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# Goodbye 'Special Interest', Hello 'Abuse of Process'

**North Queensland Conservation Council Inc. v. The Executive Director, Queensland Parks and Wildlife Service [2000] QSC 172**


*Robert Stevenson, Solicitor, Environmental Defender's Office, Queensland*


The North Queensland Conservation Council Inc. (**NQCC**) has commenced proceedings in the Supreme Court of Queensland against the Executive Director of the Queensland Parks and Wildlife Service (**QPWS**). The NQCC is seeking judicial review of the decision of the QPWS to issue a permit allowing the State of Queensland to develop a harbour and associated works within a marine park at Nelly Bay, on Magnetic Island.

NQCC has campaigned for many years to prevent the development and have the area returned to its natural state. The QPWS applied to the Court for an order dismissing the NQCC's application. The main ground that was the NQCC was not a "person aggrieved" by the decision within the meaning of the *Judicial Review Act* 1991 (Qld). The application by QPWS was dismissed by the Supreme Court. QPWS has not appealed the decision.

## The Findings

Both parties argued on the basis of the conventional law in relation to the issue of standing. Chesterman J noted that the Federal Court's decisions in *Australian Conservation Foundation Inc. v. Minister for Resources* (1989) 19 ALD 70 and *North Coast Environment Council Inc. v. Minister for Resources* (1995) 127 ALR 617 suggested that in certain cases environmental groups have sufficient standing to question executive decisions impacting on the environment. However, while the judge considered that the NQCC satisfied the need for a "special interest" in this case, he chose to base his judgment on a broadened rule of standing, based on whether the application for review is an abuse of process, stating:

> "The plaintiff should have standing if it can be seen that his connection with the subject matter of the suit is such that it is not an abuse of process. If the plaintiff is not motivated by malice, is not a busy body or crank and the action will not put another citizen to great cost or inconvenience his standing should be sufficient".


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The Court considered that such an approach takes into account the plaintiff's interests in bringing the suit and also takes account of the effect of the proceedings on the defendant.

## A new test for standing

The Court reviewed the major cases relating to standing and concluded that the "special interest" test provided little assistance in determining standing where the applicant had no proprietary or financial interest. The only rationale for restricting standing was to be found in the judgment of Gibbs CJ in *Onus v. Alcoa* (1981) 149 CLR 27 where the Chief Justice referred to the possibility of abuse of open standing provisions by 'busy bodies' and persons with a mere intellectual concern, which could put another citizen to great cost and inconvenience.

The High Court's decision in *Bateman's Bay Local Aboriginal Land Council v. Aboriginal Community Benefits Fund Pty Ltd* (1998) 72 ALJR 1270 can be seen as paving the way for a new test. At paragraph 39 of that case, the majority said:

> ". . . it may well be appropriate to dispose of any question of standing . . . by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process."

The Queensland Supreme Court made a number of points to support a broadened test for standing, listed following:

- There has been some relaxation in the strictness with which the standing test has been applied in recent years, which reflects a greater readiness by the Courts to permit challenges to the decisions of executive government.
- It was important to provide an avenue for the public to ensure that government decisions have been made in accordance with the law. Particular reference was made to the judgment of Gaudron J. in *Corporation of the City of Enfield v. Development Assessment Commission* (2000) 74 ALJR 490 at paragraph 56, where Her Honour said:

  > ". . . the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less."

- The Court expressly recognised society's interest not only in efficient government but equally in lawful government. It followed from this express recognition of a public interest in ensuring lawful government decision making that an application for review of an administrative decision will not be an abuse of process unless it is officious or the product of some collateral motive. Chesterman J. was of the view that the law may be moving towards a statement that the public interest in ensuring the lawful exercise of executive power is itself a "special interest".
- His Honour also considered that the public expects that development will occur with due regard to the environment, which requires a balance of competing factors. To allow the balancing process there must be a contestant who can challenge arguably unlawful developments.

## Application of the new test to this case

The Court posed the question of whether NQCC's concern with the litigation was such that its application was not an abuse of process. This involved an inquiry into the nature of the legal proceedings, the nature and extent of NQCC's interest in those proceedings and their outcome, and whether any person would be put to expense or inconvenience as a result of the proceedings.

