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The Public Flouting of the Law

Contempt proceedings in the public interest

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Enforcement proceedings are an integral part of any court action. The recent Land and Environment Court case of Foster v Mushroom Composters Pty Ltd has highlighted the inadequacy of contempt laws, particularly with regard to penalty. It also highlights the importance of standing for third parties to take contempt proceedings in public interest cases.

Penalties for contempt

The penalties which may be imposed for contempt in the Land and Environment Court are contained in Part 55, Rule 13 of the Supreme Court Rules, which apply to the Land and Environment Court by reason of section 20(4) of the Land and Environment Court Act 1979 (NSW).

Under Part 55, rule 13 of the SCR, where the contemnor is a corporation, the Court may only punish by fine, sequestration, or both. Where the contemnor is not a corporation, punishment is limited to committal to prison, fine or both.

Under these provisions however, the Court has little flexibility in the penalties it can impose for contempt. For example, the Court does not have the power to make orders that a respondent carry out community service or remediate a site. Stein J has criticised this limitation in the past, in *Director of National Parks and Wildlife Service v Remme [No 2]*, (1992) [1] when he said:

> "I draw attention to an apparent need to review the *Supreme Court Rules* on contempt...it is apparent that alternative punishments, such as weekend detention and community service orders are not available with respect to contempt. The remarks of the High Court in *Mudginberri* (at 114) support a wide panoply of powers in a superior court to enable it to flexibly deal with contempt and the multitude of circumstances which may face it."

Inadequacy of fines

The importance of imposing effective fines in terms of the public perception of the authority of the court system was stated by Hutley JA in *Registrar of Court of Appeal v Permewan Wright Pty Ltd*, [2]:

"Unless (the fine is) substantial, it provides no encouragement for compliance with the orders of any court...the example provided by (the respondent's) defiance is destructive to the general respect for law and order. If not publicly checked, it encourages public cynicism about the fairness of the legal system."

Case law in the area of contempt is generally characterised by lofty pronouncements from the bench on the need to discipline defendants and the importance of vindicating the authority of the court by the imposition of substantial punitive fines in contempt cases (*AMIEU v Mudginberri Station Pty Ltd* (1986))[3].

Unfortunately however, the rhetoric from the bench does not seem to be reflected in the magnitude of the fines imposed, particularly in the Land and Environment Court. For example, in *Bourke SC v Dwyer* (1993) [4]: "...the acts of the respondent were deliberate and the disobedience of the orders made was wilful...it is necessary to uphold the effective administration of justice by the Court...the disobedience of the Court's orders by the respondent is accompanied by public defiance": fine $1,500; *Bourke SC v Dwyer* (1993) [5]: "The orders of the Court have been held up to ridicule and the Court is not prepared to tolerate that behaviour": fine $1,500.

In circumstances where a contemnor stands to profit from its contempt, which may be significant in some cases, it is of fundamental importance that fines are of sufficient magnitude to punish the contemnor for its past conduct, and to coerce the respondent to comply with the court's orders in the future.

Prior to *Foster v Mushroom Composters Pty Ltd*, unreported, Pearlman J, 4 August 1995, **(Foster's case)**, there have been only two cases in which the Court has imposed a fine for contempt in excess of $10,000: *Director of NPWS v Remme [No 2]* (1992) [6], $20,000 fine and 6 month suspended sentence; *Blacktown Municipal Council v Almona Pty Ltd* [7] **("the Park Lee Markets Case")**, $50,000 fine of both the respondent company and a director.

Foster's case has illustrated the inadequacy of the fines imposed in the Land and Environment Court. In that case, Foster, on behalf of the Concerned Citizens of Ebenezer, commenced contempt proceedings to enforce an injunction that the respondent "cease emitting odours so as to interfere with the amenity of the neighbourhood with respect to smell". The respondent pleaded guilty to having been in contempt for the past year, and also to a charge of ongoing contempt.

Expert evidence was led by Foster that the likely gross profit made by the respondent during the period of contempt was $230,000. Accordingly, Foster sought a fine of $300,000. In its judgment the Court found that the respondent "...took decisions, largely for commercial reasons, which involved a wilful or deliberate breach of (the court's) order". Despite these findings and the evidence of the profit made, the Court imposed a fine of only $80,000.

Right to separate representation

As a preliminary issue in the recent *Foster case* [8], the Court was asked to consider whether the two parties seeking orders for contempt were entitled to be separately represented. Notices of motion charging contempt had been filed by both Hawkesbury Council, and Peter Foster on behalf of a local residents group. Both Foster and the Council were applicants in the primary proceedings.

Relying on the authority of *Lewis & Anor v Daily Telegraph Ltd (No 2)* [1964] [9], the respondent argued that the two applicants were only entitled to one set of solicitors and one set of counsel.

Pearlman CJ found (at p 9) that each party was entitled to separate representation on the basis that they had both been separately represented since the commencement of the primary proceedings and that each of them had the benefit of the judgment and the capability of bringing contempt proceedings in their own right.

Third party rights to instigate proceedings

However, had Foster (and hence the residents) *not* been a party to the primary proceedings, would he have retained the right to enforce orders obtained by the local council, given that the residents were directly affected by the respondent's contempt? What rights do third parties have, for example, where the primary applicant refuses or is unable to take contempt proceedings itself ?

It is unclear whether it is open to third parties to instigate contempt proceedings [10]. Civil contempt proceedings are generally brought by the applicant in whose favour orders have been made. It is traditionally a private remedy. Accordingly, under the doctrine of waiver, an applicant retains the right to waive compliance with court orders which it has obtained [11].

It is not difficult to understand the rationale for such a doctrine in circumstances where court orders are sought and made for the benefit of only one party. The doctrine may have unfortunate consequences however, if it is applied to cases where it is in the public interest that the court's orders be enforced.

There is, unfortunately, little authority on the point (see *Matthews v Seamen's Union* [1957] [12], in which the Commonwealth Industrial Court allowed a party unconnected with the original proceedings to bring contempt proceedings which it characterised as being of a "criminal nature", namely, to punish a union for an alleged disobedience of a court order, but distinguished these proceedings from an application to actually enforce that order).

