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PREVENTION IS BETTER THAN CURE:

TOXIC CHEMICAL POLLUTION, COMMUNITY RIGHT-TO-KNOW AND TOXICS USE REDUCTION

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"In our current state of environmental consciousness ... it is the area of the law regulating emissions into the environment and the disposal of waste which we ordinarily associate with pollution control, rather than ... preventive measures..."[1]

"By acting with righteous vehemence against the visible end- products of pollution, we avoid asking harder questions about global resource allocation and the sustainability of existing industrial, agricultural and personal patterns of behaviour. .... We have legitimized pollution through the very laws that were intended to eliminate it."[2]

INTRODUCTION

A number of states in America have over the last decade implemented "radical" new laws designed to curb toxic chemical pollution using what has become known as "pollution prevention". They focus not on the end of the pipe, but rather, on the the very production process itself, seeking to overcome toxic chemical pollution by encouraging and even compelling users to adopt such strategies as in-plant changes to production processes, substitution of raw materials, cleaner production, recycling within the production process and better design of end-products.

Pollution prevention aims to reduce the total amount and toxicity of pollutants in the environment. This is to be distinguished from pollution control. The former focuses on preventing the generation of chemical wastes before they are released into the environment by implementing changes in the manufacturing process, the raw materials used, the efficiency of the process and so on. By contrast, pollution control assumes that pollution will occur and that the environment has a robust assimilative capacity: it focuses on a regulatory system backed up by discharge permits, emission controls, licences, transferable credits and other end-of-pipe solutions.

The United States experience provides valuable potential instruction for Australia, particularly in view of our obligations under the Rio Declaration on Environment and Development (the "Rio Declaration") and Agenda 21.

Part of the impetus in the United States for the development of pollution prevention laws in the area of toxic substances[3], arose from the community right- to-know legislation

introduced federally in 1986: *Emergency Planning and Community Right-to-Know Act* 1986 (the "CRTK Act"). The first results from the reporting regime established by that Act became available in 1988. They indicated that almost five billion pounds of toxic substances were being released annually directly into the air, water and onto the land.[4] Australia (and NSW) is presently examining the CRTK concept and if the US precedent is anything to judge by, the effect here could well be explosive.

The other crucial impetus for pollution prevention (not just in the United States) is that pollution regulation and control is simply not working well enough. Pollution regulation and control is a slow process frequently impeded by lack of resources, scientific uncertainty, bureaucratic/industry inertia as well as the inherent flaws created by focusing on single media pollution rather than on cross-media effects.[5] It also risks overlooking the cumulative effects of pollution by a myriad of operators too small to justify attention by the regulator and accepts as inevitable certain levels of pollution. Concerning direct effects on human health, a regulation and control regime assumes that there are threshold levels below which no adverse effect occurs and that risk assessment is exhaustive.

TOXIC SUBSTANCES: FACT AND UNCERTAINTY

Due to their ability to wreak havoc on the environment and ultimately on mankind, it is toxic chemicals - rather than all chemicals - which ought to bear the early brunt of pollution prevention measures. Toxicity in relation to humans "is the effect a chemical produces once it has reached a particular organ in the body."[6] The significant characteristics of toxic chemicals are "persistence, bioaccumulation, biomagnification and the propensity to cycle through the environment ."[7]

In the United States, the *Toxic Substances Control Act* 1976 ("TOSCA") authorises the Environmental Planning Agency ("USEPA") to regulate the production and use of chemicals when it finds that:

> "... there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment..."[8]

This type of legislative scheme leaves the USEPA with no acceptable response to scientific uncertainty. The decision-making process disintegrates when faced with scientific uncertainty: despite the large numbers of toxic chemicals in use, the USEPA had, as at the early 90's, only regulated a handful of chemicals under TOSCA.[9]

Difficulties have arisen not only under TOSCA. Well over a decade after the enactment of provisions in the *Clean Air Act* 1967 (U.S.) ("CAA") dealing with the regulation of toxic air contaminants, only 7 substances had been regulated by national emission standards even though the list of "hazardous air pollutants" by that time exceeded 300 in number. Vinyl chloride, for instance, was only regulated from 1986, allegedly more than ten years after its carcinogenic quality was first recognised. In November 1990 significant amendments made to the CAA came into force. Part of the philosophy surrounding the amendments was to emphasise pollution prevention. This is now mildly reflected in the CAA:

> "A primary goal of this Act is to encourage or otherwise promote reasonable Federal, State, and local government actions, consistent with the provisions of this Act, for pollution prevention."[10]

That said, the amendments call for all sorts of scientific investigation and reporting, but do not ultimately enforce pollution prevention.

The *Federal Water Pollution Control Act* 1972 (U.S.) required that the USEPA produce a list of "toxic pollutants" (both singly and in combinations) and then finalise regulations concerning discharge. Discharge would be prohibited without licences and could in theory be completely prohibited. The regulations were to allow for an "ample margin of safety".[11] By 1989, however, few such regulations had been made. That there were going to be problems was clear even by the mid-70's when very little progress on discharge regulations had been made. What had originally been a statute with the possibility of enforcing zero discharge became an early victim of a compromise called "best available technology" .[12]

Before examining the sort of approach that has been implemented by a number of the states, it is appropriate to describe in a little detail one of the catalysts for the increasing concern over the past decade with the level and extent of pollution caused by toxic substances.

TOXIC INVENTORIES AND COMMUNITY RIGHT TO KNOW

There is increasing momentum for the widespread implementation of toxic chemical inventories and associated right-to-know regimes. The (Australian) National Pollutant Inventory ("NPI")is not far away (see below) and the New South Wales Minister for the Environment has indicated that right-to-know is seriously on the agenda for New South Wales. Core international environmental works and documents have referred to the concept too. Agenda 21 devotes attention to toxic chemicals, community right-to-know and inventories.[13]

Chapter 19 of Agenda 21 is entitled *"Environmentally sound management of toxic chemicals, including prevention of illegal international traffic in toxic and dangerous products"*. Community right-to-know is stated to be at the core of achieving "chemical safety". All governments are exhorted to consider adopting community right-to-know programmes as a risk reduction tool.

The World Wide Fund for Nature ("WWFN") views access to information in Agenda 21 as crucial in aiding toxic chemical reduction.[14] WWFN describes how subsequent to the United Nations Conference on Environment and Development ("UNCED") the UN International Programme on Chemical

Safety has coined the term "Pollutant Release and Transfer Registries" for toxic chemical inventories and has already developed guiding principles. The OECD supports this and its Pollution Prevention and Control Group has decided to:

> "... accelerate pollution prevention and reduction by developing basic documents and guidance for launching and operating PRTR's at the national level and, perhaps, the international level."[15]

Toxic chemical inventories are capable of assisting with the realisation of the aim of promoting and practising ecologically sustainable development ("ESD"). One of the key aspects of ESD is the precautionary principle. The precautionary principle holds that where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[16] By giving the public, government, the media, academia, industry etc. a better understanding of the release and use of toxic substances, there exists a greater likelihood that action will be taken to reduce or eliminate the use of toxic chemicals. Inventories can act as a catalyst for action by drawing attention to threats of serious or irreversible damage.

One of the very real gains from toxic chemical inventories is that suddenly there is a "wide range of people ... identifying and solving toxics problems."[17] It is simply human nature that different perspectives and motives will bring the potential for solutions and suggestions well beyond what would ordinarily be expected. Another useful benefit, already paying dividends in the United States (see below), is that public access means public accountability. A particular industry or facility can be monitored to ensure that reduction and prevention programs and initiatives are being implemented and are having tangible, positive effects.

