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Dugongs and Developers
Why people get confused by the law

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On 14 February 1997 Sackville J delivered judgment in the Federal Court in Friends of Hinchinbrook v. The Minister for Environment and Cardwell Properties Pty Ltd and The State of Queensland. Friends of Hinchinbrook were unsucessful and the case has been taken on appeal.

This article discusses the background to the Hinchinbrook development, the challenge which was brought and what the judgment means for environmental protection at the Commonwealth level in Australia.

Hinchinbrook Channel

If you haven't been to the Hinchinbrook Channel, then I suggest you go there - quickly - or at least buy a copy of Margaret Thorsborne's book "Hinchinbrook Island - The Land that Time Forgot". As the Regional Director of the Queensland's Department of Environment and Heritage wrote in his foreword to the 1994 Draft Management Plan for the area:

> "The scenery of the Hinchinbrook Channel is nothing short of awe inspiring...".

In addition to the spectacular scenery, the area is crucial for the protection of the endangered species, Dugong. The Dugong feeds entirely on the seagrasses of the channel and is especially vulnerable to being struck by boats and to loss of its seagrass feeding grounds.

Hinchinbrook Channel is every bit as special as its acceptance as one of the eleven World Heritage sites in Australia would indicate.

Port Hinchinbrook - Hamilton Island Revisited

It was 1985 when a subsidiary of Tekin Australia Pty Ltd proposed a marina-based resort development at Oyster Point on the Hinchinbrook Channel. The Queensland Government and Cardwell Shire Council granted a number of approvals for various works on the site, including the removal of mangroves. No formal environmental impact statement was required or obtained under Queensland law. Initial work at the site commenced in 1989 including the clearing of 7 hectares of mangroves and partial excavation of the proposed marina.

In 1989 Tekin applied to the Great Barrier Reef Marine Park Authority (GBRMPA) for a permit under the Great Barrier Reef Park Marine Act 1975 (Commonwealth) to construct an access channel and breakwater into the Hinchinbrook Channel. At this time, GBRMPA erroneously thought Hinchinbrook

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Channel was within the boundaries of the marine park. The Commonwealth Minister for the Environment directed Tekin to prepare a Public Environment Report (PER) under the Environment Protection (Impact of Proposals) Act 1974 to examine the impact of the offshore works. In 1990 Tekin went into provisional liquidation.

In May 1993, Cardwell Properties Pty Ltd (Cardwell), a company controlled by Mr Keith Williams, purchased the land at Oyster Point and obtained the benefit of the approvals issued by Queensland and the Council. By this time, the Attorney-General's department had provided further advice that Hinchinbrook Channel was not within the Great Barrier Reef Marine Park. Accordingly, no approvals were required from GBRMPA for dredging. This advice did not alter the status of the Hinchinbrook Channel being part of the World Heritage area up to low water mark on the mainland.

In 1994, a consultant's report was prepared on behalf of Cardwell. This was reviewed in a second report by the Queensland Department of Environment & Heritage. However, in June 1994 the Commonwealth Department of Environment considered that this second report was inadequate for its purposes and commissioned Dr Peter Valentine of the Department of Tropical and Environmental Studies and Geography at James Cook University to prepare a report into the World Heritage values of the area affected by the Oyster Point proposal.

Valentine's report concluded that there was an inadequate level of baseline environmental data on which to consider properly the proposal for development. It recommended that a range of potential impacts on World Heritage values should be carefully investigated if the project proceeded.

Despite a request by the Commonwealth Minister for a further environment assessment, Queensland adopted its well known "front row forward" approach to negotiation - it put its head down and charged on. On 29 September 1994 a deed was executed by Cardwell, the State of Queensland, and Cardwell Shire Council. In late October 1994 Cardwell Properties began clearing mangroves on the site. On 15 November 1994 the Minister for Environment telephoned Cardwell to request that mangrove clearing cease. Cardwell not only refused to cease clearing, but set up lights and continued bulldozing until the early hours of the following morning, when the incoming tide bogged vehicles.

A proclamation under subsection 6(3) of the World Heritage Properties Conservation Act 1983 was gazetted on the afternoon of 15 November 1994, covering areas of the Channel adjacent to the development . On 18th November 1994, regulations were gazetted particularising acts which needed consent under the Act from the Minister. Within two weeks of the Commonwealth's legislative action, the Commonwealth and Queensland had reached an agreement for a Hinchinbrook Channel strategic plan to be completed before the Port Hinchinbrook development became operational.

On 23 February 1995 Cardwell Properties made application to the Commonwealth government for consent under the World Heritage Act to carry out several activities which now clearly required consent under the World Heritage Act. These included construction of breakwaters and an artificial beach, dredging of the marina access channel and implementation of a beach and foreshore management plan. The Commonwealth Department of Environment commissioned another consultant's report to consider the impact of the proposed activities on the proclaimed area. On 15 September 1995 the Minister for Environment granted consents under the World Heritage Act to removal of fallen mangroves and the clearance or hedging of mangroves in certain areas and refused consent to all other activities.

In March 1996 there was a change of Federal government. On 12 April 1996 Cardwell made a fresh application for the Minister's consent under the World Heritage Act. This fresh application did not include the original breakwaters, which had been planned to extend into the Channel. The last of numerous amendments which took place by exchange of letters was made on 20 August 1996 when Cardwell Properties agreed not to cut the mangroves which blocked the view from the proposed waterfront blocks until after the dredging of the marina and access channel had been completed.

Environmental Protection - The Legal Framework

Before granting consent, there were several pieces of Commonwealth environmental protection legislation with which the Minister needed to comply.

The Australian Heritage Commission Act

The Australian Heritage Commission Act 1975 (Cth) ("AHC" Act) requires the Australian Heritage Commission to keep a register, known as the register of the National Estate. The AHC lists places of aesthetic, historical, scientific or social significance or other special value for future generations as well as for the present community. There are three National Estate areas identified by the AHC as affected by the proposal; these are the Great Barrier Reef area, the Cardwell Range/Herbert River Gorge area and the Wet Tropical Forests of North Queensland.

Section 30 of the AHC Act imposes duties on Commonwealth Ministers and authorities in relation to places in the register. Before taking any action that might affect to a significant extent a place that is in the register, a Minister must inform the AHC of the proposed action and give the AHC a reasonable opportunity to consider and comment on it. The Minister is prohibited from taking any action that adversely affects a place that is in the register unless satisfied there is no feasible or prudent alternative to the taking of that action and that all measures that can reasonably be taken to minimise the adverse affect will be taken.

World Heritage (Properties Conservation) Act 1983

When property is included in the World Heritage List, and the Governor General is satisfied that it is being or is likely to be damaged or destroyed, the Governor General may declare the property to be property to which section 9 of the World Heritage Act applies. Similarly, a proclamation can be made under section 7 declaring the property to be property to which section 10 applies.

Section 9(1) prohibits certain acts, subject to a ministerial power of consent. The acts prohibited must be prescribed by regulation. Regulations gazetted on 18 November 1995 prescribe a number of construction acts.

Section 10 of the Act applies to trading corporations. It prohibits a list of acts on proclaimed property and in addition the doing of any act that damages or destroys property to which the section applies.

Section 13 (1) limits the scope of the Minister's discretion to give a consent under Section 9 (1). In "determining whether or not to give a consent pursuant to Section 9 in relation to any property to which that section applies, the Minister shall have regard only to the protection, conservation and presentation, within the meaning of the Convention, of the property".

Section 13 (4)(a) requires the Minister to publish in the Gazette a notice stating that "the consent has or has not been given and setting out particulars of the act or acts to which the consent or the refusal to give the consent relates".

