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Security for costs – restricting justice to the wealthy?

Chris Norton, Solicitor, EDO (NSW)

As any person who has had dealings with the legal system knows, it is the common practice in most legal proceedings that an order will be made requiring an unsuccessful party to pay the costs of a successful party. This is the practice commonly applied in Class 4 (civil enforcement) proceedings in the NSW Land and Environment Court ("the L&E Court"). The threat of an adverse costs order can be very intimidating to small community groups, who normally cannot afford to pay their own full costs, let alone those of a number of well-funded respondents.

There has been a spate of applications recently in the L&E Court seeking orders that applicants in civil enforcement proceedings give security for costs. If the Court orders that security be given, the proceedings normally draw to a halt and no more steps are taken until the applicant deposits with the Court a sum of money determined by the Court. These funds are used to defray any costs which the applicant may be required to pay if the applicant is unsuccessful.

When is security ordered?

Sections 69(3) and (4) of the *Land and Environment Court Act 1979* relevantly provide that the L&E Court may order an applicant to give security for the payment of costs that may be awarded against it. Part 53 r 2 of the *Supreme Court Rules 1970*[1] provides that a Court may make an order for security for costs, and stay proceedings until security is given, where it appears to the Court on application of a defendant that:

a) a plaintiff is ordinarily resident outside NSW;

b) a plaintiff is suing not for its own benefit but for the benefit of another person, and the plaintiff may be unable to pay the costs of the defendant if ordered to do so;

c) that the address of a plaintiff is not stated or is mis-stated in the originating process;

d) a plaintiff has changed address after commencing the proceedings to avoid the consequences of the proceedings; or

e) the plaintiff is a body corporate and there is reason to believe it may be unable to pay the costs of the defendant if ordered to do so.

In *KP Cable Investments Pty Ltd v Meltglow Pty Ltd and ors*[2], Beazley J summarised a number of other factors that are normally

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taken into account as follows[3]:

(i) whether the application has been brought promptly;
(ii) the strength and bona fides of the applicant's case;
(iii) whether the applicant's impecuniosity results from the respondent's conduct the subject of the claim;
(iv) whether the application is 'oppressive', denying an impecunious applicant the right to litigate;
(v) whether persons standing behind the applicant are likely to benefit and willing to provide the security;
(vi) whether persons standing behind the applicant have offered any personal undertaking to be liable for the costs, and the form of any such undertaking;
(vii) whether the applicant for security is a plaintiff, or the proceedings are defensive in nature.

Recent cases in the L&E Court

Levenstrath Community Asson Inc v J&J Toms (t/as Tomsy's Timbers) and anor[4]

In an extempore decision, Bignold J refused to make an order for security for costs against an incorporated association seeking declarations as to the validity of a development consent and consequential injunctive relief. In his Honour's view, not only was the applicant's case strong, there was no evidence tendered as to the applicant's inability to pay costs that might be ordered against it.

Razorback Environment Protection Society Inc v Wollondilly Council and anor[5]

The applicant was an incorporated association of some 54 members, with a likely income of $4,000 per annum and expenditure of $3,000 per annum. Between February and December 1998, the applicant had raised $13,323 from donations, raffles and picnic days to fund the subject litigation, in which the applicant sought declarations that development consents for subdivision of land were void. The applicant had incurred costs during that time of $9,580.

Lloyd J ordered that the applicant give security for costs of each of the two respondents in the amount of $25,000 ($50,000 in total). His Honour considered in particular the following:

- The applicant's case appeared to have no better than a moderate chance of success.
- The action was not an ordinary action of private interest only to the applicants themselves.
- There is reason to believe the applicant would be unable to pay the costs of the respondents if ordered to do so.
- The applications for security were brought at a relatively early stage in the proceedings.
- An order for security may have the effect of stultifying the litigation, but an increase in fundraising activities may not be an impossible task.

Donnelly and anor v Capricornia Prospecting Pty Ltd and ors[6]

Two impecunious applicants, Andrew Donnelly and David Mundine, brought proceedings seeking various declarations and orders relating to the validity of a development consent for a water pump and pipeline; and the validity of a permit to take water from a creek. The consent and permit were related to the development of the Timbarra gold mine.

On an application brought by three of the four respondents, Lloyd J ordered the applicants to give security for costs in the sum of $20,000, and stayed the proceedings until security was given. His Honour's decision was based in particular on the following matters, amongst others:

- The applicants' case was weak.
- There was doubt as to whether the application was brought for a bona fide purpose, rather than to cause maximum disruption and inconvenience to the respondents and stop the operation of the mine.
- The applicants claimed to be traditional custodians of the land for the Millerah Bundjalung people. His Honour considered that the applicants were acting in a representative capacity for those people. There was no evidence that those people were also without means. It was reasonable to expect those "standing behind" the applicant to contribute to the costs of the proceedings.
- The fact that proceedings were brought to remedy an alleged breach of the *Environmental Planning and Assessment Act* (the *EP&A Act)* was not of itself sufficient grounds to refuse an order for security.
- A costs order had been made against the applicants in other proceedings brought against the same respondents. That costs order had not at that stage been satisfied.

Donnelly and anor v Ross Mining NL and ors[7]

This matter featured the same applicants and relevant respondents as in *Capricornia*. The same three respondents again sought an order for security in the sum of $20,000 against the applicants. These proceedings, also related to the Timbarra gold mine, sought declarations and orders relating to alleged breaches of the *National Parks and Wildlife Act* and the *EP&A Act.*

In this case, Talbot J refused to grant security against the applicants. His Honour gave particular weight to the following factors, amongst others:

- The applicants commenced proceedings on 21 August 1998. The application for security was not brought until 5 March 1999 (relevantly, one week after the making of the order for security in *Capricornia*). This was in contrast to *Capricornia*, where the application for security was brought slightly over a month after the commencement of proceedings. The respondents had also known since at least 24 February 1998 that the applicants were impecunious, and had allowed the litigation to proceed (with the applicants incurring significant costs) without any indication that an application for security would be made.
- On its face, the case was regular, and could not be said to be as weak as that before Lloyd J. There was not sufficient evidence to suggest that the claim was not brought in good faith. Although the applicants were opposed to the Timbarra gold mine, they could not be regarded as acting in bad faith by taking action to ensure compliance with statutory obligations.
- The application for security would frustrate the applicants'

right to litigate the matter. Talbot J placed particular weight on the evidence given by Mr Ireland, the respondents' solicitor. Mr Ireland admitted in cross-examination that the respondents did not want the matter to come to trial and that he had been instructed to succeed in the best way he could, including by making the proceedings difficult for the applicants. His Honour held that the primary purpose of the respondents in seeking the order for security was to attempt to bring the litigation to a premature conclusion before the real issues could be litigated, and the decision to bring the application "has overtones of an opportunistic manoeuvre to stifle these proceedings".

- The proceedings were being brought to protect communal native title interests, and the applicants may have been representing the interests of be a body of people standing behind them, but there was no evidence that those people would be in a better position than the applicants to provide security.
- The proceedings could not, at that stage, be characterised as being brought in the public interest; however, there is some public interest element in seeking to restrain a breach of a statute.

Ryde Pool Action Group Inc v Ryde City Council[8]

The applicant was an incorporated association bringing an action to declare invalid a Local Environmental Plan that reclassified land from community to operational under the *Local Government Act 1993*. The respondent Council sought an order for security in the sum of around $40,000. It was conceded that the applicant would be unable to meet any order for costs made against it and that it would not be able to proceed with the litigation without some form of legal assistance.

