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M5 East motors ahead

Residents lose appeal against motorway

Chris Norton, Solicitor, EDO (NSW)

The recent decision of the NSW Court of Appeal in *Transport Action Group Against Motorways Inc* ("TAGAM") *v Roads and Traffic Authority and anor* [1999] NSWCA 196 has highlighted a significant flaw in the environmental impact assessment process for major infrastructure projects in NSW.

Facts

The Roads and Traffic Authority ("RTA")sought approval for the construction of the 4-lane M5 East motorway between Fairford Road, Padstow, and General Holmes Drive, Kyeemagh, in Sydney, a distance of about 13.5km. Construction of the road was an "activity" which required assessment under Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW) (the *"EP&A Act"*). As the building of the motorway was likely to significantly affect the environment, the RTA was required to prepare an environmental impact statement (EIS) in respect of the building of the motorway. The EIS had to be notified and publicly exhibited, and public representations had to be considered. Almost 8,000 submissions were received.

Following consideration of the submissions, a number of significant changes were proposed to the motorway that had not been the subject of assessment in the EIS, including:

- Construction of a 775m long tunnel under the Cooks River, resulting in excavation of between 600,000 and 900,000 tonnes of acid sulfate soil;
- Realignment of the motorway to pass through the Eve Street Wetland rather than through Kogarah Golf Course, destroying the wetland, which is home to a number of frogs and migratory waders; and
- A single exhaust stack of indeterminate height located in a different suburb to the previously proposed three stacks, to ventilate a 4km long tunnel. Digging the 825m long exhaust tunnel for the stack would result in the creation of over 93,000 tonnes of additional spoil, some of which would be contaminated to a degree as yet unknown.

Each of these changes to the original activity is in itself likely to have significant

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environmental impacts, and, if proposed independently, would have required the preparation of an EIS before approval could be given.

The RTA determined to proceed with the construction of the motorway incorporating the proposed changes. No new or amended EIS was prepared. To justify this action, the RTA relied on s 112(4)(b)(i) of the *EP&A Act*, which permits a determining authority to "modify the proposed activity so as to eliminate or reduce the detrimental effect on the environment..." without the need for further environmental impact assessment or public consultation.

TAGAM's primary contention in the appeal was that the modification power could not be relied upon to permit the proposed changes to be made without a further EIS being prepared, given the substantial nature of the changes, uncertainties in the details of the final approval, and the difficulty of comparing the environmental impacts of the activity before and after the changes.

Judgement

The majority judges, Mason P and Sheller JA, held that the scope of the power to 'modify' an activity that has been the subject of an EIS without the need for further assessment is to be determined, in part, from the relationship between the 'modifications' and the activity as a whole. The changes to the proposed activity were, when examined in isolation, significant developments; but when examined in the context of the overall activity it could be said that the changes altered that activity without radically transforming it, and thus could be said to be modifications to that activity.

In particular, the majority held that the power to modify an activity without conducting a further EIS was not subject to constraints of procedural fairness, and could still be exercised even if the modification had new adverse environmental effects not previously addressed. They also held that modifications need not be expressed with absolute precision, even though different possible permutations of the final activity (due to open-ended conditions) might have different impacts.

In dissent, Fitzgerald JA found that the proposed alterations would impose new, significant, detrimental effects on different localities and different persons from those who had the opportunity to make submissions on the EIS. His Honour held that the power to modify an activity without a further EIS could not be exercised in this way. His Honour also held that it was impossible to rationally compare the different environmental effects of the initial and amended activities.

Comment

The majority decision demonstrates that the power to modify a Part 5 development under the *EP&A Act* is extremely broad. The Act permits an authority to alter an activity substantially from that which has gone through the statutory process of environmental assessment and public comment, to the extent of affecting a whole new class of persons, without the need for further assessment and exhibition, so long as those alterations do not "radically transform" the whole activity. This means that the larger the initially proposed activity is, the greater the changes that can be made to that activity without the need for a new EIS process, even if those changes have environmental impacts, and will affect classes of people, far beyond those considered in the scope of the initial EIS.

To fulfil the aims of the *EP&A Act* of environmental protection and public participation in the development assessment process, legislative amendment is needed.

Costs ordered against "spokesperson" of environment group

Case Note: Tinda Creek Spiritual & Environment Centre v Baulkham Hills Shire Council & Ors (1998) 100 LGERA 432

Marc Allas, Solicitor, EDO (NSW)

This case concerns a decision in which the Land and Environment Court held that a spokesperson for an environment group, who was not himself a party to the proceedings, was jointly and severally liable to pay the costs ordered against the group as a result of its unsuccessful court case.

The environment group, the Tinda Creek Spiritual & Environmental Centre ("Tinda"), was incorporated with the Australian Securities Commission as a company limited by guarantee for $20.00. The individual, Mr Diamond, was a director and secretary of Tinda, and had been recognized by the Court throughout the proceedings as its spokesperson, advocate and witness.

Factors in imposing payment of costs on a person not a party

Tinda brought Class 4 proceedings in the Land & Environment Court against Baulkham Hills Shire Council and a sand-mining company, Etra Pty Ltd, and a third respondent. Tinda had also brought Class 1 proceedings in relation to the same development consent, which had been struck out by consent with costs ordered against Tinda.

In the Class 4 proceedings, Tinda sought to challenge the validity of a decision by the council to modify a development consent held by Etra in relation to its sand-mining operations in the Maroota area. The proceedings were dismissed when Tinda failed to provide security for costs of the respondents of approximately $100,000. The respondents

then sought their costs for the security application and the substantive proceedings against both Tinda and Mr Diamond.

The Court held that (at 442), applying the High Court decision of Knight v FP Special Assets Ltd (1992) 174 CLR 178 ("Knight"), it had jurisdiction to make costs orders against non-parties.

In deciding the question of costs, the Court applied the following four limb test, distilled from the decision in Knight, in deciding whether an order for costs should be made against a person not a party to the proceedings:

1. Is the party an insolvent person or a "man of straw"?
2. Has the non-party played an active role in the conduct of the litigation?
3. Does the non-party, or some other person on whose behalf he or she is acting have an interest in the subject of the litigation?
4. If the above three tests are satisfied, do the interests of justice support or require that an order for costs be made against a non-party, on the basis that that party is the real party?

