IMPACT

PUBLIC INTEREST ENVIRONMENTAL LAW

edo NETWORK

No 52 DECEMBER 1998

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Cite as (1998) 52 Impact
ISSN 1030-3847

Community Land Goes Back to the People

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The management of public parks and reserves, and other public land assets under the control of local councils, is a matter of great importance to many members of the community. The *Local Government Amendment (Community Land Management) Bill 1998*, recently passed by the NSW Parliament, makes some significant changes to the statutory scheme for control of these areas that will improve opportunities for public participation and involvement in management of community land.

What is 'community land'?

When the *Local Government Act 1993* ("the 1993 Act") was introduced, some significant changes were made to the way in which land controlled by councils was managed. The *Local Government Act 1919* ("the 1919 Act") provided a set of rules regulating land uses for public land. However, the 1993 Act transferred much of the power to regulate public land use to councils.

The 1993 Act required councils to classify all land under their control as either 'community' or 'operational'. According to a note in the 1993 Act:

> "The purpose of classification is to identify clearly that land which should be kept for use by the general public (community) and that land which need not (operational). The major consequence of classification is that it determines the ease or difficulty with which land may be alienated by sale, leasing or some other means."

A note in the the Act states that community land would ordinarily be land such as a public park; while operational land is land held as a temporary asset, land used by the council to carry out its functions or land not generally available to the public like works depots or garages.

There are a number of restrictions on the way councils can deal with community land:

- Community land cannot be sold
- A council can grant a lease of up to five years over community land (or 21 years if the Minister for Local Government agrees), but only for a public purpose
- The council must prepare a plan of management for the land, and may not change the use of the land when they do so. Plans of management must place land into one of a number of specified categories, and define objectives for the management of the land. After the plan of management is prepared, the land must be managed in accordance with that plan.

No such restrictions apply to operational land.

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What is the effect of the Bill?
The Bill makes a number of significant changes to the administration of community land, several of which are set out below. Some of these changes were contained in the original Bill. Others were made by amendments to the Bill moved by the Hon Ian Cohen and the Hon Richard Jones, and drafted with the assistance of the EDO, which were ultimately accepted by the Government.

Public hearings
Under the 1993 Act, Councils can reclassify community land as operational land in two ways - by making a local environmental plan (LEP), or (in limited circumstances) by resolution. Councils must hold a public hearing in respect of a reclassification by LEP only. The Bill adds the further requirement that reclassification by resolution also requires a public hearing.

Public hearings will also now occur in connection with the making of plans of management. A hearing must be held into a draft Plan of Management that changes the category of land that an area is placed in (see *More meaningful categories of land* below).

Finally, the Bill provides that most public hearings relating to community land must be conducted by a person independent of the council. This is an important provision as it ensures the impartiality of a public hearing. The importance of this matter came to light when Ryde Council held a public hearing into the proposed reclassification of land including its aquatic centre. The public hearing was conducted by the Council's Director of Environmental Services. When a group of local residents brought legal action challenging the validity of the LEP reclassifying the land, one of their claims was that the public hearing was not impartial. Acting on the basis of legal advice, Ryde Council decided to start the reclassification process again and hold a fresh public hearing.[1]

Transparency in reclassification
The 1993 Act provided that upon land being reclassified from community to operational, any trusts, covenants or similar restrictions over the land automatically ceased to apply. As a consequence, many members of the public were surprised when they found out that when land was reclassified, conditions of its initial grant to the council that it be used for public purposes ceased to apply to the land.

The Bill provides that this will no longer automatically occur; and if a council wishes to remove restrictions over land that removal must be expressly provided for in the local environmental plan that reclassifies the land. This will ensure that members of the public inspecting the draft local environmental plan will see more readily that these restrictions are being removed, and will be able to make submissions about the desirability of the restrictions.

More meaningful categories of land
The Act requires councils to place all community land into a series of categories - natural area, park, sportsground or general community use. However, prior to the Bill, this was a virtually meaningless exercise, as there was no statutory consequence of categorising land in this way. In *Friends of Pryor Park v Ryde Council*[2], the Court of Appeal held that the granting of a lease for the conduct of a child care centre in the middle of land categorised as a natural area was permitted under the 1993 Act as it was not "manifestly inconsistent" with the categorisation.

The Bill adds a new category of "area of cultural significance". It also provides for a series of statutory 'core objectives' for each category of land, which govern the way the land can be managed. Leases and licences will only be able to be granted if they are consistent with the objectives of that category of land. This provides more meaning to the process of categorisation, and imposes a more rigorous test than that laid down by the Court of Appeal.

Where land is categorised as a natural area, the Bill permits only a limited range of buildings to be built or uses to be carried out on that land. Walkways, pathways, bridges, observation platforms and signs can be built; as can information and refreshment kiosks, work sheds and toilets, but uses such as restaurants and child care centres that have previously been carried out in natural areas will not be permitted.

Funds from community land leases to be used for the community
When preparing the Bill, the Government released a 'Green Paper' seeking input into possible changes to the community land scheme. A large number of responses indicated support for a restriction on the use of funds from leases and licences over community land. The Bill provides that although such money will be paid into a council's consolidated fund, the council must use that money primarily for buying more community land and managing existing community land, and can only use it for other purposes if there are funds left over after these needs are met. This provision will reduce the common practice of using profits from leases of community land to finance other council projects.

Tighter restrictions on leases
Under the 1993 Act, if a lease of between 5 and 21 years is to be granted over community land, the lease must be advertised; and if there is an objection to that lease, the Minister has the power to overturn any decision to grant a lease. The Bill allows for extension of these provisions to granting of leases of less than 5 years. This will prevent a council from avoiding Ministerial review of a lease by continually granting leases for less than 5 years.

Another potential loophole in the 1993 Act was the fact that once a lease was granted over community land, it could be sub-leased for any purpose, including one not authorised by a plan of management. This loophole is closed by the Bill, which requires any sub-lease to be granted for the same purpose as the original lease, or a purpose permitted by the Regulations.

The Bill also provides that any lease for a period of longer than 5 years must be the subject of public tender, unless the lease is granted to a non-profit organisation.

Public exhibition of changes to draft plans of management
There is presently no requirement to re-exhibit a draft plan of management if it is amended as a result of the public consultation process. Under the Bill, all changes to draft plans will have to be the subject of further public exhibition.
Changes to permissible land uses must be by way of LEP

Many LEPs prepared before the 1993 Act stated that land uses permissible on land zoned for public recreation were those uses permitted under the public land provisions of the 1919 Act. When the 1919 Act was repealed, the community land scheme replaced those provisions, but did not expressly permit any particular uses. As a result, in the case of *Seaton v Mosman Council*[3] (the 'Balmoral Bathers Pavilion' case), the Court of Appeal held that the land uses now permissible under those LEPs were whatever was provided for in a plan of management. This surprised many people, as it effectively meant that the making of a plan of management took the place of the usual process of planning by way of LEP. The Bill contains amendments aimed at overcoming that court decision. Under the amendments, the land uses specified in the 1919 Act will continue to be those permissible on such land, until the LEP is specifically amended. The making of plans of management will no longer take the place of a proper planning process.

Conclusion

Although the Bill does not fix all the defects in the community land scheme under the 1993 Act, it provides a much better system for management of community land allowing greater public scrutiny, and, in particular, should assist in reducing the incidence of unsympathetic use and exploitation of such land.

ENDNOTES

1 Northern District Times, 4/11/98 p1
2 (1996) 91 LGERA 382
3 (Unreported, 1998 NSWCA 75, 27/3/98)

Safe Speech

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This article is an extract from a paper which was first presented at the Environmental Defender's Office Conference, Defending the Defenders on October 24 1998. A full copy of the paper can be found on the EDO NSW website at http://www.edo.org.au or in the full set of conference papers available from the EDO NSW.