Presently at the federal level, there is precious little information collected about the use of toxic chemicals and none collected on emissions. The *Industrial Chemicals (Notification and Assessment) Act* 1989 (Cth) requires all new "industrial chemicals" to be assessed by the Director of Chemicals Notification and Assessment. However most of the remaining 40,000 chemicals on the inventory maintained pursuant to the Act have yet to be assessed.[18] Further, if the Director is persuaded that publication to the public would substantially prejudice the commercial interests of the applicant for an assessment certificate, the details will be kept confidential.

The Commonwealth Environment Protection Agency ("CEPA") has been working on the NPI in the sense of the twin concepts of a pollutant inventory and associated right-to-know element.[19] The CEPA has issued a Discussion Paper on the NPI and has now received a final report on the "Development of legislative modelling for the National Pollutant Inventory and associated right-to-know in Australia"("Minter Report").[20]

It has not been finally determined whether the NPI will be restricted to releases/emissions of toxic substances. "[T]he question of whether storage, use and processing information should be included in the NPI aroused considerable controversy."[21] While industry favours limiting the NPI, many community environmental groups favour increasing the reportage beyond mere emissions. They favour an approach similar to that operating in the United States.

While community right-to-know will be a welcome arrival on the Australian scene, it will mark one small step in the overall push for greater pollution prevention. The extent to which it contributes will very much depend on the final decisions concerning facilities covered, chemicals targeted, the inclusion of usage details (particularly on a plant by plant basis within a facility), the ease of access and the form in which the information is presented; the willingness of industry to participate in good faith; the ability to enforce the scheme and whether a concomitant right to act on the strength of the data is ever granted.

THE UNITED STATES EXPERIENCE

In 1986 the United States government enacted the Emergency Planning and Community Right to Know (CRTK)Act. It was apparently partly a response to a spate of chemical disasters (including the infamous 1984 Bhopal explosion and the New York Love Canal incident) and mounting community concern over food additives. The emergency planning side of the CRTK Act, while important, is not by and large relevant for the purposes of this paper. I turn to the right-to-know provisions.

Under the CRTK Act, those facilities subject to its reach must submit to the USEPA annually two separate reports. One is a "Hazardous Chemical Inventory Form" and the other is termed a "Toxic Chemical Release Form". The Hazardous Chemical Inventory Form includes an obligation to submit "material safety data sheets"[22] to various authorities and to prepare a toxic chemical inventory report for each designated hazardous chemical for which reporting is required. The inventory report must detail quantities of hazardous chemicals present at the particular facility. The Toxic Chemical Release Form requires those facilities which manufacture, process or otherwise use designated toxic chemicals to report upon releases[23] into the environment, whether such release was lawful or not.[24]

A crucial aspect of the scheme is that the public have access to these reports, subject to "trade secret claims".[25] As such, local communities get a much better idea of the toxic substances being used and released in their locality and can take individual or collective action accordingly. This allows the public to be more informed when lobbying government for change in practices.

A well-known example of community right-to-know in action is the Sheldahl, Inc. case. Toxic Release Inventory data obtained under the CRTK Act revealed that this Northfield, Minnesota facility released 794,000 pounds of methylene chloride into the environment during one year. This chemical is a suspected carcinogen and exposure has been linked to liver and brain damage. The union representing workers at the site had been trying for a number of years to persuade Sheldahl to reduce its release of methylene chloride. Once the 1987 figures became available, however, two community groups were formed and they teamed up with the union to press the case for reduction or prevention of the use and release of methylene chloride. In 1990 Sheldahl agreed to reduce its emissions by 90% within three

years and to eliminate usage entirely as soon as possible thereafter.

More generally, a study conducted about three years after the CRTK Act came into effect concluded that it was having a palpable and positive influence on target facilities. Companies were perceived to be implementing new waste reduction programmes, audit systems and importantly for pollution prevention, reducing the number of toxic chemicals they use and replacing some toxic chemicals with less hazardous substitutes. In 1989 it was reported that over half of all subject facilities had made operational changes based upon their participation in the CRTK Act. These included better inventory control, use of alternative chemicals and improved equipment efficiency. Based on the data from the CRTK Act, the USEPA has asked over 600 United States companies to commit to voluntary reduction of emissions of 17 targeted toxic chemicals.

An innovative response to the information available under the CRTK Act has been the so-called "Good Neighbour Agreement". This is essentially a pact between a particular emitting facility and the local affected community whereby the facility agrees to specific reduction targets for toxic substances. The bargaining chip used by a community is the mutual promise to refrain from mounting legal or administrative challenges to pollution permits/licences needed by the company concerned. Companies in several states have signed legally binding Good Neighbour Agreements covering not just a reduction of emissions but also a cut in the use of specified chemicals. Not surprisingly, the success rate in achieving these sorts of commitments has been significantly better in those states which already have toxics use reduction legislation.

While the CRTK Act and Good Neighbour Agreements have clearly wrought tangible pollution prevention and reduction progress in the United States, systemic improvement cannot be expected without the imposition of laws requiring pollution prevention.

TOXIC USE REDUCTION LEGISLATION

The *Massachusetts Toxics Use Reduction Act* 1989 (the "MTURA") has as its main aims: a 50% reduction in the toxic waste generated statewide by 1997 by means of toxics use reduction; no loss of competitiveness; the entrenchment of toxics use reduction as the preferred method of compliance with toxics related laws; and the general promotion of the reduction of toxics use: s.1 of the MTURA. "Toxics" are those substances the subject of the CRTK Act toxic chemical reporting. "Toxics use reduction" is defined as:

> "In-plant changes in production processes or raw materials that reduce, avoid or eliminate the use of toxic or hazardous substances or generation of hazardous byproducts per unit of product, so as to reduce risks to the health of workers, consumers or the environment, without shifting risks between workers, consumers, or parts of the environment."[26]

The definition then helpfully proceeds to stipulate ways in which toxic use reduction shall be achieved. These include:

- # using non-toxic or less toxic substances
- # making the end product non toxic or less toxic
- # production unit redesign
- # better operation and maintenance of production unit
- # recycling, re-use or extended use of toxics

The two principle features of the MTURA are the obligations to design and implement toxics use reduction plans and to report annually on toxic or hazardous substances manufactured or used on site.

Toxics Use Reduction Plans ("TURP") must be prepared by each large quantity toxics user for each relevant facility, must be certified by a toxics use reduction planner and a summary of the plan must be sent to the Massachusetts Department of Environmental Protection. They have to be updated and recertified every two years. A TURP must include the overall management policy for the reduction of toxic or hazardous substances and a statement of the scope and objectives of the TURP. For each toxic or hazardous substance, for each production unit within the facility there must be

- # an analysis of current and projected toxics use, by-product generation and emissions;
- # an evaluation of the types and amounts of toxic or hazardous substances used;
- # current and projected use of toxic or hazardous substances, and byproduct and emission estimates;
- # identification of the economic impact of the use of each toxic or hazardous substance;
- # technical and economic evaluation of appropriate technologies, procedures and training programs which would assist in the reduction or elimination of toxics and an estimate of the costs of implementation and the costs savings;
- # implementation schedules for these procedures;
- # 2 and 5 year reduction goals for each listed toxic or hazardous substance.

The annual reports require a large quantity toxics user to file with the Department of Environmental Protection a report on each listed toxic chemical or hazardous substance manufactured, processed or otherwise used during the reporting year.

The 50% reduction target referred to in the beginning of MTURA is repeated more specifically in s.13 and captioned the "Statewide Reduction Goal". Toxic or hazardous byproducts generated by industry are to be reduced by 50%, compared with a 1987 baseline, through toxics use reduction. To encourage toxics use reduction, the MTURA also established the Office of

Toxics Use Reduction Assistance and Technology. As the title suggests, the Office provides technical assistance. On the research front, the MTURA far-sightedly facilitated the establishment of a Toxics Use Reduction Institute as part of a Massachusetts university.