Is the party insolvent or a man of straw?
The Court found that Tinda was a "man of straw', for a number of reasons, including the following:

a) Tinda had neither traded nor carried on any business since early 1997, save for this litigation;
b) Tinda's finances were in a "parlous" state, alleviated only when Mr Diamond raised funds;
c) Mr Diamond seemed to have exclusive control of the finances of the organisation; and
d) Mr Diamond's conduct in the proceedings generally had no "representative" character.

Has the non-party played an active role in the conduct of the litigation?
Sheahan J found that Mr Diamond had played an extremely active part in the litigation. In his own affidavit, Mr Diamond had referred to "my activities" about the court action. Diamond did not regularly report back to other members of Tinda. The Court found that Diamond was playing a leading role beyond simply that which one would expect of a company director or public officer of an organisation involved in litigation.

Does the non-party have an interest in the subject of the litigation?
On the third limb of the test, the Court noted that Mr Diamond was "virtually a full-time environmental activist" and that, even though he did not have a financial interest in the proceedings, he nonetheless had "substantial and real" interest. Presumably, the Court meant that an intellectual or emotional interest could be sufficient interest for the third limb of the test under Knight.

The interests of justice
On the fourth limb, whether the interests of justice required that such an order for costs be made, the Court considered a range of factors:

a) The Court examined Tinda's objects as set out in the company's constitution. These included maintaining an environmental centre for spiritualism, publishing materials and financial activities. The objectives did not include references to bringing public interest proceedings or activities about sand mining.

b) The Court noted that Tinda was not a recognized environmental group enjoying community support.

c) The Court thought that the action had a real prospect of failing.

d) Mr Diamond had been adequately put on notice by a Council letter of the possibility that he might incur personal risk of an order for costs. The Court rejected a submission that the Court must formally warn a non-party that they could be held personally liable for legal costs.

Conclusion

Mr Diamond was held to be jointly and severally liable with Tinda to pay the respondents' costs. Although recognizing that Mr Diamond was motivated by a genuine concern to protect the environment, the Court found that Tinda was in fact a "front" organisation for Mr Diamond's personal activities.

The Court noted that holding Mr Diamond liable in these circumstances will not necessarily "discourage other litigants from taking advantage of the open standing provisions". The Court also stated that personal liability for costs is a "harsh weapon" and should not "be lightly called upon".

The decision is relevant not only to the officers of environmental organisations which are contemplating litigation, but may also have implications for company directors and office bearers of other corporate entities involved in litigation.

The decision introduces new risks for public interest litigation, which can be minimised. Persons acting for a group involved in litigation should ensure that they conduct their activities on behalf of the organisation by following proper procedures and reporting back to the organisation.

The National Network of the Environmental Defender's Office presents

A New Green Agenda

A conference on the *Environment Protection and Biodiversity Conservation Act (1999)*

Thursday, 14th October, 1999

The Masonic Centre, 279 Castlereagh St, Sydney

The *Environment Protection and Biodiversity Conservation Act 1999* is the most important re-write of Commonwealth environmental laws for 20 years. The Act passes significant powers to the States and Territories, raising the issue of the division of regulatory responsibility in Australia, and highlighting the tension between environmental powers and politics that have influenced the drafting and passage of the Act.

The National EDO Network is holding a one day conference which will examine what the Act will mean for environmental protection in Australia, how it will work, who can and ought to regulate environmental matters, and whether the Act reflects an appropriate division of powers. The conference looks to the future of environmental legislation and international initiatives.

Who should attend

- Government departments
- Industry
- Consultants
- Lawyers
- Academics
- Professional groups
- Indigenous groups
- Community groups
- Environment groups

Conference Program

Opening address

Senator Robert Hill, Commonwealth Minister for the Environment and Heritage

Commonwealth Environment Powers

Key constitutional and administrative issues in the Act
The Hon. Justice Catherine Branson, Judge of the Federal Court of Australia

An environment movement perspective on the Act
Peter Garrett, President, Australian Conservation Foundation

A State government perspective on the Act
John Scanlon, Chief Executive Officer, South Australian Department of the Environment

Environmental impact assessment

Overview of environmental impact assessment provisions in Act
Gerry Morvell, Assistant Secretary, Environment Protection Group, Environment Australia

The implications for industry of the Act
Peter Cochrane, Deputy Director, Australian Petroleum Production and Exploration Association

Environmental Defender's Office critique
Katherine Wells, Director of Policy, Environmental Defenders Office (NSW)

Protection of biodiversity

Overview of the Act's threatened species and protected areas provisions
Stephen Hunter, Deputy Secretary, Biodiversity Group, Environment Australia

An environment movement perspective
Michael Kennedy, Director, Humane Society International

Indigenous community concerns
Assoc. Prof. Stephan Schnierer, Director, College of Indigenous Australian Peoples, Southern Cross University

Future Directions

Australian and international best practice comparisons
Simon Molesworth AM QC, President of the Environment Institute of Australia

Where to from here? The Act over the next 10 years
Assoc. Prof. Rob Fowler, Director, Australian Centre for Environmental Law, Adelaide University

For full program and registration details call the EDO on 02 9262 6989 or visit www.edo.org.au/edonsw

The *Environment Protection and Biodiversity Conservation Act 1999 (Commonwealth)*

An EDO Perspective

Katherine Wells, Director of Policy, EDO (NSW)

The *Environment Protection and Biodiversity Conservation Act 1999 (Commonwealth)* (the "EPBC Act") is the most important change to Commonwealth environmental laws in 25 years. It has been extremely contentious, being both praised and criticised by stakeholders representing public interest environmental perspectives.

To assist understanding of the new Act and the changes it has introduced, the NSW EDO has compared the laws in place prior to the EPBC Act with the final Act, and has made an evaluation of the Act's strengths and weaknesses in nine areas of key concern to the environmental movement.

The full analysis is available from the NSW EDO [a copy can be viewed on our web site: *www.edo.org.au/edonsw*]. A summary of that analysis is set out below.

The main strengths and weaknesses of the new Act

Ecologically sustainable development

The new Act introduces a number of very significant positive initiatives in this area:

- a definition of "ESD principles" has been included in the Act which emphasises key environmental considerations over economic considerations, and
- for the first time, Commonwealth Departments must report annually to Parliament on their environmental impacts, any measures they are taking to minimise those impacts, and how their actions accord with the principles of ESD.