Sections 13 and 14 are also very relevant to the case. Section 13 has the effect that an "interested person" is taken to be a "person aggrieved" under the ADJR Act in relation to a decision to give or refuse consent under ss.9 and 10 of the Act. Section 14 provides that the Federal Court may on the application of an interested person grant an injunction restraining a person from doing an act that is unlawful by virtue of Section 9 or 10. It also specifically gives the Federal Court the power, where it considers it desirable to do so, to grant an interim injunction pending the determination of the application.

The legal challenge

Friends of Hinchinbrook (FOH), as "interested persons", argued that the Minister had made a number of legal errors in deciding to grant consent under the World Heritage Act to Cardwell. The main arguments advanced by FOH are summarised below.

Reliance on Regional Management Plan

Deferral of Consideration

Significant concern had been raised in advice provided to the Minister that dredging a marina access channel would have consequential impacts on the proclaimed area because of increased boating. The marina was to provide for 234 boats and there was also a two lane public boat ramp to be constructed with parking for 100 cars. This contrasts with the present situation where there is no all weather boat access to the Channel. The main adverse effect identified was the increased boat strike and disturbance of marine animals such as dugongs and turtles.

The Minister found that the potential impact could be adequately addressed by developing and implementing a regional management plan. The proposed regional plan would provide for further studies to be undertaken into the dugong populations and for management arrangements to protect and conserve this World Heritage value. He also considered it likely that the proposed regional plan would be in force before the resort was operational.

FOH argued that the Minister had deferred consideration of the nature and extent of these impacts and the measures necessary to mitigate these impacts. These were important matters for consideration at the time of making the decision. The Regional Management Plan was likely to result in boat speed limits, limits on the numbers of boats in various areas and "no go areas" to protect, in particular, the dugongs. FOH argued that it would be ludicrous, having given consent for a 234 boat marina, for a subsequent Regional Management Plan to attempt to limit the number of boats which could use the channel to, for example, 20 per day. Appropriate management options may well have been foreclosed

Social and economic factors

As noted above, in order to deal with the consequential impacts of the operation of the resort's marina , the Minister negotiated a Memorandum of Understanding (MOU) with the Queensland Government about the preparation of a Regional Management Plan under Queenslands Coastal Protection and Management Act 1995. A schedule to the MOU expressly provided that "social and economic values" were among the values which needed to be addressed with particular attention in formulating the proposed Regional Management Plan. The Queensland legislation which formed the primary framework for the preparation of the plan requires all submissions on the preparation of the draft plan to be taken into account by the Minister. In particular it requires the advice of the Regional Consultative Group to be taken into account. This group includes representatives of local government, tourism and industry, each of which has a strong interest in advancing the economic merits of development.

FOH relied on Parramatta City Council v Hale (1982) 47 LGRA 319 (NSWCA) to argue that the Minister deferred consideration of matters he ought to have considered when granting the consent. In that case, in place of comprehensive stipulations for the construction of pedestrian access ways, the Council resolution simply substituted a requirement that the applicant discuss with the city engineer and the trustees "means of providing improved pedestrian access to the stadium". His Honour quoted from the judgement of Moffit P in Hale's case:

> "Thus where there are means of mitigating obvious and serious harm of a particular class to the environment and the authority consents to a development, so a structure of enormous proportion can be commenced and completed free of any precondition and it is left to the future to work out the problems of mitigation of the harm by some agreement with the developer or by the developer with others..."

His Honour then went on to distinguish Hale's case:

> "In the present case, the Minister applied the criteria he was required to take into account by the World Heritage Act at the time he made his determination. One of the factors he took into account was the process, set in train by the MOU, for the preparation and implementation of management plans. While that process had not been completed at the time the Minister gave his consent, unlike Parramatta v Hale, critical issues were not simply left unresolved by "vacuous conditions". The Minister specifically found that the environmental impacts flowing from the consents would be insignificant having regard, *inter alia*, to the process established by the MOU."

This appears to confirm the lawfulness of devolving

responsibility for final assessment and setting of conditions to another body at a future time. The practice of conducting assessment and developing management plans after consent has been granted is a worrying trend. However, Cardwell ought not to be concerned by restrictive measures placed in a Regional Management Plan because the Queensland Coastal Protection and Management Act provides for Cardwell's compensation should the plan curtail the use of the resort.

Failure to Properly Grant Consent

The Court found that the Minister was advised and accepted that he was not lawfully able to impose conditions on the consents granted under sections 9 and 10 of the World Heritage Act. FOH argued that on its proper construction the World Heritage Act permits the Minister to give consents upon conditions. His Honour held that as a matter of statutory construction, the Minister did not have that power. The factors he considered included:

1) Neither section 9 nor section 10 expressly conferred such a power on the Minister;

2) The World Heritage Act provides no explicit mechanism for enforcement of any conditions attached to a consent although civil enforcement is provided in section 14. His Honour considered the language was not apt to deal with an infringement of a condition attached to the grant of consent;

3) The World Heritage Act addresses the scope of a consent given in section 13, but section 13 does not address the question of conditions;

4) Other conditions, such as the notice condition which require publication of whether the consent has or has not been given, do not mention particulars of any conditions attached to the consents.

As a consequence the Court upheld the process of binding the developer to environmental protection measures by entering into a Deed of Agreement. This raises serious concerns because the Deed is a private agreement which can be varied at any time by agreement of the parties and the terms of the agreement can remain confidential. Further, only the parties can enforce breaches of the Deed, which appears contradictory to the intent of section 14 of the World Heritage Act, which gives standing to restrain breaches of the Act.

Unreasonableness

FOH also argued that it was unreasonable for the Minister, having regard only to the "protection, conservation and presentation" of the proclaimed area, as required by s.9 of the World Heritage Act, to grant consent to a major development which would impact on that development. Clearly, the consent is not for the purpose of, and does not promote, any of these factors. Moreover, having regard only to protection, conservation and presentation, why would a Minister give consent?

FOH also argued that the Minister's decision, that any impact on the aesthetic values of the proclaimed area would be insignificant, was unreasonable. The Minister was advised by independent experts that there would be significant adverse impacts because of the proposal. One of the experts, from James Cook University, consulted widely with other experts in the course of his research and has published internationally on the subject.

Certainly there was no evidence that the Minister has expertise in assessment of visual impacts on world heritage values. FOH argued that this was not a case of beauty being in the eye of the beholder, and that it was not open to the minister to disregard the expert evidence before him. The minister equally could not have said that there would be no impacts on dugongs because he had visited the site and considered it unlikely that they used the area.

There was no contradictory expert evidence between which the Minister was able to choose in arriving at his conclusion. The Minister asserted that the proposed resort was only 500 metres from Cardwell, implying that Cardwell is already a substantial visible impact and the resort will not add to this significantly. This, however, does not stand up to scrutiny. Cardwell was in existence when the area was accepted to the World Heritage list. Australia is under a duty to protect the site. The resort will more than double the population of Cardwell.

To add insult to injury, it was suggested by Cardwell Properties that regard be had to its landscaping efforts at Hamilton Island. Anybody familiar with that resort will know the way the towers at Hamilton Island "blend into the background".

Despite experts identifying the likelihood of damage to the scenic values of the proclaimed area and the need for data to establish the extent of such impact, *none* of the scientific studies commissioned examined this aspect of the impact of the proposal. Several of the reviewers who were asked to comment on the report supporting the developer's application identified the narrow scope of the study as a deficiency which concerned them. Professor Peter Saenger notes that

> "...on the basis of a virtual lack of social, cultural, economic or aesthetic assessment, the question as to whether the project should go ahead cannot be answered.

