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Streamlining Approvals: The NSW Government Green Paper

James Johnson, Director, Environmental Defender's Office

The New South Wales Government recently called for comments on its Green Paper entitled: *"Towards an integrated land use, planning and natural resource approvals policy for NSW"* The paper examined ways to reform the State's planning, land use and natural resource approvals system in order to create simpler, more cost effective ways to regulate environmental and planning problems.

The Government's proposals are generally of concern to the EDO. A summary of the issues raised in our submission to the Government follow

Sustainability versus Efficiency

Concerns about efficiency and "red tape" expressed in the discussion paper are not new and to a large extent echo the concerns expressed in "30 Different Governments" the report of the Commission of Enquiry into Red Tape by Gary Sturgess, 31 January 1994.

The Paper asserts that the reforms suggested "will not result in any lowering of environmental protection, conservation values or outcomes". The principle of sustainability ought to provide the underlying guidance for any action in reviewing approval processes rather than merely efficiency. This would provide a positive approach, rather than simply aiming to have a system which is no worse than is currently in place.

Efforts to "streamline" approvals processes in the past have resulted in reduced environmental outcomes.

Efficiency does not equate with a greater percentage of developments being approved. As Sturgess points out (p7)

> "NSW could have the most efficient regulatory system in the world and still need to turn away development proposals because they are socially or environmentally unacceptable".

Lack of Information

Currently, given the multitude of approvals that are required, proponents may not know which governmental authorities need to give approvals for development. Threshold limits can easily be crossed which change the nature of the development or the way it is treated. Before looking at more radical solutions, the EDO suggests that the provision of a checklist, matrix or "expert system" to assist proponents to know the approvals they need and from whom they need to obtain approval may well reduce the uncertainty of the current system. Better guidance as to regulatory requirements will also assist the community in untangling the system.

CONTENTS

Performance Standards versus Prescriptive Provisions

The Paper raises as an issue for discussion the review of environmental planning instruments so that they clarify objectives and performance criteria rather than prescribing processes which must be followed. Such a flexible approach to planning raises many concerns.

Our experience is that "flexible" planning criteria have allowed approvals which are inconsistent on any objective reading of the criteria, but are impossible to challenge because of the amount of discretion given to the decision maker. Consider also the Bengalla mining SEPP; where development standards which were required to be met, as an alternative to prohibition of mining in LEPs, were removed by the State Government. It is now clear that if you "give an inch" in flexibility you are taken to have given a mile.

If performance standards are to be adopted, then the constraints for social and ecological protection need to be defined precisely. Criteria which can be measured and monitored need to be included.

Strategic Planning and Delegation

We agree with the proposal to conduct strategic planning. This will require strategic environmental assessment of policy decisions, both direct and indirect; the assessment of cumulative impacts; and the gathering and analysis of comprehensive environmental data. This will take time. More use could be made of Regional Environmental Studies under the *Environmental Planning and Assessment Act.*

Planning and resource management ought to be conducted on a bioregional basis. Currently decisions are made in the context of artificial local government boundaries. Downstream negative impacts may occur outside the local government area. Local councils have few mechanisms to account for the cumulative impacts of decisions in a bioregion or "catchment".

Combining development consent with operational approvals

The Paper suggests that proponents are **required** to proceed sequentially from one process to the next, increasing the time taken to commence operations and leading to uncertainty.

Many proponents choose to lodge applications sequentially. Different levels of detail may be required for different approvals. A proponent might not want to be exposed to the financial risk of investing in detailed design required for some approvals before a more general "concept" approval is given. Recent amendments to the *Environmental Planning and Assessment Act* facilitate this process, with provision for "approval in principal" and staged approval.

Once a proponent has "a toe in the door" with development consent, generally other approvals flow as a matter of course.

We consider that combining development consent with operation approvals has the capacity to provide better environmental outcomes. Information which is normally released in stages by a proponent would be available in the beginning of the process for decision makers. Local councils will know the context in which their decisions sit.

By bringing other agencies into the "front end" of the decision making process, this ought to elevate the role of those other agencies. Rather than simply having to do the best that they can to accommodate a development which they consider ought not to go ahead, government agencies ought to feel more confident about refusing those developments.

We note that the Paper sees the regulatory functions of government agencies as subsidiary to the development consent granted by local councils. We strongly disagree with this philosophy. We do not view the imposition of conditions as "reversing the development consent *by the back door*". Often development consent is at a more broad, conceptual stage of the development and major problems may not be readily apparent.

Integrated Approvals Agreements/ "One Stop Shopping"

We are familiar with the difficulties in trying to construe a number of approvals to work out the minimum standards that a proponent must comply with. An integrated consent may help to solve this problem. However, we note several concerns:

Such a process would require a "broker". However, it must be clear that the broker is acting in the role of a facilitator, not an advocate. It would be a perversion of the process if for example the success of the broker were to be measured in terms of approvals granted by the broker.

Also, it is crucial that the transparency of the decision making process be maintained. In Victoria the amalgamation of conservation and resource interests in the Department of Conservation and Land Management has internalised competing interests, reducing the transparency of decision making and resulted in what is generally perceived as poorer environmental outcomes.

Department of Urban Affairs and Planning to Resolve Disputes

The Paper contemplates resolution of disputes between Government agencies during the approvals process by the Director General of the Department of Urban Affairs and Planning (DUAP). We consider this to be highly inappropriate. No good reason is advanced for giving the power to the Director General of one regulatory agency to override decisions which are the responsibility and within the expertise of other departments.

