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Environmental Defender's Office
Level 9, 89 York Street, Sydney 2000 DX 722 Sydney Tel (02) 9262 6989 Fax (02) 9262 6998

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BILL FAILS ENVIRONMENT TEST:

The Commonwealth Environment Protection And Biodiversity Conservation Bill 1998

Katherine Wells, Senior Solicitor, EDO NSW

On 2 July, 1998 the Commonwealth Government tabled its long-awaited *Environment Protection and Biodiversity Conservation Bill 1998*. The Bill is a mammoth 400 pages and 528 sections long, and combines the Commonwealth's proposals on environmental impact assessment and biodiversity conservation into one Bill, instead of the two proposed in the Commonwealth's February "Consultation Paper". The Bill was tabled without any accompanying regulations, and without the consequential amendments which will clearly be necessary (since the Bill itself does not indicate which statutes it will repeal or amend). The EDO's views on the Bill are set out below.

1. General overview

The most positive aspect of the Bill is that it transfers the powers to trigger Commonwealth environmental assessment, and to decide whether or not to give Commonwealth approval to an action, from the relevant Commonwealth "action Minister" to the Commonwealth Environment Minister. These are significant improvements. The Bill also introduces the concept of bioregional planning, and a number of useful improvements in the area of threatened species protection.

However, overall the EDO is gravely concerned with the Bill. It demonstrates a very restrictive view of the environmental matters which the Commonwealth should be legislatively responsible for. It also uses a host of mechanisms to enable the Commonwealth and the Commonwealth Department of the Environment to delegate those environmental responsibilities to other bodies, with almost no environmental safeguards. It provides for a great deal of Ministerial discretion, which will promote uncertainty. It also appears to dismantle the National Parks and Wildlife Service. This is not the strong environmental leadership required of the Commonwealth as we head into the next century.

A number of the EDO's key concerns are set out below. They cover firstly the environmental assessment provisions of the Bill, and then the biodiversity provisions, and lastly matters relating to administration and enforcement.

2. "Matters of national environmental significance"

The Bill proposes that the Commonwealth will be responsible for assessing and approving actions which are likely to have a significant impact on "matters of national

Bumper national EDO conference edition!

environmental significance". However, the Bill's list of these matters, which is set out in Part 3, is very narrow, and will restrict Commonwealth responsibilities in most cases to very site-specific or issue-specific matters (such as Ramsar wetlands, and World Heritage sites).

The list ignores the extremely serious broad-scale issues facing Australia, such as climate change, land degradation, vegetation clearance, the allocation of water to the environment, and forest protection and management.

These issues are critical. The Commonwealth has the constitutional capacity to demonstrate strong environmental leadership. If it is to be a credible force in environmental protection, it simply *must* accept its responsibility and lead the way in dealing with them.

3. Accreditation of State processes

A major part of the Commonwealth's proposals rests on matters of national environmental significance being managed on the ground by accredited State processes. Part 5 of the Bill sets up a framework for this by providing for "bilateral agreements" between the Commonwealth and individual States. However, the Bill provides almost no details about the environmental safeguards to be associated with the bilateral agreements, and no details at all about any public participation to be associated with them.

The EDO considers that accreditation should only proceed if there are stringent safeguards built into the Bill. As a minimum:

- the public should have the opportunity to comment on draft bilateral agreements
- accreditation should only be granted where the State processes being accredited meet best practice environmental criteria which are specified in regulation, applied consistently across the States and picked up in the relevant bilateral agreement
- States should be required to comply with strong monitoring and reporting requirements
- State performance should be reviewed every three years. Significant and sustained non-compliance should prohibit renewal of accreditation for a period of no less than three years.

At present, the Bill is silent on most of these issues.

4. Assessment of environmental impacts

Under cl. 136, the Commonwealth is required to take *all* social and economic impacts into account when assessing a project. However, it can only examine a narrow range of environmental impacts - essentially, those which impact on the list of matters of national environmental significance.

For example, a proposed coal-fired power station could trigger the need for Commonwealth environmental approval because a threatened species listed under the Bill will be affected. The Commonwealth will be required to take the impact on the threatened species into account, but will not be able to consider the power station's greenhouse gas emissions - even if those emissions will cause Australia to exceed its total allowable level of greenhouse emissions.

This makes no sense at all; the Commonwealth is purporting to promote the concept of ecologically sustainable development, but is not taking a wholistic approach to the environment. Cl. 136 needs to be amended to redress this problem.

5. Delegation of approval functions

Cls. 32 and 33 of the Bill allow the Environment Minister to side-step the Bill's approval mechanisms by delegating the Department of the Environment's environmental approval functions to other Commonwealth Departments - such as, say, the Department of Primary Industries and Energy. The Minister will be able to do this by way of declaration, without any public consultation. Further, the Bill does not provide for any guaranteed environmental safeguards or any public consultation in the assessment and approval processes which must be followed by those other Departments. These clauses should be deleted.

6. "Special accreditation processes"

In addition, the Environment Minister can side-step the Bill's assessment mechanisms by approving once-off "special accreditation processes" for individual projects (cls. 80, 85, 87 and 91). Again, no public consultation is required before the Minister decides to approve a special process. Nor does the Bill provide for any guaranteed environmental safeguards or any public consultation in the assessment processes which must be followed under the special process. The references to "special accreditation processes" in these clauses should be deleted.

7. Strategic Environmental Impact Assessment

Division 1 of Part 10 of the Bill, which deals with "strategic assessment", allows the Minister to enter into an agreement with any person concerning the assessment of actions allowed under any "policy, plan or program", and then to exempt that person from the assessment and approval requirements of the Bill. This could be an extremely far-reaching tool for exemption; it could be carried out on any privately developed policy, plan or program relating to any matter. In addition, there are almost no environmental safeguards and no mechanisms for review built into the Bill.

Division 1 should be deleted. The Bill should make provision for strategic Environmental Impact Assessment (EIA), but it should be the type of strategic EIA which requires each governmental policy, program and legislative proposal likely to have a significant effect on the environment to be assessed for its environmental impacts before it is finalised. This would be a powerful tool for the integration of environmental factors into governmental decision-making processes.

8. Forests covered by Regional Forest Agreements

The Bill does not apply to forests covered by Regional Forest Agreements (RFAs), or to forests within an area which is subject to the process of developing and negotiating an RFA (cls. 38 - 42). These agreements have been and are being negotiated without minimum standards for environmental impact assessment or public participation. They cover a substantial part of Australia's forests, which in turn provide

habitat for a substantial part of Australia's biodiversity. These clauses should be deleted.

9. Threatened species

While there are a number of threatened species provisions which are an improvement on the current legislation, there are also a number of problems. For example, recovery plans, threat abatement plans and the Bill's threatened species offences apply only to threatened species in Commonwealth areas. This means, for example, that it will not be an offence to kill a threatened species listed as a matter of national environmental significance as long as the killing occurs outside Commonwealth areas. These provisions should apply more broadly.

10. Protected areas

The Bill appears to dismantle the National Parks and Wildlife Service (NPWS), and give its functions to "the Secretary". The EDO is concerned that the government will undertake less management of protected areas in the future, and will rely on management of these areas by States and the private sector. The Bill should make provision for either the continued existence of the NPWS or some other independent statutory authority in order to ensure the effective and independent management and conservation of protected areas.

Another problem is that while Part 15 of the Bill introduces a management framework for protected areas, there are almost no guaranteed environmental standards for these areas. The development of management principles for protected areas should be mandatory (at present it is optional), and should have to take place within a specified time-frame. In addition, the development of management plans for protected areas should be required within a set time-frame, instead of merely "as soon as practicable".

There is a clear commitment to "multiple use" principles in Commonwealth reserves (one category of protected area). For example, cl. 335 allows mining in all categories of Commonwealth reserve. Mining should not be permitted in strict nature reserves, wilderness areas, national parks, and habitat/species management areas.

11. Conservation agreements

Cl. 306 provides that a conservation agreement can exempt the person who signs it from Commonwealth environmental impact assessment laws. This is undesirable, and unnecessary. Conservation agreements can be a powerful tool to encourage good environmental outcomes on private land. However, it is inappropriate to provide people with the incentive of an exemption from environmental laws. The incentive traditionally used - financial and technical assistance from Government - would be quite adequate if it was properly resourced and encouraged.

It also appears that conservation agreements will be able to be made with any person, over any land (public or private). This is a major issue which was not flagged in the Consultation Paper, and should be put forward for public debate before being included in a Bill.

12. Sustainable development strategies

The Bill should be amended to require each Commonwealth Department to prepare a sustainable development strategy and table it in Parliament within two years. The strategy should identify the Department's actions, assess the impacts of those actions, establish goals, benchmarks and an action plan to address those impacts, and include provision for progress reports.

13. State of the Environment reporting

At present the Bill is silent about State of the Environment (SOE) reporting. It should be amended to require SOE reports every three years.

14. Commissioner for the Environment

There should be an independent Commissioner for the Environment established under the Bill, whose role should include:

reviewing the extent to which Commonwealth Departments have met the objectives set out in their sustainable development strategies
monitoring and reviewing State and Commonwealth compliance with bilateral agreements
co-ordinating SOE reporting.

