IMPACT edo NSW

No 42
JUNE 1996

NEWSLETTER ON PUBLIC INTEREST ENVIRONMENTAL LAW

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Cite as
(1996) 42 Impact
ISSN 1030-3847

"WHO CAN SUE? A REVIEW OF THE LAW OF STANDING"

STANDING IN ENVIRONMENTAL MATTERS

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EXTRACTS FROM THE EDO SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION ON DISCUSSION PAPER 61

1. INTRODUCTION

There is little doubt that in the ten years since the Australian Law Reform Commission first considered the law of standing there has been increased involvement by members of the public in environmental decision making. During that time more groups have been established whose purpose is to protect particular public interests.

It is now well recognised in most areas of environmental policy that solutions to environmental problems require more active involvement by citizens. Environmental decision making requires -

> "a broadening of decision making processes, involving the forces of production, private citizens and technical experts, including those completely removed from the administration. Environmentalism today means the establishment of a new administrative model characterised by active relationships between citizens and the state."[1]

The concept of "merely meddling" is therefore unsuited to this model of active relationships between citizens and the State, as it reflects a negative view of citizen involvement. The preferred view of the role of third parties, to be reflected in the law of standing, is that -

> "[They] are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests".[2]

2. WHY REFORMS ARE NEEDED TO THE LAW OF STANDING

2.1 Promoting Democracy

The right to go to Court to enforce the law, often against government itself, and private entities, goes to the heart of the balance to be struck between the role of the Courts and government, in a democratic society. The legal system must protect the right of citizens to enforce public and individual rights to maintain a healthy relationship between government and the legal system, and thereby maintain a strong democracy.

The right to go to Court affects the potential of the legal system to curb excesses by government and others, and it is that potential which acts as the incentive for good government.

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Access to judicial and administrative proceedings in the proper administration of environmental laws has received extensive recognition at the international level.

The Rio Declaration, signed at the United Nations Conference on Environment and Development in June 1992, set out principles for enabling good government based on the premise that good government will lead to better decisions about the environment. The principles include the need for public participation in environmental decisionmaking, including in particular the need for access to the Courts (see Article 10).

More recently, the 1994 Draft Declaration of Principles on Human Rights and the Environment, prepared in May 1994, by an international group of experts on human rights and environmental protection, reaffirmed the right of all persons to effective remedies and redress in administrative and judicial proceedings for environmental harm or the threat of such harm.

2.2 Practical Effect

The need for reform of the law of standing is fundamental to the development of effective environmental laws.

The need is urgent. One of the best examples which shows the effect of the failure to provide standing on the achievement of the objects of environmental laws, is the case of Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd (1991) 73 LGRA 218. Section 54 of the Fauna Conservation Act 1974 (QLD) provided that it was an offence to take fauna without an authority granted under the Act. "Take" was defined to include "disturb" or "damage".

The Society was concerned that the blasting of limestone caves, which disturbed endangered ghost bats that roosted in the caves, constituted an offence under that section, as the mining company had not obtained an authority under the Act. It sought an injunction to restrain the company from carrying out its mining activities.

The Full Court of the Supreme Court of Queensland decided that the Society did not have standing to maintain the proceedings. However, a majority of the Court did find that there was a prima facie case to be tried on the question of whether or not an offence had been committed under the Act.

Ultimately the finding on the right of the Society to bring the proceedings operated to exclude a final decision on whether the law had been broken.

By way of contrast, similar issues were raised in Corkill v Forestry Commission of NSW (1991) 73 LGRA 247 which proceedings were brought under the National Parks and Wildlife Act 1974 (NSW). Under that Act it is an offence to take or kill any protected or endangered fauna, again, without the relevant authority. However, the Act also provides that "any person" can bring proceedings to remedy or restrain a breach of the Act.

Relying on that provision, John Corkill, an environmentalist, was able to injunct imminent breaches of the Act by proposed logging operations of the Forestry Commission in relation to a large range of endangered and protected species of fauna found in the Chaelundi forests.

The key point of difference between the two cases, which involved very similar substantive provisions, was the open standing provision in the New South Wales legislation and the absence of a similar provision in the Queensland legislation.

However, that point of difference translated into very different practical outcomes - environmental protection and the achievement of the objects of the Act in New South Wales and environmental destruction in Queensland.

3. REFORMS NEEDED

3.1 "Person aggrieved" Inadequate

The "person aggrieved" test is included in some legislation and was considered by Sackville J in the Federal Court in North Coast Environment Council v. Minister for Resources. [3]

However, there are important reasons why the "person aggrieved" test is too restrictive.

The principles in NCEC v. Minister for Resources are directed to requiring some longstanding involvement or track rec[ord] with the subject matter of the action. In the case of a group, this means some formal recognition of their involvement in issues relating to the subject matter of the action or particular environment.

However, there may be issues where it has not been possible to establish a track record, (for example, when issues are new) or where the individual concerned to pursue an issue has not been an advocate in relation to the particular environment or issue, or sought to represent a particular public interest. Rather there may be concerned individuals taking on an issue for the first time.

The "person aggrieved" test may therefore operate to exclude such individuals or groups. For the same reasons the test contained in the Endangered Species Act (1992) requiring "a series of activities" is inadequate.

New South Wales experience includes many landm[ark] environmental law cases where individuals have not had a longstanding involvement or interest in the subject matter of the action not necessarily sufficient to satisfy the "person aggrieved" test. For example, the case of Vaughan-Taylor v. David Mitchell Melcann & Minister for Minerals & Energy (1991) 73 LGRA 366 established that the requirements for environmental impact assessment of activities applied to mining operations. That had a significant impact on mining throughout the State.

Vaughan-Taylor was a speleologist and member of the Sydney University Speleological Society. In that capacity, he had a broad interest in the protection of caves, and the Society would also have been able to demonstrate such an interest. However, neither he nor the Society would have been able to point to the factors identified by Sackville to show a close relationship to the Yessabah limestone caves, near Kempsey in northern New South Wales, the subject matter of the action.

He also would not have been able to satisfy a test similar to that in the Endangered Species Act (1992) (Cth). As already discussed, it is important to allow individuals and groups not

having a close relationship with the subject matter of an action, to pursue the action, to maintain the integrity of environmental laws. Particularly too, as those with the requisite relationship may not want to undertake the burdens, financial or other, of litigation.

There may be a conservation group, not having the relevant relationship, but a more general conservation objective, that may seek to undertake the litigation. A restrictive approach, therefore, would curtail the potential development of effective federal environmental law and should not be recommended.

3.2 "Any Person" Test Required
An "any person" provision is required for inclusion in environmental laws.

