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"MANAGING CONTAMINATED LAND IN NEW SOUTH WALES",

Proposals for a New Legislative and Administrative Framework

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OUTLINE OF THE NSW GOVERNMENT'S CONTAMINATED LAND LAW REFORM PROPOSALS

There are four components to the contaminated land and administration reforms of the NSW Government:

* Department of Urban Affairs and Planning (DUAP) and the Environmental Protection Authority (EPA) joint Contaminated Land Planning Guidelines for local councils (released December 1995)

* Amendment to *the Environmental Planning and Assessment Act 1979 (EP&A Act 1979)* to indemnify councils for planning decisions if they follow the DUAP/EPA Contaminated Land Guidelines.

* Amendment to the *Environmentally Hazardous Chemicals Act* allowing the EPA to appoint contaminated land auditors

* a Contaminated Land Bill (proposed to be introduced to Parliament in late 1996)

The following are extracts from the summary section of the NSW Government Green Paper issued April 1996:

'...Contaminated land legislation will be consolidated in a single new Act

There are currently four different Acts that deal directly with contaminated land. The Government proposes to introduce a single piece of legislation. The contaminated sites provisions of the *Environmentally Hazardous Chemicals Act 1985* will be transferred to this new legislation.

Sites that are a risk to human health or the environment will be subject to intervention

A basic distinction is to be made between 'risk sites' and 'non-risk sites'. A risk site is contaminated land that poses a threat to human health or the environment. A non-risk site is a site which, although contaminated, poses no risk to human health or to the environment if the existing use continues.

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In the case of a risk site, the EPA will be able to intervene and require that the site be investigated, and direct the person(s) responsible to clean up the site. The EPA's aim will be to ensure (as fairly and efficiently as possible) that a site is cleaned-up to a degree that enables the existing land use to continue. The party responsible for the clean-up will be either the person whose activities have caused the contamination (for ease of reference referred to as the 'polluter'), or the person the EPA considers to be most in control of the site in question (for example, the owner or the occupier, for convenience referred to as the 'controller').

Site classification will change when land use changes

If a person wishes to put a non-risk site to a more sensitive use, which, in view of the level of contamination, would pose a risk to human health or the environment, that person must ensure the appropriate standard of clean-up is achieved.

The Government is also proposing to introduce a State Environmental Planning Policy (SEPP) to facilitate proper control over the remediation of contaminated land and to ensure appropriate information is furnished to councils.

Information about specific properties will be more accessible

One of the principal aims of the proposals outlined in this paper is to improve the availability of information, and enable people to make informed decisions about specific properties. The proposals build on existing mechanisms rather than attempting to create large and expensive centralised registers.

It is proposed that the EPA and local councils will maintain shared databases, and information in those databases will be accessible through both the Central Register of Restrictions maintained by the Land Titles Office and a mechanism similar to that currently provided by section 149 of the *Environmental Planning and Assessment Act 1979*. Consultants who provide technical advice as part of the investigation or remediation of contaminated land will have to lodge information with the EPA and the relevant local council. This information will be included in vendor disclosure requirements in conveyancing transactions.

Accredited experts will add certainty to the remediation process

To add certainty to the remediation process, it is proposed that a technical expert will 'sign off' on the fact that a site has been remediated to a degree that allows a particular use. To facilitate this, the EPA will establish and administer a scheme for assessing the competence of technical consultants involved in contaminated sites work. These assessed persons will perform the role of accredited auditors who 'sign off' on the work of consultants.

The Planning Guidelines for Contaminated Land (DUAP/EPA 1995) released jointly by the Department of Urban Affairs and Planning (DUAP) and the EPA are part of this process. Councils that act in good faith and substantially in accordance with the Guidelines will have a statutory protection from liability if they grant development consent for or rezone land which is or may be contaminated.

Ultimately, the polluter(s) will pay for the costs of remediation

Two main principles of cost recovery are being proposed:

1. If the EPA directs that a site has to be remediated, the controller will have a right to seek to recover those costs from the actual polluter.

2. Where there is more than one polluter, the polluter who pays for the clean-up will be able to share those costs with the other polluters.

Public funding will only be used when there is no identifiable responsible party

The Government will determine the means of providing funding for the remediation of orphan sites in line with national principles. The Government is not proposing a levy on industry or the general public, however, all options for providing public funding for orphan site clean-up will be kept open. The Government will have various powers to recover public monies expended on clean-up, including the power to sell abandoned orphan sites.

THE FOLLOWING IS AN EXTRACT FROM THE EDO'S SUBMISSION TO THE GOVERNMENT ON THE GREEN PAPER

Introduction

Contaminated land gives rise to a range of difficult technical and financial issues. We are pleased that the NSW Government has seized the initiative and taken steps to bring in comprehensive contaminated land legislation.

We are, however, disappointed that key elements of the legislative scheme have already been implemented without public participation. These are the scheme for the accreditation of auditors and the exemption of local councils from liability providing a set of planning guidelines are substantially followed. In particular, we are concerned about the retrospective nature of the last mentioned changes.

We also note that there is potential for confusion between the

roles of the EPA and other State Government Agencies, particularly the Department of Urban Affairs & Planning and the Department of Mineral Resources. While the EPA has been given the job of developing new proposals to improve the management of contaminated land, we note that the Post Remediation Working Party is convened by the Department of Urban Affairs & Planning. It is proposed to implement many of the changes by way of a SEPP under *EP&A Act* 1979.