It is suggested however, that third parties should be entitled to take contempt proceedings in the Land and Environment Court, particularly where the case flows from, or can otherwise properly be characterised as "public interest" litigation.

For example, a class of persons may be adversely affected by an alleged contempt, and, where the applicant is reluctant or has waived its right to take proceedings, those persons should be entitled to enforce the court's orders. Similarly, where the contempt may result in an adverse impact on the environment, persons aggrieved by the contemnor's actions should also be entitled to institute proceedings. This would relieve those parties of commencing fresh proceedings in respect of a matter on which the court may already have ruled, thereby avoiding a duplication of proceedings.

The Land and Environment Court itself may also have a greater role to play in enforcing orders in public interest cases. Under Part 55 Rule 11 of the SCR, the Court may direct the Registrar of the Land and Environment Court to bring contempt proceedings on the court's own motion. In practice however, this provision has never been used in the Land and Environment Court.

Conclusion

Expansion of the penalties available, combined with a greater commitment on the part of the Land and Environment Court to impose fines which reflect the seriousness of breaching court orders, is needed to ensure that contempt laws are more effective.

[1]76 LGRA 431 (at434)
[2] Unreported, 4 May 1979 (at 17).
[3] 161 CLR 98 at 113.
[4] 79 LGERA 185
[5] 79 LGERA 185
[6] 76 LGRA 431
[7] (unreported), Stein J, 40219 of 1985
[8] see unreported judgment on preliminary issues, Pearlman CJ, 31 May 1995.
[9] 2 QB 601
[10] see Australian Law Reform Commission, Report No 35, (1987)
[11] A-G v Times Newspapers Ltd [1974] AC 273
[12] 1 FLR 185

Update on Teoh

In the last edition of Impact, Angus Finney reviewed the Teoh decision and foreshadowed legislation to be introduced into Parliament to overturn the effect of the decision.

On the last sitting week of Parliament in June 1995, the Attorney General introduced the Administrative Decisions (Effect of International Instruments) Bill. The operative clause of the legislation is clause 5:

> "5. The fact that Australia is bound by, or a party to, a particular international instrument, or that an enactment reproduces or refers to a particular international instrument, does not give rise to a legitimate expectation, on the part of any person, that;
>
> a. an administrative decision will be made in conformity with the requirements of that instrument; or
>
> b. if the decision were to be made contrary to any of those requirements, any person affected by the decision would be given notice and an adequate opportunity to present a case against the taking of such a course."

This means there are no legal consequences of ignoring Australia's international treaty obligations.

This legislation will have significant implications in the area of international environmental treaties. Many of these treaties do not have specific enabling legislation in Australia. They include the following; Bonn (Migratory Wildlife), Biodiversity, APIA, SPREP (South Pacific Regional Environment), JAMBA and CAMBA (Migratory Birds), Ramsar (Wetlands) and Climate Change.

The EDO acted for Greenpeace challenging a coal fired power station in the Hunter Valley, with proceedings in September 1994. This provided a good example of the ineffectiveness of international obligations which are sought to be implemented by strategies or policies only. The EDO argued that the development contradicted both Australian and International policies to reduce greenhouse gas emissions.

The judgement made it clear that neither the international treaty nor the Government's greenhouse response strategy restricted the building of the new power station. But perhaps the worst aspect of the case was the discovery that Commonwealth EPA's submission to Singleton Council in response to the environmental impact statement did not even mention carbon dioxide emissions. The EDO wrote to the office of the Minister for the Environment on two occasions seeking enlightenment as to how it could be that the Commonwealth EPA could make a detailed submission and fail to mention the issue of carbon dioxide emissions. The Minister's office won this round; we ran out of energy chasing a response.

The Government may well have had legitimate concerns that private interests may have used the Teoh decision to try to avoid obligations such as paying tax. (We are unsure how this would arise but understand it was one of the government's arguements.) However legislation could havebeen introduced simply to ratify decisions up until a certain date, after which stage a guide to assist decision making or database of treaty obligations could have been prepared.

It is of major concern to our office that decisions are being made on a daily basis where the decision makers apparently have no idea of Australia's international obligations, and that the legislation will perpetuate this problem..

Recent Developments in Commonwealth Assessment

James Johnson ,
Solicitor Environmental Defender's Office

Anecdotal evidence suggests that many Commonwealth Government departments and agencies have reviewed their decision making processes and are referring more proposals to the EPA for decisions on assessment. This follows the successful overturning of the Gunns' woodchip export licence as a result of the case brought by the EDO on behalf of the Tasmanian Conservation Trust, (the Sackville decision). Within the EPA itself, a forest assessment branch has been established and an increased budget allocated to try and deal with the additional work load.

This is a positive first step. The question then arises as to how the EPA is dealing with the increased referrals.

After a proposal has been referred to the EPA, in compliance with the obligation to designate a proponent under the Environment Protection (Impact of Proposals) Act 1974 and Administrative Procedures under the Act, the EPA makes some very important decisions. The first is whether any assessment is required at all.

If the EPA decides no assessment is required, that is the end of the matter. If the EPA decides that further assessment may be warranted, then a recommendation is put to the Minister for the Environment, suggesting that further assessment is necessary and recommending a level of assessment. This could be either by a public environment report, an environmental impact statement or an inquiry.

Current Problems
The EPA's document, "Public Review of the Commonwealth Environmental Impact Assessment Process, An Environment Protection Agency Discussion Paper", contains eight guiding principles for reform adopted by the EPA. These include:

- Provide real opportunities for public participation in government decision making.
- Be open and transparent.
- Provide certainty of application and process to all participants.
- Provide accountable decision making.

The paper goes on to criticise the current process for triggering assessment for several reasons. Firstly, it is uncertain because proponents have no way of determining in advance whether they will be subject to the Commonwealth's impact assessment process and therefore are unable to satisfactorily factor impact assessment into their project planning. Secondly, there is a lack of accountability and public access to information. The lack of accountability in the current process is exacerbated by the absence of any requirements in the legislation for action departments or agencies to disclose to the public the existence of projects they have not referred.