DUAP can claim no better record than any other agency with respect to attention to detail and consolidation of consent conditions.

Allowing the Director General of DUAP to dictate the terms of, for example, pollution control licences or the terms of concurrence for the taking of threatened species would require amendment of the legislation governing the decision making processes of each agency directed.

Substantive Protection a must

In NSW there is no substantive protection for important elements of the environment. All protection is **procedural**. For example, SEPP 14 was introduced to protect coastal wetlands. A prohibition against clearing wetlands would remove red tape. Proponents would know exactly where they stand and the level of protection which was intended would be provided.

Instead of this, a procedural protection provision was put in place where a proponent must prepare an environmental impact statement. This must be advertised and exhibited, any objectors having the right to appeal to the Court. The concurrence of the Director of Planning must be sought and a permit must be sought from the Department of Fisheries. Inappropriate development ought to be prohibited outright rather than putting red tape in the way of proponents.

Fees to be Charged

The method of setting fees and charges for development applications is based on the value of the development and makes no allowance for the additional costs in assessing a development application where, for example, threatened species are involved.

The estimated cost of the development is a blunt and inaccurate measure of the cost to a Council of assessing the development. For example, clearing and subdivision applications are relatively inexpensive.

We suggest that the regulation ought to provide for user pays for those functions which fall outside standard or base core elements. This would meet the needs and concerns of councils and developers, while at the same time enabling proper assessment of environmental impact. Only when the system is adequately resourced can information essential for decision making be obtained quickly.

Call 9262 6989 for a copy of the EDO's submission
A copy of the Government's Green Paper is available from the NSW Cabinet Office.

HERITAGE AND 'OBJECTIVITY'

AUSTRALIAN HERITAGE COMMISSION V MOUNT ISA MINES

Lee Godden, Lecturer, Faculty of Law Griffith University

Identification of Heritage

Social factors are influential in shaping how we perceive the environment and frame questions of heritage. Given the influence of cultural and value systems, is it possible for heritage value to be determined objectively? A corollary is - what institutional processes are we to give priority to in deciding these values if heritage is not a purely empirical concept but one which changes over time and circumstance?

Questioning the 'objectivity' of heritage value underlies an examination of The Australian Heritage Commission v Mount Isa Mines (1995) 133 ALR 353, (Australian Heritage Commission case). 'Objective' identification of the National Estate value of the Sir Edward Pellew Islands was implicit to the litigated issue -

'1 (e) Whether, on true construction of the Australian Heritage Commission (AHC) Act an entry may be made by the Respondent [Heritage Commission] pursuant to s 23 of the AHC Act in the Register of the National Estate of any place ...Which the respondent considers should be so recorded or whether only a particular place which objectively, answers the description of s 4 of that Act can be so recorded?'

The Federal Court held, by majority, that the status of a place as part of the National Estate is to be regarded as an objective fact ... rather than something dependent upon the 'mere' opinion of the Australian Heritage Commission. Arguably, in a broader social context, the Australian Heritage Commission case represents a tension between two institutionalised systems about the ability to decide 'factual' questions in environmental disputes.[1] Does the identification of heritage value mirror expert opinion or can we discern it as an 'out there' property inherent to the environment itself ? Majority and dissent judgments in the Australian Heritage Commission case reveal different answers.

Sir Edward Pellew Group of Islands (SEPGS)

The islands are situated in the Gulf of Carpentaria near the mouth of the McArthur River. National Estate value questions are a tangential aspect of the environmental impact of Mount Isa Mines' (MIM)[2] McArthur River mine project. Part of the project entails construction of a barge loading facility and channel dredging near the islands which are of environmental significance, supporting large sea grass beds and their associated fauna including threatened turtle and dugong species.[3]

Legal Action

The following legal action is relevant to the discussion:

a. Judicial review was sought by MIM of the decision by Australian Heritage Commission to list SEPGS on the Register of National Estate.
b. A determination by Drummond J (Federal Court) of preliminary questions interpreting the Australian Heritage

Commission Act 1975 (C'th) (AHC Act).

c. An appeal by the Australian Heritage Commission to the full Federal Court on three questions of interpretation of the AHC Act. This appeal was dismissed by majority.
d. Special Leave was granted to the Australian Heritage Commission to appeal to the High Court.

The AHC Act is concerned with Australia's National Estate: a term defined by s.4 as those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community. Section 23, is of critical importance to the exercise of the Heritage Commission's function, which is to identify places included in the National Estate and to prepare a register of those places.

The Federal Court decision

Black CJ, distinguished identification of National Estate value from the process of recording. His Honour found the opinion of the Commission was conclusive as to National Estate value but the Commission retains a discretion as to actual recording of that place on the register.

MIM argued that the Heritage Commission did not have jurisdiction to enter SEPGS on the register as it was not a place which objectively answered the description of National Estate as defined in s 4 of the AHC Act. In response, His Honour outlined the Heritage Commission's function, as a, 'careful assessment of complex facts and the formation of opinions and value judgments on a potentially very wide range of matters.'

He stated, 'In such circumstances, the very nature of the task of identifying places that are part of the National Estate is suggestive of an intention that the body established by the Parliament with the function of identification is to have the power to make a conclusive determination of that matter.[4] His final view being , ' If the conclusion that a place is part of the National Estate were to be seen as a jurisdictional fact, one of the Commission's most important functions, ... would be performed only provisionally... There would be something approaching merits review of the Commission's decision since the matter for factual review would be, essentially, the performance of the whole function of identification.'

