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COURT WIN FOR THREATENED SPECIES

Chris Norton, Solicitor, EDO (NSW)

Timbarra Protection Coalition Inc v Ross Mining NL & ors [1999] NSWCA 8

On 9 February 1999, the NSW Court of Appeal handed down a unanimous decision, which is likely to have major beneficial effects for the protection of threatened species in NSW. It held that the Land and Environment Court has the power to review, *as a matter of fact*, a decison by a consent authority that a development is not likely to have a significant impact on threatened species. In doing so, the Court has opened the gates for the effects of development to be subject to greater judicial scrutiny.

The statutory provision

The *Threatened Species Act 1995* (NSW) (the *TSC Act*) made a number of changes to the *Environmental Planning and Assessment Act 1979* (NSW) (the *EP&A Act*). One of those changes was the insertion of s 77(3)(d1) into the *EP&A Act*, which provides:

> A development application shall:
>
> ....
>
> (d1) if the application is in respect of development on land that is, or is a part of, critical habitat or is likely to significantly affect threatened species, populations or ecological communities, or their habitats, be accompanied by a species impact statement prepared in accordance with Division 2 of Part 6 of the [*TSC Act*].

Cameron's case

In Cameron v Nambucca Shire Council[1], Talbot J held that s 77(3)(d1) imposed an objective test, which established a factual condition precedent to the valid exercise of power by the consent authority. His Honour accepted that in proceedings challenging the validity of a grant of a development consent, it was open for a Court to consider whether, as a

Cont ...Page 2

Inside....

- Towards Ecologically Sustainable Development: benchmarking Corporate Performance and the Company Law Review Act 1998
- Greening the Warden's Court
- Tricky Legal Business: the impact of legal processes on the campaign against the Hindmarsh Island Bridge
- High Court decision helps protect community land

matter of fact, the proposed development was likely to have a significant effect on threatened species[2], and therefore should have been accompanied by a species impact statement (SIS). Accordingly, the Court was able to accept new evidence not before Nambucca Shire Council at the time the Council made its decision. Such an examination of an administrative decision is beyond the normal scope of judicial review, as courts in such proceedings are usually confined to examining the legal validity of a decision on the basis of the material before the decisionmaker, and are not able to substitute their own decision on the merits of the matter.

Timbarra in the Land and Environment Court

The Timbarra Protection Coalition Inc (TPC) brought judicial review proceedings in the Land and Environment Court challenging Tenterfield Shire Council's grant of a development consent to Ross Mining NL to construct extensions to the Timbarra Gold Mine in north-eastern NSW.[3] No SIS was lodged with the development application. After reviewing fauna and flora surveys provided by Ross Mining, the Council determined that there was not likely to be a significant impact on threatened species, and granted development consent without requiring preparation of a SIS.

Relying heavily on *Cameron*, the TPC (represented by the NSW Environmental Defender's Office) retained a series of experts and sought to lead extensive evidence challenging Ross Mining's reports, arguing that there was in fact likely to be a significant impact on a number of threatened species, including amphibians, small ground-dwelling animals, bats and owls. However, counsel for Ross Mining argued that *Cameron* had been wrongly decided, and that the TPC's evidence was inadmissible.

Talbot J held that he could not admit the TPC's expert evidence. His Honour held that the decision of the Court of Appeal in *Londish v Knox Grammar School and ors*[4] required him to reverse his earlier decision in *Cameron*. His Honour held that the question of whether a development application needed to be accompanied by an SIS was a matter for the consent authority to determine, and the only question for the Court to consider in judicial review proceedings challenging that decision was whether, based on the material relevantly before the consent authority, it was reasonably open to the consent authority to determine the question in the way it did.[5] The TPC conceded that if the matter was to be determined on that basis, its claim was bound to fail. The TPC's challenge on this and other grounds was dismissed.

Timbarra in the Court of Appeal

The TPC (again represented by the EDO) appealed Talbot J's *Timbarra* decision to the Court of Appeal, and argued that *Cameron* had accurately stated the scope of judicial review in relation to s 77(3)(d1) of the *EP&A Act*. Accordingly, the TPC argued, Talbot J had erred in ruling that the TPC's expert evidence was inadmissible.

In a unanimous judgement[6], the Court of Appeal upheld the appeal. Spiegelman CJ (with whom Mason P and Meagher JA agreed) held that *Londish* was distinguishable from the present case, and that the question of whether or not an SIS was required was an essential preliminary to a consent authority having power to determine a development application. His Honour relied upon a number of factors in coming to this conclusion, including the following:

1. Section 77 (3)(d1) is a provision stating the requirements for lodgment of a valid development application. Whether it is satisfied is not a fact to be decided by the consent authority in the course of its decision making process; rather, it is an essential preliminary to the consent authority having power to consider the development application.[7]

2. A SIS is also required if the development in question is on land that is, or is part of, critical habitat. The term "critical habitat" is defined to mean land declared to be critical habitat under Part 3 of the *TSC Act*. This is clearly a factual matter, and it was unlikely that Parliament had intended a significant difference between the treatment of this case and the case of a development likely to significantly affect threatened species.[8]

3. Section 77A(2) of the *EP&A Act* requires the Director-General of National Parks and Wildlife to grant concurrence to the grant of development consent if that development is likely to significantly affect threatened species. If this provision, along with s 77(3)(d1), was also construed in a subjective rather than objective manner, it may be possible for the views of the consent authority and the Director-General to differ on the likelihood of significant effect, and the Director-General may be required to decide whether to grant concurrence without the assistance of an SIS.[9]

4. The purpose of the legislative scheme is that an SIS enables the decisionmaking process to be better informed, not only directly by the supply of detailed information but also by making such information available to those who might make submissions to the consent authority regarding the development. The SIS ensures that detailed information is available to primary decisionmakers in a systematic and ordered way.[10]

5. The mere fact that, as a matter of practicality, a consent authority will have to consider and reach a view on whether a SIS should have been lodged with a development application does not mean that s 77(3)(d1) imposes a subjective test. Decisionmakers often have to consider whether they have the jurisdiction to determine the question before them, and be satisfied that they do have that jurisdiction before proceeding to make a determination. However, if the decisionmaker's finding that it had jurisdiction to determine the application was wrong in fact, its final determination may be invalidated.[11]

The Court found that Talbot J should have admitted the TPC's further evidence relating to the question of whether an SIS was required, and ordered that the matter be remitted to the Land and Environment Court. Ross Mining was ordered to pay the TPC's costs of the initial hearing before Talbot J, and of the appeal. The Court of Appeal did not make any finding as to whether an SIS was in fact required to accompany Ross Mining's

development application; this matter remains to be determined by the Land and Environment Court after considering the evidence.