The EPA "solution"
The EPA has put forward a range of options for reform in its discussion paper. However, there is one area which is in need of reform, especially when regard is had to the "guiding principles" set out above, which the EPA propose to leave untouched.

The EPA proposes in its procedural reforms, to maintain the power to make the initial important determination, whether assessment takes place at all, without the obligation to seek input to that decision from anybody else other than the proponent. There will be no public participation in the decision about whether to assess a proposal or not.

In short, the EPA's discussion paper proposes to perpetuate the fundamental problem which exists now. The key decision about whether a project receives assessment or not is being made without the opportunity for people other than the proponent to have input to that decision.

On a more positive note it is proposed to give reasons for not requiring assessment within one month of the decision not to assess. While necessary, this is not a sufficient response to address the failings of the current process.

The EPA exercises tremendous discretionary power at this initial stage. How accountable is the EPA in the exercise of that power? What opportunities are there for public involvement and the right to make comment to assist the EPA in making these decisions?

Several recent examples illustrate the nature of the decisions the EPA is making and the secrecy surrounding them.

Current Practice - Woodchipping designations
The EDO recently acted for the Tasmanian Conservation Trust and the North Coast Environment Council challenging woodchip export licences issued for woodchipping in Tasmania and the north coast of NSW respectively.

On 6 June 1995, the lawyers for the Minister let it be known that the woodchip companies had made fresh applications for woodchip export licences and the companies had been designated as proponents under the Impact Act on 24 April 1995. Despite knowing that our clients were vitally interested in these issues, the EPA gave no notice that they had received the designation or that they were preparing to make a decision whether to require assessment or not.

The EDO set in place Court processes to obtain key documents, such as the application for the licence and the letter of designation, which were clearly relevant to the exercise of the Court's discretion in hearing the proceedings we had on foot. However, any documents obtained in that way during the conduct of Court proceedings are not permitted to be used for any other purpose.

Our clients made numerous direct applications to the EPA and were unsuccessful in obtaining the documents. Quite apart from the Court proceedings, our clients wanted to have input to the decision about whether the woodchip export operations should receive environmental assessment.

The EDO contacted the EPA. We were advised that the EPA had contacted the Department of Primary Industries and Energy who refused the EPA permission to release either the application for the licence or the letter of designation. The EPA decided to treat our request as a Freedom of Information application and, having contacted DOPIE, the body from which the documents had come, would only act in accordance with their wishes. This means our clients had no idea what was being applied for by the woodchipping company, nor what had been designated.

On 14 July, the Friday before the Court cases were due to start on the Monday, the EDO again spoke with the EPA to ascertain what stage the assessment process was at. We were advised that the acting Minister for the Environment had provided a letter to the Minister for Resources and the EPA referred us to the Minister's office.

The Minister's office refused to provide us with a copy of the advice for six weeks. However we were told by a journalist at the time that the Minister's staff seemed happy to read relevant sections of the letter to them over the phone.

Current Practice - Jarosite Designation

Pasminco Metal EZ operates a zinc smelter in Tasmania, refining the zinc by roasting and other metallurgical processes. One by-product of the process is an ammonia iron sulphate compound known as Jarosite, which also contains substantial quantities of the heavy metals zinc, lead, arsenic, copper, mercury and cambium. Jarosite is a brown, fine grain material and is dumped as a slurry.

The dumping occurs approximately 60 nautical miles south east of Hobart. A barge fitted with bottom dumping doors makes approximately 400 trips per year, dumping approximately 170 000 tonnes of Jarosite. For the 1992-93 year, this included 8090 tonnes of zinc, 46 tonnes of cadmium and 2700 tonnes of lead.

The EDO, acting for the Tasmanian Conservation Trust, wrote to the Minister for the Environment on 9 December 1994, seeking reasons for the Minister's decision not to designate Pasminco as a proponent given the numerous initiatives which have been taken in relation to the "proposed action". These initiatives included meetings between the company and staff of the EPA and requests for approval in principle for a permit under the Environment Protection (Sea Dumping) Act to continue to dump Jarosite.

The Tasmanian Conservation Trust, as the peak conservation organisation in Tasmania, has had an ongoing interest in the issue of the dumping of jarosite since dumping commenced in 1974.

The Trust made a Freedom of Information application and spent two days at the office of the EPA inspecting documents provided under FOI. No attempt was made to notify the Trust about the application for the licence to dump or the subsequent designation of the proposal.

The EPA's response was as follows:

> "you or your legal advisers would be familiar with the Environment Protection (Sea Dumping) Act and would therefore be aware that the Gazette is the means by which the government informs interested parties of matters such as receipt of permit applications. One reason that route is chosen is to ensure that all parties are treated equally, and that we do not play favourites among groups on the basis of their real or perceived interest in the issue."

The Director of the EPA was quoted in the Tasmanian newspaper, the Mercury, on 22 April 1995, as saying that the Trust had "dropped the ball and they are a bit embarrassed about it", because despite its great interest in the matter it had trusted the EPA and the Minister to let it know of any application and had not been reading the Government Gazette each week.

Despite the Trust's letter to the Minister for the Environment, its peak organisation status, its involvement over the past twenty years on the issue of Jarosite dumping and its inspection of EPA documents under FOI, publication in the Government Gazette is said to be enough to notify the Trust of the licence application to dump jarosite and "provide real opportunities for public participation in government decision making" (guiding principle number 1).

The Minister for the Environment responded to the EDO on 27 June saying that

> "I understand that the Environment Protection Agency has always referred applications for dumping to all relevant Commonwealth and state government agencies as well as interested non government groups which have registered a formal interest with the agency. The Tasmanian Environment Centre Inc was sent a copy of Pasminco's last permit application in 1991. The Centre advises environment groups in Tasmania of such applications and has a copy available for public access. This opportunity to comment, at the very least, would have been accorded your client, so that the importance of our advising interested parties on receipt of a permit application would not seem an issue."

This letter contains substantial errors.