Black CJ views dissent from the majority comprising Beaumont and Beazley JJ. In their joint judgment, their Honours interpret the AHC Act as analogous to The World Heritage Properties Conservation Act, 1983 (C'th). Thus, the principle enunciated in the Queensland Rainforest case[5], that heritage value is an objective quality inherent in a place is applied to the SEPGS dispute. Importantly, their Honours add a qualification; 'But as evaluation necessarily involves matters of judgment and degree, an evaluation of the place made by a competent authority is the best evidence of its status available to our community'. With the greatest respect to their Honours, this approach seems equivocal as the objective qualities of a place are stressed but the best evidence, the way we are to appreciate that quality is through the expertise of the Heritage Commission.

But to reinforce that National Estate value is not the 'mere' opinion of the AHC, they state, 'It is one thing to say that a degree of evaluation is necessarily implicit in, as here, the formal act of recognition, by entry in the Register, of a place which, in objective terms, has National Estate qualities. It is a different thing to say that whether a place is deemed to be part of the National Estate is entirely at the discretion of the AHC...'. Accordingly, their Honours conclude, ' The status of a particular place as one having significance or other special value for future generations as well as for the present community, as provided in s.4, is an objective fact, ascertainable by reference to its qualities....'.

Heritage as part of Institutional Decision Making

Yet if identification of heritage, or more narrowly National Estate value, does not depend upon the mere opinion of the Australian Heritage Commission, whose interpretation can take us from the inherent 'objective' qualities of a place to the communal recognition of that value? By designating heritage value as objective, the majority judgment provides no clear guidance to decide the institutional process by which heritage is identified. To whom are the manifestly 'objective' qualities of a place made apparent, and by what process in our society are such qualities to be acknowledged?

The Australian Heritage Commission case is significant for the interaction of law and expert knowledge in environmental decision making. The decision implies a confined role for the Heritage Commission as it takes identification out of the realm of expert knowledge. Potentially the decision opens up many of the Commission's decisions to judicial review, which at least according to Black CJ, would be akin to review on the merits. But indirectly, through prescription of the procedure for ascribing National Estate or heritage value, law sets the framework for deciding that value.

To return to our initial question - is heritage value 'objective'? Cannot such 'facts' be seen as linked to particular interpretations of the environment rather than objectively derived positions leading to a necessary 'conclusion' or decision. Which systems; which institutional decision making processes and forums, are best placed to make the final decision are questions thrown into relief by the Australian Heritage Commission case.

ENDNOTES

1. M Brennan, 'The Concept of the National Estate: Federal Court Interpretation' (1996) 13 EPLJ 316.
2. The Australian Heritage Commission v Mount Isa Mines, (1995) 133 ALR 353 per Black CJ.
3. P Caswell, 'Fast Tracking and the Mc Arthur River Project' open letter sent to the Queensland Conservation Council May 30, 1994.
4. Australian Heritage Commission v Mount Isa Mine , 133 ALR 353 per Black CJ at 362.
5. Queensland v Commonwealth (The Queensland Rainforest Case) (1989) 167 CLR 232 see also, on the justiciability of such an issue, Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd.(1987) 15 FCR 274 per Wilcox J at 306-7.

TIME LIMITATIONS ON LAND AND ENVIRONMENT COURT ACTIONS

David Galpin, Solicitor, Environmental Defender's Office

Recent decisions in the Land and Environment Court have thrown into doubt the operation of sections 35 and 104A of the *Environmental Planning and Assessment Act* 1979 (NSW).

Sections 35 and 104A are in similar form. They attempt, respectively, to prevent challenges to the validity of environmental planning instruments or development consents after a three month time period has elapsed.[1] Until recently, there was a consistent line of Land and Environment Court decisions suggesting that challenges could still be brought outside the three month time limit if based on bad faith, breach of the rules of natural justice, manifest ultra vires, or manifest excess of jurisdiction.[2] These authorities were based on a clear assumption that both ss.35 and 104A are privative clauses. Privative clauses attempt to validate government decisions by restricting legal challenges on any ground.

In the case of *Coles Supermarkets Australia Pty Ltd* v *Minister for Urban Affairs and Planning*,[3] the Chief Judge had to consider the effect of s.35. In doing so, her Honour reviewed the earlier decisions of the Land and Environment Court and other courts regarding the exceptions allowed to privative clauses. Her Honour concluded that s.35 should be interpreted in accordance with the approach taken by Dixon J in *R* v *Hickman; ex parte Fox and Clinton*.[4] In *Hickman*, Dixon J discussed the effect of a privative clause and concluded that a decision is not invalid if the decision maker failed to conform to the requirements governing its proceedings or failed to act within the limits of the instrument giving it authority,

> "provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."[5]

Pearlman J concluded that s.35 operates as a privative clause and that legal challenges could only be brought outside the three month period if based on the exceptions contained in the *Hickman* proviso. Her Honour also concluded that (apart from the *Hickman* proviso) there is no exception allowing challenges based on the rules of natural justice. This is contrary to the previous Land and Environment Court decisions.