Implications

The *Timbarra* matter is before the Land and Environment Court again for determination, and therefore it is inappropriate to make any comments here upon the facts of that particular case. However, the Court of Appeal's decision has broad implications for developers and consent authorities which can be discussed.

The decision gives new heart to those who have been frustrated at the law's reluctance to examine the accuracy of reports of consultants and developers. In some cases, these reports may understate the impact of a development, or use inadequate techniques to examine impact which do not reveal the full extent of likely impacts. In *Cameron*, the flora and fauna assessment accompanying the development application had been carried out in winter, when a number of species were unlikely to be detected due to hibernation. However, other studies carried out in autumn revealed a wider variety of species using the development site, and it was partly upon this basis that the development consent ultimately granted was found to be void. Under the interpretation given to s 77(3)(d1) by Talbot J in *Timbarra*, if a consent authority did not discover shortcomings in the material before it a consent might be issued which could not be challenged on the basis of those shortcomings. The Court of Appeal's decision restores the position found to exist in *Cameron*, permitting decisions on this question, which are usually made by local councils, to be reviewed by the Land and Environment Court.

The decision is likely to improve the quality of environmental decisionmaking. Developers and their consultants will use more rigour in preparing development applications, and councils will scrutinise them with greater care, to avoid the inconvenience of a decision to grant consent being set aside by the Court.

It could be argued that the decision places developers in an unreasonable position, as they may be subject to great inconvenience if a decision of a consent authority is set aside because of an incorrect decision by that authority on the question of whether a SIS was required. However, as Spiegelman CJ points out,[12] remedies of the Court are discretionary, and may be refused depending on the circumstances. Also, s 101 of the *EP&A Act* requires challenges to the validity of development consents to be brought within 3 months from the giving of public notice of the grant of consent. This section greatly restricts the ability of applicants to bring proceedings outside this time limit.[13]

Finally, the decision is the most recent affirmation by the courts that the power of judicial review can, in some cases, extend beyond the usual limited scope which precludes courts from examining the accuracy of material before the decisionmakers. While the extent of review available will turn in each instance on the statutory provision in question, this decision is a reminder that on occasion broader review of an administrative decision is available.

STOP PRESS:

Ross Mining has filed an application for special leave to appeal against the Court of Appeal's judgment in the High Court. Their application is likely to be heard on 16 April 1999. If special leave is granted, the matter will be heard by the High Court. In the meantime, the rehearing of the matter in the Land and Environment Court has been set down for 10-21 May 1999.

ENDNOTES

1. *(1997) 95 LGERA 268*
2. *In this article, the term "threatened species" will be used to refer to threatened species, populations or ecological communities, or their habitats.*
3. *Unreported, NSWLEC, Talbot J, 23 February 1998*
4. *(1997) 97 LGERA 1*
5. *Timbarra* at 13
6. [1999] NSWCA 8
7. *Ibid.* at 50
8. *Ibid.* at 61-64
9. *Ibid.* at 71
10. *Ibid.* at 73-76
11. *Ibid.* at 86-87, citing *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1954) 82 CLR 54
12. *Ibid.* at 94
13. See *Londish.*

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Towards Ecologically Sustainable Development:

Benchmarking Corporate Performance and the *Company Law Review Act* 1998

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1. Introduction

In order to gauge how effectively we are meeting the goal of ecologically sustainable development - one of the greatest challenges facing Australia[1] - it is necessary to have information about how well the *private sector* complies with environmental laws.[2] The Commonwealth and various State Freedom of Information laws provide access to *public sector* information relevant to environmental protection. However, until enactment of the *Company Law Review Act* 1998 (the *Review Act*), the public had little, if any, information needed to make intelligent investment decisions which takes account for the environmental performance of a company.

Accordingly, the *Review Act* is both a welcome and necessary development in Australian environmental law. It embodies a progressive environmental policy that accords with the Government's commitment "to develop a contemporary [environmental law] regime which reflects world's "best practice . . . ."[3]

2. Reasons for company environmental disclosure

2.1 Providing information to economically motivated investors

Economically motivated investors are principally concerned with getting a return on their investment, which in turn depends on what company managers do with investors' money. The separation of ownership from management in the corporate structure requires disclosure by those with legal control of the resources of great numbers of small and otherwise uniformed investors. Disclosure of environmental performance and compliance with environmental law is an important information that shareholders need to make informed investment decisions.

Such disclosure is important for a number of reasons. First, fines and civil damages from environmental problems can result in potentially enormous losses. Second, and related to the first point, information about compliance with environmental laws is very relevant to an investor's assessment of whether the company's overall compliance record suggests that unforeseen and undisclosed problems are likely to arise in the future.

Third, compliance with environmental laws reveals a great deal about the integrity of management. A pattern of non-compliance with environmental law can indicate or reinforce a pattern of non-compliance elsewhere, perhaps with trade practices law or tax law.