Firstly, there is no way of registering a formal interest with the EPA. Indeed the above extract from the letter from the EPA confirms that the Government Gazette is the only way the EPA has of notifying interested parties.

Secondly, the Tasmanian Environment Centre is not the Tasmanian Conservation Trust and was not sent a copy of Pasminco's application in 1991. We are left to wonder in any event what an application in 1991 has to do with an application in 1995.

Non-Legislative Environmental Assessment

The EPA has also adopted a strategy of conducting assessment which is outside the legislative framework in the EPIP Act. This allows assessment to take place without complying with minimum statutory requirements for access to information and public participation rights.

For example, the Government has established a process for assessing deferred forests and woodchip licence applications. The Tasmanian Conservation Trust was invited by a letter, received 17 July 1995, to contribute to the assessment by Friday 28 July 1995.

The Trust wrote immediately seeking basic documents essential to allow the Trust to contribute to the assessment, such as the woodchip licence application and the recently granted licences. The Government's response, received by fax on 7 August, stated:

> "I am unable to assist directly with your request for copies of applications for woodchip export licences for Tasmania or a copy of the Gunns Licence re-issue on 18 July 1995, as this information is held by the Department of Primary Industries and Energy. I have therefore referred your letter...for their direct response to you."

The direct response from DOPIE, received 17 August, predictably required that an FOI application be lodged with the appropriate fee.

This means that the 11 day period for "contribution" from the Trust, the Peak conservation body in Tasmania, had expired months before the necessary basic information to enable comment could even be obtained by the Trust.

The Minister for the Environment meanwhile has decided that no EIS or PER is required for the Gunns operation, which has never had assessment under the EP(IP) Act, because

> "extensive assessment action has taken place or will take place".

That is, the high conservation value process in 1994 and the deferred forest assessment which is currently taking place, replaced the normal EIS process. This mistakes the purpose of environmental assessment, which is not just to examine the existing environment, but includes a description of the proposed development and the interaction of that development with the existing environment.

The EP(IP) EIS process is poor, but at least one starts with basic information about the proposal, presented in an EIS which is publicly available. The EIS must deal with certain fundamental issues and there is a minimum time period allowed for comment.

Summary

Publication in the Government Gazette is an inadequate means to notify the community about anything if you really want to provide opportunities for public participation.

These incidents demonstrate that the EPA prefers to adhere to the strict legal minimum for notice. When asked for details of proposals of great interest to the public generally and groups with a special interest in the issues in particular, the EPA has refused to make those details available.

In order to get reasons from the EPA after the event as to why they made various decisions and recommendations, one must fall within the restrictive category of "person's aggrieved" under the Administrative Decisions (Judicial Review) Act 1977. Only then can some inkling be gained as to the processes used to arrive at the conclusion. For example, that a new woodchipping operation in the north of Tasmania, extending over ten years, impacting on places on the Register of the National Estate with up to 475 000 tonnes per year and involving the construction of $10,000,000 mooring and loading facilities in the historic township of Stanley, would not require assessment.

The EPA and the Government have introduced a series of assessments where the rules are made up as they go along. People are put through the motions of "public participation" in a perfunctory manner, with little access to information or time to participate being given. Timelines are dictated by woodchip licence issue dates and election dates.

These assessments are now and will in future be used to excuse the preparation of an EIS, a process with at least some guarantees of participation.

No change is needed to the law to enable even that participation to take place; a change in attitude is needed. It could be done now, but it is not.

The above discussion illustrates why change is needed, and why any change as a result of the EIA review should be enshrined in legislation. When push comes to shove and difficult decisions need to be made, if there is no legislated obligation to provide minimum standards of participation, transparency and accountability, then it is all too easy to let these guiding principles be forgotten.

Clinical Legal Education – The Australian Approach

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Starting in 1996, The University of Melbourne, will be initiating its first clinical course in environmental law. What follows is a brief first person account of the genesis of the idea for the course and a desciption of wat sorts of cases and projects that "student interns" enroled in the course will be involved in.

I.

Background

The impetus behind this subject comes from the persistent encouragement of Professor John Bonine of the University of Oregon[1] in connection with our collaborative work in the Environmental Law Alliance Worldwide (E-LAW or Alliance). The Alliance is composed of public interest environmental lawyers, academics and scientists from over 35 different countries.[2] It is dedicated to promoting environmental protection across borders by sharing legal and scientific information and resources. In order to achieve this objective, E-LAW makes extensive use of the internet[3] and email.

At the 1995 Annual Meeting of E-LAW in Eugene, Oregon, Professor Bonine and I discussed the possibility of setting up an environmental legal clinic at the University of Melbourne along the lines of those established in the U.S.[4] I was hesitant due to the fact that all U.S. clinics, while extremely diverse in format, are able to provide students with the opportunity to appear in court in the role of lawyers to argue environmental cases[6] -- something not possible in Victoria. As we talked further, Professor Bonine suggested that perhaps instead of a "full-blown" environmental clinic engaged in litigation, I might consider developing a clinical course based on student research and problem solving skills.[5] The idea was to use the E-LAW organisation as a "law firm" that students in the subject would join as "interns". The numerous cases with which E-LAW offices are involved, would then serve as a source of fodder for legal work for students to engage with in legal problem solving exercises.

This proposal is a result of my further consideration of the desirability and feasibility of such a course. For the reasons that follow, I believe that the proposed course will be extremely beneficial for students, as well as for the international reputation of the Law School and University.

II.