His Honour, Cowdroy J, held that while the applicant had been slow in preparing its case, and the Council may need to expend costs of some $25,000-$50,000 of ratepayers' money in the litigation, other factors which outweighed these matters included that the applicants had an arguable case, and the public interest justified an investigation of the Council's procedures. His Honour declined to order that security for costs be given.

Comments

An order for security for costs has the potential to stifle a civil enforcement action brought by an impecunious litigant. If the trend towards applications for security continues, actions brought under the open standing provisions of the *EP&A Act* could become the exclusive realm of the wealthy and of corporations, rather than the community groups and concerned environmentalists who have been responsible for many important decisions interpreting the *EP&A Act*.

There are two key protections against an order for security being made. One such protection is if the applicant in the proceedings is legally assisted. In *Rajski and anor v Computer Manufacture and Design Pty Ltd*[9], the Court of Appeal held that although the Supreme Court had the power to make an order for security against a legally assisted person, it would ordinarily be the case that it would be a wrong exercise of the Court's power to make such an order. Therefore, although the fact that an applicant is legally assisted will not prevent a security order from being made, a Court is only likely to make an order in extreme circumstances.

The other key protection is recognition by the Court of the stifling effect that such an order would have. In this respect, the judgement in *Razorback* is of particular concern. Over the course of 11 months, the fundraising efforts of the applicant had raised $13,323, over $9,000 of which had been expended on its own legal costs to date. However, the applicant was ordered to deposit security in the sum of $50,000. Even if the rate of fundraising were to double, it would take some two years to earn this amount of money, during which time (in the absence of interlocutory orders or undertakings) the development which is the subject of the litigation could well have taken place. This increases the risk that, even if the applicant's case was made out, the Court might refuse relief on discretionary grounds. The order for security would appear likely to destroy any prospect the applicant might have of successfully concluding the litigation.

In contrast, *Donnelly v Ross Mining* and *Ryde Pool Action Group* offer some hope to impecunious applicants. In particular, in *Ross Mining* the Court placed significant weight on the concession by the respondent's solicitor that the application was brought to cause difficulty for the applicants. It is a very rare case in which an applicant will be able to obtain such a damaging admission from a respondent; however, Talbot J's decision demonstrates that the Court is alert to the use of security applications for the purposes of stifling an otherwise arguable claim.

Endnotes

1 Pt 53 of the *Supreme Court Rules* applies in classes 1-4 of the L&E Court's jurisdiction by reason of pt 6 r 1 of the *Land and Environment Court Rules 1996*.

2 (1995) 56 FCR 189

3 *Ibid.* at 197-198

4 (Unreported, NSWLEC, Bignold J, 26 November 1998, 40057/98)

5 [1999] NSWLEC 8 (Unreported, Lloyd J, 5 February 1999)

6 [1999] NSWLEC 39 (Unreported, Lloyd J, 11 March 1999)

7 [1999] NSWLEC 76 (Unreported, Talbot J, 30 March 1999)

8 [1999] NSWLEC 96 (Unreported, Cowdroy AJ, 22 April 1999)

9 [1983] 2 NSWLR 122

NSW Government legislates to validate Walsh Bay development

Case Note: National Trust of Australia (NSW) v Heritage Council of NSW and anor

Chris Norton, Solicitor, EDO (NSW)

These proceedings, relating to the preservation of historic wharves at Walsh Bay in Sydney, were due to be heard in the Land and Environment Court on 4-5 May 1999 before Bignold J. The EDO is instructed by the National Trust, which opposes the proposed demolition of wharf 6/7, shoreshed 6/7 and shoreshed 8/9.

On the morning of 4 May, before the hearing commenced, counsel for the Heritage Council and the Minister Administering the Heritage Act applied for a 6-week adjournment, on the basis that the NSW Cabinet had resolved the previous afternoon to attempt to pass emergency legislation which would have the effect of retrospectively validating the approvals being challenged. The application was refused; but the proceedings were adjourned for a day for the Trust Board to consider its position. Following discussions between the parties, on 5 May 1999 the matter was adjourned for six weeks, and has been set down for mention on 16 June 1999.

The Walsh Bay Development (Special Provisions) Bill 1999 was introduced into NSW Parliament on 13 May 1999. As introduced, the Bill retrospectively validates all approvals given so far for Walsh Bay, makes the Minister for Urban Affairs and Planning the consent authority for future development approvals, and prevents persons from bringing enforcement proceedings relating to determinations or decisions relating to Walsh Bay using the open standing provisions of the Environmental Planning and Assessment Act and Heritage Act without the consent of the Minister. The Bill would have the effect of rendering the National Trust's proceedings futile.

The Bill passed quickly through both houses of Parliament in late May and was supported by both the Government and Opposition; although it was vigorously opposed by several independent and cross bench members.

High Court win for Threatened Species, but Timbarra Goldmine goes ahead

Lisa Ogle, Senior Solicitor EDO (NSW)

In the March 1999 edition of Impact, we reported on the Court of Appeal decision of Timbarra Protection Coalition Inc v Ross Mining NL [1999] NSWCA 8. The High Court has since refused to grant Ross Mining special leave to appeal that decision.

The High Court has refused permission for Ross Mining to appeal against a Court of Appeal decision concerning extensions to its new goldmine on the Timbarra Plateau near Tenterfield.

Ross Mining sought leave to appeal against the NSW Court of Appeal decision in *Timbarra Protection Coalition ("TPC") v Ross Mining NL*, 9 February 1999. In that case, Spigelman CJ (with whom Mason P and Meagher JA agreed) held that the question of whether a development was likely to have a significant effect on threatened species, thereby triggering the need for a species impact statement under s 77(3)(d1) of the *Environmental Planning and Assessment Act 1979*, was one of jurisdictional fact. Accordingly, in judicial review proceedings challenging the validity of a development consent which was issued without a species impact statement, expert evidence was admissible to prove the existence or otherwise of that fact.

In the High Court decision on 14 May 1999, Gleeson CJ (with whom Gummow J agreed) found that Ross Mining's application failed to raise legal issues which were of sufficient importance for the High Court to hear a full appeal. Ross Mining was ordered to pay the TPC's costs.

Prior to the High Court hearing of the special leave application, the TPC withdrew its original proceedings challenging the validity of Ross Mining's development consent. Those proceedings had been remitted to the Land and Environment Court by the Court of Appeal and were relisted for hearing before the trial judge, Talbot J. The withdrawal followed the recent lodgment by Ross Mining of a new development application which was accompanied by a species impact statement.

The Court of Appeal decision, which the High Court has declined to reconsider, has important implications for mining and development throughout NSW.

The *Environmental Planning and Assessment Act 1979* requires developers to submit to local councils a species impact statement with their development application where, on an objective basis, it can be shown that there is likely to be a significant effect on threatened species. In these circumstances, the Court of Appeal decision establishes the right of the public to challenge the validity of a development consent if a local council grants a development application without a species impact statement.

The EDO acted for the Timbarra Protection Coalition in the proceedings in the Land and Environment Court, Court of Appeal and High Court.