Significant penalties may be imposed upon toxics users who violate any provision of MTURA. Wilful violation of the planning and reporting requirements attracts a fine of between $2,500 and $25,000 per day. Violations by any person of any part of MTURA (except in connection with the levies charged) can result in a fine of up to $25,000 per day.

Stenzel emphasises the worker-community coalition that is forged through toxics use reduction statutes such as the MTURA. Whereas workers faced with community lobbying in favour of protection of the environment must often choose between jobs and environmental degradation, the issue of workers' occupational health unites the two groups. Stenzel also points out that by requiring TURPs which address use and release into the environment, no one media is isolated and the result is a more holistic approach. She favours the "non-punitive, co-operative approach" adopted by the MTURA as more sophisticated and better public policy than a no-discretion punitive model. In considering the "feasibility'" of toxics use reduction, she recites how Cleo Wrap, one of the world's major gift wrap manufacturers, has eliminated what was an extensive use of organic solvents. Research has demonstrated that toxics use reduction can be economically rewarding by diminishing the cost of regulatory compliance and decreasing wastage and maintenance costs.

At the same time as Massachusetts passed the MTURA, it also made complementary changes to its environmental agency structure. The old Department of Environmental Protection was divided into three bureaux: Waste Site Cleanup; Resource Protection; and Waste Prevention. The Waste Prevention Bureau is designed to integrate pollution prevention measures with right-to-know schemes and hazardous/solid/industrial waste programmes. This restructure was designed, amongst other things, to abandon concentrating on single media and instead set about planning the reduction of the total volume of wastes generated in the State.

THE NEW SOUTH WALES POSITION

There is not presently any community right-to-know or toxics release inventory legislation which enables the public to have assured access to details of toxic substance use, storage/ transport, manufacture or release into the environment. Although access may be possible through the *Freedom of Information Act* 1989 to limited information, there are numerous exceptions in that legislation.

The Public Interest Advocacy Centre (PIAC) has published a comprehensive report on the legal and regulatory system governing toxic chemicals, together with recommendations for change and improvement.[27] One of the key findings of the PIAC report is the absence of community right-to-know provisions in New South Wales or indeed elsewhere in Australia. The consequent PIAC recommendation is that:

> "The Commonwealth, State and Territory governments should enact comprehensive ... community right-to-know legislation and a timetable for its implementation." [28]

Toxics use reduction in New South Wales

As one would expect with the constraints faced by the federal government under the Constitution, it is the states that have the primary responsibility for, and legislative power over, pollution. In New South Wales, in connection with toxic or hazardous substances, the emphasis remains on the control and regulation of pollution. Before pollution can lawfully occur as the consequence of a development, a "pollution control approval" must be obtained from the EPA and depending on the circumstances of the development, a licence as well.[29] Although the Pollution Control Act 1970 NSW states that a factor in considering whether to issue a licence is "... practical measures which may be taken to prevent, control, abate or mitigate that pollution...", this hardly adds up to a systemic mandate to impose genuine across-the-board reduction or prevention.

For those toxic substances in respect of which a chemical control order has been made a licence must be sought from the EPA before a "prescribed activity" may be conducted.[30] A prescribed activity includes manufacturing, processing, storage, sale and disposal: s.3 of the EHCA. A chemical control order is made where the EPA "has reasonable grounds to believe that [it] is necessary to prevent or minimise any adverse effect on the environment that may result from the carrying on of a prescribed activity...." Although reduction of chemical pollution may occur because a particular chemical is prohibited without a licence, or is not on the EHCA chemical inventory, this does little to alleviate pollution from the thousands of chemicals already in use.

One encouraging bright spot in New South Wales is the *Water Board (Corporatisation) Act* 1994. It provides that in implementing the "special objective" of preventing the degradation of the environment, regard is to be had to 'minimising its creation of waste by the use of appropriate technology, practice, technology and procedures'.[31] More tangible is the obligation to "effect significant reductions by 30 June 2000, of Schedule 10 substances present in waters as a result of the Corporation's sewerage services under an operating licence."[32]

The EPA must ultimately determine reduction targets for the Corporation. Details of the targets, and the corresponding licence conditions and directions ordered to implement them must be made available to the public. One large caveat though, is that if pollution control legislation, designated as such and applying to the Corporation is passed, these targets cease to have any effect.

CONCLUSION

Despite the fact that wholesale pollution caused by toxic chemicals and substances is manifesting itself the world over - and no less so in Australia - there is reason to take heart. The revelations in the United States provided by the data produced

under the CRTK Act have made a not insignificant contribution to the decision to act positively about pollution. This has involved addressing toxics pollution by reducing and eliminating the manufacture and use of toxics in the first place.

There seems to be little doubt that the sort of legislation typified by the MTURA is efficacious. Not only does it compel release reporting but also, importantly, it requires facilities to plan for the reduction and elimination of toxics. What is particularly useful about the MTURA style of legislation is that it does not confine itself to "do's and don'ts". By establishing agencies that can give toxics use reduction guidance and by foreseeing the need for research programs to be funded, the legislature has broadened the arrows arrayed at pollution and has increased the chances of reduction and elimination being successfully implemented.

In Australia, the incipient National Pollutant Inventory is long overdue. The federal government needs to ensure that it is brought to legislative fruition speedily and that it covers not only the release and discharge (by all but insignificant players) of a wide range of toxic chemicals, but also details of their manufacture, storage, transport and use. Compulsory planning provisions must be included together with appropriate collateral assistance mechanisms. The public will have access to the NPI, subject of course to trade secrets/confidentiality concerns, but there must also be citizen-based enforcement of the NPI obligations including, preferably, an open standing system.

Australia is obliged to implement ecologically sustainable development and in particular, to act cautiously and preventatively in accordance with the precautionary principle. This means enacting modified legislation along the lines of the MTURA forthwith. This is not to say that pollution prevention should replace pollution control and regulation. There will clearly always be the need for a mixture of the two regimes. It would seem, however, at least in the realm of toxics, that unless the proportion of prevention to control/regulation increases dramatically, our obligations to future generations will have no chance of being met.

Postscript

Since this paper was written, the NSW parliament has passed the Waste Minimisation Act 1995 (assented on 22 December 1995). The objects of the Act include a 60% reduction in the "amount" of waste (defined very broadly) disposed of in NSW as compared with the 1990 levels. The Act aims to establish a waste management hierarchy whereby "avoidance" ranks ahead of disposal and ahead of recycling/reprocessing.

Local councils will be grouped together under the management of a "Waste Board" which will be required to produce a "regional waste plan" (RWP). The public will be able to comment before the plan goes to the Minister for approval, and the public's comments must at least be considered. Failure to comply with a RWP will be an offence.

Industry is also targetted by the Act. The Minister may select a particular industry for the preparation of an "industry waste reduction plan" (IWRP) or an industry may volunteer itself. The IWRP has no mandatory content but may include waste reduction targets and may cover action "in the areas of product design, production and packaging" as a means of reducing waste: s.31. Industry will ordinarily have the opportunity to negotiate the content of an IWRP although the Minister has final say. IWRPs will, once gazetted, be available to the public. Failure by an "industry member" to comply with the provision of an IWRP will be an offence.

ENDNOTES

1Farrier, D The Environmental Law Handbook (2nd ed) Redfern Legal Centre Publishing, Sydney, 1993 at 170.

[2]Bobertz, BC "Legitimizing Pollution Through Pollution Control Laws: Reflections on Scapegoating Theory" (1995) 73 Texas Law Review 711 at 748, 751.

