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PAYING THE ENVIRONMENTAL PUBLIC INTEREST LITIGATION BILL: A Look at Australian Law Reform Commission Report No. 75

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1. INTRODUCTION

The EDO has been requested by the Commonwealth Attorney-General's Department to provide comments on the recommendations of the Australian Law Reform Commission ("ALRC") contained in its Report Number 75, COSTS SHIFTING -- WHO PAYS FOR LITIGATION. This comment outlines the penultimate draft of the submission that the EDO will provide to the Attorney-General later in June 1997.

The ALRC's recommendations consist of a broad package of interrelated costs allocation rules -- some extremely relevant to environmental protection, others less so. It is crucial, however, to understand the synergy between the proposed rules. Unfortunately, given space limitations this comment can only intimate the wider implications of the ALRC recommendations. The primary focus here must be on the likely effects of the ALRC recommendations, if implemented, pertaining to public interest litigation involving environmental issues.

In general, the recommendations of the ALRC in public interest cases are a progressive development of the law and should be welcomed. Unfortunately, in some respects the ALRC did not go as far as urged by the EDO Submission on the ALRC's initial Issues Paper 13 on matter.[1]

2. TRADITIONAL COSTS RULES AND THEIR RATIONALE

2.1. Civil Cases

In civil proceedings the common law has long followed, subject to what is today narrowly circumscribed judicial discretion,[2] the hoary maxim *victus victori in expensis condemnandus est*[3] -- the losing party is adjudged to pay the costs to the successful party.[4] The maxim, more commonly known as "the costs indemnity rule", applies primarily in the context of four types of civil cases involving public interest environmental issues: (1) merits review of state and local government planning matters, (2) merits review of planning or approval matters of federal departments, (3) judicial review in the appeal courts,[5] and much less frequently (4) common law tort actions such as nuisance or trespass involving a wider public environmental benefit.[6]

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The costs indemnity rule has been justified on a number of grounds. The most common reasons advanced for costs following the event are that they

- deter vexatious litigation and abuse of process,
- deter frivolous claims and defences,
- encourage settlement because of the significant additional financial stake involved,
- compensate litigants vindicated on the merits for at least some costs.[7]

As will be seen, none of these reasons are particularly compelling for sustaining the current operation of the costs indemnity rule in civil public interest environmental litigation, at least where the public interest litigant is an unsuccessful plaintiff. There are, however, cogent arguments for retaining the operation of the current rule in most cases where the public interest plaintiff is successful or compelled to defend "SLAPP" suits,[8] which are by definition non-meritorious.

2.2. Criminal Proceedings

In criminal cases, the public interest environmental litigant will ordinarily be defending a criminal charge, although in rare proceedings involving public nuisances the public interest litigant may be a plaintiff seeking injunctive relief with an attorney general *ex relatione.*[9]

Current costs rules in criminal actions vary widely from jurisdiction to jurisdiction and often depend on whether the case involves an indictable offence or summary proceedings. For example, in the ACT, Northern Territory, Queensland and South Australia, no costs may be awarded against or for the Crown in prosecutions for indictable offences. In New South Wales, Queensland and the Northern Territory there are significant limitations to awarding costs to a successful defendant in a summary proceeding.[10]

As discussed below, dictates of justice ought to require that the Crown pay a criminal defendant's reasonable costs -- regardless of type of proceeding -- if he or she is successful in obtaining a dismissal, acquittal or withdrawal of charges.

3. THE NATURE OF THE PUBLIC INTEREST IN ENVIRONMENTAL LITIGATION

In order to appreciate why an exception to the costs indemnity rule is appropriate in public interest environmental litigation, it is first necessary to consider the nature of litigating environmental issues in the *public interest.*

It is no mean feat to define exactly what is meant by "public interest" in the context of environmental litigation. In many ways the difficulty with definition is similar to determining what is meant by "environment" itself. As Lynton Caldwell observes in that context, "it is a term that everyone understands and no one is able to define"[11]. Nevertheless, it is possible to outline the general contours of the concept of public interest and its importance for the environment.

It is worth remembering at the outset that the implementation and enforcement of most environmental regulatory regimes across Australia do not routinely involve the public in the process, but are concerned with the fulfilment of governmental policy by executive agencies. It is beyond cavil, however, that the public does have a real and legitimate interest in the consequences, including the environmental consequences, of the exercise of executive power.[12] Indeed, it is a truism that democratic governments act or, at all events, are constitutionally required to act, in the *public interest*"[13]. It follows that the public has a significant interest in the proper decision-making about and assessment of environmental consequences and, if environmentally harmful activities are allowed, the management of those consequences.[14]

The public also has an undeniable interest in the *effectiveness* of environmental laws promulgated by their elected representatives.[15] Few, if any, would argue that the public has no interest in ensuring effective protection of the environment on which all life, including human life, is dependent. It would be a mistake, however, to measure the effectiveness of environmental law in terms of anything less than tangible environmental improvements.[16] Environmental legislative aspirations without effective administration and enforcement is only nominally better than empty rhetoric. On this front much remains to be done. There are, however, at least two major problems -- in addition to legislatio that may be little more than window dressing with no substantive content. Typically, environmental laws are implemented and enforced by governmental agencies with limited staff and have inadequate funding necessary to meet their mandated responsibilities.[17]

Given these problems, the effectiveness of environmental law is clearly enhanced by public interest and community involvement. The total resources devoted to the enforcement of environmental law is augmented through private involvement, thereby reinforcing regulatory efficacy. "Competition" from private citizens helps sharpen the response of public officials responsible for executing environmental law.[18] Moreover, private action can highlight deficiencies in the law's effectiveness that might otherwise be shielded by politically expedient executive inaction or through agency "capture" by environmentally unfriendly vested interests.

In recognition of these *public interests* and the salutary effects of community involvement, parliaments have increased somewhat, but not nearly enough,[19] the access to courts of individ members of the public seeking to enforce public environmental laws. [20] This belief in citizen involvement is based upon our democratic form of government. In a participatory democracy, it is essential that the validity of legislation and governmental decisions can be tested by the citizenry in order to restrain what would otherwise be unbridled power.[21] This is, at the very least, a paramount incentive for good government.

4. REASONS FOR SHIFTING COSTS IN ENVIRONMENTAL PUBLIC INTEREST LITIGATION

The purpose of an awards of costs should not be mainly punitive or compensatory. Its primary focus must be to allocate the cost of litigation *equitably*. Accordingly, there are sound reasons why, in the case of public interest environmental litigation, a general exception ought to be created in favour of the costs indemnity rule. The crucial difference between public interest environmental litigation and other litigation is that the public interest

environmental litigant can demonstrate that he or she is involved in proceedings for the broader public benefit.[22] This key difference highlights the need for a costs indemnity rule exception in the case of public interest environmental litigation. Costs of litigation are inequitably allocated otherwise.

First of all, the public interest litigant does not generally seek to vindicate private law personal rights. Instead, important constructions of public law are involved. The proceedings are designed to effectuate the forcefully declared public policy by all Australian governments of environmental protection.[23] Even if the public interest litigant does not prevail, he or she has provided a community service in bringing clarity to the law, reducing the need for future litigation. This is especially true in the case of complex environmental legislation which often gives rise to novel issues of law.

Second, the public interest environmental litigant is not primarily acting for personal gain, but in order to preserve important community environmental values. The public interest litigant will not ordinarily have a financial stake in the outcome of the litigation, but is motivated by the public good, including respect for the rule of law, that comes from upholding environmental law.