The triggers for Commonwealth responsibility for environmental impact assessment ("EIA")

Under the *Environmental Protection (Impact of Proposals) Act 1974* (the "EPIP Act"), the Commonwealth was responsible for assessing actions taken, funded or approved by it which were likely to have a significant effect on the environment. Under the new Act, the Commonwealth is responsible for assessing:

- actions taken by it which are likely to have a significant effect on the environment, and
- actions likely to have a significant effect on specified "matters of national environmental significance" ("MNES"). Six MNES are specified.

Positive aspects of the new system of triggers are that the MNES:

- can be expanded by regulation without the agreement of the States, and
- must be reviewed every 5 years to see whether further triggers should be added (but not deleted).

This gives considerable scope for the addition of further triggers over time.

Key flaws in the new system are:

- the completely inadequate list of MNES currently included in the Act, and in particular the failure to include triggers relating to climate change, the clearance of native vegetation, land degradation, water allocation and forestry operations,
- the failure to retain Commonwealth funding as one of the new triggers, and
- the failure to include a Ministerial "call-in", or "reserve", power in relation to EIA triggers.

The environmental impact assessment process

The EPIP Act established an EIA process which has been widely regarded for years as outdated and in need of substantial overhaul. Amongst other very significant problems, under the EPIP Act the Environment Minister had no ability to trigger the Commonwealth EIA process or to make the final decision about whether or not to approve a project. In addition, the Environment Minister had no enforcement powers, and the EPIP Act contained no offence provisions.

The new Act introduces an environmental impact assessment process which has a range of very positive features, and which remedies most of these problems. For the first time:

- the Environment Minister can trigger the Commonwealth EIA process,
- the Environment Minister makes the final decision about whether to approve a project on environmental grounds,

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- the Environment Minister decides whether to attach environmental conditions to an approval,
- the Environment Minister can revoke an approval,
- it will be an offence to breach Commonwealth EIA legislation, with both high civil penalties (up to $5.5m) and criminal liability,
- directors and managers of companies will face personal criminal liability for breaches of Commonwealth EIA legislation,
- the public must be notified when the Minister receives a referral, and must be given a chance to comment on whether the relevant action needs assessment and approval under the Act, and
- a broad range of EIA information must be published weekly on the Internet.

However, the new EIA process also contains a range of very significant flaws which greatly undermine the positive features listed above. Of particular importance:

- the Commonwealth can delegate its assessment and approval powers to the States under bilateral agreements (this is discussed in more detail below), and
- the Minister can delegate his or her assessment and approval powers back to the relevant "Action" Minister.

In addition:

- the Minister can decide that an action does not require assessment and approval because it will not have a "significant" impact on an MNES, and the Act does not define "significant",
- not all environmental impacts can be assessed or considered by the Commonwealth – only those which have triggered the EIA process. By contrast, all social and economic effects must be considered.
- forestry operations in Regional Forest Agreement areas do not need assessment and approval under the Act,
- actions authorised by an instrument made under the *Great Barrier Reef Marine Park Act 1975 (Commonwealth)* do not need assessment and approval under the Act,
- the Minister can decide on less rigorous forms of assessment, such as assessment by a "special accredited assessment process", assessment "on the preliminary documentation", and "strategic assessment", and
- the public still has no ability to trigger the EIA process.

Threatened species

The new Act, which replaces the *Endangered Species Protection Act 1992 (Commonwealth)*, introduces a number of key positive initiatives in this area. The most significant is that actions likely to have a significant impact on a range of listed species and ecological communities will trigger the Act's EIA processes wherever the actions occur in Australia, not just in Commonwealth areas.

Of course, the problems noted above in relation to the Act's EIA processes apply, and greatly undermine the strength of these provisions. Of particular note is the exemption relating to Regional Forest Agreement areas, where a significant proportion of Australia's biodiversity is found.

Other improvements are that the Australian Whale Sanctuary has been created, and for the first time:

- the listing process extends to vulnerable communities, critically endangered species and communities, and migratory species,
- there will be strict liability offences in relation to biodiversity in Commonwealth areas,
- there will be provisions in Commonwealth legislation relating to bioregional plans and critical habitat, and
- if the Minister gazettes a State list of ecological communities, each community on that list must be automatically considered for listing at the Commonwealth level.

However, while the Act introduces a range of innovative provisions, many of them, such as the provisions relating to bioregional plans, critical habitat, regulations concerning access to biological resources, and regulations concerning invasive species, do not impose mandatory requirements on the Minister.

Protected areas

The new Act also replaces the *World Heritage Properties Conservation Act 1983 (Commonwealth)* and the *National Parks and Wildlife Conservation Act 1975 (Commonwealth)*.

It introduces a range of positive initiatives in relation to protected areas. In particular, actions likely to have a significant impact on World Heritage properties and Ramsar sites will trigger the Act's EIA processes. As with threatened species, the problems noted above in relation to the Act's EIA processes apply, and greatly undermine the strength of these provisions. Of particular importance is the Commonwealth's ability to delegate its approval powers to individual States by way of bilateral agreement.

Other positive features are that, for the first time:

- Ramsar wetlands and Biosphere reserves are protected in Commonwealth legislation,
- management plans must be developed for all World

Heritage properties and Ramsar wetlands in Commonwealth areas, and
- Australian World Heritage, Australian Ramsar, Australian Biosphere and Australian IUCN management principles must be developed, and management plans for protected areas must be consistent with those principles.

However, there are a number of very significant problems. In particular:

- the National Parks and Wildlife Service has been abolished, and although the position of Director of National Parks has been retained, the Director's functions are not as broad as they were previously, and
- mining is still permitted in national parks.

Enforcement of the Act

The enforcement provisions of the new Act are a significant improvement over the previous regimes (the EPIP Act, the *Endangered Species Act*, the *World Heritage Act* and the *National Parks Act*). They provide a combination of:

- very high civil penalties for breaches of key EIA provisions,
- criminal penalties for key EIA and biodiversity offences,
- personal criminal liability for directors and managers in relation to key EIA provisions, and
- a broad range of enforcement powers, including Ministerial powers to require environmental audits, revoke EIA approvals, remedy environmental damage, and make conservation orders protecting biodiversity.