The Court considered it important that the proceedings asked for the judicial review of an administrative decision on the grounds that the decision-maker had no right to grant the permit in question and, accordingly, the purpose of the proceeding was to test the lawfulness of that decision.

The Court considered that the essence of abuse of process is that there is no real controversy to be resolved and that proceedings were begun primarily to vex an opponent. His Honour did not consider that to be the case here, saying that NQCC's purpose was genuinely to test the legal propriety of the permit as part of its commitment to the protection of the natural environment.

The Court also thought it important that that no one else was likely to be granted standing if the NQCC was not allowed standing. On the last factor, His Honour acknowledged that the development would be delayed, but he considered that the delay would not be great.

## Implications

The Court's decision is a significant step towards open standing for the review of government decisions. However, several notes of caution should be expressed. The new test is yet to be approved by a Court of Appeal (the QPWS has not appealed the decision in this case). Secondly, whether a given situation constitutes a lack of abuse of process will vary from case to case. A closer analysis

may need to be made by Courts where the applicant is not a peak environmental organisation and does not have a proprietary or financial interest.

Thirdly, it should not be forgotten that the new test has two arms. Beside the absence of an abuse of process, the Court must also consider the cost and inconvenience to the other party. Where a significant practical delay will occur or where private legal rights or proprietary interests are directly affected, the Courts may not be so inclined to allow a decision to be tested.

Finally, the nature of the challenge will be important. In this case, the challenge is to the power of the decision-maker to make the decision itself. If a challenge were to rest on a lesser basis, for example, on the failure to take a relevant consideration into account, it is possible that a Court would not consider this to be as strong a factor in exercising its discretion.

Notwithstanding these notes of caution, this decision appears to confirm that the demise of the "special interest" requirement for standing is almost complete.

# The Implementation of Ecologically Sustainable and Appropriate Development

*Marc Allas, Solicitor, EDO (NSW)*

## Introduction

The first part of this paper will take a practical look at the incorporation of principles of ecologically sustainable development (**ESD**) in NSW statute and case law. How ESD is applied in practice is important because ESD can be a very broad and vague concept. All developments are, to some extent, ecologically unsustainable (even if they are described as 'sustainable development').

Ecologically appropriate development may be a more meaningful term, but ESD continues to be the term used in policy and legislation. This paper will examine some recent authority which suggests that the Courts are finally requiring some practical steps to be undertaken to implement ESD principles. It is also argued, that if ESD principles are not incorporated fully into planning instruments, ESD can not be fully implemented.

The second part and conclusion to this paper will consider further areas of reform needed to fully implement ESD and 'ecologically appropriate development'.

## Part 1: State of ESD in the common law

### Legislation in NSW

Section 6(2) of the *Protection of the Environment Administration Act 1991* (NSW) states that ESD requires the "effective integration of economic and environmental considerations in the decision making process" and can be achieved through the implementation of four principles and programs:

- the precautionary principle,
- intergenerational equity,
- the conservation of biological diversity and ecological integrity, and
- improved valuation of the pricing of environmental resources.

Other definitions and a more comprehensive summary of ESD are found in other papers[1].

The encouragement of ESD is included as one of the objects of the *Environmental Planning and Assessment Act* 1979 (NSW) (the '**EP&A Act'**)[2]. It is not mandatory for a consent authority to consider ESD in deciding whether to grant development consent under s.79C of the EP& A Act, although that is under review.

### The precautionary principle

Of all the principles of ESD, the precautionary principle has received the most judicial scrutiny. Essentially, the precautionary principle is triggered in decision-making to prevent environmental degradation where the evidence of threats falls short of the degree of probability currently recognised by science as constituting proof.

