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Environmental Protection in Australia: the Need To Realize Commonwealth Potential

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1. Introduction

The Commonwealth is again considering the legal power it has to protect the environment and how that power can be used effectively. This review is taking place in at least two different fora.

In December 1996, the Council of Australian Governments (COAG) agreed to review Commonwealth/State roles and responsibilities for the environment. Unfortunately, the COAG review was deficient from the outset. The review has been hampered by extreme narrowness and unwarranted preconceptions in its terms of reference, a lack of necessary time to conduct the review, and an uninclusiveness in the review process. These deficiencies were highlighted by the EDO in its submission to COAG's Intergovernmental Committee on Ecologically Sustainable Development (ICESD).[1]

In response to these deficiencies, as well as in response to a number of "'short-sighted and alarming' [Commonwealth] decisions, including the approval of Point Lillias, [an area supposedly protected by the Ramsar Convention on Wetlands],[2] as the site of Victoria's chemical storage facility",[3] the Senate initiated a broader, more inclusive Inquiry into Commonwealth environment powers. Because of the Point Lillias debacle, the Inquiry included a specific focus on the legal implications of environmental treaties and conventions for Commonwealth, State and local environment powers.

What follows are extracts from the EDO's 43 page submission to the Senate Inquiry. Naturally, the issues addressed in the previous IMPACT article on the ICESD review are omitted. Moreover, given space limitations and the prominence of international environmental treaties in the Senate review, this article primarily concentrates on the issues raised by the Commonwealth and State roles in implementing and enforcing Australia's international environmental obligations.

2. The Commonwealth Government and the Environment

The Australian Constitution does not make a specific grant of legislative power to the Federal government regarding the environment. However, that has not stopped the Commonwealth from enacting wide-

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ranging and significant laws in this field.

Indeed, as constitutional law has developed it has become certain that the Commonwealth has extremely broad scope for environmental legislative innovation under a number of heads of power contained in the Constitution: eg, the trade and commerce power (s 51(i)), the external affairs power (s 51(xxxix)), corporations power (s 51 (xx)), taxation power (s 51(ii)), and "people of any race" power (s 51(xxvi)).[4] Provided the political will is present, the Commonwealth government has very wide power to legislate in order to protect and preserve the environment and promote ecologically sustainable development.

Of course, it would be preferable if the Constitution specifically confered environmental power on the Commonwealth. If and when a Constitutional convention or referendum takes place the issue of Commonwealth environmental power should be placed high on the agenda.

A general power with respect to the environment would certainly give the Commonwealth clear authority to act in situations which are of national importance or consequence. True, the power already exists and is exercised, but there are subtle limits and it would be preferable for the Commonwealth to be able to act on environmental matters by way of an express, specific power, instead of the formally incomplete method of current Commonwealth involvement. Moreover, this deficiency has given rise to uncertainty and corresponding needless litigation.

3. Implementing International Environmental Obligations

3.1 International Environmental Treaties

With the emergence of worldwide environmental consciousness in the early 1970s, Australia began to assume numerous international obligations regarding the environment. Initially, the implementation of environmental treaties was complicated by the fact that the Australian Constitution does not give any specific environmental protection powers in either the federal or state governments. As discussed above, however, authority for federal oversight of international treaties can be found in a number of provisions of the Constitution. These powers enable the implementation of treaty provisions through appropriate Commonwealth legislation.

The High Court has recognized that environmental treaties ratified by Australia impose international duties at a national level and have sanctioned expansive Commonwealth implementing legislation in the field.

There are now more than one thousand international treaties that serve as sources for international environmental obligations. Although Australia is not party to all of them, it has sizeable international commitments through treaties it has signed or implemented. Further, this decade has seen the continued proliferation of international environmental law and increased governmental awareness of the seriousness of global environmental problems. Australia already faces and will face greater obligations under international environmental law at the global and regional level.

3.2. Domestic Implementation of International Environmental Treaties

As the scope and coverage of international environmental law progressively widens, the coordinated operation of treaty rights and obligations will be crucial in establishing an effective international legal order for the protection of the environment. Without an integrated application of effective national regulations, international environmental law is likely to become superfluous.

At the domestic level, the implications of an effective structure to implement international environmental law are considerable. This is especially so in the context of Australia's unique brand of "cooperative federalism." The Australian Constitution splits legislative authority between the Commonwealth and State governments. Under constitutional tradition, the Commonwealth government has been accorded the power to enter into treaties and regulate foreign affairs. Even so, depending on the specific subject area covered and the constitutional division of powers, the states may still retain legislative jurisdiction over the subject area of a particular treaty. This has important implications in the area of international environmental treaties. Foremost, it has the potential to limit the ability of the Commonwealth to engage in effective domestic regulation.

The power to enact laws implementing a treaty is meaningless in the absence of a means of enforcement and a method of intra- and inter-government coordination. The most efficient method of enforcement and co-ordination is through a dedicated centralized authority at the Commonwealth level. A single centralized authority can avoid duplicative or inconsistent standards, jurisdictional rivalry, and economic competition which may be a problem with multiple State authorities. Accordingly, a strong Commonwealth involvement in enforcing and coordinating Australia's international environmental obligations, is not only crucial to the implementation of environmental treaties, but is also the most efficient mechanism for ensuring that treaty obligations are observed.

3.3. The Need for a Strong Commonwealth Role

The need for a strong Commonwealth role flows from the proposition that states within a federation lack international personality and the capacity to enter into international treaties. International obligations undertaken by the Nation *qua* Nation should be administered at a national level.

The increasing international and internal interdependence of the affairs of a nation-state requires a unitary policy. Confidence is hardly engendered by a nation that appears schizophrenic about, or unable to meet, its international obligations, with constituent states being able to override or substantially impair national decisions. The efficient discharge of international obligations will only result from a single, consistent system. Strong Commonwealth leadership will provide such a system.

In addition, implementation of international agreements binding the nation demands a single uniform rule applicable nationally. Indeed, to the extent that Commonwealth legislation is permitted under its external affairs power, any inconsistent state legislation will be rendered void. The general need for uniformity has been recognized on a regional international level by the European Community. The Treaty of Rome emphasizes the need to eliminate "disparit[ies] between the legislative or administrative provisions of the Member States." In the environmental context, the European Community recently approved a directive that not only enhances uniformity within nations, but also between states, in connection with reporting procedures. The measure standardizes reporting requirements and introduces a common reporting procedure in connection with air, water and waste regulations that are governed by more than thirty existing European Community directives. The directive is designed to make "the reporting obligations of member states more systematic and more coherent."

The practical benefits of uniform national regulation of international standards were recognized in *R. v. Burgess ex parte Henry* (1936) 55 C.L.R 608. Burgess involved a challenge to federal regulations purporting to implement the provisions of the Paris Convention for the Regulation of Aerial Navigation of 1919. In concluding that the power to promulgate the regulations fell within the external affairs power, Justice Dixon reasoned that "uniformity" of international aircraft regulations enhanced safety, regularity, and the efficiency of aviation generally. These salutary objectives would also undoubtedly be served by uniform regulation of international environmental obligations.