Hindmarsh defamation ruling

Case Note: Chapman & ors v Allan and Draper

Chris Norton, Solicitor, EDO (NSW)

Facts

This case[1] was a defamation action brought by members of the Chapman family, who are the shareholders and director of Binalong Pty Ltd, the company developing the Hindmarsh Island marina and related bridge, relating to an article published in *Green Left Weekly*.

The article purported to be an interview between a journalist and Dr Neale Draper, an archaeologist and anthropologist who formerly worked for the South Australian government. The Chapmans contended that the article alleged that they had not consulted the Lower Murray Aboriginal Heritage Committee in obtaining planning approval for the Hindmarsh Island bridge, thereby implying that they had not properly consulted with aboriginal people as required by law and/or the relevant authorities. A series of defamatory imputations were said to arise from that statement. The relevant issue had a circulation of 3,422 nationally, of which 357 were in South Australia.

The first defendant, the publisher of *Green Left Weekly*, did not appear at the hearing, and apparently did not defend the action save for filing points of defence which were later discontinued except as to quantum.

The second defendant, Dr Draper, denied speaking the words reported to have been said by him, denied that it referred to the plaintiffs or that it was defamatory; alternatively, he pleaded that the words were fair comment on matters of public interest; and that the words were true in substance and fact. He also denied responsibility for republication of the article. Dr Draper also pleaded that if he was found liable, the Court should take into account the fact that the plaintiffs had received compensation in a number of other actions relating to different defamations, and that the plaintiffs rejected an offer of apology made by Dr Draper.

Findings

Lowrie J found that the article was defamatory, that an apology given by the first defendant was inadequate, and that Dr Draper had made defamatory comments about the Chapmans. His Honour found that although Dr Draper had not authorised republication of his comments, that was not a necessary precondition for liability to arise. His Honour also rejected the pleas in mitigation, and found that Dr Draper's conduct since the publication had been "inexcusable and deserves censure".

His Honour awarded Thomas and Wendy Chapman $50,000 each in damages, and awarded interest in the sum of $11,000, making a total award in the sum of $111,000 against both defendants.

Comment

The most startling result of this case is the size of the sum of damages awarded. While not excessive by general standards, the small distribution of *Green Left Weekly* in South Australia (357 copies) means that the defendants were required to pay over $300 in damages for every reader of the publication. The size of this award no doubt reflects in part what his Honour saw as being "indefensible" conduct by Dr Draper in requiring the plaintiffs to prove that the article was defamatory, and in offering only a qualified apology.

Writers and publishers of small-circulation environmental journals and local newsletters often comment upon the adequacy of compliance by developers with statutory requirements. Results such as that in this case demonstrate that it is prudent for anyone involved in public comment on matters of controversy to have a basic understanding of the laws of defamation, and what comments may and may not be defensible. In particular, any comments made must be based on true facts. If a person the subject of an article might conceivably bring defamation proceedings, the article should be checked by a lawyer to establish whether there are good prospects of defending a claim. Having to pay a damages award of the size of that in *Chapman* would cripple, if not destroy, most community organisations.

[1] *Unreported, District Court of SA, Lowrie J, 26 November 1998*

Review of NSW's strategic land-use planning legislation

Katherine Wells, Senior Solicitor, EDO (NSW)

The NSW Department of Urban Affairs and Planning (DUAP) has commenced a review of Part 3 of NSW's main land-use planning Act, the *Environmental Planning and Assessment (EP&A) Act 1979*. Part 3 is the part of the Act dealing with strategic planning. In a Discussion Paper issued recently, entitled "Plan Making in NSW – Opportunities for the Future", DUAP raises a range of important issues, many of which have recently been, or are being, debated in other States around Australia. The NSW EDO's views on some of the main issues follow.

Background – the Strategic Planning System in NSW

Part 3 sets up a system of strategic planning based on Environmental Planning Instruments (plans) which, broadly speaking, identify zones within the area to which each plan applies, and then set out permitted and prohibited uses within each zone. They also contain a range of other overlay controls on development within the area to which they apply. There are 3 categories of plan; State Environmental Planning Policies, Regional Environmental Plans, and Local Environmental Plans.

The EDO's perspective on the Discussion Paper

The EDO considers that some of the changes canvassed in the Paper are useful ones. These are discussed briefly below. However, it is difficult to comment on many of the concepts in the Discussion Paper because they are not explained properly. There is a lack of real analysis behind many of the ideas floated in the Paper.

There are also some very radical proposals for change which, from an environmental and community perspective, the EDO views with alarm. These are also discussed below.

Useful proposals

1. Regional planning

The Paper emphasises the benefits of regional land-use planning. In the EDO's view, this should be supported; from an environmental perspective, it obviously makes more sense to try to deal with issues on a regional, and bioregional, basis. In addition, the Paper suggests using Regional Environmental Plans as a vehicle for greater integration between all the different strategies, plans and programs which currently have to be taken into account. This should also be supported, provided that the environmental standards currently contained in those other documents are not lost in the integration process.

2. The need for community participation

The Paper also emphasises the need for more, and better, community participation in the Part 3 plan making process. This should also be supported; community involvement is crucial to the proper development of plans. However, such participation should not lead to a reduction in community consultation at the site-specific development stage (that is, at the project-control stage, which in NSW is dealt with under Parts 4 and 5 of the *EP&A Act*).

3. Simpler documentation

The Paper canvasses the idea of having simpler documentation, and having all the relevant documents, State, Regional and local, in the one place. The EDO supports this; from a community perspective, it is usually very difficult under the current system to ascertain which documents apply and how they should be interpreted.

4. Plans should be regularly reviewed

The Paper suggests that plans should be subject to regular review. The EDO supports this. In addition, there should be monitoring of the effectiveness of plans, with the monitoring results fed into the review process.

Problems with the Paper

1. The Paper does not seriously engage with the need for better environmental protection

At p. 27, the Paper proposes both "guiding principles" and "key outcomes" for the review. The guiding principles are strong on terminology such as "certainty and consistency", and "flexibility". However, they contain no reference whatsoever to environmental outcomes. This shortcoming is also reflected in the key outcomes, which concentrate on issues such as improved coordination, reduced complexity, and efficient processes. No serious attempt is made to develop a key outcome which emphasises the need for environmental protection. This needs to change.

The Paper also contains almost no meaningful reference to ecologically sustainable development (ESD). Local government in NSW and most NSW environment agencies now have ESD

principles well defined in their legislation. However, DUAP has so far completely failed to integrate ESD principles into the *EP&A Act* in a meaningful way, despite concerted attempts over recent years to persuade it to do so. The Paper continues this failure.

The EDO considers that there is a need for more emphasis on ESD principles. Firstly, ESD principles should be defined in the *EP&A Act*. The definition included in most other pieces of NSW environmental legislation (for example, in s. 6(2) of the *Protection of the Environment (Administration) Act 1991*) would be quite adequate. Secondly, ESD principles should be required to be taken into account when plans are being made. Thirdly, the implementation of ESD principles should be required to be incorporated into the objectives of every plan, and followed through in the substantive provisions of the plan. Fourthly, DUAP should produce guidelines to help councils interpret the principles of ESD, and what they mean in practice.

The EDO is also concerned about the failure of the part of the Paper dealing with directions for the future to make any mention of the assessment of plans for their environmental impacts. There should be environmental impact assessment of all new plans or significant amendments to plans. It is particularly important that plans are assessed for their *cumulative* impacts. However, it is also important to ensure that such assessment does not lead to a reduction in site-specific environmental assessment (that is, at the project-control stage, under Parts 4 and 5 of the *EP&A Act*).

