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AUSTRALIAN ENVIRONMENTAL LAW: SOME STRUCTURAL ISSUES

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Judge, Federal Court of Australia.

Justice Sackville gave the opening address at the Commonwealth Environmental Impact Assessment Conference, held in Sydney, 19/20 October 1995. Below is the full transcript of his presentation

Introduction

I am honoured to be asked to give the keynote address at this Conference, which will be addressed by so many eminent figures on environmental law and policy. I acknowledge at the outset that the invitation was extended, if not on the basis of misleading conduct on my part, then at least by reason of a misapprehension.

The invitation was undoubtedly prompted by my decisions in the *Tasmanian Woodchips Case (Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 65) and the *North Coast Case (North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 41). These decisions may have suggested that I have some special expertise as an environmental lawyer. The truth is that my involvement in those decisions simply reflects the jurisdiction of the Federal Court to hear and determine most, if not all, matters arising under federal law. As it happened, the cases raised issues concerning the operation of legislation of considerable environmental significance.

The *Tasmanian Woodchips Case* raised questions relating to the Administrative Procedures prescribed under the Environmental Protection (Impact of Proposals) Act 1974 (Cth), and their impact upon licences granted to export woodchips under the Export Control (Unprocessed Wood) Regulations, 1986 (Cth). The *North Coast Case* raised the issue of whether an environmental organisation was entitled to reasons under the Administrative Decisions (Judicial Review) Act 1977 (Cth) in respect of a decision to renew a licence to export woodchips under the same regulations.

Whatever the cases reveal about my expertise, or lack of it, they illustrate very clearly what might be described as the federalisation of environmental law in Australia. As the topics for discussion at the conference suggest, the days when environmental law was purely a matter for the States or local government authorities have long since gone.

One of the themes of the conference is the role of the Commonwealth in the environmental impact assessment process. In particular, the workshops will address the "threshold of Commonwealth reach" and the changes in assessment procedures since the

Tasmanian Woodchips Case. Others will address the political and practical implications of current and proposed arrangements. However, it is appropriate to consider, if only briefly, the constitutional structure governing environmental policy, planning and assessment in Australia. This helps to shed light on the extent to which current arrangements are compelled by constitutional structures, or reflect policy choices concerning decision-making within the Australian federation.

The Expansion of Commonwealth Environmental Legislation

No one familiar with the development of Australian environmental law will be surprised to learn that important environmental issues are now determined by reference to federal legislation. Yet the enactment by the Commonwealth Parliament of legislation designed to protect the environment, or to enhance environmental values, is a relatively recent phenomenon. With one exception, the Australian Constitution contains no express reference to environmental values and confers no specific powers on the Commonwealth to legislate in order to protect those values. [1] This was because the framers of the Constitution saw the major issue as being the development of the continent, rather than the need to preserve or manage ecosystems. To the extent that conservation was addressed, it was assumed to be a matter for the States.

Of course, since the Constitution was drafted, preservation of the environment and the means of promoting ecologically sustainable development have become issues of profound international and national concern. Although Australia is one of the more geographically isolated nations on earth, few people in this country would disagree that environmental issues require co-ordinated international action. The scope of international action on the area is shown by the Earth Summit, which took place in Rio de Janeiro in 1992, although there have been other international conferences and agreements since then[2] The Summit accepted 27 general principles, intended to guide the international community in relation to achievable ecologically sustainable development. It also prescribed an action plan, known as Agenda 21, which established a "blueprint for action in all areas relating to the sustainable development of the planet until the twenty-first century". Australia is a founding member of the United Nations Commission on Sustainable Development, which is responsible for over-seeing the implementation of Agenda 21. The conference agreed on the terms of two conventions, one relating to climate change and the other to biodiversity, both of which have since been ratified by Australia.

The burgeoning of international agreements relating to the environment has led to a commensurate expansion of the scope of Commonwealth legislative power and federal environmental legislation in Australia. For some time there was uncertainty as to whether the external affairs power (s.51(xxix) of the Constitution) confers power on the Commonwealth Parliament to implement Australia's international treaty or convention obligations, independently of whether the legislation deals with a matter of "international concern". That question was settled in the Commonwealth's favour in the *Tasmanian Dams Case (Commonwealth v Tasmania* (1983) 158 CLR 1) and reaffirmed in subsequent cases (*Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232). Provided that the treaty is entered into *bona fide,* and the legislation is in reasonable conformity with the treaty, the Commonwealth legislation implementing the treaty will be valid [3]. There is now a great deal of Commonwealth legislation giving effect to international treaty obligations on such varied matters as protection of the ozone layer, world cultural and natural heritage, international trade in endangered species of flora and fauna and the prevention and consequences of maritime oil pollution [4].

Federal legislative power on environmental matters is not limited to implementation of Australia's treaty obligations. Far from it. The *Murphyores Case (Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1) established a principle of fundamental importance, in relation to the power of the Commonwealth Parliament to take measures designed to protect the environment. The case decided that it was constitutionally open to the Minister to refuse, for environmental reasons, to grant a permit to export concentrates obtained from the mining of mineral sands on Fraser Island. The law prohibiting exports from Australia without approval was a law with respect to trade and commerce with other countries, within s.51(i) of the Constitution, notwithstanding that the decision-maker took into account environmental considerations. It follows that the trade and commerce power and, for that matter, other legislative powers, can be used by the Commonwealth Parliament to achieve environmental objectives.

A number of commentators have pointed to the potential reach of Commonwealth legislative powers on environmental issues. The corporations power permits regulation for environmental purposes of the manufacturing, production and extractive processes undertaken by foreign and trading corporations, at least if they are carried out for the purpose of engaging in trading activities (J. Crawford, *supra,* at 24-25). The powers of the Parliament to make laws with respect to the Territories (s.122), fisheries in Australian waters beyond territorial limits (s.51(x)), the people of any race for whom it is deemed necessary to make special laws (s.51(xxvi)), and defence (s.51(vi)) provide other examples of powers that have been relied on to enact legislation pursuing environmental objectives [5]. The Commonwealth's power to make grants to the States subject to conditions (s.96), to spend money and to impose taxation (s.51(ii)) can be of considerable importance in achieving environmental objectives.

A Constitutional Perception

Despite the extent of Commonwealth power in environmental issues, there is a widespread perception that environmental law is essentially a matter for the States and that the Commonwealth's intrusion into the field should be the exception rather than the rule. This attitude is reflected in the Final Report of the Constitutional Commission, in 1988. The Commission recommended against altering the Constitution by adding an express provision to empower the Commonwealth Parliament to make laws with respect to the environment. The Commission recognised the "extensive range of powers available in the Federal Parliament", subject to general constitutional limitations, such as those contained in s.92 [6]. But the Commission concluded that a general environmental power should not be conferred on the Commonwealth. The report observed that such power would allow the Commonwealth

directly to regulate activities such as mining, town planning, forest management, soil conservation and river use. These were "matters which traditionally have been State concerns" (Report, vol.2, 765-766). The Commission apparently considered that there were many activities beyond the reach of the Commonwealth Parliament, although it did not explore the precise limits on federal power.

Whatever the merits of a proposal to amend the Australian Constitution, the fact that the States have traditionally regulated a particular field is not, of itself, a compelling argument to maintain the *status quo*. Moreover, the reality is that the Commonwealth has very extensive powers in relation to environmental matters, and that these are substantially wider than the concluding remarks of the Constitutional Commission might suggest. If the Commonwealth Parliament enacted legislation, for example, regulating the forestry activities of trading corporations, there is little doubt that the legislation, if otherwise complying with the Constitution, would be within the power conferred by s.51(xx). The same is true in relation to mining activities which, in any event, are largely directed to production for overseas markets.