Such a provision is to be preferred to the "person aggrieved" test or the approach adopted in the Endangered Species Act(1992) (Cth). In addition to the reasons already discussed, the narrower approaches are inappropriate because they presume some legitimacy to the flood gates argument. Namely, that such tests are required to preempt a potential mischief. [3]

In no jurisdiction has there been any evidence of such a mischief. Rather, the evidence has accumulated to discount any such argument. This is seen in the experience over fifteen years of the open standing provisions of the Environmental Planning and Assessment Act 1979 (NSW)("EP&A Act"). It shows that since 1980, there have only been 125 full hearings brought under section 123 of the Act and of those only 32% were brought by resident action groups or in the "general public interest". (Annexure 2)

The Chief Judge of the Land and Environment Court in 1990, Chief Justice Cripps, noted then that -

> "It was said when the legislation was passed in 1980 that the presence of section 123 would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited."[4]

Similarly, the remarks of His Honour Mr Justice Wilcox in Ogle v Strickland reflect the reality of the motivations of those that commence legal proceedings in the public interest -

> "'The idol and whimsical plaintiff, a dilettante who litigates for a laugh, is a spectre which haunts the legal literature, not the court room'. Litigation - in the public interest and for no personal advantage, especially against a wealthy opponent and under a cost regime requiring the losing party to pay the costs incurred by the victor - has some similarity to marriage as described in the Book of Common Prayer: it is not by any to be enterprised nor taken in hand, inadvisedly, lightly or wantonly."[5]

Moreover, even those who would have the greatest reason to restrict these rights have recognised that so often the theory of the flood gates has been built up into -

> "... some form of mythological beast.. Some members who are broadly supportive on my side of the Chamber have developed the view that such rights are a trojan horse for all matters that are deemed undesirable. But the record just does not indicate that. It would be less than honest of me if I spoke to the contrary."[6]

Similarly, the Commission of Inquiry into Red Tape which reported on 31 January 1994, concluded that -

> "At a time when public scrutiny of government is expanding, it is unthinkable that the right of review enshrined in section 123 should be repealed. The solution, if one is required, lies in reform of the legislative and administrative processes of state and local government and not in removal of third party appeal rights." [7]

3.3 Not Just For Planning Laws
In NSW there are many environmental laws that have open standing provisions. Importantly, such provisions are not limited to what are often called "planning laws", as may be a common perception.

The experience under these laws has been the same as under the EPA Act. There has not been a flood of litigation. Rather the provisions provide an essential check on the administration of the laws.

3.4 Other Factors
Concerns that frivolous and vexatious litigants will be let loose in the Courts are overcome by the inherent discretion of Courts to properly and adequately deal with any such litigant. If a litigant is a mere busy body, any lack of good faith will quickly be revealed once legal proceedings are commenced and can be dealt with by the Court.

An "any person" provision also overcomes the issue of the time for determination of whether a party has standing.

There has been a tendency to defer consideration of standing until the trial on the substantive issues. On the one hand it is undesirable for there to be uncertainty as to a party's right to bring proceedings at such a late stage.

However, in the absence of adequate reforms, that process will need to continue to ensure there is full analysis of standing in conjunction with the subject matter of the legal proceedings and that it is not dealt with prematurely and preemptorily.

A further difficulty with the restrictive tests is that they inevitably require extensive resources to adduce the evidence necessary to show that a person is "aggrieved" or has the relevant special interest. This is even with a more liberalized interpretation of the test.

3.5 Commercial Factors
Commercial factors have sometimes been cited as a reason for not providing open standing on the basis that the mere commencement of litigation can have a significant commercial

impact. Such arguments must be approached with extreme caution as they raise the issue of the extent to which commercial factors drive the legal system. They must be weighed against the need for protection of the fundamentals of a robust legal system, which, potentially, such arguments are prone to ignore.

Such factors may be relevant to the exercise of discretion at other stages in the proceedings and should not be used at the outset to abort enforcement and accountability.

3.6 Public Interest Criteria

The Commission's discussion paper has attempted to identify public interest criteria to assist in determining standing. There are clearly difficulties with such an approach and it should not be recommended.

Practice shows that the true nature of proceedings, even with the best preparation, is not always evident from the start. A particular public interest aspect may not fully reveal itself until the proceedings are on foot. It would not be appropriate to thwart proceedings on the basis of a preemptory judgement of their true nature.

"Public interest" is also likely to be an issue more relevant to the question of costs than to standing. The determination of costs orders may be assisted by reference to different categorizations of proceedings. However, it would be premature to make "public interest" a criterion for the commencement of proceedings.

Similarly, the suggested criterion of a person showing a capacity to represent the public interest is inappropriate. If the idea for such a criterion is sourced in the judgement of Justice Wilcox in Ogle v Strickland, it is necessary to clarify the remarks of His Honour in that case.

His Honour referred to the need for a litigant to fully and competently present a particular interest in a case. But in no way was that to be used as a means of preventing a party from commencing proceedings in the first place. Rather the issue went to the discretion of the Court to deal with the adequacy of the presentation once that problem arose.

A further concern with a criterion of capacity to represent an interest, is that it has the potential to lead inquiry in unanticipated directions, with little relevance and at some cost. The factors listed in the paper of "plaintiff's status, experience, resources and motivation" highlight this potential.

A definition of public interest must therefore be avoided.

4. CONCLUSION

In conclusion, it would be wrong to wait for the relaxation of standing to occur with the passage of time, rather than through legislative reforms. Such an approach overlooks the potential for a variation in approaches by judges even within the same jurisdiction. Moreover, a failure to provide open standing is a denial of one of the most fundamental elements of a legal system that provides access for the environment.

By way of summary of the remarks made in this submission, we propose that the Commission make the following recommendations.

1. An "any person" provision be included in environmental laws. This is required to provide a "fundamental safeguard" on the administration of environmental laws. Standing should be inclusive, with the Courts having inherent power to exclude litigants shown to be frivolous or vexatious.

2. An "any person" provision be preferred to the "person aggrieved" test and the test in the Endangered Species ACT (1992) (Cth).

3. An objects clause be included in the reform legislation. This can be along the lines identified in the submission of the Queensland Bar Association -

   "That the Parliament wishes to avoid Court time being wasted on considering a person's right to bring litigation as opposed to dealing with the substantive questions raised in the legislation; that the Parliament desires that actions of government and private entities be accountable to the law and that such accountability not be prevented by a requirement that persons who bring litigation have a special interest in the subject matter of the litigation."[8]

   This is consistent with the importance of objects clauses in environmental legislation.[9]

4. There be no criterion that the litigation be in the public interest, or that a person has the capacity to represent that interest.

5. There are at least three types of reforms required.

   (1). Amend commonwealth legislation to include third party civil enforcement provisions, in the sar terms as Section 123 of the Environmental Plannir and Assessment Act 1979, in the relevant Commonwealth legislation.

   (2) Amend the Environment Protection (Impact of Proposals) Act 1974 to include a provision in the same terms as Section 25 of the Environmental Offences and Penalties Act 1989 (NSW) to allow restraint of a breach or threatened breach of any Act which breach is causing or is likely to cause environmental harm.

   (3) Amend the Administrative Decisions (Judicial Review) Act 1977 to provide that any person may apply for the relief provided in the legislation, where the decision the subject of review, is causing or is likely to cause environmental harm, or is made in breach of an environmental statute. A list of the statutes can be specified by regulation.

Endnotes

[1].Capria A and Spagnolo C, Introduction to Studies on Environmental Legislation and Administration in the United States, Canada, Japan and Australia, Milan, Italian Research and Information on the Economics of Public and Public Interest Organisations, December 1989

[2].Friends of the Earth v Carey 535 F 2d 165 at 172-173 (2d Cir). See generally, Brecher JJ "The Public Interest and Intimidation Suits: A New Approach", (1988) 28 Santa Clara Law Review 105 at 105-107.

[3]. (1994) 127 ALR 617

[4].People v The Offenders, Dispute Resolution Seminar, Brisbane, 6 July, 1990

[5] Ogle v Strickland (1987) 13 FCR 306

[6] Premier Nick Greiner's Second Reading Speech, Environmental Offences and Penalties Act 1989

[7] Queensland Bar Assocation Submission 20 to the ALRC Discussion Paper

[8] Sturgess G., "Thirty Different Governments", Report of the Commission of Enquiry into Red Tape, NSW Government, January 1994

[9].Rhode, "The Objects Clause In Environmental Legislation" (1995) EPLJ 80.

