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Approve First - Assess Later: is Commonwealth environmental impact assessment an empty ritual?

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1. An unfortunate trend

An unfortunate trend has become apparent in the environmental impact assessment (**EIA**) process at the Commonwealth level. EIA is essentially procedural, rather than substantive in nature (that is, there are no prescribed outcomes or prohibitions involved in the EIA process). It has therefore always been susceptible to becoming a mere formality, which developers undertake in order to mollify opponents and present a facade of environmental sensitivity. In recent times this trend has become increasingly apparent, to the point where there are a number of examples of the Commonwealth giving approval to a proposed development before any substantive assessment occurs. This trend needs to be resisted.

2. What is the purpose of EIA?

Conceptually, EIA is intended to be a means of identifying and evaluating the potential impacts of a development proposal, appropriate mitigation measures, and alternatives to the development and their impacts. It should also propose procedures for the monitoring of predicted and actual impacts[1]. In cases where an environmental impact statement (**EIS**) is required under Commonwealth and NSW legislation, public exhibition and the right of the public to make submissions is an integral part of the process[2]. In **Prineas v Forestry Commission of NSW**[3], Cripps J. made the following comments in relation to EIA under Part V of the Environmental Planning and Assessment Act 1979 (**the EPAA**):

> "An obvious purpose of the EIS is to bring matters to the attention of members of the public...and to the determining authority in order that the environmental consequences of a proposed activity can be properly understood. In order to secure these objects, the EIS must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out of that activity."

An EIS is not intended to be a substitute for the exercise of the discretion of the decision maker. However it does provide vital information to the decision maker about the likely environmental consequences of proceeding or not proceeding with the development. Given the acceptance by the Commonwealth government of the principles of ESD[4], this is self evidently of fundamental importance to the determination of whether to

CONTENTS

approve a development or not. Such information is also essential for the determination of what conditions will be necessary or desirable to impose upon a development in order to mitigate or avoid identified potential environmental impacts.

Adequate prior assessment is also necessary to enable the community to participate in an informed manner in the decision making process.

The importance of community participation can be demonstrated by the level of response to the exhibition of EIS's for recent major projects. In the case of the proposed Eastern Distributor roadway in Sydney, the Roads and Traffic Authority received some 2 762 representations to the exhibited EIS[5] (475 of which were individually prepared representations), as a result of which substantial changes were made to the proposal. In relation to the proposed Jabiluka Uranium Mine in the Northern Territory, 86 submissions were received[6] which documented fundamental inadequacies in the EIS, and resulted in a defensive supplement to the EIS being prepared and changes being made to the final proposal.

3. Approve first - assess later: recent examples.

3.1 World Heritage Properties Conservation Act 1983 (Cth): Port Hinchinbrook Resort and Marina

In 1996 the Minister for Environment granted consents under the World Heritage Properties Conservation Act 1983 **(World Heritage Act)** to Keith William's company, Cardwell Properties Pty Ltd, to remove fallen mangroves, to clear other groves of mangroves and to dredge the Hinchinbrook Channel, all of which are located in world heritage areas on the Great Barrier Reef. The purpose of the consents was to allow the Port Hinchinbrook tourist resort development to proceed.

In the Federal Court, first before a single judge and later a Full Bench, Friends of Hinchinbrook **(FOH)** argued that the Minister had made a number of legal errors in deciding to grant consent for these activities under the World Heritage Act to Cardwell Properties.

One of the main arguments advanced by FOH is that the Minister, by negotiating a Memorandum of Understanding (MOU) with the Queensland Government about the preparation of a Regional Management Plan, which was not yet drafted, deferred for future determination essential matters which he was bound to consider.

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

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

FOH argued that the Minister had deferred consideration of the nature and extent of these impacts and the measures necessary to mitigate these impacts. These were critical matters for consideration at the time of making the decision. Similarly, social and economic factors were deferred for later consideration under the proposed Regional Management Plan.

On the issue of whether the Minister had deferred consideration of matters he ought to have considered when granting the consent, His Honour Justice Sackville (later followed by the full Bench) rejected this submission and found (at p 71):

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

The Federal Court has therefore accepted the practice under the World Heritage Act of conducting assessment and developing management plans *after* consent has been granted.

4.2 Environment Protection (Impact of Proposals) Act 1974 (Cth): Jabiluka Uranium Mine

Following the consideration of an EIS prepared by the proponent and exhibited pursuant to the requirements of the Environment Protection (Impact of Proposals) Act 1974 (Cth) **(EPIPA)**, the Minister for the Environment made recommendations to the Minister for Resources and Energy, as required by the Administrative Procedures made under the EPIPA. (The Minister for Resources and Energy is responsible for issuing a permit for the export of uranium.)

The recommendations stated that, on the evidence available to the Minister, there did not appear to be any environmental issue which would prevent the proposal from proceeding, and suggested conditions on the basis of which the project could proceed. There were, however, a number of significant flaws in this EIS process.

The objects of the EPIP Act are to ensure, to the greatest extent practicable, that matters affecting the environment to a significant extent are fully examined and taken into account (section 5). Nevertheless the guidelines issued for the preparation of the EIS indicated that it was not necessary for the proponent to assess either the use or disposal of exported uranium. It is apparent that these matters, along with radioactive contamination at the mine and processing sites, are the matters which are most likely to affect the environment to a

significant extent if the proposed uranium mine is to proceed.

In addition, the EIS was found by Environment Australia to be fundamentally lacking in necessary baseline data in relation to flora, fauna, water quality, radiation levels, hydrology, hydrogeology, soils, air quality and heritage. Social impact assessment of aboriginal communities in the area was based upon a literature review. As a result of these deficiencies, Environment Australia concluded that:

"The final construction...may not reflect what was assessed under the EPIP Act....The use of modelling based on incomplete baseline data and extrapolation from distant areas leaves open the possibility that there could be adverse impacts that have not been identified and which therefore have not been addressed."[7]

5. Conclusion - the need for legislative change.

Space does not permit the canvassing in this article, of detailed solutions to the problem of inadequate environmental impact assessment at the Commonwealth level. The Government has foreshadowed an agreement with the states on the roles and responsibilities of the Commonwealth for the environment. Following this, the Commonwealth will review its legislation, including the EPIPA. The challenge will be to ensure that a more credible and useful EIA process will flow from the review.