Finally, information about non-compliance might influence a shareholder's decision about who should control the company. As the United States Security and Exchange Commission has emphasised: "[t]he ability to avoid environmental problems provides a good measure of management's overall quality; and . . . corporate environmental responsibility will, in the long run, determine the public relations and regulatory framework in which a company operates".[4]

2.2 Providing information to environmentally motivated investors

A growing number of investors, both institutional and individual, are taking non-economic objectives into account in setting their investment policy.[5] Besides making investment decisions, investors also play an important role in monitoring corporate behaviour. Disclosure about compliance with environmental law is important in both of these areas for environmentally motivated investors. Disclosure requirements that focus solely on a company's financial condition disregard the importance of all environmental violations to these investors.

Accordingly, it is important the disclosure requirements not be related exclusively to financial disclosures, but relate to performance in relation to environmental regulation broadly. This is the case with the current *Review Act* and should be retained. Accounting concepts of materiality in financial statements should not apply.

2.3 Providing information to environmental regulators

The corporate form, by its very nature, creates "moral hazards" that derive from the nature of corporate *limited liability*.[6] The cost to a company's shareholders of injuring the environment, for instance, by illegally dumping toxic wastes, can at most ordinarily equal their investment in the company. When viewed *ex ante*, the cost of potentially catastrophic environmental harm is thus the shareholders' total investment in the corporation discounted by the probability that they, instead of someone else, will bear the cost. Hence, limited liability may serve in some circumstances as an incentive for socially irresponsible conduct by some corporations,[7] even if Directors or management liability may serve as a counterbalance.

The legal system's inability to fully internalise some costs of doing business thus creates a need to regulate corporate environmental conduct. No matter what view one takes of the legitimate size and roles of government, there will always be a need for regulation to help achieve Australia's commitment to

ecologically sustainable development. Cory J summed it up for the Canadian Supreme Court in *Canada Council of Churches v R*:[8]

> Modern society requires regulation to survive. Transportation by motor vehicle and aircraft requires greater regulation for public safety than did travel by covered wagon. Light and power provided by nuclear energy requires greater control than did the kerosene lamp.

The same is true of the environment. Anthropogenic risks posed by the use and disposal of an ever increasing number of toxic chemicals, emissions of greenhouse gases and climate change, the extinction of species and loss of biological diversity, nuclear activities, the use of ozone depleting substances, the development and use of genetically modified organisms, among others, all require greater, not less, regulation.[9]

In order for regulators to be effective they must be informed. They need to know the potential environmental impact of a company's operations, as well as the overall attitude of management toward compliance with environmental regulation. Uniform disclosure requirements under the Company Law will give regulators a valuable look at a company's overall level of compliance with environmental regulation. Indeed, the US Environmental Protection Agency has used similar disclosure laws in the US to supplement its enforcement efforts.[10]

2.4 *Providing information to the general public*

Effective environmental regulation requires provisions that give the community the right to know about the activities affecting the environment taking place around them. Community right to know laws shift the focus from a reactive, crisis-by-crisis approach to environmental law toward citizen and governmental monitoring of existing and potential environmental hazards which helps prevent crises in the first place.[11]

Accordingly, environmental performance and compliance information should be required to be available and distributed more widely than merely through annual reports. The Australian Securities and Investment Commission (ASIC) should establish a centralised register containing company environmental performance, which be available to the public free of charge and accessible over the Internet.

3. Business community concerns regarding environmental reporting

At the outset, it should be recognised that there have been many published surveys of Australian company environmental reporting in recent years.[12] Many, if not most, of these studies have been critical of the reporting practices of Australian companies. Often times, the studies reveal that corporate environmental disclosures amount to nothing more than "green wash" as many companies were found to be doing nothing more than simply providing statements of good intent with little disclosure of any form of verifiable environmental performance data.[13] More recently, a small number of companies have improved on reporting, but many have not and much remains to be done.

The *Company Law Review Act* 1998 (Cth) attempts to reverse the trend and make environmental disclosure and reporting meaningful. The Act provides that a company, registered scheme or disclosing entity must prepare a directors' report for each financial year. Under s 299(1)(f) of the Act, the report must contain the "details of an entity's performance in relation to environmental regulation" if the entity's operations are "subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory".

A number of concerns have been raised by the business community about the requirements of this reporting requirement. These concerns include: (i) what level of detail will be required, (ii) how will reporting be verified, (iii) the inclusion of overseas operations, and (iv) the application of reporting requirements to small infractions such as litter and noise. These concerns are addressed in turn below.

It is apparent that s 299(1)(f) provides little detail or guidance on the nature of what must be reported. ASIC has issued Practice Note 68 which goes some way in assisting companies and meeting the concerns.[14] The Practice Note sets out the following general guidelines on reporting:

(a) Prima facie, the requirements would normally apply where an entity is licensed or otherwise subject to conditions for the purposes of environmental legislation or regulation.

(b) The requirements are not related specifically to financial disclosures (eg contingent liabilities and capital commitments) but relate to performance in relation to environmental regulation. Hence, accounting concepts of materiality in financial statements are not applicable.

(c) The information provided in the directors' report cannot be reduced or eliminated because information has been provided to a regulatory authority for the purposes of any environmental legislation.

(d) The information provided in the directors' report would normally be more general and less technical than information which an entity is required to provide in any compliance reports to an environmental regulator.

The Practice Note states that ASIC is conscious that reporting practices in relation to environmental matters will evolve, particularly during the coming 12 months. ASIC will be monitoring reports to assess whether further guidance is necessary.

It is suggested that even greater detail in the Practice Note would provide more certainty. For instance, the Note should make clear that reporting includes both domestic and overseas operations. It is currently ambiguous. Requiring reporting on domestic compliance only provides an incomplete and inaccurate picture of company performance and management's

attitude toward compliance.

Moreover, the Practice Note could make clear reporting is intended to capture significant problems with compliance and alleviate concern about reporting on small infractions. Of course, the Note would also have to stress that reporting on these matters would become compulsory where there were repeated violations that showed a pattern of disregard for the law.