Third, a public interest environmental litigant seeks to ensure that the governmental system functions properly. Public interest litigants, especially plaintiffs, in environmental litigation play an essential "watch dog" role to keep executive agencies honest. They also serve in essence as "private" attorneys-general. In this way, the public is spared the expense, both in investigation and enforcement, that would otherwise be attendant on executive agency action -- assuming that the agency had enough resources and the political will to act in the first place.

In this light, it is clear that the reasons advanced in justification of the costs indemnity rule have little or no force in the context of public interest environmental litigation. Suprisingly, there is still opposition to an exception in such cases. Proponents of the *status quo* argue that the rule deters vexatious litigation and abuse of process. This, however, looses sight of the fact that courts already have the power to punish such conduct[24] and that, moreover, such a fear is entirely unwarranted.[25]

Proponents of the *status quo* also assert that the costs indemnity rule deters frivolous claims and defences. The specious nature of this argument generally,[26] and especially in the context of public interest environmental litigation is apparent. Quite simply, a frivolous claim or defence does not come within the purview of what is meant by public interest environmental litigation. A frivolous claim does not advance a wide public benefit and would not be entitled to an exception to the costs indemnity rule. The same is also true of vexatious litigation.

Proponents of the *status quo* argue that the costs indemnity rule encourages settlement because of the significant additional financial stake involved by the potential of a costs award. In the context of public interest environmental litigation, however, this is a problem not a boon. Forcing an environmentally unsatisfactory settlement through fear of a costs award completely undercuts the public interest in effective environmental protection and preservation. Additionally, an exception to the rule promotes the public interest in precisely those cases where an executive agency might enter into a environmentally unfavourable settlement because of "capture" or political caution.

Proponents of the *status quo* maintain that the costs indemnity rule compensates litigants vindicated on the merits for at least some costs. Admittedly, there is some force to this argument. However, remembering that the purpose of an award of costs is to make sure the financial burden of litigation is equitably shared and the public service provided by a public interest environmental litigant, the argument loses its persuasiveness as a reason for preserving the *status quo*. If anything, it is an argument that justifies the establishment of a public interest litigation fund to cover just such cases.

Finally, proponents of the *status quo* raise the tired old "flood gates" argument, maintaining that an exception to the costs indemnity rule for public interest litigation will encourage litigation. Such an argument lacks any basis in fact. Indeed, existing legislative provisions aimed at promoting public involvement in litigation have not resulted in a deluge at the courthouse doors.[27]

5. THE ALRC RECOMMENDATIONS

5.1. Public Interest Costs Orders

Based on the forgoing, it is certain that in appropriate cases where an environmental public interest is demonstrated there needs to be an exception to the costs indemnity rule. This is explicitly recognised by the ALRC. It recommends generally that in the context of litigation in the public interest a *"public interest costs order"* may be made shifting the costs or reducing the amount of costs that may be recovered.

However, before such an order would be appropriate, the court or tribunal must find: (1) that the proceedings concern an important right or obligation affecting at least a significant portion of the community, (2) that the proceedings will enhance the development the law generally and tend to reduce the need for further litigation, (3) that the proceedings otherwise have the character of public interest or test case proceedings. It is not clear if these requirements are cumulative, but they ought not to be and the use of the word "otherwise" in the third requirement lends support to a disjunctive reading. In any event, this approach accords with the nature of public interest environmental litigation and the third requirement leaves enough room for the exercise of judicial discretion.

The ALRC also recommends that a court be allowed to enter a public interest costs order even if one or more of the parties has a personal interest in the matter. Case law supports this view,[28] but to prevent abuse the personal interest involved should be secondary in nature to an aspect of the wider public benefit of the litigation discussed above.

If the tribunal finds that there is ground for a public interest costs order, the ALRC recommends that "it may make such orders as to costs as it considers appropriate" having consideration for a number of relevant economic factors.[29] While there is a need for judicial flexibility with respect to costs orders, this approach is

much too open ended. It is preferable to create a number of general exceptions to the operation to the costs indemnity rule, guided by the nature of public interest environmental litigation at issue.

Specifically, where there are grounds for a public interest costs order in the case of a public interest civil plaintiff who is unsuccessful, the ordinary rule should be that each party bear its own costs, subject to the power of the court to regulate misconduct. In such a case, discretion should be vested in the court or tribunal to order that the public interest plaintiff recover his or her costs even though unsuccessful. Discretion should also permit this shift in cost to be borne by the defendant or a public interest fund to be established. Also, in appropriate circumstances a successful defendant should be entitled to a costs order to be borne by the public interest fund.

Where there are grounds for a public interest costs order in the case of a public interest civil plaintiff who is successful, costs should ordinarily follow the event, subject only to the power of the court to regulate misconduct of the parties. Where there are grounds for a public interest costs order in the case of a public interest criminal defendant who obtains an acquittal, dismissal or withdrawal of the charges, the same rule should apply.

5.2. Public Interest Litigation Fund

The ALRC recommendations include reference to a public interest litigation fund to be used to pay all or part of the costs of one or more of the parties in public interest litigation. The ALRC recommendation is limited to making assistance available to litigants under the Commonwealth test case fund. Given the savings to the taxpayers of every Australian jurisdiction that is created by public interest environmental litigation, the ALRC recommendation does not go far enough. It is clear that public interest litigation funds ought to be established in each Australian jurisdiction.

In cases where there are grounds for public interest costs orders, the funds should be available at the discretion of the court or tribunal to pay the costs of public interest environmental litigants in every class of case, civil or criminal. It should also, in appropriate circumstances, having regard to financial capacity, be made available to successful defendants in civil cases.

