned, it will ever become an important method of countering SLAPP suits. This is because speed is often of the essence in countering a SLAPP suit and the usual range of interlocutory remedies available in civil proceedings lend themselves to quick and decisive action. further, and perhaps more problematic for these purposes, is the fact that the tort requires, as a constituent element which must be pleaded, that the proceedings upon which the plaintiff relies have been terminated in his/her favour. Consequently it cannot be pleaded by way of counterclaim.

Apart from the above, the primary restriction on the expansion of this tort into civil actions is that an essential element of the tort is, as was recently affirmed in *Little v. Law Institute of Victoria*, that the plaintiff must have suffered damage which can be characterised as coming within one of the three heads of damage identified by Holt CJ in the 17th century case of *Savile v. Roberts*. Thus the plaintiff must show that the damage is "damage to his [n]ame, if the matter whereof he be accused is scandalous. Secondly to his person, whereby he is imprisoned. Thirdly to his property, whereby he is put to charges and expenses".

As regards the first head this is redundant so far as defamation actions are concerned because a victory (i.e. a successful defence) in a defamation action is regarded as conclusive of the matter: the defendants reputation, impugned as it may have been by the bringing of the action, is cleared by the public hearing.[4] this is not so however in actions where the mere bringing of the action may cause damage to reputation without more. Thus improper use of process in bankruptcy and winding up proceedings can found an action in malicious prosecution.[5]

In the case of *Little v. Law Institute of Victoria* the Appeal Division of that Court considered the question of whether or not damage to reputation can be pleaded where the allegedly malicious proceedings do not involve a bankruptcy petition or an application to wind up a company. The Court answered that question in the affirmative, refusing to follow various decisions to the contrary[6] on the basis that the rapid and virtually instantaneous dissemination of information in modern society meant that there was no justification for restricting the first head of Holt CJ's formulation to just bankruptcy and winding up. Accordingly the appellant, a solicitor against whom the Law Institute of Victoria had instituted proceedings in an effort to restrain him from practice, had a cause of action in malicious prosecution.

That being so, it is still necessary for the plaintiff to show that injury to reputation flows from the charge. Thus, whilst it is obviously the case that such injury flows from e.g. the publication of a bankruptcy petition or an attempt to restrain someone from practising as a solicitor, it does not necessarily flow from an accusation that the defendant in the former action wrongfully pulled a train alarm cord: see *Berry v. British Transport Commission* [1961] 1 QB 149.

The second head identified by Holt CJ is unproblematic given that the instigation or prosecution of civil proceedings does

not involve imprisonment of the defendant.

To succeed under the third head the plaintiff must show loss beyond that occasioned by costs. This may be characterised as special damage: it must be pleaded and proved. Thus, in *Little v. Law Institute of Victoria* the Court held that loss in the practice of his profession suffered by the solicitor against whom the society had acted was loss of property for the purposes of this tort. Similarly, in *Jervois Sulphates (NT) Ltd. v. Petrocarb Explorations NL* (1974) 5 ALR 1, the plaintiff showed actionable loss in being excluded from housing and mineral leases. The exclusion was the result of an injunction obtained by perjury in earlier proceedings.

Other elements

The other elements that the plaintiff is required to plead and prove are[7]:

a. that the proceedings complained of were instituted or continued by the respondents, and;
b. that the respondents instituted or continued the proceedings maliciously, and;
c. that the respondents acted without reasonable and probable cause, and;
d. that the proceedings were terminated in his/her favour.

The requirement that the plaintiff in such an action plead and prove that the action has been prosecuted maliciously is a further difficulty the plaintiff must face and is notoriously difficult to prove.

It will be seen therefore, that, so far as civil proceedings are concerned, and particularly in the context of SLAPP suits, there are significant problems in utilising this tort as either a weapon in the defendants armoury or as a means of redress. The main impediment in this context, as mentioned above, is that the plaintiff in such an action has to show that the former proceedings were terminated in his favour.

Other matters

The above should be treated as an introduction to these torts and should be treated with caution. As ever, legal advice should be taken if proceedings are contemplated.

---

[1] see also S Keim "Dealing with SLAPP suits", a paper delivered at the Defending the Environment Conference, Uni of Adelaide, 9 May 1994

[2] see, in this respect *Hanrahan v Ainsworthy* [1990] 22 NSWLR @ 115F

[3] by which I assume she meant unlawful

[4] The *Quartz Hill Gold Mining Co. v. Eyre* [1883] 11 QBD 674 per Bowen LJ @ 698-90

[5] Consider the damage that can result to a company or an individual from the mere advertisement of a petition.

[6] *Cross v. Commercial Agency* (1990) 18 NLR, *Jones v. Foreman* (1917) 36 NLR, *Fenn v. Paul* (1932) 32 SR 9NSW) & *Barker v. Sands & Mcdougall Co. Ltd* (1890) 16 VLR>4

[7] per the Appeal Div. of the Supreme Court of Victoria in *Little v. Law Institute*

IMPACT NOTICE BOARD

The latest edition of the **Summary of Defamation Laws** is now available. Edited by Bruce Donald and published by the ABC legal dept - a sound investment @ $6.99!