Economic considerations also support the need for a strong Commonwealth role and uniform national standards implementing international environmental agreements. In the absence of national regulation, an Australian state that takes it upon itself to protect its environment runs the risk of being placed at a competitive disadvantage through at least the perception of increased costs. In choosing to enact provisions to protect the environment, a state will inevitably consider the increased costs to its economy. Whether the costs are borne by producers, consumers, or taxpayers, a state may feel burdened by the economic consequences of passing environmental legislation. Without national standards, states are apt to adopt a "tragedy of the commons" mentality and inadequate protection will be adopted.

Parochialism is an additional reason for the primacy of the Commonwealth and uniform national regulation concerning environmental treaties. In competing with each other for industry and development investment, Australian states are often tempted to lower costs through lax environmental regulation, or worse, no regulation at all. Waste also results from state rivalry because a disadvantaged state will forego the full economic rent for the use of its resources in order to attract investment. By contrast, the federal government tends to maintain a national perspective. It is less politically dependent upon the support of any single region and is more appropriately equipped to enforce international standards of environmental management.

The disparity of wealth among Australian states also militates in favour of national supervision. In order to generate revenue, a financially strapped state may welcome, through inadequate legislation, the transfer of environmentally hazardous substances, activities, or facilities that a more affluent state can afford to legislate against. Indeed, the Prime Minister has advanced this as a reason for rejecting binding targets and timetables for the reduction of greenhouse gases by developed states under the Climate Change Convention. The Prime Minster reasons that if Australia were to agree to such targets and timetables, industry adversely affected would move offshore to developing countries not bound as yet by the commitment to reduce greenhouse gases. In a national context, there is no reason for the citizens of one state to bear more environmental risks than those of another. National supervisory control of international obligations would diminish the chances of this happening. The implementation of Australia's international obligations in relation to the environment are likely to be complex. State environmental agencies must continue to play an important role in delegable functions such as licensing and inspection. Nevertheless, national supervision is crucial to overall enforcement and coordination of environmental protection in Australia.

3.4. The National Interest in International Environmental Law

The terms of reference for this Inquiry requests submissions to address the promotion of the "national interest" in implementing Australia's obligations under international treaties. A recent and disturbing development in Australia, however, has been the invocation of "national interest" in order to justify excusing itself from living up to established norms of international environmental law. Reliance on "national interest", however, is clearly inappropriate in the field of international environmental law.

A recent example will illustrate. It is extremely disquieting to read reports in the media that the Australian Government is contemplating a withdrawal from the Climate Change Convention if the parties to the Convention adopt binding targets and timetables for the reduction of greenhouse gas emissions. Such an attitude is strikingly inconsistent with Australia's commendable and long history of commitments to international environmental protection.

In the case of climate change, unfortunately, a narrow parochialism seems to be poised to prevail over the more enlightened prior acknowledgement by the Government that "the global nature of climate changes calls for the widest possible cooperation by all countries and their participation in an effective international response"[5]. The Government perceives the binding targets and timetables under negotiation as unpalatable because of their supposedly economically crippling nature.

The Government has invoked the hoary shibboleth of "national interest" to justify becoming in essence a "free rider" on the Climate Change Convention by withdrawing from it and escaping the obligation to fulfil the burden of the commitments required by any binding targets and timetables that may be adopted. Query, however, *what* truly represents the "national interest" in connection with global environmental problems.

Indeed, the challenge posed by international environmental problems such as climate change is precisely how to transcend the narrow self-interests of states (ie "the national interest") in order to embrace a broader international public interest. A failure to do so dooms us to ineffectual international environmental law and an increasing threat of the dangers of climate change.

Query also *who* gets to decide what is in the "national interest". In 1996, the Australian Foreign Minister stated that there had long been a "democratic deficit" in connection with treaty obligations undertaken by Australia and that from henceforth "consultation" with interested citizens would govern the process of treaty negotiation. So far as we are aware there has been no consultation with interested Australian citizens or groups regarding the current negotiations on targets and timetables so that the product of the negotiations will truly represent the "national interest". We still seem to be labouring under the democratic deficit despite assurances otherwise.

In addition to these serious problems, if Australia carries through with its threat to withdraw from its treaty obligations it will severely undermine the Convention itself and enhance the dangers posed by climate change. Australia claims that its economy, particularly its balance of payments, is especially vulnerable to proposed targets and timetable and they are thus unacceptable. The Convention, however, specifically recognises the need for developed countries like Australia to take immediate action in order to mitigate greenhouse gas emissions. Moreover, it also recognises that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries and thus developed nations bear a greater responsibility for combatting the problem.

The example that Australia is setting by claiming special treatment as a developed country and threatening to withdraw from the Convention if it does not get its way, is bound to influence developing states when it comes time for them to make binding commitments under the Convention. After all, if a wealthy developed nation like Australia cannot reduce its greenhouse gas emissions without supposedly wrecking its economy, then how can developing states be expected to agree to forsake the use of greenhouse gas producing technology in order to develop their economies and improve the quality of life for their citizen? Such an expectation would be as unrealistic as it is inequitable. The fact is, however, that without the participation of large, rapidly developing countries such as China, Brazil, and India, the environmental good achieved by developed states other than Australia agreeing to stringent measures will be more than neutralised.

4. Conclusion

Australia's international responsibilities must be handled at a national level. In order to effectively participate in international negotiations, and to have credibility as a nation concerned about the conservation of biological diversity and ecologically sustainable development, Australia needs to set standards of international excellence, significantly increasing and maintaining implementation, monitoring and reporting procedures. Through these international responsibilities, the Commonwealth will need to take action to prevent important values being eroded at the state level. It demands a continuing and vigilant Commonwealth oversight of all global and regulatory responsibilities.

ENDNOTES

1 For a thorough discussion of the COAG review process, see James Johnson, *Commonwealth/State Roles Responsibilities for the Environment* (1997) 45 IMPACT 8.

2 Convention on Wetlands of International Importance Especially as Waterfowl Habitat, *signed* 2 February 1971, 996 U.N.T.S. 245.

3 Senate Environment, Recreation, Communications and the Arts References Committee, COMMONWEALTH ENVIRONMENT POWERS INQUIRY INFORMATION BOOKLET (April 1997)(quoting Senator Meg Lees).

4 James Crawford, *The Constitution and the Environment* (1991) 13 SYD. L. REV. 11.

5 Declaration of the Hague, *reprinted in* (1989) 28 Int'l L. Materials 1308

Making Objections under the Mining Act (Northern Territory)

Robin Dyall, Solicitor Environmental Defender's Office (NT)

1. Introduction

This paper briefly examines how exploration and mining titles are granted under the *Mining Act 1980* (the Act), and how an objection to the granting of a title, particularly on environmental grounds, may be made.