Finally, there is no evidence that the Minister viewed the proposed development site from the proclaimed area. The view from water level and offshore from the land is obviously different from the view when standing on the site and the visual impacts are different. A thin screen of mangroves to 15 metres tall may well serve to screen earthworks at ground level. Even if the minister possessed the requisite expertise, he would not be in a position to assess the likely impact of the proposal on world heritage values.

Each of these arguments was rejected on the basis that it was reasonably open for the Minister to arrive at his conclusions.

Residual Power

The Minister issued a statement in September, which was tendered into evidence, that if the regional planning process did not deliver the required protection for world heritage values of the area, then he would use all the powers available to him to protect those values. The Court held that this "residual power" was a factor for him to consider when determining whether he had complied with his statutory duties.

This seems extraordinary. The reasoning is that the Minister can be satisfied now that there will be no impact, because if there is an impact he can take proceedings under section 14 of the Act to stop it. This presupposes that the relevant proclamation and the regulation protecting the channel will remain in place. As a result of strident calls from the Queensland Premier for the proclamation to be revoked, and a meeting between the Premier, the Minister, the Prime Minister and Mr Williams, it may be that the Minister may not have any such powers for much longer.

Conclusion

Following from the legal representation given by the NSW EDO to Friends of Hinchinbrook, there have been threats that Commonwealth funding to the EDO will be cut if it continues to act for clients in litigation against the Commonwealth. The Attorney General has described the case as "chardonnay-set" litigation and stated that the EDO has been acting as a "campaign post". These are unfortunate and untrue comments.

The EDO has conducted and will continue to conduct important litigation without fear or favour against government. Its independent watchdog role is crucial. This case is only the EDO's seventh against the Commonwealth in the last seven years (and only the second loss). The seven cases have included:

- the North Coast Environment Council case against the Minister for Resources, an important judgement on standing, and

- the Tasmanian Conservation Trust against the Minister for Resources and Gunns Limited, a woodchipping case which fundamentally changed the appreciation of the Commonwealth's duties under the Environment Protection (Impact of Protection) Act 1974.

The Gunns case, in particular, caused extensive embarrassment to the then Labor government and threw into doubt the validity of every woodchip licence in the country. But there was no threat of cutting the EDO's funding. We can only hope that the value of the EDO's work will soon be recognised by the current government and more, not less, support will be forthcoming.

Protection of the Environment Operations Bill 1996 Keeping the Public in the Dark

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This is an extract of a paper delivered to the recent conference on Pollution Perspectives by Lisa Ogle, Solicitor with the EDO. The paper focuses on the licensing process in the Protection of the Environment Operations Bill 1996 (NSW) ("Operations Bill") and outlines the concerns of the EDO about the lack of public participation provisions in the Bill.

A. INTRODUCTION

The public is entitled to expect that any decision making process which empowers government to make decisions which have the potential to directly impact upon people's lives, as does the regulation of pollution, should adopt provisions which enable the public to participate in that process.

The process should be transparent, so that anybody can see how the process operates and why decisions are made. The system should be fair for all people affected, not just between commercial competitors. This means there should be public participation; including notice of new proposals or changes to existing operations, easy access to information, the right to be heard and avenues of appeal.

Although pollution affects everyone in our community, the Operations Bill provides little opportunity for real community involvement in the pollution licencing decision making process. In this regard, the objects of the Operations Bill are very telling. They make no mention of public participation. This absence signals an approach with which the Environmental Defender's Office ("EDO") takes issue and which from a community perspective infects much of the legislation.

B. PROTECTION OF THE ENVIRONMENT POLICIES

The main opportunity for the community to be involved in the pollution regime is in relation to protection of environment policies (PEPs). The framework for the creation and implementation of PEPs embraces the classical principles of public participation by requiring notification, calling for submissions and imposing an obligation on the decision maker to consider those submissions.

C. LICENCING

These basic mechanisms which enable public participation are not included in the licencing regime under the Operations Bill. Indeed, the absence of these mechanisms in the licencing process is one of the most obvious omissions in this Bill.

Public participation in pollution licensing is not a radical proposition. The importance of public participation has been recognised in the *Environmental Planning and Assessment Act* 1979 ("EPA Act") which came into force nearly 20 years ago.

Pollution affects everyone. We all breathe the air. We all have a right to clean water for drinking and recreation. The right to a healthy environment has been recognised in a number of international forums[1]. Article 10 of the Rio Declaration provides:

> "Environmental issues are best handled with the participation of all concerned citizens...States shall

facilitate and encourage public participation by making information widely available. Effective access to judicial and administrative procedures, including redress and remedy, shall be provided."

The process of issuing a pollution licence is not just a technical assessment of the elements of the pollution and the receiving environment. The EPA makes important value judgments on behalf of the public. The EPA decides, on our behalf:

- what impact on the environment is "acceptable";
- what impact on human health is "acceptable"; and
- how much the polluter should pay for the privilege to pollute our environment and when this amount should be paid.

The assumption of these responsibilities on our behalf is why public involvement in the licencing process is crucial.

In short, the EDO's concerns are these. Under the Operations Bill:

- Nobody will hear that an application for a pollution licence has been lodged.
- There is no opportunity to inspect the application for a pollution licence, the documents which accompany that application, or the EPA recommendations to a local council.
- There is no right to make submissions. Nor is there an obligation on the EPA or other licencing authority to take submissions into account when granting a licence.
- There is no right for a member of the public to a merits appeal against the granting or amendment of a licence or its conditions.
- Nobody will hear if or when the EPA will review a pollution licence.

a. Notification and submissions

There is no requirement that the public be notified that an application for a pollution licence has been lodged. Similarly, there is no requirement that submissions or objections be called for in relation to a licence application.

Under the current licencing scheme, pollution licences are issued annually. However, under the Operations Bill, licences will be issued in perpetuity. Once a licence is granted, it will remain in force until it is suspended, revoked or surrendered (clause 3.6.1). In these circumstances, the argument that the public should be notified of an application for a pollution licence and have an opportunity to make submissions is even more compelling.

b. Integration of licencing and planning decisions

It is proposed to integrate pollution licencing with planning decisions by requiring a consent authority to obtain advice from the EPA about the likely environmental impacts of a development, and whether the EPA is likely to grant a licence. The Operations Bill contains a list of activities for which pollution licences from the EPA will be required. This list is similar to Schedule 3 of the Environmental Planning and Assessment Regulations 1994 which lists designated developments.

The rationale for excluding the public from participating in the pollution licencing is that they should not have "two bites at the cherry". The EPA argues that the public will be able to make submissions at the development consent stage. This may be so where the activity to be licenced is also a designated development which will be 90% of EPA licences, but, in the other 10% of cases where it is not, there will be little or no opportunity for the public to be involved.

In any event, the public will not know when they are drafting their submissions or objections to a development application whether the developer has, or intends, to apply for a pollution licence, and if so, whether the EPA intends to grant or refuse that licence. They will simply have to make an educated guess about these matters.

This problem could be addressed by relatively simple amendments to the EPA Act or its regulations requiring an application for a pollution licence to be made available for public inspection, purchase and comment in the same way as for a Development Application and Environmental Impact Study. Section 84 of the EPA Act, which requires public notice to be given of designated development, could be amended so as to also include information about whether a proposed development requires a pollution licence.

c. Merits Appeals against pollution licences: applicants only

Merits appeals provide an important form of access to the courts. Contrary to the ALP's election policy, the Operations Bill contains no third party merits appeal provisions, not even for the most contentious or potentially environmentally damaging operations. By contrast, under the Operations Bill an applicant for a pollution licence has a broad right to appeal on the merits to the court (see clause 8.2.1).

d. Keeping up with the Jones' - The "Jeff Kennett Factor"

So where have all the public participation provisions in this draft legislation gone? Is the NSW Government so concerned with industry threats to move shop to Victoria that it has shied away from the opportunity to introduce public participation mechanisms in the Operations Bill? Has it, in other words, allowed the so called "Jeff Kennett Factor" to influence policy to this extent?