ENDNOTES

1. See Maria Comino, *Submission on Costs Rules* (1995) 38 IMPACT 6.
2. See eg *TPC v Nicholas Enterprises Pty Ltd* (1979) 28 ALR 201.
3. See 3 WILLIAM BLACKSTONE, COMMENTARIES *403
4. There are three broad situations that courts have identified where a contrary costs order may be appropriate: (1) where a party is only partially successful on a claim, (2) where costs are greatly increased by an issue on which the successful party fails, and (3) where the successful party uses litigation unreasonably or acts improperly. See ALRC Report No. 75, p. 51 n. 5.
5. See Maria Comino, *supra*, pp. 6-7.
6. See Gerry Bates, ENVIRONMENTAL LAW IN AUSTRALIA (4th ed. 1995), pp. 50-55
7. See ALRC Report No. 75, p. 51.
8. SLAPP suits are civil lawsuits brought against individuals or nongovernmental organisations for speaking out on issues that are of public interest, including environmental issues. See Anthony Reilly, *A Brief History of SLAPP Suits* (1995) 37 IMPACT 8.
9. See generally Francis Trindade & Peter Cane, THE LAW OF TORTS IN AUSTRALIA (2d ed. 1993), pp. 626-27; J.C. Smith & B. Hogan, CRIMINAL LAW (1988)pp. 794-98.
10. ALRC Report No. 75, pp. 87-88.
11. L Caldwell, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (1st ed., 1984), p 170. *Cf* U.S. Supreme Court Justice Potter Stewart's similar problem with defining pornography in *Jacobellis v Ohio*, 378 U.S. 184 (1964)("I shall not . . . attempt further to define [it]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .")
12. See John Locke, SECOND TREATISE OF GOVERNMENT (1690), reprinted in THE HUMANRIGHTS READER (Walter Laqueur & Barry Rubin, eds., 1980), p. 62; THE FEDERALISTS PAPERS, Nos. 23 & 78 (Alexander Hamilton), Nos. 10 & 51 (James Madison)
13. *Attorney General (UK) v Heineman Publishers Pty Ltd* (1987) 10 NSWLR 86, 191 (emphasis supplied). *Cf.* United States Declaration of Independence, reprinted in THE HUMAN RIGHTS READER (Walter Laqueur & Barry Rubin, eds., 1980), p. 106
14. *The Environment Centre NT Inc v Department of the Environment Sport and Territories* (Unreported) (Administrative Appeals Tribunal No. 9781, 1993)(SA Forge, Dep. Pres.).
15. See Jerold S Cripps, *Administration of Social Justice in Public Interest Litigation*, in PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON ENVIRONMENTAL LAW (Sydney 14-18 June 1989), pp. 92-93.
16. Lawrence Susskind, ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS (1994), p. 12
17. See Walter A. Rosenbaum, ENVIRONMENTAL POLITICS AND POLICY (2d ed. 1991), pp. 176-80. These agencies also have considerable discretion which leaves them subject to political vagaries.
18. William H. Rogers, Jr., HANDBOOK ON ENVIRONMENTAL LAW (1977), pp. 75-76.
19. See the EDO Submissions supporting open environmental standing provisions. EDO Submission to the Australian Law Reform Commission on Discussion Paper 61 (1996); EDO Submission to the Attorney-General's Department on ALRC Report No. 78 (1997)
20. Justice Paul Stein, *A Specialist Environmental Court: An Australian Experience*, in PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW (D. Robinson & J. Dunkley, eds. 1995), pp. 258 & 271; *Ratepayers and Residents Action Association Inc v Auckland City Council* (1986) 1 NZLR 746, 750.
21. Immanual Kant, On the Relationship of Theory to Practice in Political Right (1792), *reprinted in* THE HUMAN RIGHTS READER (Walter Laqueur & Barry Rubin, eds., 1980) p. 82, 83.
22. The courts have provided some guidance as to factors that demonstrate the unique public interest nature of an environ mental case that would justify exception to the costs indemnity rule. No single factor, however, appears to be conclusive. See *Darlinghurst Residents' Association v Elarosa Investment Pty Ltd* (1992) 75 LGRA 214; *Citizens Airport Environment Association v Maritime Services Board* (1993) ELR 143; *Cooper v Maitland CC* (1992) 1992 ELR 104; *Oshlack v Richmond River Shire Council* (1994) LGERA 236. See also Christopher McElwain, *The New Cost of Public Interest Litigation in New South Wales*, (1993) 29 IMPACT 2.
23. See eg, Intergovernmental Agreement on the Environment (May 1992), section 3.
24. ALRC Report No. 75, p. 121 n. 36

25. See the comments of Cripps J at the People v The Offenders, Dispute Resolution Seminar, Brisbane, 6 July, 1990 ("It was said when the [*Environmental Planning and Assessment Act 1979* (NSW)] was passed . . . that the presence of section 123 would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that argument has been wholly discredited").
26. See the remarks of Justice Wilcox in *Ogle v Strickland* (1987) 71 ALR 41 ("'The idle and whimsical plaintiff, a dilettante who litigates for a laugh, is a spectre which haunts the legal literature, not the court roo'. Litigation - in the public interest and for no personal advantage, especially against a wealthy opponent . . . has some similarity to marriage as described in the Book of Common Prayer: it is not by any to be enterprised nor taken in hand, inadvisedly, lightly or wantonly"), *quoting Scott, Standing in the Supreme Court: A Functional Analysis* (1973) 86 HARV.L.REV. 645, 647.
27. See Environment Minister, Tim Moore, 2nd Reading Speech on *Environmental Offences and Penalties Act* (1989)("the flood gates argument has been built into "some form of mythological beast. Some members who are broadly supportive on my side of the Chamber have developed the view that such rights are a Trojan horse for all matters that are deemed undesirable. But the record just does not indicate that. It would be less than honest of me if I spoke to the contrary").
28. *Nettheim v The Minister for Planning and Local Government* (Unreported, LED, Cripps J, 28 Sept. 1988, Judgement on costs).
29. The factors considered are: (1) the resources of the parties, (2) the likely costs for both parties, (3) ability of each party to present the case or negotiate a settlement, and (4) the extent of any private or economic interest of each party in the proceedings.

WA SUPREME COURT REFUSES TO APPLY PRECAUTIONARY PRINCIPLE TO STOP LOGGING ACTIVITIES

Michael Bennett, Solicitor EDO (WA)

The WA Supreme Court has refused to grant an injunction to prevent logging activities in an area of jarrah forest in the south west of Western Australia.

The injunction was sought by the Bridgetown-Greenbushes Friends of the Forest, represented by the Environmental Defender's Office of Western Australia.

The basis of the legal case was that the body responsible for the logging activities (the Department of Conservation and Land Management, or CALM), would not be acting in accordance with the "precautionary approach" it was bound to adopt in its management of the jarrah forest, by virtue of a Condition published in the Government gazette under the *Environmental Protection Act* 1986 (WA).

The EDO argued that the precautionary approach, which it likened to the "precautionary principle" set out in the Intergovernmental Agreement on the Environment, required that logging activities could not proceed in a particular area of jarrah forest known as the Kingston Forest Area until it was resolved what the impact of those activities on the endangered fauna in the area would be.

Affidavit evidence produced by the plaintiff indicated that the Kingston Forest Area is one of the most important areas of forest in the southwest forest region of Western Australia for the conservation of endangered species; that logging activities pose a threat of serious or irreversible impact on the endangered species within the forest; that due to a lack of scientific data concerning impacts on the species in question it was not known whether those risks would be realised; that a study was underway in the area which could resolve that lack of knowledge; and that logging activities were planned to proceed before the results of the study were known. Voluminous affidavit evidence submitted by CALM sought to establish that there was no threat to the endangered species in question from logging activities.

Having considered the affidavit evidence of both sides, Justice Wheeler concluded that she was of the view that "it is at least arguable that logging and burning would be a 'step backwards' in the effort to save certain of the named species from extinction." Nevertheless, Her Honour found that it was not arguable, as alleged by the plaintiff, that CALM was required to refrain from undertaking logging and burning activities. Rather, the approach required at most an assessment by CALM of the degree and nature of the risk of environmental impact, in the context of other options available.

While to some extent the decision turned on the particular wording of the condition requiring the adoption of a "precautionary approach", the decision is also an indication of the difficulty that environmental litigants in Australia will have in convincing the courts that the "precautionary approach" or "precautionary principle" requires that in some circumstances activity that *may* impact adversely on the environment should not take place.

The unfortunate result in this case was an endorsement of the CALM view that adopting a "precautionary approach" in Western Australia forestry practice means nothing more than monitoring environmental impacts and adjusting management practices in the light of the results of that monitoring. It is questionable whether that approach is the best one to adopt, given that a great deal of environmental damage can be caused in the several years before useful monitoring results are available (for example, by reducing populations of endangered species below sustainable levels).

There were two positive aspects of the case, however. The first is the fact that the finding, that there were threats to the endangered species posed by the logging activities, was publicised in the media.

The other positive aspect of the case was the finding by Justice Wheeler that the plaintiff organisation had an arguable case that it had standing to bring its claim for an injunction. Her Honour's detailed and progressive analysis of the law in this area will provide a useful precedent to environmental groups throughout Australia who need to prove standing before the Courts.