UPDATE ON STANDING

James Johnson, Solicitor, Environmental Defender's Office

On 30th May 1996 the Australian Law Reform Commission Report No. 78, "Beyond the Door Keeper: Standing to Sue for Public Remedies" was tabled in Parliament. The report is about who is entitled to commence litigation that has a public element.

The EDOs submission is extensively quoted in the report and the recommendations made by the EDO are substantially contained in the recommendations made by the Commission.

Under the heading "Why this Reform is Needed", the report provides as follows:

> "The current law on standing for proceedings of this kind is counterproductive. It acts as an extra source of unnecessary legal costs and delay. It does not act as an effective filter for disputes that are futile, vexatious or otherwise inappropriate for litigation. Such a filter is provided by other laws and discretions available to the court."
>
> It also acts as an unpredictable technical barrier. In particular the 'special interest' test can be uncertain, complicated, inconsistent and overly dependent on subjective value judgements. This can make the legal system appear unfair, inefficient and ineffective.
>
> The standing rules do not work as a gate guarding Australia against a flood of litigation or guarding Australian business against damaging and meddlesome interference. Experience over the last ten years indicates that there is not a flood of litigants waiting to be released and that, even if there were, standing tests are not an effective restraint. Where there is a need for protection against damaging interference in government regulation of business and other activities, this requires better case management and better government decision making. The law of standing does not help.
>
> The current law on standing is therefore a door-keeper that courts do not need as protection and litigants cannot afford."

In brief, the most relevant recommendations of the report are:

- Standing reforms to apply to public law proceedings
- Reforms to the law of standing should apply to *Administer Decision (Judicial Review) Act* (ADJR) proceedings, proceedings for an injunction, proceedings for prerogative relief, proceedings to obtain a statutory remedy which is similar to these remedies BUT ONLY where the proceedings relate to a matter arising under the Constitution, federal legislation or against the Commonwealth.
- Any person should be able to commence public law proceedings, unless the legislation indicates a contrary intention or it would not be in the public interest to proceed because this would unreasonably interfere with the ability of a person with a private interest in the matter to deal with it.
- Standing ought to be determined as a preliminary issue.
- A court may give leave to any person to participate in public law proceedings.
- The court must give reasons for its decision to grant or refuse a person's application to intervene.
- Any person seeking to intervene may, with the leave of the appellate court, appeal against an order granting or refusing intervention.
- The court should have the power to direct that notice of public law proceedings be given to third parties.
- A person who intervenes in public law proceedings may appeal against the judgement of the court with the leave of the appellate court.

- Any person who intervenes in public law proceedings may seek, or be subject to, orders for costs.

- A person who intervenes with the leave of the court should not generally recover or be liable for costs.

- The rules for standing and intervention in federal public law proceedings recommended in this report should be implemented by the enactment of a Commonwealth standing statute.

Standing Under the *Hazardous Waste (Regulation of Exports and Imports) Amendment Act* 1996.

The Commonwealth Department of Environment proposed amending the standing provisions of the *Hazardous Waste (Regulation Export and Imports) Act* to allow standing in similar terms to that allowed under the *Endangered Species Protection (ESP) Act* 1992. Section 131 of the ESP Act allows proceedings to be taken by an "interested person" meaning:

> (a) a person who has engaged in a series of activities relating to the protection or conservation of or research into listed native species or listed ecological communities,or
>
> (b) an organisation whose objects or purposes include and whose activities relate to the protection or conservation of, or research into, listed native species, providing the application relates to something done after the organisation was formed or its objects dealt with the matter or engaged in those activities.

Business lobbied hard against similar standing provisions. In discussing the proposed standing changes, the chairman of the Business Council of Australia's Environment Committee opened the BCAs environment conference by saying:

> "But the process of translating good intentions into practical policy is in danger of being perverted. Key concerns include..... the ability of just anyone to mount legal challenges to ministerial decisions".

The Minerals Council of Australia obtained legal advice from Blake Dawson Waldron in Canberra as to the effect of such a provision. This advice was distributed to Government Departments including the Department of Environment and resource portfolios.

Constitutional Invalidity

The legal advice provides firstly that the standing provision may be invalid on constitutional grounds if enacted. While saying that the constitutional argument was "strongly arguable" no indication was given of prospects for success. The ALRC rightly dismissed this argument in 1985 and again in this most recent Report. I think Blakes is simply wrong and that the point is not even arguable.

Frivolous and Vexatious Litigation

The advice obtained by the Mineral Council of Australia also states that:

> "in our view, if all that is required to gain standing for judicial review is to modify the object or purpose clause of an organisation or association, the courts 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 as any two dollar association will be able to modify its objects or purposes clause to give itself standing for judicial review purposes under the Act".

Again, 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. An action could be stayed as an abuse of process or struck out. It would be an extremely brave, indeed foolish, counsel who would stand before a federal court judge and put the argument that His Honour could not control a vexatious litigant.

Industry won major concessions when the legislation was passed last month. The "extended standing" provisions now relevantly provide that a person or organisation must have engaged in a series of activities relating to research into hazardous waste, the protection of people or the environment from the harmful effects of hazardous waste, research into pollution from disposable hazardous waste or the protection of human beings or the environment from such pollution.

Sub-section 8 was added on the insistence of the WA Greens:

> "To avoid doubt, this section is intended to extend, but not limit, the meaning of the expression "person aggrieved" by a decision".

It is an indictment of the government, which acted before the ALRC report was tabled, that such an explanation is necessary.

It is worth contrasting the business and government approach not just with the recommendations of the ALRC, but with Mr Greiner's comments in Parliament upon the introduction of provisions enabling open standing to restrain a breach of **any Act** in NSW which is likely to cause harm to the environment:

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

Perhaps the Minerals Council of Australia ought to give more credibility to the advice of Mr Greiner than that of their lawyers.

WASTE REFORM PROCESS GATHERS MOMENTUM

Paddy Manning, Waste Policy Section, Environment Protection Authority

As many readers would by now be aware, the NSW Government has commenced implementation of a comprehensive package of reforms to the system of waste management in this State. The reform process was kicked off last December, with the passage of the *Waste Minimisation and Management Act* 1995, and has gathered momentum as a range of associated initiatives get underway, including formation of the State Waste Advisory Council, nominations from local councils to waste management regions, preparation of scoping papers on industry waste reduction plans, and improved regulation through enforcement of new waste-related offences. Thoroughgoing legislative reform in the waste area will be completed with introduction of new regulations under the Act and corporatisation of the Waste Service NSW under the provisions of the *State Owned Corporations Act* 1989.

The *Waste Minimisation and Management Act* (the Act), which replaces the former *Waste Disposal Act* 1970, remains the key to understanding the reform process, and this article will highlight and expand upon some of the central elements of the package in the context of the Act's provisions.

The new role for State Government

The State Government is responsible for ensuring that the objectives of the Act, spelt out in section 3, are delivered. The Act aims to ensure that local government, industry and the community each make a fair contribution to development and implementation of strategies designed to reduce consumption of natural resources and reduce waste disposal. With this goal in mind, the State Government will set policy objectives and priorities for the community as a whole. Thus, achievement of the NSW target of a 60% reduction in waste disposed to landfill per capita by the year 2000 (calculated against 1990 base levels) will be coordinated at State level.