Reasons for the Course[6]

A. Importance to the Law School and University

To start, the proposed course will further a number of the themes important in this year's Annual Planning Round.[7] First, it further "develops the Law School's curriculum" and "links innovated teaching methodology with communications and research technology". The proposed subject introduces the first clinical program into the Law School and students will get real life experience dealing with environmental problems and interacting with environmental lawyers from around the world via the internet and email. They will, among other things, use electronic forms of legal research in analysing, evaluating and solving these problems. Second, the nature of the course will promote the University's goal of "internationalisation". Because students will be working with public interest environmental lawyers from over 35 different countries, they will be exposed to a wide variety of environmental law in a comparative framework, as well as a broad range of international perspectives and opinions about the nature, function and value of law. Also, the constant posting of student work on various environmental law email discussion lists and the internet will give prominence to the University and Law School. Third, the course will enhance "research performance and research activities" by providing a database of student research into the future.[8] It is contemplated that student research will be stored electronically and uploaded onto the E-LAW space on internet [9] Finally, the course will allow students to "contribute to and interact with the community" in a broad sense. By participating in the common cause of global environmental protection, students will be addressing the international community's (both states and individuals) environmental concerns while trying to redress environmental problems giving rise to those concerns. The experience will afford students the unique opportunity to observe the law's application in action and examine its impact on not only the local community, but also on a global scale.

B. Acting Like a Lawyer

The proposed course will provide students with the chance to engage with experiential learning about the law and the lawyering process. It will serve the vital function of allowing students to be "encultured" into the "authentic practices" of their profession.[10] The course will allow students to interact with many other environmental lawyers from many different cultures in trying to solve legal (as well as social and political) environmental problems. As Richard Johnstone perceptively points out, good teaching embraces methods that "enculturate students into authentic practices through activity and social interaction in a way similar to craft apprenticeships.[11] They enable students to acquire, develop, and use cognitive tools in [real life professional activity]."[12] In addition to contact with environmental lawyers around the world, the course will include a weekly 1 to 2 hour case review session, similar to those at major law firms or government litigation offices, to discuss strategies, tactics, policy, politics, legal research, scientific and technological issues, professional responsibility and ethics, and the broader issue of lawyering. Students will be expected to keep track of their time and complete a weekly case status form for each assigned case summarising recent developments and setting objectives and tasks. The assessment of students will also reflect "real world" criteria. It is contemplated that five methods will be used to guide and evaluate students: individual conferences, case status reports, case review sessions,

informal meetings and discussion, and research produced.

C. Skills Carried to Other Subjects

The course will promote a broader understanding of the legal process and enhance the learning of substantive law. It will make students more active participants in their own education which can then be transferred over to other courses. Experiential teaching and learning in law schools augment and elevate conventional legal education and allows for more effective participation in more conventional law school classes.[13] As Spiegelman emphasises, experiential teaching and the feedback that the students receive in connection with clincal education, enhance rather than detract from our traditional concern for rigorous analytical training. Experiential exercises give the teacher new access to students' thought processes. Skilful feedback and reflection explore such questions as what assumptions of law, fact, and value were made by the student . . .; how the framing of a question influences the answer; how legal reasoning distinguishes essentials from tangentials and irrelevances; and why it is important to examine alternatives before reaching a conclusion.[14]

The course will also carry forward concepts learned in History and Philosophy of Law by focus students' attention on the significance of facts in legal analysis. The problems that students will be required to work on will present facts in "raw" form and will lead to a better understanding of the interaction between law and fact. As has been aptly commented, the "problem of finding and marshalling facts is quite different from following a court through its analysis of facts already marshalled."[15] Experiential learning "enables students to understand problems in their true context rather than as isolated disconnected episodes".[16]

D. Independent Learning

Importantly, the proposed course will teach students how to teach themselves and learn from their own professional and personal experience. Spiegleman again sapiently observes:

> The value of experiential exercises, however, goes far beyond their suitability for teaching creative problem solving. . . . Perhaps the most powerful potential of experiential learning is that it can teach students a method of evaluating their own experience that will allow them to continue to learn after they leave law school.[17]

At the end of each project in the instant subject, students will be debriefed about their experience in a carefully supervised evaluation process. Students will be expected to recreate and critically evaluate every step of their planning, decision-making and action after they have completed a case. In this way students can develop a framework "for understanding past experience and for predicting future conduct";[18] a framework that will allow them to solve problems they will encounter outside the educational environment.

E. Development of General Skills

Finally, the course will also develop more general skills which complement all forms of education. These skills include interpersonal skills,[19] verbal and written communications skills, analytical skills, teamwork, problem conception and problem solving, learning how to learn, and even creativity and lateral thinking. For better or worse, McInnis and Marginson note that there is a growing emphasis by employers on possession of general and work-related skills (as distinct from knowledge), and not providing it in an educational setting will, at the very least, disadvantage students.[20]

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[1] Professor Bonine is one of the "founders" of the late 1960s/early 1970s public interest environmental law movement in the United States. Among numerous other things, Prof. Bonine helps supervise, along with Prof. Mike Axline, the well-known environmental law clinic associated with the University of Oregon School of Law (the Western Environmental Law Center). He also supervises law students "interning" with the E-LAW U.S. office.

[2] E-LAW has offices or members in Argentina, Australia, Brazil, Canada, Columbia, Costa Rica, Czech Republic, Ecuador, Hong Kong, Hungary, India, Indonesia, Israel, Japan, S. Korea, Malaysia, Mexico, Mongolia, Nigeria, Palestine, Papua New Guinea, Peru, The Philippines, Poland, Romania, Russia, South Africa, Sri Lanka, Tanzania, Thailand, Ukraine, United Kingdom, United States and Venezuela.

[3] Indeed, last month E-LAW established its own "home page" on the internet through the efforts of Prof. Bonine. It can be located by directing your universal resource locater (URL) to:

http://darkwing.uoregon.edu/~jbonine/publicint.html

I would like to investigate the possibility of setting up an interdisciplinary environmental site here at the University of Melbourne that would include an E-LAW "mirror".

[4] E-LAW is also currently developing strategies to promote the use of the International Court of Justice in order to hold states responsible for breaches of international environmental obligations.

[5] See generally Robert F. Kennedy, Jr. & Steven P. Solow, *Environmental Litigation as Clinical Education: A Case Study*, (1993) 8 J.Env.L. & Litigation 319. Under the rules of civil and criminal procedure of all jurisdictions in the U.S. (federal and state), it is possible for law students to be admitted to appear in court and discovery proceedings essentially *pro hac vice* for the purpose of participating in a legal clinical program. See the extensive compilation of Rules authorising U.S. student law practice in, Gary J. Galperin, *Law Students as Defense Counsel in Felony Trials: The "Guiding Hand" Out of Hand*, (1982) 46 Albany L.Rev. 400, 405-07 nn. 23-27.