[3]I use the terms toxics, toxic substance, toxic chemical and hazardous substance interchangeably unless the context indicates to the contrary.

[4]Johnson, f.n. 4 at 156; Commonwealth Environment Protection Agency National Pollutant Inventory: Public Discussion Paper AGPS, Canberra, 1994 gives a figure of 4.8 billion pounds for 1990.

[5]Rabe, BG " From Pollution Control to Pollution Prevention: The Gradual Transformation of American Environmental Regulatory Policy" [1991], Environmental Planning and Law Journal, 226 at 226

[6]ILO f.n. 14 at 4.

[7]Muldoon and Valiante, f.n. 16 at 10-11.

[8]Section 6(a). "Environment" is defined to include air, water, land, and the interrelationship between them and living things: s.3(5) of TOSCA.

[9]Flournoy, AC "Legislating Inaction: Asking the Wrong Questions in Protective Environmental Decision Making" (1991) 15 Harvard Environmental Law Review 327 at 330.

[10]Section 101(c) of CAA.

[11]Yeager f.n. 15 at 218-9.

[12]Yeager notes this was victory for economic over environmental values which occurred partly, he suggests, because of an overconfidence in technological solutions: ibid at 223.

[13]Gunningham f.n. 38 sets out an extensive list of possible benefits: at 278

[14]World Wide Fund for Nature The Right to Know - The Promise of Low-Cost Public Inventories of Toxic Chemicals WWF, Washington DC, 1993 [reproduced in University of Sydney, Pollution Law Readings, July 1995, 72]

[15]World Wide Fund for Nature f.n. 38 at 73.

[16]See Principle 15.

[17]World Wide Fund for Nature at 86.

[18]PIAC Pamphlet entitled "Information about chemicals:*How do you get access*?" Public Interest Advocacy Centre, Sydney, 1995.

[19]Commonwealth Environment Protection Agency National Pollutant Inventory: Public Discussion Paper AGPS, Canberra, 1994.

[20]Minter Ellison Final Report to the Environment Protection Agency: Development of Legislative Modelling for the National Pollutant Inventory and Associated Community Right-to-Know in Australia 1995. The Report involved Minter Ellison consulting with a wide range of stakeholders.

[21]Ibid at 114.

[22]Identifies hazards, exposure limits etc. - originated by the *Occupational Safety and Health Act* 1970 (U.S.).

[23]"[R]elease" is defined broadly and means "any spilling, leaking, dumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment ... of any hazardous chemical, extremely hazardous substance, or toxic chemical." s.329 of the CRTK Act.

[24]Section 313 of the CRTK Act; Stenzel f.n. 67 at 714-5; Gunningham f.n. 31 at 277.

[25]Section 322 of the CRTK Act.
[26]Section 2 of the MTURA.
[27]Public Interest Advocacy Centre Toxic Maze (Parts 1&2) International Business Communications, Sydney, 1991.
[28]Ibid at x.
[29]Sections 17A-17H of the *Pollution Control Act* 1970(NSW) (the "PCA").
[30]Sections 24 & 28 of the *Environmentally Hazardous Chemicals Act* 1985 (NSW) (the "EHCA").
[31]Section 21(3)(b) of the Act.
[32]Section 23(1) of the Act. Schedule 10 substances include arsenic, chloride, cyanide, pesticides (including organochlorines and organophosphates and zinc).

ENERGY REVOLUTION

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In the dying days of the 1995 NSW Parliamentary session, legislation was passed to radically change the supply of energy. The reforms were largely prompted by the move to a national energy market and increased competition (Hilmer). However, the opportunities presented by the Carr Government's minority position in the Upper House, allowed some greening of the new laws. Environmentalists worked with the Opposition and the Government to introduce amendments that could have far reaching effects on the type of energy consumed by customers.

Key features of the package of laws *(Electricity Supply Act, Energy Services Corporations Act, Sustainable Energy Development Act*) are:

- Energy service corporations established with ESD objectives and specific obligations for energy conservation, use of renewable energy sources and minimisation of environmental impact.

- Compulsory requirement on energy retailers to develop 1, 3 and 5 year plans for energy efficiency, demand management and renewable energy strategies based on the principle of achieving national greenhouse gas reduction targets. Annual reporting on such strategies and carbon dioxide emissions, with audit by the EPA at intervals of no less than 3 years.

- Creation of a Sustainable Energy Development Authority to facilitate development, commercialisation and promotion to sustainable energy technology aimed at reducing greenhouse gas emissions. $63 million to be allocated over the three years.

- A Licence Compliance Advisory Board (with representatives from the environment and consumer movements) will annually review retailers and distributions. Public comment to be invited.

- Greater protection for trees in public reserves, national parks or areas zoned environment protection during powerline works.

- Creation of new energy market where consumers will be able to 'shop around' for power supplies.

Energy generators (eg Pacific Power), network operators and retailers will be corporatised according to the type of enlightened objectives, established for Sydney Water. No longer does the harsh economic rationalist model apply, where such a government owned corporation has to only be "a successful business": It also has equal social and ecologically sustainable development objectives.

A key part of the reform is to transfer energy planning power from the owners of coal fired plants (Pacific Power had previously run power policy in NSW) to the consumer. The retailers of energy have emerged as the real drivers. Since they have to compete for individual consumer loyalty, there will be a range of prices and products offered. Once consumers have made their choice, then the retailers will demand these services from the national energy generating market. The process of full introduction of competition will take several years.

Amendments to the legislation ensure that green energy services (renewable demand management programs) will not be optional. If this had not been the case then green energy would have been simply a form of product differentiation along with free gifts and competitions for consumer products and trips.

It is expected that the new Sustainable Energy Authority will target its investments into improving the commercial viability of renewable and energy conservation. The real gains in reduction of greenhouse gases from conversion to green energy will come about because the retailers give signals to the market that they want green energy.

At the same time there will be public oversight of the new corporations. A Licence Compliance Advisory Board has been established. Its task will be to examine whether the various obligations in the operating licences granted to each energy corporation, are being fulfilled. Thus the legislation does not give total trust to market mechanisms.

On paper there has been a revolution in the way energy is supplied, sold and generated. As with Sydney Water and its ground breaking corporatisation legislation, the community will have to watch implementation closely. Continual pressure will need to be applied to ensure that old corporate and energy supply cultures are worn down and green energy services given maximum opportunity.

Timber Plantations (Harvest Guarantee) Act 1995 - a Threat to Native Forests

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During the last session of Parliament in 1995, the Timber Plantations (Harvest Guarantee) Act 1995 was passed. It was touted as being a sensible way to encourage the establishment of plantations and help the move from unsustainable use of native forests. However, the legislation, essentially the same as was introduced by the Coalition a year before, has some serious flaws. The Act provides guarantees that timber from accredited plantations will be exempted from compliance with a range of laws, including the Environmental Planning and Assessment Act .

OBJECTS

The current objects of the Act are misleading. The Act purports to have as its purpose: "to encourage the establishment of commercial timber plantations". However, aside from encouraging the planting of new forests, the Act allows the redefinition of existing forests as plantations. The Act

(a) applies to existing timber plantations, and

(b) accreditation can only be sought *after* a plantation has been established.

To fulfil the objects, the application of the Act ought to be narrowed to only those plantations established after the passage of the Act and accreditation ought to be required before establishment of a plantation. Alternatively the objects should be amended to truthfully reflect the intent of the legislation.

You don't need to be Nostradamus to recognise that privatisation of plantations which are currently part of State Forests is on the horizon and that the government will realise a greater windfall if these plantations have the benefit of accreditation.