It follows that the widespread perception that the Commonwealth has only very limited constitutional authority in relation to environmental policy and planning is not accurate. The point can be illustrated by one of the schedules to the 1992 Intergovernmental Agreement on the Environment ("IGAE"), dealing with the "National Estate". Schedule 7 records an acknowledgment by participating governments that

> "primary responsibility for land use and resource planning decisions rests with the States" (Sched.7, cl.2).

While this may be an accurate statement of the policy approach of the participating governments, it is by no means an accurate statement of the current constitutional position in Australia. Of course, the existence of a legislative power is one thing; its exercise is quite another.

A Co-Operative Strategy

Despite the Commonwealth's extensive legislative powers, in Australia successive Commonwealth Governments have been content to adopt a co-operative strategy with the States, Territories and representatives of local government. This approach has been reflected in the activities of bodies such as ministerial councils. Some of these have been established by legislation (for example, the Murray-Darling Basin Ministerial Council, the activities of which are now regulated by the Murray-Darling Basin Act 1993, enacted by the Commonwealth and three States) and some operate without legislative support. It has also been reflected in inter-governmental agreements on environmental matters that are typically the product of an extensive national process of public consultation and policy making. For example, the IGAE, concluded in 1992, provides for intergovernmental co-operation on a national approach to the environment. The IGAE, which is reproduced as a schedule to the National Environment Protection Council Act 1994 (Cth) and cognate State and territory legislation, was entered into by all Australian Governments (including the States and two major Territories) and the Australian Local Government Association.

The IGAE, among other things, identifies the environmental responsibilities and interests of the three levels of government. The Commonwealth's are said to relate to foreign policy and international obligations; environmental effects reaching beyond one State or into Commonwealth areas or Australia's maritime jurisdiction; and facilitating co-operative development of national environmental standards and guidelines as referred to in the schedules to the agreement itself: sec.2.2.1. Those schedules cover data collection and handling; resource assessment and approval processes; environmental impact assessment; national environment protection measures (for example, relating to air, water and soil pollution); climate change; biological diversity; the national estate; world heritage; and native conservation. Each State is said to be responsible for the policy, legislative and administrative framework within which living and non-living resources are managed within a State. All States are said to have a responsibility in the development of national environmental standards and in Australia's position in relation to international agreements concerning the environment: sec.2.3.

One well-informed commentator has referred to the IGAE as

> "the product of closed bureaucratic negotiations, presented in formal layout and language, and officially signed by all the first Ministers of Governments. It presents a statement of some basic principles and procedures for intergovernmental co-operation on environmental management and is intended to be a working document for regular government administration."[7]

Another says that

> "[p]olitically the document represents a retreat by the Commonwealth from using its undoubtedly superior Constitutional powers to override State Governments on environment/development conflicts, in favour of more consultative processes based on broad agreements of principle."[8]

National Environment Protection Council

The co-operative approach has now been enshrined in legislation through the establishment of the National Environment Protection Council: National Environment Protection Council Act 1994 (Cth), Parts 2, 3. According to the Minister's second reading speech, the legislation is an "important landmark" because

> "[i]t marks the commitment of the Commonwealth and the states and territories to work co-operatively to develop national environment protection measures".[9]

The Commonwealth Act was part of a package of complementary State [10] and federal legislation to give effect to Schedule 4 of the IGAE. Schedule 4 to the IGAE committed the signatories to the establishment of a Ministerial Council with responsibility for framing national standards in a variety

of areas. For their part, the participating States have expressed in legislation their intention that they will implement, by such laws and other arrangements as are necessary, each national environment protection measure in respect of activities that are subject to State law: see s.7 of the NSW and Victorian Acts. The significance of the co-operative legislative scheme was, perhaps, diminished somewhat by the fact that Western Australia, although a signatory to the IGAE, had indicated that it would not participate in the Council's activities.

The Council consists of Ministers from the Commonwealth and participating States and Territories: s.9. Its functions, as envisaged by schedule 4 to the IGAE, include the formulation of national environment protection measures on such issues as ambient air and water quality, the protection of amenity in relation to noise (but only if differences or environmental requirements would have an adverse effect on national markets for goods and services), hazardous wastes, the recycling of used materials and motor vehicle noise and emission standards (but only in conjunction with the National Road Transport Commission): s.14(1),(2). In making any national environment protection measure, the Council must have regard to a number of factors. These include whether the measure is consistent with section 3 of the IGAE and whether the most effective means of achieving the desired outcomes is by means of a national standard: s.15.

Section 3 of the IGAE sets out agreed principles of environmental policy. These are:

- the precautionary principle - where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- intergenerational equity - the present generation should ensure that the health, diversity and productivity of the environment is enhanced and maintained for future generations;
- conservation of biological diversity and ecological integrity; and
- improved valuation, pricing and incentive mechanisms - to incorporate economic factors in environmental regulation (IGAE, s.3.5).

These principles have already been incorporated into the legislation of some States, as part of the objective of ecologically sustainable development.[11]

The EPA Discussion Paper

The Environmental Protection Agency's discussion paper, Public Review of the Commonwealth Environmental Impact Assessment Process (November 1994), as one would expect, adopts a limited view of the Commonwealth's environmental responsibilities. The following factors are said by the EPA to help define the Commonwealth's role:

> "The Commonwealth
>
> - represents the national interest as one perspective in the assessment of a proposal;
> - must ensure Australia's international obligations are met;
> - may assist in the resolution of transboundary (interstate) impacts;
> - can promote a co-operative approach to national standard setting; and
> - must fulfil its own environmental responsibilities arising from Commonwealth actions and decisions."

Accordingly, the discussion paper acts on the proposition that the "Commonwealth Government has a responsibility for environmentally significant issues of national or international importance" (p.13).

An Alternative Approach?

Having disclaimed expertise in this area, I cannot assert the competence to assess whether a co-operative approach to environmental policy and decision-making is the most effective means of achieving the objective of ecologically sustainable development or co-ordination among various governments and levels of governments. Plainly, a very great effort over a very long period has been invested in the current arrangements. A substantial measure of agreement has been reached, at least in the formulation of objectives and general strategies. The States have incorporated in legislation their intention to apply the national standards formulated through the co-operative intergovernmental mechanisms. The choice as to which environmental strategies should be put in place, and which means should be used to develop those strategies, are clearly political questions that must be resolved by political processes.

Nonetheless, it is important that decisions as to the proper role of the Commonwealth in environmental policy and decision-making be informed by a full appreciation of the scope of the Commonwealth's constitutional authority. The EPA's discussion paper, for example, beyond suggesting that "stakeholders" had accepted the limited view of the Commonwealth's role adopted in the paper, does not explain in detail why this view is appropriate. Certainly there is no analysis of the true scope of Commonwealth legislative powers and, in particular, of the extent to which it might extend beyond assessment of projects that are deemed to be of national or international significance. No doubt the approach taken in the discussion paper reflects the themes adopted by the IGAE and incorporated into the co-operative legislative scheme.

It is, of course, true that the Commonwealth, even if it wished to do so, could not regulate every aspect of environmental planning and assessment. But it could, if it wished, for example, lay down mandatory environmental standards without committing itself to an elaborate and necessarily time-consuming process of consultation and inter-governmental co-operation. Such standards could be enforced in many areas directly by the Commonwealth, if it chose so to do, without

intervening State and Territory legislation. In those fields where the Commonwealth lacks legislative powers, it has the means to provide powerful incentives to encourage observance of the national standards or policies.