Endnotes

1. See for example ANZECC discussion paper, A National Approach to Environmental Impact Assessment, AGPS, 1991.
2. Environment Protection (Impact of Proposals) Act 1974 (Cth) and Environmental Planning and Assessment Act 1979 (NSW).
3. (1983) 49 LGRA 402 at 417.
4. See for example the Inter Governmental Agreement on the Environment; the 1992 National Strategy for Ecologically Sustainable Development; and the Rio Declaration on the Environment and Development (adopted by Australia).
5. Proposed Eastern Distributor, Director General's Report under section 115C of the Environmental Planning and Assessment Act, Department of Urban Affairs and Planning, June 1997, page 8.
6. Proposal to Extract, Process and Export Uranium from Jabiluka Orebody No. 2: The Jabiluka Proposal, Environment Assessment Report, Environment Australia, August 1997, page 9.
7. Jabiluka Environment Assessment Report, supra.

EDO Win in WA Supreme Court:

Expansive Interpretation of Ability to Make Public Interest Objections in the Mining Warden's Court

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The Full Court of the Supreme Court of Western Australia has recently handed down an important decision in the case of *Re Heaney; ex parte Serpentine-Jarrahdale Ratepayers' and Residents' Association (Inc)* [1] regarding the standing of public interest objectors before the Mining Warden's Court of Western Australia. The Environmental Defender's Office WA represented the Association in the case.

1. The Issue

The statutory scheme to which the decision relates is set out in the *Mining Act 1978* (**the Act**). The main issue in the case was the basis upon which the Mining Warden's discretion under s. 75(4) should be exercised when confronted with a person seeking to raise objections on public interest grounds. Under the Act, an objection against an application for a mining lease may be lodged, and where that objection complies with the procedural requirements laid down by the *Mining Regulations 1981* "the Warden shall hear the application for the Mining Lease in open court on a day appointed by the Warden *and may give any person who has lodged such a notice of objection an opportunity to be heard*" (s. 75(4), emphasis added).

2. The History of the Objection

In December 1991 the Association lodged an objection to an application for a mining lease within the Serpentine-Jarrahdale Shire lodged by Cable Sands (WA) Pty Ltd (**Cable Sands**). The objections related primarily to the environmental impacts of the proposed sand mining activities, and included matters such as:

- The adverse effect of mining on ground water levels and ground water quality;
- the effect of run-off into the Peal Harvey Inlet;
- the destruction of native flora and fauna;
- the impact of dust and noise on nearby residents.

In 1993 the objections came before Mining Warden French, who found that she did not have the power under the Act to consider objections of an environmental nature, and dismissed the objection. In her view, the Mining Warden's role was limited to matters going to the Cable Sands' title, such as whether the land in question had been properly marked out; it did not extend to public interest matters.[2]

The Association successfully applied to the Full Court of the Supreme Court to quash this decision. In coming to the conclusion that the Mining Warden *did* have the power to hear objections of a public interest nature, the Court paid particular attention to the fact that under section 111A of the Act, the Minister for Mines has the power to refuse an application for a mining tenement if the Minister is reasonably satisfied on public interest grounds, that the land should not be disturbed or that the application should not be granted. It was held that in the light of this provision it must have been intended that the Mining Warden be able to consider, as part of her investigatory and recommendatory functions, public interest matters which the Minister was expressly empowered to take into account at a later stage.[3]

At the conclusion of his judgement in the *Re Warden French* case, Ipp J stated that:

> In the circumstances, I conclude that the Warden, in hearing an application under s75(1) is empowered to hear

objectors who raise matters of public interest. This does not mean that any "busybody" is entitled to object on grounds alleged by him or her to be in the public interest. Only a person with the requisite standing may object, and it is for the Warden to determine whether the objector has that standing: cf *Ex parte Helena Valley/Boya Association (Inc); Re Smith; Ex parte Rundle* (1991) 5 WAR 295. It is also for the Warden to determine whether the objection sought to be raised does go to the public interest: cf *Sinclair v Mining Warden at Maryborough.*

This dictum of Ipp J formed the basis of an application by Cable Sands to strike out the objection when the matter came back before the Mining Warden's court on 10 April 1996. The application was on two grounds:

- that the applicant had no standing to object on environmental grounds; and
- that in any event, some of the grounds of objection were incompetent, because they were based on private interests which were not indicative of a public interest.

Evidence was heard on these issues, including evidence of the interest of the Association in the granting of a mining lease. This interest was based on two things: its objects (which included the object of protecting and safeguarding the interests of ratepayers and residents); and its membership (13 of the 26 lots within the area to be subject to the proposed mining lease were owned by members of the Association).

On 24 April 1996 Mining Warden Heaney upheld Cable Sands' application, finding that the Association did not have the "requisite" standing, and that its objection "did not go to the public interest".

In his Reasons for Decision delivered on 24 May 1996, the Mining Warden indicated that in coming to his conclusion on the standing issue, he had applied the special interest test set out by the High Court in *ACF v Commonwealth* (1980) 146 CLR 493 and applied in *North Coast Environment Council Inc. the Minister for Resources* (1994) 55 SCR 492. The Mining Warden found that the Association did not having the requisite special interest in the subject matter of the objection because the Association did not have adequate credentials as an environmental organisation, and because the Association's motives for objecting to the grant of the Mining Leases seemed to the Mining Warden to be "more for the protection of [the Association's] own members private interests than for the protection of the environment".

In considering whether the Association's objection went to the public interest, the Mining Warden referred to a number of provisions in the Act which provide protection to the owners and occupiers of land.[4] He went on to find that, as a matter of statutory construction, private interests were protected by those provisions of the Act and as a result could not be relevant considerations in a Warden's consideration of whether to recommend grant or refusal of an application for a mining tenement.[5] The consequence of this finding was that he struck out the Association's grounds of objection relating to the alleged detrimental impact of the proposed mining on the lifestyles and livelihoods of local landholders within and outside the proposed area of the mining lease, and property values in the general vicinity.[6]

3. The Issues for Determination before the Supreme Court

The EDO WA applied to the Supreme Court on behalf of the Association to overturn the Mining Warden's decision.

The issues for determination in the case were:

- whether the Mining Warden had erred in exercising his discretion under s.75(4) of the Act when he refused to give the objector Association the opportunity to present its case; and
- whether the Mining Warden had erred in finding that some of the grounds of objection put forward by the Ratepayers' and Residents' Association were matters of "private interest" which he could not consider.

4. The Decision of the Full Court

Justice Franklyn delivered the leading judgement. Justices Murray and Owen agreed with those reasons for decision.