Experience with attempts to integrate threatened species protection into the *EP&A Act* shows that the roles and responsibilities of government authorities must be clearly delineated to avoid the problem of enforcement of the law "falling between two stools". Currently the NPWS are refusing to enforce *the National Parks and Wildlife Act* 1974 (*NPW Act* 1974) where they are required to construe a development consent, because they consider that this is a local council responsibility.

In our view the integrity of the system is flawed from the start because the EPA will not be responsible for all contaminated land. The Department of Mineral Resources (DMR)will continue to be responsible for the rehabilitation of derelict mining lands and the restoration of mined lands. There is great potential for the contamination of land as a result of mining activities. DMR might adopt different standards. Will "sign off" by DMR be adequate for all purposes? Is DMR to be an accredited auditor? Can the EPA direct clean-up by a polluter once DMR have released a mining company from rehabilitation responsibilities?

Risk and Non-Risk Sites

There appears to be no definition of "contaminated land" in the Green Paper. We assume that the ANZECC definition will be adopted. This definition is unsatisfactory, requiring further deficition of the term "hazardous" and requiring a judgment about whether in the long term there is likely to be posed a risk to human health or the environment. "Long term" means "forever" when it comes to land, so that contamination ought generally to result in land being considered contaminated. It remains to be seen how the definition will be interpreted.

Nevertheless, it is clear that a site can be "contaminated" yet not pose any immediate threat. These are described as "non-risk" sites, discussed below. We note that the Planning Guidelines are not consistent with this approach. At page 13, the guidelines state:

> "Land which has been remediated to below the relevant thresholds is not considered contaminated."

Any legislation ought to amend this misconception.

We refer to the definitions used in the Green Paper for "risk" sites and "non-risk" sites. We suggest that the use of these terms may be misleading. A "non risk" site may well be highly contaminated and may become a "risk" site simply by proposing a different land use. We suggest instead the use of "intervention" and "non-intervention"sites. The use of these terms would also go some way towards alleviating industry's concerns of the stigma which attaches to something which may have been a "risk" site in the past.

We are concerned that the phrase "clean-up" be accurately defined. The term may be used for capping contamination on site and even for spreading contamination over a larger area of a site. For example, we have been advised that the EPA has sanctioned the approach, on some occasions, of ploughing surface contamination further into the soil, diluting the contaminants on site and thus rendering the concentration of particular contaminants lower than those which the EPA currently regards as being a "safe" level.

We are also concerned that determinations about whether a site is "risk" or "non-risk" be made in accordance with publicly notified criteria, with reasons for the decision made available to the public. These guarantee greater transparency and accountability, especially in view of the absence of any merit appeal.

Gathering Information

As an alternative to a consultant being required to notify the EPA within a specified period of forming a reasonable suspicion that land may be a risk site, it is proposed that the primary obligation rest with the owner of the land. There is obviously a disincentive for the owner of the land to come forward. There ought to be strong provisions requiring that that information be provided to the EPA and sanctions for failing to notify.

Recording and Disseminating Information

Currently, potential house buyers obtain pest inspection reports, at their own expense, to ensure that they do not buy a property requiring expensive remediation. Twenty potential purchasers will engage twenty consultants. This is obviously a wasteful exercise.

The proposal to oblige landowners to retain copies of investigation, remediation or other reports is a positive step forward. However, the basis for restricting access to these documents to certain classes of people is not clear. The reports ought to be made public as part of the Council database.

The development sector have indicated concerns that any notation on title or a Section 149 certificate will "unnecessarily affect the value of land". Access to information is one of the prerequisites of an effective free market. A negative impact on values is no justification for hiding information.

Sign Off and Auditors

It is crucial that there be public participation in setting the standards or guidelines for standards to be met for remediating sites to specific uses. In our opinion, it is nonsense to state that the setting of these standards will be a technical matter, to be objectively determined. The setting of these standards will inherently involve many value judgments which cannot be "objectively determined". These judgments include, for example, what level of risk is "acceptable" for the community, what level of investment will be required from controllers or polluters to remediate etc.

Industry and the broader community will demand transparency of process in arriving at these key sign-off levels.

It is also crucial that the full details of investigation or remediation be made available, not simply a "sign-off". First, potential purchasers may wish to make their own assessment of the level of contaminants to which they will be exposed.

Secondly, community standards and available scientific information change. For example, the level of lead in the blood of children which was regarded as "safe" by the NHMRC changed recently from 25 micrograms/decilitre to 15 micrograms/decilitre. Overnight, children with levels of 20 went from being well under the "safe" limit to being 33% over the limit.

Unless complete information is kept on record, valuable information will be lost; a "sign-off" will be meaningless when the standard to be met changes with time.

It follows that a consultant's report will be relied on by people other than the consultant's client, which may increase the parties to whom a consultant owes a duty of care.

Liability

In Section 4.2.2, it is proposed that the EPA will have power to determine "the controller" of contaminated land. The assertion that naming a controller is necessary to overcome "uncertainty" is not clear. Presumably it means that there may be argument between, for example, a landlord and a tenant as to who is responsible.

We suggest firstly that the parties identified as potential subjects of an order to clean up be given a fixed period of time to arrive at an agreement between themselves as to who will be responsible and in what proportions. The period allowed would be reduced where there is urgency for the clean-up.