Two years ago a notorious developer made it clear to Penny Figgis, Vice-President of the Australian Conservation Foundation that his methods of dealing with his environmental opponents were to call them liars and to sue them for defamation.

Regrettably the defamation laws and other media laws operate in a complex and hugely expensive way which can seriously inhibit public interest discussion. To put it bluntly, the mere mention of defamation sends many rushing for cover. The purpose of this paper is reduce that sense of terror while acknowledging the risks.

The environment movement must maintain the political and social pressure against the use of these laws, with all their intimidating effect, and continue to remind both business and government that in a free society open discussion should not be constrained by resort of well funded parties to pursuing legal remedies against unfunded parties. However, as that debate has still not shifted the legal ground significantly, environmentalists must continue to confront the use of defamation and other media laws as one of the key pieces of artillery used by developers.

How, then, to deal with this. Understand the defamation and other media laws and learn those elements which facilitate the criticism and exposure of environmental threats - safe speech.

The best place to start learning how to speak with safety is to get a copy of the *ABC All-Media Law Handbook* from your ABC Shop. Now in its 3rd Edition and ninth printing, this booklet will explain in the simplest terms the scope for free speech under the media laws.

To begin with, not all criticism of or disagreement with people actually goes so far as to be defamatory. You only defame somebody when you publish something which **lowers their reputation** in the minds of ordinary people who hear, read or see the publication. This permits a wide range of ordinary analysis and criticism of what people do in their various pursuits that will not constitute defamation.

The liability is only for **publishing** to **other** people. So you can write confidential letters of the most severe criticism direct to the person criticised saying what you like, taking care to ensure the confidentiality. If they publish such a letter to someone else, you are not liable for that. Obviously you can't leak such a letter!

Next, you only defame when you **identify** a specific person. This means that a defamatory attack eg., on the 'chemical industry' for poor standards in carcinogenic side-effect research, without naming any company, is not a problem. (And the person has to be alive!).

More importantly even if something does defame a person, the law permits this in the interests of free speech and the operation of a democratic society if the defamation is:

- true and relates to a matter of public importance;
- a fair report of what is said in Parliament or in a Court;
- the honest opinion of the person making the statement;or
- protected by qualified privilege.

1. Truth Relating to a Matter of Public Importance

Of these defences to defamation, 'truth relating to a matter of public importance' is often the hardest one to prove because the laws of evidence are complex and admissible evidence even under the civil standard of proof (ie. on the balance of probabilities rather than beyond a reasonable doubt as under the criminal standard) still often creates a real barrier. The reason corruption can thrive for years is that direct evidence is seldom forthcoming.

The limitations of the truth defence are best demonstrated by

considering the value of 'leaked documents'. While there is nothing more devastating as a weapon in a campaign than having an original document that reveals an important issue, (remember the front page picture of the amended Sydney Water press release), a document is of no legal value unless it is possible to prove its validity by evidence from a person closely associated with it. The only documents which stand on their own terms are official registered documents, title documents and company searches. Even a statutory declaration or an affidavit does not 'prove itself' - it does not stand alone. It is only admissible if the person who swore it comes into Court and confirms the truth of its contents.

This is very important in environmental campaigning because documents are often leaked and people can easily wrongly assume that such documents can be used with absolute safety. They cannot and many a campaigner on public interest issues has used leaked documents to their peril.

The other important dimension of the truth defence is that it is often a fine line between published material being comment and therefore defensible under the honest opinion defence discussed below and on the other hand constituting a statement of fact which can only be supported if it is true.

The statement '... old growth forests are disappearing at an alarming rate', may arguably only be defensible as comment if the measured *rate* at which the forests are in fact are disappearing is either commonly known (as it is not) or is set out in the same statement. Otherwise you may have to prove it as a statement of fact.

Or consider '...John Howard has no commitment to good environmental laws' which would be a statement of fact you couldn't prove to be true; he will always say he has, of course. On the other hand '...if John Howard thinks this package of new environmental laws is the way to go, then I reckon he's in cloud cuckoo land' is not a statement of fact but, as we shall see, a defensible opinion.

It is regrettable that, except in clear cases, proving the truth of a defamatory statement is difficult; and worse still, if you set up a truth defence and fail to prove the truth, the damages can be increased (or aggravated).

Therefore from a practical point of view, except in clear cases, it is better for environmental defenders to rely on the next two defences, protected report and honest opinion.

2. Fair and Accurate Report

Because the law, in the interests of an open society, permits absolute privilege for politicians to speak within Parliament and for information to be presented in Courts, the law naturally extends this principle to protect a fair and accurate report of this absolutely privileged material.

This is a very powerful defence and any review of the daily press will see it constantly used with references such as 'it was revealed in court', 'as said in Parliament today'. It can be of vital assistance in raising matters of environmental importance where opposition and independent members of Parliament consider that the matter of concern is of sufficient importance that they should use the privilege of Parliament even where something may not be able to be factually proven as true. So a good way of using a document which is hard to prove, but for which there is a basis for supporting its authenticity, is to convince an MP that it should be tabled in Parliament.

There are of course limits to this. We are seeing them tested at the moment in NSW where the Privileges Committee of NSW has decided that Ms Franca Arena MLA exceeded an appropriate use of Parliament in publishing her paedophile allegations, that her conduct '...fell below the standards which the House is entitled to expect from a member and has brought the House into disrepute'. Arena was required to apologise or be suspended; she apologised. This will confirm the limits on MPs using privilege to table documents or make allegations on environmental issues without some basis for believing the veracity of the information.

Even within accepted limits, great care is needed because the privilege which attaches to reporting Court and Parliamentary proceedings, is not absolute but instead is 'qualified'. This means that the report must indeed be fair and accurate.

The High Court in the recent case *Chakravarti v. Advertiser Newspapers Ltd.* (1998) 154 ALR 294 found against the Adelaide Advertiser for reporting proceedings of the SA State Bank Royal Commission. In a nut-shell, the Court said that the meanings which came out of the press report of the proceedings were different from the meanings which came out of the Royal Commission transcript. To the uninitiated in defamation law, this may sound very silly but it must be remembered that in this area of the law, the so-called 'imputation' is king. Cases are fought not as much on the actual words themselves as on the meanings or imputations which are conveyed by those words. It was this distinction which was the downfall of the Advertiser in the *Chakravarti Case.*

For the environmental campaigner, it means that where you are using parliamentary or court material, you must stick to the material precisely and not depart from it. This of course includes not being selective of the material. The fairness of the report requires that all aspects of it be covered so that for example if the report includes a denial of certain facts you cannot simply quote the facts set out in the parliamentary discussion.

Another crucial element of protected report is that the protection does not permit the person who made the statement in Parliament or Court themselves to come out and repeat that statement outside in the public arena. Arguably it ought to be possible for a Parliamentarian to simply say, 'As I have just said in Parliament...'. However, the defence does not technically work this way.

The case of *Finch v Bell* in the Northern Territory was brought after an MP in the NT, Bell, repeated and discussed on the ABC information just tabled in the Legislative Assembly. Similarly, John Della Bosca, the NSW Labor Party Secretary is suing Franca Arena for saying outside Parliament: 'I stand by the comments that I made over this matter, and I believe that there has been a massive cover up to protect certain paedophiles ...' Della Bosca says he was identifiable as a relevant person

attacked by the allegations and that Arena had no parliamentary protection for repeating these matters outside Parliament. The *Bell Case* was settled (as discussed below) so the Court did not rule on the point. In the *Arena Case* it is possible that the Court would say this was a protected report but authority tends to be against Arena.