Finally, company concerns about verification and accuracy of reporting need to be addressed with the establishment of an ASIC auditing regime to monitor compliance. In general, the reporting requirements under s 299(1)(f) are no different to reporting requirements under the Tax Law. Both s 299(1)(f) and the tax law impose an affirmative obligation to report truthfully. Failure to do so is an offence. Like the Tax Law, an appropriate auditing system ought to be established for environmental reporting.

4. Conclusion

The information being collected under s 299(1)(f) of the *Company Law Review Act* 1998 is crucial to achieving ecologically sustainable development in Australia. It is vital that company disclosure and reporting on environmental performance be retained in the Company Law. Such reporting ought to complement existing voluntary reporting by corporations and provide a minimum "level playing field" for reporting. Improvements suggested above in the level of detail on the particulars of reporting should be incorporated in the existing ASIC Practice Note.

ENDNOTES

1. NATIONAL STRATEGY FOR ECOLOGICALLY SUSTAINABLE DEVELOPMENT (1992), p 6.
2. RW Painter, *Disclosure of Environmental Legal Proceedings Under the Securities Laws*, (1996) 11 JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION 91.
3. *Reform of Commonwealth Environment Legislation: Consultation Paper issued by Senator the Hon. Robert Hill Commonwealth Minister for the Environment* (1998), p. 1. See, for example, the progressive environmental disclosure requirements in US federal securities law. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1994); 1934 Securities Exchange Act, 15 U.S.C. §§ 78a-78kk (1994); Securities and Exchange Commission Regulation, 17 C.F.R. § 229 (1996).
4. Securities Act Release No. 33-5627, 8 SEC Docket 41, 47 (October 14, 1975).
5. See eg JG SIMON, ET AL., THE ETHICAL INVESTOR (1972).
6. See R Grossman, *Revoking the Corporation* (1996) 11 JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION 141.
7. B D Baysinger, *Organization Theory and the Criminal Liability of Corporations* (1991) 71 BOSTON UNIVERSITY LAW REVIEW 341.
8. (1992) 88 DLR (4th) 192 at 202.
9. See generally, RI Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey for Command to Self-Control*, (1998) 22 HARVARD ENVIRONMENTAL LAW REVIEW 103
10. H Hansmann & R Kraakman, *Do the Capital Markets Compel Limited Liability? A Response to Professor Grundfest* (1992) 102 YALE LAW JOURNAL 427, 435 n 24.
11. *See* N Gunningham & A Cornwall, *Legislating the Right to Know* (1994) 11 ENVIRONMENTAL AND PLANNING LAW JOURNAL 274; N Zimmerman, M M'Gonigle & A Day, *Community Right to Know: Improving Public Information about Toxic Chemicals* (1995) 5 JOURNAL OF ENVIRONMENTAL LAW & PRACTICE 95.
12. See eg, C Deegan and M Rankin, *Do Australian Companies Report Environmental News Objectively? An Analysis of Environmental Disclosures by Firms Prosecuted Successfully by the Environmental Protection Authority* (1996) 9 ACCOUNTING, AUDITING AND ACCOUNTABILITY JOURNAL 52-69; C Deegan and B Gordon, *A Study of the Environmental Disclosure Policies of Australian Corporations*, (1996) 26 ACCOUNTING AND BUSINESS RESEARCH 187-199; R Gibson and J Gutheri, *Recent Environmental Disclosures in Annual Reports of Australian Public and Private Sector Organisations* (1995) 19 ACCOUNTING FORUM 111-127.
13. C Deegan, *supra* n. 1.
14. Currently available from the ASIC webpage at: www.asic.gov.au/page-493.html#905

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Greening the Warden's Court

Michael Bennett, Solicitor, EDO WA

On 21 December 1999, the Full Bench of the Supreme Court of WA confirmed the power of the Mining Warden to hear environmental objections to the grant of mining leases[1]. This article will briefly describe that decision, and will consider its implication.

The case arose out of an application by Cable Sands (WA) Pty Ltd for a mining lease over an area of land bordering D'Entrecasteaux National Park. The Denmark Environment Centre, amongst many others, lodged detailed objections to that application in the Mining Warden's Court. The objection was largely based upon the environmental impacts of the proposed mining, and raised issues such as hydrological impacts on the nearby Lake Jasper.

Cable Sands responded by arguing that the Mining Warden did not have the jurisdiction under the Mining Act to consider objections of an environmental nature. If successful, this argument would have meant that the Warden's Court would be removed, probably forever, as an avenue for environmental objections.

"The decision of the Full Bench in Re Calder; ex parte Cable Sands (WA) Pty Ltd is an important one, because it has confirmed that the Mining Warden's Court is able to take into account environmental objections to the grant of mining leases."

Cable Sands' argument was ultimately heard by a bench of five judges of the Supreme Court on 2 October 1998. Represented by the Environmental Defender's Office, the Denmark Environment Centre intervened in the case to argue that the Warden could hear objections of an environmental nature.

On 21 December 1998 the Supreme Court delivered its decision. By a majority of 4 to 1, the Court found that the Mining Act allows the Warden to consider objections to mining leases that raise environmental or other public interest considerations.

The Supreme Court decision has preserved the Warden's Court as an avenue for people who wish to oppose the grant of a mining lease on environmental grounds, or to push for the imposition of particular conditions on mining operations. The challenge for the conservation movement is to now make best use of this opportunity. This will not necessarily mean lodging more objections in the Warden's Court. What it will require is that objections be made strategically, conscious of the role of the Warden's Court and other procedures that may exist in a particular case to assess the environmental impacts of a mining proposal. Some of the specific issues that will need to be kept in mind by people wishing to use the objection process are set out below.