On the issue of standing, Justice Franklyn found that a special interest in the subject matter of the objection is not a condition of the right to object under the Act[7]. The statement by Ipp J to this effect in the *Re French* case was dismissed as being *obiter dicta*.[8] Justice Franklyn pointed out that the "special interest" test had been developed by the courts to determine who had standing to sue to prevent the violation of a public right or to enforce the performance of a public duty.[9] He noted that in the present case the objector was not suing to prevent the violation of a public right or to enforce the performance of a public duty, but rather to lodge objections to the grant of an application which, in the end, would be the subject of consideration by the Minister, who may in his discretion grant or refuse that application.[10]

After noting the terms of section 75 (4) of the Act, his Honour pointed out that there is in fact no right of standing conferred by the Act, but rather a discretion conferred upon the Mining Warden to give objectors the opportunity to be heard.[11] In the exercise of this discretion, the Mining Warden is not permitted to ignore an objection, and is required to exercise that discretion judicially, having regard to the nature and content of the objection in the context of the Act.[12] His Honour concluded:

> "The proper exercise of discretion would appear to require that the Warden examine the grounds of objection and determine whether, objectively, they relate to a matter or matters of such a nature as to be reasonably capable of giving rise to the question whether it is in the public interest that the ground should not be disturbed or that the application for the mining lease be refused. Should he find it to be of that nature it is still a matter for his discretion whether the objector should be heard. Bearing in mind the provisions of the Act and in particular s111A and that, pursuant to s75 (5) the Warden is to forward to the Minister the notes of evidence relating to the application together with his support and recommendation, it would seem generally appropriate, in such case, that he hear the objector. The Minister will then have the benefit of the

"filtering of objection based upon considerations of the public interest through the Warden" (*Re Warden French:* Kennedy J at 317)."

On the issue raised of whether the Mining Warden was correct in finding that some of the Association's grounds for objection were not proper grounds of objection because of what he considered to be their private interest nature, Justice Franklyn appeared to accept that the Mining Warden should not take into account matters entirely of a private interest nature.[13] He went on to find, however, that the Warden had fallen into error in assuming that there can be *no* public interest aspect to an objection lodged by a private land owner or occupier who is entitled to protection under the provisions of the Act.[14] The approach which should be adopted by a Mining Warden when considering whether an objection is relevant to the "public interest" should be to ask whether the objection raises a question which, objectively viewed, can reasonably give rise to a concern that the disturbance of the relevant land or grant of the application might not be in the public interest.[15] This approach should be adopted whether the objection is lodged primarily in respect of a "private interest", or as one of "public interest.[16]

5. Conclusion

The decision of the Full Court in *Re Heaney; ex parte Serpentine-Jarrahdale Ratepayers' and Residents' Association (Inc)* sets a useful precedent for individuals and groups wishing to raise public interest objections to the grant of mining leases and other mining tenements.[17] It confirms that public interest objections may be heard by the Mining Warden, and establishes that the Mining Warden should not apply a restrictive definition of "public interest". It also makes clear that the special interest test of standing, which has historically been applied by the Courts to exclude some public interest litigants, should not be applied by the Mining Warden. Rather, the Mining Warden has a discretion which should ordinarily be exercised in favour of an objector putting the case for the refusal of a mining lease on public interest grounds.

Endnotes

1. Unreported, 9 September 1997, lib. no. 970431.
2. *Re French; Ex parte Serpentine-Jarrahdale Residents' and Ratepayers' Association (Inc.)* (1994) 11 WAR 315 at 325
3. *Re Warden French* at 326 (Ipp J), 316 (Kennedy J)
4. Mining Warden's Decision (Unreported, 24 May 1996), pp.5-6; *Re Heaney; ex parte Serpentine-Jarrahdale Ratepayers' and Residents' Association (Inc)* at 9; the provisions cited were ss. 28(permit from Warden needed prior to entry on private land), 29(2) (consent of owner and occupier needed for mining on some private land, such as land under cultivation), 35 (compensation must be agreed or determined before mining on private land), 123 (compensation to owner and occupier for loss or damage caused by mining).
5. Mining Warden's Decision (Unreported, 24 May 1996), p.6; *Re Heaney* at 9.
6. Mining Warden's Decision (Unreported, 24 May 1996), pp.4, 6.
7. pp.12-13
8. p. 20.
9. p. 14.
10. p. 14.
11. p. 21
12. pp. 21-22
13. p.10
14. p.10, citing with approval *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 487.
15. p.10
16. p.10
17. In respect of other mining tenements, see 59 (exploration licences) and 70D (retention licences), which are in similar terms to s.75 of the Act. Note that s 42 (prospecting licences) does not empower the Mining Warden to recommend to the Minister, and that public interest objections may therefore not be available in respect of prospecting licences.

The Need For Reform:

Biodiversity Conservation And The Commonwealth Endangered Species Protection Act 1992

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The Environmental Defender's Office and Humane Society International recently prepared a submission to the five year statutory review of the Commonwealth Endangered Species Protection Act (**the Act**), recommending major reforms. This article summarises some of the principal matters raised in that submission.

The EDO and HSI strongly support the intent of the Act. However, the Act is not fully achieving its intended purpose, due to the limitations inherent in the current form of the Act and the restricted resources which have been made available for implementation.

The EDO and HSI also consider that the Act fails to fulfill Australia's obligations under the 1992 Convention on Biological Diversity (**the Convention**). The Act could, and should, be amended to effectively implement a number of biodiversity conservation measures still not adequately covered by Commonwealth legislation. Senator Hill has recently flagged his intention to create comprehensive biodiversity legislation. The EDO considers that the amendments to the Act suggested below, and the further matters recommended in the full EDO and HSI submission, will result in the Act fulfilling that purpose.

Australia's biological diversity remains under constant - and ever increasing - pressure, due to the nation's growing population and the utilisation and consumption of resources. It is essential therefore, that the Act provide for effective long term strategic measures to conserve biodiversity, and that those measures are fully implemented.

Summary of principal reforms

To start with, it is clear that the resources currently allocated for implementation of the Act are not sufficient to effectively and efficiently meet the requirements of the Act. The Endangered Species Advisory Committee has advised that proper implementation of the Act in its current form will require approximately $25 million per year.

1. The Act's Objectives

The following objects should be included in the Act:

- an object to promote ecologically sustainable development (**ESD**), along with an appropriate definition of ESD;
- an object to prevent species, populations and ecological communities from becoming vulnerable in the first place;
- an object to implement Australia's obligations under the CBD.

2. Australia's International Obligations

The Convention obliges Australia, amongst other things, to enact legislation for the protection of threatened species and populations, including provisions promoting the protection of natural habitats, the rehabilitation of degraded ecosystems, and the recovery of threatened species.

This obligation carries with it two distinct jurisdictional duties. First, Australia must ensure that such legislation covers all endangered species and natural habitat within its national jurisdiction. Second, Australia must ensure that the legislation also covers all processes and activities, *regardless of where their effects on biological diversity occur*, which are carried out under its jurisdiction and control.

To comply with these obligations, a new Schedule should be added to the Act containing the current World Conservation Union (**IUCN**) list of international threatened species. The regulatory provisions of the Act would then apply to that schedule.