I stress that I am not necessarily advocating the full exercise of Commonwealth powers over environmental issues. But it is important to appreciate, contrary to widespread perceptions, that the Australian Constitution has proved itself very accommodating to Commonwealth regulation of environmental issues. The Constitution may have been drafted in the days of horses and buggies, but it has shown a remarkable capacity to adapt - or be adapted - to the concerns of the late twentieth century. Few of those concerns can be more important than the preservation of the environment consistently with the principles of ecologically sustainable development.

The only suggestion I make - although I think the point is critical - is that policy makers should avoid any misapprehension as to the scope of Commonwealth power over environmental issues. The notion that the Commonwealth, either from a constitutional or legislative perspective, is an intruder in the field of environmental regulation, is simply not accurate. For this reason I doubt that the arrangements currently in place or proposed will be the last word on the subject.

Endnotes

[1]The exception is s.100 which prevents the Commonwealth abridging "the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation". See J. Crawford, "The Constitution" in T. Bonyhady (ed.), Environmental Protection and Legal Change (1992), 2-5, 17-19.

[2](For a summary of the proceedings, see G. Bates, Environmental Law in Australia (4th ed. 1995), 27-29.)

[3]See J. Crawford, "The Constitution and the Environment" (1991) 13 *Syd L Rev* 11, at 21-24.

[4]G. Bates, *supra*, at 82-83

[5] See, for example, the Environmental Protection (Nuclear Codes) Act 1978 (Cth), discussed in J. Crawford, *supra*, at 28-29; Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth); Fisheries Management Act 1991 (Cth).

[6]See J.G. Tabemer and D.J. Lee, "Section 92 and the Environment" (1991) 65 ALJ 266) and s.51(xxxi) (the power of the Commonwealth to make laws with respect to the acquisition of property on just terms.

[7] A. Gardner, "Federal Intergovernmental Co-operation in Environmental Management: A Comparison of Developments in Australia and Canada" (1994) 11 *EPLJ* 104, at 110.

[8] G. Bates, *supra*, at 32

[9] Cth Parl. Deb., Senate, 6 June 1994, 1315.

[10] See, for example, National Environment Protection Council (New South Wales) Act 1995 (NSW); National Environment Protection Council (Victoria) Act 1995 (Vic.)

[11] See, for example, Protection of the Environment Administration Act 1991 (NSW), s.6(1), (2). See also the National Strategy for Ecologically Sustainable Development ("NESD"), endorsed by the Council of Australian Governments in December 1992.

Commonwealth Environmental Impact Assessment Review

Don't Bother Watching This Space

The EDO has been involved in extensive negotiations on behalf of the conservation movement with government and industry as part of a working party reviewing amendments to the Commonwealth administrative procedures under the Environment Protection (Impact of Proposals) Act 1974. After long and patient negotiation organised by the EPA, an agreement was reached on a small number of important changes which could be effected by amending the administrative procedures. These changes would have increased certainty for industry, allowed designation much earlier in the process and allowed accreditation by the Commonwealth of state processes and vice versa.

For those proposals for which assessment was to take place, there was to have been increased certainty about the public participation process and better guidelines for that process. For those decisions where it was determined there would be no assessment, there was to be a period allowed for further input by the public before a review of the decision by the Minister.

As detailed in earlier editions of Impact, one of the great flaws of the current process is that the EPA makes a decision about whether assessment shall take place, and if so the level of assessment, in secret without public input and based solely on information provided by the proponent of the project.

One only has to set out this broad framework in a sentence to recognise that it is not conducive to transparency, accountability or the making of environmental decisions based on the best available information. Commonwealth environmental impact assessment remains a joke.

It appears that commonwealth development agencies such as DOPIE have "white-anted" the hard fought agreement which had been reached. Not surprising when you realise that DOPIE have consistently refused over the years to sign a Memorandum of Understanding with the Department of Environment or the EPA about what should be referred for assessment.

Another amended version of the proposed changes may yet be approved by Cabinet, with the environment minister's role again reduced. Conservation groups are currently considering this new version and the jury is out on whether it is worth supporting.

EXTRACTS FROM A PAPER DELIVERED TO THE NATIONAL ENVIRONMENTAL LAW ASSOCIATION ANNUAL CONFERENCE, 14-16 SEPTEMBER 1995

MINING AND ECOLOGICALLY SUSTAINABLE DEVELOPMENT

THEORY AND PRACTICE

James Johnson, Director, Environmental Defemder's Office

Ecologically Sustainable Development.
The concept of ecologically sustainable development has been discussed extensively both in Australia and overseas. ESD is incorporated in the Intergovernmental Agreement on the Environment. Nine sectoral working groups were established, reporting in November 1991, to examine ways of achieving ESD. Two further reports, on intersectoral issues and greenhouse, have been produced. A National Strategy for ESD was developed.

How much impact has all this strategic thinking had? How has the concept of ESD been implemented?

Public participation in environmental decisions is essential to achieve ESD. It makes sense to look before you act and environmental assessment processes generally acknowledge the importance of obtaining the views and contributions of the community.

EIA is essential to achieve ESD. Having examined impacts and potential impacts, the Precautionary Principle provides if there are threats of serious environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

I propose to examine recent developments, with particular emphasis on mining, to evaluate progress in achieving ESD, from the point of view that participatory mechanisms, provided for example through the EIA process, are the practical outcome of institutionalising ecologically sustainable development.

Mining and ESD
How then does the mining industry deal with its responsibilities in achieving ESD? I have already mentioned the ESD working group, which had two members of AMIC on the committee. Recommendations from this working group, reflecting the consensus viewpoint of industry, government union and conservation groups, include:

> Recommendation 63:
>
> -that Australian mining companies with operations overseas endeavour to operate to at least Australian practices and standards of environmental management, ...

> Recommendation 65:
> -that the Australian mining industry support and participate actively in the development of international codes of practice which support principles consistent with those of ESD

The Business Council of Australia, which includes BHP, Pasminco, MIM, CRA, RGC etc has "Principles of Environmental Management". At page 14:

> (c) Establish a policy and strategy to reduce, and, where practicable, eliminate the discharge of environmentally harmful substances".

The International Council on Metals and the Environment, which includes BHP, WMC, MIM and CRA has an "Environmental Charter".

The NSW Chamber of Mines has a set of principles, including the promotion of property rights and a "practical" concern for the environment.

Against this background I will examine some recent developments which indicate the approach to ESD taken by the mining industry.

Ok Tedi - The Reality of Mining in Papua New Guinea
In PNG the laws include the Constitution; statutes passed by the PNG government; English common law, which governs contract, tort, administrative review and a range of other matters; and customary law. Customary law, the role of which is guaranteed in the Constitution, has governed the lives of the people of PNG for centuries. It includes the payback system and an attack on land is seen as being an attack on the people.

In a subsistence lifestyle, statutes and common law only really become relevant when someone from outside the community, who doesn't know or feel bound by customary law, interacts with the community.

Without a basic grounding in the law, the negotiation process which takes place for access to indigenous owned resources is like sitting down to play chess with village people and not explaining the rules. And corruption and cronyism is rife.

The EDO has worked with ICRAF (the Individual and Community Rights Advocacy Forum) in PNG to develop

materials in pigeon and english and to present workshops for landowners to explain their rights.