2. The Environmental Impact Assessment Process

The objection process is particularly relevant where the proposal is not considered significant enough to require formal environmental impact assessment under the *Environmental Assessment Act* 1982 (as amended by the Environmental Assessment Act 1994).

At present, the Northern Territory Department of Minerals and Energy (the Department) requires a Notice of Intent for all mining operations including extractive industries and expansions to current operations. The Notice of Intent is usually a brief summary of the proposal. It includes a description of the proposal and the likely impacts on the environment. The Department evaluates the Notice of Intent to determine whether the proposal should be referred to the Minister for Lands, Planning and Environment for assessment under the

Table 1: Guidelines to determine whether a project should be assessed under the Environmental Assessment Act
Draft Only
Northern Territory Department of Mines and Energy

Criteria	*No Formal Assessment*	*Assessment under Environmental Assessment Act*
Production rate (or increase in production)	<200,000 tpa	>200,000 tpa
Commonwealth involvement anticipated	No	Yes
Total disturbed area	<200 ha	>200 ha
Proximity to settled areas	>2 km	<2 km
Proximity to coastal zones, rivers or wetlands	Not in coastal foreshore zone, >1 km from a major river or in a wetland	In coastal zone, <1km from a major river or coastal zone or wetland
Acid generation potential	No sulphide minerals	Sulphide minerals in ore or waste
Potential for contamination of surface or ground water	Nil or insignificant	Significant with potential for long term consequences possibly requiring long term hydrological and water quality management
Potential for disturbance to offshore areas	Nil or insignificant	Any significant disturbance and proximity to environmentally significant habitats
Impacts on parks or conservation reserves	Nil except extractive industries	Mining on parks or mining that impacts on parks
Impact on species of conservation significance	Nil	Potential to impact on species or habitats (eg destroy nesting sites)
Potential for social, heritage or cultural issues	Nil	Significant requiring community consultation
Potential for land and/or water use conflict	Nil or minor	Consultative with other parties necessary: arbitration potentially necessary
Extractive industries	>2 km from town boundary	<2 km from town boundary
Time scale of operation	<3 years	>3 years

Note: there is no table for petroleum, explorers are encouraged to contact the NT Department of Mines and Energy for further information.

NOTE: This table is still under negotiation but generally being applied

Environmental Assessment Act. The decision is based on an assessment of the Guidelines listed in Table 1 (above). It seems that in many cases there will be no referral.

3. The Mining Act 1980

The Act commenced on 1 July 1982. Various amendments have been made since then. It applies only to onshore minerals.

No exploration or mining for minerals or extractive minerals may be done other than in accordance with the Act or other Territory Law [1]

4. Exploration and Mining Titles

It is vital to ascertain exactly who has what interest in the land. A full history of mining interests is also very helpful.

Classification of land
Procedures and entitlements applying to exploration and mining under the Act vary depending on the particular classification of the relevant land. Under the Act land is classified into four categories; Crown land, parks and reserves,

Aboriginal land and private land.[2]

3.1 Titles

The titles which may be conferred under the Act are:

(a) a miner's right in relation to minerals and extractive minerals

(b) in relation to minerals:
- an exploration licence
- an exploration retention licence
- a mineral lease
- a mineral claim

(c) in relation to extractive minerals:
- an extractive mineral lease
- an extractive mineral permit.

Only a *miner* (that is, the holder of a miners right[3]) may apply for and be granted an exploration licence, exploration retention licence or mining tenement.[4] *Mining tenement* is a mineral lease, mineral claim, extractive mineral lease or extractive mineral permit.[5]

4. Notice

All applications, other than for a miner's right, must be advertised as soon as practical after they are received. The Secretary or Mining Registrar, as the case may be, publishes a notice in a newspaper printed in the Territory and circulated in the Territory or in the relevant mineral field. Objections must be submitted within the timeframe indicated in the notice.

5. When can objections be made to exploration and mining titles?

5.1 Miner's right

An application for a miner's right may be made to one of 4 people - the Minister, a warden, a mining registrar or an authorised person. It is granted by the person to whom the application is made. There seems to be no ability to object to the grant of a miner's right. Judicial review of the decision is limited by the very limited nature of the discretion available to the person granting the miner's right.

5.2 Exploration licence/ extractive mineral permit

The Minister may not grant an exploration licence until he has considered all objections and the answers to those objections. A similar provision governs the mining registrar's discretion in respect of an application for an extractive mineral permit.

5.3 Exploration retention licence

There is no specific reference in the granting power to objections. However, Part 8 of the Act contains general provisions relating, amongst other things, to notice and objections. These provisions are "apply to...the exploration licences, exploration retention licences and mining tenements to which they are expressed to relate to the extent that they are not inconsistent with specific provisions relating thereto contained elsewhere in this Act."[6]

5.4 Mineral lease/ mineral claim/ extractive mineral lease

Objections may be lodged under the Act in relation to an application for a mineral lease, a mineral claim or an extractive mineral lease (see Sections 58, 59, 85, 100 and 163). Where this occurs, the objections must be considered by a warden in a public hearing. This is dealt with in more detail below. The warden then makes a recommendation to the Minister about the application and the Minister may, in his discretion, grant the lease or claim.

The Minister cannot refuse an application by an exploration retention lease holder for a mineral lease except with the approval of the Administrator of the Territory.

6. Warden's Hearings

6.1 Public Participation

The Act requires the mining registrar to fix a date for consideration by a warden of an application for a mineral lease, mineral claim or extractive mineral lease and a hearing in open court of objections to the proposed grant. Where there are no objections lodged under Part 8 the warden may dispense with the hearing[7].

The warden must in either case consider the matters before him and make a report to the Minister recommending the grant or refusal of the application. The warden must also forward to the Minister all documents and notices of objection considered by him in compiling his report.

The applicant and all objectors must be advised of, and may be heard at, the hearing. They may be represented by counsel.

The hearing is held in the warden's court for the relevant mineral field unless otherwise determined by the mining warden in consultation with the applicant. At present, there are 3 mining fields - North, Central and South. Courts are at Darwin, Tennant Creek and Alice Springs.

The warden must take such evidence and hear such persons and inform himself in such a manner as he considers appropriate in order to determine the relative merits of the application and objections. Subject to the Act the warden may determine his own procedures in connection with the hearing.

The warden may direct an inspection of the land and a report to be made to him, by a person appointed by him.

6.2 Assessing environmental impacts

The warden may also require an applicant or an objector to arrange for a study to be carried out in connection with the likely or possible effects of proposed mining operations on any part of the environment on or in the vicinity of the land.

The warden may require that report to contain:
- a statement of the objectives of the applicant
- a full description of the mining operations proposed to be carried out on the land and all associated works and other uses proposed
- the details of all feasible alternatives to the preferred mining proposal or other use
- a description of the aspects of the environment likely to be affected by the mining proposal and other feasible alternatives
- an assessment of the potential benefits and detrimental effects on the environment of the proposed mining or other use and other feasible alternatives
- a description of specific safeguards and environmental it is

management proposals which could be incorporated as conditions of the lease to avoid, minimise or ameliorate adverse environmental effects and

- estimates of the cost of carrying out the proposals or specific actions for the amelioration of the effect of the proposed mining or other use.[8]

The Act clearly contemplates objections being made on environmental grounds.