Of particular note, in relation to the enforcement powers, are:

- the provisions allowing the Minister to revoke EIA approvals where information was inaccurate because of negligence or a deliberate act or omission by the proponent, and
- the provisions allowing the Minister to remedy environmental damage at the proponent's expense where false and misleading information is provided in the EIA process.

This may well lead to an improvement in the standard of information provided in the EIA process, and is likely to place substantial pressure on the EIA consulting industry. The Act's third party standing provisions are quite inadequate, however. It is extremely disappointing that the Act does not contain "open standing" provisions similar to those in NSW.

Independent Commissioner for the Environment

A range of stakeholders suggested the establishment of an independent Commissioner for the Environment, or, in the alternative, extended powers for the Auditor-General. Disappointingly, while there are a number of references to the Auditor-General in the Act, none of them appear to add anything to the current statutory functions of the Auditor-General. It is also disappointing that an independent Commissioner for the Environment, with the power to audit State as well as Commonwealth compliance with bilateral agreements, was not established.

State of the Environment reporting

A key positive initiative of the new Act is that, for the first time, Commonwealth legislation contains a requirement for Commonwealth State of the Environment reporting.

"In our view, the most significant flaw in the Act is that it permits the Commonwealth to delegate its environmental impact assessemnt powers to the States."

Bilateral agreements

It is worth commenting specifically on bilateral agreements. In our view, the most significant flaw in the Act is that it permits the Commonwealth to delegate its EIA powers to the States. In analysing the potential impact of bilateral agreements, however, it is worth looking at the delegation of EIA assessment powers and EIA approval powers separately.

In our opinion, if the Commonwealth provisions allowing assessment bilateral agreements to be made imposed sufficiently rigorous safeguards, they would at least improve on the EPIP Act situation. Under the EPIP Act, State assessments have been used frequently by the Commonwealth, but have not been subject to any formal Commonwealth legislative controls.

A more significant problem with the Act, in our view, is the potential for the Commonwealth to enter into approval bilateral agreements with the States.

EIA decision-making is, by its very nature, highly discretionary. For this reason it is highly inappropriate for the Commonwealth Minister to be able to delegate his or her approval powers to the States. The Minister has stated in Parliament that it would be unusual for this to happen.

Nevertheless, it clearly can under the new Act. It is highly likely that if it does occur, States will be able to follow all

the correct procedures, and still approve many actions which a Commonwealth Government might not approve because it has less parochial interests at stake.

These decisions will often be very difficult to challenge on administrative law grounds because of the broad discretion involved. Once the powers are delegated, even where a bilateral agreement is suspended or cancelled, approvals given in accordance with accredited management plans cannot be overturned.

This is a major problem with the Act. It is extremely disappointing that the Commonwealth has chosen to go down this path. It is also extraordinary that, at a time when the broad extent of the Commonwealth's constitutional environmental powers cannot be doubted, and the enormous extent of Australia's environmental problems is clear, the Commonwealth should choose to give itself the option of delegating to the States even the very limited EIA approval responsibilities it has agreed to take on under the 1997 Council of Australian Governments Heads of Agreement on the Environment.

Having said that, it would be possible for the bilateral agreement framework to be used quite deliberately – if the Commonwealth chose to do so – to lift the standards of State EIA assessment and approval processes. The Commonwealth could do this by refusing to accredit State processes unless the States meet substantial and rigorous Commonwealth criteria.

The issue therefore becomes, are the Act's provisions sufficiently rigorous to ensure adequate environmental standards. At present, in our view, the answer to this has to be "no".

There are prerequisites in the Act which must be met before the Minister can enter into a bilateral agreement, although these are expressed to be "to the Minister's satisfaction", and are therefore very discretionary. In addition, there is an opportunity for public participation at the draft bilateral agreement stage.

In relation to approval bilateral agreements, there is a requirement for approvals to be issued in accordance with "bilaterally accredited management plans" made under State laws. Crucially, however, there are no direct requirements in the Act as to the content of bilateral agreements, accredited management plans, or the State laws the management plans are to be made under.

This situation could be remedied with the inclusion of stringent criteria for all of these instruments in regulations made under the Act. The Minister has given a commitment in Hansard to introduce "best practice" assessment regulations into the Parliament, and the Act requires the Commonwealth to make regulations about criteria for management plans and the relevant State laws, if approval bilateral agreements are to be introduced.

The spotlight will therefore be clearly on the extent to which adequate criteria are included in regulations.

Is the Act an improvement on the current situation?

In relation to the biodiversity protection provisions, the answer to this appears to be "yes".

In relation to the EIA provisions, the answer is more complex. If all that the Act did was to introduce the EIA improvements listed above, there would be no doubt that it had introduced a far better system for Commonwealth EIA than the one established under the EPIP Act, and that, combined with an expanded list of MNES, it provided an appropriate EIA framework to take Australia into the next century.

Unfortunately, as is obvious from the long list of EIA flaws set out above, this is not all that the Act does, and the flaws greatly undermine the positive EIA aspects of the Act.

Ultimately, in our view, the answer to the question of whether the Act is an improvement on the current situation has to be "no" in relation to the EIA provisions. We say this in particular, because of the potential for the Commonwealth to delegate its approval powers to the States; the best system in the world is no good if it can be sidestepped. Some of the problems with the bilateral agreement process could be addressed if the regulations made under the Act are stringent enough.

Conclusion

In our view, there are many positive initiatives in this Act. However, significant flaws in some fundamental aspects of the Act seriously detract from the protection it offers.

It is extremely disappointing that the Government has not chosen this seminal piece of legislation to make a strong, unambiguous statement about Commonwealth leadership in the environmental field.

This Act sends mixed messages, and at a time when the extent of Australia's environmental problems is only too obvious, this is something our environment can ill afford.

A Year of Integrated Development Assessment

What has been achieved?

Chris Norton, Solicitor, EDO (NSW)

The *Environmental Planning and Assessment (Amendment) Act 1997 (NSW)* commenced on 1 July 1998, making substantial changes to Part 4 of the *Environmental Planning and Assessment Act 1979 (NSW)* (the "EP&A Act"). A key purpose of the amendments was to introduce a scheme known as Integrated Development Assessment ("IDA").

Anecdotal evidence received to date by the EDO, however, indicates that in the first year of operation the IDA scheme has failed to live up to its promise. Rather than provide a more streamlined system, the scheme has resulted in increased workloads for councils, increased processing time and delays at development application ("DA") stage, and increased costs for developers.