Mining plays an incredibly significant role in the economy of Papua New Guinea. Currently mining generates 66% of PNG's export earnings. This reinforces a serious conflict of interest.

> "The State finds itself in the impossible position of regulator (environmental control being just one aspect of state regulation), equity participant in mining companies and receiver of tax revenue from mining operations. If dependence on revenue makes it difficult for the State to enforce environmental protection measures whose funding may well reduce the profitability of mining companies, the State's acquisition of equity in mining companies may render its position as regulator virtually untenable."[1]

And indeed the government has failed to regulate. The Ok Tedi mine commenced operation without a tailings dam on a "temporary basis" in 1984. Overnight the river turned red-brown. This mud was the visible symptom of damage, but there were others.

Agenda item 7 of the Ok Tedi Mining Ltd (OTLM) 7 and 8 June 1984 Board Papers discloses that:

> "The State have expressed concerns about the discharge of heavy metals in the slimes. This concern has arisen because the total copper and lead levels measured at Ningerum during construction exceeded the expected values. It has been agreed that under the circumstances of the interim tailings this is an acceptable impact..."

The impacts are no doubt all the more acceptable because the members of the Board did not have to be subjected to them.

Maximum levels were agreed, but they were well above the "acceptable" levels for a developed country. Further the monitoring point for testing the water was 100km downstream of the mine. When the "acceptable" levels still couldn't be met, the monitoring point was shifted to the Fly River, approximately 200km from the mine. The river became a waste disposal canal.

In 1986 the tailings dam was deferred again. Tailings are still being dumped into the river, with the area downstream looking like a "moonscape".

Damage does not just result from the planned impact of dumping 80,000 tonnes per day of mine tailings into the Fly River after the company squirmed out of building a tailings dam. Impacts also result from accidents such as the loss of dozens of drums of sodium cyanide from a barge.

People in the vicinity of the mine have had their lives shattered as far down as the mouth of the Fly River. The water is milky, has become shallow and is becoming impossible to navigate. The fish and crabs have gone.

> "Our lives depend on the river system. We are losing food. We have lost our drinking water. Money is not the problem we are looking at. The environment is what we want. All we are asking is that the court should order..to put up the dam so that our environment is protected, our generations coming up next are protected. Money will come today and may finish today, money is not the problem[2]."

The Eighth Supplement Agreement Bill

Legal proceedings have been commenced in Melbourne, by landowners representing other members of their clans, seeking damages as a result of discharges from the mine to the Ok Tedi River.

As found in the recent Victorian Supreme Court contempt proceedings, BHP engaged solicitors to help draft a Bill for the PNG Government, known as the Eighth Supplement Agreement Bill which would have had a major impact on these preceedings had it been passed. The agreement was signed by all parties on 4 August 1995 but, following contempt preceedings in the Victorian Supreme Court, the legislation was withdrawn. The legislation will now be introduced into parliament in a different form.

The Eighth Supplement Agreement is to apply notwithstanding anything in other law in the country.

Although human rights are guaranteed in the Constitution of PNG, Clause 38 of the Constitution provides a general qualification on these rights. These rights can be regulated or restricted for the purpose of giving effect to the public interest in matters such as public safety, the protection of children and persons under disability, but only to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

The Eighth Supplement Agreement Bill is expressed to be a law for

> "the special benefit, welfare, protection and advancement of females children and young persons, members of underprivileged and less advanced groups and residents of less advanced areas".

While expressed as a law within Clause 38 of the Constitution to protect women, children and underprivileged people, in my opinion it is a law for the special benefit, welfare, protection and advancement of BHP.

The Minister had power to make all grants required under the Eighth Supplemental Agreement and was not bound by any law requiring any consent, approval, report, appeal procedure or formality. That no doubt would address issues such as natural justice, appeal provisions or the requirement to consider advice or recommendations.

Clause 8 of the Bill made it an offence to contravene certain provisions of the Agreement. I shall deal later with one of the provisions, clause 29F. The maximum fine is 100,000 kina

(approximately $100,000 Australian). A person who aids abets counsels or procures or is a party to a contravention of 29F is also guilty of an offence with the same maximum fine.

The Eighth Supplement Agreement
Turning to the Agreement itself, a schedule to the Bill, there are several self-serving recitals including the following:

> E "Foreign lawyers have been active in connection with this litigation or attempted litigation and have raised unrealistic expectations among persons affected by the company's operations as to the compensation those persons may expect to receive. This litigation or attempted litigation if allowed to run its course, is likely to take an extremely long time to resolve and to be very expensive for everyone involved in it. Significant social unrest and disharmony would be likely to result. It is contrary to the national interests of Papua New Guinea for this to be allowed to happen."
>
> F "The State, the Company and the Corporate sponsors have always recognised that persons who are adversely affected by environmental damage as a result of the company's operations must be fairly treated and adequately compensated."

In my opinion, the cynicism of these changes is breathtaking when you think of the foreign lawyers "active in connection with" a devastatingly polluting multinational company funded by foreign investors.

"Compensation claim" is defined to include any claim in connection with the project or the agreement or any law that relates to the Agreement, in connection with the disposal of waste, pollution of the environment or any effects resulting from the company's operations upon the physical environment, the streams and rivers, the inhabitants and the biota of the mining area, any loss or damage to property.

This appears to be wide enough to cover liability for any damage resulting from the operation of the mine, including worker's compensation, occupier's liability and vicarious liability for actions of the company's employees.

"Compensation proceedings" means any proceedings whether in Papua New Guinea or elsewhere, presumably by those "foreign lawyers", in connection with a compensation claim, subject to exclusions which do not concern Clause 29F.

Clause 29A inserts a formula for an amount of general compensation to be paid to the provincial government. According to media reports, this amounts to approximately $110 million.

Clause 29B provides limits on that compensation; if the company is obliged to undertake capital spending to mitigate the company's impacts on the river then the amount of general compensation is reduced.
Clause 29F provides, in my opinion, the real crunch. It is clearly aimed at the litigation commenced in Melbourne against BHP.

> F.2 Neither (a) a non citizen nor (b) any other person
>
> shall directly or indirectly commence or maintain or otherwise continue any compensation proceedings.
>
> F.3 Neither (a) a non citizen nor (b) any other person
>
> shall directly or indirectly assist any person to commence or maintain ... any compensation proceedings.
>
> F.4 Without limitations to Clauses 29F.2 and 29F.3 neither
>
> (a) a non citizen nor (b) any other person
>
> shall give evidence in or directly or indirectly assist any person to give evidence in any compensation proceedings.
>
> 29.F5 Neither
>
> (a) a non citizen nor (b) any other person
>
> shall register or enforce or commence any suit upon or otherwise do anything to give effect to any judgment or order given in any compensation proceedings....

The Effects of the Eighth Supplement Agreement Bill
In combination with Section 8 of the Bill, clause 29F makes it an offence for lawyers to advise or act for people who have suffered damage through the company's operations. This law will make the plaintiffs, their lawyers and their experts criminals. It will be an offence for a court officer to file a document in a court registry[3]. Compensation is limited, decided by the provincial government and not open to claims.

As found by the Victorian Supreme Court, we effectively have the Big Australian helping the PNG government pass a law which says that abolition of fundamental rights to property, clean water, fishing and hunting is justifiable in a democratic society. BHP apparently fears the scrutiny of the courts in a country whose government it can influence but not control.

BHP's chief executive says:

> "In the final analysis it is the sovereign government of PNG that has the accountability and responsibility in this matter. They are responsible for determining in the end whether the circumstances are appropriate".