The EPA will play the lead role, carrying prime responsibility for monitoring, reporting upon, and guiding the performance of key participants in the waste management process, including state government agencies, local government and industry.

To ensure that local government and other stakeholder groups have a direct line to the Minister for the Environment and a clear voice in setting waste policy, the Act established a new State Waste Advisory Council. The Council consists of representatives from local government, industry, the waste industry, and consumer and environment groups. It has the power to advise the Minister, and the EPA, as appropriate, on a wide range of waste policy, planning and funding issues.

To complement this initiative and further improve communication on environmental matters between the State and local government spheres, the *Protection of the Environment Administration Act* 1991 was amended to allow a member with expertise in local government matters to be appointed to the Board of the EPA. The President of the Local Government Association, Mr Peter Woods, accordingly commenced a twelve-month appointment to the Board on 12 March 1996.

As well as setting broad policy directions, the EPA will retain responsibility for the regulation and licensing of the waste management industry. The Act and proposed regulations overhaul the current regulatory system applying to solid waste.

To improve enforcement in the waste area, penalties for environmental offences relating to waste management and handling have now been brought into line with those established under other pollution control statutes. The Act establishes a number of new offences and incorporates these into the *Environmental Offences & Penalties Act* 1989 (EOPA) by amendment. Under the EOPA these new offences may be subject either of proceedings attracting penalties ranging from $5,000 to $125,000, or issue of penalty infringement notices carrying fines from $200 to $600. Certain offences can be dealt with by authorised officers appointed by the EPA under section 81 of the Act, and it is expected that the EPA will authorise local council officers to enforce some of these.

The effect of the Act is to strengthen the enforcement powers of the EPA with respect to waste generation, handling and disposal. The new offences for illegal waste dumping are an example. Previously the EPA had only two options to take enforcement action on waste dumping: issue of a $300 fine for littering, or prosecution of a Tier 1 offence for wilful or negligent disposal of waste without lawful authority in a manner likely to cause harm to the environment. The Tier 1 offence carried heavy penalties - up to $1,000,000 for a corporation and $250,000 for an individual, as well as the possibility of imprisonment - but also placed a heavy burden of proof on the EPA, making successful prosecution difficult. Now, under sections 63 and 64 of the *Waste Minimisation and Management Act* 1995, waste dumping is subject of specific Tier 2 offences carrying penalties up to $125,000 for a corporation and $60,000 for an individual. Section 63 allows the EPA to commence proceedings against both persons disposing of waste without lawful authority (as defined in the Act), *and* the owner of the waste which has been disposed (subject to a defence of due diligence, to be proved by the owner of the waste). Section 64 allows the EPA to target the owner or occupier of the land on which waste has been illegally disposed. Both offences can be subject of infringement notices issued by local government officers (irrespective of any authorisation by the EPA under section 81).

Along with the new enforcement provisions, the licensing scheme administered by the EPA has been overhauled. Draft regulations under the Act, and a regulatory impact statement, have been released for public comment this month in accordance with the *Subordinate Legislation Act* 1989. Written submissions from stakeholders are encouraged.

The draft regulations propose new criteria for licensing waste activities, transporters and facilities State-wide. These criteria will allow the EPA to focus its regulatory effort upon the activities which pose the greatest threat to community health and the environment, by taking into account proximity to environmentally sensitive areas, the volume of waste involved, and the toxicity of the waste in question.

The EPA intends that a more concentrated regulatory effort will result in better environmental management performance among licensees. Where the regulations require waste receival facilities to be licensed, for example, the EPA will ensure these are operated in a responsible manner by requiring operators to develop a comprehensive Environmental Management Plan before they are able to obtain a licence to accept waste. Licences prepared after approval of a facility will take account of the management techniques proposed in the Plan, which should show how the facility would conform with the EPA's environmental objectives - with provisions on facility siting, design, construction, operation, monitoring and post-closure. To assist operators in preparation of Environmental Management Plans, the EPA will issue Guidelines which clearly identify the environmental objectives associated with a range of waste handling and receival operations, and provide advice on how operators might be able to satisfy those objectives - the *Environmental Guidelines: Solid Waste Landfills* are the first of a series to be released. The regulatory approach will thus be performance-based: the EPA will specify the outcomes which licensees are required to achieve, rather than dictating the techniques which licensees must adopt in their operation. The aim is to raise standards of environmental performance while minimising the cost of compliance to industry, by allowing licensees the flexibility to adopt more innovative and efficient management techniques as these emerge, as long as they can demonstrate that the specified environmental objectives can be met.

A new role for the Waste Industry

Consistent with its pre-election commitments, and also with its obligations under the National Competition Policy, the NSW Government will retain public sector control of putrescible waste landfills. However, the private sector is not precluded from operating putrescible landfills. A public authority (state or local government) must hold a "supervisory" licence for a putrescible landfill wherever commercial arrangements with private waste companies are entered into. Through its supervisory licence the public authority will be made accountable for the key environmental management aspects of the facility, and the setting of disposal charges. The private waste company would also be issued an "operational" licence.

The Government believes the trend of increasing private sector involvement in the putrescible and non-putrescible waste reprocessing and recycling industry should be strongly encouraged. The public sector control provisions do not extend to other types of waste management facilities.

The Waste Service will be corporatised and will, for the first time, be able to compete for the provision of waste services anywhere across the State. Proposed legislation is presently being considered by the Government for introduction to the Parliament in the Spring Session.

To address past problems in landfill siting, the Government has also set in place a new State Environmental Planning Policy (SEPP), which provides for the determination of development applications proposing major new putrescible landfills (or extensions and upgrades to existing landfills) meeting certain threshold size criteria. SEPP 48 "Major Putrescible Landfill Sites" establishes the Minister for Urban Affairs and Planning as the consent authority for all such applications under the *Environmental Planning and Assessment Act* 1979 (EPAA). In determining such applications the Minister must consider, in addition to the full range of matters listed under section 90 of the EPAA, advice from the EPA on whether there is a legitimate or "justifiable" demand for the increased waste disposal capacity, and whether the landfill is the preferred waste management strategy under an approved Regional Waste Plan (see below). The SEPP will give effect to the Government's policy position that there will be no new major regional landfills approved unless it can be demonstrated that viable waste reduction alternative strategies are unavailable.

The Act maintains the requirement for waste facilities to be subject to a waste disposal levy (similar to the section 29 levy under the former *Waste Disposal Act* 1970). The levy will account for the externalised social and environmental costs of waste disposal, and will act to discourage waste disposal and promote waste reprocessing and recycling alternatives. The draft regulations propose that in the Sydney area levy rates will increase to $10 for each of tonne of waste received at a licensed waste disposal facility (up from the current $7.20/tonne) until 1 July 1997, and that over the same period the levy will be extended to the Hunter and Illawarra regulated areas for the first time, at a rate of $4/tonne. From 1 July 1997, it is proposed that these amounts would rise to $15/tonne and $8/tonne respectively. The levy will also apply at waste facilities which receive waste from within the Sydney, Hunter and Illawarra areas. Unlike the section 29 levy, the new levy will be a more flexible economic instrument with the capacity for exemptions and rebates to be provided for beneficial uses of waste, such as reprocessing and recycling. Thus the proposed regulations provide that premises used solely as waste storage, transfer or treatment facilities (excepting incinerators) will be exempted from the requirement to contribute, and that a waste disposal facility which reprocesses or recycles waste (on- or off-site) can get a levy rebate for the amount of waste diverted from landfill.