Representative vs Individual Objections

In some recent cases involving environmental objections to mining leases, hundreds of objections have been lodged. Often, the objections contain similar grounds which could be encompassed in one representative objection by a conservation or residents' group.

No doubt, the large number of objections are intended by those making them to indicate to the Warden and the Minister for Mines the strength of public opposition to the grant of the mining lease in question.

However, there is much to be said for pooling of knowledge and resources for the preparation of one representative objection. Apart from making for a more professional and complete objection, it will do much to streamline the hearing of objections by the Mining Warden. This heads off any argument (as we have heard in the Native Title area) that the objection system is "unworkable" and that objection rights should be removed.

The Role of EPA Assessment

In Western Australia, mining proposals may be assessed by the Environmental Protection Authority under Part IV of the *Environmental Protection Act* 1986. Historically, that assessment has only taken place *after* a mining lease has been granted.

It appears that the reason for this approach has been that in the typical case an applicant for a Mining lease does not have a firm mining proposal. Rather, mining leases are typically applied for to gain security of tenure so that a decision may be made at a later stage as to whether mining should proceed. It is at that later stage that EPA assessment may take place.

This system is facilitated by the practice of the Minister for Mines to impose upon a mining lease a condition requiring that, prior to any productive mining taking place, a Notice of Intent to Mine be prepared and provided to the State Mining Engineer (an officer of the Department of Minerals and Energy). This officer will then refer that Notice of Intent to the EPA in what he considers to be an appropriate case. In order to assist the State Mining Engineer, the Department of Minerals and Energy and the Environmental Protection Authority have entered into a Memoran-

dum of Understanding describing the circumstances in which a Notice of Intent should be referred to the EPA.

This convoluted system creates difficulties for potential objectors in the Mining Warden's Court.

First, it compels those who are seriously concerned with the environmental impacts of a mining proposal to object against the grant of a mining lease, even if they would be happy with those environmental impacts being assessed by the EPA. This is because they cannot be sure, until their opportunity to object has passed, *that* the EPA will in fact assess that proposal.

Second, it makes the task of the objectors difficult because no details as to the nature and extent of mining operations is available at the objection stage. The objectors are forced to deal with generalities and hypothetical situations.

The established system also raises concerns that once a mining lease is granted, there is less chance that any assessment under Part IV of the Environmental Protection Act will result in a refusal to allow mining to proceed. This is because there here will tend to be a perception that the holder of the mining lease has rights which should not lightly be interfered with.

Some of the difficulties with the current system could be solved if it were accepted that a mining lease should only be available where there is a firm proposal to mine. If that were the case, the EPA could make a decision as to whether the proposal should be assessed before any hearing proceeded before the Mining Warden. Objectors could then decide whether they were satisfied with an EPA assessment, or whether on the other handed they wished to persuade the Warden that there should also be a separate hearing before the Warden.

Some objectors may prefer to have their objections heard by the Warden rather than have an assessment by the EPA. Before the Warden, they may have the chance to call their own expert witnesses, to cross-examine the witnesses of the applicant for the mining lease, and to make oral submissions. In addition, although there is no ability for objectors to obtain a wide-ranging order for discovery, the Warden may require that an applicant for a mining lease furnish the Warden with particular documents or information.[2] In contrast with these extensive opportunities for objectors to press their case, the only rights of participants in the EPA assessment process are to lodge written submissions and appeals.

In a matter currently before the Mining Warden's Court the EDO is arguing that the grant of a mining lease is not permissible under the Mining Act where there is no proposal for mining but rather a proposal for exploration and feasibility studies. If this argument is adopted it will go some way to overturning the current practice of granting a mining lease first, and considering environmental impacts later.

Conclusion

The decision of the Full Bench in *Re Calder; ex parte Cable Sands (WA) Pty Ltd* is an important one, because it has confirmed that the Mining Warden's Court is able to take into account environmental objections to the grant of mining leases. However the implications of that decision in practice will take some time to work out. In particular, the interaction of the objection processes available under Part IV of the Environmental Protection Act will need to be closely considered. A better integration of those processes, and a more effective consideration of the environmental impacts of mining proposals, will be possible if the current practice of granting a mining lease prior to environmental assessment is overturned.

ENDNOTES

1 *Re Calder: ex parte Cable Sands (WA) Pty Ltd* (supreme Court of WA, Unreported 21/12/98, lib.no. 980734

2 Section 74(2) Mining Act. See also Various Objections to the Grant of Mining Lease Application 70/1009 (written reasons not published at time of writing)

NOTICEBOARD

Two New EDO Network Solicitors

We welcome Tim Prichard as the new Solicitor at the Northern Territory EDO. Michael McNamarra takes up his new role as Solicitor at the North Queensland EDO. Michael is no stranger to the network having previously worked for the Victorian EDO.

Commonwealth Bill Update

The Senate Committee inquiry into the Environment Protection and Biodiversity Conservation Bill 1998 (Cth) has been holding public hearings around Australia over the last few months. EDO solicitors have appeared at a number of these hearings to argue the points made in the written submission which the EDO Network made to the Committee on behalf of Australia's peak national and State environment groups. The Committee was originally due to report back to the Senate on 22 March 1999. This reporting date has now been extended to 27 April 1999, and debate on the Bill is expected after that date.

Freedom of Information and The Right To Know Conference

Held by the Communications Law Centre and International Commission of Jurists (Australian section).

National and International speakers will address issues such as proposals for reform of FOI; the effects of privatisation, contracting out and commercial confidentiality on access to information and FOI; journalists use of FOI; the Blair government's White Paper on FOI;Ireland's new FOI legislation; the FOI experience in Canada and New Zealand; information access developments in the EU; FOI and public interest work;issues for practitioners; and review processes.

Date:19 & 20 August 1999
Sheraton Towers Hotel, Melbourne

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Tricky Legal Business: The Impact of Legal Processes on the Campaign Against the Hindmarsh Island Bridge

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This is an edited version of a paper originally presented at the national EDO conference "Defending the Defender" in October 1998. The conference proceedings are available for sale from the EDO NSW.