What happened to ESD? Or corporate responsibility? All the recommendations and codes of conduct in the world mean nothing when there is a dollar to be made.

It has been interesting to watch BHP use of the media. Tactics include denial that there is a problem; accusing critics of being misleading, being selective etc; then saying that studies are

being done, matters are in hand, the company is co-operating with the government.

Mr Laver, BHP's General Manager, external affairs, in a letter to the Australian, accuses Ralph Nader, the US consumer advocate, of "a cavalier attitude to the truth".

He goes on to say that tailings are

> "ground up natural rock and not in any way toxic to the river system"

Next they'll be calling it mineral water and trying to sell it to the local people.

OTML has called an ACF study done in 1993 "a selective use of information".

In the Supreme Court of Victoria Justice Byrne referred to the "tendentious and misleading conduct" by the general manager of BHP in PNG in relation to a letter summarising an engineering report on the tailings dam which was sent to the PNG Prime Minister. He said the summary contained "selective passages" and "did not provide a fair summary".

Implementing ESD at a National Level in Australia

Back at home, the Commonwealth government is overhauling two major pieces of environmental legislation which are highly relevant to the mining industry. These relate to hazardous waste and environmental impact assessment. Here the mining industry is again very active in trying to restrict democratic rights.

The Commonwealth proposes to include more open standing in its review of the **Hazardous Waste (Regulation of Exports and Imports) Act**. As to the effect of such a provision, the Minerals Council of Australia has obtained legal advice which is at the loopier end of the spectrum or is wrong.

The advice asserts that

> "in our view, if all that is required to gain standing for judicial review is to modify the object or purposes clause of an organisation or association, the Court's power to exclude vexatious litigants and protect the interests of bona fide participants in the scheme set up under the Act will be largely removed. The overall effect will be to essentially give a carte blanche to vexatious third party litigants and open the process to abuse ..."

In my opinion the above is plainly wrong. The proposed amendment would have no effect on the Federal Court's power to control vexatious litigants. Any vexatious action could be stayed as an abuse of process or struck out.

The EPA's discussion paper, **"Public Review of the Commonwealth Environmental Impact Assessment Process"**, contains eight guiding principles for reform adopted by the EPA, including to provide real opportunities for public participation in government decision making and to provide accountable decision making.

Open standing and access to information are key parts of fulfilling these objectives, yet we anticipate that the same emotional and unsubstantiated tripe about "vexatious litigants" will be trotted out by the mining industry if and when legislative proposals are put forward by the government.

It is not consistent to purport to support the principles of ESD on the one hand and to vigorously oppose open standing to seek justice in courts on the other.

Future Risk

Current practice is important when assessing the future risk of mining in PNG.

> "The public's assessment of risks is quite rationally based on judgments concerning the forms of control of the risks; this includes institutional judgments of the performance, openness and overall "social demeanour" of the relevant industries and regulatory bodies; in turn this logically requires empirical study of past institutional behaviour in these respects[4]".

Civil war on Bougainville started as unrest about environmental damage. At Ok Tedi, the common law is being used as a way of forcing corporate and government greed to internalise environmental costs. People in remote areas are beginning to learn that the courts represent a viable alternative to self help and violence. By denying legitimate property rights and access to due process of law, the people may be left with little option but to again help themselves outside the legal process.

Political risk in PNG is being heightened by the imposition of a "structural adjustment program" by the World Bank and the IMF. This includes the lifting of price controls for essential food items, abolition of the minimum wage and the abandonment of financial, police and intelligence checks on foreign investors.

Another part of this program is the move to a new system of land ownership to facilitate large scale development. This is not a popular move either.

In the face of these developments we have a new mine starting in PNG on the island of Lihir. How is this new mine dealing with this risk?

The Australian Government, through the Export Finance Investment Corporation, has given the mining company $US250 million in political risk insurance. That is, if things turn nasty, EFIC will guarantee the principal and interest for the investors. Australia has removed the very element which would have driven the mining company to work to respect the local people and environment.

BHP

BHP may not care what people think about its actions, but they may affect future performance of the company. Ralph Nader is quoted in the Australian saying:

> "BHP is now trying to expand in the US and

> Canada but we are going to be in their face every step of the way".

In my opinion, the systematic and arrogant destruction of the environment being perpetrated by BHP in PNG, one of the largest ever mining devastations of the environment in the world, compares with the recent actions of the French in the South Pacific.

It cannot be good for corporate morals or the achievement of corporate goals for people who respect the environment to know they work for a company which fouls the waters and land of subsistence landowners, and then assists in drafting an Act of Parliament to remove these people's rights in a way which Australians would not tolerate.

Conclusion

You may have seen the mining industry ads on TV some time ago,

> "Where would we be without mining? It's essential"

with the stove disappearing, peoples clothes disappearing, the house falling down. Of course the ads present a false dilemma. The choice is not all or nothing. And even if it were, the people of the Fly River might have a different response about where they would be without mining.

The choice of when, where and how to allow mining involves value judgments about environmental and social costs as well as benefits. To determine these limits we use democratic processes. The common law can assist when greed causes the inherent limits of property rights to be ignored. Removing democracy and people's right to property is a short sighted and counter productive approach.

Lawyers too have a responsibility. Being advocates for a client is one thing but assisting in the removal of fundamental democratic rights is questionable behaviour.

The Federal Government has recently called for a Code embodying such principles. One wonders what the effect of yet another code would be. The Chairman of BHP agrees that it is already supposed to be BHP's policy to apply the same standards of environmental protection in PNG as in Australia.

The Lihir mine will be the next big test in our neighbourhood of the mining industry's commitment to ESD. With 330 million tonnes of waste to be dumped in the island's harbour and 89 million tonnes of tailings proposed to be piped straight into the ocean as "international best practice", killing the reef for at least 7 km; and with "political risk" insured by the people of Australia, things don't look good for the future. I hope to be proven wrong.

Endnotes

[1] "Mining and Environmental Protection in Papua New Guinea", Kibuta Ongwamuhana. Environmental and Planning Law Journal Volume 8 No 2 June 1991.

[2] ABC Radio, Background Briefing, 20 August 1995.

[3] The last example is not far fetched. I refer to Gabara v. Newell, unreported judgment of Doherty J in the National Court of PNG, handed down on 27 June 1995. This was a case where the Registrar of the Court became a protagonist and refused to file writs on behalf of affected landowners on the Ok Tedi and Fly Rivers.

[4] Wynne, "Frameworks of Rationality in Risk Management" in Brown AJ, Prayers of Sense and Reason, p.403 EPLJ Vol 9 number

Helman
v.
Byron Council and Batson Sand and Gravel Pty

In the June 1994 edition of Impact we provided a case note for Broken Head Protection Committee and Peter Helman v. Byron Council and Batson Sand and Gravel Pty Ltd, a case heard in the Land and Environment Court. On 1 August 1995, the Court of Appeal delivered judgement in the Appeal which was lodged in this case.

By way of summary, an environmental impact statement had been prepared in relation to a sand and gravel quarry. An FIS was required but was not placed on exhibition. The EIS which was exhibited was not adequate to include the requirements of an FIS. Justice Pearlman held that the object of the legislation was to require the public to be alerted to the impacts of the proposed development. So long as the development application and the documents which accompanied it, which were on exhibition, were adequate for that purpose, the object of the Act would be met. In this case, her Honour held that the object of the Act had been met and there was no reason for the FIS to have been publically exhibited.

The Court of Appeal considered the effect of the failure to comply with the public participation provisions of the law, which failure was not in issue. Did the breach mean that development consent could not be granted?