2. Emphasis on "flexibility"

One of the concepts which appears time and time again in the Paper is "flexibility". The Paper actually canvasses the idea of getting rid of zones and prohibited uses in order to provide a more flexible approach to planning. This is of great concern to the EDO. From a community viewpoint, this sort of "flexibility" would be enormously difficult to deal with. It would mean that there would be less certainty about what is and is not permitted, and far more opportunity for developers to take advantage of the system. (It is good to remember that in the development stakes, all parties are not of equal bargaining strength.) It would also almost certainly lead to a reduction in guaranteed environmental standards.

The emphasis on flexibility brings up the entire issue of "objective-based planning", and whether or not that is appropriate. Objective-based planning operates, basically, on the principle that as long as a use is consistent with the objectives of a zone, it should be permissable with consent. In practice, the problem with this approach is that it often substantially reduces the likelihood of any real strategic planning taking place.

Firstly, by its very nature, objective-based planning hands councils enormous discretionary power. Secondly, it is not uncommon for plans to exacerbate this situation, by including a broad range of objectives (often competing objectives) within the one zone, and then saying that very few or no uses are prohibited within that zone, and that most uses are permitted with consent.

The consequence of this type of planning, from the community's point of view, is often just sheer confusion. It is not clear what standards, if any, apply, and it often seems as if the objectives of the zone can be used to promote almost any outcome the council wants.

In the EDO's view, proper strategic planning – which is surely what Part 3 of the *EP&A Act* is all about – requires a good sense of direction. That necessarily implies a degree of certainty of outcome. For this reason, it is crucial that both zones and prohibited uses be retained. In addition, each zone should be required to clearly express its most important objective, and if competing objectives are included in the zone, an adequate list of prohibited development should be retained, so that clear direction is provided to councils, developers and the community about the purpose of the zone, and the limits to the zone.

3. Involvement of private certifiers in the plan-making process

The Paper suggests that councils should be allowed to make Local Environmental Plans (LEPs) provided the LEPs are checked for consistency with State and Regional documents by accredited professionals. (Currently only the Minister can sign off on LEPs.) The involvement of accredited professionals (or certifiers) in the Part 3 plan making process should be strongly opposed. Even the simplest of LEPs is likely to raise a host of discretionary issues. Accredited certifiers should not be able to make discretionary decisions; only elected representatives should be able to do that. DUAP recognised this principle in its review of Part 4 of the *EP&A Act*, two years ago, but now appears to have forgotten it.

4. Appeals from zoning decisions

The Paper canvasses the idea of appeals from zoning decisions. This should also be strongly opposed; it would only benefit developers, and would undermine a council's ability to take a strategic approach in its plan-making.

Conclusion

It is good that DUAP is thinking broadly about the possibilities for change, and some of the changes being canvassed would be useful ones. However, there are some very radical proposals for change in the Paper, and in the EDO's view, the case for radical change has not yet been made out sufficiently to warrant support.

Most of what really needs to be done can be done within the basic structure set up by the current system. For example, a greater emphasis on regionalism and better integration could be achieved right now if Regional Environmental Plans were used more systematically and strategically across the State. Many of the other matters which warrant change can also be tackled with minimal legislative change. Let's look closely at how the current system is implemented in practice before we opt for far-reaching, unnecessary and potentially destabilising change.

Industrial chemicals, NICNAS and confidential listing:

Time to open the doors

Don Anton, Policy Coordinator, EDO (NSW)

Introduction

Recently, the Technical Advisory Group of the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) began considering Guidelines for the Director of Chemicals Notification and Assessment (the Director) to consider in making determinations as to whether to make a confidential listing of an industrial chemical on the Australian Inventory of Chemical Substances (AICS). This article considers the adequacy of NICNAS and the Draft Guidelines. It concludes that greater levels of information need to be included in the AICS and that greater transparency and access to information than is currently provided for under the law is required.

Industrial chemicals are regulated in Australia under the *Industrial Chemical (Notification and Assessment) Act* 1989 (*ICNA Act*). Under the Act, the NICNAS has responsibility for maintaining the AICS. The AICS is the legal mechanism that distinguishes new industrial chemicals from those already existing in Australia. All industrial chemicals on the AICS are defined as existing. All new industrial chemicals not included in the AICS must be notified and/or assessed by NICNAS before they can be introduced in Australia.

The AICS consists of a non-confidential section and a confidential section. Chemicals are listed in the confidential section primarily on the basis of commercial confidentiality requests by manufacturers. Both sections are required to include only the chemical name, a Chemical Abstracts Service Registry Number (CAS Number) or AICS number, molecular formula and synonyms.

Neither section includes health hazard or safety information, environmental risks, listings of products that contain the chemical, or information linking the chemical with the notifier or original nominator of the chemical for inclusion in the AICS. Since the 1997 amendments to the *ICNA Act*, once listed in the confidential section a chemical may remain confidentially listed indefinitely, subject to approval every five years.[1] No information in the confidential section is publicly available.[2]

The initial list of industrial chemicals contained in the AICS included chemicals already in commercial use in Australia over the period of 1 January 1977 to 28 February 1990. It included approximately 36,000 non-confidential chemicals and 1000 chemicals listed in the confidential section of the AICS. Additional chemicals were added as 'existing' chemicals to the AICS under an amnesty from 1993 to 1995. Under the *ICNA Act* chemicals are not required to be assessed in Australia for health or environmental effects, and the vast majority have undergone no such assessment.

Since the NICNAS came into effect on 18 July 1990, new industrial chemicals and priority existing chemicals already listed have been required to be assessed and the reports made public. However, new industrial chemicals assessed under NICNAS are not included on the AICS until a period of 5 years from notification and assessment has elapsed.[3] The rationale for this extended period of exclusion from the AICS is "to protect the rights of the original generator of the chemical data".[4]

Adequacy of information included in the AICS

An essential component of an effective chemical inventory is the requirement that it include information on the health and environmental hazards of listed chemicals and where those chemicals are used. Detailed data collection on these hazards and the location of chemical use can assist in:

- helping government regulators to identify high-priority problems and develop regulatory responses;
- focusing industry attention on the specific nature of the risks their facilities pose to workers, the community and the environment, and encouraging them to reduce utilisation of harmful substances in manufacturing and the release of pollution into the environment;
- enabling the community to assess risks to their health and safety from risks associated with listed chemical use or exposure;
- allowing the heads of schools, hospitals, day care centres, and other public facilities to be aware of potential risks and to develop emergency plans or other contingency plans in consultation with nearby industrial facilities;
- assisting the government and community to determine whether regulatory measures designed to reduce and control chemical risks are working;
- providing scientists with substance-specific data that could help establish cause and effect linkages between listed chemicals and local ecological changes or health effects; and
- providing community groups with pollution data that will allow them to lobby intelligently for specific technical or regulatory measures that could reduce risks associated with listed chemicals.[5]

Experience has shown that chemical inventories are only as good as our knowledge about the chemicals that require listing. What we do not know may be hurting us. Public health and safety, as well as environmental protection from pollution releases, cannot be based on faith. Guinea pig status is not acceptable. It is clear that the AICS does not provide enough information about the effects of the majority of listed chemical substances released in to the environment, as pollution or otherwise, to determine whether they pose health and/or environmental risks.[6]

The AICS should require information on health and environmental hazards of listed chemicals. Until adequate assessments can be carried out, chemicals that do not have minimum health safety screening information available should be identified to the public. This identification would more accurately convey to the public the unknown nature of the potential risks represented by such chemicals. It would also be an incentive for manufacturers or users of listed substances to acquire the necessary data to avoid such designation.