Even more disturbing in this context is the definition of "plantation".

CONVERSION OF NATIVE FOREST TO TIMBER PLANTATION.

The Act allows for native forest to be converted to timber plantation and thus to avoid the public scrutiny afforded by the Environmental Planning and Assessment Act and the Threatened Species Conservation Act 1995

The scenario which our clients have outlined, which is open on any reasonable reading of the Act, is as follows. An area of old growth forest is logged with say, 60% of the canopy cover removed. State Forests then actively encourages the establishment of trees (whether by sowing seed or otherwise) for the purpose of timber production. The predominant number of trees forming or expected to form the canopy are then trees which have been "planted".

To "avoid doubt", the legislation provides that an area is not a natural forest merely because it contains some native trees that have not been planted. The area of forest is then eligible for accreditation as a timber plantation.

If it is not the intention to enable the exemptions given under the Timber Plantations (Harvest Guarantee) Act to extend to regenerated areas of State Forest, then that should be made clear. This could easily have been done by

a. Amending the definition of timber plantation in the Act;or

b. Gazetting those areas currently held by State Forests which are plantations and providing that no other area of land which is currently State Forest shall be eligible for accreditation as a timber plantation.

PROMOTION OF VEGETATION CLEARANCE

The Act may well promote vegetation clearance, rather than prevent it. Officers from the Department of Land and Water Conservation maintain that plantations will not be accredited if they have been established in breach of any law including SEPP 46. However, that is not what the Act provides.

The Act provides in section 13(3) that the Director General **may** refuse to accredit the timber plantation **if the Director General is satisfied that** it has not been established in accordance with any relevant law. The Director General has total unfettered discretion. That discretion is exercised at two stages. Firstly, the Director General may refuse (not "must refuse") to accredit a plantation. Secondly, the Director General needs to be satisfied as to a certain state of affairs. That is, that there has been a breach of the law.

The only challenge to the Director General's determination would be on the basis that is was so unreasonable that no decision maker acting reasonably could make that determination. This is a basis for challenge which seldom succeeds.

In order to provide the protection which the government asserts is intended, section 13(3) should have been amended so that the Director General must refuse to accredit the timber plantation if

they have been established on land cleared illegally.

MATTERS TO BE REGULATED BY CODES

The Act removes the operation of the Environmental Planning and Assessment Act 1979 and the Threatened Species Conservation Act 1995. Instead, a code is to be developed to provide protection for the environment during the growing and harvesting of the trees. The Act provides that a code **may** regulate the carrying out of harvesting operations and **may** deal with a number of particular matters.

The amount of discretion as to the contents of the code is extraordinary. It does not even have to regulate the carrying out of harvesting operations on an accredited timber plantation. Further, sub section (3) provides that the Code can authorise any matter or thing to be determined, applied or regulated by a specified person or body. This appears to be a return to legislation by regulation which, in our opinion, is not a hallmark of good government.

The contents of the code ought to be prescribed more clearly.

EXCLUSION FROM PART 5 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT.

The removal of public participation and accountability afforded by the Part 5 procedure should not be supported. State Forests has demonstrated in the past the necessity for these mechanisms to ensure good environmental decision making. Our concerns are heightened because it has been indicated that the definition of harvesting operations includes thinning operations and the use of biocides.

ACCESS TO INFORMATION

We note that while section 18(3)(b) provides for the inspection of documents, no provision is made for obtaining a copy of same.

RESTRAINT OF BREACHES OF THIS ACT

Every piece of environmental legislation introduced into the NSW Parliament since at least the Heritage Act 1977 has provided open standing to ensure that any person can enforce the law. The need for such a provision is increased because of the removal of normal environmental protections. Conditions of consent or approval are not able to be imposed under the Environmental Planning and Assessment Act.

If the community is to have faith in the protections purported to be afforded by the code, then any person must be able to enforce the provisions of the Act and the code.

Civil Remedies under the Environmental Offences and Penalties Act (EOPA) 1989

Warren Kalinko,
Graduate Volunteer, Environmental Defender's Office

SYNOPSIS

This article focuses on para.14(2) and s15 of the EOPA. These provisions are civil remedies available to public authorities and members of the public who have suffered loss as a result of the commission by another of a Tier 1 or Tier 2 offence under the EOPA. ***Part One*** *introduces the provisions and examines the extent to which they have been used.* ***Part Two*** *looks at standing and the measure of damages.* ***Part Three*** *explores why the remedies have been so little used, with particular focus on local councils, the EPA, and individual members of the public.*

INTRODUCTION

> "We wish to make it absolutely and abundantly clear that this is an area where the doctrine of the polluter pays is an imperative and that the cost of cleaning up should be borne by the person or the organisation that causes the damage."[1]

The Greiner government envisaged that the EOPA would make 'polluters pay' in two ways. First, by imposing steep penalties for offences against EOPA, and second, (the subject of this paper), by introducing reimbursement and compensation provisions for loss suffered as a consequence of the offence. As will become clear, for a variety of reasons, the reimbursement and compensation remedies have not been as effective as was initially envisaged.

PART ONE- INTRODUCING THE PROVISIONS

The reimbursement and compensation remedies are contained in paragraph 14(2) and s15 EOPA. They allow a court, **in the context of criminal proceedings for an offence under Tier 1 or 2 of the EOPA** to make certain orders. First, it can order an offender to reimburse a public authority for the costs and expenses incurred by it in preventing, controlling, abating or mitigating the harm caused by the offender: s14(2)(a).

Second, it can order the offender to compensate any person (including a public authority) for either the damage caused to their property as a result of the offence, or for the costs incurred in preventing or mitigating such damage: s14(2)(b).

Although the section 15 remedies are similar to those of s14(2), they differ in one important respect. Section 15 has **post-**

conviction application only. It is an avenue for recovery of costs incurred (or property damage suffered) subsequent to conviction of the offender. Of course, such costs (or damage) must be referable to the offence for which the offender was convicted.

Remedies Rarely Sought

Since their commencement on 30 November 1989, these seemingly useful remedies have rarely been used. This part examines the three instances in which a s14(2) remedy was sought. Para. 14(2)(b) and section 15 remain untested.

The first s14(2)(a) order was made in the case of *EPA v Capdate Pty Limited, EPA v Phillips (1993) 78 LGERA 349.* There the EPA prosecuted Capdate and its managing director Phillips for breaching s16(1) of the Clean Waters Act 1970 (CWA). Capdate had pumped 15000 litres of a toxic solution from its plant into a stormwater drain which flowed into an unnamed creek. Because the creek flowed into South Creek, part of the Hawkesbury-Nepean river system, the EPA decided to "de-water" the creek, at a cost of $37,100. The defendants were convicted of the offence and pursuant to s14(2)(a) made jointly and severally liable to reimburse the EPA for the full $37,100 incurred, within a period of six months.

The second case was *The Council of the Shire of Warringah v Gregory Robert Ross (Unreported, Judge Bannon, 25/10/93, case #50018/93).* Warringah Shire Council successfully prosecuted Ross for breaching s5(1) EOPA, which prohibits wilful or negligent disposal of waste in a manner likely to harm the environment, without lawful authority. Ross had dumped 170 tonnes of building rubble in a council reserve. The council restored the reserve by removing the rubble, landscaping and doing weed control. The council, (for reasons discussed in Part 2) recovered $7,000 of the $17,817.56 it sought, pursuant to s14(2)(a).