#### *(a) NSW Cases on the precautionary principle*

In *Greenpeace v Redbank Power Co*[3], the Land and Environment Court (Pearlman J) held that even without express statutory recognition, the principles of ESD are a relevant matter that should be considered by a consent authority under the EP&A Act. This concept was recently affirmed in *Carstens v Pittwater Council.* [4]

In *Greenpeace*, the Court dismissed an appeal against a grant of development consent to a coal-based power station. Greenpeace argued that the Court should apply the precautionary principle, so that in the absence of conclusive evidence about the likely greenhouse gas impacts of $CO_2$ emissions the Court should refuse to grant consent. The Court

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held that (at 154):

> "…The application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh all other issues".

The Court noted the evidentiary uncertainty on the greenhouse issue (154):

> "…Greenpeace's contention was that scientific uncertainty should not be used as a reason for ignoring the environmental impact of $CO_2$ emission…There are, however, instances of scientific uncertainty on both sides of the issues…Greenpeace has asserted that carbon dioxide emissions from the project will have serious environmental consequences, whilst Redbank has asserted that there is considerable uncertainty about its consequences…"

In *Nicholls v Director-General of National Parks and Wildlife* [5], by way of comment the Court noted that the precautionary principle has the potential to "*create interminable forensic argument"* and that *"taken literally in practice it might prove to be unworkable"* (at 419).

**"The .... NSW decisions suggest that the courts adopt a cautious approach to environmental decision making ....."**

In *Leatch v National Parks and Wildlife Service*[6] the appellant argued that the precautionary principle should be applied to refuse a licence to kill endangered fauna because of lack of scientific certainty on the effects of a development on the endangered fauna. Stein J held that (at 281-2):

> "…the precautionary principle is a statement of commonsense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty…caution should be the keystone of the Court's approach…"

Given the inadequate scientific knowledge and assessment of the habitat of the Yellow-bellied Glider and Giant Burrowing Frog, the Court held that the effects of the road development on the endangered fauna were uncertain. The Court upheld the appeal, refusing to grant the licences. Stein J's comments on ESD in *Leatch* were later approved by Sackville J in *Friends of Hinchinbrook Society Inc. v Minister for Environment* [7].

The above NSW decisions suggest that the Courts adopt a cautious approach to environmental decision-making, but this does not necessarily require the Court to refuse to grant consent to a development merely because scientific evidence as to the likely impact of the development is uncertain.

***(b) Interstate cases***

The South Australian decision of *Conservation Council of South Australia v Development Assessment Commission and Tuna Boat Owners Association* (No 2)[8] (the '**SA Tuna case**') is reported more fully elsewhere [9]. Although the decision in favour of the appellant was overturned on appeal, the Court's basic comments on ESD were left unchallenged**.**

Under the South Australian legislation, assessment of the development (in that case, a tuna farm) required consideration of whether the development was to be carried out "in a ecologically sustainable way". The Court held that to be ecologically sustainable, the development would need to have conditions imposed on it establishing a "monitored adaptive management regime"[10]. Presumably, such a management regime was required in line with the "conservation of biological diversity and ecological integrity" aspects of ESD[11].

In this case, such a regime could not be achieved through the use of conditions on the development consent because the relevant legislation did not give the relevant authority power to vary conditions. The Court stated (at 14):

> " It is envisaged that it would be essential for an authority to have the ability to vary conditions, as more information about environmental impacts becomes available…We accept that an adaptive management approach, implemented by way of licence conditions to achieve ecologically sustainable development, which could be varied in response to new knowledge, is one means by which the development could proceed in an ecological sustainable manner".

The Court accordingly refused to grant consent to the development.

***(c) Management plans***

In the SA Tuna case, the Court rejected the proposition that the developer's own management practices and management plans could properly ensure that the proposed development was done "in an ecologically sustainable way".

The "adaptive management approach" to which the Court referred was one under which management practices were imposed by way of strict and enforceable conditions, which could be varied as the need arose[12]. The SA Tuna case also held that a consent authority should have sufficient information and certainty of environmental impacts, in considering ecological sustainability.

The Court's decision points to the limitations on the use of management plans by developers[13]. In NSW, conditions are often imposed on development consents requiring the developer to submit an Environmental Management Plan, to the satisfaction of the consent authority before use commences. In some cases, this may lead to a developer not providing adequate information on the ecological sustainability of the development at the time of granting consent.