A new role for Local Government

The linchpin of the reform package is the regionalisation of waste management. The Act formally constitutes waste management regions from groups of council areas, and establishes Waste Planning and Management Boards to plan and manage domestic, commercial and industrial wastes on a regional basis. Grouping local government areas into waste management regions will enable waste planners and decision-makers to take advantage of better economies of scale, and pool expertise and resources to gain access to modern waste collection, sorting and reprocessing techniques which have previously been beyond the reach of councils.

Waste Boards will be able to ensure a consistent waste reduction effort across their regions by member councils. Each Waste Board will be required to develop a comprehensive Regional Waste Plan. The Plan will profile waste flows in the region, and commit member councils to introducing efficient strategies for waste reduction and waste management. The Plans will set out the Board's waste reduction objectives for the region and describe the steps the Board will take to ensure those objectives are met.

Waste Boards will be required to consult with the community on the range of initiatives proposed by releasing a draft of the Plan for a period of two months public review.

The Act establishes a Waste Planning and Management Fund to finance the establishment cost of waste boards and to fund regional waste reduction programs identified in Regional Waste Plans. The projected commitment to the Fund is approximately $32.5 million dollars for the first three years. Ongoing payments to Waste Boards from the Fund will be tied to performance against the objectives set

out in Regional Waste Plans.

The Minister for the Environment will be responsible for approving Regional Waste Plans and allocating associated funds to Waste Boards after considering any advice from the State Waste Advisory Council.

The process for forming waste management regions and nominating representatives to Waste Boards is formalised in the Act. Participation in the Waste Board scheme is mandatory in the major urban centres of Sydney, the Hunter and the Illawarra, but voluntary for other areas of the State. The Government expects that Waste Boards will be formally established by August this year.

A new role for the Manufacturing Sector

The new Act also tackles the problem of getting manufacturers and distributers to reduce generation and disposal of wastes for which they are responsible, by establishing a producer responsibility scheme involving the development of binding commitments on industry sectors in comprehensive Industry Waste Reduction Plans (IWRPs). IWRP commitments may require nominated parties to meet waste reduction targets, make financial contributions from industry to support community waste recovery and recycling services, adopt cleaner production techniques, support litter control programs, and so on.

The Minister for the Environment will nominate which industry sectors are to be subject to the requirements of the scheme, on environmental grounds. The process of negotiation will be transparent, and can only commence after the EPA has advertised widely regarding the intention to develop an IWRP for the nominated industry sector, and has taken written submissions from the public. The Act requires that SWAC be closely involved at all stages of the negotiation process, and the resulting draft plan must be submitted to the Council for advice before the Minister can give final approval.

Relevant industry sector members will be made accountable for performance against the objectives and targets set out in the Plan: failure to comply with a plan is made an offence under section 39 of the Act, and carries a maximum penalty of $125,000 for a corporation and $60,000 for an individual. Commitments under a plan will also be able to be attached as a condition of a licence issued to individual industry sector members, or in regulations.

The Producer Responsibility Scheme enables the Minister for the Environment to *impose* an IWRP on an industry sector which is clearly not committed to waste reduction or a negotiated IWRP process.

As last resort options and where the negotiated IWRP process fails, the Act also enables the Government to regulate to ban the sale in NSW of an industry sector's products or to impose "take-back" requirements on an industry sector. Under these requirements the industry would literally take back all of its products directly from consumers and from community recovery and recycling schemes. Industry members can be required to put up a bond, as an assurance that a take-back scheme will be put in place.

Preparation of the first IWRPs, on the milk packaging industry and the tyre industry, is already underway.

Conclusion

The waste reform package launched with the *Waste Minimisation and Management Act* was the culmination of months of intense policy development by the new Government, and more than two years of consultation and debate arising from the deliberations of the Joint Select Committee upon Waste Management and its report of September 1993.

The package equitably shares responsibilities between State Government, Local Government, the manufacturing sector and the waste industry and underpins those responsibilities with a blend of planning and regulatory initiatives and economic incentives necessary to effect sound waste management in NSW for the year 2000 and beyond.

Further information

The EPA has published a booklet entitled *Waste Reforms*, which outlines the direction of waste policy in NSW, and is freely available to members of the public, as are copies of the proposed *Waste Minimisation and Management Regulation* 1996 and Regulatory Impact Statement - contact the EPA's Pollution Line on telephone (02) 795 5555. Other publications include the EPA's *Guideline: Forming Waste Management Regions in NSW*, the *Green Waste: Draft Action Plan*, and *Environmental Guidelines: Solid Waste Landfills*, and *Guideline: Establishing Waste Planning and Management Boards in NSW* (forthcoming). For further information, contact Paddy Manning on telephone (02) 325 5826.

THE THREATENED SPECIES CONSERVATION ACT 1995 - WHAT DOES IT MEAN IN PRACTICE ?

This paper was presented at the Threatened Species Conservation Act Seminar, Sydney, 31 May 1996 .

James Johnson, Environmental Defender's Office

The changeover - Transitional provisions.

Many of the difficulties in understanding how legislation will work in particular cases relate to developments or activities which are part way through the consent/approval process. To assist in understanding how proposals at different stages will be affected, transitional provisions, in the form of regulations, have been passed. These, together with the Act, hopefully give an idea of how any particular proposal is affected.

For development consents or approvals granted before the commencement of the *Threatened Species Conservation Act* 1995 (TSC Act) on 1 January 1996, no further licence needs to

be obtained to carry out that development or activity, provided it is carried out in accordance with the development consent or approval conditions and it is essential for the carrying out of the development or activity. Thus the new legislation seems to provide no protection against harming or picking threatened species, populations or communities or damaging critical habitat where consent or approval has already been given.

Where a development application (DA) has been lodged but not determined before 1 January 1996, the proponent must continue with the preparation of a fauna impact statement in accordance with section 92D of the National Parks & Wildlife Act.

Where assessment under Part V of the *Environmental Planning and Assessment Act (EP&A Act)* has commenced, at least to the extent that the Director General has given requirements for a fauna impact statement under the former legislation, then the provisions of s.92D must be followed for obtaining a fauna impact statement.

In both of these cases, it seems that third party merit appeal rights have been repealed. Where a s.120 licence has been obtained, that licence continues in operation. Where a fauna impact statement has been prepared in accordance with the transitional provisions set out above, then the National Parks and Wildlife Service (NPWS) can issue a s.120 licence.

It will be clear from the above that many developments and activities will never have been assessed for their impact on a range of species. Even those assessed under the *Endangered Fauna Interim Protection Act* might not have been assessed for their impact on endangered species of plants.

However, the Director General of NPWS does have the power to make an interim protection order in respect of an area of land which has natural scientific or cultural significance on which the Director intends to exercise any function or which is critical habitat.

Part 4 of the EP&A Act
Where a local council receives a DA, if the development is:

> "likely to significantly affect threatened species, populations or ecological communities, or their habitats"

it must be accompanied by a species impact statement (SIS). The council must forward a copy of the application and SIS, plus any submissions made on it, to the Director General of NPWS. The council must not grant consent to the DA without the concurrence of the Director General, who has 40 days to respond but who can extend the time period.

The council on the other hand must make its decision within 60 days or risk an appeal on the basis of a deemed refusal.

Part 5 of the EP&A Act
Similarly, a determining authority must not carry out or give approval to an activity that is:

> "likely to significantly affect threatened species, populations or ecological communities, or their habitats"

unless a SIS has been prepared. If the determining authority is not a Minister, then the Director General must grant concurrence, as in Part 4. If the determining authority is a Minister, then he or she is only obliged to consult with the Minister for Environment.