The final instance, involving Fairfield City Council, was the case *of Jean-Claude Gilbert Blandin de Chalain v Katen & Health Pty Limited (Unreported, Stein J., 5/4/94, case #50033 of 1993).*

The defendant was charged with a breach of s16(1) of the Clean Waters Act 1970, after 2800 litres of diesel fuel escaped from its bus transport depot into the drainage system and eventually into Burns Creek. The council used a combination of booms and absorbent materials to prevent the spread of oil, although about 3km of waterways were affected. The defendant was convicted of the offence and (in addition to a fine) was ordered, pursuant to s14(2)(a),to reimburse the council $8915.52.

PART TWO - STANDING AND MEASURE OF DAMAGES

Section 14(2)

As a preliminary point to the issue of standing, s14(2) in no way requires that those seeking the order, **themselves** successfully institute criminal proceedings against the offender. The court can make orders reimbursing or compensating any aggrieved party, regardless of whether they were the ones to institute proceedings (although it would be necessary to prove the costs were incurred and/or damage suffered by the party seeking the remedy). Typically, however, the person seeking the order will need to institute criminal proceedings themselves. It is in this context that standing to prosecute Tier 1 and Tier 2 offences becomes relevant.

Section 13(1) EOPA provides that anyone can prosecute an offence against the EOPA provided they have the EPA's written permission to do so. If written permission cannot be obtained, then leave of the Land and Environment Court can be sought, but will only be granted where the court is satisfied that:

(a) the EPA has decided not to take 'any relevant action' (as defined in s13(2B)), or has failed to make a decision within 90 days;
(b) the EPA has been notified of the proceedings;
(c) the proceedings are not an abuse of the court's process; and
(d) the particulars disclose a prima facie case without any hearing of evidence: s13(2A).

Local Councils have additional standing. They do not require EPA consent or leave of the court to institute proceedings for some Tier 2 offences: s13(3)-(5A). In *Katen & Heath,* for example, Fairfield Council prosecuted a breach of s16(1) CWA without EPA consent or leave of the court.

Councils are required to obtain EPA consent or leave to prosecute Tier 1 offences. This was the case in *Ross* where Warringah Shire Council obtained leave from Justice Stein to prosecute Ross for breach of s5(1)EOPA.

Section 15

As section 15 is available only **after** a conviction has been entered, the issue of standing for the purposes of prosecution does not arise. The costs incurred in preventing, controlling, abating or mitigating harm to the environment can be recovered as a debt from the offender: s15(2). A claim for compensation for property damage can be made before the Land and Environment Court or any other court of competent jurisdiction: s15(1).

Limits on amount recoverable

Section 14(2) is a discretionary remedy. Expenses sought to be recovered must be referable to the particular offence alleged, and must be reasonable. This is illustrated by *Ross* where the council recovered only $7,000, despite having spent $17,817. The court found the council had "moved considerably more material than was dumped [by the defendant]", and that its claim for 75% of the cost of weed control and landscaping was excessive. Similarly in *Capdate*, Stein J considered it important that the council's decision to de-water the creek was fully justified and the costs incurred reasonable.

PART THREE- WHY THE REMEDIES SO SELDOM USED

Individuals

The fact that private individuals have not made use of ss 14(2) and 15 EOPA is probably explained by the fact that these remedies are not widely known. Sections 14(2) and 15 do, however, present obstacles to individuals given the cost in terms of time and money of first securing a conviction against the polluter. The risk of an adverse costs order, is also a

significant obstacle to private prosecution, especially given the prosecution's onus of proving the offence beyond a reasonable doubt. Individuals might find it more efficient to petition the EPA or local council to prosecute.

EPA - A Similar Remedy is Available

The limited use of ss14(2) and 15 by the EPA might be explained by the existence of alternative remedies contained in s27 Clean Waters Act 1970 (CWA) and s25A Clean Air Act 1961 (CAA). The advantage of these remedies is that they **are not dependent on the public authority obtaining a conviction for a pollution offence, before the remedy will be granted**[2]. They are, however, more limited in that they don't provide a remedy for property damage, whereas paras 14(2)(b) and 15(b) do.

Local Councils[3]

Again, the foremost obstacle to the use of these sections by councils, is that they require conviction of an offender before court orders for reimbursement and compensation can be obtained. In a significant percentage of cases, councils were unable to trace pollution to a particular offender. As such, they were unable to prosecute and consequently unable to recover under para 14(2) and s15. In those cases where offenders were identified, the council's clean-up costs were typically paid without the need for further legal action.

The existence of s27 CWA and s27A CAA, plus the availability of penalty notices were other reasons cited to explain the limited use by councils of para 14(2) and s15. It should be noted though, that although funds raised from penalty notices might offset the expense to councils of clean-ups, they suffer from two relative disadvantages when compared to the para 14(2) and s 15 remedies. First, the penalty notices have strict maximum penalties attached to them, and may not be sufficient to cover the funds expended by the council. Secondly, they do not provide for compensation for damage to council property caused by the act of pollution.

Among other reasons provided for the remedies' limited use was a lack of awareness of their existence, plus the availability (prior to July 1995) of funds from the Environmental Restoration and Rehabilitation Trust to clean up serious pollution.

CONCLUSION

Sections 14(2) and 15 EOPA offer individuals and public authorities a viable remedy for the recovery of costs they incur in cleaning up pollution and for the damage caused to their property as a result. They had, however, been used on only three occasions at the time of writing (October 1995). This is explained by the fact that their operation is conditional upon the successful prosecution of the polluter, by the existence of similar remedies in s27 CWA and s25A CAA, and by a general lack of awareness of their existence.

ENDNOTES

[1] Mr TJ Moore, Minister for the Environment and Assistant Minister for Transport, Hansard, Legislative Assembly, 1 August 1989, p8816

[2] Para 556,145, *Local Government Planning and Environment*, (NSW) Butterworths Loose-leaf Service.

[3] This section was compiled on the basis of telephone interviews I conducted with officers of various NSW local councils, including Sutherland Shire Council, Fairfield City Council, Botany Council and Canterbury Council.

TASMANIAN CONSERVATION TRUST INC V MINISTER FOR RESOURCES AND GUNNS LTD

IN THE FEDERAL COURT OF AUSTRALIA

James Johnson
Solicitor, Environmental Defender's Office

Davies J 9 February 1996 Unreported.

On 9 February 1996, Davies J handed down judgement in the third of a series of cases in the Federal Court challenging the grant of woodchip export licences by the Minister for Resources to Gunns Limited.

Background

In October 1993, Gunns had made application for a licence to export 475 000 tonnes per annum of woodchips. The proposal was to be developed in two stages. Stage 1 was exporting 200 000 tonnes per annum of woodchips, thus increasing production in existing plants. Stage two involved construction of major infrastructure and an increase in the annual output of woodchips to 475 000 tonnes per annum.

The proposal was a long term proposal, for at least ten years.

On 10 June 1994, the Minister for Resources granted a woodchip export licence for up to 200 000 tonnes of woodchips for the period ending 31 December 1994. The Minister also gave "in principle approval" allowing Gunns to export up to 200 000 green tonnes of hardwood chips per annum until the end of 1999, subject to the issue of annual woodchip export licence. No step had been taken under the Administrative Procedures made under the *Environment Protection (Impact of Proposals) Act* 1974 to designate a proponent of either the grant of in principle approval or the grant of the first annual licence.

The Sackville Decision

The failure to designate a proponent was challenged in the Federal Court and Sackville J set aside the decision to grant a licence to Gunns. He held that the phrase "proposed action" seemed likely to refer to the project rather than the approval for it and that the proposed action was a proposal by and on behalf of Gunns, set out in a document identifying its intended activities. As to the meaning of "initiative", his Honour held that the Minister contemplated granting an export licence to Gunns and, having made inquiries to this end, this constituted an initiative enlivening the obligations in the administrative procedures. His Honour went on to say that:

> "there may well be circumstances in which an action or contemplated action by the Minister is so closely related to a previous action, such as the grant of an earlier licence or an earlier direction to designate a proponent, the later action cannot properly be described as "an initiative" in relation to a proposed action".