3. Honest Opinion

What I have called the 'honest opinion' defence is more generally called the fair comment defence which is a misnomer because what makes this defence so strong is that your comment need not necessarily be fair at all. The common law of free speech in a diverse society permits people to express their opinions, however unreasonable or biased they may be. I have always thought this is a good thing because as I have often put it, without rat-bags at both ends of the spectrum, the middle ground of any community is seldom challenged to reconsider its positions.

So, you can freely say that it is absolutely outrageous and contemptible for ERA to be building a uranium mine in the middle of a World Heritage National Park where the traditional owners disagree. You can say that the approval by the Minister for the Environment of the Hinchinbrook Project, the biggest coastal resort development on the entire east coast of Australia, in a National Estate area and adjacent to a World Heritage area, is stupid, appalling and wrong. You can say that everybody associated with the decision approving the Toaster near the Sydney Opera House, from the Mayor through the City Planning Committee, should be deeply ashamed of themselves for utterly failing in their exercise of sensitivity to the environment by making such a hopeless decision.

All of these may be statements of the honestly (even if unreasonably) held opinion of a person and even if they do defame the people identified by the comment, they are completely defensible.

There are two key problems with the honest opinion defence which mean that people should not have a false sense of security about using it.

First, as noted above, the statement must be a statement of **opinion** and not in reality a statement of fact defensible only as truth on a matter of public importance.

This is a fine distinction which even has QC's guessing, so be careful. But while it's not opinion to say, 'the Minister is dishonest', (that's a statement of fact), it is opinion to say, 'It would be very dishonest for the Minister to say the mine will not significantly affect the endangered birds when faced with the evidence before him that they will die in large numbers' (provided there is such evidence before him).

Or statements which seem to be factual but which are really opinions, eg.,. ' The Minister for Resources has really divided the nation by approving the Jabiluka mine'. You wouldn't have to prove the statistics on such a division because it is clearly an opinion. (Actually, it may not even be defamatory in that it may one of those critical statements that does not denigrate the Minister in the eyes of ordinary people).

Secondly, the statement must be **based on facts** which are either **set out in the same publication** as contains the comment **or else are well known** to the audience.

A good example relates to conflict of interest. The precise legal definition of what amounts to conflict of interest in each particular commercial or public context may differ and be complex. You can avoid this problem if you set out specific facts about a Councillor or a Minister which are true, such as their ownership of certain shares or property or that of a member of their family, and then say that for that person to make a decision on the particular issue in question would in your opinion be a conflict of interest. You have set out the facts on which your opinion is based, they are true so your opinion is defensible.

One of the best illustrations of the strength of the opinion defence lies in the wide use in Australia of satire. The endless representation of public figures as being extremely silly often falls within the legal classification of acceptable, if outrageous, opinion. (Of course, it can also mean that most people don't take satire so seriously as to consider the reputation of the butt of a joke to have been reduced!)

4. Qualified Privilege

The last group of defences to defamation arises in a range of limited circumstances where, in the interests of protecting the essential flow of information, a limited or qualified privilege is allowed by the law. They are circumstances where the publisher or speaker has a duty to provide information on a subject to a person who has an interest in receiving the information. The duty may be a moral or social duty as well as a legal duty. These circumstances can be important in environmental campaigns.

The best cases covered by this are confined communications such as letters where the writer and the recipient are sharing information on a subject of importance for one or other of them. Examples of this are submissions to Ministers or officials (such as local councils) who are empowered to make a decision and have invited or would benefit from views and representations from interest groups. If you send your submission to that person you don't have to be able to prove the precise truth of defamatory material it contains unless perhaps the claims made are wild assertions with no relevance or clearly factually wrong.

Qualified privilege will however be defeated as a defence if the publication was malicious, ie, not for the purpose of contributing to the debate on the issue in question.

Another limb of the qualified privilege defence is the limited so-called public interest qualified privilege defence involving matters of major governmental public importance where the publisher has acted reasonable under quite strict criteria. For a while, the decisions of the High Court in *Theophanous* (1994) 124 ALR 1 and *Stephens* (1994) ALR 80, excited enthusiasm that Australia might develop a healthy public interest defence along US lines. The High Court has however in *Lange* (1997) 145ALR 96 retreated from this and reformulated this test within the normal law of qualified privilege.

The principle in the *Lange Case* after years of legal argument and hopeful anticipation, really comes down to virtually no change in the law and the introduction of a concept which really does not provide much help at all to people seeking free debate on public issues. The High Court said that the concept of freedom of speech and communication implied in the Australian

Constitution requires, not a separate defamation defence for public debate but rather, that the common law categories of qualified privilege include the dissemination and receiving of information about government and political matters that affect the people of Australia.

However the publication must be 'reasonable' and 'not actuated by malice'. The reasonableness test set out by the High Court is very strict namely that conduct will not be reasonable unless the publisher had reasonable grounds for believing the defamation was true, took all reasonable steps to verify the accuracy of the material, did not believe the defamation was untrue and sought a response from the person defamed and published any such response.

I venture to suggest that in virtually no case of an ordinary presentation of published material, will these preconditions be able to be satisfied. Certainly, it would have been of no benefit in the *Lange case* because the program in that case, being roundly critical of the private sector funding of the New Zealand Labor Party wouldn't have had a hope of getting to air if responses were necessarily sought on every occasion from all parties.

No Stopping for EIA - M5 East Motors Ahead

Transport Action Group Against Motorways Inc. (TAGAM) v Roads and Traffic Authority (RTA) and Minister for Urban Affairs and Planning. Land and Environment Court No. 40006 of 1998

Andrew Sorensen, Solicitor, EDO NSW

Judgment was given by Bignold J in these proceedings on 25 November 1998, dismissing the application. The proceedings concerned the proposed construction and operation of the M5 East Motorway, situated between Beverley Hills and Sydney Airport. TAGAM had challenged the validity of the RTA's decision under Part 5 of the Environmental Planning and Assessment Act 1979 (EPA Act) to proceed with the proposed Motorway, and the Part 5 approval granted by the Minister to the Motorway.

The facts and the applicant's arguments

Section 112(1) of the EPA Act states that the RTA cannot carry out an "activity" that is likely to significantly affect the environment (in this case being the proposed Motorway) without first preparing an environmental impact statement (EIS) in respect of that "activity". An EIS had been prepared by the RTA and exhibited, but subsequent to the preparation and exhibition of the EIS, a number of major changes had been made to the project by the RTA, which were subsequently approved by the Minister.

TAGAM's principal argument was that the changes to the proposal for the Motorway were so extensive that the EIS which had been prepared by the RTA could no longer be said to be in respect of the "activity" (being the Motorway as approved by the Minister). Accordingly s.112(1) had not been complied with. There had been no opportunity for the public to be informed of the nature and scope of the changes or their potential environmental impacts.

Further, TAGAM argued that the RTA could not rely on its power to modify the activity under s.112(4) of the EPA Act, as the changes were too extensive and uncertain in nature to be validly characterised as "modifications", and in any event could not be said to eliminate or reduce the detrimental effect of the activity, as required by s.112(4).

Accordingly both the decision of the RTA to proceed and the Minister's approval, neither of which could be given until the activity had been the subject of an EIS, were invalid.