It is worth comparing the threshold test for preparation of an Environmental Impact Statement (EIS) under Part 5, which requires an EIS if the activity is "likely to significantly affect the environment". Arguably if an activity crosses the threshold for an SIS it has also crossed the threshold for an EIS. Only one document needs to be prepared, but an EIS is a little more wide ranging in its scope. At the Commonwealth level, the law recognises that a significant impact on threatened species equates with, and crosses the threshold for, significant impact on the environment generally.

"Significance" and the threshold for the preparation of a species impact statement
Local councils have generally had very little discretion as to whether an environmental impact statement ought to be prepared for a development. Schedule 3 to the Environmental Planning & Assessment Regulation (EPAR) sets out reasonably clearly those developments which will require an EIS. This has removed pressure from councils to avoid the assessment and public participation processes associated with an EIS and has achieved a certain level of consistency throughout New South Wales.

Section 5A of the *EP&A Act* now provides that consent authorities (often councils), as well as determining authorities, must determine whether there is "likely to be a significant effect on threatened species, populations or ecological communities, or their habitats". This requires these bodies to make difficult decisions in quite technically scientific areas and assumes that they have mastered a large body of scientific knowledge. To adequately carry out this role, councils in particular will, it seems, need to employ staff with expertise in threatened species or employ consultants when the need arises.

The word "significant" has been considered by the Courts in the context of s.112 of the *EP&A Act* where determining authorities must prepare an environmental impact statement where an activity is "likely to significantly affect" the environment.

> ""Likely" has been held to mean a "real chance or possibility" and "significantly" to mean "important, notable, weighty, or more than ordinary"; **Jarasius v. The Forestry Commission of New South Wales**. I see no reason why these constructions should not be imported into the similarly worded provisions of ss4A, 77(3)(d1) and 90(1)(c2). The same statute is involved and similar approaches are dictated; See also **Leatch v. The Director General National Parks & Wildlife Service (1993) 81 LGERA 270**". (Stein J in **Oshlack v. Richmond River Shire Council** 82 LGERA 222 at 233)

A local council has a tremendous amount of discretion in forming an opinion about whether an effect will be significant.

The decision need only be one which is reasonably open to the decision maker. Expert opinion will differ, and faced with conflicting expert evidence, a decision maker is generally allowed to prefer one above another. Put simply, the legislative framework requires an informed decision, it cannot make sure that the best decision is made.

The Eight Point Test

The factors to be taken into account in s.5A in arriving at a decision about significance,, known as the 'eight point test" are all factors which must be weighed by a decision maker They all go into the basket. You cannot seize on one particular factor to the exclusion of the others. The NPWS and Department of Urban Affairs and Planning (DUAP) are currently developing guidelines to assist with the interpretation of s.5A.

Matters considered by the Director General as concurrence authority.

Section 77C sets out a range of matters which the Director General of NPWS must take into account when deciding whether to grant concurrence for an activity. Reading between the lines, some toing and froing between departments must have gone on in the drafting of this section. The inclusion of sub-paragraph (h)

> "the likely social and economic consequences of granting or not granting concurrence"

is obviously redundant when it follows sub-paragraph (g)

> "the principles of ecologically sustainable development (as described by s.6(2) of the *Protection of the Environment Administration Act* 1991)".

and emphasises the role of other portfolios in attempting to water down the legislation. (Similarly the inclusion of section 44(2) in matters for consideration by the Minister when considering a recommendation to declare critical habitat shows a late addition to placate someone).

Ecologically Sustainable Development (ESD)

The meaning of these principles has not been subject to much scrutiny in the courts in New South Wales. This is likely to change because the phrase is popping up in more and more places. The concept has been introduced into Schedule 2 to the EPAR which provides for the contents of EISs. Clause 5 of that Schedule provides that an EIS must contain

> "The reasons justifying the carrying out of the development or the activity in the manner proposed, having regard to biophysical, economic and social considerations and the principles of ecologically sustainable development".

> Clause 8 elaborates upon these principles.

Regulation 57 of the Environmental Planning & Assessment Regulation 1980, the former provision governing the contents of an EIS, used to provide that a justification in terms of social and economic factors was required. Samuels JA in the **Guthega** case dealt with this interpretation, establishing a fairly low threshold for dealing with "justification" for the development.

Rather than an assessment of whether a proponent can make a dollar, which is essentially the minimum that was required, the incorporation of a requirement to consider the principles of ESD may well require something closer to a cost benefit analysis for a proposal. This is because the principles of ESD require improved pricing and valuation of resources or "cost internalisation". This will be a step forward, requiring the broader costs to the community of proposals to be quantified.

One of the principles underlying ESD, the precautionary principle, was discussed in **Leatch v. The National Parks & Wildlife Service and Shoalhaven City Council**, 81 LGERA 270. In that case the court held there was insufficient information about the Giant Burrowing Frog, which was listed as endangered fauna, to make a decision when regard was had to the precautionary principle.

The precautionary principle was later considered in **Nichols v. The Director of National Parks & Wildlife**, 84 LGERA 397. On this occasion the Court granted a fauna licence. Again, in **Greenpeace v Redbank Power Company** the court considered the precautionary principle and held that it was just one of the factors to which regard should be had. The decisions are not inconsistent.

Not Part 4 or Part 5

The new legislative scheme does require licensing for works that do not have development consent or approval. For example, land clearing does not require development consent in some areas, if less than 2ha (See State Environmental Plan Policy (SEPP) 46). If the land is not "protected land" under the Soil Conservation Act, then approval to clear will not be required.

A licence must then be obtained under s.91 of the *Threatened Species Conservation Act* if the work results in harm to a threatened species population or ecological community or its habitat, except for:

(a) routine agricultural activities (these have yet to be defined); or

(b) where the work is identified in and carried in accordance with a property management plan approved by the Director General. The legislation provides no guidance as to what a property management plan might contain.

There are third party appeal rights to decisions to grant these licences.

Bushfire Act Activities

It is also a defence if the work was authorised to be done by or under the *Bushfires Act* 1949 or the *State Emergency and Rescue Management Act* 1989 and was reasonably necessary in order to avoid a threat to life or property.

How much can be done under cover of the *Bushfires Act* which harms or picks threatened species, populations or communities? The question is yet to be addressed by the courts but in my

opinion the defence is not as broad as many people appear to have interpreted. In order to rely on the defence, a person would need to establish there was a threat to life or property. Secondly, a person needs to establish that the work was reasonably necessary to avoid this particular threat.

The *Bushfire Act* defence will not be available for any burning or clearing a person might want to do. Arguably there must be some immediacy of threat or compliance with a s.41A Bushfire Management Plan.

Critical Habitat

Essentially critical habitat is habitat of an endangered species population or ecological community that is critical to its survival. The declaration of critical habitat is obviously key to the successful operation of the *TSC Act*. Declaration of critical habitat results in:

(a) an automatic trigger of a species impact statement for development on that land

(b) an obligation to amend environmental planning instruments which relate to that land to show the location of that critical habitat.

The decision as to whether to recommend the nomination of land as critical habitat remains with the Director General who is under the direction and control of the Minister for the Environment. The Director General must consult with a scientific committee before preparing a recommendation, give notice to land holders, public authorities and others, and publish notice of the recommendation. The Director General must consider submissions received and forward recommendations to the Minister.