6.3 Problems with access to information

Records of proceedings are not readily accessible. Hearings are not reported. The Court retains only bare records of applications, such as the application number, parties and dates of activity. Tape recordings of proceedings are retained for 12 months. As not many cases are heard there is no separate list. Even though application numbers are marked "MW" the database is not easily accessed. Transcript costs $7.00 per page. The other documents relating to the case are sent to the Department and retained on the Department file relating to the particular application.

Through approaches made to the Department, counsel and clients the EDO has obtained some information on hearings conducted to date. Objections based on environmental matters have been considered but have not resulted in the warden recommending against any of the applications. With one exception, the determinations then made by the Minister have been to grant the application. It is not possible to obtain reasons for the Minister's decisions

7. Conclusion

From a brief examination of the few decisions made available it is clear that the objections must be well-founded, and that expert and other evidence must be submitted to support the contentions made. As always there will be a need to weigh up whether the best avenue for a successful contest will lie under the *Mining Act* or the *Environmental Assessment Act,* and what costs conducting a hearing will involve.

ENDNOTES

1 Section 190
2 Section 4. See Section 4 for definitions
3 Section 4 (1) "miner"
4 Section 4 (1) ("Miner"), 11 (1), 16 (1), 54 (1), 82 (1), 96 (1), 107 (1)
5 Section 4 (1) "mining tenement". It also includes an area of land the right to occupation of which is conferred by Section 61 (2) or 104 (2) or is continued by or under Section 191 (19) or (20).
6 Section 160
7 Section 58(8)
8 Section 58(7)

Business attacks Public Interest Litigation

James Johnson, Director, Environmental Defender's Office (NSW)

The EDO has recently become aware of attacks by the business community on public interest litigation. These are discussed below.

1. ACCI endorses Commonwealth Restrictions on EDOs

The Federal Attorney General recently announced that EDOs are no longer able to use Commonwealth funds to conduct "litigation related activities". Following this announcement, Mr Ian Booth, Senior Environment Regulation Advisor for the Australian Chamber of Commerce Industry (ACCI), expressed his reasons for endorsing the Commonwealth's actions in the May 30 edition of Environmental Standards Update.

As legal practitioners representing people who seek to protect the environment in the public interest, we disagree strongly with the views put forward by Mr Booth. We set out below our brief response to the major assertions made by Mr Booth. Mr Booth's assertions are in italics.

1.1 EDO's Response

"You've got to recognise the difference between the interests of someone who has spent a lot of money on a project versus those who haven't".

The quantum of a company's investment should not exempt it from compliance with the law. Otherwise litigation would be decided by an inspection of the balance sheets of the respective parties. In our opinion, it is unconscionable and unjust to recognise the rights of those conducting projects to the exclusion of people affected by those projects.

The economy will benefit from the removal of one of the business sector's "litigation headaches".

We strongly reject this assertion. The Australian Law Reform Commission report on Standing notes that the benefits that can arise from public interest litigation include

- development of the law leading to greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law (leading to less disputes and less expenditure on litigation)
- economies of scale
- contribution to market regulation and public sector accountability through private enforcement
- reduction of other social costs by stopping or preventing

costly market or government failures.

"Litigation is expensive, it's delaying, it's confrontationist and it certainly increases business uncertainty".

The EDO treats litigation as a last resort. The EDO encourages parties to resolve matters both before and after litigation has commenced. We dispute however, the claim that litigation increases business uncertainty. On the contrary, where the law is clarified an element of certainty is introduced. As noted above by the ALRC, where the law is enforced, confidence in the legal system is reinforced, as is the need for compliance.

"In the bulk of cases, there is no reason why the government umpire's decision shouldn't be final".

Obviously, the government's decision is final in the bulk of cases. However, would a business accept all decisions of the Australian Taxation Office, for example, on face value? Certainly Justice Donald of the Federal Court wouldn't. In a judgment delivered 19 June 1997, he states:

"It is no answer, in the remaining days of this century, to say that the Commissioner can be trusted. That is an argument which betrays a lack of realism and experience with tax administration".

The same can be said, on occasion by the community or by business, in relation to environmental protection. More fundamentally, ACCI fails to appreciate the role of the Courts as a check on the exercise of power by the Government, which is a "player" not an "umpire". This is what people mean by the separation of powers.

"The Australian Law Reform Commission clearly believes there is too much litigation..."

The ALRC report on Standing states:

"2.32 Public interest litigation has increased in the last ten years. This increase is closely related to the growth in administrative and judicial review of government decisions and to an increase in the number of statutory 'public rights'.

2.33 The increase in public interest litigation also reflects the fact that while litigation is primarily used as a means of resolving disputes between two parties, it is also an important mechanism for clarifying legal issues or enforcing laws to the benefit of the general community.... There are also laws creating public rights, such as those in relation to the environment and consumer protection, which rely on private enforcement as an integral part of ensuring compliance."

"There are other ways you can keep the business sector honest other than by taking companies to court. You can embarrass them. If you have a good case against them you can take them to the court of public opinion".

This is a most generous suggestion, but one which ACCI is unlikely to make to its own members.

1.2 ACCI Responds

ACCI has replied to the EDO, saying that it has two main concerns with public interest litigation.

First, ACCI is concerned that Australia is already too litigious and there is generally no reason why litigation should be further encouraged by government funding. Secondly, in cases where community interests have a good opportunity to participate in government decisions, under processes contained in environmental legislation, ACCI is opposed to judicial reopening of administrative decisions on legal technicalities.

It is clear, however, that business is by far the greatest user of the courts. Bearing this in mind, there is no reason why corporate litigation should be further encouraged by government subsidies The EDO is making a submission to the Senate Legal and Constitutional Reference Committee which is enquiring into the Australian Legal Aid system and the equity implications arising from the current tax deductibility regime for legal expenses. We support the removal of tax deductibility for legal expenses for business.

The second concern is about the "reopening" of cases where the community has already had a good opportunity to participate. It is misleading to characterise judicial review as "reopening" a case. Many public interest cases are "reopened" precisely because procedural fairness has been denied to people, and people in the community have not been given their opportunity to participate. If proper care were taken to ensure legal processes had been followed, there would be no need or grounds for judicial review. In addition, there might have been a different outcome on the merits. Failure to allow for community interest to participate is more than a mere technicality.

2. Allen Consulting Group

The EDO has recently become aware of a project being run by the Allen Consulting Group in Melbourne which appears to be a broad based attack on the right of access to the courts and the role of public interest litigation. The project has a high profile steering committee of lawyers, including senior legal counsel for BHP. It will examine, among other things, 'the Americanisation of the Australian legal system', 'the drift to a litigious society,' and policy alternatives that 'will facilitate *proper* access to justice' (emphasis added). The result will be used to lobby the Commonwealth Government to restrict public interest litigation.