In summary, the changes to the project included:

- the construction of a single exhaust stack of undetermined height and 800 metre exhaust tunnel to ventilate the Motorway's long tunnel, instead of and at a different location to the three exhaust stacks previously proposed;
- the construction of a tunnel of undetermined nature under the Cooks River instead of a bridge, with the associated generation of spoil and contaminated sediment;
- the realignment of a section of the Motorway from Marsh Street, Arncliffe to the Cooks River, passing directly through wetlands at Marsh Street and Eve Street, which constitute respectively habitat for the endangered Green and Golden Bell Frog, and an important wetland for migratory birds listed under international agreements;
- the construction of an underpass at Beverley Hills, instead of an overpass on embankment, with the associated generation of spoil;
- the provision of compensatory wetlands at an undetermined location;
- temporary construction facilities, including a concrete batching plant and mid tunnel access site at undetermined locations;
- unspecified works for the management, treatment, transport and disposal of clean and contaminated spoil, contaminated sediment and acid sulphate soils, which would be generated as a result of the underpass, the Cooks River Tunnel, the exhaust tunnel and the wetlands realignment;

TAGAM also argued that the Minister's approval was invalid because a large number of the conditions of the approval were uncertain in their operation, that it left open the possibility of

major future changes to the project, and postponed for future determination the assessment of many aspects of the project. TAGAM relied on numerous previous cases which stated that development consents granted under Part 4 of the EPA Act needed to be final and certain in their operation.

The RTA's decision to proceed with the changed project

In finding against TAGAM, Bignold J determined that it was relevant that Part 5 of the EPA Act imposes other or further obligations for environmental assessment beyond the preparation of an EIS. His Honour found that the changes to the project set out above were not themselves dealt with in the EIS prepared by the RTA, but were nevertheless the subject of environmental assessment, by the RTA in its Representations Report to Urban Affairs and Planning; by the Director General of Urban Affairs and Planning in her Report to the Minister; and by the Minister in granting approval.

Giving consideration to the whole of s.112, His Honour determined that the true meaning of the requirement for an EIS in respect of the "activity" does not depend upon the manner in which the relevant activity is described or characterised. The overall scheme of s.112 was to place the determining authority (ie the RTA) under a duty to progressively consider the environmental impact of a proposed activity, and to consider (pursuant to s.112(4)) whether the activity will detrimentally affect the environment and if so, to modify the proposal so as to eliminate or reduce that effect.

His Honour went on to find that the original activity and the changed activity were substantially the same, or to put it positively, the changed activity was substantially the same as the original activity.

In respect of the modifications power granted to the RTA under s.112(4), Bignold J found that the changes to the activity were relevantly "modifications" and were sufficiently definite to come within s.112(4). His Honour also found that the changes objectively eliminated or reduced the detrimental effects of the activity, and that the RTA had validly formed this same opinion at the time it determined to proceed with the changed activity.

Consequently, the RTA's decision to proceed with the construction of the Motorway as altered was valid.

The Minister's approval of the changed project

Bignold J then addressed TAGAM's discrete challenge to the Minister's approval on the ground of uncertainty (as described above). In finding the approval valid, His Honour determined that it was inappropriate to apply established principles concerning the validity of development consents granted under Part 4 of the EPA Act to the Minister's approval function under Part 5.

His Honour focussed in this respect on the "pivotal s.111" of the EPA Act which "imposes an all pervasive and permeating duty for ongoing environmental assessment". His Honour also interpreted the recent legislative history of Parts 4 and 5 of the EPA Act as evincing Parliament's intention that the restrictions on the granting of development consents under Part 4 should not apply to the Minister's approval function under Part 5. Accordingly, the "finality" and "certainty" requirements imposed on development consents by cases such as **Mison v Randwick Municipal Council** did not apply to the Minister's Part 5 approval.

Conclusion

The decision is disappointing, and may have significant negative ramifications for the adequacy of environmental assessment undertaken for major projects, as well as public participation in the decision making process for such projects.

In stating his reasoning in relation to the validity of the RTA's decision to proceed, His Honour does not appear to have addressed a fundamental function of an EIS, which is to bring matters relating to the proposed activity to the attention of the public, who then have an opportunity to make submissions and thereby participate in the decision making process. This latter function in particular cannot be replicated by any of the subsequent assessment processes relied upon by Bignold J.

Although not addressed in His Honour's judgment, the documentary evidence tendered in the hearing demonstrated the potential for each of the changes to the project specified above to have significant environmental and social impacts. These potential impacts include: localised air and visual pollution from the single exhaust stack; the substantial destruction of the Eve Street and Marsh Street wetlands; flooding of the Cooks River; disturbance of contaminated sediment, contaminated soils and acid sulphate soils; the generation of vastly increased quantities of spoil for transport and disposal; subsidence leading to fracturing of the South West and Southern Ocean Outfall Sewer line; and construction of compensatory wetlands of an undetermined size at an undetermined location. As a result of the failure of the EIS to deal with the changes to the project, the community has had no opportunity to comment in an informed manner in relation to any of these issues.

In contrast to Bignold J's finding that it is not necessary to characterise the "activity" which must be the subject of an EIS for the purposes of s.112, Cripps J in **Liverpool City Council v RTA** specifically found that a determining authority under Part 5 is not permitted to misdescribe an activity for the purpose of avoiding the duty imposed upon it by s.112. Cripps J also found in that case that an EIS was required to include material known to the RTA and of significance to the environment. No mention of this case is made in the judgment of Bignold J.

In relation to the Minister's approval, His Honour's reasoning fails to address the fundamental purpose of imposing conditions on a project, namely to provide certainty for both the developer and the community as to the scope and nature of the project being approved, and to ensure the environmental impacts of the project are appropriately addressed. It is a self evident proposition that one can only impose conditions which fulfil these functions if one knows with a reasonable degree of precision what the works required for a project are, where they are to be located, and what the impacts are likely to be. Given that a number of the changes to the Motorway are not finalised, are at undetermined locations, and involve unspecified works, and are accordingly subject to largely open ended conditions under the Minister's approval, it is difficult to see how the approval fulfils its role in providing certainty as to the project being approved or in addressing the environmental impacts of the project.

Reforming the Aquaculture Approval Process in South Australia

Mark Parnell, Solicitor, EDO SA

Aquaculture is one of the fastest growing industries in South Australia and many other States. As with all "frontier" industries, there is often a tension between the enthusiasm of proponents and their government supporters on the one hand, and conservation groups pushing for a more precautionary approach on the other. These tensions came to a head recently when the State's peak conservation body, the Conservation Council of SA Inc. (CCSA) successfully appealed against four aquaculture proposals in coastal waters.

The CCSA appeals followed many years of generally fruitless submissions and representations to government fisheries and planning bodies urging the adoption of 'ecologically sustainable development' (ESD) and 'community right to know' (CRTK) principles in the planning and approval process for aquaculture. Whilst these principles are in fact incorporated in various degrees into the relevant SA legislation, they are poorly applied in practice.

The appeals

The four CCSA appeals were against development approvals for snapper farming that had been granted by the Development Assessment Commission (DAC) - a statutory authority - through its delegate - the "Aquaculture Committee". The approvals authorised the placement of sea-cages to be stocked with commercial quantities of fish and moored to the seabed in Fitzgerald Bay, near Whyalla in South Australia's upper Spencer Gulf.

Fitzgerald Bay is a remote and unspoilt area that has previously only been subject to limited commercial and recreational fishing. The original CCSA submission to DAC (opposing the developments) stated:

"The farming of snapper may have the potential to provide a valuable boost to the local economy, but badly managed farms have the potential to seriously damage the economically-important wild fishery and the environment that sustains that fishery. If the lack of attention to detail that has characterised the development approval process is mirrored in the management and planning of the farms, the CCSA has grave concerns for the future of the upper Spencer Gulf environment."

In addition to arguments over the merits of the proposals, the CCSA submission highlighted a litany of procedural errors it claimed were made by both the applicants and the DAC. It was also argued that the only ecologically defensible and procedurally correct decision would be to reject or defer the applications pending the provision of more detail about the proposed fish farms and the host Fitzgerald Bay environment. These arguments were rejected by the DAC which approved one of the applications for full commercial production and three others for limited commercial production in July 1998.