How does IDA work?

Briefly stated, the IDA process attempts to provide a developer with some certainty as to whether it is likely to receive all necessary approvals for a development by providing for co-operation between the consent authority and relevant approval authorities at DA stage.

When a developer applies for development consent, the consent authority must consult with other agencies that will need to issue specified approvals for that development to proceed - for instance, an environment protection licence under the *Protection of the Environment (Operations) Act 1997 (NSW)*, or a consent to destroy an Aboriginal place under the *National Parks and Wildlife Act 1974 (NSW)*. The authority responsible for issuing that approval must notify the consent authority whether or not it will give that approval, and if so, indicate any general terms of approval that it would seek to impose.

If the authority indicates it is not prepared to grant the approval, the consent authority must refuse to grant development consent. However, if the authority indicates it would grant an approval, then development consent may be granted; and if the developer applies for such an approval within 2 years of the grant of consent the approval must be granted, and no conditions may be imposed on that approval which are inconsistent with the position stated to the consent authority.

Another feature introduced into the EP&A Act is the introduction of private certification of compliance with conditions of consent. Private accredited certifiers can fulfil the roles previously undertaken by council officers of ensuring compliance with development consents during construction.

Problems encountered in practice

Some of the problems of which the EDO has become aware are as follows:

- Developers need to provide much more information at DA stage, as they need to provide adequate information for all approval authorities to make informed comments on the DA. This often requires the provision of more detailed material than would otherwise have been required to obtain a DA. If the consent authority refuses the DA, the developer has been put to additional expense that would not previously have been necessary.
- Local councils are taking far longer to process applications, partly because of the need for extensive liaison with approval authorities. Council staff also now need to be familiar with a wide range of legislation that was not previously considered during the assessment process.
- The need to obtain building approval under the *Local Government Act 1993 (NSW)* has been abolished. Councils are thus dealing at DA stage with detailed conditions relating to the construction of buildings, as there is no other opportunity to regulate this aspect of development. These matters are being dealt with by elected councillors, rather than council staff; and it is not unusual for several hundred conditions to be imposed on a DA.
- The requirements for supervision by accredited certifiers are extremely onerous. The requirement of certification of 100% compliance means that a certifier must be present for most stages of construction of a development, rather than making periodic random inspections as a council inspector would.

Conclusion

Although no comprehensive survey has been undertaken, the comments received by EDO (NSW) to date suggest that the IDA amendments have failed to deliver a more streamlined and efficient scheme. Instead, the amendments appear to have resulted in more costly DAs, generated additional work for councils, led to delays in the development approval process, and make impractical demands of accredited certifiers. Virtually all the key stakeholders appear to be worse off rather than better off.

EDO(NSW) is considering holding a conference in the first half of 2000 to examine the effect of the IDA amendments. We would be interested to hear of the experiences and comments – positive or negative – from any person who has dealt with the IDA system in any capacity.

Subverting the rule of law?

Retrospective legislation in NSW environmental planning

Chris Norton, Solicitor, EDO(NSW)

The recent case of *National Trust of Australia (NSW) v Heritage Council of NSW and anor*[1] is the latest in a line of legal proceedings in NSW that have been brought to a premature end by the State Government making retrospective legislation to cure potential invalidates in planning approval processes.

This article looks briefly at some of these cases, and canvasses some of the legal issues that this course of action raises.

Why use retrospective planning legislation?

The inclusion of open standing provisions in environmental and planning legislation in NSW[2] has opened up government decisions in this area to a greater degree of scrutiny than had been enjoyed in the past. Attendant upon such an increased level of scrutiny was a reduction in certainty for those relying on approvals issued by various approval authorities.

From time to time, challenges to the validity of approvals succeed and such approvals are set aside, sometimes on a basis that would prevent a similar approval from being issued under the law as it stands.

Several options are then available to the proponent if it is desired that the project proceeds:

1) Modify the project.
2) Find an alternative legal avenue to permit the project to proceed under the current law.
3) Alter the law and grant a new approval that does not run foul of the law.
4) Alter the law to retrospectively validate the approval.

The greatest certainty is generally achieved by adopting option 4, as save for challenges to the validating legislation, the question of the validity of the approval is resolved, whereas proceeding via options 1-3 can leave a subsequent approval open to further challenge.

Examples of retrospective planning legislation

Bengalla Coal Mine

Bengalla Mining Co Pty Ltd applied in 1993 for development consent for a coal mine. After two Commissions of Inquiry and a case before the Land and Environment Court, the Minister for Planning made a State Environmental Planning Policy (SEPP 45) in August 1995, which had the effect of overriding provisions of the relevant Local Environmental Plan, making the Bengalla mine permissible; and granted consent to the mine. The validity of SEPP 45 and the development consent was challenged in the Land and Environment Court. Stein J upheld the challenge, holding that several steps in the process of making SEPP 45 were manifestly unreasonable, and therefore SEPP 45 and the development consent granted in reliance upon it were invalid.

Bengalla appealed Stein J's decision in the Court of Appeal. However, while the Court's decision was reserved, the NSW Government passed the *State Environmental Planning (Permissible Mining) Act 1996*, which had the effect of validating SEPP 45 and the development consent granted to Bengalla. Although the Court of Appeal indicated in its judgement that it would have held that SEPP 45 and the development consent were valid even in the absence of the legislation, the legislation clearly had the effect of rendering the proceedings futile.

Kooragang Island

In 1997, Robert Bell brought proceedings challenging the validity of a development consent issued for the third stage of the Kooragang Island Coal Terminal, on the basis that the consent was not accompanied by a valid environmental impact statement, as the statement did not assess the impact of trains travelling to and from the terminal.

The Land and Environment Court dismissed the proceedings. Before an appeal could be heard retrospective legislation (the *Kooragang Coal Terminal (Special Provisions) Act 1997*) was passed validating the consent.

Port Kembla Copper Smelter

In 1996, Helen Hamilton brought an action in the Land and Environment Court challenging the validity of a development consent granted in connection with the upgrading and expansion of a copper smelter and refinery at Port Kembla. The matter was set down for hearing in the Land and Environment Court; however, before the hearing commenced the Court was informed that legislation was shortly to be presented to Parliament that would have the effect of retrospectively validating the consent.