The Minister must consider the recommendation having regard to the factors in s.44 of the *TSC Act*. The Minister will need to consult with any public authority if the recommendation is likely to affect the exercise of its functions. The Minister can direct an amendment be made by the Director General and can approve or refuse a recommendation.

As with the listing of species populations and ecological communities, in our opinion the declaration of what is critical habitat ought to be a scientific decision based on the best knowledge available. The processes which respond to that declaration of critical habitat are then political processes. Unfortunately, besides the Minister's control of the process, the government can provide in regulations that land is not able to be declared as critical habitat.

Public authorities must have regard to critical habitat and regulations may prohibit certain actions on critical habitat. Maps are to be prepared and forwarded to a number of the key players including public authorities and land holders, and the Director General must keep a register of critical habitat.

Critical Habitat and Planning

Finally, but most importantly the Director of Urban Affairs and Planning(in relation to a draft SEPP, REP (Regional Environmental Plan) or environmental study) and a local council(in relation to an environmental study or a draft LEP (Local Environmental Plan)), must consult with the Director General of NPWS if critical habitat will or may be affected by the study or environmental planning instrument. This allows input at the planning stage, not just at the specific development application stage.

The emphasis on individual developments in the past has often resulted in "death by a thousand cuts". Even now, as the law is currently framed, an application for subdivision of land which only involved "lines on maps" and perhaps the placing of survey pegs would not arguably be likely to have a significant effect on threatened species populations or ecological communities. If the subdivision enables housing on residential blocks, taken individually, the first, second and successive development application may not be likely to have a significant effect on threatened species populations or ecological communities. However cumulatively the impact could well be catastrophic.
The provisions of s.34A requiring consultation at least give the opportunity for information to be placed before the Director or the council. However the Director General only has the right to have input and has no concurrence role at the planning stage.

Public Participation

The legislation outlined above results in greatly reduced public participation in decisions about actual developments. One of the most obvious reductions in public participation is that there is no longer a merits appeal when work has a significant impact on threatened species, unless of course it is also a designated development.

Less obvious on first reading, and possibly unintentional, is a failure to require consent authorities to advertise and exhibit DAs which are accompanied by a species impact statement (SIS).

A SIS is obviously an important document and is only prepared for developments of significance for threatened species. In view of the fact that this SIS process replaces the former process of a comprehensive fauna impact statements together with merit appeals to the Land and Environment Court, one would have expected that certain minimum public participation rights would attach to this process.

As it currently stands, there is no obligation contained in the legislation for an SIS to be advertised, to be placed on public exhibition or to be made available for purchase. There may well be developments where a council chooses not to advertise and exhibit a SIS. In these cases the community will not know that a SIS has been prepared or that a development with potentially significant impacts on threatened species is being proposed.

Section 77C (c) of the EP&A Act provides that the Director-General of NPWS must take into account any submissions or objections received concerning the development application. This clearly contemplates that people will have the opportunity to make submissions and objections relating to the development and the SIS.

This omission contrasts with Part 5 activities where the law specifically provides for advertising and exhibition of a SIS in the same way as for an EIS.

A further barrier to effective public participation in this important process is the failure to require a proponent to make available copies of the SIS for purchase. This means that even if a concerned member of the community finds out about a development application involving an SIS, they are restricted to examining the SIS during Council's business hours at Council chambers. This is totally impractical for many people.

Conclusion

The TSC Act has the capacity to integrate approvals process formerly undertaken in succession. This is a positive result, yet it need not have been achieved at the expense of public participation. It will be interesting to see whether the government takes a parallel approach in its new pollution control legislation. Hopefully we can see integration of processes and the efficiencies which can result as well as public participation which is so lacking in our current pollution licencing process.

Please contact the EDO if you are interested in obtaining a full set of papers from the Threatened Species Conservation Act Seminar held 31 MAY 1996.

CASE NOTE
Sawmillers Exports Pty Ltd v Minister For Resources
Administrative Appeals Tribunal, 17 May 1996

James Johnson, Director, EDO

On 17 May 1996 the Administrative Appeals Tribunal (AAT) handed down its reasons for decision following an application by Sawmillers Exports to review the Minister for Resources' decision on 6 February 1996 to issue a woodchip export licence. Sawmillers applied for a licence to export up to 500,000 tons of hardwood chips for the 1996 calendar year. In the licence granted, the authorised quantity for export was 288,000 tons. The application was for a merit review of the new licence to increase the quantity for export.

With the change of Federal Government after the election on 2 March 1996, it appears that the present Minister for Resources offered little or no evidence in support of the decision of the former Minister for Resources. Indeed in his statement of reasons, the present Minister made some significant statements which might almost be called admissions. The absence of an opportunity for any alternative point of view to be put before the A.A.T. no doubt lead the Deputy President of the AAT to say,

> "no question has been raised in the present proceedings that the applicant's activities, having regard to their source, are in any way environmentally objectionable".

The AAT accepted evidence that,

> "if such wood were not processed it would have to be disposed of or burned".

It later concluded that:

> "it is no longer economically viable to purchase these logs because the non-recoverable part cannot be sold as woodchip. These logs will likely be left in the forest to waste".

From a woodchipping company's and the Minister for Resources' point of view, leaving trees growing in the forest may well be leaving them to waste. Documents tendered in *TCT v. Minister for Resources and Gunns plc*, supplied by the Minister, confirm that this is the view. The following was handwritten across the top of a briefing minute for the Minister are the words:

> "storing the woodchips on the stump".

With the new Minister for Resources declining to offer evidence in support of the decision to impose the ceiling, Sawmillers Exports were able to call a succession of witnesses whose evidence was left substantially untested.

Ultimately the appeal by Sawmiller's Exports was dismissed and the grant of the licence by the Minister was upheld because it was in accordance with the Export Control (Hardwood Woodchips) Regulations 1995 which came into effect on 29 November 1995. These Regulations set a ceiling on the total exports of woodchips from Australia. The A.A.T. dealt with the validity of these regulations saying

> "the Regulation is a reflection of changed government policy directed towards reducing exports of woodchips on a gradual scale. It does not seem to me to be unreasonable to achieve this object by the imposition of a national ceiling for a particular year. Furthermore, it should be remembered that the making of a regulation is no mere executive act. It involves the creation of an instrument that is subject to parliamentary scrutiny. Although it may reflect policy, it is not a policy document. In the A.A.T.'s opinion, the regulation was a valid exercise of the regulation making power created by the Export Control Act 1982."

However, the Regulation is a disallowable instrument under the *Acts Interpretation Act* 1901 (Cth). The Government has now given notice of its intention to disallow the Regulation. It may well be that the government overturns the regulation in order to increase rather than decrease Australia's woodchip exports.

CASE NOTE
Rosemount Estates P/L & Anor v Minister for Urban Affairs and Planning & Anor

Andrew Sorenson, Solicitor, EDO

On 6 March 1996, the Land and Environment Court handed down judgment in relation to a challenge to the validity of SEPP 45 (State Environmental Planning Policy) - Permissibility of Mining. The case was brought by Rosemount Estates in relation to a consent granted by the Minister under SEPP 45 to Bengalla Mining Co. P/L, for an open cut coal mine near Muswellbrook in the Upper Hunter Valley.

Background

The proposed site for the mine is in a largely rural setting, close to the Hunter River and with several heritage buildings in the locality. The consent was for the extraction of about 112 million tonnes of coal from a 12 square kilometre area, over a 21 year period. Mine operations were to be conducted 24 hours a day with night lights and would have required the construction of extensive industrial plant.