The EPA ought to have the power to determine more than one controller, even if these are consecutive determinations. If a controller turns out not to be financially capable of taking action, or if further investigation reveals another party to be more responsible, then the EPA ought to be able to make a subsequent determination that another party is the "controller". Similarly the Green Paper talks of directing "the polluter" to take action. There may well be multiple polluters and the EPA ought to be able to make successive determinations as to who is "the polluter" for the purposes of clean-up.

We note that "polluter" has not been defined in the Green Paper. It seems that someone may be a "polluter" without having been in breach of any law at the time the act of pollution was committed. Is a person who disturbs existing contamination a "polluter"?

It is proposed that the EPA will be authorised to determine that someone is a "polluter". This determination is likely to carry a stigma, being associated with a finding of guilt before there has been any trial and indeed despite the fact that the acts constituting the pollution may not have been illegal . In this context, to what degree ought the EPA be satisfied that a person is a polluter? That is, to a civil or criminal standard? And if an appeal is brought against such a determination, is the question one of "jurisdictional fact", to be determined by the court, or is the Court only to overturn the EPA's decision if it is "unreasonable" or on some other ground of judicial review?

These questions ought to be resolved in the legislation to avoid unnecessary litigation.

Role of State Government

Section 6.4 of the Green paper states that the liability of the State Government will be determined on the same basis as liability for the private sector. This is misleading. Memorandum 91/9, issued by the Premier and which the Premier's Department has confirmed today is still current, deals with litigation between government departments and authorities.

Clause 2.4 of the Prosecution Guidelines provides that if government authorities at senior level cannot resolve a matter in a dispute without resorting to criminal preoceedings, then it is referred to their respective Ministers. Clause 2.5 provides that the matter is then to be referred to the Attorney General if it remains unsolved.

Clause 3.3 of the guidelines attached to the memorandum provides that where there is a dispute between Government authorities which could give rise to civil proceedings, all attempts must be made to resolve the dispute at senior officer level, and if necessary, by the relevant Ministers.

Clause 3.4 provides that where it is not possible to resolve the matter in dispute, the matter should be referred to the Premier.

Clause 3.5 provides that no proceedings should be instituted without the approval of the Premier.

Clearly State Government liability is dealt with on a different basis from the private sector. We note that the EPA failed to refer to this Memorandum in its draft Prosecution Guidelines over three years ago when it asserted that prosecution had now been removed from the political sphere. We trust the EPA will recognise in future documents that it operates in a political framework and that it is misleading to imply to the public that it is not subject to constraints other than those contained in its own enabling legislation.

Conclusion

There is a long way to go from the broad discussion paper to specific legislation. There is also little indication of how integration with the *EPA Act* 1979 and between government agencies will take place. We request that a guarantee be given by the Government that there will be a reasonable period for comment on any Bill which is drafted before it is tabled in Parliament. Where a SEPP is to be introduced, then we suggest that again there ought to be consultation before any SEPP is finalised.

THE SIGNIFICANCE OF THE CONVENTION ON BIOLOGICAL DIVERSITY

By Susan Stanton, Macquarie University

Below is an extract from the essay "Effectiveness of the Convention on Biodiversity" by Susan Stanton that was awarded the Peter Hunt Memorial Prize. In memory of Dr Peter Hunt, an extraordinary environmental broadcaster and journalist, the EDO offers an annual prize of $300 for the most outstanding essay or thesis on environmental law by a postgraduate student at Macquarie University.

The full essay is available from the EDO. Phone: 9262 6989.

No single group or institution can attempt to embrace biodiversity, and the Convention was preceded by some very innovative thinking; concepts of sustainability and new initiatives regarding land and water management. The coming into being of the Convention itself was greeted with optimism. It was seen as a landmark treaty in the environment and development field, an international agreement signed by a majority of countries as a necessary step from which national guidelines, legislation, education programmes, community participation and management programmes could be put in place.

During the negotiation process, the Convention received little Non-Governmental Organisation (NGO) or media attention, perhaps, as has been suggested, because negotiation for a convention on climate change attracted the headlines; perhaps because biodiversity, a 'blanket' term without full scientific backup was not media friendly; or perhaps there was a perception that the biodiversity negotiations were doomed to fail because of the complexity of such a general area and the need for complex political and scientific solutions that were not seen in sectoral agreements.

The Convention was, in fact, a very significant development because it took an 'umbrella' view of the whole, because it attempted to address the complexity of biodiversity, and accepted that a lack of scientific certainty should not preclude conservation management programmes being put in place.

The loss of biodiversity is the only process that is wholly irreversible and the value of the world's biota is still largely unstudied and unappreciated. Therefore precaution and sustainability are necessary ingredients in a biodiversity convention, as is the recognition that biodiversity is unevenly distributed around the world, the north being far more degraded, with large reserves of biodiversity still to be found in the south. The need to conserve however, is accepted as a responsibility of both the north and the south; the south needing technical expertise and financial assistance. The Convention contains three chapters which join north and south and which can only be contemplated on a global rather than a national scale,[1] although it is also recognised that conservation strategies would differ from one region to another.[2]

The Convention is not, as some had hoped, a hard law document, it is a framework convention with no hard and precise obligations or targets. It is an international convention under which States agree to deal with biodiversity conservation as a common objective and a good management option. Article 1, which sets out the Convention's objectives, including the conservation of biological diversity and the sustainable use of its components[3] would seem to support the optimism that preceded the final form of the Convention.