As with its original submission, the CCSA appeals covered both procedural and merits grounds. The procedural grounds included allegedly misleading public advertisements and the failure to provide potential representors with required information about the proposed developments. The CCSA also challenged the delegation of decision-making power from DAC to its Aquaculture Committee. The merits arguments revolved mainly around the lack of environmental data and the potential risks that aquaculture posed to the local environment. In particular, the water beneath the proposed cages appeared to be too shallow and the risk of nutrient-rich waste causing algal blooms hadn't been properly investigated.

The matter was first listed for a pre-trial conference in September 1998. Shortly after the third adjournment of the conference, both the DAC and the developers conceded that the approvals were "probably invalid" on procedural grounds and both respondent parties declined to contest the appeal. Orders allowing the Conservation Council appeals were granted by consent shortly afterwards.

Whilst a win at the pre-trial stage was a good outcome in relation to the specific developments appealed against, it was a little disappointing not to have either the process or merits arguments judicially determined. No specific concessions were made by either of the respondent parties in relation to any of seven specified grounds of appeal. This means that the possibility of subsequent test cases remains high. The CCSA is particularly keen to have the Environment Resources and Development Court determine the meaning of ESD, which is a concept increasingly being used in legislation and government policy documents.

The One-Stop-Shop

One of the problems with the regulatory regime for aquaculture in SA is the government's "one-stop-shop" policy. Under this regime, aquaculture developers are able to lodge a single application with the resource department - Primary Industries and Resources SA (PIRSA) for the three different approvals required to farm fish in marine waters. As well as development approval under the Development Act 1993 SA, proponents are required to obtain a "fish farming licence" under the Fisheries Act 1982 and land tenure (lease or licence) under the Harbours and Navigation Act 1993. All three approvals were effectively granted by the Aquaculture Committee pursuant to delegations. The difficulty with this approach is that the standards, discretions and degree of public participation vary considerably under each Act. For example CRTK is specifically provided for in the Development Act, but the other, older Acts provide for no such rights. Similarly, there are no third party appeal rights in the two older Acts.

The one-stop-shop also embodies a real potential for bias and lack of procedural fairness. It is arguably very difficult for the decision-making Committee (or its individual members) to keep an open mind about the Development Act process (which

included public representations), if it had already made up its mind in relation to the other two necessary approvals.

Reforms following the appeals

As a result of the Conservation Council appeals, a number of reforms have been made or are in process. First, the DAC has changed the form of advertisement it uses to invite public representations on developments. The Development Act provides that "any person who desires to do so" may make a representation. The DAC advertisements, however, implied that a person needed to be "affected" in order to be entitled to make a representation. The advertisements have now been changed to reflect the words used in the Act. Whilst the DAC has not formally conceded that the previous advertisements were misleading the EDO believes that potentially, all previous approvals which used the old form of advertising are open to legal challenge.

Another response by DAC to the CCSA appeals was to abolish the Aquaculture Committee and effectively bring an end to the one-stop-shop. This means that Development Act assessment of aquaculture will now be handled by the full Commission and not by a delegate. The licence and land tenure approvals will be made by bureaucrats under delegated authority.

One particularly frustrating aspect of the approval process for aquaculture was the informal policy of the DAC never to provide (or even sell) photocopies of development applications or supporting documentation to members of the public. This meant that persons or groups wanting to make representations had to sit in the DAC reception area and copy out long-hand any particulars they required. Following the CCSA appeals, this policy has now been reversed. The DAC has also advised that copies of EPA, Coast Protection Board and other referral agency comments will also be made available prior to the DAC hearing of oral representations from third parties. It will also be possible for representors to access the proponent's responses to their submissions prior to these hearings. Previously, representors were at a distinct disadvantage at DAC hearings because they only had a fraction of the material that was available to the proponent or the decision-maker.

Where to next?

The CCSA has offered to assist the DAC to reform the process of aquaculture assessment. A key aspect of this reform is to draw up a new application form for development applications. This is important because the form sets out the information that is required of proponents in relation to both the proposal and the host environment. A failure on the part of a proponent to adequately address the matters raised in the application form can lead to subsequent procedural challenges.

The CCSA has also met with the failed developers of the Fitzgerald Bay snapper farming proposals. Understandably, the developers are keen to re-submit their applications and they are seeking more details about the conservationists' concerns over the merits of their plans. Whilst the CCSA will be reserving the right to lodge subsequent legal challenges to any further proposals, it has agreed to provide a non-exhaustive "dot-point" list of issues it believes were not properly addressed in the earlier applications.

One final point to make about these cases is that they have provided a timely boost to the morale of many conservationists in South Australia. Many prominent environmental campaigners are collectively and personally facing legal action at the suit of developers - mainly defamation actions in connection with the proposed Hindmarsh Island bridge. A win in the Courts (even if uncontested) has reminded many that the legal system can also be used to further conservation objectives, and that it sometimes yields good outcomes.

Regulatory Flexibility

James Johnson, Director, EDO NSW

The Government recently introduced the *Subordinate Legislation (Regulatory Flexibility) Bill* into Parliament. The Bill has far reaching potential impacts for environmental protection as well as other key fields of regulation, such as dangerous goods and occupational health and safety.

Background

The Regulatory Flexibility Bill will apply to all "principal statutory rules", that is all new regulations which are not direct amendments or repeals.

Regulations are automatically repealed after 5 years. Before they can be re-introduced the responsible Minister is required to ensure the guidelines set out in Schedule 1 of the Subordinate Legislation Act are complied with and a "regulatory impact statement" must be prepared.

The guidelines state that the objectives of the regulations and the reasons for making them must be clearly formulated and that the following principles must be considered:

- Implementation by means of a statutory rule should not normally be undertaken unless the anticipated benefits to the community from the proposed statutory rule outweigh the anticipated costs to the community, bearing in mind the impact of the proposal on the economy and (people) that may be affected.

- The alternative option that involves the greatest net benefit or the least net cost to the community should normally be chosen from the range of alternative options available to achieve the objectives.

There is a substantial obligation on Ministers to ensure that the objectives of regulations are clear and that regulations are not passed unless the expected benefits outweigh the costs.

The Regulatory Flexibility Bill

1. The Bill requires all Ministers to ensure that all regulations are "*performance based*", a requirement which is loosely defined. The objectives of the regulation will determine the

requirements. How that objective is to be achieved is left to the individual who must compy with the regulation. Regulations which are not performance based will only be allowed where the Minister considers it is not appropriate, having regard to the costs and benefits or it is not reasonably practicable.

For example, if the objective of a regulation is to ensure that people drive at a speed which does not endanger their own or other lives, a performance based regulation might provide that people shall not drive at a speed which endangers their own or other lives. This could replace a "prescriptive" scheme of various speed limits in various locations.

2. If a statutory rule is not performance based, then the regulation must include an *alternative compliance provision*. That is, a provision which allows a person to be exempted from compliance with a regulation, providing some alternative requirements are complied with. There appear to be no limits on the nature of these alternative requirements.

Section 9D of the Bill gives an example of a compliance provision which may be adopted. Under its terms, a Minister may make an order exempting compliance with a regulation, providing the requirements in the order are complied with.

Discussion

Ministers are already obliged to pursue alternatives to regulation as a means of achieving a purpose. Regulation is clearly meant to be the last resort. The fact is that in some cases regulation will need to be used and it will be prescriptive because prescription is necessary.

Unfortunately it is also used on occasion as a quick fix, a cheap way of being seen to take action. Good government in this respect doesn't require the passage of this Bill. It requires compliance with the Subordinate Legislation Act as it already stands.

Performance Based Standards

Ministers already have the power to make performance based regulations. This Bill goes further; it requires them to make such nebulous regulations where there is any measurable cost of the regulation on business.