The Act should also regulate certain "processes and activities" Australia's Exclusive Economic Zone, thereby helping to ensure protection of endangered species worldwide.

Given the varying levels of state and territory legislative responses to the protection of species and habitat, it is necessary for the Commonwealth to legislate for effective protection by covering the field with minimum standards and criteria for the protection of endangered species. The EDO and HSI recommend that the Act be amended to give its provisions Australia-wide application, subject to the States and Territories enacting equal or more rigorous legislation.

3. The nomination and listing process

In addition to the existing categories of "endangered" and "vulnerable" species, the Act should provide for the recognition and listing of two new lower level "at risk" categories: "rare" and "potentially vulnerable". All four categories should apply to communities as well as species.

The Act should also make provision for the listing of endangered, vulnerable, rare and potentially vulnerable populations.

There is a need for the Act to make provision for the identification and protection of habitats crucial for the long-term survival of threatened species ("**critical habitat**").

The EDO and HSI have serious concerns about the time taken to adjudicate upon public nominations for listing of species and threatening processes. The Act should impose an obligation requiring a final listing determination to be made within 6 months of the date of a nomination.

4. The Act's Long Term Strategic Tools

The Act should make provision for the identification, declaration and management of protected areas, in accordance with Australia's obligations under Article 8 of the Biodiversity Convention. Article 8 requires that each contracting party establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity.

Given the large number of species to be dealt with, and schedules which are steadily increasing in size, there is and will continue to be a long interval following listing, during which the species, and communities listed will receive no protection through the Act's long term strategic tools. The EDO and HSI propose that the Act be amended to require the preparation of species "Action Statements", providing interim information on the conservation needs of listed species, for the purpose of government, industry and community circulation.

5. The assessment and approval process under the Environment Protection (Impact of Proposals) Act (EP(IP) Act)

The mechanisms for environmental impact assessment and the approval of development proposals likely to affect listed species under the EP(IP) Act are inadequate. Currently the Minister responsible for a particular activity refers the matter to the Minister for the Environment for assessment if the activity could threaten with extinction, or significantly impede the recovery of, a listed native species or community. If a matter is not referred then effectively no impact assessment occurs. If a matter is referred then the Minister for the Environment has a discretion as to whether an environmental impact statement (**EIS**) or Public Environment Report (**PER**) is required. The Minister for the Environment can only make *recommendations* regarding whether a proposed activity will proceed.

The process is highly discretionary, with the consequence that it does not result in adequate or uniform assessment of activities which may affect listed species. Nor does it result in effective or uniform restrictions being imposed on harmful activities. The EDO and HSI advocate the following amendments:

1. The Acts should be amended to *automatically* require the preparation and submission to Environment Australia of an equivalent to the Species Impact Statement (**SIS**) required under the NSW Threatened Species Conservation Act, if a proposed activity is likely to significantly affect listed species, populations, communities or their habitats.

2. The current public exhibition and participation requirements applicable to EIS's under the EP(IP) Act should be made applicable to such SIS's.

3. The Director of the Biodiversity Group should be given a concurrence role regarding the determination of whether such an activity should proceed.

4. The EP(IP) Act should be amended to allow *any person* to refer a proposal to Environment Australia for determination of whether a SIS, EIS or PER is required.

5. If the SIS determines that an activity may threaten a species with extinction through the destruction of critical habitat or otherwise, then the activity should not be allowed.

6. Conservation orders

The procedures under the Act for the imposition of conservation orders should be reviewed. The powers of the Minister to impose such orders are subject to excessive restrictions. The Director of National Parks and Wildlife should be empowered to make conservation orders, and the power of other Ministers to effectively veto the imposition of a conservation order should be removed.

7. Obligations under and enforcement of the Act

The effectiveness of the Act in achieving its objects is potentially severely compromised by the failure to ensure that the Act's provisions are uniformly binding on affected parties. In particular the exemption of Commonwealth bodies from prosecution or civil enforcement proceedings means that compliance for such bodies, with any of the provisions of the Act, is almost entirely discretionary.

The exemption of the Commonwealth from prosecution under the Act should be removed, along with the restrictions on third parties bringing civil proceedings for enforcement of the Act.

The EDO and HSI also consider that the threat to biological diversity presented by vegetation clearance justifies the imposition of a positive obligation for assessment of biodiversity prior to undertaking clearing, or other activities potentially damaging to listed species.

Conclusion

The EDO and HSI consider that the amendments proposed above and in the submission will:

- substantially increase the effectiveness of the Act in achieving the current objects;
- result in more extensive and substantive compliance by Australia with its international obligations under the Biodiversity Convention;
- increase the scope of application of the Act; and
- assist in the establishment of a uniform protection regime for threatened species across Australia.

For more information or a copy of the full submission, contact Andrew Sorensen on (02) 9262 6989.

Environmental Legal Research and the Internet: A Guide

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1. Introduction

"The Web", "E-mail", "USENET", "listserv", "IRC", "telnet", "majordomo","HTTP", "gopher", "FTP", "homepage", "URL" and of course,"globalisation". This is the alphabet soup of jargon that is being used increasingly to extol the virtues of computer network technology, particularly now that computers can be readily connected to each other around the world. In fact, these networks and their myriad applications are extremely useful tools and they are having a substantial influence on the public interest practice, research and teaching of environmental law.

For example, through Internet email conferencing a group of public interest environmental lawyers and scientists around the world, known as the Environmental Law Alliance Worldwide (E-LAW), have assisted each other to meet the challenge of the vastly superior resources that are possessed by opposing counsel representing those engaged in or threatening environmental harm. By pooling their expertise and resources over the Internet, very small public interest environmental law firms can rival the talent of the big law firms which charge polluters and developers extremely high rates, and can almost rival their resources.

Academically, there is an Internet email discussion list devoted to global exchanges between environmental law professors. In Australia, plans are in train to establish a similar discussion list, designed to facilitate discussion between environmental law teachers across Australia.

The focus of this article, however, is on only one part of this contemporary world of "legal" computer applications - the research and informational potential of the Internet. Other applications, such as the strategic potential of establishing a presence on the Internet - known as a homepage or Website - or of communicating information quickly to large numbers of people, will be subsequently explored in other articles.