15. Enforcement and Standing

The enforcement provisions of the Bill contain a number of problems. Conservation orders should be able to be made in relation to any of the matters covered by the Bill, and not just threatened species (cl. 464). The ability to apply for an injunction or judicial review should be available to "any person", and not restricted to "aggrieved persons" (cls. 475 and 487).

Lastly, the Bill designates various clauses as "civil penalty" provisions, including clauses which go to the core of the legislation, such as the offences of failing to obtain, or comply with, an approval (cls. 12, 16, 18, 20, 142). It also extends these civil penalty provisions to executive officers of corporations (cl. 494). These are clearly matters where penal sanctions should be available; the clauses should be amended to allow the prosecuting authority the choice of criminal or civil proceedings.

16. Where to from here?

The Bill has been referred to the Senate Environment, Recreation, Communications and the Arts Legislation Committee, which was originally required to report back to the Senate by 7 October 1998. The EDO made a submission to the Committee on behalf of a large number of national and State peak environment groups, including the ACF, Greenpeace, HSI, TWS, WWF and the State Conservation Councils. However, this process has now been put on hold until the outcome of the federal election is known.

First National Environmental Defender's Office Network Conference....

See Page 18 for details

Leaving it in the ground is hard yakka:
Update on Jabiluka uranium mine protests

Robin Dyall, Solicitor, EDO Victoria

Most readers will be aware that a blockade is currently conducting significant protest action against the proposed Jabiluka uranium mine (Jabiluka) in the Northern Territory. Jabiluka is located "in" Kakadu, or more accurately, excised from but surrounded by Kakadu National Park (Kakadu). Jabiluka and Kakadu are both on Aboriginal land granted to traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

Energy Resources Australia Ltd (ERA) holds a mineral lease over Jabiluka. ERA also operates the nearby Ranger uranium mine (Ranger). Ranger is also on Aboriginal land and is also excised from but surrounded by Kakadu.

Why is the blockade being held?
Environmental concerns and Aboriginal land rights issues have been the impetus for the protest. Environmental concerns include the question as to whether uranium should be mined at all, the impact of a mine on the land and on Kakadu, and the process by which such issues are determined. Concerns articulated by Aboriginal people include the right to determine what is done on Aboriginal land and by whom, the social impact of the proposal and the process by, and manner in which, decisions are made.

The mineral lease was granted by the Northern Territory Government in 1982 under the *Mining Act 1980* (NT). The issue of the consent of the traditional owners to the lease has long been contentious.

Validity of the mineral lease
Yvonne Margarula of the Mirrar people is the senior traditional owner of the land and is currently contesting the validity of the lease. One of the main issues is the capacity of the Northern Territory to grant a mineral lease for the mining of the uranium which is owned by the Commonwealth. The Full Court of the Federal Court handed down its decision on 21 August 1998 upholding the validity of the lease (unreported: Yvonne Margarula v. Minister for Resources and Energy and Ors Federal Court of Australia, Full Court 21 August 1998). It is not known yet whether Yvonne Margarula will seek leave to appeal to the High Court.

Validity of the authorisation to commence the first stage of construction
Yvonne Margarula is also contesting the authorisation granted by the NT Minister for Mines under the *Uranium Mining (Environmental Control) Act* 1979 (NT) to carry out the construction of a portal and access decline at Jabiluka, together with associated infrastructure. The NT Supreme Court has reserved its decision.

The blockade and ERA Response
The blockade is camped in Kakadu. It operates under a permit granted by Yvonne Margarula as well as under the regulations relating to the Park. The Mirrar grant a "passport" to blockaders who agree to abide by certain rules. The aim of the blockade is, by peaceful protest, to stop the mine from proceeding. ERA has employed or at least authorised security guards to patrol Jabiluka and Ranger. Surveillance has been conducted and protest action filmed. The guards have also issued warnings to stay off and/or given directions to protesters entering Jabiluka or Ranger. On occasion protesters have mistaken the guards for Police.

Actions and Northern Territory Police Response
Protesters have generally focussed their actions at the entrance to Ranger and to Jabiluka. Some actions have taken place on Jabiluka and in Kakadu.

The first action was to "lock on" to drilling rigs on Jabiluka. "Locking on" is a process where people use bicycle or other specially designed locks to secure themselves by the neck or wrist to an object. The protesters were arrested and charged with trespass. Subsequent actions have included marches and gatherings, "locking on" to the Ranger gates and "locking on" to vehicles. Initially the police took a fairly low key approach. In combination with the guards, trespass warnings were issued. Some arrests were made and trespass charges laid under the *Trespass Act* 1987 (NT). There are three relevant offences under this Act. The first is trespass after warning to stay off, the second is trespass after direction to leave and third is to trespass unlawfully on enclosed premises. A warning to stay off may be given by an occupier. A direction to leave may be given by an occupier or by the police at the request of an occupier.

The ERA security guards were involved with the Police in giving warnings and directions. These were done on an individual basis. As part of this process ERA guards took the name and address of individuals. At times it was not clear what authority was being exercised and whether it was guards or Police acting. The uniforms were hard to distinguish.

Some protesters have pleaded guilty to trespass but over 200 contested charges are to proceed.

Arrest and Bail
Almost 400 protesters have been arrested so far. Even though charges can be laid on summons, most protesters are arrested and released on bail. Initially bail was granted on an undertaking to appear and on payment of $100 cash to be forfeited on non-appearance. Later, the nature of the conditions changed. The police imposed conditions to limit the ability of those charged to continue being involved in other actions. A common additional condition was not to be present at the Jabiluka or Ranger access gate and not to enter any ERA mineral lease. In one case a protester was also not to go north of the Magela Creek. This is to prevent access to the Jabiluka entrance.

When contested before a Magistrate the bail conditions were modified but the ERA lease condition remained. In subsequent matters, even though the Jabiluka access gate is located in the Park, the Magistrate upheld the condition. Some protesters are refusing bail. One protester has served 28 days awaiting the hearing of his charges. He has been released on bail now but still has hearings outstanding.

In June 1998 Yvonne Margarula and other traditional owners were arrested and charged with trespassing on Jabiluka, their own land. The hearing was held and written submissions made. On 3 September 1998 the Magistrate handed down his decision finding them guilty and convicting them of trespass.

Offences against police: Following the arrest of the traditional owners, Police began laying charges of offences against police such as hinder and assault.

Arrests where no action: Vehicles driven by protesters along the Oenpelli Road towards the Border Store at Cahills Crossing were stopped. Drivers and passengers were questioned as to their activities. The blockade and one of the entrances to Jabiluka are located off this road. The road is also the only tourist access to Ubirr rock. Charges relating to minor motor vehicle offences were laid on occasion.

Obscure and/or inappropriate charges: Police have also resorted to more obscure and possibly inappropriate "charges" such as "Disorderly behaviour in a public place", "Disobedience to the laws of the Northern Territory" and "Attempt to commit a simple offence". In many cases. no date or alleged circumstances giving rise to the offences has been included on the charge sheet.

"Failing to cease to loiter" has, for example, been used where protesters were walking down Oenpelli Road and when attempting to leave Jabiluka after a direction to leave. Some of these charges have been dropped but only through legal representation at the door of the Court.

"Forcible entry" under the *Summary Offences Act*[1] (NT) (12 months) was used by the Police as an alternative to trespass in relation to the Hiroshima Day march onto Jabiluka. There is High Court authority that "entry" really means "entry with the intention of taking possession of the property".[2] The charges were dropped when legal representation was arranged.

Private and property oriented charges: Some protesters have been charged with "Victimisation as to employment and delivery of goods" under the *Observance of Law Act* (NT)[3]. Essentially the allegation is that the right to carry on lawful occupation or employment has been interfered with by a physical act. The acts range from obstructing traffic by standing on the road waving arms to locking on to construction vehicles. There is an attempt now to relay the charge under the same Act to interference with the right of ERA to obtain services (penalty $100 or 6 months).

A larger number of protesters have been charged under the *Criminal Code Act* 1983 (NT) with "Damaging Mines". It is alleged that the protesters intended to damage or obstruct the working of a mine by unlawfully obstructing the working of a machine pertaining to or used with the mine (7 years).

Mandatory sentencing offences

The Territory has a "one strike and you're in" mandatory (literally) sentencing regime for certain offences. Some protesters who "locked on" to a truck have been charged under the *Criminal Code* 1983 (NT) with "Unlawful Use of a Motor Vehicle" and "Criminal Damage". First, it is alleged that ERA suffered damage by way of lost earnings by reason of the delay in work on the mine. Secondly, it is alleged that the truck itself was damaged in that it was, although only temporarily, rendered inoperative. If convicted of either of these offences, the protesters will serve a minimum of 14 days actual imprisonment.

Convictions and penalties

In all cases where a charge has been found proven, a conviction has been entered. Even though the Court may dismiss a charge and enter no conviction or enter no conviction and place the offender on a bond, no Magistrate has exercised this discretion in favour of any of the protesters.

Generally the penalties have been fines of several hundreds to six or seven hundred dollars, even where there are no prior convictions for anything. Some protesters have elected to do time rather than pay the fine imposed. This takes twice the time it would in other Australian jurisdictions.