Most likely, this will occur with poorly trained or poorly resourced consent authorities, who are faced with well-funded development proposals. In the case of designated development, the public may be unable to properly assess a development consent and decide whether to appeal, if most of the information relating to environmental protection is merely part of a management plan, to be submitted in the future.

Deferred commencement provisions (s80(3) EP& A Act) may permit the use of such management plans in NSW. However, if ESD is to be achieved, the terms of such development consents should not leave fundamental issues open for further consideration, so as to allow significant changes to the development in the future [14].

The benefits of certainty and finality are to ensure developers are diligent in their environmental assessment and management, and to facilitate more effective public involvement in both decision making and enforcement[15].

Public participation itself is fundamental to ESD[16]. It informs decision-makers about what is important to the public and why, thereby improving the decision-maker's ability to weigh up the value of preserving the current environment against the value of the development itself.

***(d) International cases***

A theme running through several of the international decisions on the precautionary principle is distinguishing actual "threats of harm" that would trigger the precautionary principle from mere conflicting evidence on environmental impact.

In *Greenpeace New Zealand Inc v Minister for Fisheries*[17] the New Zealand High Court held that in relation to the catch of Orange Roughy fish "*the fact that a dispute exists as to basic material upon which the decision must rest does not mean necessarily the most conservative approach must be adopted"*. The precautionary approach is a "*weighting and not a decisive factor"*.

The 'threat versus evidence' issue was explored in the USA case of *Ethyl Corp. v EPA*[18]. In that case, Ethyl Corp. challenged the EPA's regulations which were designed to reduce lead levels in petrol, on the basis that there was insufficient evidence to suggest that lead in petrol "will endanger the public health or welfare" under the *Clean Air Act* 1963 (US).

The Court dismissed the challenge. Judge Wright stated that (at 97):

> "Man's ability to alter his environment has developed far more rapidly this his ability to foresee with certainty the effects of his alternations…[we] have created watchdog agencies to warn us, and protect us, when technological "advances" present dangers unappreciated or unrevealed by their supporters…"

In dissent, Judge Willkey criticised the majority for "wild speculation" in not requiring scientific conclusions based on events recorded and observed. Further the Court's division between risk versus facts was stated to be indefensible (at 121):

> "All true risk assessment is based on facts and nothing else…To the extent that hunch and intuition enter into any final decision, these are separate factors outside scientific calculation"

**"..the precautionary principle is more readily applied where there is genuine uncertainty or ignorance on the seriousness of environmental impacts.."**

The threat versus evidence issue was further explored in the British case *R v Secretary of State for Trade and Industry; Ex parte Duddridge* (1994)[19] where the applicants challenged the placement of high voltage cables, which the applicants submitted exposed them to a risk of developing leukaemia.

The Secretary had asked himself whether there was evidence to suggest that the cables did in fact give risk to a risk of leukaemia. The applicants argued that the precautionary approach required only that there was some evidence of a possible risk. The Court applied the precautionary principle but found that, on the evidence, it was unable to find a "significant risk" of leukaemia.

In summary, the threat versus evidence issue means that the precautionary principle is more readily applied where there is genuine uncertainty or ignorance on the seriousness of environmental impacts, rather than disputed evidence on whether there will be an impact of the environment. Courts will still approach decisions from the basis of weighing up evidence on environmental impacts.

However, the precautionary principle effectively reverses the onus of proof, so that an objector does not necessarily have to demonstrate environmental harm through scientific proof before a decision-maker is entitled (although not required) to take steps to address that environmental harm.

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**Intergenerational Equity**

Turning to "intergenerational equity", in *Finlayson Pty Ltd v Armidale County Council*[20] the Federal Court stated that the Environment Protection Authority was required to take into account the interests of future generations in any decision on whether to require remediation steps to be taken. NSW awaits further authority on this area.

**Conservation of biological diversity and ecological integrity**

In NSW, different aspects of biodiversity and ecological integrity are, to some extent, dealt with by legislation, such as under the *National Parks and Wildlife Service Act 1974* (NSW), the *Native Vegetation Conservation Act 1997* (NSW), and the *Threatened Species Conservation Act 1995* (NSW).