2. What is the Internet and How is it Used?

Quite simply, the Internet is a group of computers around the globe that are connected together into a massive network. It can be used for a number of different purposes including:

- sending and receiving messages consisting of text, computer files or programs, using electronic mail (E-mail);
- reading and contributing to discussion groups on thousands of topics (USENET news);
- receiving information updates and participating in discussions on various subjects by joining E-mail lists (often called listserv or majordomo);
- running programs, such as a library catalogue search, on someone else's computer (telnet);
- conversing with E-mail in "real time" with people around the world using Internet Relay Chat (IRC);
- downloading a copy of a file or program from another computer (using FTP - File Transfer Protocol);
- retreiving text information using a system called Gopher (a way of searching certain databases); and
- viewing, reading or publishing text, graphics, images, sound and video on the World Wide Web (WWW or the Web).

While Internet applications that foster the quick exchange of information over the Internet (E-mail, USENET news, IRC) are important in campaigning and increasing public awareness, they are not particularly helpful in conducting legal research. The applications used to transfer information from other computers (telnet, FTP, Gopher and the Web) are where the Internet research potential lies. Increasingly, however, the Web is seen as the Internet. In fact, the Web is gradually absorbing all these forms of Internet use. Modern Web "browsers" used to access the Web include E-mail, news groups, telnet, FTP, and gopher capabilities.

3. Getting Started

With the following background, you are now ready to get started. You will need to have:
(i) a computer, the faster the better — one with a Pentium chip and 32 megabyte of RAM (Random Access Memory) if possible;
(ii) a modem, again the faster the better — a speed of 28.8k if possible;
(iii) an Internet Service Provider (ISP); and
(iv) necessary computer programs.

After acquiring what is hopefully a fast computer and modem (and setting it up), you will need an ISP. This is a company that allows you to access the Internet, for a fee, through their computers. Using your modem, you dial up the ISP on a phone line with the number they provide, and then send or receive E-mail, browse the Web, or engage in the other Internet applications. There are local ISPs throughout Australia. You should consult the Yellow Pages and comparison shop - prices vary considerably.

Email software, such as Eudora, and web browsers, such as Netscape, will allow you to get started. Other software for using the Internet is available from retail computer stores, and your ISP may provide preconfigured software as part of its service package. Once you are hooked into the Internet with a browser, you will also be able to download "shareware" and "freeware"

that allow you to make use of other Internet applications.[1]

4. Your Own Internet Law Library and Newspaper Archive

You have now surmounted the headaches of setting up your computer and installing your software. You dial up your ISP and open your web browser and up comes a "homepage" - usually your ISP's - with dazzling graphics, and all the flashing lights, bells and whistles. Naturally you are sidetracked with your new "toy". After playing around for a few months, you finally decide to get some work done. The first step is to find and "bookmark"[2]some good "search engines" and indices.

The Web is filled with everything from crazed rantings and amateur babble to truly useful information. Numerous sites exist to help you find what you are looking for; you should experiment with several, because they vary in ease of use, comprehensiveness and search methodology. Some independently evaluate any site that wants to be added to their index, in a sort of quality control. Some have organised Websites by subject catagory, so you can start your search with a general focus.

At a macro level, one good place to start searching is a site called Yahoo.[3] It is easy to use, pre-screened for junk, has a subject index, and covers an extensive array of sites. If it does not turn up your search terms in the titles of Websites or abstracts, there are a host of other useful search engines and indicies. If you are looking exclusively for an Australia Website try using the Webwombat, [4]Australia's most comprehensive full-text search system of Websites exclusive to Australia. Alternatively, you can search on Lycos, Webcrawler, Excite or Infoseek, all very good search engines in their own right. For an excellent subject index, try the WWW Virtual Library.[5]

All of these search engines and indicies allow you to search for not only legal environmental information, but also scientific and political aspects of environmental problems. They allow you to access legal texts, as well as newspaper articles and government websites. Additionally, there are law-specific search systems, such as Findlaw, and environment specific search tools, such as EcoNet's Gopher.[6]

A few observations about on-line searching are in order. First, like all researching, it takes some practice in order to become proficient. Searches improve with time; make sure you have the on-line information about how to use each engine or index you want to use. Second, it is hard (at least for this writer) to avoid distraction by following "cool" links into obscure subtopics. Third, it takes as much or more time as doing research in a library because, frankly, your local law library is better organised. Finally, for every site that contains detailed and useful information, you will probably view at least a dozen that are superficial, inaccurate or otherwise worthless.

One of the most useful kinds of Website is one in which a dedicated person has already spent time assembling a "bibliography" of good Websites on your topic of choice. For example, the University of Melbourne's Law Faculty has a good list of Australian law resources, including links to even more Australian law links. The EDO has a list of useful environmental law resources (both Australian and internationally) constantly under construction.[7]

5. A Sampling of What's On-Line [8]

As this guide is for beginners seeking environmental legal and other information over the Internet, the sampling of what is out there in this article is intended to simulate how much useful material could be obtained by a novice with limited time and a specific area of research. The natural area of focus is, of course, municipal Australian environmental law and policy, or international environmental laws of interest to Australia. As it turns out, as with any other legal research, it is virtually impossible to know what resources have *not* been located by one's chosen search strategy.

5.1 Legislation

There are two excellent sources for legislative materials in Australia. At the federal level, the full-text of both current Acts and pending Bills is available at the Commonwealth Parliament Homepage. Likewise, the Australia Legal Information Institute's (Austlii) homepage, probably the best legal homepage in Australia, contains the full-text of Commonwealth statutes. Austlii also provides the full text of most, if not all, current Acts of all States and Territories. As with any other statutes be sure to check on how up to date the amendments are.

5.2 Case Law

Again, Austlii is the leader for full-text searching of case law on the Internet. It has cases from the full range of Australian jurisdictions, including all States and Territories and the NSW Land and Environment Court. The dates of coverage are not as comprehensive as might be desired, but it is by far the best site for searching case law.

The High Court also has its own Website and provides searchable full-text Commonwealth Law Reports, for those rare environmental cases that get to the High Court of Australia.

5.3 Governmental Departments

These are some of the best on-line resouces for general Australian environmental law material. Environment Australia is an award winning leader here, especially its ERIN Webpage. The site includes current events, legislative proposals, State of Environment Reports, National Environment Protection Measures, policy statements, and an invitation to comment on the various matters. Although the depth is variable - ranging from simple announcements to full-text documents - this is a very good site for keeping up to date.

From the Environment Australia homepage, you can link its other useful pages. For example, the State of the Environment Reports are on-line with useful statistics and information on Australian environmental quality. Also in the works is a page that will contain detailed information by various companies subject to the reporting requirements of the National Pollutant Inventory.

At a State level, the NSW Environment Protection Authority has gone on-line and its site contains a variety of useful information on current developments in New South Wales.

5.4 Environmental Law Organisations

Naturally, I have to first plug the EDO Network homepage in this space. It carries the individual pages of every EDO Office in Australia. At the EDO NSW page, for example, you can obtain weekly up-dates on office activities, information on the cases the EDO is working on, full-text copies of policy documents and law reform submissions, a publications list, and information on the environmental law workshops it periodically conducts at various locations throughout the State. You will also find links to other Environmental law sites.