BHP in particular has been involved in important public interest litigation which has had severe negative impacts on the image of the Big Australian. Most recently, BHP was shown to have been actively involved in the drafting of legislation in Papua New Guinea which indicates the means by which it is prepared to facilitate "proper access to justice". The legislation related to proceedings brought by landowners detrimentally affected by BHP's Ok Tedi mine. In a schedule to the legislation, there are several recitals including:

"E. Foreign lawyers have been active in connection with this litigation or attempted litigation and have raised unrealistic expectations among persons affected by the

company's operations as to the compensation those persons may expect to receive. This litigation or attempted litigation if allowed to run its course, is likely to take an extremely long time to resolve and to be very expensive for everyone involved in it...."

The draft legislation, which was ultimately rejected by the PNG Parliament, made it an offence for lawyers to advise or act for people who have suffered damage through the company's operations. This Bill made it a criminal offence to bring proceedings against BHP, or to assist these people as lawyers or experts. BHP was subsequently found guilty of contempt in the Supreme Court of Victoria for attempting to influence proceedings before the Court. The finding was overturned on Appeal because in Victoria, the Attorney General must authorise contempt proceedings.

3. Conclusion

In seeking to prevent public interest litigation, business is simply acting to protect its own powerful interests. There is nothing new about this. But our concern is not only with the lack of merit in their arguments, but with the level of access to government and influence which business enjoys to put their arguments compared with the restricted access experienced by community interests. As one senior bureaucrat with the Attorney General's Department noted to the EDO,

"I'm afraid sometimes it's not so much what is being said as who says it that is counted as important."

Responsible industry ought to have a strong interest in ensuring that there is a level regulatory playing field, with commercial competitors being prevented from cutting corners and breaking the law. A system which allows the law to be broken and "cowboys" to thrive is in no-one's interest.

Responsible industry ought also to recognise the wider benefits which public interest litigation brings.

Public interest litigation

- can help to redress imbalance in power and resources between Government and corporate sector interests on the one hand, and community interests on the other.
- can develop or clarify legal rights and obligations affecting large numbers of people. In this sense it can be very cost effective, leading to greater certainty and increased public confidence in the administration of the law (leading to less disputes and less expenditure on litigation)
- informs social policy, and acts as a trigger for legislative change.
- has an important role to play in ensuring both public and private sector accountability through private enforcement.
- leads to reduction of other social costs by stopping or preventing costly market or government failures.

Public interest litigation is a valid and valuable use of resources, and industry would do well to recognise this.

Queensland EDO Represented on Environment Protection Council of Queensland

Ros MacDonald, Faculty of Law, Queensland University of Technology and Queensland EDO Board member

The Environment Protection Council of Queensland (the Council) was established in September 1996, following an election commitment to do so by the Coalition. It will continue until August 1998.

It is comprised of 21 members from conservation groups, local government and industry representatives. As yet there is no representative of the indigenous community, though this may occur soon.

The QLD Environmental Defender's Office is represented on the council.

The objective of the Council is:

'To provide the Minister for Environment with relevant and appropriate advice on matters relating to the management of Queensland's environment.'

The terms of reference which flow from this objective, as expressed in the Strategic Plan under which the Council has been operating, are set out below.

The Council will consider and provide advice and information to the Minister on:

- any matter referred to it by the Minister
- all legislation administered by the Department of Environment
- the recommendations referred to it by the former Ministerial Advisory Committee on 31 May 1996
- policies or guidelines relating to matters administered by the Department of Environment

- the need for and appropriate levels of consultation with government, community and business groups
- the Council will prepare an Annual Action Plan incorporating time frames and specific tasks to be completed
- the Council will establish Working Groups to assist it in achieving its objective

Every six months, the Council reports on its actions to Parliament, through the Minister. The initial six monthly report (September 1996 - March 1997) will be available soon.

The Council has established a number of working groups to examine, in detail, various issues that are difficult to resolve in a meeting of the full Council. The Queensland EDO is a member of the following Working Groups:

- Environment Protection Policy (Noise) Working Group
- Nature Conservation Working Group
- Ministerial Advisory Committee Actions Working Group (the MAC Actions Working Group)

The Environment Protection Policy (Noise) Working Group had its first meeting in May. The Nature Conservation Working Group is undertaking a review of the operation of the *Nature Conservation Act* and the MAC Actions Working Group has been dealing with issues referred to the Council from the MAC. It has considered the determination of licence conditions, procedures for determining environmentally relevant activities, licencing system performance indicators, delegations, an emergency remediation fund, and conditional approvals. The MAC Working Group's recommendations have been presented to the Council for consideration.

The EDO was also a member of a Planning Working Group which recently hosted a workshop for Council members which was based on a consideration of the issues raised by the initial national State of the Environment Report.

Although the Council is a non-statutory advisory body, the representation on it is broad-based, from the Local Government Association of Queensland, the manufacturing and resource based industries (Metal Trades Industry Association, Queensland Timber Board and Queensland Fisheries Management Association) to the Queensland Conservation Council, Greenpeace, the Wildlife Preservation Society of Queensland and the Queensland EDO. This means that the conservation groups are able to be advocates for the environment in a representative forum which provides opportunities for a broad dissemination of views.

Remediation: The Land and Environment Court flexes its muscles

Case note: Oshlack v Iron Gates Pty Ltd and Anor

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

The Land and Environment Court has always had the power to order that a site be remediated to remedy a breach of the *Environmental Planning and Assessment Act* 1979 **("EPA Act")**.[1] The recent case of *Oshlack v Iron Gates Pty Ltd and Anor*[2] has illustrated the extent of those powers, and demonstrates the potentially serious consequences of those provisions for developers.

Background

The Iron Gates site has been the subject of extensive litigation over the past decade[3]. This focus stems largely from the environmental sensitivity of the site itself: it contains an abundance of wildlife, a resident koala colony, numerous other endangered species including bats and small marsupials, a wetland registered under SEPP14, and a rare coastal (littoral) rainforest, and is bounded on three sides by the Broadwater and Bundjalung National Parks.

Refusal of interlocutory injunction

In July 1996, Iron Gates Pty Ltd began to clear fell vegetation on the site for a 110 lot residential subdivision. Oshlack (for whom the NSW EDO acted) commenced Class 4 proceedings in the Land and Environment Court under section 123 of the EPA Act, seeking an interlocutory injunction to restrain the clearing of the land. He argued that the clearing was not authorised by the development consent in that Richmond River Shire Council **("Council")** had approved a "green subdivision" the conditions of which required all of the native vegetation to be retained, apart from that which was required to be removed for constructing work.

An interim injunction was granted on 9 July 1997, but was subsequently discharged on 11 July 1997. The Court refused to grant the injunction primarily because Oshlack was unable to give the usual undertaking as to damages[4].