MAJOR CHANGES PROPOSED TO NSW PLANNING LAWS: THE NSW EDO'S SUBMISSION ON THE DRAFT INTEGRATED DEVELOPMENT ASSESSMENT BILL

Katherine Wells, Solicitor, EDO (NSW)

The NSW Department of Urban Affairs and Planning (DUAP) recently released a draft Bill which that will introduce the most significant changes to NSW's planning system that have been seen in almost 20 years. Set out below is a precis of the NSW EDO's submission to DUAP concerning the draft Bill (known as the Integrated Development Assessment Bill). The precis does not attempt to outline all the points made in the EDO submission; it concentrates on the most significant issues raised. Copies of the EDO's submission are available for $5.00 (postage and handling) from the NSW office on (02) 9262 6989. Also available on the EDO Website - http://www.internetnorth.com.au/edo/edonsw/policy/policy.htm

1. INTRODUCTION

The NSW EDO, while accepting that aspects of New South Wales' environmental planning and assessment system would benefit from reform, considers that many of the amendments contained in the draft Bill are flawed, and that the Bill should not be tabled in Parliament until these flaws have been rectified.

2. GENERAL COMMENTS

This package represents the most important amendments to the *Environmental Planning and Assessment Act* (the Act) since its introduction in 1979, almost 20 years ago.

In view of this fact, the EDO wishes to record its deep concern with the following aspects of the draft Bill, namely:

- the failure of the draft Bill to take a balanced approach to the task of regulating land-use planning in New South Wales. The Bill is overtly pro-development, and in a system intended to balance competing interests, rather than favour one set of interests over another, this is an extremely unhelpful approach to take,
- the inadequate consultation period allowed for comment on the draft Bill,
- the failure of DUAP to consult with the Environment Protection Authority (EPA) over the preparation of this Bill and its integration with the Protection of the Environment (Operations) Bill 1996 (a particularly inexplicable state of affairs, given that the Bill sets out a proposal for overlap between the environmental planning and pollution control systems), and
- the failure to include any of the Regulations and guidelines so important to the success of the draft Bill in the package that was distributed for comment.

In particular, the EDO wishes to comment as follows on the first of these points.

2.1 Bias in Favour of Development Interests

Section 5 of the Act makes it clear that the objective of the Act is, essentially, to find a balance between development and environmental protection interests. Section 5 also makes it clear that an important objective of the Act is to provide increased opportunity for public involvement and participation in environmental planning and assessment.

The draft Bill, on the other hand, takes an overtly pro-development stance, often going to extreme lengths to facilitate development. While some simplification and streamlining of the current environmental planning and assessment processes would not be a bad thing, the EDO considers that the Bill has not done enough to ensure a reasonable balance between development interests and community and environment values.

One of the outcomes of this pro-development stance, for example, is that the draft Bill fails to consider a range of long-overdue amendments which would have assisted in promoting the environmental protection objectives of the Act. Amongst other things, the Bill:

- fails to introduce an "ecologically sustainable development" objective into the Act - despite the fact that one was introduced into New South Wales' pollution legislation 5 years ago - and fails to make "ecologically sustainable development" a relevant consideration for consent authorities,
- fails to strengthen public participation rights in relation to non-designated developments,
- fails to introduce much-needed reforms to the environmental impact assessment process, such as ensuring that the process can take account of cumulative impacts,
- fails to introduce provisions requiring reasons for decisions from consent authorities, and
- fails to reverse the current privileged position of mining activities, which are effectively exempt from the development control process.

Another equally important outcome is that despite declarations to the contrary in the White Paper which accompanies the draft Bill, the Bill consistently reduces public participation rights and the transparency of decision-making under the Act. These points are dealt with in more detail below.

If this lack of balance were apparent in a Bill of less importance, the EDO would be less concerned. However, as stated above, this is the most important set of amendments to the Act in almost 20 years. The EDO considers it unacceptable that the draft Bill should approach its subject in such an unbalanced way.

3. SPECIFIC COMMENTS

3.1 Integrated development consents

The Bill proposes that a "one-stop-shop" be set up for a range of approvals which are related to, but do not currently form part of,

the development consent process. These approvals are listed in Annexure C to the White Paper.

The EDO believes that the early consideration of all the issues related to a development application is of benefit to all interested parties, and is to be encouraged. However, the EDO is concerned about the way in which the Bill attempts to link early consideration of the issues to pre-determined outcomes for the approvals listed in Annexure C, and at the inability of approval bodies to vary consents issued under the proposed "integrated development consent" mechanism.

In an ideal world, this simplistic approach might work. However, many of the approvals listed in Annexure C, such as approvals issued under the *Pollution Control Act* 1970 or the *Waste Minimisation and Management Act* 1995, require the production and consideration of very complex data. It is simply unrealistic to assume that approvals such as these can be adequately dealt with as quickly, and as early in the process, as proposed by the draft Bill.

This part of the draft Bill is unsophisticated, poorly thought through, and needs to be completely reconsidered if it is to be made workable. The EDO's preferred position would be to see the whole idea abandoned. However, failing that, it is essential that the more complex types of approvals be deleted from Annexure C, and that clause 93 be modified to make it clear that in appropriate circumstances an approval body will be able to vary the terms of the approval granted for integrated development.

3.2 Providing for "appropriate assessment"

The draft Bill takes various steps to create what the White Paper describes as "a more streamlined decision-making system" for development applications.

3.2.1 Reducing the number of assessment criteria

One of the steps the draft Bill takes is to reduce the criteria listed in section 90 of the Act to five broad criteria proposed in the Bill. (Section 90 sets out a list of some 30 matters which consent authorities must take into account when considering a development application.) The EDO is greatly concerned at this.

Put simply, the more specific the list in section 90 is, the more enforceable it is. The more generic it becomes, the more room there is for consent authorities to vary their consideration of environmental impacts - and the stronger the signal to consent authorities will be that the criteria - and the community - do not need to be taken seriously. It will become harder for the community to appeal a consent authority's decision by way of judicial review.

If the Government is serious about environmental protection and achieving a balance of interests in the application of the Act, this proposal should be abandoned.

3.2.2 State significant development

The draft Bill also creates several new categories of development. One of these is "State significant development".

The White Paper claims that the creation of the category of "State significant development" is necessary because the current mechanisms for dealing with projects of State significance are "confusing for both the applicant and the community". However, the draft Bill merely creates another 2 ways of dealing with a project of State significance - if anything, *adding* to the confusion. The EDO is deeply concerned at a number of aspects of this expansion of Ministerial power.

First, the provision of the draft Bill relating to Ministerial gazettal of State significant development - arguably the most important of the 2 new ways of dealing with a project of State significance - contains no mechanism for public notification or participation.

Second, the other new way of dealing with a project of State significance - declaring State significant development in an environmental planning instrument - clearly contemplates taking advantage of the way in which State environmental planning policies (SEPP's) are made; no public consultation is required in that process, either.

Third, the draft Bill amends the current section 101 of the Act - the Ministerial call-in power - so that the Minister will have discretion as to whether or not to hold a Commission of Enquiry,

and objectors will only have the right to be heard if the Minister decides to hold the Commission of Enquiry. (Section 101 currently provides that an objector can require a hearing before the Minister makes his decision, and that where this occurs, the Minister must hold a Commission of Enquiry.)

Fourth, similar proposals for the call-in of prohibited development (sections 100 and 101 of the Act) would see persons who have made a submission under section 87(1) of the Act lose their right to require a hearing before the Minister makes his decision; only councils will be able to require a Commission of Enquiry.

Fifth, unlike the current section 101 procedure, under clauses 88A and 89 the Minister is no longer required to give any reasons for his decision.