In the Preamble, however, where responsibilities are set, there is a reaffirmation of a long-standing principle of international law : "..that States have sovereign rights over their own biological resources[4] although adding that ".. States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner." Article 6 calls for the development of national strategies and the integration "as far as possible and as appropriate" of conservation and sustainable use of biodiversity into relevant sectoral and cross-sectoral plans, programmes and policies. This requires cooperation from all branches of government, and national strategies are obviously critical to the implementation of the Convention but we are firmly back with the concepts of 'national sovereignty' and a 'sectoral' approach, which ignore interdependence on a global scale, and the Preamble to the Convention also accepts the economic imperative "..that economic and social development and poverty eradication are the first the overriding priorities of developing countries."[5]

The precautionary principle and sustainability are written into the Preamble and the Convention provides for burden sharing through the responsibility of the richer nations to help the poorer move towards prevention, precaution and sustainability. However, there are, in reality, strong economic incentives for the richer nations - which have become rich, and continue to become richer at the expense of the poorer - to avoid such responsibility if they so choose, avoiding the introduction of precautionary thinking into all human cultures, when the desired outcome must be one where the entire landscape is being managed to conserve biodiversity. "Anything less than the sustainable use of biological resources will lead inevitably to a decline in productivity and quality of life."[6] This view of economics is one area that has become global. The consequences for biodiversity protection and for the less developed countries are severe. Is the Convention undermined by the economic imperative?

In addressing the inequitable economic situation, the Convention intended that immediate tangible benefits accrue to less developed countries: access to financial resources and fair and equitable benefits to be derived from the use of genetic resources and transfer of technologies relevant to biodiversity conservation. One of the primary objectives of the Convention was the sharing of benefits derived from genetic resources and

biotechnology. Previously there had been no formal restriction on the taking of genetic plant material, for example, with benefits going to the biotechnology companies, no royalties or profit-sharing for the owners of the original material. In supporting access to genetic resources on mutually agreed terms (Article 15 1), the Convention also noted the need for care, Contracting Parties being responsible for the prevention of release of living modified organisms resulting from biotechnology and the introduction of alien species which threaten ecosystems, habitats or species.[7]

Although the problems with biotechnology were, therefore, addressed in the Convention, the industry itself is huge[8] and highly profitable, and there will remain powerful lobby groups in the richer nations with influence on governments, not only in their home countries but around the world where they operate as transnational corporations. An example is the activities of the major European and United States of America chemical corporations, seed companies and privately funded research organisations which are engaged in 'genetic imperialism', the biotechnology industry using international alliances to gain access to markets and additional capital.

Where the Convention supports access to genetic resources on mutually agreed terms it also states that, for the importance of meeting food, health and other needs of a growing world population "..access to and sharing of genetic resources (is) essential." (Preamble).

But without any further restrictions in place, except for the goodwill of the Contracting Parties, there is little protection for what diversity which remains. Industrialised countries export 'unsustainability' often through what are considered the normal movements of international trade.[9] Of 5,000 food plants that used to be grown worldwide, modern agriculture uses some 150, and even these last valuable strains are vanishing through the biotechnology industry[10] modern agricultural economics demanding conformity. About ten transnational companies control one third of all cereal varieties; they gather seeds from remote regions of the less developed countries, breed them with other varieties, or change them with biotechnology and sell them back.

While the Preamble to the Convention provides that State parties should be responsible for conserving their biodiversity, and using their biodiversity resources in a sustainable manner, so that conservation of all species is now recognised in an international treaty (with the qualifications of the principle of national sovereignty and an emphasis on the potential value of wild species for humankind), there still remains the important economic imperative which justifies loss of biodiversity by the aim of " ..meeting the food, health and other needs of the growing world population.."

As pointed out by De Klemm and Shine[11] treaties increasingly deal with both conservation and exploitation issues. The effective transformation of the International Whaling Convention from a commercial exploitation treaty to a conservation treaty is cited as an example of the positive aspects of this trend. In the Biodiversity Convention we now have the language of 'sustainable use'.[12] The difficulty is not the acceptance of performance obligations but the legitimacy of conservation itself, on a global scale.

It is only an acceptance of this legitimacy that will lead to effective conservation measures worldwide. Local communities and NGOs recognise this necessity and it is from these levels that the moves for global change are coming. They are increasingly gaining access to local, national and international forums and this is cause for hope. The Biodiversity Convention, especially because of its wide acceptance, does offer a 'lever' for pressure to be exerted nationally, regionally and globally. It accords legitimacy to many cross-sectoral activities and, as the dangers in continual exploitation become more and more apparent, pressure in all areas will increase. The Convention can work as a catalyst for global action. The Convention is a major move forward and gives a strong reason for demanding that national action take place in an international context. We have a global economic system in place; we need a global ecological system, and this involves a change in paradigm from the pre-eminence of the former.

Dr. Kenton Miller[13] has said the problem lies also right at the heart of government. Perverse and unco-ordinated policies are in place in forestry, agriculture, fisheries, land use zoning, coastal zones and seas, handling of wetlands.

We cannot manage the changes that are necessary on a small scale but it is also small communities where people live and work which will provide much of the knowledge that is needed. As will landowners, as much of our areas that need protection are on privately owned land.

ENDNOTES

1 Krattiger et al op cit p 398; Access to and transfer of genetic resources (Article 15): Access to and transfer of technology, including biotechnology (Articles 16 and 19): financial mechanisms to ensure solidarity with developing countries (Articles 20 and 21).

2 Ibid p 77, "Although the problem is of global concern ... most action ... must occur through governmental and non-governmental organisations, local communities, and the private sector, among others".