If this is the case, a brief look at the pollution licencing legislation in other States indicates that this arguement may be misguided.[2] NSW is dragging the chain. Most other States and Territories make provision for members of the public to make submissions on applications for pollution licences and allow for third party merit appeals.

When it comes to public participation, our Victorian cousins are streets ahead of us. In Victoria, the EPA must publish notice in the newspaper once it receives an application for a pollution licence and must call for public submissions. Any person who "feels aggrieved" by a licencing decision can appeal to the Administrative Appeals Tribunal (the equivalent of a Class 1 action in the Land and Environment Court) within 21 days of the decision.

D. ENFORCEMENT FROM THE COMMUNITY PERSPECTIVE: What if the system doesn't work?

In this respect, the Operations Bill makes some improvement on the present position. As the law presently stands, an applicant must first seek the leave of the Court before being entitled to bring a civil action.[3] This restrictive requirement to seek leave has not been included in the Operations Bill which is a significant improvement.

E. COMMUNITY RIGHT-TO-KNOW: ACCESS TO INFORMATION

The Government has made a commitment to the principle of community right-to-know, but the Operations Bill fails to embrace this principle. Whilst the Bill requires the EPA to keep a public register which will contain information about environment protection licences (pollution licences) and notices (clause 8.5.1), this information will only be accessible after the event, that is, *after* the licences have been issued.

The Operations Bill empowers the EPA to impose licence conditions requiring mandatory audits to be carried out by the licence holder. However, there is no obligation on the EPA to make the information obtained under audit available to the public.

The recent experience in the United States under the Community Right to Know legislation which was introduced in 1986[4] in response to the Bhopal tragedy, has resulted in significant reductions in the volume of pollutants discharged into the environment. Implementation of the Toxic Release Inventory under that legislation, which requires compulsory reporting of toxic emissions, has resulted in a significant reduction of pollution in the US[5]. In light of these results the arguement becomes more compelling that the Operations Bill should require industry to publicly disclose information of pollutants.

F. WHY HAVE PUBLIC PARTICIPATION?

One of the most obvious and persuasive arguments is that public participation results in better decisions being made, both for the community and the environment. This has been recognised in our planning laws which emphasise community participation in recognition of the fact that it improves the quality of environmental decision making. The public can provide critical input from those who actually live in the environment affected. The better the information base, the better the decision.

Industry has much to gain from encouraging public involvement in the licencing. A fair opportunity to have ones say defuses hostility to unwelcome decisions. The opportunity to participate in environmental decisions reduces conflict with people who otherwise feel frustrated when left out of the process. Lack of access to information results in suspicion.

The same arguments can be applied to the decision maker. Local councils and the EPA will find their decisions attract less opposition if they have been determined by a fair and open process. Being conscious of the potential for merits appeals to be taken not by the polluter but also by dissatisfied members of the public should strengthen the EPA's hand and result in more balanced decisions.

G. CONCLUSIONS

It is not appropriate that the process of licencing pollution occur in secret, as a private negotiation between the EPA and the polluter, as is proposed in the Operations Bill. To use those well worn words, the process should be open and transparent. The decision maker should be accountable, not only to industry, but also to the community. The proposed changes leave the NSW public worse off in public participation terms.

The EDO urges all those who are concerned with the provisions of this Bill to make their views known to the EPA and the NSW Government.

See below for copies of this and other papers from the Pollution Perspectives Conference

ENDNOTES

1. See the World Expert's group on environmental law commissioned by the Brundtland Commission, the author of Our Common Future".
2. See EDO publication "Balancing the Public Interest in Pollution Laws", July 1996, for a description of the public participation provisions for pollution licencing in each State in Australia.
3. See section 25 *Environmental Offences and Penalties Act* 1989, and Brown v EPA (1992) 75 LGRA 397.
4. *Emergency Planning and Community Right to Know Act* 1986 (US)
5. Gunningham, N. and Cornwall, A. "Toxics and the Community: Legislating the Right to Know" Australian Centre for Environmental Law, ANU, circa 1994, pp 7 - 13.

Commonwealth/State Roles Responsibilities for the Environment

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The Commonwealth Government is currently reassessing its role in protecting the environment.

The EDO recently made a submission to the Intergovernmental Committee on Ecologically Sustainable Development (ICESD) in response to the Committee's discussion paper on Commonwealth/State Roles and Responsibilities for the Environment. Extracts from the submission, which was prepared by the Environmental Defender's Office (NSW) on behalf of the Australian Conservation Foundation, Humane Society International, World Wide Fund for Nature Australia and the EDO National Network, appear below.

1. SUMMARY

The EDO submission makes the following main points.The terms of reference for the ICESD review are too narrow and inadequately defined. There is an urgent need to define the 'national environmental interest' where Commonwealth leadership is essential, rather than focussing solely on administrative processes. The review, which only sought to involve a select few participants, should also be widened to consult with a broader range of Australians and be conducted in a more transparent manner.

The following reforms are recommended:

•integration of environmental considerations into all aspects of government decision making;

•broadening the triggers for Commonwealth involvement in environmental decisions:

•accreditation by the States of Commonwealth processes where this is in the national environmental interest or would be more efficient, such as with fisheries management;

•accreditation by one jurisdiction of another's processes only where the accredited processes would be equally or more protective of the environment and involve equal or better public participation processes, and accreditation should be subject to on going satisfactory performance;

•Commonwealth protection of environmental attributes of national significance through tied program delivery and funding linked to environmental performance, similar to the National Competition Policy reforms;

•greater use of community grants as a means of achieving cost effective, responsive and innovative conservation;

•better protection of heritage sites by maintaining the national listing system and ensuring broader application of the legislation to the States, involving development of conservation plans for heritage sites;

•Ensuring that Australia's aid program continues to be developed in such a way as to avoid any significant adverse impacts on the biological diversity of recipient countries.

2. GOVERNMENT RESPONSIBILITY FOR THE ENVIRONMENT

2.1 An integrated approach

The Review Paper notes that a key issue for consideration by the Working Group will be:

> *"How the governments of Australia discharge their collective responsibility to protect the national environmental interest"*

The Review Paper goes on to identify core issues and discuss each in turn, limited to the issue of *who* assumes responsibility, with little consideration of what that responsibility is and how government collectively will approach this responsibility. We consider that the Working Party needs to concern itself with this core issue at the outset.

Government needs to integrate environmental considerations into all aspects of its decision making processes in order for development to be ecologically sustainable. For example, current tax arrangements indirectly sponsor clearing of vegetation and tree clearing, as clearing expenses can be deducted against income as ordinary operating expenses.

The 1996 State of the Environment Report notes:

> "Overall, economic planning appears to take little account of environmental impacts. It is assumed that the first priority should be a healthy economy and that problems can always be solved using the wealth created....".

2.2 The Role of the Community

There are many reasons why a government may choose not to enforce environmental protection laws, including lack of adequate resources, a difference of opinion as to the meaning of the law, and political considerations. While government should maintain the primary responsibility for enforcing our environmental protection laws, it is crucial that the public be able to exercise that right where government does not do so.

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

rights to maintain a healthy relationship between government, the public and the legal system, and thereby maintain a strong democracy.