The matter was adjourned, and the foreshadowed legislation was enacted. The *Port Kembla Development (Special Provisions) Act 1997* provided that the initial development consent for the smelter, the modification to that development

consent, and the consent as modified were validated and taken to have been made in accordance with law. The Act provided that the consent was valid despite whatever might happen in any pending legal proceedings.

Walsh Bay

The National Trust of Australia (NSW) brought proceedings challenging the grant by the Heritage Council of NSW of approvals for development of the historic finger wharves at Walsh Bay. Although the wharves were protected by a permanent conservation order, the application purported to approve the demolition of one of the wharves and two of the associated shoresheds.

On the first day of the hearing in the Land and Environment Court, the Court was informed that the NSW Cabinet had resolved to pass legislation retrospectively validating the approvals.

The proceedings were then adjourned by consent. The *Walsh Bay Development (Special Provisions) Act 1999* was enacted, not only retrospectively validating the approvals but also retrospectively validating development consents granted in respect of the development and removing open standing provisions under the *Heritage Act* and *Environmental Planning and Assessment Act*. The Act again provided that its provisions had effect despite any pending legal proceedings.

Comments

Is retrospective planning legislation valid?

There is no general principle of law which will invalidate any statute which purports to retrospectively validate an action in relation to environmental planning or assessment. It is also not the case that legislation will be invalid merely because the subject matter of that legislation is currently the subject of proceedings before a court, and the passage of that legislation will affect the outcome of those proceedings.

In *H A Bacharach Pty Ltd v Queensland and ors*[3], the plaintiff had challenged the rezoning of certain land, which would have permitted a shopping centre to be constructed. The plaintiff's appeal to the Queensland Planning and Environment Court was unsuccessful, but before the plaintiff could pursue a further appeal to the Court of Appeal the Queensland Parliament enacted the *Local Government (Morayfield Shopping Centre Zoning) Act 1996* which effectively permitted the proposed development. The plaintiff challenged the legislation on the ground that it constituted an unlawful interference with judicial power.

The High Court held that there may be circumstances where legislation will be found invalid because it constitutes an interference with judicial power. This is normally the case with the making of retrospective criminal laws.

One such example was *Liyanage v The Queen*[4], in which, following an unsuccessful coup, the Sri Lankan Parliament purported to pass Acts retrospectively legalising the detention of persons associated with the coup, allowing arrest without a warrant, widening the class of offences for which trial without a jury could be ordered and prescribing new penalties for offences related to the coup.

The Privy Council held that the Acts infringed judicial power in a manner inconsistent with the Constitution of Sri Lanka, which demonstrated an intention to make the judiciary free from political and legislative control. However, in *Bacharach*'s case there was no unlawful interference with judicial power. A change of town planning legislation did not concern a matter appertaining exclusively to judicial power, such as the determination of criminal guilt or the trial of an action for a civil wrong.

Rather, it pertained to rights, the determination of which Parliament had chosen to assign to the courts. While legislation which interferes with the actual judicial process may infringe the Constitution, there is no constitutional prohibition on the alteration of rights which may be in issue in judicial proceedings[5].

Is retrospective planning legislation desirable?

In relation to criminal law, Blackstone wrote in his *Commentaries* that it would be contrary to the nature of the legislative function under our system of government if:

> '... after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement; which is implied in the term 'prescribed'.[6]'

The Rule of Law requires that people be able to be aware of the laws, so that they may shape their actions according to those laws, and not base their actions upon assumptions that may later be altered.

Blackstone's argument regarding conduct retrospectively declared to be criminal can be applied with only slightly diminished force in the civil arena, where the retrospective alteration of rights and obligations, whilst not attracting

Cont ...
the legally punitive sanction of criminal punishment, can still have a significant adverse effect on those who are affected by that alteration.

Retrospective planning laws are no exception. The public importance of an open and transparent process of environmental planning and assessment is recognised in NSW by the public participation and open standing provisions in the *Environmental Planning and Assessment Act 1979* and numerous other pieces of environmental legislation.

A series of rules are established prescribing a process for the making of planning instruments and applying for development approval. The public have a reasonable expectation that a person wishing to carry out development will comply with these requirements.

If they are not complied with, the public are entitled to bring proceedings seeking to prevent the development from being carried out. Legislation which retrospectively legitimises an otherwise invalid grant of development consent, or an invalid change in the planning scheme, which has been carried out by a different process impinges on the rights of all citizens of the jurisdiction, who were all entitled to enforce the former legislative provision.

Endnotes:

1 *Land and Environment Court of NSW, No 40043 of 1999*
2 *See, for example, Environmental Planning and Assessment Act 1979 s 123, Local Government Act 1993 s 674, National Parks and Wildlife Act 1974 s 176A, Protection of the Environment (Operations) Act 1997 ss 252, 253, Threatened Species Conservation Act 1995 s 147*
3 *(1998) 101 LGERA 68*
4 *[1967] 1 AC 259*
5 *See, for example, Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth (1986) 161 CLR 88 at 96-97*
6 *Blackstone, Commentaries (1830), vol.I, pp 45-46*

Coalcliff win: waste dump consent "lapsed"

Case note: Coalcliff Community Association Inc v Minister for Urban Affairs and Planning and Others [1999] NSWCA 317

Marc Allas, Solicitor, EDO (NSW)

The Coalcliff Community Association has won an appeal in the NSW Court of Appeal against Wollongong Council's decision to allow the recommencement of coal waste dumping at a site near Maddens Plains on the Illawarra Escarpment.

The case reaffirms the principle that a development consent can "lapse" if a developer fails to comply with certain conditions of consent. The decision overturns the earlier decision of Talbot J in the Land and Environment Court reported at (1997) 95 LGERA 114 (see the article "Coalcliff gets its fill of Coal waste" at (1996) 43 Impact 13).

In 1995, Wollongong Council purported to modify an original development consent which allowed the recommencement of dumping on the site, deleting a requirement specified in the original consent for the owner to build an underground tunnel to transport waste from a certain mine to the site.

The previous owner of the site, Coalcliff Collieries, had also failed to enter into a deed with the Minister to dedicate land to the public before commencing work, as required by the original consent. The Council and State Government knew of these breaches but chose not to enforce them.