As to the in principle approval, His Honour held that the in principle approval by the Minister could not be characterised as a substantive determination which is "final" or "operative and determinative". Nor is the approval a decision which the Export Control (Unprocessed Wood) Regulations required or authorised. It was held that the grant of in principle approval was not a decision for the purposes of section 5 of the *Administrative Decisions (Judicial Review) (ADJR) Act* 1977, nor was it conduct engaged in for the purpose of making a decision. His Honour therefore declined to grant relief in relation to the in principle approval for the export of woodchips until 1999.

The Davies Decision

In contrast, Davies J held that the proposed action must be an action of the Commonwealth government and that, in the case before him, was the grant of a licence for the export of woodchips during 1995. He held that the approval in principle was reviewable under the ADJR Act being "an act or thing" within paragraph (g) of section 3(2) of that Act, which expands the meaning of decision for the purposes of the Act. He held

> "the grant of the approval in principle in association with the grant of the first licence sufficiently affected the relationship between Gunns and the Australian Government as to constitute the decision then made."

> "The decision making process is not limited to the grant of annual licences, for many operators also require, for the purposes of their business, some assurance of tenure and resource."

Following this reasoning, His Honour held that the matter under consideration by the government was not whether an in principle approval should be given to Gunns stage one project, but simply whether a licence should be granted for the remaining months of 1995.

This was not the first time that Davies J has considered the granting of an in principle approval. In *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, Davies J considered the granting of in principle approval to Harris Daishowa for the logging of woodchips over seventeen years. The EDO represented the ACF. On that occasion, his Honour treated the grant of the approval in principle, given by letter and announced by press release, as a decision which could be reviewed.

> "...the documents constituted no more than a decision in principle or an assurance on which Harris Dishowa could rely for future planning. It follows that what was done in December 1988 is not irrevocable or unchangeable..."

Importance of the Decision

The decision is important because it raises again for consideration the question as to whether the grant of an in principle approval is reviewable. The grant of such an approval is meant to carry some weight and give some comfort to industry that it can expect to receive ongoing licences and should therefore be willing to commit resources to a project. Such an approval in effect results in de facto resource security. There are now two judgements of the Federal Court with diametrically opposed views on this point.

The case is also important because it is further evidence that the procedures for Commonwealth Environmental Impact Assessment are not working. A new woodchipping venture has commenced in Tasmania which has never had a public process of environmental impact assessment. Individual slices of this project, in the form of licences, are now being referred by the Minister for Resources and assessed by the EPA. With licences as short as six months, the cumulative impact of the proposal is simply ignored.

Costs

His Honour held that the case confirmed the Trust's contention that the procedures required by the *Environment Protection (Impact of Proposals) Act* and the administrative procedures have not been followed because the environmental effects of Gunns' long term project did not become the subject of any environmental assessment. Because of this, the Trust have had some success and his Honour ordered that each party pay their own costs of the proceedings.

Appeal

Those of you who have been following the series of cases conducted by the Trust in this matter will no doubt be wondering whether an appeal will be lodged. Our client considered its position, but the following factors weighed heavily. The appeal would have been about a licence which has expired, issued in accordance with laws which have been changed. Further, because of the lack of independence of the current Commonwealth system of granting legal aid, in our experience legal aid will never be granted to conduct a case of any importance against the government.

THREATENED SPECIES

MORE SPECIES BUT LESS PUBLIC PARTICIPATION IN THEIR PROTECTION

James Johnson,
Director, Environmental Defender's Office

In the last days of parliament, the opposition combined with the upper house independents to substantially strengthen the Threatened Species Conservation Bill introduced by the government. In a nutshell, the new laws replace licensing, under the Endangered Fauna Interim Protection Act, with a system where the Director General gives concurrence to developments having significant impacts or must at least be consulted with.

While the scope of the legislation is wider, now providing protection to plants as well as animals, the protection is not as comprehensive.

Firstly, for the National Parks and Wildlife Service to have any role, the works proposed have to have a significant impact on the species or community, not just on an individual member of the species.

Secondly, the question of whether an impact will be "significant" is a question to be determined by the Council or determining authority. It is almost impossible to overturn a decision-maker's exercise of discretion on this question. This is particularly so if an "expert's" report has been obtained which says there will be no significant impact on the species. The EDO has been involved in a case where an "expert" has said there will be no significant impact on koalas if every koala in NSW is lost because the species would still exist in Queensland and Victoria.

Public participation has also been curtailed. Because developments no longer require licences from the park service, there will no longer be the opportunity for merit appeals to the Land and Environment Court.

The success or otherwise of the legislation will largely depend on how it is implemented. Key threatening processes need to be listed. Endangered populations and ecological communities need to be listed. Recovery plans and threat abatement plans need to be prepared. Regulations need to be gazetted. A biodiversity strategy needs to be finalised. The laws need to be enforced.

To give these new laws their best shot at working, the EDO will be conducting community workshops to explain the laws and how people can take part in developing the protection of threatened species in NSW.

CORONER HANDS DOWN FINDINGS INTO 1994 SYDNEY BUSHFIRES

Maria Comino,
Solicitor, Environmental Defender's Office

On 28 February, Coroner Hiatt delivered his findings into the four deaths that occurred during the 1994 Sydney bush fires. The Coroner also reported on the section 22A hearings which related to the broader circumstances of the fires, including fire prevention and fire management issues.

The EDO acted for the Nature Conservation Council (NCC) of NSW and attended the section 22A, though not the fire specific hearings, before the Coroner.

In addition to the fire control agencies NPWS, State Forests, Sydney Water and local authorities appeared throughout the hearings. The hearings commenced in August 1994 and with short intervals ran through to January, 1995. Final submissions were made over several weeks in August 1995.

Commenting on the Coroner's findings, Dr Judy Messer, Deputy Chair of the NCC said that the Coroner had rightly identified many of the institutional failings of the current system of bush fire management in New South Wales. However, in the Council's view, not all the recommendations acknowledged the two key components of the NCC's Bush Fire Policy being prior ecological assessment before hazard reduction and effective public involvement in all levels of decision making.

cont...

In his report, the Coroner highlighted the failure of Bush Fire Management Committees to prepare bush fire management plans as required under s41A of the Bush Fires Act 1949 which hindered the prevention of adequate fire prevention and management strategies. This requirement had been introduced by amendments to the Act in 1989, but had not been carried out as envisaged under the amendment.

The Government delivered its response to the Coroner's findings on the same day, stating that many recommendations affecting a number of agencies had already been implemented. However, any amalgamation as recommended by the Coroner, between the NSW Bushfire Brigades and the NSW Fire Brigades, was ruled out.

Apart from institutional arrangements, the Coroner's findings included particular reference to the management issues on which significant evidence had been adduced. After such lengthy hearings and detailed submissions, it would clearly be remiss of the Government not to take more time to fully examine and understand the basis for the Coroner's findings.

HAWKESBURY CITY COUNCIL AND PETER FOSTER v MUSHROOM COMPOSTERS PTY LTD.

Lisa Ogle, Solicitor, Environmental Defender's Office

On 21 February 1996, Her Honour Pearlman J delivered judgement in the Land and Environment Court on an application under section 5(3) of the fines and penalties act.

Both the Council and Mr Foster had instituted contempt proceedings to restrain breaches of the orders of the court prohibiting offensive odour from a mushroom composting plant.