Pearlman J states that the rules of natural justice are procedural rules governing the exercise of a power under the *Environmental Planning and Assessment Act*. Her Honour then seems to suggest that the *Hickman* proviso may apply where there has been a breach of those rules. That is, the breach of the rules of natural justice may be so extreme as to actually constitute one of the grounds of review in the *Hickman* proviso. It is difficult to see how a breach of the rules of natural justice would ever satisfy the *Hickman* proviso and if it did, one would be concerned about that other ground anyway and not with natural justice. Pearlman J appears to be allowing an illusory exception. Indeed, her Honour went on to conclude that the challenge founded upon procedural fairness in *Coles* did not satisfy the *Hickman* proviso.

In three even more dramatic decisions, Bignold J has determined that ss.35 and ss.104A are not, in fact, privative clauses at all, but time limitation clauses.[6] The key distinction which his Honour makes is that under ss.35 and 104A challenges can be made on all legal grounds provided that they are brought within the 3 month limitation period. Within that time period there is no removal of the Court's jurisdiction. In contrast, privative clauses simply restrict legal challenges on any ground, irrespective of when they are brought. As a consequence Bignold J concludes that there is no basis for allowing exceptions to the operation of sections 35 and 104A as has been done by courts in relation to privative clauses. In his Honour's view, no challenges can be entertained after the three month period has elapsed.

It is difficult to see how, in principle, the distinction which his Honour makes can be a basis for refusing the exceptions which would be available if ss.35 and 104A were privative clauses. The distinction made is not meaningful. When they come into effect (after the relevant 3 month period), ss.35 and 104A operate precisely as privative clauses. The real issue is whether the need for developers to have certainty regarding development consents should take priority over ensuring that decision makers do not act in bad faith, or beyond power or in breach of natural justice. Surely this would be a matter better determined in the exercise of the Court's discretion whether to grant relief rather than being a bar to all challenges.

Conclusion

The remarkable position now exists in the Land and Environment Court that prospective litigants must play judicial roulette in deciding whether to commence proceedings after the three month period has expired. Stein J presumably adheres to his approach in *Yadle* and *Calkovics* allowing challenges on natural justice grounds, Pearlman J will apply the *Hickman* principle (perhaps allowing some challenges on natural justice grounds) and Bignold J will allow no challenges at all.

ENDNOTES

[1] The three month time limit commences from the date of the gazettal in respect of environmental planning instruments and from the date on which the required public notice was given for development consents.

[2] See *Woolworths* v *Bathurst City Council* (1987) 63 LGRA 55, per Cripps J; *Yadle Investments Pty Ltd* v *Roads and Traffic Authority of NSW* (1989) 72 LGRA 409, per Stein J; and *Calkovics* v *Minister for Local Government and Planning* (1991) 72 LGRA 269, per Stein J.

[3] (1996) 90 LGERA 341, delivered on 3 May 1996 whilst *Breitkopf* v *Wyong Council* (1996) 90 LGERA 341 was still being heard.

[4] (1945) 70 CLR 598.

[5] Ibid, at 615.

[6] *Breitkopf* v *Wyong Council* (1986) 90 LGERA 269; *North Sydney Council* v *North Shore Properties Pty Limited*, unreported, Bignold J, 3 April 1996; and *Vanmeld Pty Ltd* v *Fairfield City Council*, unreported, Bignold J, 28 June 1996.

THEY'RE CHANGING THE DEFAMATION LAWS AGAIN. IS THIS GOOD FOR THE ENVIRONMENT?

Bruce Donald, Chair Environmental Defender's Office

It's Defamation Law Reform time again, this time in NSW. The NSW Government has produced the latest proposals dramatically to change the defamation laws and the way they work in this State. It has published an Exposure Draft Defamation Bill 1996. Despite this being an implementation of Law Reform Commission recommendations, any experienced defamation lawyer should recommend caution in such an exercise and call for detailed consideration of the changes.

Environmentalists must take a keen interest in the defamation laws. The developers of this world often boast about how they use the laws of defamation as a weapon against environmental opposition.

The so-called SLAPP writ (Strategic Litigation Against Public Protest) has become a feared device. Even mere hairy chested solicitor's letters seem capable of shutting protestors up (quite wrongly in most cases). Therefore it becomes essential for protestors to know how these laws work *in favour* of free speech and confrontation in public interest matters, and to keep them working that way. *Lawfully to defame* someone may be crucial to preventing seriously damaging the environment.

For example, by understanding the *right freely to state your opinion* about someone if it is based on true facts, people can maintain strenuous debate against proposals which threaten loss of environmental values. Or if something is in fact *true* (noting the difficulties sometimes of *proving* truth) and concerns matters of *public interest*, then you are free to say it even if it defames a person. Again, where you are *reporting what is said in Parliaments or the Courts*, even if this defames a person, they cannot win a defamation case against you.

Despite the fact that we have a different set of defamation laws for each of our eight Australian jurisdictions, these basics are roughly uniformly applicable.

Environmentalists have also taken great heart from the recent decisions of the High Court of Australia which, in the face of refusal by State Parliaments to enact an American-type "public figure defence" against a claim of defamation, have judicially extended rights of free speech and restricted the threat of defamation actions in debate over the affairs of governments and those exercising public authority. Therefore there is great concern at suggestions that a change in the judges appointed to the High Court might see these advances cut back; there is a fear a new majority on the High Court might decide that Parliaments not judges are the people to make these sort of legal reforms.