The Court applied the principles in Tasker v Fulwood (1978) 1

NSWLR 20 at 23-24, noting the following propositions.

(1) The problem is to be solved in the process of construing the relevant statute

(2) The task of construction is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done..

(3) The only true guide to the statutory intention is to be found in the language of the relevant provision and the scope and object of the whole statute

(4) The intention being sought is the effect on the validity of the act in question, having regard to the nature of the precondition, its place in the legislative scheme and the extent of the failure to observe its requirement..

(5) It can mislead if one substitutes..an investigation as to whether the statute is mandatory or directory.."

The Court looked to the language which is in mandatory terms, governed by "shall" in each case.

Next the Court looked at the framework of the legislation and noted the importance that parliament attached to the objection procedure.

The Court held that section 77, which defines the form and content of development applications in mandatory terms, imposes obligations in the nature of a condition precedent directed to ensuring the Councils have the benefit of the views of objectors before making a decision on a development application.

> "In the result, late lodgement of the FIS bypassed the statutory requirement that such a document be available for inspection and consideration by the public."

The Court quoted with approval other cases which construed the obligation in a similar way. For example in Pioneer Concrete v Brisbane City Council (1980) 145 CLR 485 at 518 where Wilson J said

> "The imperative underlying my conclusion is the importance of a faithful adherence to the provisions of the Act and ordinances so that the interests of all parties concerned ... are protected."

and further

> "One may never know whether a proper application and adequate advertisements would have alerted other citizens who would have exerted their rights to participate as objectors."

The Court went on to say that

> "The problem in these cases is that the Court has no means of knowing whether other objectors may have come forward and other objections have been raised had there been proper compliance with the statutory requirements."

A question remained as to the Court's jurisdiction in Class One proceedings to deal with questions of law. The Court confirmed what is generally regarded as settled law. The Land and Environment Court can entertain legal objections in merit appeals.

Finally, there was a challenge to the validity of the consent conditions, because a particular condition required surveys of endangered species to be done and forwarded to the Council to determine, in consultation with the NSW National Parks and Wildlife Service, the need for a section 120 licence to take or kill endangered fauna. If a licence was required then no clearing or quarrying was to proceed in those areas until the licence had been issued. The challenge was on the basis that there was no "finality" to the decision.

The Court noted that the development consent does not confer a positive authority on a company to carry out development authorised under the consent. It does no more than relax the relevant prohibition in the Environmental Planning and Assessment Act. The company was in any event obliged to comply with the National Parks and Wildlife Act.

The Court examined Commercial Radio Coffs Harbour Ltd v Fuller (1986) 161 CLR 47 where the High Court held that a radio broadcasting licence issued under the Broadcasting and Television Act did not enable the licensee to construct and use a radio transmitting station without obtaining development consent under the Environmental Planning and Assessment Act. (The EDO acted for Fuller in these proceedings.)

While all of the above findings appear simply to confirm settled law and principles, it was vital for environmental protection that this appeal was pursued. It is a reminder that while we have reasonably good participation principles in NSW, the community must be eternally vigilant to protect them and ensure that they are not eroded.

CRAWL BEFORE YOU WALK -

The story of the Development and Operation of the Environmental Law Community Advisory Service in South Australia

John Scanlon, Founding Chair, ELCAS, Environmental Law and Policy Consultant
and
Paul Leadbeter, Former Chair, ELCAS Director, Australian Centre for Environmental Law (University of Adelaide)

1. The Start

The development of the Environmental Law Community Advisory Service (SA) Inc (ELCAS) is a story about the efforts of a dedicated group of environmental practitioners who decided that it was time to do something about the communities lack of access to legal advice and representation in relation to environmental problems. This group, known as the Steering Committee, was drawn from the legal profession, academics, the conservation movement and students. It developed a great deal of momentum and enthusiasm and drew upon an extensive network to support the concept of establishing an environmental law advisory service.

ELCAS was set up officially in 1992. For some years prior to that there had been a very informal network of barristers and solicitors within South Australia who were prepared to give advice and assistance on a pro bono basis in relation to public interest environmental law matters.

Extensive efforts over many years by Associate Professor Rob Fowler, from the Law School at the University of Adelaide, to attract substantial funding for a National Environment (public interest) Law Firm did not eventuate and if Rob could not attract funding, it was felt that no one could! With the benefit of this experience the Steering Committee recognised that funding for ELCAS was not likely in the short term. However that was not seen as a reason for doing nothing. It was decided that if enough resources could be found to at least get started we would be able to provide a voluntary service and in the process ascertain the extent of the community need for the service (even if we were unable to meet it). It was thought that if a need did exist (which, from our collective experience, we were sure it did) and we could demonstrate that need, then we would be better placed to attract funding in the future. In essence we decided to crawl before we attempted to walk.

The objectives of ELCAS are to assist persons who otherwise would not be able to obtain access to traditional environmental legal services. It also aims to increase the awareness within the community of legal remedies and other non-litigious approaches for resolution of environmental disputes.

Some limited funding (for printing brochures and the like) and a location for an Advisory Service was what was necessary to get started and the Environmental Law and Policy Unit (now ACEL (Adelaide)) and the National Environmental Law Association (SA Division) (NELA) were approached for donations of $500 each. A good relationship had already been developed with the Bowden Brompton Community Legal Centre and they were asked about the possibility of using their premises on a Thursday night for the Advisory service. The ELPU and NELA agreed to make donations of $500 and the Bowden Brompton Community Legal Centre agreed to make its premises available for the Advisory Service free of charge.

We were away! ELCAS now had enough money to get started and a location for its' Advisory Service. The organisation was quickly incorporated and ELCAS was formally launched by Chris Sumner, the then Attorney General for SA, on 4 June 1992 at the Bowden Brompton Community Legal Centre, the day before World Environment Day and the start of the Earth Summit.

A Management Committee was established and it went about setting up an Advisory Panel of legal practitioners to give free legal advice on a Thursday night. The response from the profession was fantastic, with 27 lawyers agreeing to participate and 3 legal firms and 3 barristers agreeing to participate in a pro bono scheme (both of which are explained in further detail in this article).

The Management Committee also set about writing, printing and distributing a brochure to over 100 community groups and councils and having articles published about ELCAS in a wide range of publications. Publicity was also obtained through several television and radio news items and the Committee made a point of both writing to and (where possible) meeting with politicians from all three parties. This resulted in the Liberal Opposition giving support to ELCAS in its' 1993 pre-election policy statement on the environment.

2. On-going Funding

Funding was always going to be a problem for ELCAS and the Committee immediately set about looking for other sources of funding. This included establishing a strong relationship with the NSW EDO (through Maria Comino) to look for ways of making joint applications for funding. This resulted in some early success with the Minister for Environment Sport and Territories approving a grant of $2,800.00 in 1993 to facilitate national networking between the EDO's in NSW, Vic, Qld and SA (ELCAS).

Apart from the initial seeding grant of $1000 ,a grant of $3000 was provided by the Law Foundation of South

Australia and another $5000 came under the Grants to Voluntary Conservation Groups from the federal government, Department of Environment Sport and Territories. The South Australian Minister for the Environment and Natural Resources, Mr David Wotton has provided ELCAS with the sum of $30,000 to be paid in an amount of $10,000 per year over three years.

3. Membership, Management and Pro-Bono Panel

Membership of ELCAS is open to anyone who supports the organisation's objectives. There is a nominal sum of $10 payable as an annual membership fee.