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

3. TRIGGERS FOR GOVERNMENT INVOLVEMENT IN ENVIRONMENTAL DECISIONS

It is inaccurate to suggest, as the Review paper does, that " the triggers (for involvement) do not relate to impacts on the environment or to the significance of that impact". Under the *Environment Protection (Impact of Proposals) Act* 1974 (Impact Act), Commonwealth involvement is only triggered where there are likely to be significant effects on the environment. Under the *Australian Heritage Commission Act* 1975, the trigger is where an item is adversely affected. The trigger is significant by definition, because of the item's place on the Register of the National Estate.

3.1 *What sort of triggers are important and how would they operate in practice?*

All actions which affect the environment to a significant extent ought to be subject to environmental assessment. If the Commonwealth now seeks to modify its role and to devolve to the States responsibility for actions which may be of local or regional significance, it ought only to do this on the basis that these actions are still assessed by another level of government, and that the assessment process meets or exceeds that of the Commonwealth.

It is clear that problems with administration of the legislation in the past have been due to reluctance by ministers and departments to trigger Commonwealth involvement, especially in environmental impact assessment. This reluctance to recognise triggers is highlighted by the failure of key Commonwealth departments to conclude memoranda of understanding with the Department of Environment as to which matters will be referred to the department. The report by the Auditor General entitled "Living with Our Decisions" (No. 10, 1992-3) noted:

> "...officers with little EIA experience are being made responsible for proposals for which a decision on environmental significance is required. .....the major agencies involved in evaluating proposals have not provided professional development for their officers on their responsibilities under the Impact Act".

After the Federal Court decision in Tasmanian Conservation Trust v Minister for Resources and Gunns Limited, the number of referrals by government departments and ministers to the Commonwealth Department of Environment has increased dramatically as responsibilities for triggering assessment become more widely appreciated.

3.2 *National or international significance*

Some types of developments ought to be listed as automatically requiring a public inquiry, which is generally accepted as being the highest level of assessment. Examples are nuclear facilities, uranium mines, armaments depots and other types of developments where threatening processes are well known.

The following are listed as examples which definitely ought to be above the threshold of national significance:

- National Estate sites
- Ramsar sites
- World Heritage areas
- Habitat of species covered by the China Australia Migratory Birds Agreement, the Japanese Australia Migratory Birds Agreement, Bonn Convention and other treaties
- Wetlands listed in the Directory of Important Wetlands in Australia
- Species, Communities and Populations listed under the Endangered Species Protection Act or under corresponding State legislation
- Proposals involving fisheries, because the artificial three mile limit makes the task of management a fiasco

The decision of Environment Australia (EA) as to whether a proposal is likely to result in effects which are of national significance should be reviewable in the Administrative Appeals Tribunal (AAT).

3.3 *Significance means assessment*

Once the threshold of significance is crossed, the result should be not be simply a referral to Environment Australia to decide whether assessment should take place. As in other jurisdictions which have adopted the threshold of significance, once that threshold has been crossed assessment should be automatic. This increases certainty of process and ensures a "level playing field", removing a further level of arbitrary discretion.

3.4 *Who can cause referral to EA for assessment of whether a proposal is of national/international significance?*

Any person ought to be allowed to refer a proposal to Environment Australia for determination as to whether the proposal is of national or international significance. This would include proponents, local and State governments and the general public. Referral by any of these parties should result in assessment by Environment Australia of whether the proposal is in fact of national or international significance by reference to the specified criteria.

This broad right of referral is necessary to ensure that environmentally significant effects are assessed and that there is public trust in the assessment system. In order for an informed decision to be made as to significance, referrals ought to contain a certain minimum amount of information (a "Notice of Intention").

It is also crucial to seek public input in the decision as to significance. Once a Notice of Intention has been received it should be advertised both locally and nationally and the public involved immediately. The current situation, where Ministers and Departments without expertise in environmental impact assessment are responsible for making the key threshold determination of significance, is inefficient and ineffective in achieving environmental protection.

4. ACCREDITATION

4.1 Accreditation ought to be two-way

There are key areas where there ought to be accreditation by the States of Commonwealth processes, and not just by the Commonwealth of State processes. For example, fisheries, nationally threatened species, populations and communities and management of world heritage sites are areas where it would be appropriate and efficient for the States to accredit the Commonwealth.

4.2 No reduction in environmental protection or rights of participation

Accreditation of one jurisdiction's processes over those of another ought only to occur where the accredited processes are equally or more protective of the environment *and* involve equal or better public participation processes and where effective monitoring, reporting and compliance mechanisms exist.

This means that before accreditation, regard will need to be had not just to environmental laws but to a jurisdiction's "participatory infrastructure". For example, is there adequate access to information through FOI legislation?

4.3 Accreditation ought to depend on satisfactory performance

Accreditation ought not to be "once and for all". It ought to be subject to review that includes meaningful community input and therefore depend on satisfactory performance by the accredited jurisdiction.

5. PROGRAM DELIVERY AND FUNDING

5.1 Commonwealth leadership essential

Commonwealth government leadership is essential in environmental matters. Firstly, Australia has international obligations to protect the environment. Secondly, State governments have shown consistently that they find it difficult if not impossible to adequately protect the environment by themselves. Local and State political imperatives often prevail over the greater good of the nation.

Thirdly, industry is demanding uniformity of regulation on a national basis, particularly in the framework of competition policy.

The Commonwealth role should include:

1. Ensuring compliance with international obligations;
2. Being responsible for policy and management in those areas which
   (a) are most efficiently managed on a national basis or
   (b) are of national significance for conservation of environmental or cultural values.
3. Establishing and ensuring "best practice" national environmental standards which are the minimum which States and Territories must meet.
4. Enacting national legislation which either sets a benchmark for State and Territory governments to follow or alternatively provides a framework for accreditation of State legislation on key environmental issues of national interest such as biodiversity and greenhouse.
5. Coordinating the gathering of information and monitoring of environmental quality on a national basis.
6. Providing tied funding and other resources to combat inefficiencies which are currently inherent in the system.

Having established the key areas of Commonwealth programs, specific issues of delivering funding become clearer.

5.2 Areas of program delivery and funding requiring reform

Four issues are particularly pertinent.

1. **Cost-shifting and cost-sharing.**

Tougher agreements must be developed to prevent States from using Commonwealth funds to displace State funds. Commonwealth funds need to enhance environmental protection undertaken by States, not substitute for it. Cost-sharing arrangements need to ensure that States contribute to outcomes. These points are particularly important for the delivery of the relatively large Natural Heritage Trust.

2. **Compliance.**

States must agree to cease activities within their jurisdiction that undermine the objectives of Commonwealth policy and funding.

3. **Monitoring.**

Strong measures of financial and environmental accountability need to accompany funding arrangements. This accountability must focus on outcomes, not inputs.

4. **Assessment.**

Decisions on Natural Heritage Trust funds distribution will be made through existing mechanisms such as State and Regional Assessment Panels (SAPs and RAPs) which often do not have sufficient expertise and are too geared towards production outcomes to make informed decisions about the distribution of funds on biodiversity and nature conservation related programs.

5.4 Improvements to existing community grant programs and mechanisms

Properly designed and monitored, a community grant program can be an extremely effective mechanism for the delivery of environmental protection programs. Community groups often have a detailed understanding of the problems which environmental protection programs seek to address. They play vital roles in raising awareness of conservation issues in the community and provide a focus for participation. They can also make highly efficient use of resources, drawing on extensive volunteer networks. They are generally more cost effective, responsive, innovative, have excellent community networks, and are better trusted by the Australian community than governments or the private sector.

6. COMPLIANCE

The immunity of agencies and businesses associated with the Commonwealth from State and Territory environmental planning laws is a key area of concern in the community. Almost daily the EDO network receives expressions of concern in

relation to, for example, mobile phone towers and the Federal Airports Corporation.