Indeed, the Draft Guidelines on Confidential Listing recognise "that the greater the *perceived* [chemical] hazard, the less justification to restrict the release of commercially sensitive information". While public concern is relevant, decision-making affecting public health, environmental safety, and large commercial interests should depend on as much scientific evidence as possible by requiring a notifier of a chemical to provide information on its health and environmental effects.

"....the current system of access to information about confidential industrial chemicals is inadequate."

NICNAS should also include a requirement that industry develop basic data for new and existing listed chemicals in high volume use. This is not a novel idea and has already been recommended by the Organisation for Economic Cooperation and Development, to which Australia belongs.[7] A key element for regulation would be an automatic sanction for failure to produce timely data. For example, the law could provide that chemicals that do not have specified data publicly available by a fixed deadline may not be manufactured, sold, or used in Australia.

The current system also suffers from a perceived, if not actual, problem of excessive commercial influence on outcomes. For this reason the assessment and review of industrial chemicals and chemical products should either be publicly funded or conducted by government using a levy on industry.

If registrants continue to pay for test data, any moves to protect data must be accompanied by improved consumer access to information beyond existing arrangements. This should include access to information on:

- test data with respect to active and inert ingredients, as well as formulation mixtures (but not necessarily formulation processes);
- primary data made available by the registrants at the initial assessment stage to NICNAS; and
- all available constituent element data.

Confidential listing and community right to know

An essential component of effective industrial chemical management is a 'community right to know' scheme that gives the public information as comprehensive as possible about chemical activities taking place around them (production, storage, transportation and use). 'Community right to know' laws shift the focus from a reactive, crisis-by-crisis approach to chemical incidents and emergencies toward citizen and governmental monitoring of existing and potential chemical hazards, helping prevent future crises.[8]

As the Commonwealth Ombudsman's Office recognised in its *1994-95 Annual Report*: "Information is the currency that we all require to participate in the life and governance of our society. The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity. Alternatively, the greater the restrictions that are placed on access, the greater the feeling of "powerlessness" and alienation".[9]

With respect to the current review of Guidelines for Confidential Listing of Chemicals on the AICS, it is important to again emphasise that no new industrial chemical (whether ultimately listed as confidential or not) is listed until an initial five years has elapsed. This period is much too long to follow as a matter of course under the *ICNA Act*. With this extremely generous grace period, the Act should provide for a presumption against confidential listings.

Moreover, the current system of access to information about confidential industrial chemicals is inadequate. While it is true that in order to obtain a confidential listing the notifier must establish that prejudice to its commercial interests outweighs the public interest in the publication of those particulars, the employment of confidential listings under AICS undermines the proper focus of a chemical inventory by putting private profit ahead of human health and safety and environmental protection.[10] The public interest should control the decision. Clearly, the Guidelines on Confidential Listing should establish ways to provide *more* information about chemicals to the community, including the use of a presumption against confidentiality.

The Draft Guidelines for Confidential Listing attempt to infuse the decision about whether a chemical may be listed in the confidential section with specific public interest considerations. However, it does not go nearly far enough to protect the community against potential health and environmental risks that chemicals pose. There are at least seven major problems that make the Guidelines unacceptable as currently drafted:

1. The Guidelines merely recognise that the public has the right to information as recognised in the Commonwealth Freedom of Information legislation. In connection with chemicals that may lethally or chronically injure human health or the environment, the public should have much

greater rights. The community must be entitled to know the man-made risks and hazards that chemicals may present.

2. The Guidelines merely establish that "the onus is on the applicant *to provide information* in support of a claim for confidential listing on the AICS". This is clearly insufficient. The Guidelines should clearly provided that that onus on the applicant is to ***establish beyond all reasonable doubt that the public interest in access to information does not outweigh the commercial interests that are sought to be protected.***

3. The Guidelines fail to establish a presumption against confidential listing. Given that new industrial chemicals assessed under NICNAS are included on the AICS only after the expiration of five years (a problem in itself which should be corrected), it is essential that the Guidelines establish a presumption against confidentiality. It should be presumed that a gratis five-year period is ordinarily sufficient to protect the rights of the original generator of the chemical data.

4. The Guidelines fail to provide the elements that an applicant need prove in order to justify a decision to allow a confidential listing. Applicants should not be able to claim commercial confidentiality unless they can prove beyond all reasonable doubt:

   - that the information has not already been disclosed anywhere in the world;
   - another law, in Australia or in any other country, does not require disclosure of the information;
   - keeping the information confidential *would not* create a significant public health/environmental risk.
   - disclosure would cause substantial harm to the party seeking confidentiality;
   - the chemical identity is not readily discoverable through reverse engineering; and
   - all other required information concerning the industrial chemical has been disclosed.

   If an applicant fails to prove each of these elements beyond reasonable doubt, the chemical should not be allowed to be listed in the confidential section. If the chemical is included in the confidential list, a label should be required on all products incorporating the chemical to indicate that a specific chemical identity or composition is being withheld as confidential information.

5. The Guidelines fail to require the Director to have regard to the precautionary principle in making a decision whether to allow a chemical to be included in the confidential section of the AICS. In the event of scientific uncertainty about any of the elements of proof necessary to obtain confidential listing, the Director should have recourse to the "precautionary principle" contained in clause 3.5.1 of the May 1992 *Intergovernmental Agreement on the Environment.* In applying the precautionary principle in the context of whether a chemical should be confidentially listed, the Director should not use scientific uncertainty about any of the elements of proof listed above as a justification to list a chemical in the confidential section of the Inventory.

6. The Guidelines fail to provide a mechanism for public involvement or representation in the decision to list a chemical in the confidential section of the AICS. In making the decision, the Director only gets to hear the applicants' side of the case. Naturally, this side of the case will be slanted in favour of confidentiality. Clearly, natural justice requires that the public should be entitled to put its case. If, as currently envisioned by the Guidelines, applications are treated as commercial-in-confidence and no direct public participation is allowed, a Public Interest Advisory Group should be created in order to make the case, if one there be, against confidentiality.

7. The Guidelines merely *allow* the Director to seek advice from the Technical Advisory Group on matters related to confidential listing. In making the decision about confidentiality, the Director should be *required* to seek the advice of the Technical Advisory Group. In giving its advice, the Technical Advisory Group should have regard to the broad public interest in keeping the information non-confidential, as well as the technical and scientific considerations surrounding the listing.

Conclusion

Access to information about industrial chemicals, especially about the nature of the health and environmental risks they pose, is an essential prerequisite for effective chemical inventory. It is also vital to public input into environmental decision-making.[11] With increasing levels of use of toxic chemicals in all aspects of industrial and agricultural production, it is important for informed decision-making that both the government and the public be fully informed of the health and environmental risks associated with their use.[12]

Accordingly, reporting requirements about the identities, characteristics, effects, locations, quantities, storage, treatment, and disposal of listed chemicals have become a modern feature of contemporary environmental law.[13] It is time for NICNAS to incorporate these contemporary developments. In order to achieve the practical benefits related to listing chemicals on the AICS, provisions giving the public access to inexpensive, comprehensive and understandable data should, as a matter of course, outweigh confidential listing.