A Merry Christmas and a Happy New Year

A lot of matters are listed for hearing in the festive season (December and January). In addition to listing these matters for hearing, a "confirmatory" mention is listed shortly prior to the hearing date. The mention is specifically to check that the offender is present for the hearing, despite already being on bail. Evidence of travel arrangements for the hearing will apparently be sufficient for the mention.

Seizure of property

At times property has been confiscated illegally from protesters by the Police. After lengthy negotiations and legal representation the property has been returned.

Treatment of offenders and complaint to Ombudsman

One of the first incidents of concern at an action was when Police removed shade and water from protesters who had "locked on" to the Ranger gates and blocked attempts to provide water to those "locked on". Someone who threw water at the gates was charged with assaulting one of the Police because some of the water splashed onto the policeman's shoe.

While being "processed" at the Police station, protesters have been ridiculed for being dirty and unwashed. They have been described as "unemployed" despite advising their actual occupation. On 14 July 1998 when 117 people were arrested many were held in appalling conditions at the Jabiru holding cells. Numbers greatly exceeded the authorised maximum of 12. About 60 were released on bail when police notified a Magistrate of the situation.

Protesters have been refused showers prior to attending Court despite being held for hours at Jabiru, transported 3 hours to Darwin and being held overnight. Some have also not been

given their footwear to wear in Court. Issues as to manhandling by the Police during arrests have also arisen.

A range of complaints has been made to the NT Ombudsman. On 7 August 1998 a lengthy document containing statements regarding various complaints was submitted. The complaints are to be investigated by a Joint Review Committee. The Investigating Officer will provide regular reports to the Ombudsman and to the Police Professional Responsibility Unit for assessment and evaluation. If necessary, the Ombudsman may seek a further inquiry.

Conclusion

Peaceful protest and conscientious objection often attracts an unfavourable response from government and the Police. This seems to occur when the stakes are high and the government is intent on pursuing a particular course of action irrespective of public opinion. The response is made more difficult when a private stakeholder is allowed to actively participate in the "control" of the protests by the use of security guards in conjunction with police operations.

In such situations it is vital that the legal system provides a balance to the response meted out by the political system.

Endnotes

1. The Summary Offences Act comprises the Police and Police Offences Ordinance 1923 as amended by other Ordinances and Acts specified in a table to the Act
2. Prideaux v. DPP (1987) 163 CLR 483
3. The Observance of Law Act comprises the Observance of Law Ordinance 1921 as amended by other Ordinances and Acts specified in a table to the Act

Waiver of High Court filing fees - Friends of Hinchinbrook Inc. wins appeal to the Administrative Appeals Tribunal

Case Note: Friends of Hinchinbrook Inc. v High Court of Australia. No. N 97/1498

Andrew Sorensen, Solicitor, EDO NSW

Friends of Hinchinbrook Society (FOH), represented by the EDO, has succeeded in its appeal to the Administrative Appeals Tribunal. FOH appealed against the refusal of the High Court Registrar to waive the filing fee for its Special Leave Application.

FOH had made application for waiver of the filing fee on the grounds of financial hardship, pursuant to sub-regulation 4(4)(c) of the High Court of Australia (Fees) Regulations. However the High Court Registrar determined that it could only waive filing fees on the grounds of financial hardship for natural persons, not incorporated groups such as the Friends of Hinchinbrook. This determination was based on the Registrar's interpretation of the term "person" in sub-regulation 4(4)(c), applying the *eiusdem generis* rule of interpretation. Accordingly, the Registrar considered that FOH was not entitled to have its application for waiver of the filing fee considered.

In a decision on 2 June 1998, her Honour Justice Matthews questioned the appropriateness of the application of the *eiusdem generis* rule in the context of sub-regulation 4(4), and found that, in any case, the factual basis on which the Registrar reached his conclusion was incorrect (in that the Registrar had assumed that references to "person" in sub-regulations 4(4)(a) and (b) could only apply to natural persons). Her Honour then examined the wording of sub-regulation 4(4)(c) itself. Her Honour found that the presumption set up by section 22(1)(a) of the Acts Interpretation Act 1901, to the effect that, unless the contrary intention appears, expressions such as "person" include a body corporate, had not been displaced by such phrases in 4(4)(c) as "income, liabilities and assets", "financial hardship" and "day to day living expenses".

Her Honour then found that FOH had established that the payment of fees would cause financial hardship to it, and was therefore entitled to have the filing fee waived. The decision under review was set aside and substituted by the Tribunal's decision to have the filing fee waived.

Hot Topic: *Environmental Law* (July 1998) Published by Legal Information Access Centre

The latest issue of *Hot Topics: burning legal issues in plain language* focuses on recent changes to environmental law. In 1997, the NSW Parliament passed four new Acts relating to the environment. They include the *Environmental Planning and Assessment Amendment Act 1997*, the most significant change to land use planning and development in 20 years and the *Protection of the Environment Operations Act 1997*, which consolidates and simplifies pollution laws. There are also significant changes to the law protecting native vegetation and regulating contaminated land.

Hot Topics is an ongoing series of booklets about recent changes and current debates in the law. It is a community legal education initiative of the Legal Information Access Centre (LIAC) and is distributed to all public libraries and a wide range of community organisations in NSW. It is also available for sale for $15.00 each. *Hot Topics* is a useful resource to support community education programs and bulk copies can be purchased at a discount rate.

For further information, contact Trish Luker at LIAC: (02) 9273 1645 (tel), (02) 9273 1250 (fax) or email: tluker@slnsw.gov.au

NEW VISIONS FOR NSW NATIONAL PARKS

*James Tedder, Secretary, North Coast Environment Council, NSW**

Few knew what to expect when the Minister for the Environment, Pam Allan, announced last year that she would convene a symposium in 1998 to help decide the shape of the National Parks and Wildlife Service (NPWS) in the new millennium. Her announcement was made at the joint National Parks Association and Nature Conservation Council public conference, 'New Visions for National Parks in the New Millennium', in July 1997. The NPWS 'Visions for the New Millennium Symposium' was held from 16-19 July 1998 in Sydney.

A conference steering committee appointed by the Minister included representatives of farmers, recreation users, miners, NPWS staff, academics, conservationists and Aboriginal people. The presence of senior conservationists Peter Prineas, Jeff Angel and Tom Fink gave cause to hope the outcome would be favourable for the future of the NPWS and estate despite the fervent advocates of multiple use, commercialisation, 'access for all' and privatisation.

The task set was to pursue a "long-term vision for NSW to have the world's best system of protected areas managed by the world's best nature conservation agency." The USA National Park Service 75th Anniversary Symposium held at Vail, Colorado, in 1991 had influenced the Minister's decision to hold this symposium and hoped it would draw together many groups and individuals to review the past and set the agenda for the future. The symposium "was to produce a set of objectives similar to the Vail agenda."

A series of workshops held at very short notice in a number of regional centres were often used by the recreation lobby to demand access to "everywhere". These representatives seemed to have little interest in the role of national parks to protect nature. Other participants urged multiple use parks to accommodate the miners, the loggers, the beekeepers, the hunters and all. Held during the daytime, the workshops excluded many volunteer conservationists.

However in a number of workshops a diverse range of participants agreed that the protection of native plants and wildlife could be done in co-operation with other landholders on the basis of core reserves in the national parks estate, linked by corridors and off reserve management for biodiversity on private and Crown lands.

With a maximum of 200 participants planned for the symposium,the National Parks Association (the major nature conservation group dedicated to the national parks system) were stunned when offered only one place. Eventually, three places were offered, along with other major conservation groups. Overall a satisfactory number of NPA members attended although many also represented other organisations.

The event was launched with a penetrating hypothetical on the establishment of the new 'Big Gum National Park' by the Minister for the Environment, Mary Mainchance, and her Director General, Roger Ranger. The debate raging over conservation, jobs, political opportunism, science, money, and self interest encapsulated much of the arguments of the past 40 years. In the end, only the conservation movement was left as the undaunted advocate and final defender of the environment, uncompromised by self interest, politics or money.

The Symposium was a day of keynote addresses from Australian and international speakers, followed by a day and a half of workshops and a plenary session to receive workshop summaries. Participants nominated five workshops and were assigned to three. The workshops were:

- *Reserves and other protected categories*
- *Managing for conservation*
- *Filling the gaps in protected areas*
- *Understanding nature*
- *Community partnerships*
- *Bioregional planning*
- *Commemorating our history*
- *Aboriginal communities and their heritage*
- *Understanding heritage*
- *Providing for appropriate use*
- *Fostering appreciation and understanding of heritage*
- *Using biodiversity wisely.*

Several workshops appeared to overlap and none were planned to review the success or otherwise of the existing system of parks, their administration, or to specifically tackle the NPWS role in off-reserve biodiversity protection. Glaring omissions were workshops to address the organisational structure and funding of the NPWS. This caused much frustration and these issues, particularly funding, became recurring themes in most of the workshops.

Planning and preparation may well have enhanced the conference. Participants received, just prior to the conference, several large documents titled *Trends*, *Regional Workshop Reports* and *Symposium Workshop Papers*. The *Trends* paper attempted an overall view of the economics, social and political trends during the past few years. It basically took a pessimistic view of the prospects for a significantly expanded system of national parks, with an independent professional NPWS dedicated to nature conservation, as the basis for nature conservation in NSW.