The EDO considers that the draft Bill has failed to justify this expansion of Ministerial powers, and particularly the attendant loss of transparency and public involvement. State significant development is, by its very nature, development which will have a major impact on the community. It is inappropriate that the community's rights be curtailed in the ways described above, particularly when the current call-in mechanisms in the Act provide an adequate way of dealing with matters of State significance.

The EDO believes that the whole notion of the new category of 'State significant development" should be questioned, and that at the very least, if these amendments are to proceed, they should only do so after the inadequacies identified above have been rectified.

3.2.3 Exempt and complying development

Two other new categories of development created by the draft Bill are "exempt" and "complying" development.

The EDO does not have an in-principle objection to the notion of development which is exempted from the need to obtain a development consent and the provisions of Part 5 of the Act, provided it is clearly development of a very minor nature.

However, the White Paper refers to exempt development being of a minor nature, but the Bill contains no such qualification. It is essential that clause 76(2) of the Bill be amended to make it clear that development, to be exempt, must be minor in nature.

In addition, the EDO is concerned about the creation of the category of complying development. Nowhere is it stated that this category is intended to apply only to minor development - and taken together with the creation of the private certification scheme proposed by the draft Bill, this proposal has considerable potential to exclude the community from decisions which affect it. The EDO believes that this category should be reconsidered.

In addition, the Bill should be amended to ensure that exempt and complying development cannot include development impacting on the habitat of threatened species, items of environmental heritage, heritage conservation areas or environmentally sensitive areas.

3.3 Miscellaneous

3.3.1 Transfer of certain provisions of the Act to Regulations

The introduction to the draft Bill proposes to relocate a range of so-called "procedural" matters in Part 4 of the Act from the Act to Regulations.

However, many of the provisions listed are not merely procedural; rather, they set out critical public participation rights, and should be retained in the Act, where they will be less amenable to change than if they are placed in Regulations. Examples of such provisions include:

- sections 77(3)(d) and (d1) - provisions requiring the submission of environmental impact statements and species impact statements in certain circumstances,
- sections 84(1), 85, 86, 87(1) and 95 - provisions setting out the public's rights to be notified of a development application for designated development, to make submissions about that application, and to be notified of the consent authority's determination,
- sections 102(1)(b) and (2) - provisions requiring a consent authority considering an application for the modification of a development consent to satisfy itself that no prejudice will be caused to any person who objected to the consent, and that notice of the proposed modification be given to persons who objected to the consent.

It is interesting that a large number of provisions throughout the rest of Part 4 of the Act which are of a similar nature to thoselisted above, but do *not* relate to public participation rights, have not been identified by DUAP as "procedural" provisions, and remain in the draft Bill.

3.3.2 Deletion of certain provisions of the Act

It is also curious that while most of the provisions of Part 4 of the Act have survived the transition to the draft Bill, the provisions which have been deleted entirely from the Act nearly all relate to public participation rights or issues of transparency in decision-making. Examples of such provisions include sections 77A(6), (7) and (8), 77B(3) and (4), 79(3), 89(2) and 94AB(4).

None of these deletions were mentioned in the White Paper, or alluded to in the Part 4 conversion table which precedes the draft Bill. No justification has been provided for them.

The EDO considers it unacceptable that these provisions should be deleted from the Act.

4. CONCLUSIONS

The EDO considers that there are a number of quite serious flaws in the draft Bill.

In the EDO's view, the most serious of these flaws is the Bill's overt bias towards development interests at the expense of community and environmental protection interests. This unbalanced view is demonstrated on numerous occasions in the draft Bill:

- in its failure to consider long-overdue amendments to the Act which would have assisted in promoting the environmental protection objectives of the Act,
- in its continual reduction of public participation rights,
- in its continual reduction of the transparency of decision-making under the Act.

The EDO considers this level of bias unacceptable, given that the Act's stated aim is to balance competing interests, rather than to promote one set of interests over another.

The EDO also considers it necessary to comment specifically on the proposed "one-stop-shop" proposal. The EDO believes that this proposal as it currently stands is unworkable, for very practical reasons, and that it needs to be completely revisited - and this time, in conjunction with the EPA.

The EDO is also extremely concerned at the lack of information on so many crucial parts of the proposals contained in the draft Bill. Most of the detail of the proposals, it appears, has still to be worked out and included in Regulations or guidelines. Given the scope of the changes proposed, it is quite unacceptable that the public should not have the chance to comment on the entire package before the Bill goes to Parliament - particularly given that the Bill proposes to relegate so many of the public's rights to the level of Regulation or guideline.

Without this information it is impossible for the EDO to support many of the proposals in the Bill.

These issues, and others outlined in the body of the submission, are critical. It is vital that the Bill does not proceed to Parliament until there has been an adequate opportunity to address them.

POLLUTION LAWS: FOR BETTER OR WORSE?

James Johnson, Director, EDO (NSW)

Recently the NSW EDO, prepared a submission on behalf of Australian Conservation Foundation, Friends of the Earth, National Parks Association of NSW, Nature Conservation Council of NSW and Total Environment Centre in response to the Protection of the Environment (Operations) Bill 1997. Copies of the EDO's submission are available for $5.00 (postage and handling) from the NSW office 02 9262 6989. Also available on the EDO Website - http://www.internetnorth.com.au/edo/edonsw/policy/policy.htm

In summary, the EDO was disappointed with the Bill, which is an unimaginative rewrite of the current command and control system of environmental regulation. It proposes to hand over responsibility for a large part of pollution regulation to local councils, with no adequate provision for resourcing or training councils or for co-ordinating the regulation of pollution and the gathering of information. This will make it far more difficult to monitor and address cumulative impacts and defeat coherent application of the Environment Protection Authority's (EPA) recent "bubble licensing" initiative. The government's Integrated Development Assessment proposals (see this issue of Impact) will substantially amend the Operations Bill, yet no attempt was made to integrate the proposals

Public Participation in licensing

The Operations Bill proposes not to allow participation in the issue, review or amendment of a pollution licence. It is proposed that participation in the development consent process will be sufficient. However for the reasons outlined above, this is clearly not so. Further, the licence conditions are not even settled at the development consent stage.

The framework of our planning and development laws emphasises community participation in recognition of the fact that it improves the quality of environmental decision making. It is unacceptable to deny the community that participation when it comes to some of the most important environmental decisions made in this State.

It is also unacceptable to deny public participation in decisions to licence existing pollution sources, **some of which have never had public assessment and are having a significant effect on the environment.**

As a nation Australia has committed itself to the principles contained in the Rio Declaration 1992 which include a clear recognition of the public role in achieving the objectives of those principles. The Rio Declaration - Principle 10 - states that :

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level .....States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

State governments have also made a commitment to the principles of ecologically sustainable development in the 1992 National Strategy for ESD. Public participation is integral to achieving the objectives of this strategy (see in particular Parts 12, 13 and 16).

Further, the Environment Protection Authority has the power under Protection of the Environment Administration Act s8 to invite and "consider public submissions .. when it issues, renews or amends licences under the environment protection legislation". The EPA has been aggressive in its refusal to use this general power in promoting transparency of process to date and the government continues this approach in the proposed licensing system.

Pollution Reduction

The Bill introduces Protection of the Environment Policies (PEP's) which are an attempt to give legal effect to policies to protect the environment.

To meet the legitimate expectation of the public that the aim of the Operations Bill should be to provide for continual reduction in levels of pollution, not only should each licence granted by the appropriate regulatory authority comply with standards, goals guidelines and protocols of the relevant PEP but also each licence should provide a mechanism for the constant reduction of pollution under each individual's licence. Compliance with the mechanism for pollution reduction must be made a condition of the licence.