The Draft Guidelines ought to be revised to ensure that the public interest in keeping information about industrial chemicals non-confidential is protected. The Guidelines should recognise the extensive right of the public to know about the nature of chemicals in the AICS. They should provide burden of proof requirements that adequately protect the public's right to know, including the use of the precautionary principle. They should include a presumption against confidentiality and make sure that the public's interest in making information about chemicals available is adequately represented.

Endnotes

[1] *ICNA Act*, Part II.
[2] Id., s 16.
[3] *ICNA Act*, s 14.
[4] See NICNAS, Draft Guidelines for Establishing a Case for Confidential Listing of Chemicals on the Australian Inventory of Chemical Substances (Version 2, 29 March 1999).
[5] N Zimmerman, M M'Gonigle & A Day, Community Right to Know: Improving Public Information about Toxic Chemicals (1995) 5 Journal of Environmental Law and Practice 95, 100.
[6] For example, recent research in the US has shown that even the most basic toxicity results cannot be found in the public record for nearly 75% of the top volume chemicals. This confirmed the National Academy of Sciences' National Research Council study of the early 1980s which demonstrated that 78% of high volume chemicals had not had even minimal toxicity testing. In thirteen years nothing much had changed. Environmental Defense Fund, Toxic Ignorance: The Continuing Absence of Basic Health Testing for Top-Selling Chemicals in the United States (1997), p 15.
[7] Turnheim, *Evaluating Chemical Risks*, The OECD Observer (No. 189, Aug/Sept 1994), pp. 12-15.
[8] See N Gunningham & A Cornwall, Legislating the Right to Know (1994) 11 Environmental and Planning Law Journal 274.
[9] See also Attorney-General's Department, *FOI Annual Report 1982-83* (1983), p xi; *Cleary and Dept of the Treasury* (1993) 31 ALD 214, 217-18.
[10] *ICNA Act* s 14(4).
[11] Neil Gunningham & Amanda Cornwall, *Legislating the Right to Know* (1994) 11 Environmental and Planning Law Journal 274, 274.
[12] John Todd, *Science for the People*, in Notes for the Future: An Alternative History of the Past Decade (R. Clarke, ed., 1975).
[13] N. Zimmermann, M. M'Gonigle & A. Day, *Community Right to Know: Improving Public Information about Toxic Chemicals* (1995) 5 Journal of Environmental Law and Practice 96, 97; P. Orum & A. Mc[T] ean, Progress Report: Community Right to Know (1992).

No choice on Integrated Development

James Johnson, Director, EDO (NSW)

Last year the government introduced a process of "integrated development", where several agencies have to decide in a very short time whether they will give an approval for a development. In the course of discussions with officers of Department of Urban Affairs and Planning and local councils, we have learned that many people are treating the integrated development process as optional.

We think this is against the law and developers who don't ensure the proper process is followed may find their development consent open to challenge.

What is "integrated development"?

Integrated development is development that, in order for it to be carried out, requires development consent and one or more of various approvals required under other acts. For example, development that requires a pollution licence is integrated development.

The Environmental Planning and Assessment Regulation (r.52A) says that a development application requires the developer to say if the development is integrated and to list the other approvals required (Form 1). If a developer doesn't list the approvals, the development application is in breach of the regulation.

If a council receives an application for a development which will require one of the integrated development approvals, the form must indicate whether the development is integrated. If the development is in fact integrated but the application has not been marked as integrated, the development application is not valid and council should not deal with it further. It is not a matter of choice for a developer as to whether or not to treat the development as integrated.

Council concerns

Some councils have expressed concern that for every development they receive they only have 2 days to decide if one of the integrated approvals is needed and refer it to the appropriate agency. They have adopted this approach regardless of whether the DA is marked as "integrated". This is because section 52A says that within 2 days after it receives a development application for integrated development, the consent authority must forward a copy of the application to the relevant approval body.

These concerns have no basis in our opinion. It is important that this myth of a proponent being able to choose whether to tick the integrated box or not is exploded. Council need only treat the development as a normal development if it is not marked as integrated. This is because it has not received a "development application for integrated development".

If at any stage during council's consideration of a DA it realises that the development is integrated, it must refuse development consent or return the application and ask that it be validly lodged. This is because the application was improper.

Queensland code assessment

Joanne Bragg, Solicitor, EDO (Qld), and Fleur Kingham, lawyer and environmental consultant

Queensland is currently implementing a new development assessment system that is being closely watched by other jurisdictions in Australia. The purpose of this article is to explore one aspect of that system, code assessment, and to consider whether code assessment is a model that should be emulated by other jurisdictions or a process that needs to be significantly reformed.

The *Integrated Planning Act 1997* ("*IPA*") establishes a framework that is intended to integrate planning and development assessment so that development and its effects are managed in a way that is ecologically sustainable. Its purpose is to achieve ecological sustainability by, amongst other things, managing the process by which development occurs and managing the effects of development on the environment[1].

IPA provides that planning schemes should contain a number of key elements. They include Desired Environmental Outcomes (DEOs) for the planning scheme area, measures to facilitate the desired environmental outcomes to be achieved and performance indicators to assess their achievement. Desired environmental outcomes have a special status under IPA. In most, but not all cases, a development decision must not compromise the achievement of the desired environmental outcomes for the planning scheme area[2].

Outline of IDAS

IDAS is the new Integrated Development Assessment System under *IPA*. It repealed the *Local Government (Planning & Environment) Act 1990 (P&E Act)*. As well as covering the range of approvals under the now repealed *P&E Act*, IDAS also incorporates approvals under the *Environmental Protection Act 1994* and the *Building Act 1975*. Progressively, the IDAS process will replace other development assessment processes in a range of environmental and infrastructure legislation[3].

Under IDAS the local government will normally be the assessment manager and make the decision on the development application as well as coordinating the assessment process. Once identified in a regulation to *IPA*, relevant State agencies will be involved in the assessment and approval process as "referral agencies". Some referral agencies will only have the power to give advice to the assessment manager. Others will be "concurrence" agencies with the power to require the assessment manager to refuse the application or to impose conditions upon the development permit.

There are many concerns with the way in which environmental approvals have been integrated with development permits. In particular there are stringent limits on the jurisdiction of the Department of the Environmental Protection Agency[4] as a concurrence agency under IDAS, which reduce its power.

Types of assessment under IPA

Not all activities that fall within the definition of development[5] will require a development permit. The Act establishes 4 different categories of development:

- exempt,
- self-assessable,
- assessable: code assessment, and
- assessable: impact assessment.

No development permit is required for exempt development (including mining & petroleum, some agricultural activities and forestry) or for self-assessable development. A development permit is required for assessable development: code assessment categories, and the application must proceed through IDAS, but without public submission and appeal rights. A development permit is also required in the case of assessable development: impact assessment categories, and the application must proceed through IDAS, including public submission and appeal rights.

Although no formal public participation rights are proscribed, there are a number of ways of requiring some element of public consultation for code assessment.

Firstly, the assessment manager can decide to ask any person for advice or comment about an application at any stage of the application, as long as it does not extend the stage[6]. That request can be made by publicly notifying the application. The draft Brisbane City Plan requires some level of notification for certain types of development that are code assessable.