The Kumarangk Legal Defence Fund (KDLF) is principally concerned with a series of defamation cases brought by marina developers Tom, Wendy and/or Andrew Chapman against a number of people and organisations opposed to the building of a bridge to Hindmarsh Island. There are 5 cases involving 13 parties, and a further 5 cases against mainstream media organisations. One of these, against the Australian Broadcasting Corporation (Supreme Court Action No. 321 of 1998) is by far the largest, involving some 22 separate allegations of defamation from 1992 to 1997.

However, it is the cases brought against community organisations and individuals which are our principal concern, although I will also discuss other actions which form part of the history of this campaign. Hindmarsh Island (Kumarangk) lies at the mouth of the Murray River some 90 kms from Adelaide. In the late 1980s the South Australian State government made further development of the Marina Goolwa on Hindmarsh Island (a marina owned by the Chapman family company Binalong Pty Ltd) contingent on the building of a bridge to the island. For a range of environmental reasons and for reasons to do with issues of Ngarrindjeri heritage, a number of people and groups opposed the plan to build a bridge. I will focus on that opposition to the bridge, and on the impact on that opposition of a range of legal events.

But before telling that story, I want to make a number of preliminary points. I am not a lawyer and neither are any of the members of the KLDF. Thus our perspective is one of ordinary activists who have been forced to address and learn very quickly a range of legal issues which were quite foreign to most of us. Secondly, I want to point out that the KLDF is not part of the campaign against the Hindmarsh Island bridge: it has been established solely to support those being sued in connection with that campaign. We welcome support from those who are undecided or in favour of the bridge, but who are concerned about the impact of the litigation against individuals, community groups and the media.

Indeed, for us that is the crux of the matter. We are concerned at the way the slow, painful and often impenetrable working of the legal system can impact upon community campaigns and the community's ability to speak about environmental issues and issues of public interest.

The story I want to tell begins then not with the bridge, not with the marina, not with the settlement and 'development' of Hindmarsh Island, nor with the Ngarrindjeri whose story begins there long before the system of law I am talking about was a twinkling in Mr Blackstone's eye. Rather the story I am telling begins, admittedly somewhat out of context, in 1990. In 1990 opposition to the Hindmarsh Island bridge was mounting, with local residents forming a loose group to oppose the bridge. In February 1993 this loose grouping became the Friends of Hindmarsh Island.

By late October of that year initial work on the bridge had commenced, and so came the first community picket. In the meantime, the 'Friends of Hindmarsh Island' name was registered - *apparently by the pro-bridge landowners* - not the anti-bridge community group who had been using the name. The anti-bridgers were then threatened with legal action if they continued to use their original name.

In view of this, the anti-bridge community decided upon a more appropriate name, the 'Friends of Goolwa and Kumarangk'. This time they incorporated it, but it was the first inkling for many that campaigning against the bridge could be a legally complicated business. It was not the last such experience.

Litigation

In March 1994, Binalong Pty Ltd and its associated company, Marina Services Co, filed an application in the Federal Court, against two officers of the Conservation Council of South Australia, three officers of the Friends of Goolwa and Kumarangk, and two officials of the Construction, Forestry, Mining and Energy Union (CFMEU), claiming damages for breach of section 45D of the Trade Practices Act, and for the common law tort of interference with contractual relations.

In addition, the developers sought interim injunctions stopping the respondents from hindering or preventing the provision of banking services by Westpac to the developer, or similarly hindering or preventing the Minister of Transport or her contractor, Built Environs, from constructing the bridge. Seven orders were sought, going beyond those aimed at Westpac and the Minister of Transport, preventing any action to induce the Minister to breach her contractual obligations with the developers.

Two weeks before the injunctions were ordered officers of the Conservation Council and the Friends of Goolwa and Kumarangk had been quoted in the media criticising the State government for its handling of environmental issues, including Hindmarsh Island. A rally on 24 March 1994 had also delivered a letter to the Westpac state office from the Conservation Council, asking Westpac as the marina financier not to litigate over the bridge issue. (The State Government had claimed (and still does) that they were only proceeding with the bridge because of their fear of litigation from the bank, amongst others, if they did not honour the contracts signed by the previous Labor government.)

Two weeks later, all injunctions against the Conservation Council were dissolved, but the injunction restraining the CFMEU, the 'Friends' and named officials or their servants, from hindering and preventing or attempting to hinder or prevent the construction of the bridge remained in force. The injunction relating to Westpac was discharged.
It is worth noting the inflammatory and misleading role of the media at this point. On 20 April, *The Advertiser* headlined 'Bridge protesters to be sued', and reported that the court orders '*forbid...anything which could hinder or stop the construction of the $6.4m bridge linking Goolwa and Hindmarsh Island. This includes picketing the Goolwa worksite, making public statements to the media or lobbying parties involved with the project.*'.

David Bamford of the Flinders University School of Law, writes that '*...the injunction certainly did not go so far as [to] forbid anything which could hinder or stop the construction of the bridge. It did not, in my opinion, forbid picketing in the strict sense of the word, and certainly did not forbid public statements to the media or lobbying the parties involved with the project. Yet this was the public perception at the time. Members believed they could not write to their MP, or make public statements of any sort. I suggest the emphasis of legal advice should be as much on what can be done as there is on what is forbidden.*'

On 16 April 94 Colin James, the Chief Reporter at *The Advertiser*, wrote '*...Overnight, vital sources of information dried up.*'

Meanwhile, the Friends had received a demand from the developer's lawyers for the Friends' membership list. This request was refused. There was considerable consternation amongst the members of the Friends over the injunctions issue. There was more consternation over media reports of the developers photographing picket lines and videotaping a rally, and especially over a report of photographing of people leaving a private house after a meeting of the Friends.