It is inconsistent for the Commonwealth to be privatising government enterprises and encouraging a national competition policy while at the same time continuing the immunity of Commonwealth government agencies and businesses associated with the Commonwealth government. The Commonwealth should legislate to subject itself and all of its agencies, authorities, government business enterprises and tenants to all State environment protection and planning laws and local government ordinances, subject to specific exemptions.

The only exemption should be those concerning national security, national emergencies, cases where Commonwealth legislation is more consultative and protective of the environment than state laws and where there is an overwhelming case on practical grounds for a uniform national approach that is embodied in Commonwealth legislation. Immunity should not be granted on the vague and unaccountable basis of "national interest".

Why Developers should read their Consents?

Oshlack v Iron Gates Pty Ltd and Anor, unreported, 6 March 1997, 40152 of 1996

Lisa Ogle, Solicitor, Environmental Defender's Office, NSW

As the result of a recent case brought by the EDO, the NSW Land and Environment Court has ordered work to cease on a residental subdivision development as a result of extensive breaches by the developer of its development consent.

The case was brought by a conservationist, Mr Alan Oshlack, who alleged that a developer had breached its development consent under section 76 of the *Environmental Planning and Assessment Act 1979* (**"EPA Act"**). Enforcement proceedings were taken under the open standing provisions in section 123 of that Act.

The subdivision involved a controversial development at the Iron Gates site on the North Coast of NSW. The site forms a wildlife corridor between the Broadwater and Bundjalung National Parks and, prior to the clearing, contained habitat for several threatened species including the Koala and the Queensland Blossom Bat. It is also adjacent to a wetland registered under NSW State Environment Protection Policy 14 (SEPP 14), and contains stands of littoral rainforest.

In 1993 the then owner of the site, Iron Gates Developments Pty Ltd, obtained a development consent for a 110 lot subdivision from the local council, Richmond River Shire Council.[1] The site was sold in early 1996 to Queensland based developer, Iron Gates Pty Ltd. The development as applied for and approved was not to be a traditionally engineered subdivision, but a "green" one which was carefully tailored to take account of the environmental sensitivity of the site. A condition of the consent required that "all native vegetation be retained other than that which was required to be destroyed by constructing work required by the approval...".

Rather than retaining all native vegetation, the site was clear-felled, including an area which had been set aside in the consent as a wildlife corridor. Substantial drains were also constructed on the site for which the developer did not have consent. The applicant argued that the large number of breaches of the development consent, taken individually or as a whole, rendered the development significantly different from that which had been approved in the development consent.

The developer relied on Ziade v Woolahra Municipal Council and Ors (unreported, NSW Court of Appeal, 28 April 1994) and raised as a defence to many of the breaches that construction had taken place in accordance with plans which had been approved by the Council. It argued that the clearing was carried out in accordance with the approved engineering plans which required almost the whole of the site to be cut and filled, and allowed for the construction of two massive drains.

However the Court found that the local council had not considered whether the engineering plans complied with the development consent. The Council had consequently approved engineering plans which altered the develope nt in a number of fundamental respects, and which were inconsistent with that consent.[2]

In addition to the breaches of the EPA Act, the Court also found that the developer had breached section 118D of the *Threatened Species Conservation Act 1996*, by destroying the habitat which the developer knew to be the habitat of threatened species.

As a result of the extensive breaches the Court held that "the developer's conduct has rendered the consent nugatory" as it is no longer possible for the development to be completed in accordance with the development consent. An order was granted restraining the developer from carrying out any further development pursuant to the consent.

The Court has also indicated that it is prepared to make orders under section 124(2)(c) of the EPA Act that the site be revegetated and remediated to its original condition. The case has been listed for further hearing on 19 - 22 May 1997 to determine the final terms of the remediation order.

Note: Both the developer and the Council have lodged appeals.

[1].The subdivision consent had previously been the subject of an unsuccessful challenge to its validity, see Oshlack v Iron Gates Development Pty Ltd (1993) 82 LGERA 222.

[2].See Scott v Wollongong City Council (1992) 75 LGRA 112.

Native vegetation protection on hold

Jamie Pittock, Manager- Nature Conservation
World Wide Fund for Nature Australia

The NSW Government continues to procrastinate on crucial legislation to conserve the State's privately managed bushland. We understand that government agencies are developing proposals that would significantly weaken the year old controls in NSW State Environment Protection Policy 46 (SEPP 46).

Prior to the introduction of SEPP 46 around 150,000 ha of bushland were being destroyed each year, primarily for agriculture. By comparison, the National Parks recently created after the forests campaign a total of 283,000 ha. The clearing in NSW has been concentrated in the ecosystems least well conserved in parks and containing a plethora of threatened species.

Vegetation clearing is described in the 1996 'State of the Environment Australia' report as the most significant cause for the loss of flora and fauna. Bush land destruction may be responsible for extensive land degradation and up to 27% of Australia's greenhouse gas emissions. It is incongruous that our governments are willing to fund tree planting projects while allowing the destruction of thousands of hectares of existing bushland.

SEPP 46 was introduced in August 1995 as a temporary measure to enable public consultation and development of long term vegetation protection laws. SEPP 46 has been poorly promoted and implemented by the responsible government agencies. The government began weakening the SEPP in December 1995. The ungainly public consultation process culminated in the NSW Vegetation Forum report in August 1996 which recommended new vegetation management legislation.

The Department of Land & Water Conservation (DLWC) is the lead agency preparing the proposed legislation. Regrettably the Department is showing a distinct reluctance to regulate bushland destruction and is opting for substantial self-regulation by land owners within regional plan guidelines to be drafted by regional committees.

State cabinet has been scheduled to decide on the new legislation since before Christmas. At this time (late April) we can only hope that the delay reflects some genuine debate directed at improving the DLWC submision.

NSW conservation groups have four major concerns with the DLWC's apparent position:

1. Regional vegetation plans

We understand the state government may consider allowing any self-nominated rural community to prepare vegetation plans for their area under the proposed legislation and that these plans will fail to adequately restrict bushland destruction.

Similar Total Catchment Management (TCM) and grassland regional planning processes based on regional committees with limited expertise and resources have prepared plans of questionable value. Often such plans have not been based on a good overview of regional environmental information, so that the resulting plans have lacked authority. These plans have not been widely implemented, frustrating rural communities and leading to the current NSW review of TCM. Vegetation planning should avoid these problems by a professional and whole-of-government planning body and extensive regional consultation.

Coordinated regional planning is also essential to reducing the proliferation of regional planning processes and committees in NSW, which is hampering efforts to identify conservation priorities, fund and implement environment programs. Already there are complaints that NSW is losing Murray-Darling Basin Commission community project funding to better organised states. This problem may be exacerbated when the Commonwealth Government's Natural Heritage Trust is established and implements plans to disburse vegetation conservation funds in a competitive process through regional committees.

2. Notification of bushland destruction

A process requiring proponents to provide notification of intended clearing is essential if vegetation conservation measures are to be effective and credible. Without notification, it will be very difficult for most landholders to determine whether their intended clearing is in compliance with a regional plan or other legal requirements. For instance, most landholders could not identify threatened species.

Notification will allow ready development of uncontroversial proposals and ensure that public resources may be concentrated on assessing proposals that may adversely affect the environment. Benefits of notification include: provision of expert advice to landholders; protection of proponents from reports of improper conduct and collection of more reliable data.