Secondly, the local government could make a local planning policy specifying that for certain types of development, the local government would be likely to request information about community attitudes to the proposed development. This is one way that a local government can encourage pre-lodgment consultation with the affected community for significant developments. This is an approach being considered by Brisbane City Council for its new scheme.

Concerns about Code Assessment

As well as the difference in public submission and appeal rights, there are significant differences between code assessment and impact assessment in the criteria applied and the powers of the decision maker[7].

There are limits on the powers of the assessment manager to refuse or conditionally approve the code assessable application. The assessment manager's decision may conflict with an applicable code if there are sufficient planning grounds to justify

the decision having regard to the purpose of the code. The assessment manger must examine the DEOs, as for assessment against a code in a planning scheme - the assessment manager's decision must not compromise the achievement of the DEOs for the planning scheme area.[8] However on one interpretation the assessment manager could not refuse an application based on compromise to the achievement of a DEO unless the application also conflicted with codes.[9] The reason for that view is that an assessment manager may refuse the application only if the assessment manager is satisfied of two things, that the development does not comply with applicable codes and also compliance with the code cannot be achieved by imposing conditions[10].

There is no ability for the assessment manager to consider adverse environmental (eg. ecological) effects of a proposal that is code assessable, unless the planning scheme has already contemplated those effects and given them effect either in the codes, or at least the purposes of the codes or in the DEOs. There is no obligation on the assessment manager to advance the purpose of the *IPA* (to seek to achieve ecological sustainability) when conducting code assessment.[11]

In contrast when the assessment manager is conducting impact assessment[12], by definition that means the assessment of the environmental effects of the proposed development and the ways of dealing with the proposed effects.[13] The assessment manager is thus to undertake a broader investigation into the effects of impact assessable development applications than of code assessable applications. The assessment manager's decision for an application for development in a planning scheme area must not compromise the achievement of the desired environmental outcomes for the planning scheme area. The assessment manager's decision must not conflict with the planning scheme, unless there are sufficient planning grounds to justify the decision. The assessment manager is obliged to advance the purpose of the *IPA* (to seek to achieve ecological sustainability) when conducting impact assessment.

It is evident that in order to protect the natural environment from unacceptable adverse environmental effects that desired environmental outcomes concerning the natural environment must comprehensively deal with the key features of the natural environment which need to be protected and make clear what type and level of adverse environmental effect would compromise those features. All DEOs in a planning scheme need to be consistent. To avoid uncertainty DEOs covering economic development and other values sometimes in conflict with protection of the natural environment also need to be considered. However codes and the role they play requires further discussion.

Concerns with codes

Codes may be[14]:

- Identified in a planning scheme;
- Identified as a code for IDAS either in IPA or in another Act; or
- Identified in a preliminary approval.

There are at least the following types of codes that may be developed. Some codes may have more than one of the following features:

- Codes that are geographically based;
- Codes that apply to particular types of developments;
- Codes that apply to a number of categories of development - self-assessable, code assessable and impact assessable; and
- Codes that include "triggers" to determine when development requires code assessment or impact assessment.

The Act does not specify any minimum requirements for codes or any process for their development and adoption. Codes do not have to be developed as part of the planning scheme. Codes can be overridden if there are sufficient planning grounds, having regard to the purpose of the code[15]. The purpose statement in a code is, therefore, a critical component of the code. Codes developed out of the context of *IPA* may not clearly identify what the purpose of the code is or draw a link between the purpose of the code and the desired environmental outcomes for the planning scheme area.

The only opportunity the community has for commenting on codes is during the public consultation periods for a draft planning scheme. It is unrealistic to expect the community to review the proposed codes at the same time as the planning scheme is open for public comment.

The interaction of a plethora of codes and their hierarchy in the assessment process is also unsatisfactory. The approach Brisbane has taken is generally to identify one code as the applicable code. However the codes cross-refer to each other and attempt to incorporate into the applicable code, the requirements of the codes referred to.

There are a number of issues with this. Are all the codes so incorporated applicable codes? If there is a conflict between the purpose statements or other provisions of the various codes, which code prevails? Even where there is no conflict, will the emphasis or orientation of one code colour the interpretation or application of the other codes referred to?

There are no answers to the questions about the hierarchy of codes in *IPA*. Whilst *IPA* does anticipate that there may be more than one applicable code, it is silent on how conflicts, inconsistencies or differences in emphasis should be dealt with. Until there is judicial determination of these questions, the process will remain uncertain.

Conclusions and Recommendations

Reform of *IPA*

- Code assessment in its current form is not a model that should be emulated in other jurisdictions and requires significant reform if it is to achieve the objects of *IPA*;

- The process of code assessment is too constrained to achieve the objects of *IPA*. This is because:
  i. the material the decision-maker can assess the

development against is limited,

ii. the opportunities for public involvement in the process are discretionary to the assessment manager and referral agencies and do not extend to third party appeal rights,

iii. the assessment manager is not obliged to achieve the purpose of *IPA* when conducting code assessment and,

iv. the power of the decision-maker to refuse an application, possibly even if an approval compromised a DEO, is restricted.

- Given the restricted scope of code assessment, its integrity relies strongly on the content of the codes. If these are inadequate, there is little room for the assessment manager to plug the gaps with additional requirements to achieve the objects of the Act unless the DEOs apply. Accordingly there needs to be more rigour in the requirements as to the contents of the codes.

- Further, there should be a transparent process for the development of codes that includes adequate opportunities for public involvement in an appropriate time frame

- The *IPA* needs amendment to require that the relationship between various codes, and the relationship between codes and DEOs needs to be clearly identified in each planning scheme to avoid uncertainty of when codes are applicable and to avoid codes compromising DEOs.

Tips for Reviewing draft Planning Schemes

For those involved in reviewing draft *IPA* planning schemes we suggest that you:

- Identify which developments are code assessment and consider whether these are the types of assessment you are comfortable not hearing about. Also consider if you are satisfied with the legal possibility that the assessment manager lacks power to refuse a code assessable development;

- Carefully review the content of any codes in or referred to by the planning scheme. In particular, focus on the purpose statement to ensure that the purpose of the code is stated clearly and forcefully enough to act as an effective guide for decision-makers;

- Check that the codes that apply to a code assessment are comprehensive and incorporate codes with an environmental objective, giving appropriate priority to those environmental objectives;

- Ensure that the relationship between various codes, and the relationship between codes and DEOs is clearly identified in each planning scheme to avoid uncertainty of when codes are applicable and to avoid codes compromising DEOs;

- Ensure that the desired environmental outcomes clearly and specifically protect ecological values and that these are not inappropriately contradicted by other DEOs promoting different values. Is it clear when the DEOs are compromised?

Endnotes

[1] Planning schemes can not prohibit development, only regulate it, see *IPA*, s2.1.23(2) and (3).

[2] The provisions suggest desired environmental outcomes can be compromised in a code assessable development that complies with relevant codes.

[3] The provisions of the *Environmental Protection Act 1994* still specify the criteria by which the department of the Environmental Protection Agency assesses applications concerning environmentally relevant activities. In lieu of an environmental authority, an operator will now receive an IDAS development permit. However, the operator will still need a "personal" environmental licence under the *Environmental Protection Act 1994* that imposes conditions on the holder personally and does not run with the land in the way that the development permit does.