The particular mechanism for pollution reduction by the licence holder should be a matter of negotiation between the appropriate regulatory authority (where this is not the EPA, the EPA should be involved) and the licence holder, again with public input.

Below is a summary of the other main points made by the EDO.

1. The Operations Bill may not even deliver as much protection as the current system. It certainly does not promote pollution prevention or represent best practice in environmental regulation.

2. The Department of Urban Affairs and Planning (DUAP) White Paper on integrated development assessment substantially changes the proposals in the Operations Bill. The end result has not been explained by either DUAP or the EPA. The White Paper fails to integrate the approvals process. It represents instead an attack on public participation, removing most public participation provisions from Part 4 of the *Environmental Planning and Assessment Act* (EP&A Act). The EPA and DUAP have not co-ordinated their proposals. The White Paper should be withdrawn with a holistic review to be undertaken with special reference to the pollution control aspects of the planning and development system.

3. The objects of the Operations Bill ought to make strong direct reference to the principles of Ecologically Sustainable Development (ESD) and to pollution reduction.

4. A Protection of the Environment Policy (PEP) should be a legally binding instrument, a breach of which is enforceable and is an offence. Otherwise environmental decisions will still be made in an ad hoc way. Worse still, the Clean Waters Regulations, which provide legally enforceable pollution standards will be replaced with an unenforceable policy instrument. These regulations should remain unless replaced by enforceable provisions which are no less stringent.

5. Pollution licences should be called "pollution licences" and not "environment protection licences". The Operations Bill is deceptive and counterproductive in this regard.

6. Pollution licences should not be granted in perpetuity and should be for a maximum of three years, as per ALP policy.

7. There must be public participation in the pollution licensing process, providing for:

   - merit appeal for the licensing, not just for the development consent, of polluting developments which are likely to affect the environment to a significant extent, and;
   - advertising of, and public submission on, the issue, alteration or renewal of all licences.

8. The Operations Bill should be withdrawn or the provisions enabling devolvement of licencing to local councils be deferred until an adequate review with public comment is conducted so that provision can be made for:

   - resourcing and training of local councils;
   - a framework to ensure consistency of approach to licensing by local government authorities and;
   - a framework to ensure that cumulative impacts which go beyond one local government area are assessed, monitored and addressed in the licensing process.

9. Decision makers ought to be required to provide reasons for their decisions in :

   - the issuing or refusal of pollution licences;
   - the decision to grant an exemption from the Act or the Regulations ; and
   - the exercise by the Minister of EPA licensing functions (Schedule 4, clause 4.9[7]).

10. All pollution licences should contain pollution reduction programs.

11. All pollution licences which legalise the discharge of pollutants contained in any list of reportable substances established as part of the National Pollutant Inventory should contain specific programs to reduce and eliminate the emission of those substances.

12. The EPA should develop a list of substances whose discharge to the environment should be reduced as a priority because of their impact on the environment. Targets should then be established for the reduction of

these substances. All pollution licences which legalise the discharge of these pollutants should contain specific programs to meet these targets.

13. There should be a requirement for environmental audits to be implemented in the same way as has been done for financial audits: to be conducted annually by an accredited auditor and the signed results to be filed with the EPA and made a matter of public record.

14. There should be a general environmental duty which applies to all activities, not just those requiring a pollution licence.

15 There should be specific provisions requiring information relevant to the functions of the Board to be provided to the Board of the EPA as a matter of course.

16. To assist in overcoming the technical barriers to improved environmental performance, there should be established an Authority, to operate in a similar fashion to the Sustainable Energy Development Authority. The objective of the Authority would be to achieve a reduction in the pollution discharged to the environment through facilitating the development, promotion and use of pollution prevention and cleaner production methodologies, technologies, processes and strategies.

CASE NOTE: Who says its part of the National Estate? Australian Heritage Commission v Mount Isa Mines

David Galpin, Solicitor EDO (NSW)

In a recent decision, the High Court has overturned decisions of the Federal Court that would have opened up determinations of the Australian Heritage Commission to constant merits review.[1]

Mount Isa Mines Limited ("MIM") commenced proceedings in the Federal Court seeking review of a decision by the Australian Heritage Commission ("AHC") to enter an area on the Register of the National Estate ("the Register"). The area of approximately 300,000 hectares comprised the Sir Edward Pellew Group of islands, a nearby strip of mainland coast and the adjacent waters in the Gulf of Carpentaria ("the Sir Edward Pellew Islands"). MIM brought the proceedings as a "person aggrieved" under the *Administrative Decisions (Judicial Review) Act* 1977 (NSW) ("the ADJR Act").

In the course of the Federal Court proceedings, the AHC applied by notice of motion for certain questions of law to be determined as preliminary matters. One of these questions centred around the listing of places by the AHC in the Register under s.23 of the *Australian Heritage Commission Act* 1975 (Cth). The question was whether the AHC can list any place in the Register that it considers should be recorded as part of the National Estate, or whether a place must objectively be part of the National Estate before it can be listed.

This preliminary question was important, because in the substantive proceedings MIM argued that the AHC had fallen into jurisdictional error in deciding to enter the Sir Edward Pellew Islands on the Register. MIM relied on paragraphs 5(1)(c), 5(1)(d) and 5(1)(f) of the ADJR Act as grounds of review. What MIM really wanted was to have the Federal Court determine whether or not the Sir Edward Pellew Islands should have been entered on the Register. That is, MIM was effectively seeking a *merits* review of the AHC's decision.

Generally speaking, courts will not indulge in review of the merits of administrative decisions in judicial review proceedings. This is certainly true for errors of law made within a decision maker's jurisdiction. However, superior courts have long exercised a supervisory jurisdiction over inferior courts and tribunals.[2] This supervisory jurisdiction has included review in circumstances where the jurisdiction of the court or tribunal is conditional upon the existence of some objective fact. In these circumstances courts have been willing to engage in something akin to merits review to determine whether or not the objective fact exists in order for the tribunal or court to have jurisdiction.

The High Court appeared to accept that the jurisdiction introduced by paragraphs 5(1)(c), 5(1)(d) and 5(1)(f) of the ADJR Act would operate in a similar way. That is, if the decision about whether a place should be entered on the Register is an objective fact that must be decided before the AHC has power to enter an item, then the Court can examine on review whether that objective fact has been satisfied.

The Federal Court determined at first instance that a place must objectively be part of the National Estate before it can be listed on the Register by the AHC.[3] This was confirmed on appeal by a majority of the Full Court of the Federal Court. [4]

The High Court disagreed with this approach. The Court held that the AHC may enter any place on the Register that it determines, according to law to be part of the national estate. One of the reasons for this decision was that the Australian Heritage Commission Act requires the AHC to give public notice of decisions to make entries on the Register and to consider public submissions. The Court apparently thought it would be contrary to the scheme of the Act to allow decisions of the AHC to be constantly open to challenge in circumstances where the public already has significant rights to be heard in relation to decisions of the AHC.

The AHC can now breathe a sigh of relief.

1. *Australian Heritage Commission v Mount Isa Mines Ltd,* High Court of Australia, 18 March 1997, unreported, Dawson, Gaudron, McHugh, Gummow and Kirby JJ.
2. *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Company Pty Ltd* (1953) 88 CLR 100; *R v Gray; Ex parte Marsh* (1981) 157 CLR 351, actually involving a superior court of limited jurisdiction; *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1; *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132; and *Craig v State of South Australia* (1995) 131 ALR 595.
3. (1995) 56 FCR 219; 86 LGERA 259, per Drummond J.
4. (1995) 60 FCR 456; 89 LGERA 253, per Beaumont and Beazely JJ, Black CJ dissenting.