**Improved valuation, pricing and incentive mechanisms**

This aspect of ESD means that elements of the natural environment should be given their appropriate valuation, and the cost of impacts on such values should be passed on to those causing those impacts. At present, many of the benefits provided by an ecosystem, such as soil production, conversion of $CO_2$ to $O_2$, regulation of weather, and purification of air and water, do not cost the consumer any money. As a result, the market often accords them no value.

This allows developers to argue that their development is beneficial, as it will provide jobs and services worth money, but the true costs are not accounted for. While labour and capital efficiency are valued, resource efficiency is not. If it were possible to value aspects of the ecosystem, decision makers would better be able to weigh up what is being offered against what is being lost. Tradeable pollution entitlements and carbon credits may be examples of this concept.

## Part 2: How does a consent authority facilitate ESD through the planning system?

**Conditions needed for ESD**

While the NSW decisions on ESD have tended to regard ESD principles as advocating the taking of a cautious approach, but not dictating any particular result, the SA Tuna case approached the ESD sections of the particular planning instrument under consideration as requiring the development to be carried out in a way that ensured a sustainable outcome, in that case a "monitored adaptive management regime". What kind of lessons can be learnt from the SA Tuna case?

Firstly, it is clear that a consent authority cannot ignore certain environmental impacts (say, air pollution), merely because they will be regulated by conditions to be imposed by other regulatory authorities (in the case of air pollution in NSW, the Environment Protection Authority).

While a development consent could run forever, a pollution licence or a fisheries licence might only be for a discrete period, so completely relying on such licences would probably not be adequate to ensure ecological sustainability.

Section 79C of the EP& A Act should be amended to make it mandatory for a consent authority to consider ESD in deciding whether to grant development consent. To rely on other regulatory authorities' assessment of ecological sustainability promotes a fragmented assessment and does not allow consideration the ecological sustainability of the whole development.

Secondly, to achieve ESD in the sense required by the SA Tuna case, in most cases it is desirable that any conditions for an adaptive management regime should be regularly audited and enforced by regulatory authorities. However, if environmental impacts turn out to be worse than expected, a consent authority in NSW is unable to modify the conditions to the consent without an application by the developer.

A possible solution is for consents to be issued with a definite time limitation, say 5 years, after which time a new development application could be submitted and, if appropriate, new conditions could be imposed.

Thirdly, the issue of enforcement is vital, given the trend towards giving developers more 'flexibility'. The NSW Department of Urban Affairs and Planning is currently considering, as part of its review of Part 3 of the EP&A Act, "performance-based conditions of consent"[21] or "sustainability indicators".

The problem is that indicators based on performance, for example, that "a development must not adversely affect air quality" instead of "emissions of substance X must not exceed Y", can be vague and meaningless to enforce.

**Introducing ESD to the forward-planning system**

Planning instruments must cater for assesssment and management of cumulative impacts in order to implement ESD principles. This is because in many areas, such as water resources, fisheries, pollution, and biodiversity, it is not a single development which causes risks of serious environmental damage. Rather, it is the accumulation of many inappropriate developments in the same area that causes ecological unsustainability. Accordingly, a single development may not trigger the precautionary principle

or other ESD principles because it alone does not cause risk of serious environmental damage.

For instance, probably the biggest threat to biodiversity conservation, the third principle of ESD, is not the impact of individual developments on threatened species, but rather the gradual and incremental fragmentation of habitat (in other words, cumulative impacts).[22]

The best way for consent authorities to control these one-off inappropriate developments, which only cumulatively constitute ecologically unsustainable development, is to maintain appropriate controls and goals in planning instruments.

Such instruments should contain clear requirements to manage the cumulative impacts of developments over a region, and require developers to consider best alternative technology to achieve resource efficiency, not just economic efficiency. For instance, the Dubbo Shire, in NSW, has local instruments that contain many laudable and detailed provisions relating to the protection of threatened species.