3. Threatened Species Conservation Act

DLWC have sought to assume some approval roles under the Threatened Species Conservation Act. We consider that the National Parks & Wildlife Service (NPWS) should continue to administer all aspects of the *Threatened Species Conservation Act 1995 (NSW)*. NPWS has the resources and expertise and this should not be duplicated. We have suggested a 'one stop shop' process for more timely assessment of property management plans by state agencies to meet a number of legislative requirements.

4. Incentives

Incentives are essential to encourage land managers to conserve native vegetation. Conservation groups and the NSW Farmers' Association have prepared detailed incentive proposals for

fencing and managing remnant vegetation and for grasslands conservation. These would cost the state just $14 million over three years. By comparison, the State and Commonwealth Governments spent $232.5 million in 'drought relief' in NSW in 1994 and 1995.

A cabinet decision is due any week and legislation is proposed for the first session of Parliament in 1997.

Finally, the vegetation protection laws will only be effective if there are sufficient funds to implement the program. Further biological surveys, regional plans, extension officers, assessment of proposals, enforcement and monitoring are essential and require funds. However government is already suggesting that the vegetation program will be funded by pillaging from other programs. It would be most regrettable if a government that is spending hundreds of millions of dollars on new freeways and reimbursing toll fees could not find the estimated and miserly $20 million required to conserve the entire state's remnant bush land.

A Trickle through the Floodgates: Applications for leave under S.25 Environmental Offences & Penalties Act 1989

Andrew Sorensen, Solicitor,
Environmental Defender's Office, NSW

The debate regarding the introduction of a general right to bring legal proceedings unrestricted by the need to demonstrate a "special interest" (ie open standing) is a continuing one in most jurisdictions, both in Australia and overseas. However in New South Wales, 1992 saw the enactment of section 25 of the Environmental Offences and Penalties Act 1989 ("the EOP Act"), which grants qualified open standing to bring civil proceedings for environmentally damaging breaches or threatened breaches of any NSW legislation. Now 5 years later, the record in relation to use of section 25 puts paid to the tired mantra that open standing provisions open the "floodgates of litigation".

In the five years since section 25 was enacted, only two applications for leave under section 25 have been heard by the Court, with a third pending at the time of writing. Leave was granted by the court in both of the applications which have so far been heard.

Section 25 of the EOP Act allows "any person" to bring proceedings in the Land and Environment Court for an order to restrain a breach or apprehended breach of any Act or statutory rule under any Act, if the breach or apprehended breach is causing or is likely to cause harm to the environment.

Sub-section 25(3) of the Act provides that any such proceedings may only be brought with the leave of the court. Before granting leave, the court must be satisfied that:

(a) the proceedings are not an abuse of the process of the court;

(b) there is a real or significant likelihood that the requirements for the making of an order under section 25 will be satisfied; and

(c) it is in the public interest that the proceedings should be brought.

The first application for leave was in the case of Brown v EPA and Anor. (1992) 75 LGRA 397. The application was to bring proceedings alleging that certain pollution control licences issued by the EPA were invalid.

Debate in the hearing of the leave application centred around the test of satisfaction in s.25(3)(b). It was submitted on behalf of the applicant that satisfaction must be met from an examination of the application and points of claim - the breach alleged and the relief sought. The EPA submitted that the test is one of probability of success (i.e. a prima facie case), which includes consideration of some discretionary factors. On behalf of the second respondent, it was submitted that the approach of a court to interlocutory injunction applications should be followed without the need to examine the balance of convenience.

Stein J. immediately discarded the test of a prima facie case, contrasting the wording of s.25 with that of sub-section 13(2A) of the EOP Act (which allows the institution of proceedings by a person for an offence against the Act, with the leave of the court). Section 13(2A) expressly requires that the Court be satisfied that a prima facie case exists. Then, referring to the Second Reading Speech in the Legislative Council in relation to s.25, His Honour further stated that the application for leave should be approached in a summary fashion, rather than a formal hearing with detailed evidence and cross-examination.

Stein J. also rejected the application to section 25 of the test for an interlocutory injunction, stating that it was not apparent that a leave application should be equated to the seeking of interim relief pending a final hearing.

Referring in particular to the words "the requirements" in s.25(3)(b), His Honour concluded that they lead to an inference that the Court has to be satisfied on the balance of probabilities that the case sought to be brought is within the jurisdiction of the court, seeks a remedy within the power of the court, *alleges* an actual, threatened or apprehended breach of the EOP Act or any other Act, and that the breach is *alleged* to be causing or likely to cause harm to the environment.

In relation to the two other requirements set out in s.25(3)(a) and (c), Stein J. found that the proceedings clearly were not an abuse of the process of the court. His Honour also found that the proceedings were in the public interest, alleging as they did a serious breach of the Pollution Control Act 1970 (NSW) by the EPA's issue of an invalid pollution control licence.

Accordingly, leave was granted to the applicant to commence the relevant proceedings.

The second leave application to come before the court was in Winn v Director General of National Parks and Wildlife & Ors (unrep., Talbot J., No.40064/96, 27 March 1996). The application in this case was to bring proceedings alleging that the second and third respondents were carrying out mining related activities in breach of the *Clean Waters Act* 1970 (NSW), the *Mining Act* 1992 (NSW) and the *Hunter Water Board (Special Areas) Regulation* 1989.

Talbot J. found that mining is self evidently prima facie an activity which is likely to cause harm to the environment. Extracting what His Honour referred to as "particulars of the applicant's claim" including evidence of the nature of the mining operations carried on by the second and third respondents, His Honour also found that the proceedings were not an abuse of the process of the court, thereby satisfying s.25(3)(a).

As regards the test of satisfaction in s.25(3)(b), Talbot J appeared to adopt the test for a prima facie case laid down by the High Court (in the context of an application for an interlocutory injunction) in Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618. In that case, the majority of the High Court considered that the plaintiff should make out a prima facie case "in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief". Commenting on the approach of Stein J. in Brown, Talbot J stated that "If...His Honour was saying that something less than the test of a prima facie case was appropriate to a leave application, then I cannot readily embrace his approach". However Talbot J then went on to say that it was not necessary to finally determine the matter because His Honour was able to find on the evidence that the applicant satisfied the Beecham test.

His Honour also found that the s.25(3)(c) requirement that the proceedings be in the public interest was satisfied, on the basis that it was not disputed by the parties that the mining was taking place in an area sensitive to aquifers which supplemented the potable water supply to Newcastle, and served nearby private bore users.

Accordingly, leave was granted to the applicant to commence the relevant proceedings.

The third leave application, which is currently before the Court, is in the matter of Canyonleigh Environment Protection Society Inc. v Wingecarribee Shire Council & Ors., No.40286/96. The proceedings for which leave is sought pursuant to section 25 involve the construction and use of a large dam in alleged breach of the requirement for a licence under the Water Act 1912 (NSW).

The result of the application will be reported in the next edition of Impact.

The justification for Environmental Defender's Offices

David Mossop
Solicitor, Environmental Defender's Office, ACT

Given that an office is only opened once I thought I should take the opportunity to say some general but fundamental words about the role of the ACT EDO and indeed EDOs generally.

The EDO is part of the network of community legal centres around Australia. It is remarkable how quickly the network of community legal centres has spread in the last twenty or so years. If I am not too far wrong there are now around 115 centres. Those comprise both generalist centres and specialist centres such as the EDOs. The important feature of CLCs is that they both provide traditional legal aid services as well as undertaking community legal education, legal policy and law reform work. In addition CLCs are independently managed and operated and hence not subject to the logistical and political constraints of being a governmental or semi governmental institution. This means that they are an efficient means of delivering legal services that are responsive to community needs.