Furthermore, just when those High Court decisions seemed to be making things simpler in public interest debate, the NSW proposals are tabled. In the name of "balance" between free speech and the right of reputation, introducing complex new laws which change well known concepts can make it easier for well resourced proponents of environmental impacts to quickly stifle necessary debate from their critics who are usually unable to afford to consult a lawyer let alone fight a Court case.

The main change proposed for NSW is to focus, right at the outset, on whether or not a publication is *true or false*. Instead of truth being a defence, defamatory publications would only be "actionable" if *false* or *inherently not capable of being proved true or false* (defamatory publications which do *not relate to a matter of public interest* are also actionable). The person who says they were defamed must prove the publication to be false (or not about a matter of public interest). On the face of it, this would favour the defamer who at present must prove truth. But as, under a civil standard of proof, the burden to prove this would effectively shift back to the defamer when the defamed had led evidence that showed falsity more probably than not, this benefit may be minimal for a defamer without resources to fight legal cases.

Much more importantly, the draft Bill allows a defamed person who argues *falsity*, a new speedy remedy with major limitation on the current defences for the defamer. This is the *declaration of falsity* which can be applied for quickly in defamations capable of being proved (true or false). The only defences will be absolute privilege or protected report; all other current defences are *excluded*. If the defamed person proves falsity, the Court can order publication of the declaration of falsity as well as damages for economic loss (ie not for non-economic loss-damage to reputation and hurt feelings).

The most difficult question is how will this leave statements of *opinion or comment* which as noted above, are often crucial in environmental campaigns; will they all fall outside the declaration of falsity remedy as they are not able to be proved true or false. If they don't, to deny the defence of fair comment in such a case will be a dramatic shift against free speech.

Equally important, since *qualified privilege* won't be an available defence in declaration of falsity claims, people writing private letters, where that defence has very useful application under current law, may be much worse off. (For environmental campaigns, private letters to decision makers can often be very important.) This change therefore needs very careful testing in discussion of these proposals.

Also the denial of the defence of *contextual truth* may be a serious disadvantage in a declaration of falsity case for a defamer. That defence at present means that if one falsity appears among other true material, which is equally defamatory of the person, the false material *won't* be enough to get a judgement. Much thought needs to be given to this proposed denial.

There are many other proposed changes needing a lot more scrutiny. Moreover, the Bill does not deal with fundamental questions, eg the vexed question of why *companies* can use the defamation laws to recover *non economic loss* in the first place. Why shouldn't they be required to prove actual economic loss since they exist only for economic purposes. Such a change to the law would bring real balance to public debate since much criticism, even indefensible defamatory comments of companies, produces no loss to the bottom line.

The Bill declines to deal with the "public interest defence' on the basis that the high Court cases are the preferable way of dealing with this. But as noted, the judges could take the opposite view and send the matter back to Parliaments. Why not use this opportunity to clarify the question and codify the new public interest test if it is regarded as appropriate.

In my view we should hasten slowly or risk even more restrictive defamation laws from these reforms.

PS Proof of the value of knowing your defamation law came after a recent workshop by the EDO on defamation. People from SHURE, the hard-working group protecting the Hawkesbury, attended and learned enough for them to feel much more confident in criticising a local Councillor, calling for him to withdraw from a vote for conflict of interest reasons. This resulted in decisions *against* proposed adverse developments. It's worth making sure the defamation law changes don't downgrade the rights of such campaigners! (Watch out for the next workshop).

SOUTH AUSTRALIAN DEVELOPMENT ACT CHANGES - PUBLIC RIGHTS AXED

Mark Parnell, Solicitor, Environmental Defender's Office (SA)

In August, the EDO (SA) joined forces with other conservation and legal groups to lobby against draconian new development legislation introduced into State Parliament by the Liberal government.

The Development (Major Development Assessment) Amendment Bill 1996 was primarily designed to revise the State's laws governing environmental impact assessment procedures, however in the process, a number of sinister changes were introduced. One such change was a new s.48E which purports to remove all rights of judicial review in relation to major projects. The Section provides that:

> *"No proceeding for judicial review or for a declaration, injunction, writ or other remedy may be brought to challenge or question..."* [any decision, proceedings, procedures, acts, omissions etc etc. involving major developments]

The EDO believes that the effect of this new section is to put government decisions beyond public scrutiny, even in cases where the government has acted illegally in approving or assessing a major development.

The Bill, including the offensive anti-review clause was eventually passed by the Parliament, with only the two Australian Democrats in the Legislative Council supporting the EDO and conservation group's position.

Whilst support for Jeff Kennett style control of major development was not unexpected from a government obsessed with development at any cost, the attitude of the Labor opposition dismayed most observers. Labor and the Democrats have the numbers in the upper house to block or amend any legislation. The simple message that the EDO and conservation groups failed to get across to the opposition was that to support public rights of judicial review did not make the opposition "anti development". In fact, the evidence in South Australia is overwhelmingly that bad process and a disenfranchised community leads to bad development or in many cases, no development at all.

The antijudicial review amendments to the Development Act were all the more remarkable given that there has only been one action for judicial review of a major project in South Australia in thirty years. This, combined with the fact that under existing Act merits appeals are not allowed in relation to major projects, shows that either the government is particularly paranoid, ir it is planning something big that is determined to push through without legal challenge.

The EDO argued strongly that the importance of judicial review lies not in its day-to-day application, but in its simple presence as a silent sentinel. The ability to challenge illegal government behaviour provides a last resort opportunity for the community to insist on due process being followed.