Declaration of breach of development consent

Despite being denied interim relief, Oshlack continued his proceedings, seeking a declaration that the clearing and other subsequent works were in breach of the consent and a final injunction. Oshlack also sought an order that the developer revegetate the land under section 124(2) of the EPA Act, which provides that, where the breach of the Act has the effect of altering the condition or state of any land, the orders may require "...the reinstatement, so far as is practicable, of that ...

land to the condition or state the...land was in immediately before the breach was committed."

After successfully opposing the application for an interlocutory injunction, the developer, Iron Gates Pty Ltd, continued apace with its residential subdivision pending the final hearing of the matter. In carrying out further work, the developer cleared a designated wildlife corridor, constructed two 300 metre drains adjacent to a wetland and a rainforest, constructed approximately 2 kms of sealed roads and undertook extensive earthworks over a 20 hectare area.

The matter was heard by Stein J in December 1996. By the time judgment was delivered in March 1997, some 8 months after the proceedings were commenced, the subdivision works were almost fully completed.

On 6 March 1997 The Court found that: "...the development is radically different from the environmentally sensitive subdivision with "green easements"which was approved. It (the Company) proceeded to develop a traditionally engineered subdivision by wholesale clear felling and vegetation removal in disregard of the consent that had been granted...".

Justice Stein declared that the breaches of the development consent made it impossible for the development to be completed as the development consent envisaged, and that the consent was therefore rendered nugatory. It also found that the habitat of threatened species, in particular the Koala and the Queensland Blossom Bat, had been destroyed in breach of section 118D of the *National Parks and Wildlife Act 1974.*

The proceedings were stood over for further hearing the issue of what, if any, remediation would be ordered.

Remediation orders

On 4 July 1997, Chief Judge Justice Pearlman ordered Iron Gates Pty Ltd to demolish its residential subdivision and to restore the Iron Gates site at Evans Head, NSW, to its pre-development state. The judgment represents probably the most extensive and comprehensive restoration order made by the Land and Environment Court to date.

The primary issue between the parties was whether the orders for remediation should have regard to the possibility of the future subdivision of the site and its development for residential purposes. The Court rejected the developer's submissions which proposed that the internal roads and drains be retained and that replanting take place on the road verges and lots, thereby keeping open the possibility of the subdivision development proceeding at some time in the future, subject to the developer obtaining a new development consent.

In determining whether it was "practicable" to order remediation, the Court found that it should not have regard to the current zoning of the site (which was Village 2(v)), the uses to which it may be put and the development which had been approved. Instead, it confined itself to weighing up the environmental harm of leaving the internal structures in place as compared to the harm which might be caused by removing them.

Pearlman J held that:

> "...the correct approach is to be found in the plain words of s 124(2)(c) - that is, the Court should make orders designed to bring about reinstatement, so far as is practicable, of the site to its condition before the breach was committed. That approach requires the Court to assess the possible environmental consequences of requiring the drains and internal roads to be removed as against the environmental consequences of allowing them to remain in place."

A detailed remediation plan proposed by the applicant was adopted by the Court which required the developer, over a 2 year period, to rip up approximately 2kms of sealed roads, backfill the extensive drains, undo the earthworks over approx 20 ha, and replant the entire site (approximately 30 ha) with native vegetation which is to be grown by the developer in a nursery established for that specific purpose.

Her Honour declined to refuse to order remediation due to the financial hardship which would be caused to the developer and found that, "(The developer's) evidence demonstrated that it would be financially difficult for the developer to carry out remediation which required the removal of the drains and internal roads as well as revegetation of the site, but there was no conclusive evidence that the developer would be unable to meet the cost. Funding may need to be obtained from borrowings or rearrangement of assets within the group of companies, but there was no evidence which would warrant refusing to make the remediation orders".

For the Iron Gates site to now be developed, it will be necessary for the developer to obtain a new development consent from the Minister for Planning (who has issued a section 101 direction over the site), or to comply with the remediation order over the next 2 years and then apply to the Land and Environment Court to have the injunction dissolved.

Iron Gates Pty Ltd has appealed to the Court of Appeal against the decisions of Stein and Pearlman JJ.

Costs

The decision on costs in the *Iron Gates* case has also provide a salutary warning to practitioners about the consequences of failing to file a submitting appearance.

Oshlack made application for his costs for the 5 day hearing before Pearlman J on remediation to be paid by both Iron Gates Pty Ltd and the second respondent, Richmond River Shire Council. The application was opposed by the Council on the basis that it did not play an active part in the case. The Council submitted that, in contrast to the role played by Iron Gates Pty Ltd (which opposed the remediation orders sought by Oshlack and which pressed for an alternative remediation plan based on its own extensive expert evidence), the Council did not play an active role. It did not lead any affidavit evidence, did not cross-examine any witnesses, and only made very limited submissions. However, the Council did not formally submit to the orders of the Court save as to costs until it withdrew on the third day of the hearing.

Pearlman J ordered that the Council and Iron Gates were jointly and severally liable for Oshlack's costs up to the time that the submitting appearance was entered, after which time Iron Gates Pty Ltd became solely liable for the applicant's costs. In so ordering, Pearlman J followed *Latoudis v Casey*[5] in which the High Court held that the purpose of a costs order was not to punish the losing party, but to compensate the successful party for its costs in bringing or defending the proceedings.

ENDNOTES

1 See section 124(2), *Environmental Planning and Assessment Act* 1979 (NSW).

2 Unreported judgment, Pearlman CJ (on remediation), 4 July 1997. Also see the earlier unreported judgment of Stein J, (on breach of consent) LEC, 6 March 1997, 40152 of 1996, and Ogle L, "Why developers should read their consents", (1997) 45 Impact 11.

3 *The Richmond-Evans Environment Protection Society Inc v Iron Gates Developments Pty Ltd* unreported, 1991, Bannon J, LEC; *Iron Gates Developments Pty Ltd v The Richmond Evans Environment Protection Society Inc* (1992) 81 LGERA 132; *Oshlack v Richmond River Shire Council and Anor* (1993) 82 LGERA 222 (appeal on costs orders heard by High Court on 8 August 1997, judgment pending), *Wilson v Iron Gates Pty Ltd* and Anor unreported, 2 December 1996, Stein J, LEC, 40172 of 1996 (on appeal).

4 *Oshlack v Iron Gates Pty Ltd* unreported, 11 July 1996, Talbot J. See case note in Ogle L, (1996) 43 Impact 9.

5 (1990) 170 CLR 534.

Surveyors and Threatened Species: Should a surveyor attempt the 8 part test?

Case Note: Environment Network Inc v Bega Valley Shire Council and Others (Land and Environment Court, No. 40078 of 1997)

David Galpin, Solicitor, Environmental Defenders Office (NSW)

A recent EDO case, which settled before hearing, highlights the need for 8 part tests on threatened species to be conducted by properly qualified experts.