### Conclusion

This paper has looked at ESD in the assessment of development applications, plan-making, and in placing a value on the natural environment. In addition, what is needed most broadly in order to fully implement ESD is to introduce a concept of public responsibility into land ownership.[23] The public needs to move away from the assumption that property rights are absolute and from the assumption that to permit the destruction of environmental values, for instance through land clearing, is acceptable.[24]

Environmental protection is not a restriction on private 'rights', rather, it is a responsibility attached to them. Interestingly, the early Western concept of 'property' encompassed this sense of responsibility[25] , as does indigenous law and custom[26] , and German law.[27]

More recently, the Australian Industry Commission has recommended that a duty of care to protect the environment be introduced for land owners.[28] Seen in this light, private landowners' claims that they should be entitled to compensation for managing their property in an ecologically sustainable way becomes less tenable.[29]

Despite the claims of governments and various business groups that they have implemented ESD, the public should be demanding fundamental shifts in legislation and planning instruments if the economy is to achieve ecologically sustainable development or appropriate development, rather than just sustainable development.

## Endnotes:

*[1] Stein J (2000) "Are Decision makers too cautious with the Precautionary Principle" 17(1) EPLJ 1; Sperling K (1999) "If caution really mattered" 16(5) EPLJ 425; Pearson L (1996) "Incorporating ESD principles in Land-Use Decision-making: some issues after Teoh" 13(1) EPLJ 47; see also v.40 Impact page 6 "Mining and Ecologically Sustainable Development"*
*[2] section 5;*
*[3] (1995) 86 LGERA 143*
*[4] [1999] NSWLEC 249, see Norton C (2000) 57 Impact 9;*
*[5] (1994) 84 LGERA 397*
*[6] (1993) 81 LGEAR 270*
*[7] (1997) 93 LGERA 249; also see Article "The Relevance of the Precautionary Principle: Friends of Hinchinbrook Society Inc v Minister for Environment" (1997) 14(5) EPLJ 370.*
*[8] [1999] SA ERDC 86, Environment Resources and Development Court*
*[9] Parnell (2000) "Tuna Feedlots, ESD and the Burden of Proof" (2000) 57 Impact. Also see Parnell's article in this edition of Impact;*
*[10] supra; at p.13*
*[11] in NSW this is contained in section 6(2) of the Protection of the Environment Administration Act 1991 (NSW)*
*[12] supra; at p.14;*
*[13] these are allowed in NSW under ss 80(3) and 80A(2) of the EP& A Act;*
*[14] Proprietors SP 13318 & 13555 v Lavender View Regency Pty Ltd & ors (1997) 97 LGERA 337;*
*[15] (1994) 33 Impact "1993 Amendments to the Approvals process- helping speculative developers"*
*[16] Principle 10, Rio Declaration*
*[17] Unreported, High Court of New Zealand, 27 November 1995*
*[18] (1976) 541 F.2d 1 D.C Circuit, Full Court of the US Court of Appeals,*
*[19] Unreported, UK Queen's Bench Division Farquharson LJ and Smith J, 4 October 1994;*
*[20] [1997] 1517 FCA, Burchett J*
*[21] see s. 80(4) EP& A Act, and 1995 DUAP Best Practice Guidelines on performance based conditions;*
*[22] Sperling (1999) supra; see also Murray & Raff (1998) "Environmental obligations and the Western Liberal Property Concept" 22(3) Melbourne University Law Review 657; at 658*
*[23] Murray & Raff (1998) "Environmental obligations and the Western Liberal Property Concept" 22(3) Melbourne University Law Review 657; at 658*
*[24] Murray & Raff (1998) supra;*
*[25] Murray & Raff (1998) supra*
*[26] For Australian discussion on duties attached to the land, compare Backhouse v Judd [1925] SASR 16 with Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141. This later case was overruled on some grounds by Mabo.*
*[27] Murray & Raff (1997) supra;*
*[28] Industry Commission "Inquiry into Ecologically Sustainable Land Management (1998) .*
*[29] Consider that the House of Representatives Standing Committee on Environment and Heritage is currently investigating measures to ensure that "public good" measures of conservation are "shared equitably by all members of the community".*

# Not waving, drowning!

## EDO Analysis of the *Water Management Bill 2000* (NSW)

*Tim Holden, Policy Officer, EDO (NSW)*

In July 2000, the *Water Management Bill 2000* was tabled in the NSW Parliament. The development of the Bill was extremely rapid, with the Government keen to ensure that it does not forfeit any payments from the Commonwealth National Competition Council, which are tied to the passage of the water 'reforms'. The result is a Bill that appears to have been drafted without proper structure and sufficient detail to effectively address water management needs in NSW and follow through on issues necessary.