[6] I am grateful to Pene Mathew for a large number of the ideas contained in this section. In particular, I found an essay she prepared for a Columbia University Legal Education Seminar instructive. See P. Mathew, *Proposal for a Course in Refugee Law and Policy for an Australian Law School* (copy on file with the author of this proposal).

[7] See Acting Law Dean Cheryl Saunders' Memorandum of 19 April 1995 to Academic Staff in the Law School regarding "Information for Annual Planning Round", at p 1-2.

[8] Student clinical experience also enriches the faculty by bringing to their attention new and untapped areas of legal research. See C.Menkel-Meadow, *The Legacy of Clincial Education: Theories About Lawyering*, (1980) Cleveland State L.Rev. 555, 571.

[9] See footnote 2 above. Of course, University and student credit will be acknowledged.

[10] See Richard Johnstone, *Rethinking the Teaching of Law*, (1992) 3

LEGAL ED.REV. 17, 40.

[11] While it may be argued that the period of articles of clerkship serves the purpose of experiential learning, many articled clerks' experiences are not happily instructive. Indeed, the Pearce Report notes the dissatisfaction with articles resulting from the fact that many solicitors are too busy to teach articled clerks. The Report also emphasises that its survey of graduates indicated that Law Schools were not doing enough to equip graduates with necessary lawyering skills. AUSTRALIAN LAW SCHOOLS: A DISCIPLINE ASSESSMENT FOR THE COMMONWEALTH TERTIARY EDUCATION COMMISSION, D. Pearce, chairperson (Canberra: AGPS, 1987)(hereafter PEARCE REPORT), at 857-59 & 13. Moreover, according to the Report, one of the essential goals of legal education includes training students for the legal profession and for other careers involving legal work, and "a principal service to a law student may well be to equip that person with the skills necessary to acquire . . . knowledge". *Id.* at 25. Experiential learning of the kind contained in this proposal serves both objectives.

[12] R. Johnstone, *supra* note 11.

[13] DAVID WEISBROT, AUSTRALIAN LAWYERS (Melbourne: Longman Professional, 1990), Chap. 5 at 131-35, *citing* the PEARCE REPORT.

[14] P.J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, (1988) 38 J.LEGAL EDUC. 243, 259-60.

[15] Kathy Mack, *Bringing Clinical Learning into a Conventional Classroom*, (1993) 4 LEGAL EDUC.REV. 89, 100, *quoting* Seymour, *CLEPR from the Viewpoint of the Practicing Bar*, in CLE FOR THE LAW STUDENT; PAPERS FOR THE CLEPR NATIONAL CONFERENCE JUNE 6-9, 1973 (CLEPR, 1973), at 12.

[16] J.M. Brown, *Simulation Teaching: A Twenty-Second Semester Report*, (1984) 34 J.LEGAL EDUC. 638.

[17] Spiegelman, *supra* footnote 15.

[18] See A.G. Amsterdam, *Clinical Legal Education -- A 21st Century Perspective* (1984) 34 J.LEGAL EDUC. 612, 617.

[19] The lack of attention to personal skills in Australian legal education has been noted and criticised by G. Nash, *Skills Course or Clinic?* (1980) 54 ALJ 535, at 535.

[20] CRAIG MCINNIS & SIMON MARGINSON, AUSTRALIAN LAW SCHOOLS AFTER THE 1987 PEARCE REPORT (Canberra: AGPS, 1994), at 25-28. The authors also note the continuing tension in law schools between general intellectual preparation and direct and specific preparation for professional practice. Le Brun and Johnstone point out that in Australia "there is a developing body of literature reconciling clinical programs with sound educational goals of the university and with social theory". MARLENE LE BRUN & RICHARD JOHNSTONE, THE QUIET (R)EVOLUTION[:] IMPROVING STUDENT LEARNING IN LAW (Sydney: The Law Book Co., 1994), at 310 (footnotes omitted).

Nothing to lose but our surfers:

Public Interest Environmental Law and the Reform of the Legal Aid System in England and Wales

Vicky Phillips, Solicitor, Earthrights, a public interest environmental law centre in the UK. Vicky spent several months volunteering at the EDO earlier this year.

"We rolled on the floor and wept with laughter when we got your letter about the seven publicly funded public interest environmental lawyers", said one of my colleagues at EarthRights on my return from Australia in June.

Over the last few years a keenly developed sense of humour has been an essential tool for those of us in the UK struggling to obtain legal aid to fund advice and representation in the environmental field. In the absence of block funding arrangements, obtaining funding on a case by case basis has been essential, although it often involves a long and gritty struggle with officials of the Legal Aid Board who are more accustomed to divorces and burglaries than the nuances of the direct effect doctrine as they relate to European Community environmental legislation.

The current review of the UK legal aid system being conducted by the Lord Chancellor's Department seems unlikely to produce a revolutionary change in the way public interest environmental law is funded. Its principle objective is to cut costs "through the introduction of predetermined budgets for criminal, family and civil non-family legal aid". Much of the public discussion has rightly centred upon the threat that this poses for access to justice. It has been pointed out that the Governments of New South Wales and Victoria were quick to use the availability of a cash-limited system to reduce the total amount of money available for legal aid.

The Green Paper upon which the Lord Chancellor is currently consulting, "Legal Aid: Targeting Need" (published May 1995) makes no mention of environmental law whatsoever, in sad contrast to "The Justice Statement" produced by the Commonwealth Attorney-General's Department in the same month.

This reflects the fact that those cases with an environmental component have tended to be presented as cases in which individuals seek to recover damages for personal injuries or damage to property to fit in with the general thrust of the UK legal aid system. The modern legal aid scheme grew out of the nineteenth century "dock briefs" which barristers were ordered to pick up by judges in the criminal courts on behalf of poor, unrepresented defendants. It has remained firmly focused on the individual and his or her immediate problems. A case will not be funded because it has a public interest element: indeed the suggestion that anyone other than the applicant, especially someone who might have been able to afford to pay for legal help, might benefit in any way from a successful outcome is often enough to bring about a refusal of legal aid by return of post.