Symposium Workshop Papers were often a simple chronology of what had been happening in that particular subject, and

contained a few questions and further reading. In many cases these papers only reached participants a week prior and the workshops themselves were only assigned on the first day of the symposium.

With limited numbers (4 - 20) the workshops offered an opportunity for everyone to participate. Although some of the workshops were probably too tightly controlled and others loose and unstructured, most provided wide-ranging discussion. Participants reflected a range of organisations: farming, recreation, mining, forestry, conservation and Aboriginal groups, together with a large number of NPWS people.

What is the result? Did we end up with a set of objectives for the new millennium?

This was never directly possible from a symposium that carefully excluded any plenary opportunity to develop conclusions or move resolutions. However, I will go out on a limb and say that there was a strong level of support for the following principles :

1. adequate conservation of our natural world **will** require a significant expansion of those protected areas classified by the World Conservation Union (formerly the International Union for the Conservation of Nature) as categories I to IV, which form our present core NSW system of national parks and nature reserves, as well as less strict conservation areas under WCU categories V and VI, the latter two outside the national parks estate.
2. there is need for an overall view of the State by 'bioregions' to determine what needs to be protected in reserves under categories I to IV;
3. there is an urgent need to find out what is critical habitat in each bioregion and the priorities for conservation - filling in the gaps;
4. this process should be public with early and adequate discussion with the landholders and the wider community;
5. there must be built up in each bioregion a series of buffer zones and corridors and off reserve management offering a range of conservation measures complementary to the core reserve system in the national parks estate. NPWS should be the lead agency to advise the community about off reserve biodiversity conservation.
6. each "core" reserve should have a clear description of the values it is to protect and a plan of management which clearly sets out the appropriate human uses. "Multiple use" by natural resource exploiters, e.g. mining and logging must continue to be excluded from our national parks estate.
7. the National Parks and Wildlife Service should be a senior department which does not include natural resource managers, ie forestry, fisheries, mining and crown lands.
8. there is a need to raise the status of national parks as national icons;
9. There is a need for significant amendments to the current *National Parks and Wildlife Act* 1974 on a range of issues, beginning with a clear and direct statement of objectives (sadly lacking in the current Act);
10. more and better education to the public at large on the positive benefits of a comprehensive system of national parks, and the work of the NPWS, is required to ensure not only community but also political support;
11. there must be pro active and committed leadership and advocacy by the NPWS. When vested economic or inappropriate recreation interests make outrageous public attacks on nature conservation and parks management, the NPWS must enter the debate.
12. there must be adequate resources available

Pam Allen in closing the symposium promised that the initiative for positive reform would not be allowed to go stale. There is an expectation that she will take early steps for change but in doing so she must be strongly guided by the assessment and recommendations that the Visions steering committee will now develop. There is now a wealth of community and expert input from the joint NPA/NCC conference, the regional workshops, the symposium and subsequent submissions lodged to ensure that the future of the NPWS and our national parks system is "the world's best".

***James Tedder** is past President of the Three Valleys Branch (near Coffs Harbour) of the National Parks Association.

Go West! Review of the NSW Western Lands Act

Jamie Pittock, Program Leader - Nature Conservation, World Wide Fund For Nature

Background

The NSW Minister for Land & Water Conservation, Mr Richard Amery has "instituted a review of the administration and condition of the western lands", the 42% of NSW[1] in the Western Division covered by the *Western Lands Act, 1901* (NSW).

The review has the terms of reference to:

- Review and report on the effectiveness of the operation of the Western Lands and associated Acts on the management of western lands;
- Identify issues which impact on the long term sustainable management of western lands addressing economic, social and environmental outcomes;
- Recommend actions required to implement sustainable management and use of the western lands resources including appropriate legislation, institutions and tenure agreements.

The review is being lead by Mr John K~rin, the Independent Chairperson. Public information available to date includes the "Western Lands Review Bulletin" and "Scope of Issues" paper[2]. A summary report is due to be presented to the NSW Government in December 1998 and legislative reform is mooted for 1999.

Pastoral industry and the environment

The current Western Lands Act primarily purports to regulate NSW's 1,000 odd pastoral leases. In 1884 the pastoral lease system was established in preference to freehold tenure to maintain environmental values and ensure greater public regulation of the agriculturally marginal arid and semi-arid rangeland areas. Western Division pastoral leases have largely been converted to perpetual tenure but they remain Crown land.

The Western Division is in a deplorable environmental condition and showing few signs of improvement. Extensive dingo control has allowed native and feral herbivores to explode in number. Further, provision of artificial watering sources in formerly dry areas has fuelled the growth of these animal populations. There is no longer any point in western NSW further than ten kilometres from water. Excessive grazing is preventing the regeneration of many major plant species, such as Sugarwood, an overstory tree species.

The pastoral industry has indirectly and deliberately suppressed fire. This combination of lack of fire and overgrazing are the apparent cause of the dense growth of grazing resistant native plants, locally called "woody weeds", in over 40% of the Division.

The Review process has been triggered in part by the passage of the NSW *Native Vegetation Conservation Act* 1997, which replaces a number of the vegetation clearing controls formerly contained in the Western Lands Act. It is also driven by a campaign of pastoral lease holders for partial or total conversion to freehold tenure.

Although the pastoral industry occupies 93.4% of the land area[3], it is a minority and declining employer and economic force in the Western Division. Wilcox and Cunningham[4] note in their assessment of Australian rangelands that in 1993 the "average grazing enterprise ... [in western NSW was] eating into reserves or decreasing its equity level to just pay for operator and family labour without providing for depreciation and plant replacement." The average annual trading result was a deficit of around $52,000, which included government agricultural assistance that averaged $8,000 per lease. Nothing less than fundamental industry restructuring will improve the health of the remaining pastoral industry in the region.

It is surprising therefore that the Review appears to perpetuate the focus of successive NSW governments on the pastoral industry in the Western Division rather than considering the sustainability and economic growth of industries such as mining, irrigation, tourism and conservation, and the needs of the Aboriginal traditional owners.

Opportunities for improvements

There is much scope for improvement. Currently legislation is ancient and should be amended to incorporate the principles of ecologically sustainable development. Basic conservation tools can be provided, such as explicit provision for leaseholders to enter into conservation agreements for which Western Lands Lease fees could be waived.

The legislation should incorporate regulations to provide for a minimum standard of environmental management of this public land including the requirement for property management plans, similar to those in South Australia, and a requirement for artificial watering points to be shut off when not required for livestock watering.

More lands should be transferred to National Parks. A meagre 1.9% of the land area of the Western Division is in conservation reserves and the Division includes some of Australia's worst reserved bioregions. Despite being an environmental priority and the land being cheap, too few of the new parks being established in NSW are in the Western Division.

The Review needs to recognise and facilitate a greater diversity of land use in the Western Division. Already, a number of pastoral leases have been purchased by hunters and for private wildlife sanctuaries. These trends should be encouraged and recognised in legislation.

A regional agreement or agreements are required with the traditional Aboriginal owners of the region to share land management, provide access to leases, and allow for sustainable diversification of land use. Establishment, training and accreditation of appropriate community organisations to implement environmental programs and legislation should be considered, including Aboriginal community ranger programs.

The impending return of a number of existing parks to the traditional Aboriginal owners in the region sets a precedent for future, cooperative return of lands to Aboriginal owners and their management for cultural and conservation goals. This offers scope for the development of appropriate small businesses, particularly in tourism.

The hardest question the Review will need to address is the lack of sustainability of the pastoral leases which are occupied by the so called 'woody weeds'. Some hard government decisions for industry restructuring are required, rather than the current focus on grants to leaseholders to kill these native species. The Review should recommend a program to repurchase many of these leases.

The Review must make some hard decisions, however, with a NSW State election looming, courageous policy making is unlikely.

For further information:

- Western Lands Review c/-Department of Land and Water Conservation, GPO Box 39 Sydney NSW 2001. Fax (02) 9228 6564. www.dlwc.nsw.gov.au
- Lisa Ogle, Solicitor, Environmental Defender's Office: 02 9262 6989
- Pip Walsh, World Wide Fund for Nature: 02 9299 6656

Endnotes

1. Department of Land and Water Conservation, 1996. "A discussion paper of regional issues for clearing and cultivation for the Northern Floodplains and Southern Mallee in the Western Division of NSW", DLWC, Dubbo.
2. Department of Land and Water Conservation, 1998. "Western lands Review Public Consultation Meetings Scope of Issues, July 1998", DLWC, Sydney.
3. Department of Land and Water Conservation, 1996.op. cit., p.23
4. Wilcox, D.G. & Cunningham, G.M. 1994, "Economic and Ecological Sustainability of Current Land Use". In Morton, S.R. & Price, P.C. (eds.). R&D for Sustainable Use and Management of Australia's Rangelands. Land & Water Resources Research & Development Corporation, Canberra. p.138-139

All Washed Up - Integrated Protection and Management of Australia's Oceans for the 21st Century

Andrew Sorensen, Solicitor, EDO NSW

Introduction

An Issues Paper on Australia's Oceans Policy published by the Commonwealth Government discusses proposals for the integrated management of Australia's ocean jurisdiction. The EDO considers that an overhaul of the current regulatory systems is essential to achieve adequate protection of the oceans environment and the achievement of ecologically sustainable development in the marine context.