3 Article 1: "The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding."

4 and that (Article 3) "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their environmental policies .."

5 This would be demanded by the less developed countries, but makes the assumption - against a "biodiversity conservation paradigm" that a "catch-up" in economic and development terms will be a positive growth movement and assist in eradicating poverty.

6 Ibid.

7 See C de Klemm et al "Conserving Biological Diversity: the Legal and Institutional Issues" in D Craig (ed) "Transnational Environmental Law" (1995) Vol 2 p 5.40 ff and Krattiger et al op cit p 15. op cit. op cit p 5.51.

8 The United States biotechnology industry - 1311 companies, 254 of which are public companies, employing 103,000 people - in

1994 spent $7 billion on research and development - 15 agri-biotechnology companies spent $85 million on R & D. In 1993 spending was 43.6% higher than it had been in 1992. In 1994 there were industry seals of $7.7 billion. And all US companies have alliances with European companies - equity sharing or R & D collection. "Biotechnology Development Monitor" No 27 September 1995.

[9] "Sometimes this is starkly obvious as when toxic wastes are shipped to Third World countries for disposal, But it occurs on a much more widespread basis through the normal mechanisms of international trade. ... Fishing grounds are depleted, forests destroyed, soil eroded, wilderness areas despoiled. Even degradation from subsistence farming can often be traced back to the displacement of traditional communities onto more fragile, marginal land by landowners and governments oriented towards exports" Michael Jacobs "The Green Economy" Pluto Press, London, 1991, p 181.

[10] See, for example Susan George "How the Other Half Dies" Penguin 1976. In the Philippines, 90% of crops are sown with five expensive high-yielding seeds. These hybrids can be wiped out by epidemics, and new, disease-resistent strains have to be found. In a tiny mountain village in northern Nepal a farmer, using traditional maize and rice seeds, would plant on terraces, using different varieties according to altitude, soil moisture and sunlight. When government extension workers came to his village he welcomed the new high-yield maize and rice seeds. Now he sows one variety of each he must use fertilizers and must irrigate with scarce water and the maize does not produce the straw needed for his buffaloes. Most of each crop must be sold to pay for the next season's seeds, fertilizer and pesticides - and the maize doesn't taste as good. "New Internationalist" (date?)

[11] De Klemm and Shine

[12] Ibid p 54.

[13] Miller op cit.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT - A CRITIQUE

by Andrew Sorensen, Solicitor, Environmental Defender's Office

The *Environmental Planning & Assessment (Amendment) Act 1996* ("the Act") became operational as of 1 August 1996. The Act contains a variety of amendments and was introduced by the government in a briefing note as providing "desired improvements to the efficiency, effectiveness or accountability of particular parts of the planning system." However the effect of a number of the amendments has been an increase in the centralisation of control, a reduction in the accountability of decision makers, and an erosion of public participation opportunities in the system of forward planning and development control set up by the *Environmental Planning and Assessment Act 1979 (EPAA).*

Schedule 1 provides the Minister with the power to make changes of substance to draft Regional and Local Environmental Plans without having to re-exhibit them.

This amendment was introduced in response to the Court of Appeal decision in Leichhardt Municipal Council v Minister for Planning (1995) 87 LGERA 78. In that case the Council and the then Director of the Department of Planning ("the Director") had agreed on maximum height limits to be applied to three sites covered by the proposed draft Greater Metropolitan Regional Environment Plan (REP) No.1. These height limits were included in the draft Plan which was publicly exhibited, but were removed by the Minister in making the Plan. The Plan was declared invalid by the Court of Appeal as a result.

A majority of the Court found that the power of the Minister to make an altered plan had to be read in the context of the entire plan-making process set out in Part 3 Division 3 of the *EPAA*. The power was confined by the need for the ultimate plan to be the outcome of the process, which included public exhibition of the draft plan.

The result of the amendments is a reduction in the effectiveness of public participation, and in the level of accountability of the Minister in his role as decision maker.

Schedule 2 provides that an environmental study and related draft REP may be prepared together. This replaces the need to prepare the environmental study first, then subsequently prepare and exhibit the draft REP.

An environmental study is similar in terms of its function to an environmental impact statement. As such its purpose should be (inter alia) to determine whether an REP is needed at all, and once a decision is made to proceed with the REP, to guide the form and the content of the REP. This amendment, which collapses the process of preparation of a study and REP, will result in the environmental study becoming a formality and not fulfilling its intended purpose.

Schedule 2 also replaces the previous requirement for the Director to consult with relevant bodies in relation to the intention to prepare both a study and a draft REP with a notification requirement. The period for comment by a notified body to the Director on the preparation of the environmental study or draft regional plan is reduced from 40 to 28 days.

The overall thrust of these and the amendments contained in Schedule 1 to the Act is to reduce the need for the Government to consult and be accountable to key stakeholders, under the guise of reducing red tape.

Schedule 6 provides for the joint exhibition of a development application (DA) and a draft amendment to an environmental planning instrument (EPI), in circumstances where the EPI is applicable to the proposed development and needs to be amended before consent can be given to the DA (eg where a Local Environmental Plan (LEP) prohibits a particular type of

development within a zone).

There is clearly a danger that the public will be misled by this process. Different DAs may be lodged for a range of developments which become permissible in a zone as a result of the amendment of an EPI. However a draft rezoning might be accompanied by an innocuous DA, leading people to believe that there will not be a great impact as a result of the re-zoning. Once the re-zoning is complete, there is nothing to stop developers lodging separate DAs for more intensive or even radically different uses of the land, providing they are allowed under the zoning. A flower farm might not be objected to, but the reaction to a piggery would be very different. A rural zoning might allow both uses of the land.