In addition to members there is a panel of voluntary advisers who are legal practitioners. ELCAS is also beginning to collect the names of professionals in other fields who are prepared to offer their services to ELCAS on either a pro bono or fee reduced basis as experts in relation to environmental matters. To date we have a couple of planners and a firm of architects on the list as professionals offering assistance to ELCAS.

ELCAS also maintains a pro bono panel upon which the names of various lawyers is kept. Those lawyers can be either firms of solicitors, sole practitioners or barristers. To be on the panel they must have all indicated they are prepared to give assistance on a pro bono or fee reduced basis.

Management of ELCAS is undertaken by a management committee of nine members. The committee's membership has been predominantly lawyers although there are also representatives of conservation groups on the committee. Since April 1995 ELCAS has employed a part time administrator for one day a week. He is a lawyer but essentially has very limited time to involve himself in legal advice. The administrator's role includes coordinating the advisory service, ensuring that communications with the various government departments and conservation movement are kept open and generally being the first port of call for anyone wishing to make enquiries of ELCAS.

4. Legal Advice Service

ELCAS joined the South Australian Council of Community Legal Centres. Its Thursday night advisory service operates out of the Bowden/Brompton Community Legal Centre in the inner western suburbs of Adelaide. A filing cabinet is maintained at the centre which contains all of the relevant ELCAS files and all ELCAS records regarding people who have sought advice and assistance from the service. The Bowden/Brompton Community Legal Centre also act as a receptionist for ELCAS. They take bookings for people wishing to get advice from the advisory service and are also able to refer people on to appropriate members of the management committee or the administrator where that is deemed necessary.

The main function of ELCAS to date has been the Thursday night free advisory service. It is staffed by volunteer lawyers who will from time to time be joined by law students. Advice is meant to be of a preliminary nature and in each case given for the duration of no more than 30 minutes. If the person providing advice believes that the matter is of particular public interest and deserves further assistance it can be put to the management committee on that basis. If the management committee believes it is an environmental issue of public interest and wider community importance it will seek assistance from the profession for the persons involved.

Once ELCAS finds assistance it has no further role regarding the arrangements struck between the lawyers and the client. However, as a matter of policy, ELCAS does ask the lawyers appointed either on a pro bono or fee reduced basis to provide ELCAS with a report on the final outcome of the matter for our records. Generally, however, the grapevine in Adelaide is fairly small and we will have heard of the outcome of cases of that nature.

5. Other ELCAS functions

ELCAS also provides comments on changes to legislation, new legislation and policy proposals.

It seeks legal assistance and pro bono/fee reduced assistance from lawyers for groups and individuals deemed worthy of assistance. In each respect the members of the management committee who have strong contacts within the profession have proved to be invaluable. They have been able to call upon their contacts to try and obtain assistance from time to time with respect to various issues.

Community education is the last main function undertaken by ELCAS. It has been involved in the presentation of various seminars the most notable of which is the Defending the Environment Conference run by ACEL (Adelaide) normally in May in each year. In 1995 ELCAS sponsored the Defending the Environment Conference and has already indicated to ACEL (Adelaide) that it will sponsor the 1996 conference.

The organisation has been involved in preparing environmental law fact sheets which contain information on various relevant environmental law matters in South Australia. They are modelled on an environmental law fact sheet put out by the Environmental Defender's Office in NSW and designed to give people preliminary legal advice in various areas. The preparation of the fact sheets has been undertaken by law students, then settled by lawyers with knowledge in the particular area.

ELCAS has also been involved in training programmes for the general public. For example, earlier in 1995 ELCAS assisted the Legal Services Commission with a training program entitled "Law for Non-Lawyers from an Environmental Law Perspective". The program was very successful with a strong demand from participants. ELCAS hopes that this may be able to be an ongoing initiative.

6. Nature of enquiries to the advisory service

Approximately thirty percent of all enquiries come from community groups and conservation bodies, the rest from individuals.

Sixty percent of the enquiries are land use planning related.

That essentially reflects the fact that in South Australia, up until the proclamation of the *Environment Protection Act* in May 1995, the predominant piece of environmental legislation and, indeed, the only piece to grant any third party rights, had been the planning legislation.

With the proclamation of the *Environment Protection Act* on the 1st May 1995, limited third party rights became available. It remains to be seen how that will influence future trends. The Environment, Resources and Development Court in South Australia has a very general power enabling it to join parties to an appeal (see s17 *Environment Resource and Development Court Act*, 1993). A recent decision of the Supreme Court considered this particular provision in relation to the planning legislation. The Supreme Court have indicated that joinder of parties to appeals which have already been instituted may in the future be possible in more situations than was previously anticipated. If the court as a matter of practice is starting to increase the rights of people to be joined to appeals by a developer then it is likely there will be a greater call for ELCAS assistance.

ELCAS has since its inception been keen to involve law students in its activities. Student representatives from both Adelaide University and Flinders University sit on the management committee. Those students normally take on the role of enlisting the support of interested students at their respective university. The students also attend the advisory service and to date have been used on a number of occasions to provide research assistance for opinions being prepared by lawyers on the pro bono panel, for the preparation of matters for litigation and for the preparation of the environmental law fact sheets.

8. Some Final Comments

In terms of general observations or comments on the development of ELCAS we would suggest the following:

(1) Don't become too big too quickly.

(2) It is essential to have the support and backing of the local legal profession.

(3) The support of relevant politicians is of enormous assistance.

(4) Do involve students because they are a source of talent and unbridled enthusiasm which can be most refreshing and extremely helpful. Students also like to be involved because it gives them the opportunity to come into contact with members of the profession in the area in which they are interested and there have certainly been a number of job opportunities for students which have arisen out of a contact which they made in ELCAS.

(5) It is essential to maintain good ties with the peak conservation groups but do not become beholden to them. The same can be said for the contacts with politicians.

(6) Sharing premises with a community legal centre or a similar organisation can be very helpful in reducing costs, and building up some camaraderie and support.

(7) It is important that the organisation continually work on its public profile and keep its name up before the general public at all times.

(8) If possible the organisation should provide comments on legislative change. The government and the opposition generally appreciates such comments and it again helps reinforce the position of the organisation in the community. It is useful to make sure that comments suggest a solution to that problem or an alternative provision.

(9) Finally, as we have experienced, the employment of an administrator even on a part time basis is a very cost effective approach. ELCAS has saved an enormous amount of time for individual members of the management committee by having the services of our administrator, James Blindell.

SUGAR INDUSTRY INFRASTRUCTURE PROGRAM AND THE MAHOGANY GLIDER

James Johnson, Solicitor, Environmental Defender's Office

The EDO recently provided advice for World Wide Fund for Nature Australia on whether or not the Commonwealth Government had complied with the Environment Protection (Impact of Proposals) Act 1974 with respect to the Sugar Industry Infrastructure Program.

The Federal Government funds a number of initiatives under the program. One of the eligibility criteria for project selection for funding includes that the project should result in industry expansion through increased acreage.

The program includes the construction of cane railways, drainage of wetlands, the construction of dams and weirs and other works.

Several individual initiatives under the program had been designated. The question arose as to whether the program as a whole was a "matter affecting the environment" to a significant extent and where the provision of funding for it came within the definition of a "proposed action".

With the gazettal of the new administrative procedures on 5 May 1995, the question then became whether the Commonwealth's action in funding the program was "an environmentaly significant action".