The **Wild Agenda Conference** organised by the Wilderness Society and Community Campaigns is being held on July 1-2 at Sydney University. For Further details, contact Community Campaigns ph/fax (02) 948 7862 or 332 3913

The **Environmental Law Conference, Sydney**, (hosted by NELA and EPLA) is being held on 14/15 September. The conference covers a wide range of issues of interest of persons interested in environmental law in Australia and the Pacific region. For further information, please contact Michele Kearns on 02 221 3527 or Jan Brown on 019 657 728

The **Inland Rivers Conference Papers** are now available offering invaluable discussion on how to manage our rivers sustainably. Available from the EDO for $30 per set. Tel: (02) 261 3599

The **EDO Annual Conference will be held in Sydney on 19/20 October 1995. The conference, on Commonwealth Environmental Impact Assessment,** will be of interest to Commonwealth, State and local government depts, industry, cousultants, the legal profession, community and environment groups. For further information or to register an interest, please contact Tessa Bull on (02) 261 3599

CORRECTION We wish to apologise to Matthew, newly born son of Nicola Pain and partner Micheal, for misnaming him James, in the last issue of ED. Wishful thinking on the part of James Johnson?

CALL TO AGGRIEVED POLLUTION FIGHTERS

At the EDO policy day in April, it was agreed to expand pollution work. Subsequently, the EDO received a grant from the Law Foundation to look into pollution licences. We would be interested to hear from all those who feel they have been unfairly affected by pollution, or not given the right to have input to a pollution licence. Contact Maria Comino, EDO, on 02 261 3599

Please send **Notice Board** items to: Editor, Impact, EDO, Suite 82, 280 Pitt St, Sydney NSW 2000

EDO NEWS

NSW

EDO 10th Birthday Celebrations

In May 1995, the EDO celebrated its 10th birthday with a bushdance and dinner in the wilds of North Turrumurra. With over 100 guests, it was a gathering of old faces and new, with many present and former staff, board members, supporters, clients and friends. Bob Brown, the special guest speaker for the evening, gave a rousing speech praising the vital work of the EDO and all defenders of the environment. His speech was fittingly accompanied by a tremendous storm which set the mood for the lively bushdancing that followed. The general consensus at the end of the night was that we shouldn't wait 10 years before we party again!

TCT v. Gunns

The case has been set down for a hearing on 17 July 1995. In the interim, Gunns have applied for a fresh woodchip export licience for 1995 so that they have an application in the pipeline in case they fail. The Minister for Resources, Mr Beddall, has designated Gunns, referring the proposed export licence to the Minister for the Environment, who must now decide what, if any, assessment must be taken.

Jarosite

As we go to print, the Minister for the Environment has decided a Public Environment Report will be prepared into the proposed dumping of jarosite from 1995-1997. No further details are available.

Darling River Environment Group

The EDO is acting for the Darling River Environment Group, a group campaigning for the environmental protection and rehabilitation of the Darling River its catchment and rangelands of the region. Members of the groups objected to an application for a water transfer licence on the Darling River. Those objections triggered a hearing before the Land Board in Wilcannia, which recommended that the licence should not be granted. Both the Department of Water Resources and the applicant for the licence, McClure, have lodged appeals against that decision to the Land and Environment Court. The members of the Darling River Environment Group have been joined in those proceedings with the hearing of the Department's appeal being set down for trial in early October. McClure's appeal has been adjourned pending the outcome of the Department's appeal.

Foster v. Mushroom Composters Pty Ltd

The EDO continues to act in contempt proceedings for Peter Foster on behalf of The Concerned Residents of Ebenezer. On 22 May 1995 the company pleaded guilty to Foster's charge that the company was in breach of court orders to stop emitting offensive odours. The matter has now been listed for hearing on 12 and 13 July 1995 for the Court to determine an appropriate penalty.

WESTERN AUSTRALIA

Sharpe Forest Block

In late April 1995 contractors for the Department of Conservation and Land Management (CALM) bulldozed a logging access road into one of the South West's most beautiful and environmentally sensitive old growth forests: Sharpe forest block near Walpole.

Since CALM commenced this roading operation, a series of hearings has taken place in the Supreme Court where The South-West Forests Defence Foundation is seeking an injunction to prevent further destruction of the forests and associated natural ecosystems.

On May 27 1995, members of the SWFDF had their right to privacy upheld in the Supreme Court when Justice Wallwork denied CALM access to their names. Environment Minister Peter Foss had earlier disclosed that CALM wanted the names and addresses of members of the Foundation so they could be sued personally for damages.

Foundation spokesperson, Dr Beth Schultz, said that Justice Wallwork had made a wise and just decision.

> "It is an important victory for freedom of expression and freedom of association. "

VICTORIA

A Reprieve for the Marble Daisy Bush

On 14 March 1995, the EDO Victoria, acting on behalf of the National Threatened Species Network, brought a successful appeal in the Administrative Appeals Tribunal against a permit to mine for marble in a gully where the rare marble daisy bush grows. Not only is the gully the only place in the world where the marble daisy grows, it is also habitat to Australia's only known remnant of the pomaderris shrubland, a plant community remnant from the glacial period 12,000 years ago. The marble daisy is listed as threatened under the *Flora and Fauna Guarantee Act 1988* (Vic).

Contrary to expectations, the decision was not based on the *Flora and Fauna Guarantee Act*. The Tribunal based its decision on the failure of the miners to obtain a permit to clear native vegetation, their failure to disclose on the planned access routes to the site of the mine and their failure to conduct archaeological and flora and fauna surveys. It is open to miners to rectify these deficiencies and come back with another application. Meanwhile the Marble Daisy bush has a reprieve.

IMPACT is published by the Environmental Defender's Office Ltd, a Sydney based independent community legal centre specialising in environmental law. Printed on recycled paper.