A further effect of collapsing these processes into one is an effective reduction in the time available for public scrutiny and comment. Also by bringing together the processes of forward planning and individual development control, it is arguable that a bias is created towards the development end of the overall planning process.

Schedule 7 allows the insertion of "non-discretionary development standards" (NDDSs) in LEPs, REPs and State Environmental Planning Policies (SEPPs). If such standards are complied with in a DA, the consent authority cannot refuse the application on grounds related to those standards, nor can conditions be imposed which are more stringent and relate to the same subject matter.

There is clearly scope for such provisions to result in increased centralisation of control over the planning process, and the imposition of developments which comply with generally applicable NDDSs but are nevertheless inappropriate in particular localities. NDDSs are inherently developer-oriented and reduce the ability of local authorities to consider individual developments on their merits.

Schedule 8 allows the Minister to limit the scope of a Commission of Inquiry to specific aspects of a proposed development or activity.

There is danger that a Commission of Inquiry which is limited as to the environmental and social impacts it can investigate in relation to a development may present distorted recommendations. A direction from the Minister limiting the scope of an inquiry could result in aspects of a development which have a major impact being overlooked or downplayed in importance, only to become apparent once the development has commenced.

Schedule 9 allows a Regulation to the EPAA to adopt, apply or incorporate any publication as in force from time to time.

It is important for the proper operation and enforcement of the law that there be certainty as to what the law is. If publications are gazetted, anybody can ascertain the precise document referred to by regulation independently and with certainty. This amendment removes that certainty. It appears that as a result reliance must be placed on the officers of the various departments which produce the publications; a wholly unsatisfactory situation.

Conclusion

The Act is the latest in a series of moves by the current NSW Government to chip away at the structures of accountability, local decision making and public participation created by the EPAA. It is noteworthy that the Minister for Urban Affairs, Craig Knowles, objected to a similar bill being introduced in 1994 by the government of the day, on many of the grounds set out above. The cynical attitude of the Government in relation to these issues does not augur well for the outcome of the much-vaunted integrated approvals program currently underway.

COURT OF APPEAL OVERTURNS PUBLIC INTEREST COSTS CASE

CASE NOTE :Richmond River Shire Council v Oshlack & Anor,

Court of Appeal, unreported, 3 July 1996

Lisa Ogle, Solicitor, Environmental Defender's Office

The Court of Appeal has recently overturned the existing precedent in the Land and Environment Court that proceedings which are brought in the public interest may, in some circumstances, justify a departure from the usual rule that costs should follow the event.

In *Richmond River Shire Council v Oshlack & Anor*, Clarke JA, Sheller JA and Cole JA overturned the earlier judgment of Stein J, in which Stein J had declined to order costs against the unsuccessful applicant, Oshlack, in Class 4 proceedings in the Land and Environment Court.

In the case at first instance, Oshlack had brought proceedings under section 123 of the *Environmental Planning and Assessment Act* 1979 seeking a declaration that a development consent granted by Richmond River Shire Council was void, primarily because it failed to take into account the effect on the environment of endangered fauna, in particular the Koala. Stein J had held that the public interest nature of the proceedings was a relevant circumstance to be considered with other matters in determining whether to depart from the usual rule.

However the Court of Appeal has held that the usual rule that costs should follow the event should only be departed from when there exist special circumstances, and held that it was erroneous to regard the fact that the litigation is brought in the public interest as a relevant consideration in the exercise of the judicial discretion in ordering costs. In this regard the Court followed the decision of the High Court in *Latoudis v Casey* (1990) 170 CLR 534.

The respondent has made an application for special leave to appeal to the High Court.

Case Notes on Recent Interlocutory Injunctions in the Land and Environment Court

Two recent cases involving injunctions in the Land and Environment Court highlight the inconsistency with which the Court approaches the granting of interlocutory relief in public interest cases where the applicant does not give an undertaking as to damages.

THE IRON GATES CASE

Lisa Ogle, Solicitor, Environmental Defender's Office

In *Oshlack v Iron Gates Pty Ltd*,(Land and Environment Court, 11 July 1996, No 40152 of 1996, Talbot J, unreported), the applicant, a private litigant sought to enforce a development consent under sections 123 and 124 of the *Environmental Planning and Assessment Act* 1979.

On the basis that the company was in breach of its development consent, the applicant sought orders restraining the respondent from continuing to clear vegetation for a 110 lot residential subdivision from an environmentally sensitive site on the NSW North Coast (known as "Iron Gates") which was habitat to a number of threatened species. The proceedings were brought in the public interest.

The applicant was unable, and therefore declined, to offer an undertaking as to damages. No evidence was led by the respondent as to the likely damages which might be incurred by it if the injunction were granted but the applicant was ultimately unsuccessful.

After an inter partes hearing, Justice Talbot delivered an extempore judgment. In taking into account that the applicant was unable to give the usual undertaking as to damages, His Honour stated that:

> "...I think that when the usual undertaking as to damages is not forthcoming, something more than being satisfied on the strict application of the *American Cyanamid*[1] test of a serious question to be tried should be required."