A development application was initially lodged by Bengalla in November 1993 and was referred to the Minister, who directed that a Commission of Inquiry investigate the "environmental aspects of the Bengalla Coal Project". The report of the Commission recommended that the coal mine go ahead, despite concerns, in particular about the visual intrusion of the mine into the locality.

Rosemount commenced proceedings in the Land and Environment Court and in January 1995 it was found that the conclusion of the Commissioner was manifestly unreasonable. The Commission was subsequently reconvened and again recommended that the project go ahead. SEPP 45 was then gazetted on 4 August 1995 and three days later the Minister granted development consent to Bengalla's application, which led to Rosemount commencing the current proceedings.

The Court Decision

It was found by Stein J that both the substance of the SEPP and the manner in which it was made were manifestly unreasonable.

The SEPP made permissible mining which was likely to be inconsistent or incompatible with zone objectives and/or environmental performance criteria, which is contrary to good environmental planning. It involved setting aside a fundamental stage in the system of planning established by and integral to the Act, ie the "first" or "planning" stage.

Having regard to the scope and effect of the SEPP, it was unreasonable for the Director of the Department of Urban Affairs and Planning who drafted the SEPP, to only consult with the Chief Executive Officers of two government Departments and not with any other public authorities, in particular councils, and for the Minister not to publicise the draft policy before making his recommendation to the Governor to make the SEPP.

The SEPP itself was not explicable by reference to the stated object of providing clarity and transparency in LEPs (Local Environtal Plan) dealing with the permissibility of mining. No LEP was identified in the SEPP as being affected by any lack of clarity or transparency.

The SEPP was also a disproportionate response to the 'problem' outlined by the Director.This perceived problem was that provisions in environmental planning instruments introducing environmental criteria and zone objectives involve an unacceptable level of uncertainty in relation to mining developments.

Therefore the SEPP was invalid and so was the development consent based upon which it was based.

The decision was the subject of an appeal, and at the time of writing, judgment in the Court of Appeal has been reserved.

Importance of the Decision

The case is important as the effect of SEPP 45 was to undermine the two stage system of forward planning and project control established by the Environmental Planning and Assessment Act 1979.

Despite the drastic nature of the changes to the planning system, it is clear, as noted by Stein J in his judgment, that neither the Director nor the Minister had any comprehension of the land which could be affected by the SEPP, or the environmental attributes of that land.

If the SEPP were to be upheld, development which, because of its nature and extent, has a major impact on the environment of the State, would be allowed to bypass a fundamental element of the development control process. The integrity of the system, already affected by a growing list of exceptions to the statutory process, would be fundamentally weakened.

POSTSCRIPT

Not prepared to await delivery of judgment by the Court of Appeal, Craig Knowles, Minister for Urban Affairs and Planning, has signalled his intention to introduce the State Environmental Planning (Permissible Mining) Bill 1996 in State Parliament during the week ending 14 June 1996. The Bill seeks to retrospectively validate SEPP 45 in exactly the same form in which it was declared to be manifestly unreasonable by the Land and Environment Court, as well as the consent granted to Bengalla pursuant to the SEPP.

"No" - The Optus Cable Cases

David Galpin, Solicitor, EDO

In late 1995, Optus Networks Pty Ltd ("Optus") approached several Sydney councils and indicated that it intended to start installing its cable network. These cables will form part of the Optus telecommunications network, which will supply telephone, pay television and interactive (high speed data) services. Optus proposed to attach the cables to the existing electricity supply infrastructure. In places where the electricity power lines are above ground, the coaxial cables would be fixed to the same poles, about five metres above the ground and one metre below the power lines.

Several Sydney councils were opposed to the installation of the aerial cables in their areas and, when it became clear that Optus intended to proceed over their objections, sought injunctive relief in the Land and Environment Court and the Supreme Court. The judgments in relation to those urgent applications have recently been handed down.[1]

In the Land and Environment Court, Lane Cove Council argued that Optus had not obtained the consents and approvals required under the *Environmental Planning and Assessment Act 1979 (NSW)* ("the EP&A Act")[2] and the *Local Government Act 1993 (NSW)* ("the LGA"). In its defence, Optus relied on several provisions of the *Telecommunications Act 1991* (Cth) ("the Federal Act") and the Telecommunications (Exempt Activities) Regulations ("the regulations"). Optus argued that these provisions exempt it from the relevant state laws and s.109 of the Constitution operates to override them.

Sections 129 and 130 of the Federal Act give Optus, amongst other things, power to construct a facility over any land for the supply of a telecommunications service and to cut down or lop trees. Regulation 6 of the regulations[3] provides that a carrier may engage in certain specified exempt activities, including the installation of "a line" despite "a law of a State...about" various things, including "town planning".

The Land and Environment Court found favour with the argument that s.116 of the Federal Act and regulation 6 were intended to remove all restraints created by State planning and building laws. As a conseuence, s.109 of the Constitiution had the effect of overriding those state laws. Bannon J expressed extreme dissatisfaction with the result and declared that he washed his hands of it.

In the Supreme Court action, the four plaintiff councils were also unsuccessful in arguing for the application of State laws, Dunford J taking a similar approach to that of Bannon J.[4]

However, the councils also challenged whether Optus had complied with the provisions of the Telecommunications National Code ("the Code"), prepared by the Federal Minister under s.117 of the Federal Act. This Code places numerous obligations upon carriers in carrying out certain activities, including those prescribed in regulation 6. A carrier must, amongst other things, identify the prescribed activity in which it intends to engage, prepare a Corporate Environment Plan in respect of that activity, notify state authorites of the prescribed activity and consult with those authorities. If councils make objections of an environmental nature, or there is substantial community concern about the effect of the activity on the environment and the carrier considers that the effect of the activity on the environment is likely to be significant, then the carrier must notify the Department of Environment Sport and Territories ("DEST") about the proposal. DEST must then review the proposed activity and one possible outcome is that DEST can order that the activity be publicly reviewed.

The Court held that Optus had failed to comply with its obligations in several respects. The most important findings were that Optus had not properly notified and consulted with the councils and, secondly, that Optus had considered irrelevant matters in deciding whether to notify DEST.

Dunford J was concerned to point out that the Code replaces state environmental planning, development and building control laws, but does not seek to bypass the expertise of councils. It is important then that the notification and consultation requirements of the Code be complied with. Optus was in breach of the Code and the councils were entitled to injunctive relief. Optus had not provided the councils with specific details of which streets would have aerial cables in them and which would not. This meant that the councils could not make meaningful submissions regarding the activity.

Optus had made a policy decision in 1994 that there was not likely to be a significant effect on the environment. In making that policy decision, Optus considered irrelevant matters, including the objects of the Code, such as facilitating rapid development of an efficient network. Each proposed activity, including every street in which the cable is to be installed, must be assessed separately and by reference to the particular streetscapes in the locality. In each case a decision must be made whether to notify DEST.

As a consequence of the breaches of the Code, the councils were entitled to injunctive relief.

ENDNOTES

1. *Lane Cove Council* v *Optus Networks Pty Limited*, unreported, Land and Environment Court, Bannon J, 9 April 1996; and *Concord Council, North Sydney Council, Woollahra Council and Manly Council* v *Optus Networks Pty Limited*, unreported, Supreme Court of NSW, Dunford J, 11 April 1996.
2. Part IV.
3. Made in accordance with s.116 of the Federal Act.
4. Although his Honour concluded ss. 129 and 130 of the Federal Act were also subject to the s.116 and regulation 6 exemption provisions: cf Bannon J.

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