The existing jurisdictional arrangement between the Commonwealth, State and Territory Governments is currently an ad hoc, piecemeal process without sufficient regard being had to cumulative effects on the oceans environment. The Offshore Constitutional Settlement (OCS), and the pre-existing, largely sector-based, resource management and regulatory systems which apply within Australia's ocean jurisdiction (for example fisheries management, offshore petroleum and mining, defence, shipping and navigation, ship-sourced marine pollution) demonstrate this.

However difficulties arise in undertaking a comprehensive overhaul of current regulatory systems, in large part due to the Commonwealth Government's self imposed decision not to interfere with current jurisdictional arrangements (Issues Paper, page 31). Given this constraint, the EDO has suggested the following model as an effective means of providing for the strategic, integrated planning and management of Australia's ocean jurisdiction

Preferred model

The model envisages the creation of three new bodies (as specified below) to achieve this objective and is based on that put forward by the Ministerial Advisory Group on Oceans Policy (MAGOP) [1].

The system to be set up would be legislatively based, utilising mirror legislation. Such legislation will be referred to as the Oceans Law. The two primary objects set out in the legislation would be:

1. to provide for strategic, integrated planning and management of Australia's ocean jurisdiction, as it exists now and in the future; and

2. to ensure that oceans use and management complies with the principles of ecologically sustainable development (ESD).

Ministerial Council (Oceans)

Consisting of Environment Ministers from each State, Territory and the Commonwealth the Council's functions would include the following:

- to facilitate achievement of the objectives specified above.
- overseeing and issuing directions to the National Oceans Commission; and
- making National Oceans Management Protocols (NOMPs).

National Oceans Commission

A joint Commonwealth, State and Territory authority, the National Oceans Commission's primary functions would

include:

- advising the Council
- carrying out the directions of the Council
- preparing annual National State of the Oceans reports, utilising its own research and integrating information provided by the Regional Boards (see below)
- preparing National Oceans Management Protocols
- acting as a determinations body in respect of matters referred to it by the Regional Boards (ie a "call in" function)
- considering and declaring Regional Oceans Management Plans prepared by the Regional Boards
- considering and declaring alterations to Regional Oceans Management Plans following annual reviews by Regional Boards
- monitoring Australian compliance with international agreements relevant to the oceans jurisdiction
- issuing binding directions to existing Commonwealth, State and Territory authorities and Regional Boards in appropriate cases (for example in relation to the granting of particular approvals, or the preparation or amendment of management plans/planning instruments)
- general assessment and information gathering functions

An Advisory Committee with scientific, community/ conservation, indigenous and industry representatives would also be created, and would have the function of advising the Commission and the Ministerial Council.

National Oceans Management Protocols (NOMPs)
The Oceans Law would contain a provision stating that it is the intention of each relevant parliament to implement, by such laws as are necessary, each National Oceans Management Protocol (NOMP). The exact manner in which the Protocols are implemented would be up to the individual government. However the Oceans Law would specify that implementation must occur through legislation or delegated legislation, rather than through administrative or policy measures.

Protocols could have the following basic functions:

1. setting out the procedural requirements to be implemented by Commonwealth, State and Territory governments in order for their relevant regulatory systems to comply with the objects of the Oceans Law (e.g. public participation requirements, transparency, need for authorities to give primary consideration to ESD, preparation of management plans/planning instruments, licensing regimes, need for annual review of systems etc.)
2. setting out the measures required to be implemented by Commonwealth, State and Territory governments in order to ensure that each sector-based authority, whose sphere of influence includes any part of Australia's oceans jurisdiction (either directly or indirectly), comply with and promote the objectives of the Regional Oceans Management Plans (ROMPs).
3. setting out the requirements for implementation of Australia's obligations in respect of the oceans jurisdiction under relevant international conventions

The Protocols could also be utilised for the following functions:

4. setting out the process by which Regional Boards would prepare ROMPs, and the required structure and contents of those plans. The nature of ROMPs is discussed further below.

The degree of detail and specificity of the Protocols would vary depending on the purpose of each Protocol. Potentially, a Protocol could impose a particular standard or outcome which must be complied with (for example a ban on fishing of a particular species), or deal with more general matters such as procedural requirements. Generally however, the Regional Oceans Management Plans would be the more detailed documents. The directions power of the Commission (see above) could also be used to achieve specific detailed outcomes at short notice, in preference to the use of Protocols.

Regional Oceans Management Plans (ROMPs)
The ultimate objective would be to have a ROMP for each large marine region which is administered by the Regional Boards (approximately 5-8 in total). The ROMP would reflect a "bubble" model of the relevant region, which takes into consideration all inputs to the region and cumulative effects of past, present and likely future uses/management of the area.

Each ROMP would cover the total regional ecosystem, but would provide discrete assessments of particular conditions and considerations for each bioregion contained within the large marine region. Management considerations may vary for each such bioregion, and the management plans should reflect this accordingly.

The NOMP would require existing sector-based authorities to carry out their functions in a manner which is consistent with and promotes the objects of the applicable ROMP. So, for example, if a particular authority prepares management plans or planning instruments as part of its pre-existing functions (e.g Fisheries Management Plans, Local Environmental Plans), such plans would have to be consistent with and promote the objects of the applicable ROMP. In such cases, the NOMP would require the relevant authority to submit any draft management plan or planning instrument to the relevant Regional Board for comment/consultation before putting the plan/planning instrument into effect. The NOMP would also require the relevant authority to conduct annual reviews of any such plans/planning instruments, in order to assess how effectively the objects of the applicable ROMP are being achieved.

If a sector-based authority has a responsibility to determine applications for licences or approvals that function must be carried out in a manner which is consistent with and promotes the objects of the relevant ROMP. Licences and approvals above a specified level of significance would be subject to a requirement that they be referred to the relevant Regional Board for consultation or concurrence before the licence/ approval can be granted.

Regional Boards
Regional Boards would be joint Commonwealth State and Territory authorities (depending on how many jurisdictional boundaries their area of administration covers). There would be approximately 5-8 such boards, reflecting the large marine regions identified in Australia. The Boards should include scientific, non-government conservation/community, indigenous and industry representatives.

Their primary functions would be:

- to prepare ROMPs and then refer them to the National Oceans Commission for comment and declaration
- to consult and comment on individual applications for licences and approvals which are received by the sector based authorities
- to make recommendations to the National Oceans Commission to "call in" licence or approval applications of significance for:
  a. the protection of the ocean environment;
  b. ecologically sustainable use or management of the ecosystem area which the Board administers, or
  c. Australia's oceans jurisdiction as a whole.
- prepare material in relation to their large marine region for inclusion in the annual National State of the Oceans reports prepared by the National Oceans Commission.
- general assessment and information gathering functions

ROMPs would be subject to annual review by the Regional Boards. Reports on such reviews would be referred to the National Oceans Commission, along with any recommendations for alterations to the contents of the ROMP.

Transparency, public participation and enforcement
The minimum public participation requirements would be:

- The Oceans Law would provide open standing provisions, allowing third party enforcement actions to remedy or restrain breaches of the Oceans Law, and also breaches of any Commonwealth, State or Territory legislation causing, or likely to cause, harm to the marine environment.
- All licences and approval applications above a specified level of significance affecting the marine environment would be subject to public notification requirements and would be open for public submissions
- Draft NOMPs, ROMPs and sector based management plans/planning instruments would be subject to public notification requirements and would be open for public submissions

Outcomes-based system
The regulatory system discussed above would not be purely procedural, and would provide for specified outcomes in terms of ecosystem health, biodiversity, sustainable species numbers, water quality etc. These and other outcomes should be specified primarily in the ROMPs, but also in the NOMPs and sector based management plans/planning instruments. The directions power of the National Oceans Commission could be tied to the achievement of such outcomes.

The National State of the Oceans reporting by the National Oceans Commission will play an important role in identifying desirable outcomes, and the effectiveness of current systems in achieving those outcomes. The requirements for the contents of the State of the Oceans reports should include the identification of deficiencies in the current system which are allowing/ contributing to environmental degradation, and recommendations which address those deficiencies. Recommended actions could include the amendment of, or the making of new, NOMPs and ROMPs in particular, and/or the issuing of directions by the Commission in specific instances.

Conclusion
This model puts in place a regulatory structure to achieve the objective of effective integrated oceans management, in compliance with the principles of ESD. The structure attempts to achieve the most effective outcomes, whilst at the same time recognising the political constraints on major reform of the current system and jurisdictional arrangements.

Endnote
1. as Model 2 in the Group's Report of March 1998 (see pp. 12 to 13).

Costs orders in the wake of *Oshlack v Richmond River Shire Council*

Chris Norton, Solicitor, EDO NSW

The last edition of *Impact*[1] reviewed the High Court's decision in *Oshlack v Richmond River Council*[2]. In *Oshlack*, the High Court held that in exercising its discretion to award costs under s 69 of the *Land and Environment Court Act 1979* (NSW) in proceedings brought under s 123 of the *Environmental Planning and Assessment Act 1979* (NSW) ("the *EP&A Act*"), the Land and Environment Court could take into account the fact that the proceedings were brought in the public interest. Several months down the track, it is worth considering the use that has been made of *Oshlack* and the attitude that courts have taken to its application.