It is much harder to prove a breach of such a regulation. With the speed limit example, a person could on each occasion argue the merits of the road conditions, the level of traffic, their own driving skill and the type of car they were driving to say that they were within the objective of the regulation.

Many regulations which appear prescriptive are necessarily so. Invariably the result of inquiries into major accidents in the workplace is that requirements set out in regulations have not been followed. The very reason that prescription is needed is that people tend to cut corners when pushed to save a dollar.

Alternative Compliance provisions

This aspect of the Bill is perhaps the most concerning. It paves the way for individuals to negotiate with the Minister to avoid compliance with the law as it applies to everyone else. It is completely open as to how compliance can be structured. For example, a corporation will be able to negotiate an alternative compliance plan, using the potential to invest in the State as a bargaining chip. To date, the deals which are done to entice investment in NSW have entailed financial and tax inducements. In future they may involve negotiating away environmental protection and workplace safety standards. One possible impact of the Bill that cannot be ignored concerns the potential for conflicts of interest for the exercise of undue influence that is inherent to the compliance plan scheme.

Section 9D provides some minimal protections for accountability. An Order made by the Minister must be published in the Gazette; a register of Orders made must be kept (somewhere) for public inspection. It is worth noting that an Order is not a disallowable instrument and will not be subject to Parliamentary scrutiny.

Moreover, people should not be misled into believing that even these minimal protections will be part of alternative compliance provisions. Section 9D is just one example of how an alternative compliance provision can be structured.

For example, mining companies could be exempted from compliance with pollution, occupational health and safety and dangerous goods regulations providing they comply with a code of conduct endorsed from time to time by the Minerals Council.

The Bill creates a significant level of uncertainty with respect to the application of alternative compliance provisions. Knowing what the text of the 'law' is, knowing when it applies, knowing when it ceases to apply and knowing what the consequences of amendments are, are all significantly uncertain. Presumably penal sanctions will attach to breaches of these provisions and therefore significant consequences are at issue in the context of these uncertainties.

The clarification of these uncertainties is in part dependent on the drafting of compliance plans which it appears will be done by persons not necessarily trained in drafting, paid by the person applying for the compliance plan, and owing no duty to the other persons who will be subject to the plan.

The Bill exposes ordinary citizens to punishment for conduct that has become criminal because of a private agreement between two other persons; under rules that may not necessarily be published and may not be fully accessible; by penalties imposed by Parliament in relation to some other conduct and transferred to conduct under an alternative compliance plan without any consideration of appropriateness.

Small businesses are unlikely to possess the expertise to formulate and negotiate their own alternative compliance provisions, nor will they have the resources to hire the professional consultants and lobbyists which passage of the Bill will inevitably require.

The Bill provides the Minister responsible for making regulations with almost unlimited discretion. This is highlighted by s.9D(7), which provides:

> The making of an order under this section is at the absolute discretion of the responsible Minister.

Aboriginal Ownership of National Parks in NSW

Tim Moore, Barrister

The first attempt in NSW to create a legislative framework for the ownership of national parks by Aboriginal traditional owners was introduced in 1991. It was based on a proposal for return to Aboriginal owners of the freehold estate of appropriate National Parks or other parts of the conservation estate such as Nature Reserves. These would then be leased back to the state with their subsequent management being undertaken through a board of management structure with majority Aboriginal owner membership.

This first bill was referred to a Parliamentary Committee for scrutiny. After considerable discussion and field visits to examine a number of Northern Territory models of Aboriginal ownership and joint management, the committee presented a bipartisan report suggesting a number of significant improvements to the original legislative model. Passage of revised legislation based on the committee's report awaited the election of the Labor government in 1995.

In late 1996, the *National Parks and Wildlife (Aboriginal Ownership) Amendment Act* was passed by the NSW Parliament with unanimous support in both Houses. In early 1997, Pam Allan MP, the Minister for the Environment asked the author to act as the facilitator for the negotiations between the state government and the Mutawintji Local Aboriginal Land Council for a lease to permit the return of the Mootwingee lands as the first return on lands to Aboriginal ownership under the Act.

The Land Council supported this appointment and a mediation process commenced in March 1997.

The Minister designated senior staff of the National Parks and Wildlife Service (NPWS) to act as negotiators on her behalf. As envisaged by the legislation, a negotiating panel was established from amongst those expected to be registered as Aboriginal owners to join with Land Council representatives in the negotiations. In addition to some limited Commonwealth funding to support the negotiations which had been made available to the Land Council under an indigenous protected areas program, the NSW Government provided funding to ensure that independent advice was available to the Land Council during the negotiation process. This not only comprised legal advice but also included other specialist advice on land management and valuation and economic advice during the separate rental mediation. This separate mediation was conducted by the Valuer-General during the latter stages of the broader negotiations process.

During the early part of the negotiation processes, concern was taken to identify those interests external to the direct parties who needed to be involved or kept informed of what was being undertaken without compromising the confidentiality of the lease negotiations.

The first of these external interests were conservation groups. As part of the negotiations during the enactment of the Aboriginal ownership legislation, the Minister had given an undertaking to conservation interests that they would be consulted about legislative issues. It was therefore agreed that general briefings on the negotiation process would be given to conservation groups in conjunction with discussions on legislation.

Two other, more focussed, groups were identified as needing to be offered opportunities for discussion of the negotiation process as it evolved.

The first of these was the staff of the Broken Hill district office of NPWS. The novelty of a joint management arrangement posed significant potential industrial relations issues which it was considered would best be dealt with by keeping affected staff informed of what was evolving. The staff were also provided with the opportunity, through the mediator, to have issues raised with the negotiating parties for their consideration.

The second group comprised the Western lands lease holders who would be the neighbours of the Aboriginal owned and joint managed lands at the end of the negotiations. Government and opposition parliamentary committees were also briefed to ensure continuing bypartisan support.

Early on, the parties adopted a target of early September 1998 for a hand back ceremony as this would coincide with the 15th anniversary of the Aboriginal blockade of Mootwingee in support of a claim for Aboriginal ownership.

On 5 September 1998, the Premier of NSW, the Deputy Premier and Minister for Aboriginal Affairs and the Minister for the Environment were welcomed to the Mutawintji lands in the Paakantji language for the ceremony to hand back the lands to Aboriginal ownership. Over 750 people travelled from around Australia to celebrate this major step for reconciliation in NSW. The Premier presented the Chairperson of the Land Council with a copy of the Governor's proclamation returning the land to Aboriginal ownership. In turn, the Chairperson of the Land Council handed the Premier a copy of the executed lease which creates the joint management framework for the lands.

As part of the important reconciliation function of the lease document, the parties agreed to include a preamble (which does not form a technical and binding part of the lease) which recites the history of indigenous dispossession of Mutawintji, the struggle for its return and the process which had made the hand back possible. Each clause in the lease also has a plain English

explanation (which does not form part of the lease) to ensure the widest accessibility to the document.

The lease[1], accessible through the Land Council's home page hosted by AustLII at www.austlii.edu.au/mutawintji/, also includes photographs of the hand back ceremony.
As part of continuing the process of hand back to Aboriginal ownership under such joint management regimes for culturally significant portions of the NSW National Park estate, the NSW Government has recently added the Biamanga National Park to the schedule of reserves appended to the *National Parks and Wildlife Act 1974* which can be subject to such arrangements. In addition, a program of consultations will continue over the next five or six months on what possible amendments might be desirable to improve the legislative basis for Aboriginal ownership. In parallel with this, a process will continue for the registration of Aboriginal owners for other areas on the schedule and the commencement, at appropriate times, of negotiations for hand back and joint management of these other areas on the schedule.

At a time when indigenous land management issues continue to create acrimony and tension in the wider Australian community, the Mutawintji hand back provides a beacon for all those committed to the course of reconciliation.