In March 1997 Bega Valley Shire Council consented to a 14 lot subdivision at Reedy Swamp Road, Tarraganda. The Council granted consent contrary to the advice of its own staff, National Parks and Wildlife Service ("NPWS") and the Department of Urban Affairs and Planning who all advised that there was insufficient information for the Council to determine whether the development was likely to significantly affect threatened species. This is a matter which the Council had to consider when deciding whether to grant development consent: *Environmental Planning and Assessment Act* 1979 (NSW) ("the EP&A Act"), s.90. If the development was likely to significantly affect threatened species then a species impact statement ("SIS") would have to be prepared: EP&A Act, s.77.

Information provided by NPWS to Council and the developers indicated that at least 11 species listed as threatened under the *Threatened Species Conservation Act* 1995 (NSW) were likely to occur on the site. Despite this information, the developers did not carry out a flora and fauna assessment of the site. Instead, the developers had their surveyor prepare an assessment of whether the development was likely to significantly affect the 11 threatened species (the "eight part test"), in accordance with s.5A of the EP&A Act. The assessment concluded that the subdivision would not significantly affect threatened species. As a consequence no SIS was prepared for the development. The surveyor who prepared the assessment apparently had no relevant qualifications to enable him to make judgments about impacts on flora and fauna.

Environment Network Inc an incorporated association sought to have Council rescind the resolution granting development consent. When Council refused, The Environment Network approached the EDO for assistance. The EDO considered that the development consent was invalid for two main reasons. First, the Council had failed to take into account a relevant consideration, being the eight factors listed in s.5A of the EP&A Act. It could not have considered these factors because the only information it had before it was an inadequate assessment prepared by a surveyor. This conclusion was supported by the fact that no conditions were imposed by Council to address the potential impact of the development upon threatened species. The decision that the subdivision was not likely to significantly affect threatened species was also manifestly unreasonable. That is, in the face of the advice and information provided by council staff and NPWS, no reasonable decision-maker could have decided that the development was not likely to significantly affect threatened species.

The Environment Network commenced judicial review proceedings in the Land and Environment Court against the Council and developers seeking declarations that the development consent was invalid, that Council had failed to consider relevant considerations and that Council's decision was manifestly unreasonable. An injunction was also sought to restrain development.

After several directions hearings in the Land and Environment Court the matter was settled on the basis that the developer surrender its consent and the Council pay the other parties' costs.

The case provides a salutary lesson regarding the need, in certain circumstances, to commence legal action in order to have any bargaining power with government decision makers and developers. There is little doubt that if The Environment Network had not taken action then an area of likely habitat for Pink Robin, Swift Parrot, Powerful Owl, Masked Owl, Sooty Owl, White Footed Dunnart, Southern Brown Bandicoot, Brush-tailed Phascogale, Spotted Tailed Quoll, Koala and Yellow Bellied Glider would now be subdivided.

Coalcliff Gets its Fill of Coal Waste

Casenote: Coalcliff Community Association v Minister for Urban Affairs and Planning & Ors (No 40047/96 unreported, 17 July 1997, Talbot J, Land and Environment Court)

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

A recent Land and Environment Court case has highlighted the difficulties in NSW of requiring adequate environmental impact assessment of pre-existing environmentally damaging activities, and the relative ease with which, in the right circumstances, developers can avoid compliance with fundamental development consent conditions without significant consequence.

Background

In 1983 the NSW Minister for Planning and Environment granted development consent for a coal waste dump at Maddens Plains, on the Illawarra escarpment near Wollongong, NSW. The consent allowed the then owner of the land, Coal Cliff Collieries Pty Ltd (CCC), to dump up to 13 million tonnes of coal washery refuse on the land, subject (inter alia) to the following conditions:

- that within 4 years an underground drift be constructed to transport the waste to the site; and
- that prior to the commencement of dumping the owner of the land enter into a deed for the dedication of a large parcel of land to the east of the dump site for the purposes of open space following completion of mining.

Between 1984 and 1991, just under 1 million tonnes of coal waste was dumped on the site. The drift was never constructed and the deed was not entered into.

In late 1995, a prospective lessee of the land, Metropolitan Collieries, made an application to modify the consent under section 102 of the *Environmental Planning and Assessment Act* 1979 **(EPA Act)**. The application was not accompanied by an environmental impact statement. Wollongong City Council approved the modification under delegated authority from the Minister. The modification allowed Metropolitan Collieries Ltd, to dump up to 13 million tonnes of coal waste on the site.

A group of local residents called the Coalcliff Community Association Inc **(CCA)** (for whom the NSW EDO acted) brought proceedings in the Land and Environment Court, alleging that the consent had lapsed or expired because of the failure to enter into the deed before dumping commenced and the failure to build the underground drift. CCA also argued that both the delegation from the Minister to the Council and the subsequent modification were invalid.

Lapse of consent

CCA argued that, because the drift was never constructed, the consent expired and could not be modified. However the Court found that the consent was not time limited and had not expired as a consequence of the failure to comply with these conditions.

CCA also argued that, because there had not been compliance with the pre-commencement condition requiring CCC to enter into a deed to dedicate land, there had been no lawful commencement of the development for the purposes of s. 99 of the EPA Act and the development consent lapsed. Talbot J found in favour of CCA that there had been non-compliance with condition 9, but that the breach was "technical" because no immediate environmental consequences flowed from that breach. Consequently, the Court declined to declare that the consent had lapsed, and directed that a further hearing be held to determine what orders should be made.

Delegation from Minister to Council

The Court did not find that the delegation from the Minister or the modification of the consent were invalid. CCA had argued that the delegation by the Minister to Wollongong Council of the function to determine the modification application was a fetter on discretion. The instrument of delegation stated that the Council could not refuse the application unless otherwise directed by the Minister, that the Minister had to agree to the conditions contained in the draft modified consent, and if a Commission of Inquiry was held the delegation would be revoked. Talbot J found however that the instrument of delegation was a proper exercise of power.

Effects of modification

CCA also argued that the Council failed to take into account a relevant consideration or acted unreasonably by ignoring the environmental consequences and effects on objectors of recommencing the dumping. The Council had considered that under s.102 EPA Act it was bound to disregard the effects of the dumping because the effect of the modification was to allow coal waste to be transported by road from a different source.

CCA alleged that because the original consent conditions prohibited the emplacement of coal after four years without construction of the drift, the effect of allowing the modification was to make lawful the recommencement of

modification was to make lawful the recommencement of dumping of coal waste. Accordingly the environmental effects of recommencing the dumping had to be taken into account by the consent authority under s.102. Talbot J held however that the Council was entitled to limit its consideration to the effects of road haulage.

Conclusion

The findings of the Court in this case are disappointing. Evidence was before the Court that transport of the coal waste to the emplacement site was considered to be the most important issue by the Government in granting the 1983 consent. Despite this it was found that the failure to construct the drift in breach of several consent conditions effectively had no consequences, as the breaches did not lead to the lapse or expiry of the consent, and the conditions were not enforced by the Minister or the Council.