Environmental law

In *Friends of Hinchinbrook Society Inc v Minister for Environment and Ors*[3], the Full Court discussed the impact of *Oshlack*, emphasising the comments of Gaudron and Gummow JJ[4] that in that case the debate about public interest litigation distracted attention from the legal issue that was at stake - whether the Court of Appeal could find Stein J's reliance upon matters such as the public interest nature of the proceedings to be irrelevant considerations in exercising his discretion not to award costs. In awarding costs against the applicant, their Honours endorsed the statement of Burchett J in *Australian Conservation Foundation v Forestry Commission*[5] that the fact that a body is bringing litigation in the public interest does not of itself require that costs should not follow the event.

The applicants in *Seaton and Ors v Mosman Municipal Council and Anor*[6] challenged the validity of a plan of management for community land under the *Local Government Act 1993* (NSW). In finding against the applicant, Mason P[7] had regard to *Oshlack*, but noted that *Seaton* did not raise questions of general principle; and that the applicants, residents of the local government area in which the land the subject of the plan was situated, had "not urged the same degree of disinterested motivation as was relied upon by Mr Oshlack."[8]

Timbarra Protection Coalition Inc and Anor v Ross Mining NL and Ors[9] concerned a challenge to the validity of a development consent for extensions to a gold mine. The proceedings concerned, in part, the validity of Tenterfield Council's decision not to require the preparation of a species impact statement - a similar matter to one of those raised in *Oshlack*. Talbot J ordered the unsuccessful applicant to pay the costs of all respondents. Although his Honour found that the applicant and its members had no financial interest in the outcome of the proceedings, and that there was evidence illustrating public interest in the outcome, he was still of the view the proceedings were not "public interest litigation". His Honour also indicated that in his view, the comments of the High Court in *Oshlack* were made in relation to costs orders relating to public authorities and therefore were of little relevance when dealing with private respondents such as Ross Mining. If a costs order was not made in favour Ross Mining, this would diminish the suggestion that "special circumstances" were needed before a successful party would be deprived of its costs.

Special Leave applications

In *South-West Forest Defence Foundation v Department of Conservation and Land Management*[10], unsuccessful applicants for special leave to appeal argued that their proceedings, seeking to enforce environmental laws relating to endangered species, were of a public interest character and therefore there should be no order as to costs. Rejecting this argument, the Court did not decide whether or not the proceedings were actually brought in the public interest. Gaudron, McHugh, Hayne and Callinan JJ did not give detailed reasons for their decision; however, Kirby J pointed out that *Oshlack* does not require that a new costs regime apply to all proceedings in the public interest. To do so would require legislation (such as s 123 of the *EP&A Act*, which was a factor in the majority decision in *Oshlack).*

Other areas of law: Liquidators, immigration

In *Energy and Resource Conservation Company Pty Ltd (in liq) v Abigroup Contractors Pty Ltd and Ors*[11], Rolfe J rejected an argument that when liquidators bring proceedings fulfilling their public duty to wind up companies in an orderly fashion they should be compensated by way of costs orders. His Honour noted that his costs order in that case did not depend on public interest issues.

De Silva and Ors v Ruddock and Anor[12] concerned a challenge in the Federal Court to the validity of migration regulations by applicants for immigration visas. Merkel J held that there were no public interest aspects to the litigation, as the applicants had brought the proceedings for individual benefit. The fact that the proceedings involved elements of public law did not mean that they were brought by the applicants for the benefit of the public or to enforce a public duty. A similar finding was made by RD Nicholson J in *Selliah v Minister for Immigration and Multicultural Affairs*[13].

Summary

The application of *Oshlack* shows that that decision is extremely limited in scope. It certainly has not established a requirement that the public interest nature of litigation be taken into account. As many of the above cases show, it is rare that proceedings will be found to be brought in the public interest; and even when they are that will not of itself be sufficient to secure a costs order. Even in the Land and Environment Court, proceedings brought to enforce laws relating to the protection of threatened species in which the applicants had no personal interest was held not to be public interest litigation. Also, Talbot J's judgment in *Timbarra* suggests that different considerations may apply when considering whether a costs order should be made in favour of a private respondent to public interest litigation, rather than a public authority. For the public interest nature of litigation to become a more reliable factor in a court's exercise of its discretion to require costs legislative reform is required.

Thanks to Simon Greenacre for assistance with preparing this article. (Endnotes overleaf)

Endnotes

1. Blindell, J. "Community Enforcement Costs Orders, the High Court and the Need for Reform", in Impact 50, June 1998 p
2. (1998) 72 ALJR 578; 152 ALR 83; [1998] HCA 11
3. [1998] 432 FCA
4. [1998] HCA 11 at 30-31
5. (1988) 81 ALR 166 at 171
6. Unreported, Court of Appeal, No 40709/97, 27 March 1998
7. (Meagher and Sheller JJA concurring)
8. At 36.
9. Unreported, Land and Environment Court of NSW, Talbot J, 15 May 1998
10. [1998] HCA 35. For further discussion of this case see "High Court Rules on Forrest Cases" in this issue of Impact.
11. Unreported, NSW Supreme Court, Rolfe J, 18 March 1998
12. [1998] 311 FCA
13. [1998] 469 FCA

High Court Rules on Forest Cases

Michael Bennett, Solicitor, EDO WA

On 1-2 April 1998 the High Court, sitting in Hobart, heard applications for special leave to appeal brought by the WA EDO on behalf of the South-West Forests Defence Foundation and the Bridgetown-Greenbushes Friends of the Forest.

The applications before the High Court arose out of legal actions which had been taken in the Supreme Court of Western Australia. Those actions had attempted to prevent logging in four high conservation value forests: Kerr, Hester, Jane and Sharpe. A number of important legal issues relating to forest management in Western Australia had been raised by the legal actions, and more specifically by attempts to strike out the statements of claim in those actions. The issues raised included the following:

- whether conservation groups have standing to go to court where they believe a government body is breaking an environmental law;
- whether the manager of Western Australian State forests, the Department of Conservation and Land Management (CALM), has a duty under its forest management plans to take reasonable steps to conserve endangered flora, fauna and ecological communities in State forests rather than simply having a duty to implement those plans "honestly and in good faith";
- whether local conservation groups such as the Bridgetown Greenbushes Friends of the Forest have a legitimate expectation that they will be consulted about local logging plans where there is a public undertaking to consult with the local community concerning that issue;
- whether the Crown - effectively government bodies such as CALM - is bound by the fauna protection provisions of the *Wildlife Conservation Act* 1950 (WA); and
- whether environmental protection conditions imposed under the *Environmental Protection Act* 1986 (WA) can be enforced by a conservation group through injunction proceedings, in circumstances in which the conditions provide their own procedure for auditing compliance.

Although the South West Forest Defence Foundation had been successful on most of these points at first instance, the Full Court of the Supreme Court found against both groups on all but the standing issues on appeal. The conservation groups sought to reverse this position before the High Court, and the respondents to that application (the Executive Director of CALM, and the State of Western Australia) raised the standing issue in the event that special leave to appeal was granted.

The majority ruling

The High Court ruled, by majority of 4 to 1, that the case was not an appropriate one for the grant of special leave to appeal. In making this decision, the majority of the Court, comprising Gaudron, Hayne, Callinan and McHugh JJ (Kirby J. dissenting), decided that the meaning and legal effect of the alleged duty owed by CALM to liaise with the local community surrounding Hester forest was not seen as a matter of sufficient importance to attract the grant of special leave to appeal. In addition, in respect of the argument that CALM and its agents and contractors were bound by the fauna protection provisions of the *Wildlife Conservation Act*, the Court found that the issue raised bordered on the hypothetical and again was not an appropriate point of law on which to base the grant of special leave, because CALM could get permits to allow the taking of wildlife.

In a previous directions hearing, Justice Toohey had framed 18 questions for the High Court to consider. Many of these questions required interpretation of the forest groups' statements of claim. Although not appearing in the High Court's reasons for decision, the fact that many of the questions raised issues of interpretation rather than well-defined questions of legal principle clearly played a role in the Court's decision.

It is important to note that the majority did not, as is often the case when applications of this sort are refused, indicate that the judgment of the Supreme Court was correct. Indeed, in respect of the Supreme Court finding that CALM's obligation to follow the "Conservation Objective" and subsidiary procedures in the Forest Management Plan 1994-2003 was limited to acting "honestly and in good faith", the majority indicated that it felt there was some merit in the submissions put on behalf of the forest groups.

Furthermore, the majority of the Court indicated that because the Supreme Court judgments arose from interlocutory decisions (albeit with final effect) as to the striking out of the forest group's statements of claim, the forest groups could potentially bring fresh proceedings on the same points before the Supreme Court of Western Australia. Of course, there are

significant practical obstacles in the way of this course of action being adopted, most notably the huge amount of legal costs that the forest groups must now pay in respect of the Supreme Court and High Court proceedings.