Debate on the Bill has been delayed until later in 2000, to allow for a period of public comment on the Bill and amendments to the Bill before debate in Parliament commences. The following analysis is based on the Bill that was tabled in July 2000.

### What does the Water Management Bill do?

The Bill replaces the *Water Act 1912* and a number of other Acts, such as the *Water Administration Act 1986*, *Rivers and Foreshores Improvement Act 1948, Drainage Act 1939* and the *Irrigation Act 1912*.

The main objective of the Bill is to "provide for the sustainable and integrated management of water sources of the State for the benefit of both present and future generations…".

It seeks to do this by providing for:

- a regional planning framework which, among other things, establishes regional committees, whose role it is to develop environmental principles,
- a scheme of "basic landholder rights" which allow in specified circumstances the extraction of water and construction of dams without the need for a licence or approval,
- licensing requirements for the taking of water from water sources,
- approval requirements for the construction of works such as:
  - pumps, bores, tanks, and dams,
  - pumps, pipes or channels that are constructed or used for the purpose of draining water from land,
  - barrages, causeways, cuttings or embankments that are in the vicinity of a river, estuary or lake, or within a floodplain, and are of such a size to be likely to have a significant effect on the flow of water,
- public involvement in decision-making, and
- an enforcement regime which includes the establishment of offences and the power to require people who are contravening the Act to take specified action.

The Bill will have extremely broad application. Water sources are defined as "a river, estuary, lake or aquifer, and includes the coastal waters of the State" (essentially, this means out to the 3 nautical mile limit).

### Flaws in the Bill

The Bill contains significant flaws which threaten to undermine its effectiveness. Below are some examples of the NSW EDO's primary concerns about the Bill.

The Bill does not establish any **environmental benchmarks.** As a result the regional planning framework will operate in a policy vacuum. It will not be integrated, consistent, coordinated or accountable. In a system such as the Murray Darling Basin, where the actions of up stream water users will directly affect the environment of down stream water users, an absence of environmental benchmarks is untenable.

Nor does the Bill establish a cohesive set of **environmental principles** to guide the development of water management plans by the regional water management committees to be set up under the Act (discussed below). The development of these principles is left to the individual committees.

The role of **regional water management committees** under the Bill is to develop water management plans. These are to be the sole documents guiding decision-making under the Bill. However, the Bill fails to address a number of important issues relating to these committees and plans.

The EDO believes the Bill should:

- require that these committees be established and plans to be developed (currently their establishment is at the discretion of the Minister for Land and Water Conservation),
- require that committees address water management issues in their area in a holistic way (the Bill currently proposes that the Minister can create more than one committee in any area and confine each to looking at small parts of the overall problem),
- provide committees with guidance as to the environmental outcomes that are required,
- provide the committees with certainty of tenure and an ongoing role in water management in the region, and
- guarantee the financial, administrative and technical

support necessary for the committees to carry out their role effectively.

As such, the Bill does not reflect a best practice integrated approach to regional water management. A similar framework under the *Native Vegetation Conservation Act 1997*, which also lacks environmental benchmarks, has resulted in lowest common denominator decision-making and protracted delays in the development of plans. It appears that very few lessons have been learnt from this experience.

Translation of the concept of sustainable water use (assuming this is addressed by a management plan) into effective decision-making under the Bill is also wanting. When making decisions as to whether to grant a licence or approval the Minister faces very few constraints. For example, the amount of water that may be extracted may be determined by "available water determinations". There are, however, no criteria guiding the Minister as to when or how these determinations should be made.