The Court of Appeal (Meagher, Stein JJA, Hodgson CJ in Equity) held that the Council's decision to modify the consent, by deleting the conditions that had been breached, was invalid. Applying the principle established in Irongates Developments Pty Ltd v Richmond-Evans Environmental Society Inc (1992) 81 LGERA 132, that works carried out illegally do not constitute commencement, the Court found that the original consent had "lapsed" due to non-compliance with these conditions of consent.

This case is a reminder that developers who commence work under a consent without first complying with environmental protection works which are pre-conditions to the commencement of work, bear the risk that their consent may lapse.

Losing one's development approval may occur automatically, even when public authorities do not take action to enforce conditions of consent.

Duty on landowners to report on contaminants

Marc Allas, Solicitor, EDO (NSW)

From 1 July 1999, the Contaminated Land Management Act 1997 (NSW) ("CLM Act") requires landowners to report contamination of land to the NSW Environmental Protection Authority (EPA) which is likely to present a significant risk of harm to the environment. The penalty for failure to report when such a duty arises is up to $137,500 for a corporation and $66,000 for an individual.

If the EPA investigates alleged contaminated sites and finds that contamination presents a significant risk of harm to human health or some other aspect of the environment, then the EPA can regulate the site and have the clean up costs paid by the polluter.

The way in which the EPA assesses significant risk to the environment is therefore of crucial importance. The EPA has issued Guidelines on this issue. According to these Guidelines, a significant risk is likely to exist where a particularly toxic contaminant or a high concentration or large quantity of a hazardous substance can be identified.

The risk of harm posed by such contaminants is assessed in relation to actual and potential human exposure, and in relation to effects on living and inanimate parts of the environment. Pathways to exposure are evaluated in light of the strictness with which use of the substance is regulated, and the migratory potential of the contaminant once in the environment.

Where an occupier/owner or neighbour suspects contamination, the EPA Guidelines suggest that a site history review and inspection should be undertaken. The purpose of such an inquiry is to look for indicators (which need only suggest the possibility of contamination), and to identify potential risks of human exposure or environmental detriment.

Where uncertainty regarding the risk of harm arising from contamination persists, further investigation is recommended, with the assistance of the EPA, which will usually involve an environmental consultant and possibly a site audit. If a site is contaminated but does not present a significant risk of harm, developers and consent authorities must still address the contamination issue as part of the development approval process.

The EPA's primary goals under the CLM Act are the removal or reduction of risk posed by contamination, and the facilitation of existing or approved land uses. In accordance with these goals, information provided to the EPA by persons who have a duty to report contamination is not admissible as evidence in any proceedings against that person for an offence under legislation administered by the EPA. However, the EPA may declare the land an 'investigation area' or a 'remediation site' and make orders to prevent or mitigate contamination.

The new duty to report under the CLM Act is an important practical implementation of the precautionary principle and a promising shift of the legal onus from the victims of toxic effects onto polluters. The CLM Act permits EPA intervention on behalf of threatened environments on the basis of their inherent amenity, rather than their use value, which suggests that legislation is moving away from the anthropocentric environmental regulation models that presently dominate planning instruments and regulatory frameworks.

"The new duty to report ... is an important practical implementation of the precautionary principle and a promising shift of the legal onus from the victims of toxic effects onto polluters."

The extension of the scope of the duty to report to owners/occupiers of adjacent sites, and the provision for initiation of complaints by any party, whether or not they are aggrieved or concerned, are valuable steps which encourage community participation in environmental regulation.

The broad scope of the duty, and wide standing provisions for the initiation of EPA action, remind us that environmental vigilance is a broad and ongoing concern and enshrines a pre-emptive rather than ameliorative strategy in response to the risks arising from potentially harmful substances and activities.

Copies of the EPA Guidelines are available from the EPA. Ph: 131 555.

Upcoming WTO 3rd Ministerial Conference
Conspicuous absence of environmental concern

Donald K Anton, Solicitor, EDO (Vic)

In March 1999, the Department of Foreign Affairs and Trade ("DFAT") sought public input in formulating Australia's approach to negotiations in connection with the third World Trade Organisation ("WTO") Ministerial Conference to be held in Seattle in November and December 1999.

The call for public submissions suggested a number of important issues and areas for consideration. Disturbingly, however, DFAT did not deem the relationship between environmental protection and international trade important enough to mention specifically.[1]

Perhaps, though, this is not so surprising. A recent press release from the WTO about the Ministerial Conference omits any reference to the environment.[2] Member States of the WTO do not seem any more predisposed to consider the issue in Seattle. Of the 90 plus communications received by the WTO General Council from various states on the upcoming ministerial conference, only Switzerland and Norway have raised the possible inclusion of the issue of the relationship of trade and environment for discussion.[3] Such a state of affairs makes the much touted March 1999 High-Level Symposium on Trade and Environment[4] held under the auspices of the WTO appear to have been merely lip service.

Clearly, states should be doing more to address the long-standing tensions that exist between rigid trade rules and disciplines, and effective environmental protection. Indeed, Australia should be doing more. This article looks at one key item - the relationship between trade rules and multilateral environmental agreements ("MEAs") - that ought to be a high priority at the 3rd WTO Ministerial Conference. It is an item that has languished over the past 5 years and an item that should be driven by the Australian delegation.

Trade rules and MEAs

Because trade rules and MEAs have developed on separate tracks, their provisions often do not fit neatly together. A number of MEAs rely on trade measures as mechanism to protect the environment, to punish non-compliance and to encourage non-parties to join. These MEAs have the potential to come into conflict with, and be overridden by, trade rules.

The Montreal Protocol,[5] for instance, prohibits the trade of listed ozone-depleting substances between parties and non-parties. If a party and a non-party are both WTO Member States, this could be claimed to be a violation of the most favoured nation requirement under the General Agreement on Tariffs and Trade ("GATT").[6]

The WTO Committee on Trade and Environment ("CTE") has, for over five years, been considering the relationship between WTO trade provisions and legitimate discriminatory trade measures permitted under MEAs.[7] Unfortunately the CTE has not been able to significantly progress the issue beyond the bland assertion that that the preferred approach for governments to take in tackling trans-boundary or global environmental problems is cooperative, multilateral action under an MEA and that unilateral actions in this context should be avoided.