The Court also found that the modified development remained "substantially the same" for the purposes of s.102, despite the fact that the modification meant that transport of waste would be by road instead of underground drift for the next 25-30 years. The effect of the modification was also to make lawful the dumping of up to 13 million tonnes of coal waste on the emplacement, however the Court found that it was not necessary for the environmental consequences of that dumping to be taken into consideration.

Further, it is difficult to understand the Court's finding that the breach of condition 9 requiring a deed to be entered into for the dedication of land was "technical" and had no environmental consequences simply because those consequences were not immediate.

Species Impact Statement & jurisdictional fact

Casenote: Cameron v Nambucca Shire Council and Anor (unreported, 8 August 1997, Talbot J, Land and Environment Court)

James Johnson, Director, Environmental Defender's Office (NSW)

The Land and Environment Court recently delivered an important case on the assessment of the impact of development on threatened species. The proponent had made application for development consent for a resort style residential development at Scotts Head, NSW. Ninety cabins were to be brought onto the site. A species impact statement was not lodged with the development application.

In January and February 1997 the proponent cleared part of the land in preparation for designing and constructing the development. Council had issued a deferred development consent and only became satisfied that the deferred commencement condition had been met on 15 May 1997. Council reissued the notice of determination for the consent to operate from 19 May 1997. Accordingly the clearing was found to be in breach of section 91AA(1) of *the Environmental Planning and Assessment Act* 1979 (NSW) **(EP&A Act)** and section 118D of the *National Parks and Wildlife Act 1974 (NSW)* **(NPW Act)**.

Development Likely to Significantly Effect Threatened Species

Section 77(3)(b)(I) of the EPA Act provides that a development application

> "...shall, if the application is in respect of development on land that is, or is part of, critical habitat or is likely to significantly effect threatened species, populations or ecological communities, or their habitats, be accompanied by a species impact statement prepared in accordance with division 2 of part 6 of the *Threatened Species Conservation Act 1995*."

The Court followed the decision of the Court of Appeal in *Helman v Byron Shire Council* (1995) 87 LGERA 349, which held that compliance with section 77 is a factual condition precedent to the exercise of power by the decision maker to grant development consent. Where the relevant question of fact is to be determined by reference to objective criteria, the council as a decision maker cannot confer on itself the power to make the determination by incorrectly deciding that question of fact.

What this means is that the question as to whether a development is likely to significantly effect the habitat of threatened species is an objective question to be determined on evidence. It is not a question which the council can decide as a matter of its own opinion and which can only be overturned by way of judicial review. This is a most significant and positive development in the law.

On the facts of the particular case, the proponent's expert conducted preliminary flora and fauna assessments relying upon a survey of the site undertaken over three days in mid winter "at a time when it must necessarily exclude a sweep of species that are native to the type of habitat found on the land." The Court held that:

" in order to understand whether there exists a viable local population of the species referred to ... there must be a proper survey to establish the extent of the local population and its viability."

The judgment highlights the necessity for better baseline information about the presence of species, covering a range of seasons. The Court considered the applicant's evidence which relied on inspections of the site over two days which found

several threatened species on the site. The Court held that:

> "although the duration of the survey undertaken by the applicant's experts was for a lesser period, the results demonstrate that a proper assessment of a development site may require investigation during more than one season and the utilisation of a range of techniques to take account of migratory movements and seasonal variation in detectability of species."

The *Cameron v Nambucca Shire Council* case represents the second time that the Land and Environment Court has found that section 118D of the NPW Act which makes it an offence to destroy habitat of threatened species has been breached[1], neither of which were brought or assisted by the NSW National Parks and Wildlife Service, the regulatory authority charged with the responsibility of protecting threatened species in NSW.

Congratulations to the applicant, to Tim Robertson (Barrister) and Bruce Woolf (solicitor) on their success.

ENDNOTE

[1] For the other example see Oshlack v Iron Gates Pty Ltd and Anor (unreported, Stein J, LEC, 6 March 1997).

Councils and Expert's Reports

Case Note: Harry Seidler and Associates v Wingecarribee Shire Council (unreported, 3 April 1997, Lloyd J, Land and Environment Court)

James Johnson, Director, Environmental Defender's Office (NSW)

On 3 April 1997 Lloyd J in the Land and Environment Court handed down judgment in Seidler v Wingecarribee Shire Council, which is an interesting judgment on the question of costs.

Harry Seidler and Associates was the applicant, on behalf of the owners of a property, for development consent to construct a residential dwelling. The dwelling was to be situated on top of an escarpment and one of the critical issues to be resolved was the question of bush fire hazard. On the recommendations of the Councils bush fire control officer, the applicants engaged a fire expert who was described as someone whose opinions were respected by the Council.

The report submitted by this expert concluded that the risk of fire was low and that "fuel free" and "fuel reduced" zones together with a well designed building would provide an appropriate standard of bush fire protection. In the meantime Council employed a new bush fire officer. This officer reported that in his view the sight of the proposed dwelling was unsatisfactory. However, two weeks later the new fire officer appeared to have changed his opinion and agreed that the original report was reasonable.

The Council engaged another consultant to undertake a further analysis of the bush fire hazard. Two weeks after doing this, two things happened. Firstly, the Council resolved to refuse the development application because of the bush fire risk. Secondly, Council received a response from the consultants it had engaged in which the consultants agreed with the assessment of the original expert that the sight was suitable for the erection of a dwelling. Council hadn't waited for this report before deciding on the development application.

Class 1 proceedings were immediately commenced and not long after the Court granted approval by consent.

The Court held that the failure of the Council to wait until it had received the report of the consultant that it had engaged constituted "exceptional circumstances" which would justify an order for costs in this instance. This follows the usual practice of the Court that no order for costs is made in planning and building appeals unless the circumstances are exceptional.

The judgment appears to be the first time, however, that an applicant's own costs have been allowed as recoverable. The Court recognised the practical reality that the applicant was the expert engaged on behalf of the owner.

WHEN DID I READ THAT ARTICLE IN *IMPACT*....?

Inserted in this edition is the first complete Index of Impact (1986 - 1997). The Index will be updated annually and included in each September edition.

NOTICEBOARD

A precedent worth following!
Law firm Slater and Gordon has settled out-of-court with the Financial Review, in defamation proceedings over an article on the law firm's involvement in a case regarding mining in the Solomon Islands. The law firm has donated the funds to three environment groups including $5 000 to the Environmental Defender's Office, Victoria.

Environmental Law Conference 1997, Environmental and Planning Law Association
30 & 31 October 1997 The Town Hall Sydney
"Meeting the Challenge - Implementing Environmental Legislation for the 21st Century". Topics include:Staged and integrated development; Who cares about development; Clean up your Act; Should you be certified - legislation proposals; Should there be public interest in the public's interest; The conflict between morals and planning. Information: Michelle Kearns 02 9221 8644

1997 Environmental Outlook Conference, Aust Centre for Environmental Law 9-10 Oct 1997 Hyatt Regency, Sydney
An international and national update on environmental law and policy for business and government: Australia, European Union, Asia and United States. Information: 02 6281 6624

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