Section 5(3) of the *Fines and Penalties Act* provides that

> "where the Act imposing or authorising the imposition of a fine, penalty or forfeiture makes no direction as to the application whereof, the court before which such fine, penalty or forfeiture is recovered may, where the informer or other person prosecuting or suing for the same is not a member of the police force, direct that such a portion of the fine, penalty or forfeiture as the court thinks fit (but not exceeding a moiety thereof) shall be paid to the informer or other person prosecuting or suing for the same."

Her Honour was also required to construe the application of section 694(1) of the *Local Government Act*, which provides

> "any penalty, fine or forfeiture under any act recovered in proceedings instituted by or under the direction or on behalf of or for the benefit of the Council is
> (a)to be paid to the Council; and
> (b)to be allocated by the Council to the Council's consolidated fund"

Her Honour held that the section 694(1) relates only to a fine or penalty which is prescribed or fixed by the relevant Act. In contrast, the *Land and Environment Court Act,* while it implies a power to impose a fine for contempt, does not prescribe, fix or provide for a fine for contempt for its orders. The appropriate punishment is a matter for the Court in the particular circumstances. Accordingly, Her Honour concluded the fine was not required to be paid to the Council under the *Local Government Act.*

The question then became whether Mr Foster was entitled to *Fines and Penalties Act.* Her Honour considered the fact that the original proceedings were commenced by the Council and Mr Foster later joined as a party. Her Honour held that the *Fines and Penalties Act is* not designed to make up for short falls in costs agreements that may be reached at the conclusion of the proceedings. A fine for contempt is imposed in order to punish the contemnor, not to compensate the party seeking to enforce the Court's order. Accordingly Mr Foster's application was unsuccessful.

The case is important because it establishes that applications can be made under the *Fines and Penalties Act* for half the fine imposed in matters such as a contempt matter; that is, where a fine is authorised by an Act. In these cases a Council will not automatically be entitled to the whole of the fine. They will be limited to half the fine and they will be obliged to make application for it, the granting of which is discretionary.

:stop press:

Report on Standing

The Australian Law Reform Commission is due to report to the Commonwealth Government on standing. The report will be tabled in the April session of parliament.

See the next issue of *Impact* for further details.

OFFICIAL LAUNCH OF THE NATIONAL NETWORK OF EDOS

On the 24th of January, the National Network of Environmental Lawyers was launched in Melbourne with presentations from both the former Commonwealth Attorney-General, Mr Michael Lavarch, and the former Justice Minister, Mr Duncan Kerr.

Below are some extracts from the Minister's speech:

"EDOs facilitate involvement in decision-making to avoid or minimise environmental damage done by humans.

EDOs also lobby for improvements in existing regulations or licensing schemes. In a complex area of the law they identify relevant laws and regulations.

And they gather information about the physical, social and economic affects of a particular proposal or problem from a wide variety of sources. This might include local, national and international comparisons and precedents.

... We simply cannot afford to be complacent about protecting the environment. History shows that we cannot abrogate our responsibilities as citizens to statutory bodies charged with implementing environment legislation.

All governments and individuals must support environmental action groups' role to improve decision-making, taking the public interest into account, not just the lobbying of the rich and powerful.

EDOs act as environmental watchdogs, securing citizens' rights to have their say in decisions affecting them.

...the Commonwealth's funding is money well spent. It is value for money when you look at the outputs - both their range and quality. These will help safeguard our environment for future generations.

EDOs lift the standard of participation in environmental planning processes, resulting in better, well-balanced decisions. This means better environments for us and our children.

As Simon Molesworth says:

> "a properly funded EDO will, by its participation in the processes, inevitably assist in the making of better decisions in the environmental field. If this results in a better safeguarded and better managed environment, then the funding of an EDO must surely be in the interests or all Australians."

Increased Commonwealth funding under the Justice Statement for EDOs is making environmental protection a reality for all Australians ".

EDOS IN OTHER STATES

EDO Cairns
EDO Cairns has now received funding for a full-time solicitor. The position is currently being advertised. Contact Ruth Venables 070 317 688.

EDO South Australia
Two solicitors have now been appointed for one position on a job share basis. James Blindell and Mark Parnell started on 4th March 1996. They hope to move from their temporary location to permanent premises in the next few weeks. They are presently contactable on 08 232 0008

EDO Tasmania
EDO Tasmania is now up and running. Lincoln Siliakus has been appointed full-time solicitor and Sally Walker as a part-time assistant. Lincoln is not new to Tasmanian environmental law having represented the Wilderness Society during the Franklin Dam campaign. The EDO is located at 150A Collins St, Hobart 7000. Tel 002 232 770 Fax 002 232 680

EDO Western Australia
EDO Western Australia now has a full-time solicitor, Michael Bennett. The EDO is located at First Floor, Law Society House, 33 Barrack St, Perth, WA 6000. tel (09) 221 3030 Fax (09) 221 3070

EDO Northern Territory
The EDO Northern Territory have taken on a full-time solicitor who will start in early April. The EDO will be located temporarily at the Darwin Community Legal Centre, tel: (089) 413 394 Fax: (089) 413 773

EDO Queensland
As part of the Access to Justice package launched by Prime Minister Keating last year, there was a welcome increase in funds for EDO Queensland, located in Brisbane, and funding for a second EDO now establishing itself in Cairns in the Far North of the State.

NOTICEBOARD

The EDO, in conjunction with the Threatened Species Network, is holding **a one day seminar on new Threatened Species Legislation** on Friday 31 May 1996. For further information, please contact Tessa Bull, EDO, 02 261 3599

Urban Wildlife in the Greater Sydney Region is the theme of the NPA's 1996 lecture series. The series of 9 lectures runs from 11/3/96 - 11/11/96 at the Hallstrom Theatre, Australian Museum. Enquiries:Claire Carlton 560 4553

Law Week runs from 13-18th May 1996. For further information, call the Law Society on 02 220 0266

On Sunday 31 March 1996, the Total Environment Centre is holding a one day seminar in Sydney on ***New Laws on Threatened Species, Energy and Waste***. For futher details, contact TEC on 02 247 4714

The deadline for public submissions on the Draft Environmental Impact Statement Guidelines for Sydney West Airport (Badgery's Creek) is now 1st April 1996.

On 22/23 May 1996, ACEL-ANU will be holding a course, ***Beyond Regulation: Towards a flexible, efficient and effective strategy.*** The course is presented by Professor Neil Gunningham and Mr Francis Grey. Enquiries: Rebecca Pallavicini on (06) 249 3487 of fax (06) 249 4899

Socially Useful Slavery

The EDO is looking for a new College of Law Student who wishes to fulfil the practical experience component of the College of Law's new two-stage Professional Program by volunteering at the EDO. The EDO was approved by the Legal Practitioner's Admission Board as a suitable legal centre for this program. For further details, please contact James Johnson or Lia Ogle on (02) 261 3599

Trade and Environment Seminar, hosted by ACEL and Sydney University CLE Dept., in Sydney on Friday 3rd May 1996, 9.00 am - 4.00 pm. Contact Jenny Littman on (02) 351 0238

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Yes, I wish to become a Friend.....$_____

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Yes, I wish to become a Friend AND subscribe to Impact.....$_____

Yes, I wish to make a tax deductible donation of .....$_____

Please complete the form below

Name_____

Address/DX_____

_____

_____**Postcode**_____

Phone_____**Fax**_____

PAYMENT DETAILS

I enclose a cheque/money order ☐ or please debit my credit card as detailed below

Bankcard_____Visa_____Mastercard_____

Number Expiry Date _____

Amount_____Signature_____

Please send this form with payment to:
Environmental Defender's Office, Suite 82, 280 Pitt St, Sydney NSW 2000 DX 722
Tel:02 261 3599 Fax: 02 267 7548