In our opinion, the Commonwealth Government was in breach of the EP (IP) Act. Under the new administrative procedures, in our opinion it is clear that the provision of funding for a program is the relevant "Commonwealth action" which is the trigger for assessment. This is an example of the new administrative procedures requiring designation of a program rather than individual developments. Providing Commonwealth Government agencies abide by the new procedures, the way is clear already for the evaluation of programs of work, as opposed to individual proposals. It would be unlawful to artificially split the program into smaller projects, some of which may not be considered to be "significant". Also the significance increases when regard is had to the additional clearing and use of pesticides and fertilisers the program will facilitate.

The Mahogany Glider

The Mahogany Glider, found in Queensland, was presumed to be extinct until 1989. The remaining gliders are under serious threat particularly if land clearing under projects such as the Sugar Industry Infrastructure Programme is allowed to continue at its present rate.

On 20 October 1995 in a joint statement, the Queensland and Commonwealth Governments announced a $16 million package to protect the endangered Mahogany Glider and other flora and fauna along the Queensland coast. Called the Sugar Coast Environment Rescue Package, the package would enable more than 38 000 hectares along the Queensland coastline to be voluntarily acquired. The sites identified are important habitat and will become a network of national parks which will be managed to aid the recovery of the species.

The Nature Conservation (Mahogany Glider) Conservation Plan 1995 will be made under the Nature Conservation Act 1992 to give effect to this protection. It was worth noting that in section 3 of the discussion draft of the plan which has been released, it was stated

3(1) the Mahogany Glider has only been recently rediscovered and there is little information available about conservation of the glider.

(2) However, on the basis of the precautionary principle the purpose of this plan is to ensure the conservation of the Mahogany Glider by limiting threatening processes to the glider's habitat, by providing for

> (a)the continuation of existing uses of the habitat that are compatible with the conservation of the glider; and
>
> (b)so that future uses of habitat that are compatible with the conservation of the glider.

Before anybody thinks that this is groundbreaking recognition of the precautionary principle coming from Queensland, this is not a good example of the application of the precautionary principle at all. Enough information is known about the species, which was presumed extinct, to know that unless action is taken the species will in fact become extinct in the near future. There is not a question of scientific uncertainty; that time has passed.

However, the program seems to be a positive step even if environmental assessment processes appear to have been defective at the Commonwealth level.

ANTI - TEOH BILL WITHDRAWN

Lisa Ogle, Solicitor, Environmental Defender's Office

The so called "Anti - Teoh Bill" has been withdrawn from consideration by Federal Parliament.

Given that there will now be an election in 1996, it appears increasingly unlikely that this Bill will be debated by this Parliament. The Bill was supported by both major political parties, but was strenously opposed by community and environmental groups.

The Federal Government proposed to introduce the *Administrative Decisions (Effect of International Instruments) Bill* to overturn the effect of the recent High Court case of *Minister for Immigration and Ethnic Affairs v Teoh* (see "International Treaties and Legitimate Expectations" (1995) 38 Impact 10).

In the Teoh case, the High Court held that ratification by the Commonwealth of an international convention gave rise to a *legitimate expectation* that an administrative decision would be made in accordance with that convention.

Consequently, if a decision-maker proposes to act in a manner contrary to a convention, then procedural fairness dictates that a person affected by that decision has a right to make submissions to the decision-maker against adopting the proposed course of action before the decision is made.

The failure of the Bill to be enacted into law this year means that, for the time being, decision-makers who fail to notify and hear from persons who will be affected by a decision which are not in accordance with Australia's international treaty obligations, may find the decision being challenged in the courts. Decisions made in the State context may also be open to challenge.

In the environmental area, relevant international conventions to which decision makers must have regard under the Teoh case include the Ramsar Convention on Wetlands, the Convention on Biological Diversity and the Convention on the Conservation of Nature in the South Pacific (APIA Convention).

The Progress of EDOs in other States

Following the Justice Statement in May 1995 which proposed to establish a national network of environmental lawyers, with an environmental law service available in every state (see ED Winter 1995), EDOs are being established nationwide.

Western Australia

Concerned lawyers and the Conservation Council of WA are pleased to announce the formation of the Environmental Defender's Office (EDO) in WA. For many years much environmental law advice and representation in WA has been provided in the public interest by concerned lawyers who have been prepared to act on a low-fee or no-fee basis. Over 20 legal actions in WA within the ambit of environmental law have been conducted since the late 1980s.

With no legal aid available for environmental cases in WA and only limited assistance from the Law Access program of the Law Society of WA, the EDO will greatly expand the provision of legal services to protect the environment.

A part-time project officer has been employed to help establish the EDO and it is hoped that a full-time environmental lawyer and office co-ordinator will start in December 1995. EDO WA will be located at First Floor, 33 Barrack St, Perth, tel (09) 221 3030, fax (09) 221 3070. Contact Margaret Robertson.

Victoria

As a direct result of the Access to Justice initiative, EDO Victoria has appointed a second on-staff solicitor, Michael McNamara. He joins Chris Loorham.

EDO Victoria's address is: 1st Floor, 504 Victoria St, North Melbourne, Vic 3051 Tel: (03) 3284811 Fax (03) 326 5687 Our internet address is: bathedo@melbpc.org.au

South Australia

ELCAS (The Environmental Law Community Advisory Service of South Australia) is poised to advertise a full-time solicitor's position as soon as the funding from the Access to Justice package comes through. James Blindell has been acting an administrator since March 1995 for one day per week. With a full-time solicitor, ELCAS will now be able to give legal advice to the community.

ELCAS is located at Bowden Brompton Community Legal Centre, 19 Green St, Brompton, S.A. 5007. Tel (08) 346 9394 Fax (08) 346 9477.

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THANKS...

The EDO would like to thank all of you who have given us your support over the years and we look forward to your continued support in the years to come. Special thanks go to all the volunteers who have put in many hours of hard work which have been vital to the EDO. As the fight to protect and conserve our environment becomes more pressing, your support is all the more critical.

Changes to the EDO Board

We would like to thank departing members of the Board, David O'Donnell, Patrick Quinlan, Chloe Mason and Paul Murphy for all the hard work and dedication they have given to the EDO. Special thanks to David O'Donnell, who leaves as Convenor having been on the Board for 10 years. We welcome Bruce Donald as the new Convenor, Matthew Baird and Amanda Armstrong as new Board members.

Thanks also to the following barristers who have appeared for or advised EDO clients in 1995 at substantially reduced fees:

	Case
Matthew Baird	Water
John Basten, QC	TCT/NCEC
Robert Beech Jones	TCT/ NCEC
Peter Callaghan	Mushrooms
Patrick Larkin	Mushrooms/Bushfires
John Griffith	TCT
Lucy McAllum	Coastwatchers
Bruce McClintock	Maybury Defamation
Peter Neil	DREG
Tim Robertson	Various Advices
Jonathon Simkins	Friends of Wolli Creek
John Thompson	Maybury
Chris Whitelaw	CRAG
Neil Williams	TCT/NCEC

We wish all our members, supporters and clients a very happy Christmas and a productive new year.

Keep up the good work!

TCT v. Gunns Update

On 26 September 1995, the EDO commenced proceedings on behalf of the Tasmanian Conservation Trust against the Minister for Resources and Gunns Limited. The application seeks to review the decision of the Minister for Resources on 18 July 1995 to grant a woodchip export licence to Gunns Limited, together with other decisions designating Gunns.

The hearing took place in the Federal Court on 5 & 6 December 1995. In the meantime, the EDO has written to the Minister for Resources and the Minister for the Environment for reasons for their decisions surrounding the issue of the 1996 licence to Gunns.