The dissenting judgment

In a strong dissenting judgment, Justice Kirby indicated that in his view special leave to appeal should be granted. He indicated that important questions of law were raised by the proceedings, and that in his preliminary view the Supreme Court had not decided those questions correctly. His Honour noted in particular that the legal effect of statements in management plan, such as the forest management plans in question was an issue of national importance given the increasing use of such management plans around Australia.

Where to from here?

The refusal of the High Court to overturn the Supreme Court's decision in these cases means, on the current state of the law:

1. CALM is not required to take reasonable steps to pursue the conservation objective in its Forest Management Plan 1994-2003 to conserve endangered flora, fauna and ecological communities in State Forests - rather, it has a vague duty to "act honestly and in good faith" in pursuing its conservation objective.

2. The fauna provisions of the *Wildlife Conservation Act*, which prohibit the killing and disturbance of native fauna, do not apply to CALM or other State Government instrumentalities.

3. The Environment Protection conditions imposed by the Minister for the Environment on CALM in 1992, in respect of management of State Forests, cannot be enforced until the EPA or Minister for the Environment have made a determination that those conditions have been breached.

The EDO has taken steps to pursue law reform changes in respect of the second two points outlined above.

In relation to the *Wildlife Conservation Act*, the EDO is preparing a discussion paper detailing what is required for a complete overhaul or replacement of the Act. This discussion paper will outline reforms needed to modernise the Act, make it more effective and to specifically bind the Crown.

In respect of the ministerial conditions issue, the EDO has provided a written submission to the EPA which deals, amongst other matters, with how to ensure that the Ministerial conditions are being complied with properly. The submission includes a critique of the internal audit system established by CALM to test compliance with laws such the ministerial conditions. The submission also requests that the EPA convey to the Government the substantial and strong concerns that members of the community have about the current structure of CALM, and about the urgent need for the reform of CALM to separate its regulatory and business operations.

Public Access to Government Documents

James Johnson, Director, EDO NSW

Two recent cases have strengthened the right of the public to gain access to documents held by government in various circumstances.

Hamilton v Environment Protection Authority

(District Court of NSW, No 367 of 1997, 5 August 1998, unreported)

On 5 August 1989 Judge Ainslie-Wallace delivered judgement in the District Court of NSW at Wollongong in an appeal under section 55 of the *Freedom of Information Act* (FOI Act). The appeal was against the refusal of the Environment Protection Authority (EPA) to produce documents, following an application under the FOI Act made on 3 June 1997.

Background

In 1989 the forerunner of the EPA, the NSW State Pollution Control Commission, imposed requirements on a copper smelter in Wollongong, the Southern Copper Ltd smelter, because it was emitting unacceptable amounts of pollutants. The smelter sought an increase in output as part of an upgrade of the smelter to improve the rate at which pollutants were contained. The upgraded smelter commenced in 1991 or 1992 but failed to meet the environmental criteria. In 1993 the EPA sought to impose a pollution reduction program on the company. In order to meet the requirements of the program, the smelter company proposed a further upgrade of the smelter which would increase production by 50% and, of course, promised further reductions in pollution.

A development application was lodged, a Commission of Inquiry held and development consent granted to the smelter. The consent allowed the smelter to release emissions which were in excess of those recommended by the National Health and Medical Research Council and the World Health Organisation.

Ms Hamilton, a local Wollongong resident, commenced proceedings in the Land & Environment Court challenging the validity of the grant of consent for the smelter, but before the proceedings were heard the Government introduced legislation which had the effect of validating the consent. The smelter remains undeveloped and there appears to be no immediate prospect of it reopening.

The FOI application to the EPA

Ms Hamilton made application for access to various documents relating to the grant of a Pollution Control Licence by the EPA for the smelter. The grounds which an agency may rely on to refuse access to documents are set out in section 25 of the FOI

Act. Exemptions for most documents were claimed under Clause 9 of Schedule 1-Internal Working Documents. This clause provides an exemption if a document contains "an advice or recommendation, or consultation or deliberation in the course of, or for the purpose of, the decision-making functions of the government, and it would on balance be contrary to the public interest to disclose it".

In determining the competing public interest, the EPA uses a set of guidelines it has prepared. The Court considered each of these guidelines. In doing so it took into account the objects of both the FOI Act and the environmental legislation administered by the EPA. Judge Ainslee-Wallace noted:

> "I am satisfied that the legislation to a degree enacts the recognition by the Government of the need for consultation of and communication with the public on matters of the environment which affect them...I find that I am not limited to a consideration of the objects of the Act merely to assist in determining any ambiguity but that they should properly form part of the consideration of the Act as a whole".

In this context, the Court then went on to consider the various guidelines adopted by the EPA to determine whether release of documents would be in the public interest.

The first guideline was that "disclosure would impair the integrity of the decision making process within the agency by inhibiting the frank and open exchange of views prior to final decision making".
The Court held:

> "...there is no place for such a test when considering the public interest that is said to work against disclosure under the FOI Act. It seams to me, with respect, to be an untenable proposition to say that the quality of the advice given by public servants and indeed that the quality of their suggestions on particular issues be impaired if those advices or suggestions could become public".

The Court considered that future publicity may even act as a deterrent against specious or expedient advice and so be in the public interest. The application of the guideline was ultimately limited to instances to which there is particular evidence which supports the contention that there will be a loss of candour in similar future deliberative processes. The second guideline falls squarely within the first, described above and needs no separate consideration.

The third guideline was that disclosure of documents developed in the formulation of policy is against the public interest. The Court held that this guideline does not assist the EPA in deciding where the balance of public interest lies and therefore held that it was not a proper test to be applied in considering the competing public interests.

The fourth guideline was that disclosure would encourage ill informed and "captious" (disapproving) public or political criticism. This test appears to have been borrowed from Reed LJ in *Conway v Rimmer [1968] AC 901*, considering Crown privilege. Gibbs ACJ cited the case in *Sankey v Whitlam (1978) 142 CLR 1*, and went on to say that the protection was to ensure the proper working of government and not to protect ministers and other servants of the Crown from criticism however unfair and intemperate. Her Honour went on to hold;

> "Any support for the protection of ministers and public servants gleaned from (*Conway v Rimmer*) and from (*Sankey v Whitlam*) has to be confined to the context in which they were made and in my view that protection does not extend for it to become a matter of public interest to be weighed in determining disclosure".

The Court thus held that the guideline was not legally available. The Court also considered recent defamation developments including *Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104*, and the implied constitutional freedom of speech relating to government and political matters.

> "I am of the view that this test does infringe the second limb of the tests proposed by the High Court by placing a restriction on political discussion if it be carping and which is not reasonable to obtain a legitimate object of the FOI Act and would, but for my earlier ruling, be invalid for determining the public interest".

The fifth guideline was that premature release of tentative or partially considered policy matter may mislead and encourage ill-informed speculation. The Court held that the test offended section 59A(b) of the FOI Act which provides that it is irrelevant that disclosure may cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

The sixth guideline is essentially that to disclose the documents would be unfair in some way to the decision maker or prejudice the decision making process, especially where the decision maker is of a high level and if the matter concerns a decision with particular sensitivity. As to the last part of this guideline, the Court held that it is the content of the document which will determine its disclosure not the level of which it was created. However, the Court considered that this guideline is legally available in particular cases and should be determined on a document by document basis.

The EPA raised two further tests during the hearing. The first was confidentiality. As to this, the Court held that whether a document contains or was created from confidential information must find its exemption within the existing categories of exemption and not within the public interest test.

The second was E-mail communication. The EPA argued that matters which would in the past have been discussed face to face or in a telephone call are now discussed in E-mail. When printed out they appear to have a degree of finality which was never intended. The Court held that the FOI Act is concerned with the provision of information rather than the form in which it was contained and dismissed this test as irrelevant in determining the public interest.

The Court has been relisted to examine, in the light of this

judgment, each of the documents to which access was refused.

This case is important because it strikes at the heart of the Premier's Guidelines which are used by all NSW agencies in interpreting the FOI Act. Hopefully it will also play a role in challenging, if not changing, the culture within the EPA.

Transport Action Group Against Motorways Inc v The Roads and Traffic Authority

(Land and Environment Court, No 40006 of 1998, 4 August 1998, unreported)

On 4 August 1998 Lloyd J delivered judgment in the Land & Environment Court on an interlocutory application where the Roads and Traffic Authority (RTA) sought to claim public interest immunity to avoid production of documents. The judgment is important for its consideration of public interest immunity in the Land & Environment Court.

Background

The EDO is acting for the Transport Action Group Against Motorways (TAGAM) in proceedings challenging the grant of an approval by both the RTA and the Minister for Urban Affairs and Planning to the M5 East Motorway. It is argued that there were significant changes to the proposal after the preparation and exhibition of the Environmental Impact Statement (EIS). Accordingly the EIS is inadequate.

The Minister for Roads issued a media release on 27 March 1998 stating in part that "Environmental considerations have required considerable changes to the original plans. There have also been complex engineering issues related to the route crossing the Cooks River at the Airport".

TAGAM issued a Notice to Produce seeking all documents relating to the complex engineering issues referred to in the Media release.

The RTA noted that some documents described in the notice to produce arise from the tender process for the M5 Motorway. The invitation to tender contained a confidentiality provision, noting that the processes would be conducted in accordance with the NSW Governments' Code for Tendering, which emphasises the importance of confidentiality of information supplied in the tender process.