In forming this conclusion, Talbot J appears to have taken an irrelevant factor into account in applying the test of whether there is a serious question to be tried. Rather, the applicant's failure to give an undertaking as to damages was a matter which the Court should have considered in determining whether the second limb of *American Cyanamid* was met, namely, whether the balance of convenience lay with the granting of the injunction.

Indeed it is clear from the judgment of Cripps CJ in *Ross v State Rail Authority of NSW*[2] that the failure to give an undertaking is merely a factor to be taken into account. In *Ross*, His Honour held that: "where a strong prima facie case has been made out that a significant breach of an environmental law has occurred, the circumstances that an applicant is not prepared to give the usual undertaking as to damages is but a factor to be taken into account when considering the balance of convenience." It is clear that the failure to give an undertaking is merely a factor to be taken into account in the exercise of the Court's discretion, and should not necessarily preclude the applicant from obtaining interlocutory relief.

A further irrelevant factor which the Court took into account was that there had been no action taken by either the Local Council or the National Parks and Wildlife Service. In this regard, Talbot J stated that:

> "The Court might expect, in circumstances where no undertaking as to damages is forthcoming, that there would be some indication that the relevant authorities have at least a concern about what is actually happening, or is about to happen."

The suggestion that a private litigant's application requires some form of support from a regulatory authority is contrary to the objects of the EPA Act, as reflected in the open standing provisions of section 123[3]. To the contrary, that it is open to regulatory authorities to seek injunctive relief without being required to give an undertaking as to damages was noted in *Ross*[4] where the Court stated that:

> "...it was not irrelevant, in my opinion, to note that if the Attorney-General had brought these proceedings and sought an interlocutory order in the terms asked for by [the applicant], no undertaking as to damages would have been sought. It seems to me in these circumstances, I should not deny [the applicant] the interim order because she is unwilling to give the undertaking as to damages".

In lieu of his refusal to grant the injunction, Talbot J granted expedition. However, shortly after the interlocutory hearing, much of the remaining vegetation on the Iron Gates site was clear felled, thereby destroying the very subject matter which the proceedings sought to protect.

THE ABBOTT ROAD CASE

David Galpin, Solicitor, Environmental Defender's Office

A different result was reached in the recent case of *Residents of Blacktown and Seven Hills Against Further Traffic Inc v Roads and Traffic Authority of NSW*, Land and Environment Court, No. 40106 of 1996 (**"Abbott Road case"**).

The Abbott Road case involved, *inter alia*, an application for an interlocutory injunction by a residents group to restrain the

RTA from constructing a road which would effectively extend the M2 Motorway at Abbott Road, Seven Hills, until an environmental impact statement was prepared in accordance with Part V of the EPA Act.

By the time of the interlocutory hearing work on the construction had progressed significantly. The RTA tendered photographic evidence of the road works, evidence of shut down costs and costs to the community if the reconstruction is not completed. Shutting down the works would cost $459,529, with ongoing costs of $32,915 per month and re-establishment costs of $89,800. The applicant tendered evidence regarding the speed with which the decision to proceed was made and the noise impacts of the reconstructed road.

The interlocutory application was heard by Stein J, who delivered an ex tempore judgment. His Honour determined that there was a serious question to be tried as to whether the respondent was in breach of section 112 of the EPA Act for failing to obtain an EIS.

His Honour then addressed the balance of convenience as to whether an order should be made. There were three factors which the Court weighed in relation to the balance of convenience. The first was that the applicant did not give an undertaking as to damages. The second was the delay in bringing proceedings and in pursuing the application for interlocutory relief. Although the delay in number of days was not great, the respondent submitted that because significant work had been carried out, inconvenience would be caused to the RTA, in the form of costs, and the community, in the form of restricted access to Abbott Road. His Honour held that any delay was not so great as to disqualify the respondent from obtaining interim relief. A third factor raised by the respondent was that the Applicant had a weak case. However, Stein J disagreed with that submission, and instead took the strength of the applicant's case (rather than its weakness) into account as a factor to be weighed.

In the Abbott Road case, the applicant also declined to give an undertaking as to damages. However the Court concluded, after weighing all of the factors in that case, that it should not refuse relief for reasons of convenience. An interim injunction was granted, although with certain exclusions designed to remedy some of the alleged inconvenience.

The final hearing took place in September 1996 and judgment is presently reserved.

ENDNOTES

1 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

2 (1990) 70 LGRA 91.

3 See *F Hannam Pty Ltd v Electricity Commission of NSW (No 3)* (1985) 66 LGRA 306, Street CJ, at page 313: "Section 123 totally removes the conventional requirement that relief is normally only granted at the wish of a person having sufficient interest in the matters sought to be litigated. It is open to any person to bring proceedings to remedy or restrain a breach of the Act. There could hardly be a clearer indication of the width of the adjudicative responsibilities of the Court."

4 See note 2.

Legal Aid Costs Indemnities no longer enforceable in Federal Court

CASENOTE: Woodlands v Permanent Trusteee Company Limited and Ors, (unreported) Full Bench, Federal Court, No NG 660 of 1994, 25 July 1996

In a recent decision in the Homefund case[1], the Full Bench of the Federal Court has held that cost indemnities from the Legal Aid Commission (**"Commission"**) are not enforceable in the Federal Court.

An indemnity against costs is routinely issued by the Commission under section section 47 of the *Legal Aid Commission Act 1979* (NSW) (**"LAC Act"**) as part of a grant of legal aid. Section 47 of the *LAC Act* provides that:

> "Where a court or tribunal makes an order as to costs against a legally assisted person:
>
> (a)...the Commission shall pay the whole of those costs; and
>
> (b) ...the legally assisted person shall not be liable for the payment of the whole or any part of those costs".