[4] This is the new name for the Department of Environment and Heritage in Queensland that administers most of the *Environmental Protection Act 1994*.

[5] "development" includes making a material change of use of premises and reconfiguring a lot, as well as actual works on the lot, *IPA* s1.3.2.

[6] *IPA* s3.2.7(1)

[7] The article deals with code assessment under the *Integrated Planning Act 1997* once local governments have *IPA* planning schemes, which may take up to 5 years in some local government areas. The transitional provisions of *IPA*, s6.1.28 demonstrate the change in assessment criteria between *P&E Act* and *IPA* because they apply the IDAS process to applications lodged after commencement of the *IPA* but still require the *P&E Act* consideration of environmental effects, apparently whether or not public submission and appeal rights apply, until the transitional planning scheme is replaced by an *IPA* planning scheme.

[8] *IPA*, s 3.5.13(1)-(4)

[9] *IPA*, s3.5.13 (3)(b), which refers to DEOs does not clearly apply to s3.5.13 (4) concerning refusal power.

[10] *IPA*, s3.5.13(4)

[11] *IPA*, s1.2.2 (2)

[12] There is no provision for environmental impact statements under *IPA*. This has been criticised- see Bragg J *'Will the Integrated Planning Act protect the Natural Environment?'* Queensland Environmental Law Conference 1998 and Brown L and Nitz T. *'Where have all the EIAs gone?'* QELA conference 1999.

[13] *IPA*, Schedule 10

[14] *IPA*, Schedule 10 definition of "code"

[15] *IPA*, s3.1.13(2), but also consider 3.1.13(3)(b) that states that DEOs cannot be compromised.

EDO NSW Funding Approved

Funding for the EDO's NSW office for the coming financial year has been approved by the Trustees of the Solicitor's Trust Account Fund. The Solicitor's Trust Account Fund has provided funding to the EDO NSW for the past three years, making possible many of the services the EDO NSW provides to the public, such as community education, litigation and advice work, and legislative and policy support work.

Papua New Guinea landowners win damages for illegal logging

Lisa Ogle, Senior Solicitor, EDO (NSW)

Papua New Guinea contains one fifth of the world's remaining tropical rainforest. These forests are seriously threatened by unsustainable logging carried out by Australian, Malaysian and Korean logging companies.

In April 1999, a group of PNG landholders successfully defended a landmark damages award for nearly US$2 million which the courts had ordered the State of Papua New Guinea and two logging companies to pay (*State of PNG and ors v Rafflin*, Supreme Court of PNG, SCA 78, 80 & 81 of 1997). The decision marks the first time that landowners have successfully won compensation through the PNG courts for illegal logging operations on their land.

The damages were awarded to the landowners by a trial judge back in 1997, who had found that the State and two logging companies had logged the landowners' land without their consent in a logging operation which took place in 1993. The State and the two logging companies appealed against the decision. In April the Supreme Court unanimously struck out the appeals due to the appellants lengthy delay in preparing the appeals for hearing.

Lawyers from two non-government organisations in PNG, the Independent Community Rights Advocacy Forum (ICRAF) and the Pacific Heritage Foundation, and Brian Brunton from Greenpeace PNG, acted for the 38 landowners. The EDO assisted the team of lawyers to defend the appeal and to brief a barrister from Sydney, who appeared for the landowners at the hearing.

Legal support for PNG landowners and rainforests

Like the forest cover in some places, legal assistance for landowners and the forest is thin on the ground. The EDO hopes to help change this with one of its new projects.

This case marks the beginning of a new EDO project in PNG. Funded by the Macarthur Foundation in the United States, the EDO has started a three-year programme in PNG. The EDO will assist Greenpeace and other public interest environmental lawyers to develop their skills to give advice and legal representation to landowners on forestry matters.

Book Review

"The Environmental Law Handbook" Third Edition, Prof. David Farrier

Reviewed by Marc Allas, Solicitor, EDO (NSW)

The third edition of the Environmental Law Handbook by Professor David Farrier is a reminder of how NSW planning and environment laws have changed considerably over the past few years. The amount of new legislation and law included in the third edition is enough for a new book in itself. New legislation reviewed in this edition includes:

- A review of the Integrated Development Planning amendments to the *Environmental Planning & Assessment Act* and Regulations, where building, subdivision and all other planning approvals have been incorporated into one development approval process.
- The *Protection of the Environment Operations Act 1997*, which introduces an integrated & load-based pollution licensing scheme.
- The *Threatened Species Conservation Act 1995*, which protects threatened wildlife. The *Contaminated Land Management Act 1997*, which gives the Environment Proctection Authority the power to regulate sites where contamination presents a significant risk of harm. The Act shifts the costs of cleaning up contaminated sites from the occupier to the polluter.
- The *Sydney Water Catchment Management Act* and the *Water Legislation Amendment (Drinking Water and Corporation Structure) Act 1998* passed after the Sydney Water crisis.
- The *Rural Lands Protection Act 1998*, which replaces the Rural Lands Protection Act 1989 and brings the existing 48 Rural Lands Protection Boards under the supervision of the State Council of Rural Lands Protection Boards.
- The *Sydney Harbour Foreshore Authority Act 1998*, which establishes the new Sydney Harbour Foreshore Authority.

Apart from new legislation, the third edition is note worthy for delving into some topical areas in the environmental law and policy, such as: security for costs and the ordering of costs in public interest litigation; legal aid; alternative dispute resolution; the Aboriginal Land Rights Act 1993, Mabo and the Native Title Act, the Wik case, "Mining and Native Title", and amendments to the Native Title Act in July 1998.

One disappointment is the third edition's decision not to update or continue a unique and interesting chapter that discussed the broad roles and responsibilities of the various levels in government. Also absent is any comprehensive review of the proposed Commonwealth's Environment Protection and Biodiversity Conservation Bill 1998.

A very informative, easy to use and essential guide for lawyers, councils, planners and conservationists.

Available from Redfern Legal Centre Publishing
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NOTICEBOARD

James Johnson, EDO NSW Director, departs for the Bar

After 9 years at the EDO, James Johnson is leaving to pursue a career at the Bar. James began work at the EDO as a solicitor in 1990 and was appointed Director in 1993.

Over the years he has advised thousands of people who have sought assistance through the EDO's telephone advice line. He has enjoyed a number of significant achievements in the courtroom, making an important contribution to the jurisprudence of public interest environmental law. Some of the reported cases which James has conducted over the years include:

- Brown v Environment Protection Authority and ors (1992) 75 LGERA 397 and (1992) 78 LGERA 119
- Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society (1992) 81 LGERA 132
- Tasmanian Conservation Trust v Minister for Resources (1995) 85 LGERA 296 ("Gunns Case")
- Friends of Hinchinbrook v Minister for the Environment and ors (1996) 69 FCR 1

James has made a substantial contribution to the development and reform of planning laws, threatened species laws and pollution laws in NSW, and to environmental legislation at the Federal level. He has sought to make the law understandable and accessible to the public through plain-English publications and an extensive and highly successful community workshop programme. In 1996 James was appointed as a Commissioner on the Legal Aid Commission, a position he has occupied for the past 3 years.

In conjunction with a number of interstate EDOs, James and former EDO solicitor Maria Comino provided the impetus which resulted in the Commonwealth Government funding a national network of EDO's throughout Australia in 1995.

We wish him well in his new career.

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