Accordingly, the RTA claimed that the public interest would be damaged by production of the documents because:

1. the documents contained innovative solutions to engineering challenges arising from the Motorway Project which is the intellectual property of the tenderers and should be protected,
2. production may cause the withdrawal of project tenderers
3. there is a risk that the tenderers may learn the details of other tenderers and there is therefore a potential threat to the competitiveness of the process,
4. production of documents may damage confidence in the process more broadly, because tenderers might be reluctant to submit tenders for projects involving the RTA.
5. production may threaten public confidence in the tender process for other Government Departments.

Preliminary Issues

The Court dealt with two key preliminary issues. The first was whether the purpose for which the Applicant requested the documents is a legitimate forensic purpose: that is, is it likely to assist the Applicant's case. The Court rejected the claim that the Applicant's notice to produce was a mere fishing expedition and based on a bare unsupported assertion. It held that it was "on the cards" and reasonably probable that some of the documents requested will be of assistance to the Applicant in its case.

The second preliminary issue was whether the Court should defer access until the main issues had been determined in the hearing as the documents went predominantly to the question of the exercise of the Court's discretion. The Court rejected this submission. Deferral would mean that a large amount of material would only be made available to the Applicant during the hearing of the proceeding. It would be likely to lead to an adjournment which would be inefficient and inconvenient. Further it is not always that an issue such as discretion can be divorced from the remainder of the proceeding.

Public Interest Immunity

The court reviewed the relevant principles relating to public interest immunity, noting the words of Gibbs ACJ in Sankey v Whitlam that;

> "It is in all cases the duty of the Court, and not the privilege of the Executive Government, to decide whether a document will be produced or may be withheld".

The Court noted that in exercising this discretion it must balance the public interest in administration of justice requiring the disclosure of all relevant material, against any competing public interest in withholding that material.

Of particular importance, the Court had regard to the fact that the litigation was not brought to enforce a private right, but was brought in the public interest to further a statutory obligation. The Court had regard to section 123 of the *Environmental Planning and Assesment Act* 1979 (NSW) which gives open standing to enforce the Act. The Court noted:

> "in balancing the public interest the type of litigation which is being pursued is, in my opinion, a relevant consideration".

The Court was prepared to make orders limiting access to legal representatives and experts upon the provision of a written undertaking from each of those persons not to use the information for any other purpose.

This appears to be a logical application of the principles recently confirmed by the High Court in the *Oshlack* v. *Richmond River Shire Council* (1998) 72 ALJR 578; 152 ALR 83; [1998] HCA 11, that in exercising discretion in matters under the *Environmental Planning and Assessment Act* 1979 (NSW), the fact that the litigation is brought in public interest is a relevant factor to be taken into account.

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BOOK REVIEW
"Global Spin: The Corporate Assault on Environmentalism"
by Sharon Beder*, Scribe Publications, Melbourne, 1997

Review by Katherine Wells, Senior Solicitor, NSW EDO

"A new wave of environmentalism is now called for: one that will engage in the task of exposing corporate myths and methods of manipulation." [Sharon Beder]

It is Sharon Beder's contention that corporate activism has enabled corporations to counter many of the gains made by environmentalists over the last few decades, and, as we reach the end of the 1990's, to dominate most debates about the state of the environment, and what should be done about it.

The purpose of her book is to examine the way in which this has occurred - and it makes for fascinating reading. Looking mainly at developments in the USA, she traces the rise of corporate activism since the 1970's, and the techniques used by corporations to reshape public opinion about environmental matters and influence environmental decisions at the political level.

She looks, for example, at the use of industry front groups, such as "The Alliance for Responsible CFC Policy", representing US chemical companies, and in Australia, the Forest Protection Society, which shares the same postal address as the National Association of Forest Industries. Many of these groups would appear to the public to be environmentalists. She also looks at the way in which public relations firms are now assisting their corporate clients to respond to the success of community environmental campaigns by "manufacturing grassroots support" for industry positions on environmental issues through the use of specially tailored mailing lists and telephone banks. This support, which manifests itself in the form of telephone calls and personalised letters to politicians, is a powerful influence on legislators.

She has a chapter on SLAPP suits (Strategic Lawsuits Against Public Participation), such as defamation actions and, in Australia, actions under the *Trade Practices Act* 1974 (Cth), and the "climate of fear" that such legal actions produce, dissuading the public from speaking out on matters of public interest, and discouraging activists from continuing the "honourable tradition" of civil disobedience.

She also has several chapters on conservative think-tanks and the enormous influence they have wielded over the last few decades. She traces the way in which they have moved the entire policy agenda to the right; free-market ideas have come to dominate all policy issues, including environmental policy. She lists some of the techniques used by the think-tanks to achieve their desired policy outcomes: they cast doubt on the urgency of environmental problems; they seek to paralyse governmental regulation by requiring full risk assessments and cost benefit analysis before any new regulation can be introduced; and they argue that economic instruments should replace "outdated command and control" regulations as the appropriate way to deal with environmental problems.

Beder then spends several chapters looking at the activities of the multi-billion dollar public relations industry in more depth, and in particular the activities of the PR firms who earn the largest part of the environmental dollar, such as Hill and Knowlton, and Burson-Marsteller. She examines the strategies they employ to influence the media and to lobby government, and in a particularly interesting chapter looks at how they assist clients to deal with local communities and environmentalists. They use techniques which emphasise the positive and attempt to cultivate trust, and they use "divide and conquer" tactics with environmentalists. They may, for example, recommend that corporations fund environmental groups as a way of winning them over - or employ troublesome environmentalists as a way of silencing them.

At the opposite end of the spectrum, they label environmentalists with negatively-charged words such as "eco-terrorists". (The attempt by the recently-screened series "Against Nature"to draw a link between Hitler and environmentalists is a recent example of this.) One PR specialist has apparently categorised activists as either radicals, idealists, realists or opportunists. His formula for dealing with them is as follows: isolate the radicals, turn the idealists into realists by force of persuasion, co-opt the realists to support industry solutions - and opportunists will go along with the final agreement.

Beder also has chapters on the power of advertising and the way in which advertisers influence the media. She looks at green marketing, and in particular at the activities of the world's largest advertiser, Proctor and Gamble.

Lastly, she examines the media itself, and way in which it is influenced by corporations and conservative foundations (not least through the ownership by corporations of media outlets - such as General Electric's ownership of NBC). She also looks at the way in which rules of "objectivity" and "balance" in journalistic reporting tend to exclude much of the environmental debate and give undue prominence to corporate views.

"Global Spin" is compelling reading - and a "must" for all environmentalists if they are to understand the sophisticated nature of corporate responses to pressures for greater levels of environmental protection. However, it is disappointing that Beder has not used more Australian examples of the manipulative techniques she exposes.

There is a whole chapter on the Wise Use Movement in the USA, for example, but no examination of the activities of the Australian mining industry, with its promotion of "multiple use" concepts, or of the (Australian) National Farmers Federation, and its campaigns in favour of private property rights. There are brief mentions of the right-wing Australian

think-tanks, the Centre for Independent Studies and the Institute of Public Affairs, and their involvement in the environmental debate - but there is scope for far more detail. There is extended commentary about the effect corporate activism has had on US legislators and environmental legislation, but almost nothing is said about the Australian context.

It would be fascinating to see a systematic analysis of the effect of corporate activism on environmental policy and legislation in Australia since the late 1980's, when the environmental movement was at the peak of its political influence. How is it, for example, that the Australian corporate world has managed to co-opt ESD terminology so effectively? Why is it that almost a decade after criminal environmental liability for directors was introduced around Australia, and widely recognised as being an extremely significant deterrent against environmentally harmful activities, the Commonwealth Government has introduced a major new environmental Bill which specifically excludes directors from criminal liability for breach of many of the Bill's most important provisions?

There are clearly many lessons for the environmental movement in "Global Spin". Not the least of these is Beder's conclusion that: "Environmentalists, particularly those in the major environmental groups, tend to concentrate their efforts in the public realm of pressure groups politics and ignore the ideological sphere where corporations set the agenda. It is in this ideological sphere that environmentalists need to devote their energies if they want to win." It will be interesting to see how the environmental movement responds.

*Sharon Beder will be a keynote speaker at the National Environmental Defender's Office Network conference **Defending the Defenders** in Sydney on October 24, 1998. Call 02 9262 6989 for further details.

Coastal Environmental Law Workshops

The EDO has received limited funding from Coastcare to hold a series of coastal environmental law workshops. It is proposed to hold 8 workshops along the NSW coast in late October/ November 1998 focussing on coastal issues such as planning, coastal policy, native vegetation and pollution.

We are presently involved in discussions with community groups in the following areas **Bega/Narooma, Nowra, Wollongong, Narrabeen, Newcastle, Forster, Coffs, Grafton, and Lismore**. If you would like to be put on our mailing list, please contact Tessa or Julie at the EDO on 02 9262 6989 or email us at edonsw@edo.org.au

IMPACT is published by the Environmental Defender's Office (NSW) Ltd, a Sydney based independent community legal centre specialising in environmental law. Printed on recycled paper.

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