Shortly after that, on 22 April, 35 locals were hand delivered a letter from the developer's lawyers, which claimed that the people being served were responsible for the developer's problems and that they could be sued for debts and lost profit, $47m in all.

Dr David Shearman recalls, '*This produced anxiety and even terror in many ordinary members of the community who feared the loss of their houses and assets. All these individuals were deeply concerned with their local environment and the future. ... Some in their eighties have been reduced to sleepless nights by these letters. Others developed anxiety states.*'

It was the fear of litigation which had the impact here, and the first of the defamation cases we are concerned with was still 3 years away.

Complaints

But it was not just fear of litigation which raised activist uncertainty. There were reports in the local media that the Chapmans had asked the Police to investigate an alleged 'conspiracy to defraud' perpetrated by anti-bridge campaigners, and later demanded the prosecution of those circulating a pledge to protest/blockade any construction work.

On 25 June 1997, *The Advertiser* reported Wendy Chapman's criticism of Democrat Senator, Natasha Stott Despoja for her supposed involvement in the production of the newsletter of the Kumarangk Coalition. The complaint led to an investigation by the Administrative Services Minister, and was dismissed.

In August 1997, in response to the first couple of defamation cases, the Kumarangk Coalition organised a 'Forum on Understanding Defamation Law'. They invited four local Adelaide legal people to offer their perspectives on the role of the law in matters of protest and free speech. Whilst most of the small Sunday afternoon audience was made up of people opposed to the Hindmarsh Island Bridge, there was at least one person (not one of the Chapmans) in attendance who took a contrary view. This person seems to have taken particular offence at the contribution of Mark Parnell, a Flinders University law lecturer, long time conservation campaigner and part time solicitor with the Environmental Defenders Office in South Australia.

This person subsequently lodged two formal complaints against Mark Parnell, first with the Commonwealth Attorney-General over alleged (mis)use of Commonwealth funds and secondly, with the SA Legal Practitioners Conduct Board for the alleged crimes of 'inciting known trouble-makers to break the law' and advising protest organisers to encourage large crowds at demonstrations! Both complaints were dismissed.

Most recently, the Kumarangk Legal Defence Fund Inc.'s web site was closed down after a complaint received by the Internet Service Provider claiming that they would be liable for alleged defamatory material - this time about the defamation cases themselves. No commercial ISP is going to be interested in whether or not the defamation claim is arguable; it is much safer for them to drop the site. However, the KLDF website has just been re-established at another address (http:///www.green.net.au/hindmarsh). You can form your own opinion on its content, but one letter of complaint led to about 3-5 days of activist work in three or four cities.

More Litigation

Throughout the years of the campaign against the bridge, the Conservation Council and others had received the occasional correspondence from the Chapman's lawyers, regarding comment made, requesting retractions and apologies, and

warning of the potential for defamation litigation. Many hard hours were spent, labouring over how to respond not only legally, but politically and strategically for the campaign itself. The effect of this on successive boards, campaigners and staff has been to slowly build an organisational 'tumour' of fear. The effect of the 'worst-case scenario impending-crisis' approach, was a self imposed silence.

In this continuing climate of fear and suspicion over the past four years, active campaign networks have moved 'underground'. When the Kumarangk Coalition received an award from the Reconciliation Council for the 'Long Walk' (an event many people were proud to have organised, involving hundreds of people walking in support of the Ngarrindjeri people, along the 80km route from Adelaide city to Goolwa), nobody wanted to publicly accept the award!

The Conservation Council has not made official comment on the bridge issue for years now. That has been left to others, because the Conservation Council needs to protect itself for other campaigns now and in the future.

Nonetheless, on 5 November last year the Conservation Council and others were served papers suing for defamation regarding a leaflet produced and distributed three and a half years earlier. On 16 February this year, the Conservation Council was again served with documents, this time for a Supreme Court defamation action, with 17 separate allegations, based on material said or published from 1994 to 1997. Also served were three of Conservation Council officers (Bolster, Shearman and Owen). This is a much bigger case. The defence has just been prepared by a combination of activists and lawyers and they have successfully had 5 of the 17 sections struck out by the Supreme Court.

There have been some successes amongst these 'trials'. Earlier this year the Conservation Council successfully had the first defamation case against it struck out. However, the case against the other defendants remains on foot at this stage, and the Conservation Council's win has been appealed to the Supreme Court.

I want to stress that this story of green groups being sued is but one part of a much bigger picture. As noted earlier, a number of media outlets are also being sued. Disappointingly from our point of view, some have already settled out of court. More importantly, individuals are being sued, and there is amazing stress and trauma for the them - torn between their principles, the needs of their stressed families and the prospects for their bank accounts. And for the Ngarrindjeri people opposing the bridge, the fact that their supporters are being sued can only add to their suspicion of and hostility to white law.

The issues are also not limited to defamation. There are complex legal arguments as to whether the members of an unincorporated organisation (ie: the Kumarangk Coalition) can be sued, or none at all, and who is liable for actions taken in the name of the group. It has been particularly difficult to get an answer to the last question, and related issues are now on appeal. But I suspect that question has far-reaching implications for all community groups. As an aside, I would note that, contrary to the usual legal opinion, thus far the unincorporated bodies have fared better than the incorporated bodies.

Bigger Questions

It is clear that the fear and lack of knowledge of litigation for many in the community makes it impossible to talk sensibly about the legal actions, or to plan campaigns coherently. This was a contributing reason for setting up the KLDF as a separate body. The legal planning had to be done properly, and campaigners were happy to remove the cancer of legal discussion from the campaign meetings. This has been a particularly important strategic move. The KLDF also attempts to overcome the isolation of 'individuals before the law' by morally and politically supporting the defendants and facilitating information flows between defendants so they are strengthened by the collective efforts. As an example, some of the evidence of the public debate that the Conservation Council cites in its defence is nicely recorded (free of charge) in the Chapman's statement of claim in other cases.