BEING ENDANGERED IS NO GUARANTEE OF PROTECTION

The Small Golden Moths Orchid and The Flora and Fauna Guarantee Act

Chris Loorham, Principal Solicitor EDO (Vic)

The Western Basalt Plains Grasslands once covered about one tenth of the State of Victoria, from Melbourne to Hamilton. As a result of the expansion of urban and agricultural activities only about 1% of this ecosystem remains intact, and only 200 ha (representing 0.01%) of the original cover is in reserves.

Many of the plant and animal species of this grassland habitat have become endangered. One such species, which has now come to the brink of extinction is the Small Golden Moths Orchid (Diuris sp. Aff. Lanceolata). This is one of six orchid species occurring in grasslands which are down to one or two sites, each with only a handful of individuals left.

The last known site for the Small Golden Moths Orchid is an area of grassland in Altona known as the Slough Estate. It is an area zoned for industrial development adjoining some of Australia's major chemical industries. The orchid was seen in the hundreds on this site in the 1980's but was down to about 20-30 plants in 1993 when observed by local conservationists. In 1990 a Department of Conservation and Environment survey assessed this site as being of regional significance.

In 1988 The *Victoria Flora and Fauna Guarantee Act* (the Act) came into force. Its purpose is to "establish a legal and administrative structure to enable and promote the conservation of Victoria's native flora and fauna...".

Under this Act The Western Basalt Plains Grasslands were listed as a "threatened community" in 1991 and an action statement was prepared by the Department of Natural Resources and Environment (DNRE) which recommended that discussions be held with the Department of Planning and Development about the zoning of grassland sites.

The Act sets out a series of flora and fauna conservation and management objectives which include "...to guarantee that all taxa of Victoria's flora and fauna... can survive, flourish and retain their potential for evolutionary development in the wild". Sub-section (2) of section 4 provides that a Public Authority must be administered so as to have regard to these flora and fauna conservation and management objectives.

Notwithstanding these objectives, in April 1994 the City of Hobson's Bay issued a permit for subdivision on part of the Slough Estate, including the area in which the Small Golden Moths Orchid was last seen. Two years later, just before the planning permit was due to expire, a plan of subdivision was approved by the City of Hobson's Bay. These decisions occurred without any consideration of the requirements of the Act or reference to the Department administering the Act. (Under the State Section of Victoria's Planning Scheme, local authorities are required to refer certain applications for native vegetation clearance to the DNRE. However, there is no similar requirement relating to applications which may affect listed taxa and communities under the *Flora and Fauna Guarantee Act.*)

On the 4 May 1996, under section 20 of the Act the Secretary of DNRE made a critical habitat determination for the whole of the habitat of the Small Golden Moths Orchid. This was the first critical habitat determination made under the Act. Under section 20 the Secretary may determine that the whole or any part of the habitat of any taxon or community of flora or fauna is critical to the survival of that taxon or community. A critical habitat determination is a condition precedent to the imposition of an Interim Conservation Order by the Minister for Conservation and Land Management.

In May 1996 DNRE took legal action in the Victorian Administrative Appeals Tribunal to cancel the permit to subdivide on the grounds that the critical habitat determination was a material change of circumstances pursuant to section 87 of the *Planning and Environment Act* 1987. It was argued on behalf of the land owner that DNRE had instituted cancellation proceedings as a ploy to avoid paying the compensation which

the land owner would be entitled to if an Interim Conservation Order had been imposed by the Minister for Conservation and Land Management. The Tribunal rejected the DNRE application and held that:"The critical habitat determination was not relevant to any matter to be considered under the provisions of the *Planning and Environment Act* and cannot constitute a material change in circumstances which has occurred since the grant of the permit".

Since this decision there have been two further planning determinations over the area of critical habitat determination. In June 1996 another permit to subdivide part of the critical habitat determination was issued by the City of Hobson's Bay, and in September 1996 the Minister for Planning approved a planning scheme amendment for the development of a rail freight depot on the land.

Those who are concerned with the fate of our native grasslands and endangered species are entitled to ask what is wrong with the law when it allows a series of land use decisions to be made in a way which is apparently oblivious to an Act designed to protect endangered flora and fauna. One answer lies in the fact that the only "teeth" in the Act are contained in the Interim Conservation Order provisions (sections 26-44) which are applied at the discretion of the Minister for Conservation and Land Management. Since such orders can create an entitlement to compensation, most governments are very reluctant to use them.

There is also no provision in the Act which imposes a positive duty on land use decision- makers to consider designations under the Act such as critical habitats, action statements or the listings of threatened taxa or communities.

Planning scheme amendments to include critical habitat determinations in planning schemes pursuant to section 6(2)(j) of the *Planning and Environment Act* 1987 would be one very modest way to make a major difference to the fate of Victoria's endangered species. Action statements could also be included in planning schemes. Steps like these would create the positive duties which the Act presently lacks.

THE NSW THREATENED SPECIES CONSERVATION ACT KEY ISSUES FOR THE REVIEW OF THE ACT

Katherine Wells, Solicitor, EDO (NSW)

Section 157 of the Threatened Species Conservation Act 1995 (NSW) (the Act) requires that a review of the Act be undertaken 18 months after the commencement date of the Act (1 January 1996), and a report of the review tabled in Parliament within 2 years of the commencement date. The review must be undertaken by a Parliamentary Committee set up for that purpose. The Committee must determine:

- *whether the policy objectives of the Act remain valid, and*
- *whether the terms of the Act remain appropriate for achieving those objectives.*

On 1 - 2 May 1997 the NSW EDO, the Nature Conservation Council of NSW and the NSW Threatened Species Network held a conference on the Act which was attended by over 200 people. The conference's main purpose was to look at the implementation of the Act to date, and decide what issues the conference believed should be considered by the review Committee.

The final paper delivered to the Conference was an EDO paper which summarised the main points made by conference speakers to that point, and outlined a series of key issues for the review. A summary of the major points made in that paper follows. Copies of the full paper are available from the NSW EDO.

1. Introduction

The purpose of this paper is two fold: to give the EDO's perspective on some of the key issues for the review, and to distill the key issues that have arisen out of the discussions which have taken place over the last two days. However, before looking at the *content* of the review, it is worth spending a moment looking at its *structure*.

2. How should the review be structured?

The EDO considers that the following principles should apply to the way in which the review is to be structured:

- The public should, if possible, have the opportunity to make suggestions as to the Committee's terms of reference.
- The review committee should be an all-party Parliamentary Committee taken from both Houses of Parliament.
- The public should have the opportunity to make written and oral submissions to the Committee.

3. What issues should the review consider?

3.1 Implementation of the Act to date

- It is clear, given the timing of the review, that its main purpose is to measure the Act's appropriateness and effectiveness at an early stage in the Act's life by looking at what can be learned from the Act's implementation to this point. The following figures summarize how often the main strategic planning and regulatory tools available under the Act have been used since the Act came into force:

Strategic planning tools		Regulatory tools	
Listing of threatened/vulnerable species, populations, ecological communities	~30	Concurrences issued under the EP&A Act	issued 7 refused 0
Listing of key threatening processes	0	Licences to harm or pick threatened species	issued 8 refused 0
Declaration of critical habitat	0	Certificates that development will not significantly affect threatened species	4
Recovery plans	0		
Threat abatement plans	0	Stop work orders	0
Joint management agreements	0	Prosecutions	0

These figures were provided, for the most part, by the National Parks and Wildlife Service (the NPWS); the listing figures come from Dr Chris Dickman, Chairman of the Scientific Committee set up under the Act.