Also very good is the Australian Centre for Environmental Law (ACEL) home page. It has a list of Internet sources for both environmental law and policy information, plus a good list of links to environmental law sites in Australia and around the world. It also provides information on the classes and courses that ACEL offers.

5.5 Environmental Interest Groups

There are a host of environmental interest groups with a presence on the Internet. One of the most useful sites that I have found is the Nature Conservation Council of NSW home page. They not only offer internet space - for a fee - to other environmental groups, but provide a broad range of useful information on hot environmental topics of the day.

The Association for Progressive Communications is a multinational association of computer networks related to social justice issues (environment, peace, labour, etc). Their Australian partner is called Pegasus. The network runs E-mail conferences, a calendar of events, news services and job postings. To participate, there is a modest fee. However, it is a great service if it is vital for you to be "in the loop" with the grass roots community.

6. Conclusion

While there is a variety of worthwhile environmental information available over the Internet, it is probably fair to say the information is still in its rudimentary stages. The biggest boon, perhaps, is the speed with which you can obtain documents found, especially international instruments that once took weeks and months to obtain in Australia. Also, it is an extremely convenient reference tool. If you need to know in a hurry what section 5 of the Environment Protection (Impact of Proposals) Act says, or when the Convention on Biological Diversity came into force, and what States are party to it, you can look up these details in minutes. If you want to see how the Commonwealth is thinking about implementing National Environment Protection Measures, you can download a copy of the proposed Bill right now.

As more information gets added to the Web, it is more likely that your research will uncover useful material. The wait is not likely to be long. The first Website was created in 1991; in 1993 there were 341 websites, a 634 per cent increase in Web use; by the end of 1995 the Web was doubling in size every 3 months. If something you are looking for does not turn up a first time, keep on looking.

Endnotes

1. Shareware is software that is made available over the Internet for a free trial period, after which it needs to be registered in order to remain operable. Freeware is provided free over the Internet. A popular site for downloading shareware and freeware is "Tucows". The URL (Universal Resource Locator or web address) is http://www.tucows.com/
2. All web browsers have a "bookmark" function which allows you to save and organise the URLs of Websites that you find useful so that you do not have to search from scratch each time you use the Internet. Note that URLs change frequently on the Internet, so it is necessary to keep your bookmarks current. Usually when a change occurs, you will be advised of the new URL at the old Website for some period of time.
3. The URL is http://www.yahoo.com/
4. The URL is http://www.webwombat.com/
5. All of these search engines can be reached through the environmental and legal links on the EDO Network homepage. The URL is http://www.edo.org.au/
6. Again, these can be reached through the environmental and legal links on the EDO Network homepage.
7. Again, these can be reached through the environmental and legal links on the EDO Network homepage.
8. All of the Websites referred to in this section can be found in the environmental and legal links on the EDO Network homepage.

Development Approvals, Cassowaries and the Nature Conservation Act

Rowan Silva, Solicitor, Environmental Defender's Office (Nth Qld)

Introduction

The object of Queensland's *Nature Conservation Act 1992* (**the Act**) is simply "..the conservation of nature".[1] Whilst there is still considerable debate about how well it achieves this purpose, the Act does contain a valuable mechanism for enhancing nature conservation on private land, through the creation of conservation agreements between landholders and the Minister for the Environment (on behalf of the State of Queensland)[2]. The EDO (Nth Qld) acted for the environmentalists in this case.

A recent Planning and Environment Court case, settled by way of a consent order, illustrates how this mechanism can operate effectively in the context of the development approval process when local authorities, developers and environmentalists are prepared to negotiate conservation outcomes.

Background

During 1995, the Community for Coastal and Cassowary Conservation Inc. (C4) commissioned renowned ornithologist Francis Chrome to conduct a survey of cassowary habitat in the Mission Beach and Garners Beach districts. The endangered cassowary is an icon for this region and the area is often referred to as the 'Cassowary Coast'. In his report Mr Chrome identified several areas of critical cassowary habitat, including a large block adjoining Clump Point National Park. He specifically recommended that efforts be made to secure a conservation agreement under the Act over this block.

When the owner of the block subsequently applied to the Johnstone Shire Council for rezoning to support the establishment of an eco-tourist development, C4 lodged a lengthy submission in which it objected to certain aspects of the development proposal and argued for a condition that 90-95% of the site be included in a conservation agreement. Additionally, it argued that the project as whole should be subject to a comprehensive Environmental Management Plan (**EMP**).

The Council approved the rezoning subject to a number of conditions. Amongst these conditions was a requirement that a conservation agreement under the Act be negotiated with the Department of Environment over the whole of the land prior to any building or earthworks being undertaken. The approval led to two appeals to the Planning and Environment Court, one by the developer, Celestine Investments (Qld) Pty Ltd and the other by C4, represented by the Environmental Defender's Office of Northern Queensland. Each party also joined as a respondent to the other's appeal.

The Conservation Agreement

For C4, the securing of the conservation agreement was critical to protecting the habitat values of the land. Under the Act a conservation agreement, or specified parts of it, may be binding on the landholder and all successors in title [3] and must then be registered against the title by the Registrar of Titles.[4] In practice, when dealing with a single landholder, the Department of Environment tends to utilise a standard form of agreement which does not expire, the whole of which is binding on successors in title and which results in the land being declared as a Nature Refuge under the Act. Variations relating to the land in question are set out in schedules to the agreement.

Following the initiation of legal proceedings, the parties entered into negotiations in an effort to resolve differences and avoid an expensive and potentially lengthy hearing. During the course of the negotiations, the Department of Environment prepared a draft conservation agreement for the land and the developer provided copies to C4, together with the relevant schedules. The agreement followed the standard format referred to above.

With the terms of the proposed agreement available and a commitment from Celestine that it would enter an agreement in this form when it received a formal invitation from the Minister, C4 was able to approach the negotiations confident that its major objective had been secured.

Resolution

Apart from a minor condition relating to fencing, which was settled by a short hearing, the parties reached agreement on all conditions. On 31 July, 1997 the proceedings were finalised when the Planning and Environment Court made an order by consent approving the rezoning subject to 23 conditions. Amongst these conditions was the requirement that a conservation agreement under the Act be entered into over the whole of the property prior to the rezoning being forwarded for gazettal. It was specified that the agreement be generally in accordance with the draft generic agreement submitted by the Department of Environment and that it take effect upon gazettal of the rezoning or upon approval of an EMP depending on which was last to occur.