While no dispute involving a direct conflict between an MEA and trade rules has ever found its way before a GATT or WTO dispute panel, the goal of environmental protection of individual states has suffered roundly by the decisions taken by trade dispute panels. The history of the primacy of trade rules over environmental protection in these decisions clearly shows that the present wording of limited environmental exceptions in the GATT is inadequate.[8] The decisions by these panels have increasingly curtailed the options that policy-makers have to use trade measures for environmental or animal protection purposes.

For example, an unsound method or manner by which goods are produced is often a key environmental concern. Under Article III of the GATT national regulations may only be applied to foreign products to the extent they are equally applied to "like" domestic products. Unfortunately for the environment, the "like product" has been interpreted by dispute panels to prohibit regulation based on differences in production and processing methods.[9] Thus, regulatory discrimination between a domestic and foreign products that are physically similar to an end product is not permitted, even if one is produced in an environmentally unsound manner.

Dispute panels have narrowed the exceptions contained in Article XX(b) of the GATT, which allowed for measures "necessary to protect human, animal or plant life or health". According to a number of dispute panels, trade measures are only "necessary" under Art. XX(b) if they constitute the least trade restrictive measure that can be taken. In the *Tuna Dolphin I* case, for instance, the panel found that US import restrictions on tuna involving a high incidental dolphin catch did not meet the necessary test because the US had not exhausted less trade restrictive options including "the negotiation of [an] international cooperative agreement".[10]

Dispute panels have also narrowed the Article XX exception "relating to the conservation of exhaustible natural resources . . ." (Art. XX(g)). This terminology would appear to impose a less stringent requirement than the "necessary" test under Art. XX(b). However, until recently[11] dispute panels have consistently applied a similar analysis - one reflecting the strict "necessity" test - to both articles, thereby limiting the scope for environmental protection.

Panels have interpreted the term "relating to conservation" to mean "primarily aimed at conservation", which in turn has been narrowly interpreted to permit only regulations that directly accomplish the stated conservation policy goal. Regulations that accomplish the goal indirectly or over a period of time do not qualify for Article XX(g) protection.[12]

The need for clarification

The history of decisions regarding the relationship between trade rules and unilateral environmental regulation has resulted in a great deal of uncertainty as to how the GATT, WTO and MEAs relate to each other. Clarifying these relationships would be in the best interest of all concerned and should be a priority for the upcoming 3rd WTO Ministerial Conference. Successful trade challenges to the provisions of MEAs would not only undermine the vital protections they afford, but could also harm the system of liberalised trade.

In brief, the WTO should consider the adoption of the following interpretive rules to ensure that the environmental protection afforded by MEAs is not diminished by the draconian application of trade rules:

1. An interpretive rule that trade related environmental protection measures contained in MEAs presumptively fall within the exceptions provided by Article XX of the GATT.

2. An interpretive rule that the term "like product" as used in Article III of the GATT, and as applied to environmental protection policies, permits differentiation based on process of production method so long as the policies are not intended primarily or disguised as a protectionist measure. If developing country producers are affected, sufficient financial and technological assistance should be forthcoming by parties to the MEA to help ensure compliance.

3. An interpretive rule in relation to the "necessity" test under Article XX(b) that allows for a range of policy options on the part of a regulator and is not limited exclusively to the least trade restrictive. In the case of an MEA there should be a presumption of necessity, in that the international community has decided that environmental trade measures are necessary to achieve the desired goals.

4. An interpretive rule in relation to the "relating to conservation" test under Article XX(g) requiring dispute panel to apply the plain meaning of the term so as to include trade related environmental measures under a MEA that either directly or indirectly achieve the stated environmental objective, either immediately or over time.

5. An alteration of the presumption under the 1994 Dispute Settlement Understanding which presumes an "adverse impact" on trade has occurred whenever there is a breach of the rules. This presumption is inconsistent with the Article XX exceptions whose very purpose is to countenance "adverse impacts". The WTO should adopt an interpretive rule which shifts the burden of proof once a defending state(s) raises an Article XX exception.

Endnotes:

1 *Department of Foreign Affairs and Trade, Request for Public Comment, Australia's approach to further multilateral trade negotiations, The Australian (March 1999). Specific issues mentioned by DFAT for consideration included, trade and investment; trade and competition policy; transparency in government procurement; electronic commerce; industrial market access; and, WTO institutional issues.*

2 *WTO, The World Trade Organization's 3rd Ministerial Conference, 28 June 1999, available on the WTO website www.wto.org/wto/minist/minrel.htm (visited 28 July 1999).*

3 *Communication from Switzerland, WTO Doc. WT/GC/W/265 (20 July 1999); Communication from Norway, WTO Doc. WT/GC/W/176 (30 April 1999).*

4 *WTO Doc., Background Note, Trade and Environment in the WTO/GATT (High Level Symposium on Trade and Environment 15 and 16 March 1999).*

5 *Protocol on Substances that Deplete the Ozone Layer, [1989] ATS (No. 0018), reprinted as amended*

6 *Art. I, General Agreement on Tariffs and Trade (1947) 55 UNTS 187.*

7 *Report of the WTO Committee on Trade and Environment, WTO Doc. WT/CTE/1 (12 November 1996).*

8 *See P Pescatore, et al., Handbook of GATT Dispute Settlement (1991).*

9 *See eg United States - Restrictions on Imports of Tuna, Report of the Panel, GATT Doc. DS21/R-39S/155 (3 Sept. 1991)[Tuna Dolphin I].*

10 *Id., at 5.28.*

11 *See United States - Standards for Reformulated and Conventional Gasoline, Report of the Panel, WTO Doc. WT/DS4 (20 May 1996).*

12 *United States - Restrictions on Imports of Tuna, Report of the Panel, GATT Doc. DS29/R-02S (23 May1994)[Tuna Dolphin II].*

NOTICEBOARD

EDO Network staff movements

Don Anton, formerly Policy Officer with the NSW office of the EDO, has recently taken up a position as Solicitor with the Victorian EDO.

Don replaces Michael McNamara, who is now Solicitor with the North Queensland EDO, located in Cairns. We wish Don and Michael continuing success in their new EDO roles.

Lisa Ogle has been promoted to Principal Solicitor with the NSW EDO, and Katherine Wells has been appointed Director of Policy and Education.

These two new positions replace the NSW EDO Director role previously held by James Johnson.

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