As the risk of embarking on litigation without the protection against having to pay the other side's costs offered by the legal aid scheme is too great for those on an average income, environmental lawyers working in the public interest have had to cut their suits to fit the available cloth. To attack the privatised water companies record on implementing European Community directives on bathing water quality, first find an unemployed surfer with a throat infection. For a breach of air quality standards seek out an asmathic four year old living on a main road.

This is one way of doing business but many of us doubt whether it is the most satisfactory way to spend the limited amount of public money that is available for environmental law matters.

EarthRights principal concerns about the reforms suggested by the Green Paper include:

1. The introduction of a system of block contracting.
The Green Paper wishes to replace the existing system of case by case funding with block contracts to suppliers who will have to tender for different types of work. It is not at all clear how more specialised organisations, who deal with a relatively small number of cases each year, will fit in to this system. It seems unlikely that appropriate contracts will be offered and it is not clear that aspiring suppliers will be asked to draft their own.

Environmental law is difficult to categorise neatly in the way that, for example, family law, criminal law or personal injuries work can be categorised. EarthRights' work involves advising on a broad range of different types of law which are relevant to the protection of the environment and human health. These include not only environmental statutes, planning law and the common law, but also the powers of public authorities, criminal law, property law, trusts and the relationship between international, European Community and national law.

It appears that a system of block contracting could provide a focus for initial inquiries from the public in the environmental law field. However, because of the varied nature of the problems covered under the term "environmental law", it is inevitable that some members of the public will consult a local civil legal aid practitioner about concerns that could also have been dealt with by a specialist environmental law centre, such as a personal injury thought to be induced by environmental factors. A rigid dividing line between suppliers of advice could create many problems in practice.

2. Costs restrictions
The Green Paper's emphasis on paring costs to the minimum is also problematic for public interest environmental law. The lawyer for a legally aided person will often be representing that person against a large industrial concern or public body. Where the subject of the dispute is complicated, the law relatively new and untested and the opponent has access to almost unlimited legal advice and resources, a quality service cannot be provided to the legally aided person without a great deal of time and effort on behalf of that person's lawyer. Thus, although the legal aid fund is receiving good value for money and expenditure is carefully controlled, the price of obtaining justice is high.

A more specific costs worry is the proposal to include all disbursements within the block contract price. Many environmental cases involve new areas of science and rely heavily on expert evidence. It may well not be possible for an initial assessment of the likelihood of the case succeeding to be made until several experts reports have been obtained. New evidence often has to be sought as the case progresses because of changing scientific opinion. Relevant experts are often overseas.

It would therefore be very difficult to predict the costs involved in advance. An insistence on including disbursements in the contract price could discourage public interest lawyers from taking up cases which are reliant on scientific evidence. EarthRights is considering recommending that a disbursements fund similar to that proposed in "The Justice Statement" be introduced to meet the costs of experts reports and other major disbursements in relation to the types of cases which habitually require such evidence.

3. The introduction of continuous assessment of cases.
Under the present system, once legal aid has been granted cases tend to proceed without much further input from the Legal Aid Board. The Green Paper proposes that the lawyer should carry out continuous assessment so that funding can be withdrawn if it is no longer justified. Continuous assessment could be very difficult in environmental cases because new scientific evidence emerges all the time and may constantly shed a new light on the likely success of the case.

It appears that a continuous assessment system in relation to environmental law would need to incorporate an obligation on the lawyer to "warehouse" cases. Legal aid would have to be suspended temporarily in situations where initial research showed that scientific evidence in support of the client's case was not yet available but could be expected to become available in the future. The warehousing obligation could also apply where scientific evidence which was not favourable to the client came to light after the advice giving process had commenced, but could be expected to be contradicted by more favourable evidence at a later date.

A warehousing obligation would not sit particularly easily in a legal aid system where the lawyer was expected to progress matters to conclusion as quickly and efficiently as possible. However it appears to represent the best option where the successful outcome of a case was dependent on future developments outside the control of the parties.

Despite the above worries, the Green Paper contains a number of **ideas which could work in favour of public interest environmental law in the UK if implemented. These include:**

1. An emphasis on alternative means of service delivery.
Under the current legal aid advice system, known as the "green form scheme", money is only provided for advising members of the public who attend a solicitors' office in person. The Green Paper envisages that suppliers of legal services will be actively encouraged to use telephone advice lines, "electronic information kiosks" and other alternatives to traditional face to face consultations. Such flexibility would be very helpful in ensuring that access to help was available country wide. This

is particularly important in a specialised area such as environmental law where many people around the country are currently out of reach of the few environmental lawyers willing to give advice under the green form scheme.

2. An emphasis on alternative dispute resolution.
EarthRights tends to agree with the Green Paper that lawyers' clients are often "encouraged towards court based solutions when these are not the most effective solutions to their problems". This is partly a result of the fact that few lawyers in the UK have received any training in alternative dispute resolution. It also highlights the fact that there are few facilities, such as dispute resolution or mediation centres, which the public can use, and that the "small claims" procedure in the civil courts is still too complicated for many people. The legal aid review is taking place simultaneously with a review of the civil justice system which is considering some of these issues.

3. Legal aid for representation in non-court based proceedings.
At present legal aid is very seldom available for representation in non-court based proceedings. In the case of environmental law, it would sometimes be desirable for clients to be able to be represented at planning inquiries, appeals against the grant of pollution licences, during Parliamentary Bill procedures, during alternative dispute resolution procedures and at the new tribunal the Government is intending to set up. This tribunal will deal (inter alia) with appeals against the refusal to supply information relating to the environment pursuant to the Environmental Information Regulations 1992. The Green Paper recognises that non-court based proceedings can be as important to an individual as conventional litigation. It raises the possibility that legal aid may be available in the future in those cases which require it because they are particularly complicated or involve difficult points of law.