The EDO believes that these changes to the Development Act might ultimately back-fire on the government. For a start, the community will not accept the legislation without a fight. Without doubt legal challenges to bad government processes will be made, regardless of the changes to the Act.

Secondly, individuals and groups will increasingly turn to extra-judicial methods of opposition and protest. It is a logical consequence of the removal of legal rights, that communities revert to picket lines, demonstration and other forms of direct action, to have their voice heard. Is this the sort of development climate the government wants to promote?

The EDO will be monitoring the operation of the changes to the Development Act over coming months.

RTA MAKES A LOT OF NOISE

David Galpin, Solicitor, Environmental Defender's Office

The Land and Environment Court recently handed down its decision in the case brought by a group of residents at Blacktown and Seven Hills against the RTA.[1] The residents were unsuccessful in their attempt to prevent the RTA from reconstructing Abbott Road, Seven Hills from a two lane road to a five or six lane road without first preparing an EIS.

On 24 October 1995, the RTA decided to upgrade Abbott Road, Seven Hills. Residents were concerned about the reconstruction because Abbott Road is located directly opposite the western end of the M2 Motorway (currently under construction). When Abbott Road has been upgraded to a five or six lane road and the M2 opens, traffic will flow freely from the M2 onto Abbott Road. It will be a de facto extension of the M2.

Abbott Road is a part of the Prospect Highway, which leads from the western end of the M2 to the M4. It was feared that the RTA would also have to upgrade other sections of the Prospect Highway and traffic would then travel between the M2 and the M4 through the middle of the Blacktown and Seven Hills community. A number of studies prepared for the RTA refer to the importance of the Prospect Highway as a link between the two motorways.

The RTA prepared a Review of Environmental Factors (REF) for the proposed reconstruction which was placed on public display from 25 January 1996 to 16 February 1996. The REF was finalised on 1 April 1996 and the RTA determined to proceed with work on 4 April 1996. The RTA considered that the activity was not likely to significantly affect the environment within the meaning of s.112 of the *Environmental Planning and Assessment Act* 1979 (NSW) and that no Environmental Impact Statement (EIS) was required.

The residents commenced proceedings in the Land and Environment Court on 16 May 1996 seeking to prevent the work proceeding without an EIS being prepared. An injunction was granted by Stein J on 21 June 1996 preventing most of the work proceeding.

The residents raised two principal arguments. Firstly, that the RTA's decision to treat Abbott Road as a stand alone project was manifestly unreasonable. Traffic will inevitably travel between the M2 and the M4 along the Prospect Highway. As a consequence, other parts of the Prospect Highway would need to be upgraded and residents along the whole Prospect Highway would be affected. Secondly, the residents challenged the decision that the activity was not likely to significantly affect the environment. It was argued that the increased traffic on Abbott Road would have a significant noise impact on residents, particularly sleep disturbance as a result of heavy vehicle traffic at night time. There is also an economic cost associated with the increased noise which can be calculated through the cost of noise insulation, productive time lost through sleep disturbance and reduced home values.

A Stand Alone Project

The Court held that there was merit in the argument that an integrated rather than piecemeal approach should be taken to transport planning. However, Abbott Road was in need of upgrading and it could not be said that the decision to only look at Abbott Rd was so unreasonable that no reasonable decision maker could have made it.

Environmental Impact

In relation to the environmental impact of the reconstruction, the Court appeared to accept that peak noise levels (caused, for example, by trucks) were the crucial factor to determining whether people would suffer sleep disturbance. It was clear that the RTA had made no attempt to consider peak noise levels, but had only looked at the likely increase in (day time) ambient noise. However, the Court was satisfied that the method used by the RTA was widely followed in other countries. It therefore concluded that the RTA had taken into account to the fullest extent possible matters likely to affect the environment. Furthermore, the RTA could reasonably have reached the decision that the noise impact would not significantly affect the amenity of residents.

The Court accepted that the economic cost of road noise was excluded from the RTA's cost benefit analysis (a recipe for building more roads), but concluded that this was not unreasonable as less than 5% of all economic evaluations included such costs.

Conclusion

The decision is fiercely in support of the status quo to the detriment of sound technical arguments. As a result of the decision, it is likely that the RTA will continue to conduct work on a piecemeal basis, segmenting larger projects into smaller sections for environmental impact assessment. Furthermore, the RTA will no doubt continue to conduct environmental impact assessments which downplay or ignore the impact of heavy vehicle traffic on sleep disturbance and the economic cost of those impacts.

ENDNOTE

1. *Residents of Blacktown and Seven Hills Against Further Traffic Inc* v *RTA*, Land and Environment Court, unreported, Pearlman J, 17 October 1996.

HINCHINBROOK UPDATE

CASENOTE: Friends of Hinchinbrook Society Inc v The Minister for Environment and Cardwell Properties Pty Ltd and State of Queensland. Federal Court, No NG 806996, 1 November 1996 Branson J, Sydney (unreported)

James Johnson, Director, Environmental Defender's Office

On 1 November 1996 Branson J delivered judgement on interlocatory matters in the Federal Court in proceedings brought by Friends of Hinchinbrook Society Inc.