- While statistics can never tell the whole story, one thing that is obvious is that while the Scientific Committee has been active, in many parts of the Act for which the NPWS is responsible, there has been remarkably little action.

  There may well be some good reasons for this. For example, a threat abatement plan cannot be approved until a key threatening process has been listed - and as yet, the Scientific Committee has not listed any key threatening processes. It is also worth reflecting that figures such as these do not indicate how much work is going on behind the scenes - and the NPWS has indicated, for example, that it is in the process of working up quite a number of draft recovery plans.

  Nevertheless, it is clear that there are large parts of the Act which it will be difficult for the Parliamentary Committee to review properly, because much of the Act has not yet been utilised. Possible reasons for this disappointing situation include:

- that as a practical matter, it is simply too early in the life of the Act for this review to be held

- that NPWS is suffering from a lack of resources, and without a substantial boost in resources, will be largely unable to achieve what the Act is intended to achieve

- that NPWS lacks the will to take regulatory action.

In the EDO's view it is likely that all of these reasons apply to some extent.

3.2 Specific issues

The rest of this paper looks at specific issues arising out of the Act's implementation to date. In doing so it draws on

- the implementation figures set out above

- the comments made by both the speakers and the audience during this conference

- the EDO's experience of the Act to date.

It canvasses the positive aspects of the Act as well as the negative.In addition, where possible, as well as identifying problems, it canvasses possible solutions - either where one appears obvious to the EDO, or has been mentioned during the conference. Some of these solutions may involve legislative changes, and others will require some other sort of action, such as administrative or funding changes.

a) The nomination and listing process

- By and large, the nomination and listing process is considered to be working well. The independence of the Scientific Committee, the efficiency with which it is getting through its workload, and the public participation mechanisms available are seen as particularly valuable aspects of the process, and the first and last of these as features which should be carefully guarded in the future.

- There are some problems, including the lack of successful nominations for key threatening processes, a lack of information about threatened species, the disparities in nominations made to date between different taxonomic categories and geographic regions, and the failure of the Act to extend to marine fauna. A possible solution to the first of these problems is the establishment of a strategic threat abatement framework in which the NPWS takes the primary responsibility for nominating key threatening processes (but does not exclude the community from making such nominations).

b) The strategic planning process

- It is difficult to comment on the appropriateness or effectiveness of this part of the Act because there is so little evidence of how it will operate in practice. The main issue here is the failure of NPWS, so far, to implement any recovery plans or threat abatement plans, or declare any critical habitat. These are seen as crucial parts of the Act - particularly threat abatement plans, which are potentially

more effective than recovery plans, because they can provide protection for a whole range of species, rather than simply concentrating on an individual threatened species.

- It is clear that a large injection of resources will be required if the present position is to be improved. Other possible solutions include inserting timetables for the declaration of critical habitat into the Act; preparing combined recovery plans for species grouped in taxonomic categories and geographic regions, rather than the 600-odd individual recovery plans currently required under the Act; and allowing recovery teams to identify and prepare recommendations as to critical habitat (at present only the NPWS may do so).

c) The approvals process

(This includes concurrences required from the Director-General of the NPWS for development applications relating to development which is likely to significantly affect threatened species, and licences issued by the Director-General of the NPWS permitting a licensee to harm or pick threatened species.)

- There is a question to be asked about why it is that every time NPWS formally considers an application for an approval which will affect a threatened species, it *grants* that approval.

- There are a number of ways in which public participation in the approvals process can be improved. One of these would be to provide public notice, exhibition and submission rights whenever a development application requires a species impact statement, whether or not the development is "designated" under the *Environmental Planning and Assessment Act* 1979. (At present such rights only exist for development which is designated.) Another improvement would be to require NPWS to make copies of all licence applications available to the public, and to give reasons for its decisions about licence applications.

d) Enforcement of the Act

- The enforcement picture is dismal, particularly when taken together with the apparent failure to enforce the legislation which preceded the Act, the *Endangered Fauna (Interim Protection) Act* 1991. The Act must not only be enforceable, but be seen to be enforced. While consultation, cooperation and community education are undoubtedly necessary when attempting to implement an Act such as this, they are not enough.The raft of enforcement mechanisms included in the Act was put there on purpose; the NPWS should not shy away from using them, as it appears to do. Prosecution/enforcement guide lines would help.

e) Miscellaneous

- real problem for the NPWS is its relationship with rural NSW. This may require creative solutions, such as an increased reliance on property management plans and incentives.

- The relationship between the Act and the *Bush Fires Act* 1949 needs to be addressed. The exemption clause in the Act is being interpreted so broadly by the bushfire services and others that the Act is effectively overruled by permits and notices issued under the Bush Fires Act.

4. Conclusion

There is much that is good about the Act. In the context of the review, it is vital that the conference emphasize its support for the worthwhile parts of the Act, as well as indicating ways in which the Act and its implementation can be improved.

EPA CAN'T LOOK AT ENVIRONMENTAL IMPACT?

James Johnson, Director EDO (NSW)

The NSW Environment Protection Authority (EPA) has done an about face and issued an approval for illegal works carried out by the developer in the Iron Gates case.

The developer, Iron Gates Pty Limited, had applied for a pollution control approval for two massive drains it had dug after clear-felling threatened species habitat. In proceedings brought by Al Oshlack in July 1996 (a local North Coast conservationist for whom the EDO acts) the Land and Environment Court has declared the drains to be illegal, and has granted an injunction restraining the company from using them

The EPA issued a pollution control approval at 4.30pm on the Friday before the Oshlack remediation hearing began in Court the following Monday. Despite assuring us that they would immediately provide us with copies of the approval and covering letter, it wasn't until after the second day of the hearing that they were faxed to us.

The EPA's covering letter is important because it makes it clear that the EPA has not looked at the impact on the adjacent wetlands, but only the pollution impacts of the drain. The developer tendered the approval on the first day of the remediation hearing but failed to tender the covering letter.

Few people realise that the EPA has adopted such a narrow view of its environmental protection responsibilities, confining them only to direct pollution impacts. Perhaps it should be renamed the Pollution Authority.

NOTICEBOARD

A Guide to Environmental Law in WA: This invaluable Guide (230 pages) clarifies how the law can be used to prevent or remedy environmental problems. Published by the EDO (WA) it features chapters on Planning law, Pollution Control, Heritage Law, Mining Law, Environmental Impact Assessment and Common Law. Also included is a fascinating account of the Ok Tedi case by John Gordon, a solicitor for the landowners of Papua New Guinea in their action against BHP. To order please send a cheque for $30/$20 (concession & community groups) to EDO 1st Floor, 33 Barrack St Perth WA 6000. Ph: 09 221 3030

Environmental Justice: Global Ethics for the 21st Century: An international academic conference at the University of Melbourne 1-3 October 1997. Expressions of interest and proposals for papers are now invited. Contact: Nicholas Low, Faculty of Architecture, Building and Planning, University of Melbourne, Parkville 3052. Ph: 03 9344 7458. Email: n.low@architecture.unimelb.edu.au. Information about the conference can also be found on the Internet web page: http//www.arbald.unimelb.edu.au/events/enjust.htm

Environmental Justice and Market Mechanisms: New Challenges for Environmental Law: An international conference hosted by Faculty of Law, University of Auckland New Zealand. 5-7 March 1998. The conference aims to examine how environmental justice features in law. For more details or to submit a paper contact: Barry Williams on 64 9 373 7599 (ext 8903) or fax 64 9 373 7419. Email: b.williams@auckland.ac.nz

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