C4 Secretary Lyn Overton regarded it as a 'win-win' outcome for all concerned:

> "It shows how critical habitat can be preserved using the strength and security of a Nature Conservation Act agreement, whilst still allowing environmentally sensitive and low scale tourist development to take place on the balance of the site."

The land has since been designated the Brooks Beach Nature Refuge.

Endnotes

1. Section 4
2. Section 45
3. Section 45(5)
4. Sections 134 and 51

Native Vegetation Conservation Bill, NSW

David Galpin, Solicitor, Environmental Defender's Office in NSW

In July 1997 the New South Wales Government issued a White Paper entitled "A proposed model of native vegetation conservation in New South Wales". The White Paper proposes introduction of a Native Vegetation Conservation Act. At the time of writing, the legislation had not been introduced in Parliament, but it is expected to be introduced some time in November.

The Environmental Defender's Office in NSW (**EDO**) coordinated a submission in relation to the White Paper on behalf of World Wide Fund for Nature Australia, the Nature Conservation Council of New South Wales, Total Environment Centre and the National Parks Association of New South Wales. The submission is extremely critical of the White Paper and the proposed Native Vegetation Conservation Bill. The White Paper fails to include any basic standards and goals for the retention and conservation of native vegetation. The proposed legislation does not represent best practice in relation to other Australian States, with the packages in South Australia and Victoria being superior in most respects.

Some of the more significant criticisms are discussed below. The full text of the submission is available from the EDO

Objects and purpose of the legislation

The proposed objects and purpose of the Native Vegetation Conservation Bill should explicitly recognise the need to conserve vegetation for the following reasons:

- the prevention of further reduction in biological diversity;
- the prevention of further land degradation;
- the reduction of greenhouse emissions; and
- the protection of water catchments and water quality.

These matters are not proposed to be dealt with explicitly in the objects and purpose of the Act. Instead, the purpose of the Native Vegetation Conservation Bill is seen to be the management, rather than conservation, of native vegetation. This unsatisfactory emphasis is reflected throughout the proposals for the Bill.

Regional Vegetation Management Plans

The centrepiece of the new legislation will be Regional Vegetation Management Plans ("**Regional Plans**"). These plans will be prepared for regions made up of local government areas. They will identify areas of land on which native vegetation should be protected and improved, or on which revegetation should be encouraged. Clearing of native vegetation will generally be permitted on all the remaining land. Furthermore, clearing will also be permitted on land identified for the protection of native vegetation, as long as a person obtains development consent for the clearing, or the clearing falls within one of the many exemptions proposed in the White Paper. In no circumstances, not even for high conservation value native vegetation, is the tough legislative decision taken to simply prohibit any clearing.

There is some merit in appropriate regional planning. It makes sense to obtain detailed environmental information and classify vegetation according to its conservation value. However, if clearing is to take place it should be restricted to areas of low conservation value and concrete protection needs to be provided to vegetation that is identified as having high conservation value.

There must be a core set of principles that underpin the government's approach to conservation of native vegetation. There are circumstances in which clearing of native vegetation will be inappropriate no matter where the vegetation is situated. For example, clearing should never be allowed if it is likely to result in soil erosion or salinity. In order to maintain a responsible approach to native vegetation conservation it will be essential to state these basic principles in the Native Vegetation Conservation Bill.

The White Paper suggests that there can be no uniform principles governing native vegetation conservation across New South Wales because it is necessary to allow for regional differences. However, these "regional differences" seem to be little more than a political excuse for parochial vested interests to abuse native vegetation according to local mythology. There are no issues which cannot be catered for by including uniform principles that allow for regional variation in the Native Vegetation Conservation Bill.

The need for sound environmental information

The White Paper proposes that Regional Vegetation Management Plans will be like Regional Environmental Plans under the *Environmental Planning and Assessment Act* 1979, but will be prepared without a Regional Environmental Study. This is unsatisfactory. The Native Vegetation Conservation Bill must require a Regional Environmental Study to be prepared with every Regional Plan. It must also specify a minimum set of matters that are to be contained in Regional Environmental Studies. Without this basic information for each region, regional planning becomes meaningless.

There is potential for significant synergies to be achieved by drawing on data collected in a number of parallel processes, such as the Comprehensive and Regional Assessments for forests.

Notice of clearing under a Regional Vegetation Plan

At present the White Paper proposes that developers will be able to clear native vegetation if authorised by a Regional Plan. There is no requirement to give prior notice to the Department of Land and Water Conservation ("**DLWC**") of an intention to clear. This leaves the interpretation of Regional Plans entirely up to developers. If an error of interpretation is made, then native vegetation that should have been protected will have been cleared. Although a prosecution might follow, the damage will already have been done. Even in situations where clearing is permitted by a Regional Plan, developers should be required to give notice to DLWC. This will allow the Department to take action if it considers that clearing is not actually permitted.

Development consent for clearing

It is proposed that developers will be able to obtain development consents to clear native vegetation in circumstances where that clearing would be inconsistent with a Regional Plan. Development applications will be processed in the same way as development applications under Part 4 of the Environmental Planning and Assessment Act. These development applications will be subject to the new integrated development assessment (**IDA**) Bill which is currently before the NSW Parliament.

It is of great concern that native vegetation clearing applications will be dealt with under the IDA system. The IDA draft Bill is overtly biased towards development interests at the expense of community and environmental protection interests. The final form of the IDA legislation will have great importance for the Native Vegetation Conservation Bill.

Of more concern is the fact that the White Paper makes no attempt to limit the circumstances in which clearing applications should be granted. The EDO can accept that there may be circumstances in which clearing should be permitted that is inconsistent with a Regional Plan. However, such development applications should be granted only as a matter of last resort, in circumstances where the proposed clearing will not adversely affect the goal of conservation of native vegetation. The grounds or circumstances in which clearing applications will be granted should be specified in the Act.

Furthermore, given that clearing applications are intended to be a last resort and given that such clearing is contrary to Regional Plans, there is a basis for treating these applications as designated development. Although this is not proposed in the White Paper, it would ensure that a thorough environmental assessment is carried out for the proposed clearing, that the public is notified and given the opportunity to comment and that members of the public have the right to appeal a development consent to the Land and Environment Court. It would make sense for the concurrence of the Director General of National Parks and Wildlife to be required as well in these circumstances.

Exemptions

The White Paper states that there will be exemptions from the Native Vegetation Conservation Bill for:

- land that is already protected for its native vegetation values;
- activities that are essential to prevent environmental harm (such as necessary bushfire activities or activities under the Noxious Weeds Act) or which have been given adequate environmental assessment under other legislation; and
- minor and essential works for day to day land management.

It is possible to support exemptions from the Bill based upon these criteria. Unfortunately, the exemptions listed in the White Paper seem to be much broader than the criteria would justify.