Background

The Society commenced proceedings exparte on 2 October 1996. The Court granted interlocatory relief restraining Cardwell Properties Pty Ltd from coppicing, damaging or removing any living mangroves in an area adjacent to the Port Hinchinbrook development site until 5pm on Friday 4 October 1996. When the matter was before the Court again on 4 October 1996, Cardwell Properties gave an undertaking to the Court not to coppice the mangroves and the Society gave an undertaking to pay any damages which Cardwell might suffer. The matter was adjourned for further hearing until the 24 October 1996.

In the interim, several other applications were made. The State of Queensland filed a motion seeking orders pursuant to section 12 of the *Administrative Decisions (Judicial Review) Act* and order 6 rule 8 of the Federal Court rules that the State of Queensland be made a respondent to the proceedings.

Section 12 of the ADJR Act provides, relevantly, that a person interested in a decision, being a decision in relation to which an application has been made to the Court under the Act, may apply to the Court to be made a party to the application. The section goes on to provide that the Court may grant the application unconditionally, subject to conditions or refuse the application.

The State of Queensland led evidence of its extensive involvement in and expenditure of significant resources on the facilitation of the proposed development. The State of Queensland is also a party to the Deed which is subject of the litigation brought by the Society.

The Court held that the interests of justice in the case would be served by an order making the State of Queensland a party to the application under the ADJR Act, subject to the condition that it meet all of its own costs as a party.

To be successful with its application to be made a party in reliance on order 6 rule 8 of the Federal Court rules, the State of Queensland needed to satisfy the Court that it "ought to have been joined as a party" or that its joinder was "necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined and adjudicated upon". The application was dismissed to the extent that it was in reliance on order 6 rule 8 of the Federal Court rules because it was not a necessary party to the proceedings. However the State of Queensland was given leave to be heard as an amicus curiae for the purposes of the hearing on 24 October 1996.

Application to disqualify

The first application by Cardwell Properties was for her Honour Branson J, to disqualify herself. This was on the basis that Her Honour had met and knew the Minister for Environment and the Chair of the Australian Heritage Commission. Her Honour held

> "I am satisfied that there is no real possibility that a fair minded observer, with knowledge of the material objective facts might entertain a reasonable apprehension that I will be unable to bring an unprejudiced and impartial mind to the hearing and the determination of this proceeding a reason of my relationship with Ms Macarthy".

Transfer to Queensland

Cardwell also filed a Notion of Motion seeking to have the hearing of the matter transferred to Queensland.

After noting that the Court is a national Court and may sit to take evidence and hear witnesses in any place in Australia or in a territory, the Court was not satisfied that the NSW district registry was a plainly inappropriate place for the proceedings to be instituted. A further strong factor telling against the immediate transfer of the proceeding to Queensland was that the judge was part heard in respect of the applicant's claim for interlocutory relief. Counsel, other than for the State of Queensland, were resident in Sydney and each party, other than the State of Queensland, had Sydney based solicitors on the record who have been concerned with the application. Her Honour also had regard to the efficient case management of the proceeding, noting that the public interest requires a prompt resolution of the issues raised in this proceeding. Accordingly the matter was listed for hearing during the week commencing 16 December 1996. Cardwell is still able to make further application to have the matter, or part of the matter, heard in Brisbane.

Security for costs

Cardwell solicitors put on affidavit evidence that the likely costs to be incurred by Cardwell up to the costs of the hearing. The estimate was approximately $115,000. The Society had filed an affidavit of Margaret Thorsborne which set out the history of the applicant, its organisational structure and outlined its actions in relation to the environment. This affidavit was for the purposes of standing.

Mr Shand QC sought to cross examine Ms Thorsborne as to the financial means of the applicant in an endeavour to obtain a concession that the Society did not have assets sufficient to satisfy an order for costs. Mr Shand further submitted that he wished to test whether or not the applicant was acting on behalf of another in these proceedings. Although Mr Shand assured the Court that the cross examination would not be a "fishing expedition" there was no evidence filed on the topic and ultimately the Court formed the view that:

> "the application to cross examine Ms Thorsborne was not made bona fide to the purpose of testing evidence put forward on behalf of the applicant in respect of the second respondent's application for security for costs"

After reviewing the authorities, Her Honour held that:

> "an order for security for costs in anything like the sum served by the second respondent would prevent the applicant from being able to litigate".
>
> "There is, however, in my view, a very real difference from a relationship from a member of a non profit association formed to advance a public interest to the association of which he or she is a member, and the relationship of the shareholders in the company to which he or she holds shares. The benefit which a shareholder might expect to obtain from litigation conducted by a company will ordinarily be, either directly or indirectly, financial. Members of a non profit organisation will not ordinarily benefit financially from litigation initiated by the association. The benefit which they might obtain from such litigation is likely to be constituted by intellectual or emotional satisfaction. The fact that the applicant has had discussions with other groups, apparently of a like mind with respect to a proposed development, does not mean, in my view, that the applicant is to be regarded, for the purposes for the present application, as suing for the benefit of such groups."

Her Honour noted that in Equity Access Limited v Westpac Banking Corporation (1989) ATPR 40-972, Hill J took the approach that some weight was to be given in Trade Practices litigation to the provision of an effective mechanism whereby there may be agitated before the Court issues of contravention of the legislation. Her Honour noted that provisions of section 13 (5) and 14 of the *World Heritage Properties Conservation Act* which gives standing to an interested person. Her Honour noted:

> "the above provisions, in my view, whilst concerned principally with the issue of standing, disclose an intention that legitimate organisations and associations concerned with World Heritage Properties should be able to agitate before the Court issues arising under sections 9 and 10 of the Conservation Act. Organisations and associations of this kind will not infrequently have limited financial means. On considering an application for security for costs in a proceeding involving the Conservation Act, it is legitimate, in my view, for the Court to have regard for the apparent intention of Parliament that such organisations and associations should be able to initiate such litigation."