EarthRights has already taken part in a pilot scheme concerned with alternative means of service delivery, concentrating in particular on community outreach work and alternative dispute resolution, and is enthusiastic about the potential for working in this way. In 1994-5, it received a block grant from the Legal Aid Board to provide advice and assistance to a community in West London who were adversely affected by construction works and poor air quality. This work was the subject of a study by the Policy Studies Institute on behalf of the Legal Aid Board.

Despite the absence of specific discussion of or requests for information about the impact of the reforms on environmental law, EarthRights will be contacting the Lord Chancellor's Department to highlight some of the concerns and some of the positive points which arise out of the Green Paper. It is also contributing to a submission written by a group of public interest lawyers working for organisations such as the Public Law Project, the Citizens Advice Bureaux, the Child Poverty Action Group, Liberty (formerly the National Council for Civil Liberties), the Prisoners Action Group and the Law Centres Federation, which recommends that a special fund be set up for research projects and public interest test cases.

It is heartening to know that the Australian Government has responded positively to the work of the EDO, other public interest environmental law organisations around Australia and to the lobbying efforts of their numerous supporters. Hopefully there will be some good news from this corner of the northern hemisphere in the next few years, although I doubt whether you will be rolling on the floor with amazement.....!

Commonwealth Environmental Decisions A Guide to Participation

James Johnson,
Solicitor, Environmental Defender's Office

The Environmental Defender's Office recently received funding from the Commonwealth Department of Environment to produce a guide to enable people to participate in environmental decisions made by the Commonwealth Government.

The guide will cover Commonwealth laws and administrative processes, including participation under the Freedom of Information Act 1982, the Administrative Decisions (Judicial Review) Act 1977 and the Environment Protection (Impact of Proposals) Act 1974. It will contain contact names and phone numbers for further information and assistance from relevant government and non-government bodies, together with checklists and flowcharts to assist in understanding the processes.

The Worlds Experts Group on Environmental Law was established in 1985 by the Brundtland Commission to prepare a report on legal principles for environment protection and sustainable development, giving special attention to legal principles and rules which ought to be in place now or before the year 2000.

One of the articles adopted by the experts group on environmental law is Article 6:-

> "States shall inform all persons in a timely manner of activities which may significantly affect their use of a natural resource or their environment and **shall grant the concerned persons access to and due process in administrative and judicial proceedings**"

More recently Australia has signed the Rio Declaration which provides in Article 10:-

> "Environmental issues are best handled with the

participation of all concerned citizens ... **States shall facilitate and encourage public participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".**

Thirdly the ANZECC paper on a national approach to Environmental Impact Assessment in Australia - National Principles for Australia - under the heading Principles for Government, acknowledges the importance of opportunities to ensure there has been adherence to due process.

Unfortunately, people cannot have access to judicial and administrative proceedings or other methods of participating in environmental decisions unless they know the opportunities and procedures to participate and know how to have access to information.

Community education about judicial and administrative processes is a key part in providing access to these processes. The present lack of material informing the community of opportunities to participate means that there is often insufficient participation. Consequently people are often dissatisfied, leading them to resort to political, media or legal avenues. This could be largely avoided if people made use of the processes available at an earlier stage.

The Environmental Defender's Office provides free initial advice to the community by telephone on a range of matters. Traditionally our statistics have reflected a low Commonwealth content (approximately 5% of total inquiries). More recently however, this has shown a marked increase, and, although we are predominantly a NSW based organisation, approximately 20% of our inquiries now relate to Commonwealth matters.

This increased need is partly a reflection of the increased role being taken by the Commonwealth in environmental matters. The community is being urged to participate and contribute to discussion papers and forums to assist the Commonwealth. However, it is our experience that most members of the community have a poor understanding of how existing processes work, what the impacts of change will be and how the proposed changes will fit in with existing processes.

The Commonwealth is doing more in the environmental area, asking for more from the community in the environmental area and yet there is no plain language, readily accessible guide to enable people to make use of the legal and administrative systems put in place for community participation.

Long Term Benefits of the Project

The basic understanding of avenues for participation in environmental decision making will:-

a. increase the quality of environmental decision making;
b. increase the acceptance of these decisions within the community and reduce conflict and subsequent litigation;
c. provide a more open and accountable government;
d. reduce the misunderstandings within the community about rights and processes. This will mean that unfounded expectations about community rights and the Commonwealth role in environmental protection will not be raised saving time and money expended in continually explaining the laws and processes to members of the community;
e. increase community awareness of environmental issues;
f. illustrate the benefits of laws providing community participation, with a view to encouraging their introduction in other Commonwealth laws.

CONFERENCE ON COMMONWEALTH ENVIRONMENTAL IMPACT ASSESSMENT

THURSDAY 19 AND FRIDAY 20 OCTOBER 1995

The EDO is holding a major conference on Commonwealth EIA. It offers an exciting and challenging program with a huge diversity of speakers representing the many stakeholders who have an interest in EIA. If you haven't received the full program, please let us know.

There are three sessions on the first day: the first session offering an insight into overseas models; the second with speakers from all levels of government discussing what role the Commonwealth Government should play: and the third giving the perspectives of other players, such as industry, consultants, legal firms, conservation groups and the aborginal community. On the second day, there are a series of workshops covering the most contentious issues.

Speakers include:
Justice Ron Sackville, Barry Sadler , Director of the International EA Effectiveness Study, Canada, Professor Tom Fookes , New Zealand, Ipat Luna , a solicitor from the Philippines, Professor Rob Fowler, Steve Munchenberg, CEPA, Gabrielle Kibble, Dept of Planning and Urban Affairs, Michael Barker, Barrister, WA, Genevieve Rankin, Mayor, Sutherland Shire Council, Professor Ben Boer, ACEL...

The timing of the conference is critical with Commonwealth EIA currently under review. It will be an ideal forum to discuss details of changes to the Amended Administrative Procedures due to be released in October. The conference may present the last opportunity to discuss key issues with other stakeholders and assist the government in preparing the best legislation.

For further information, please contact Tessa Bull or Maria Comino on 02 261 3599 Fax 02 267 7548

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