Author biography
In 1991, as Minister for the Environment, Tim Moore introduced the first Aboriginal ownership bill into the NSW Parliament. Prior to commencing practice as a barrister in Sydney, he spent three years as an Assistant Secretary in the Department of the Prime Minister and Cabinet managing the Secretariat of the Council for Aboriginal Reconciliation.

Endnotes
[1]. The lease document was published on the Internet, by AustLII, simultaneously with the hand back ceremony.

Lake Victoria Tests the Environmental Planning and Assessment Act

Lisa Ogle, Solicitor, EDO NSW

Lake Victoria is an eerie yet spectacular place. It is located in the south west corner of NSW near the Victorian and South Australian borders. Since 1928 the Lake has been used as one of the four major water off-river water storage facilities on the Murray-Darling, storing water for irrigation and use by downstream South Australia by artificially raising the level of the Lake from its natural level of 23 metres to 27 metres. The Lake is managed by the Murray-Darling Basin Commission.

Seventy years of operation as an artificial water storage has significantly altered the natural environment of Lake Victoria. This natural shoreline has been inundated, destroying the shoreline vegetation. Apart from being an important wetland, the Lake is of great significance to aboriginal people. When the Lake was drained for repair work in 1994, it was discovered that the shores of the Lake contained up to 16,000 aboriginal burial sites, making it possibly the largest pre-industrial burial site in the world. It also became clear that the artificial raising and lowering of the water level in Lake was causing significant damage to those aboriginal burials and other relics by eroding the soil surrounding and covering the relics.

In 1995 the NSW Aboriginal Land Council obtained an injunction in the Land and Environment Court restraining the Murray-Darling Basin Commission from using the Lake as a water storage. The NSW ALC argued that the Commission needed a consent to destroy aboriginal relics under section 90 of the *National Parks and Wildlife Act 1974* (**"NPW Act"**), and a permit to destroy under section 87 of the NPW Act. It also argued that this triggered the need to prepare an environmental impact statement under Part 5 of the *Environmental Planning and Assessment Act* 1979 (**"EPA Act"**), as the activity of raising the Lake from 23 metres to 27 metres was an activity which was likely to have a significant impact on the environment.

Consequently, in March 1998, the Commission applied for a consent and licence, supported by a hefty EIS containing 10 background experts' reports. This EIS highlighted the damage to the relics, the salinity problems, and the adverse impacts on flora and fauna caused by the Lake's operations. Under the EIS, the Commission sought approval to operate the Lake to a full supply level of 27 metres.

After a lengthy consideration of the EIS, the National Parks and Wildlife Service issued a consent and permit to destroy relics in late August 1998. The consent and permit impose strict environmental conditions on the Commission, and require it to lower the water level of the Lake to approximately 24.5 metres, with permission to exceed this level in limited circumstances. The conditions of the consent and permit also require the Commission to undertake remedial works to protect the relics, to revegetate the shores of Lake Victoria and to undertake extensive monitoring and evaluation of the environmental impacts of the Lake on salinity and water quality.

The Lake Victoria case provides a practical and positive illustration of the effectiveness of the safety-net under Part 5 of the EPA Act which requires environmental impact assessment of environmentally significant activities.

Access to Justice - Are you Getting Enough?

James Johnson, Director, EDO (NSW)

With a shrinking legal aid budget, more and more people are not getting access to justice. The Law Society of NSW has appointed an Access to Justice Task Force, which recently produced a discussion paper on ways of achieving better access. While we congratulate the members of the Task Force on the substantial amount of work which has been contributed to the Discussion Paper, we raised three issues with the task force.

Legal Aid for Environmental Matters

The first is the area delineated as "co-responsibilities for legal aid" in section 7.1 of the report. The conduct of public interest environmental law matters can have far reaching benefits for hundreds if not thousands of people and the public interest.

The links between the public interest litigation and the benefits to people are well illustrated in a number of cases. When Helen Hamilton was challenging the approval given to the Southern Copper Smelter at Port Kembla, she was fighting an approval which allowed World Health Organisation maximum limits for pollution to be exceeded regularly. In the pursuit of jobs, thousands of low income people, largely from a non-English speaking background, were to be subjected to pollution which would not be tolerated in other parts of New South Wales or indeed in most of the world.

While the public benefit to an individual is harder to depict in monetary terms when public interest litigation involves protecting threatened species and the natural environment, the community benefit is no less valuable. Maintenance of biodiversity and protection of our national treasures are fundamental to social and economic well being. They are issues which the community feels strongly about (for example, see "Who Cares about the Environment?", a survey of community attitudes by the NSW EPA) and are the subject of international treaties to which Australia is a party.

Although the Legal Aid Commission of NSW provides only a small amount of money annually for public interest environmental matters, the Commission regards it as one of its most important areas of work. Protection of the environment is a core responsibility, not a luxury. We ask that the Law Society include public interest environmental law in any grouping of "core" legal aid issues.

The Land and Environment Court

The second issue is that of the amalgamation of the Land and Environment Court into the Supreme Court. The EDO does not support this proposal. The Land and Environment Court, in our opinion, leads the Supreme Court in many respects in terms of Court management. For example, the Land and Environment Court has had a case management system for nearly seven years. It has developed performance standards and reports on compliance with these standards. It has incorporated alternative dispute resolution processes into its case management processes.

In order to promote access to justice AND the economic development of the State of New South Wales, it is imperative that environmental and planning disputes are resolved expeditiously. The Land and Environment Court has a proven track record of doing this and of managing especially urgent cases extremely quickly. It has stood head and shoulders above other less fortunate States such as Victoria where amalgamation has taken place, and where the importance of environmental issues is consequently often downgraded.

From a public perspective there is much more to be gained from keeping the Court separate. It sends a clear message to the community and decision-makers about the importance of environmental issues. Our experience is that there is a good understanding of the role of the Court and there is not the same confusion that exists as to the roles of the District and Supreme Courts.

Litigation and Public Debate

Finally, we are concerned about litigation which has the effect of silencing and intimidating community advocates particularly defamation proceedings and applications for apprehended violence orders, . We have recently concluded a conference on this issue ('Defending the Defenders'), discussed elsewhere in Impact.

A matter will only be summarily dismissed if no cause of action at all is apparent. Accordingly, people can live with the threat and expense of the proceedings for several years. They have effectively been silenced because the matter is before the Supreme Court and because they risk aggravating any harm in the remote chance they are found to have defamed. Even with better case management, these cases can take a long time. We urged the Law Society to recommend amendments to Supreme Court rules and procedure to enable "fast-tracking" of litigation of this nature where requested by the defendant.

Open Government Conference and Workshops

10-11 February 1999
Gazebo Hotel, Elizabeth Bay NSW

The NSW Government recently introduced new rights for citizens through the new Adminstrative Appeals Tribunal to review governnment decisions. The conference will discuss how to use these rights and Freedom of Information rights effectively and the impact they will have on accountability of government.

For further information, contact Sarah Mitchell at the Public Interest Advocacy Centre, Level 1, 46-48 York Street, Sydney NSW 2000 tel (02) 9299 7833 fax (02) 9299 7855 email: piac@fl.asn.au

Forests Bill:
A giant step backwards for environmental protection

Katherine Wells and Chris Norton, Solicitors EDO NSW

In November, the NSW Government introduced the *Forestry and National Park Estate Bill 1998* into Parliament. Introduced against the background of the Government's recent controversial decision on the north-east forests, the Bill is cause for great concern. It creates a proposed new reserve system which is considered by environment groups to be completely inadequate (but which we do not comment on here). It also creates new "forest agreements" and 20-year "integrated forestry operations approvals" within a legal framework which removes key environmental impact assessment and public participation rights. Our main concerns about this framework are as follows.