But at the back of our minds, in the corners not cluttered by the particulars of innuendo or the pleadings of the first, second and fourth defendants to paragraph something or other, in the back of our minds is the bigger picture; the questions raised about the nature of our legal system and of political discussion in Australia. It is surely the Government's role as the representatives of the people, to make sure that the laws and legal processes do not in effect curtail legitimate public comment and action.

Short of this, there are roles for others. Peak community organisations like the Conservation Council must inform and represent the community of environmental concern, but they must also inform the environment movement.

The EDOs also have a role. As the community's environmental law resource, they are charged with informing and empowering us.

Lastly, despite the adversity encountered in the campaign and the stress, fear and time wasted on legal matters, there are bright sides. Conservationists forged unbreakable links with the Ngarrindjeri people, the union movement, social justice groups, other environment groups and churches, and have drawn immense support from the wider community. The knowledge of the law, the media, corporate business and campaign dynamics is incomparable to that of six years ago. The campaign is well documented so as to pass on that knowledge.

While the litigation has disrupted some sections of the movement, others have grown stronger and harder - learning how to speak out still. Some still hope to turn these defamation cases to political advantage, challenging in evidence much that has become accepted 'truth' about the Hindmarsh Island Affair. It is a possibility, but time is short. The bridge construction can start at any time now. However, community opposition to the bridge remains strong, the determination is immense and the cases against bridge opponents have served to cement that resolve.

High Court decision helps protect community land

Casenote: Bathurst City Council v PWC Properties Pty Ltd [1998] HCA 59

Grant Hackleton, College of Law student

The High Court recently handed down a decision restricting the ability of councils in NSW to reclassify and sell off "community land". When the *Local Government Act 1993* (NSW) came into force, all land controlled by local councils was required to be classified as either **operational** or **community** land. Operational land is generally land held by the council as a temporary asset, such as works depots and garages. Community land is land kept for use by the general public, such as public parks and reserves.

The importance of classifying land as community land is that the ability of council to deal with that land becomes restricted. For example, a council cannot sell community land, and community land must be managed according to a publicly scrutinised plan of management. Land may be reclassified from community to operational either by way of Local Environment Plan (LEP) or by way of council resolution. However, if land is 'subject to a trust for public purposes' it can only be reclassified by a LEP. (LEPs are NSW local planning schemes regulating zoning and development control within a LGA. They must be publicly advertised when being made, and public comments must be called for. When a draft LEP relates to a proposed reclassification of community land, there must be a public hearing into the proposed reclassification.)

In May 1994, Bathurst City Council purported, by resolution, to reclassify land used as a car park from community land to operational land. PWC Properties commenced proceedings in the Land and Environment Court to set aside the resolution, arguing that the car park was subject to a trust, and reclassification could only be achieved by way of LEP. The Court found that an express trust for car parking spaces on the land had been sufficiently established. On appeal, the Court of Appeal, while agreeing that there was a trust, stated that the nominated lots were held by the Council on a constructive trust for the purpose of providing a car park for the public.

The High Court concluded that a council might accept real or personal property for a public purpose even though that purpose was not a charitable purpose and the property was not transferred to and accepted by the council 'on trust' as that term is technically construed. The term 'trust' includes governmental responsibilities which may fairly be described as 'statutory trusts' which act to bind the land and control what would otherwise be the freedom of disposition enjoyed by a registered proprietor in fee simple. Even though these obligations would fall outside the concept of 'trust' in private law, for the purposes of the relevant statutory provisions they met the description of a trust for public purposes. Given this broader interpretation it followed that the council had acted beyond its power in resolving to reclassify the land through the operation of a resolution rather than a LEP.

The implication of this decision is that land held by local councils subject to statutory requirements may be defined as being held on trust for a public purpose. This wider definition of a public purpose trust will result in a greater range of circumstances where a LEP will need to be used for reclassifying land rather than a council resolution. The use of LEPs will enable greater public scrutiny and increase the opportunity for community participation when councils try to reclassify community land.

Case note: Echt v Ryde City Council & Anor.

(Cowdroy AJ, unreported, 21 August 1998, Land and Environment Court, No. 40074 of 1998)

This case establishes an important precedent that councils are under a duty to ensure that the requirements of the *Local Government Act* 1993, and of any approval granted under that Act, are fulfilled.

The applicant in this case sought (inter alia) a declaration that the Council had wrongly refused to take any action under the *Local Government Act* to enforce certain conditions of a building approval, granted by the Council to the second respondent for alterations to certain premises. The relevant condition required the erection of a privacy screen between the properties of the applicant and the second respondent.

Some months after completion of the approved alterations, the applicant wrote to the Council complaining that the screening had not been installed. Following an exchange of correspondence which indicated that the Council was not prepared to take action to enforce the conditions of the approval at present, proceedings were commenced.

Cowdroy AJ found that the conditions in question had originally been imposed specifically for the benefit of the applicant. His Honour went on to find that the Council had a responsibility to ensure that its approvals were carried into execution within a reasonable period where no specific time limit had been imposed, and that the appropriate course was for Council to issue an order under the *Local Government Act*.

Cowdroy AJ granted a declaration that the Council had failed to take any action under the Local Government Act to enforce certain conditions of the building approval. His Honour also ordered the Council to pay the costs of both the applicant and the second respondent, stating that councils have an obligation to ensure that, so far as is possible, active steps are taken to settle disputes of this type. The decision is currently on appeal by the Council.

This case is important in establishing the principle that councils must take responsibility for the enforcement of their own approvals, and cannot simply ignore non-compliance. The principle is likely to extend to development consents granted under the *EP&A* Act, particularly in light of the recent amendments to that Act. The amendments have resulted in building approvals, which were previously granted under the *Local Government Act*, being integrated into development consents granted under the *EP&A* Act.