The maximum presently payable by the Commission is $12,500.

The Federal Court held that section 47 of the *LAC Act* is inconsistent with section 43 of the *Federal Court of Australia Act 1976* (Cth), under which the Federal Court is empowered to award costs. Section 43 relevantly provides that:

> "the Court or a Judge has jurisidiction to award costs in all proceedings before the Court... other than proceedings in respect of which any other Act provides that costs shall not be awarded".

Accordingly, the Full Bench applied section 109 of the Constitution in finding that section 47 of the *LAC Act* did not apply in the Federal Court and noted that a State Act cannot absolve a person from a liability imposed on that person pursuant to a Commonwealth statute.

The Court also rejected the applicant's argument that section 47

was enforceable under section 79 of the *Judiciary Act 1903* (Cth). That section provides that all Courts within the Federal jurisdiction are subject to State laws relating to "procedure, evidence and the competency of witnesses". The Court found that section 47 could not be categorised as such a law, and that rather that it was a substantive provision. Allowing section 47 to be enforced in cases in which the subject matter could be found in NSW would "...undermine the principle that federal substantive law operates uniformly throughout the nation".

The Homefund case has significant implications for public interest environmental litigants who may still be able to obtain legal aid to bring cases in the Federal Court where the subject matter of the proceedings is in NSW, but will nevertheless find themselves exposed to costs despite being in receipt of a costs indemnity.

The Applicants in the Homefund case have filed an application for special leave to appeal to the High Court.

ENDNOTES

1 Woodlands v Permanent Trusteee Company Limited and Ors, (unreported) No NG 660 of 1994, 25 July 1996; Bass v Permanent Trustee Company Limited and Ors, (unreported) No NG 835 of 1994, 25 July 1996; and Conca v Permanent Trustee Company Limited and Ors, (unreported), No NG 928 of 1994, 25 July 1996.The proceedings were heard by Wilcox, Burchett and Olney JJ.

Environmental Impact Assessment in Australia: Theory and Practice

Ian Thomas, The Federation Press 1996, 241pp

Review by David Mossop

There were two features of Ian Thomas' book *Environmental Impact Assessment in Australia: Theory and Practice* that leapt out at me. The first is that it reads like one long literature review and the second is its emphasis on the value based nature of environmental impact assessment. The purposes of the book are to bring together the different aspects of EIA, to establish the context in which EIA is conducted in Australia, to illustrate the practice of EIA so that newcomers to the field have a handbook to assist them, to provide a resource that will give a starting point for research and emphasise the value lade nature of the process.

The book was developed from the notes for a course on environmental impact assessment at Monash University. Therefore it aims to provide an introduction to ideas about environmental assessment. As a result there is a heavy emphasis on references and for this reason the text reads more like a literature review than the author's own views on the subject. For those wishing to use the book as a starting point for further research this is an advantage but it does demonstrate that this book is more a coalition of other people's ideas than an original contribution to the theory of environmental impact assessment.

The second outstanding feature of this book is the very sensible emphasis on the value laden nature of environmental impact assessment. The point is made throughout the book that EIA involves making value judgments and forms part of the (political) decision-making process. It is important that this fact be emphasised for all too often those that are unfamiliar with EIA assume that somehow it provides " a universal law to ensure that the environment is protected". Certainly this misconception is exploited every day and the book is correct in pointing out that EIA is a procedural mechanism which has no necessary substantive outcome in terms of environmental protection. While Thomas points out the value based nature of EIA he does not seek to provide the path to objective EIA. Quite sensibly he recognises than "an unbiased EIA is not possible" and concentrates on creating an "awareness of the possible biases... in the mind of the EIS author and reviewer".

It should be noted that the book focuses on the theory of EIA and the issues that arise from an environmental manager's perspective. What little description of the legal basis of assessment at the Commonwealth level and in the States and Territories appears to be largely drawn from brochures produced by the Government departments administering those laws. There is no analysis of the differences between the systems in different jurisdictions nor the fundamental question in many EIAs- how bad can it be and still achieve its aim. Nevertheless in providing an overview of the nature of the EIA process and the issues that arise, it is a good introductory text and, as intended, provides a starting point for more detailed research. Producers and consumers of EIA would be well advised to read this publication.

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HAVE YOUR SAY ON BIODIVERSITY!
A Biodiversity Strategy required by the new *Threatened Species Conservation Act 1995* is being prepared by the NSW Government. It will complement the National Biodiversity Conservation Strategy. The Director-General of the NSW National Parks and Wildlife Service is required to establish a Biological Diversity Advisory Council (BDAC) comprising representatives of conservation, industry, science, Aboriginal Land Councils and local government.

The Strategy is being developed with the advice of the BDAC and in consultation with other government agencies, interested groups and the community. A draft will be released in late September 1996 for comment by interested groups and individuals. The EDO, and other interested groups, will be notified direct and advertisements requesting submissions will be placed in major NSW newspapers. For further information contact Lynn Webber at NPWS on 02 9585 6680

Senator Hill has announced a review into the mechanisms for the protection of Australia's heritage including sites of international, national, state, regional and local significance. Viewed with caution is the suggestions to hand powers back to State Governments away from the Commonwealth. For a copy of the discussion paper contact the Australian Heritage Commission on (06) 217 2111. Deadline for submissions is 31 October 1996.

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