The Bill allows forest agreements and integrated forestry approvals to be varied without requiring any environmental impact assessment of the variation. The usual threatened species protections - the "8-part test" and species impact assessments - will not apply either. This is despite the fact that amendments of approvals could have very significant environmental impacts, because there are no restrictions on the types of changes that can be made by amendment.

The Bill contains very little provision for public participation. Integrated forestry operations approvals can be made and varied with no public consultation whatsoever. Forest agreements can also be varied in secret, with no public participation. This is contrary to the principles of accepted land-use planning legislation and practice in this State.

The Bill also expressly revokes all the "open standing" provisions which would allow the public to take action to enforce forest agreements and integrated forestry approvals. Because integrated forestry approvals will be able to incorporate the licencing requirements of various other Acts, this has particularly wide ramifications. It means that the public will not be able to take action to stop a breach of a forestry approval, or a breach of any other environmental licence granted to a logging operation under other legislation, such as a pollution licence granted under the *Protection of the Environment Operations Act 1997*, or a licence to harm threatened species granted under the *Threatened Species Conservation Act 1995*. These are open standing provisions that have been used to great effect in the past to bring landmark forest protection cases, such as the cases relating to the Chaelundi forests.

To our knowledge, this is the first environmental legislation in NSW in 20 years to specifically remove open standing provisions. It is consequently very disturbing - not least because it could set an example for others. If one sector exempts itself from accountability in this way, there are likely to be calls from other sectors for the same exemption.

The Bill also provides that areas covered by integrated forestry approvals cannot be proposed or declared as wilderness areas, regardless of their natural values. An amendment successfully moved by the Coalition removes the power of the NPWS to issue 'stop work' orders to protect threatened species.

The EDO believes that the Bill sets dangerous precedents for the future development of environmental law in many areas. In particular, the removal of open standing rights is of great concern. These provisions are relied on by most of the EDO's clients to bring cases to ensure that environmental laws are complied with. At the time of writing, the Bill has been passed by the Upper House.

The Public Interest Environmental Law Boot-Camp:
Annual Meeting of the Environmental Law Alliance Worldwide (E-LAW)

Donald K Anton, Policy Coordinator, EDO NSW

The last week of this past October saw 60+ public interest environmental lawyers from 26 different countries and every continent invade Australia for the annual meeting of E-LAW, hosted this year by the EDO (NSW). The EDO (NSW) serves as *E-LAW Australia* and is one of the original 9 founding E-LAW offices. E-LAW was established in 1989 to create an information and support network for public interest environmental lawyers around the world. There are presently 20 Offices in the network and more than 200 E-LAW members representing over 60 countries. The annual meeting presents an important opportunity for the amigos to meet and share information and strategies, and to gain support from others around the world.

The meeting was held at the Glengarry Girl Guides camp in North Turramurra, which backs onto Kuringai National Park, and provided a spectacular location. Each day concluded with singing and dancing and on the last night, much revelry around a huge campfire. But all was not fun and games. In addition to "round the clock" work, the accommodation consisted of male and female barracks and bunk beds with sagging mattresses for many.

The meeting covered a wide range of matters. Each country gave a report detailing the key environmental issues in their country. This then led to "project circle" discussions covering key issues including the following: public participation, threats to environmental defenders (including defamation, SLAPPs, violence, etc.), and strategies to combat threats; international environmental legal issues, the activities of multinationals and development banks; FOI; standing; litigation issues/strategies; environmental impact assessment; proving damages for environmental harm; trade and environment issues; water, air and land pollution; and biodiversity conservation. Working groups were also established to collaborate on a number of ongoing issues.

EDO Network - going from strength to strength

Katherine Wells, Solicitor, NSW EDO

The EDO network was first established in 1996, with funding from the Federal Government (although a number of individual offices in the network had been in existence for years before that). A short report follows here on recent EDO network activities; they demonstrate that the network is rapidly coming of age.

1998 Annual EDO Network Meeting

In October the network held its Annual Network Meeting in Sydney. EDO solicitors from every office in the network attended (except for the NT EDO, which at that time was advertising its solicitor's position), together with a number of the network's administrative officers.

The Annual Network Meeting is an opportunity for the offices to discuss both broad policy and strategic directions, and more specific legal, technical and administrative matters. The agenda ranged over issues such as:

- key strategic directions and relationships
- the ever-present topic of funding
- recent litigation, advice, education and policy work, and
- office procedures and precedents.

First EDO Network Public Conference

In October the Network also held its first public conference, "Defending the Defenders", in Sydney. This highly successful conference attracted 170 participants, and included speakers such as the renowned Indian public interest environmental lawyer M.C. Mehta, and John Bonine, from the USA, the founder of the E-LAW network (an international network of public interest environmental lawyers). The conference looked at the risks facing those who defend the environment - such as the risk of defamation actions and criminal prosecutions under summary offences laws - and canvassed ways in which these risks can be managed and reduced. A more comprehensive report on this conference is found elsewhere in this edition of Impact.

Stronger Network Ties

The past year has seen a strengthening of EDO network ties. Each office in the network is constituted separately, with its own memorandum and articles - but the network is increasingly coordinating on key issues, and sharing information and pooling resources to avoid duplication of effort.

At a legal level, this is reflected, for example, in EDO network policy submissions, such as the network submission on the Commonwealth's *Environmental Protection and Biodiversity Conservation Bill 1998*, and in cases such as the Hinchinbrook case in North Queensland, where the NQ EDO and the NSW EDO (which had more substantial litigation resources) collaborated in running the case.

At the community education level, in addition to the EDO network conference, the network is involved in joint projects such as a plain English guide to threatened species laws around Australia. The network also collaborates in producing this journal (Impact) on a quarterly basis, and in maintaining a network website, which can be found at: http://www.edo.org.au.

At an administrative level, the offices support each other with shared information about office systems. The network also has an internal e-mail conferencing facility which is invaluable in providing a cost-effective method of communication between the offices - particularly important, given the distances between them.

The most recent evidence of the strengthening of network ties is that the network decided, at its October meeting, to develop a network logo and letterhead, and a joint mission statement and set of objectives. These will be in place shortly. The network is also investigating the establishment of a legal resource database for network solicitors.

Conclusion

The EDO network has something that probably no other law firm in Australia has; lawyers with environmental law expertise in every State and Territory. In servicing the public interest, it also fills a gap that is not presently addressed consistently by any other legal office or offices. The developments outlined above demonstrate that as the network grows in experience and confidence, it is becoming a force to be reckoned with.

Defending the Defenders Conference

The first conference of the National Environmental Defender's Office Network was a great success as judged by participants and presenters alike. Nearly 200 people environment groups were inspired and educated. Opened by Justice Murray Wilcox the conference went on to hear from outstanding international public interest litigators MC Mehta (India) and John Bonine (US). Case studies from Hinchinbrook and Hindmarsh Island followed as well as an overview of legal threats and how to deal with them. Building on a model presented by Bob Burton, the conference concluded with a discussion on how environmental defenders can be supported and protected. During the conference Margaret Thorsborne (Friends of Hinchinbrook) was presented with the Serventy Conservation Medal awarded by the Wildlife Preservation Society of Australia. Following the conference EDO Chair and conference presenter, Bruce Donald, gave a lengthy interview covering the conference themes on Radio National's 'The National Interest'.

What conference participants said:
"Thank you for the opportunity - I listened, I gained knowledge, I was inspired." "Great mix of presenters, giving legal, activist and community points of view." "Superb standard of presenter; topics and workable practical solutions:.

Conference papers are available for $20 (excluding postage) by contacting the EDO 02 9262 6989

Coastal Environmental Law Workshops 1999

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 March 1999 focussing on coastal issues such as planning, coastal policy, native vegetation and pollution. (These workshops were planned for November 1998 but have been delayed).

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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