The development of environmental laws has occurred in parallel to the development of community legal centres. Although pollution legislation was around in the 1960s it is really the early 1970s and the Commonwealth's Environment Protection (Impact of Proposals) Act that marks the start of growth of modern environmental laws. Since then there has been a proliferation (some might say a plague) of environmental laws. The range of laws relating to the environment is enormous - they relate to conservation reserves, wilderness areas, endangered species, pollution control, control of hazardous substances, protection of natural and cultural heritage, town planning and development control. I should particularly point out that the ACT is no exception. For a small jurisdiction it has a bewildering array of environmental laws. It probably has the highest volume of environmental laws per capita of any State or Territory of Australia.

There are two points to be made about this growth of environmental laws.

First, as I have mentioned, there are lots of them and finding

one's way through them is a difficult task. What they lack in obtuseness in comparison with, for example, tax legislation, they make up for in number and the degree of overlap. They are not such that normal individuals can easily determine their rights or determine the extent to which they can make use of them.

The second point is that all these environmental laws create or protect public rights, interests and values. They are statements by society that particular elements of the environment are valued and should be protected or regulated - the public value of orderly and planned development, the public value in protecting and preserving our natural and cultural heritage and so on. Because of the inherently public nature of environmental laws, all citizens have an interest in ensuring the maintenance of these laws and indeed this has been recognised by legislatures through the provision of various processes by which citizens can ensure that this is the case.

In the context of the current - or perhaps perpetual squeeze on legal aid funding - I would like to work through some of the implications of these two points.

First, two facts which, I think, are indisputable. Because of the complexity of environmental laws and the fact that public rights are created by those laws there is a need for legal advice and assistance. Secondly, most ordinary people cannot afford those legal services. Even in matters where there is a clear self interest most people cannot afford legal services. But in situations where they are seeking not simply to protect their own rights but the rights of the community as a whole the position is even worse.

Not only do people need legal advice but, in my view - and I realise that it may not be a view universally shared - they are entitled to legal advice and assistance because environmental laws create public rights. The laws are there to be obeyed and are not simply a facade. And in order to ensure that they are not simply a facade they are also entitled to make use of the mechanisms provided by the legislature to enforce those laws or address any grievances that they might have.

More fundamentally they are entitled to legal advice and assistance in relation to environmental laws because this society is governed by the rule of law. Each person is entitled to know the law not simply so that they can regulate their own behaviour but so that they can determine their rights in relation to others under the law. This is all the more so when those others are powerful institutions such as the executive government or large corporations.

I have said all of this because the EDO, providing legal services on a highly politicised subject matter, often for clients whose interests collide with that of the executive government or other powerful interests, is particularly vulnerable to, what I regard as unjustified attack. I have tried to put the role of the EDO in fundamental terms because it is important see the EDO as not only fundamentally similar to other community legal centres but more generally to other lawyers. Just as all lawyers advise their clients of their rights under law and how to exercise those rights so as to advance their interests, so too does the EDO.

For those critics of the office I can only suggest two things.

Remember that EDOs provide legal services just like every other law firm. You may not support what our clients want to do but remember that they are entitled to legal advice and representation just as much as BHP or the executive government is.

Secondly, if our clients make use of rights they have under environmental laws then they are doing so because they are entitled to do so. If people have problems with that then they should direct their efforts not against the EDO but should make their case to the legislature. Depriving people of legal assistance is not the answer. It is as absurd as denying people charged with criminal offences the right to legal representation because you don't like the constraints of the rules of evidence. If there are interest groups who wish that members of the public not be able to exercise rights under environmental laws then it is only proper that that they seek to deny those rights openly. They should do so openly rather than attacking EDOs so as to nominally retaining rights under environmental laws whilst denying all but the most wealthy the ability to understand or make use of them.

Perhaps in providing these anticipatory defences of the value of EDOs I am fencing at shadows but, if experience is any guide, I fear not. On a more positive note, I think that the ACT EDO will play an important role in assisting people with environmental law issues in the ACT. Particularly in a small jurisdiction with a complex system of environmental laws access to organisations such as the EDO is, as I hope I have demonstrated, essential if those laws are to work effectively.

This is an edited version of a speech given at the opening of the ACT Environmental Defender's Office on 13 November 1996.

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NOTICEBOARD

On the Brink: Your bush, their habitat, our Act.
Is the Threatened Species Conservation Act working?
A 2 day conference hosted by the EDO, Nature Conservation Council and the Threatened Species Network. May 1 - 2 1997 at the University of Sydney.
Call 02 9241 2052 to book

Biodiversity Conservation on Road Reserves
A series of 2 workshops, Friday April 18 & Thursday 15 May. ARRB Transport Research. To register and further information contact: Danie Ondinea (02) 9569 5447

Acel Outlook Conference. May 7-8 1997, Hyatt Kingsgate, Sydney NSW

Negotiating the Environmental Web. May 14-17, 1997. Ramada Great Barrier Reef Resort, Palm Cove, Call Toni Slater on 07 3832 4865 for details

Guide to Environmental Law in WA, Mar 1997, 230pp, $30 ($20 Concession). Also features a facsinating account of the Oktedi case For more information, tel EDO (WA) 09 221 3030

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Threat to national EDO Network funding

The EDO (NSW) has been put under the spotlight because it represented Friends Of Hinchinbrook in the proceedings against the Commonwealth Government. The Office of Legal Aid and Family Services has asked the EDO (NSW) to provide it with information to respond to a request from the Prime Minister's Office. There are strong signs that the funding the national EDO network receives from the Commonwealth government may be under threat.

It is no surprise that high profile litigation against government decisions has generated pressure from some quarters against the new national network of small public interest EDOs. This is not a new phenomenon and it ought to be resisted. The "Gunns" woodchipping case caused embarrassment for the former Government, yet had important positive impacts for the administration of environmental law and for environmental protection.

To allow the Hinchinbrook case to influence any funding policy decision misconceives the crucial role of EDOs in the national environmental law system. It also misconceives the inherent nature of environmental law, much of which is about public input to the decisions of Ministers and governmental authorities at all three levels of government as well as judicial review of the legality of those decisions. Without public interest lawyers to assist the public, the system is incapable of meeting its objectives.

The Work of the EDO network

The NSW EDO is the largest office and was formed in 1984, followed by Victoria and Queensland, with the other EDOs being established with funding from the Justice Statement in May 1995. EDOs are part of the community legal centre network. As the name suggests, EDOs specialise in environmental law. EDOs may only act in public interest matters. They cannot act where there is a private right involved or private remedy to be gained, such as damages. EDOs carry out work in four main areas; advice, representation, law reform and policy, and education.

Funding the EDO network

Each EDO receives $70,000 per annum from the Commonwealth, apart from EDO ACT which receives $35,000. This modest but crucial amount enables each EDO to employ a solicitor, administrative support, rent office space and pay office expenses! EDOs raise funds from other sources and seek donations. As well, they receive strong support from the private legal profession and are a focus for volunteer assistance from the public.

The National EDO Network

The Commonwealth contribution to EDO funding is more than crucial; it is a matter of survival for most EDOs, which have just become established, to provide a long overdue service to the people of Australia in all jurisdictions.

At a time when the Australian Government is legally and administratively taking centre stage in environmental matters with the $1 billion National Heritage Trust, the small amount of funding required to fund the EDO network, totalling less than $600 000 p.a., should be a central part of the Government's program of environmental protection.

What you can do

- Write a letter of support

An indication of your support for the role your local EDO and its work would be invaluable at this time as the Attorney General's Department prepares its budget submissions and the Expenditure Review Committee makes its decision. Write to the Attorney General and The Prime Minister. See the enclosed flyer for more information and contact details

- Visit your local Federal Member. Let your local Member of Parliament know how much the work of the EDO Network is valued.