In the end the application for security for costs was dismissed.

Conclusion

The case is an important precedent for public interest environmental matters, both in the Federal Court and elsewhere. It provided judicial recognition of the importance of enabling cases which seek to enforce the law in the public interest to be brought. Obviously the court retains its important discretion in the matter, but those who bring bona fide proceedings ought to take some comfort that they may have one less procedural hurdle to jump on their way to achieving justice.

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ENVIRONMENTAL POLITICS AND INSTITUTIONAL CHANGE

Elim Papadakis, Cambridge University Press 1996, 240 pp

Review by Nicola Franklin, Lecturer Faculty of Law, The University of Sydney

Environmental movements provide rich material for students of political science. In Environmental Politics and Institutional Change, Papadakis uses empirical material derived from Australian political party policies, the media and public opinion surveys to explore the capacity of established political organisations and institutional practices to respond and adapt to environmental challenges. His broader project is to raise concerns about, and possibilities for, greater responsiveness. Can we, to use the author's closing words, revive the chances for politics to remain relevant and to make a difference? This, he argues, is crucially dependent on fostering constructive dialogue between political organisations and between political and other sub-systems. The book is both useful and stimulating.

The author's case studies and data are organised in accordance with an heuristic model of the sequence in which the policy agenda and public opinion are likely to be shaped. Papadakis suggests a causal chain running from expert communities — which provide the intellectual frameworks and play a key role in design, innovation and discovery — through to the agenda-setters — social movements and political parties which appropriate some of these frameworks and discoveries — to the media, and ultimately public opinion. Although public opinion is placed at the end of the causal chain — reactive and manipulable — the author argues in favour of the capacity of citizens to evaluate and influence policies. In this respect he draws on Yankelovich's distinction between 'top-of-the-head' responses to opinion polls and considered judgements of policy options. This goes to a central concern of the author about the need for expert communities, the media and political organisations to facilitate dialogue and consensus.

Patterns of change in the policy agendas of the established political parties, and their responsiveness to environmental issues, are given extensive consideration. The author's data are drawn from the federal party platforms and policy speeches of the Liberal and National Parties and the ALP from the 1940s to the present, and of the Australian Democrats since their foundation in 1977. His analysis identifies when an issue first appeared on the agenda of a political party and which of the established parties was first to recognise its importance. He then turns to the role of the mass media. Using one source — The Bulletin — over a period of 35 years, he employs a 'story-counting technique' to explore the articulation of environmental issues by the media in terms of the intensity and selectivity of coverage, their sources of information, and trends over time. Finally, noting the limits and possibilities of survey research, he analyses data on patterns of public opinion about environmental issues in Australia.

Importantly, the empirical analysis is preceded by a discussion of key questions about political institutions and social change. The author draws on diverse intellectual sources in his endeavour to articulate obstacles to, and possibilities for, the policy-making process. These include Luhmann, Jänicke, Putman and, yes, Edward de Bono. Despite the difficulty for communication posed by self-referentiality in social systems (Luhmann), and despite the view that 'most institutional history moves slowly' (Putnam), Papadakis remains cautiously optimistic. He is concerned to emphasise the possibilities for disrupting the circularity and binary coding of political communication and for changing political culture from adversarialism to dialogue. Adversarial logic and rigid dichotomies are critically targeted as being unhelpful in dealing with complex problems. Consensus and dialogue, and trust and goodwill, are identified as key principles in any attempt to deal effectively with contemporary challenges: "without trust and goodwill between groups emerging from different sub-systems, the possibilities for constructive dialogue and for resolving controversial issues are slim." For the author, "both innovation and tradition can provide a basis for effective political action over the long haul, especially if they are based on principles like trust and goodwill."

But there are large gaps as the book moves between pessimism and optimism, and between empirical analysis and the possibility of designing institutions that facilitate dialogue and make it possible to enact effective policies. Taking on board environmental concerns is one thing. Introducing effective reforms — a term much used in the book — is another. For the author, effectiveness means the capacity of political institutions and organisations to attract support for policies and then to implement policies over which there is broad consensus. The author is concerned with how one arrives at consensus. The book, however, has little to say about policy delivery, either in terms of sincerity or ability. Further, contrary to the flier accompanying the book, the author does not explore a key player in environmental policy formulation and delivery — the bureaucracy. Industrial and bureaucratic organisations receive occasional reference, notably in discussing the work of Jänicke. Set against the extensive coverage of party platforms and policy speeches, these gaps requires a leap of faith on the part of this reviewer in order to share in some of the author's optimism about institutional capacity to tackle effectively environmental problems.

And what about cynical politics? *Scitech* (Vol 16, No 10, October 1996) reports a senior Government advisor describing the Howard Government's proposed Natural Heritage Trust as a "blatant and cynical political fraud". The advisor, according to *Scitech*, said senior Coalition MPs joked about the policy and admitted to the fact that it could not possibly make any serious impact on the nation's massive problems of land degradation, ailing rivers, and loss of biodiversity.

This book is recommended reading. The vital project, however, has a long way to run.

NOTICEBOARD

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