Exemptions for land

The White Paper proposes to exempt specified categories of land, including land within the generic zonings of residential, township, village, retail or industrial. This is unfortunate, given that land in such zones may contain significant native vegetation. The Cumberland Plains Woodland in western Sydney, which is listed as an endangered ecological community under the *Threatened Species Conservation Act* 1995 is such an example.

Exemptions for activities

The White Paper proposes exemptions for a range of specified activities. These include activities:

- related to mining or prospecting authorised under the *Mining Act* 1992;
- authorised or permitted under section 88 , *Roads Act* 1993 or under a consent issued under Division 3 of Part 9 of the *Roads Act* 1993; and
- authorised under Part 3A of the *Rivers and Foreshores Improvement Act* 1948, such as excavation adjacent to or in a river.

These are activities that may be approved without any consideration necessarily being given to native vegetation conservation. Moreover, some of the agencies concerned have a single or primary purpose that does not include the conservation of native vegetation.

Exemptions by order

The White Paper proposes that the Native Vegetation Conservation Act will commence with the exemptions presently contained in State Environmental Planning Policy No. 46, the *Soil Conservation Act* 1938 and the *Western Lands Act* 1901. The effect of this proposal is that the extensive exemptions in SEPP 46 will apply to all land in New South Wales, including land previously accorded a higher level of protection, such as protected land under the Soil Conservation Act.

The Minister for Land and Water Conservation will have the power to specify further exemptions by order. This is a dangerous proposal, that will effectively remove the scrutiny of Parliament from new exemptions. Although the present government may well have a responsible attitude to the list of exemptions, there is no guarantee that a subsequent government would take the same approach.

It is proposed that Regional Plans will be able to expand upon the list of exemptions to the Native Vegetation Conservation

Bill. Although there may be vegetation differences across regions, it is not clear why this necessitates additional exemptions from the operation of the Act.

Exemptions for Codes of Practice

A further exemption will apply where Codes of Practice have been prepared under the Native Vegetation Conservation Bill for particular land uses. For example, a Code of Practice may be prepared for timber plantations. These developments will be exempt from the Native Vegetation Conservation Bill provided that they comply with the Code. There does not seem to be any justification for such an exemption. Codes of Practice could provide guidelines for particular industries, while at the same time keeping them subject to the standard provisions of the Act.

Conclusion

The environmental problems confronting Australia as a whole and NSW in particular as a result of native vegetation clearance and fragmentation are massive. It is extremely disappointing that the proposed legislation appears to be more about processing applications to destroy native vegetation than establishing a new standard for its conservation.

BOOK REVIEW:
"Applying the Precautionary Principle"
by Adrian Deville and Ronnie Harding, Federation Press, 1997

Review by Lisa Ogle, Solicitor, Environmental Defender's Office in NSW

Ever wondered what the precautionary principle is? More to the point, ever wondered how to apply it? Why is it that, the initial promise of the precautionary principle, identified over 10 years ago in the Brundtland Report entitled "Our Common Future" (1987), and widely adopted by the world's nations at the Earth Summit in Rio in 1992, has not been realised?

In their recent book, Adrian Deville and Ronnie Harding have tried to tackle one of the most vexing issues for achieving real gains in environmental protection: how, in practical terms, does one actually go about making the precautionary principle work?

Those who are not familiar with the precautionary principle will find the book very informative. It contains a useful description of the principle, illustrated with many scenarios of how the principle might be applied. It also identifies the underlying rationale for the principle and highlights its essential usefulness in shifting the onus to the proponent to prove that their proposed activity *will not* have adverse environmental impacts.

Recent examples are cited of instances which illustrate the application of the concept, including the 1995 "Deferred Forest Assessments" process which temporarily set aside forest areas from logging pending further assessment of their conservation values, and the Land and Environment Court case of *Leatch v Director-General of NPWS,* where the Court set aside a permit to take threatened species as it may have resulted in an acceleration of the species becoming extinct.

These are contrasted with examples where the concept has not been applied, such as the failure to reduce acid rain in Europe, the failure to reduce the use of pesticides due to the absence of a causal link which established the harm being caused to human health, and the use of asbestos despite indications since the 1930's of its harmful effects.

The text identifies the first explicit example of the principle as the 1987 international treaty which agreed to cease dumping in the North Sea. The text then identifies the current policy and legislative instruments in Australia which incorporate the precautionary principle.

The authors seek to develop a decision making framework to determine such questions as whether precautionary measures are needed, and if so, how "precautious" we need be. What this section fails to acknowledge however, is that these questions are essentially value-based. It is not so much the difficulty of identifying the threats which creates problems in applying the precautionary principle, as it is the determination of what level of risk is acceptable.

The most useful and interesting part of the book is the final chapter, where the authors identify opportunities for precautionary measures to be included in 6 different levels of the decision-making process, ranging from the project-based level, through to current administrative arrangements between different government departments, finishing with an (unfortunately brief) summary of law reform proposals and economic incentives to implement the precautionary principle.

Unfortunately, the book does not attempt to place the precautionary principle in the context of the broader societal framework in which it must be applied. Consequently, it does not go on to address the most difficult issue threatening the ultimate effectivenes of the concept, which is not how to identify the precaution needed, but how the need to take precautions is to be weighed by decision makers against the myriad of other competing factors, such as social and economic considerations.

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To request a copy phone Susana on 02 9262 6989 or e-mail edo@magna.com.au

Generous Green Judge

Judge Pain generously donated his extensive legal library which dates back to the 1950's to the EDO in NSW on the eve of his retirement from the NSW District Court. A special "Green Drinks" was held to thank the Judge and dedicate the library.

Forest in the Future: Peace or Protest?

A conference hosted by the Nature Conservation Council and supported by Sydney University Greens and Sydney University Union. It will examine NSW's Comprehensive Regional Assessment process and what is happening in other States. Friday Dec 5 and Sat Dec 6, 1997 at Sydney University. Contact NCC on 02 9241 2052

EDO in PNG

The EDO in NSW has been providing support to ICRAF, a legal centre in Port Moresby, whose solicitors help landowners to overturn fraudulent or illegal logging agreements. Last week ICRAF received its first judgment; an award of K2.3 million (A$2.1 million) in favour of the customary landowners.

Iron Gates Appeal

The appeal by the developer against the remediation orders in Oshlack v Iron Gates Pty Ltd will take place on 17 and 18 December, 1997.

First jail sentence for environmental offence in NSW

Charles Gardner was sentenced to 9 months jail, fined the maximum penalty of $250 000 and ordered to pay $170 000 costs for discharging sewage from his caravan park into the Karuah River. (EPA v Gardner)

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