To make matters worse, there are **significant exemptions** from the normal decision making processes established under the Bill. For example, there is either no, or reduced, assessment and public scrutiny in relation to decisions concerning:

- basic landholder rights,
- the grant of exemptions from the requirement to obtain an approval,
- areas that have historically received special treatment, such as the Fish River water supply works, the Hunter Valley and the Lowbidgee, and
- aspects of joint private works and public utilities.

**Rights of public participation** are not adequately protected by the Bill. There is no requirement in the Bill for notification of the public about applications for the grant renewal or variation of licences or approvals. Similarly, the Bill does not give the public a right to make objections about applications for the grant renewal or variation of licences or approvals, or to appeal decisions of this type. All of these vital matters are left up to Regulations that are yet to be drafted.

Of real concern is the proposal to **exclude the right to object** to and appeal from decisions that have been made in an area in which there is a water sharing management plan in force. If there are to be any constraints on the right to appeal a decision, these should be determined with reference to the likely impacts the decision will have on other water users or the environment.

This will depend upon the nature of the proposal and the sensitivity of the receiving environment. This principle has been established under the *Environmental Planning and Assessment Act 1979* for the last 21 years, and despite dire predictions, has not resulted in a "flood" of litigation.

## Conclusion

While the Bill purports to adopt environmental values, the basic provisions of the Bill merely maintain a 'business as usual' approach. The Bill promotes the view of water as a short-term economic resource and fails to address the decline in this State's water dependent ecosystems and the advance of salinity related land degradation in rural areas.

The timetable for drafting of the Bill has been extremely tight, and it is understood that the Bill will be redrafted prior to it being debated in Parliament. It is hoped that significant amendments will be made which ensure that the Bill provides a solid foundation for the restoration of healthy rivers and ecosystems, while permitting the continuation of ecologically sustainable agriculture and industry.

Of course, the Bill is only the first step in the process. Even if all of the required amendments are achieved, the effectiveness of the Bill will be determined by the Government's commitment to properly administer and enforce it. If the lack of enforcement of the *Native Vegetation Conservation Act 1997* is any indication, winning improvements in the Bill will only be the first step in a long and tortuous process.

Copies of the Bill are available from the NSW Department of Land and Water Conservation on 1800 353 104, or from the Web at: dlwc.nsw.gov.au. Public submissions on the Bill closed 31 August 2000.

# Tuna Feedlots and ESD on appeal

## Case Note: Tuna Boat Owners Association of SA Inc. v. Development Assessment Commission and Conservation Council of SA Inc. (No.2) Judgment no. [2000] SASC 238.

*Mark Parnell, Solicitor, EDO (SA)*

In the March 2000 edition of *Impact*, the results of South Australia's longest environment trial were reported. On 16 December 1999, a Full Bench of the South Australian Environment Resources and Development Court upheld an appeal by the Conservation Council of SA Inc. (**CCSA**) against development consents granted to the Tuna Boat Owners Association, for 42 new tuna feedlots in the waters of Louth Bay near Port Lincoln.

That decision was appealed to the Full Supreme Court of South Australia by the Tuna Boat Owners. The appeal challenged most of the findings of the Environment Court, including its findings on ecologically sustainable development (**ESD**), the application of the 'precautionary principle' and the onus of proof.

The Full Court handed down its decision on 2 August 2000. While the Court allowed the appeal, it did not reinstate the development consent over-turned by the Environment Court. The Full Court set aside the decision of the Environment Court and remitted the matter back to that Court for further consideration, taking into account the findings of the Supreme Court.

The Environment Court may now consider further evidence from the Minister of Fisheries (who is not a party to the case) as to how the Minister proposes to regulate the 42 proposed tuna cages. If the Environment Court is satisfied that this new evidence will result in an ecologically sustainable industry, then development approval may be given.

In his Judgment, the Chief Justice made it clear that it was open to the Environment Court to make the same decision it had previously made. The Environment Court is not obliged to re-open the evidence and may still allow the CCSA's appeal, forcing the tuna industry to make fresh development applications.

At a practical level, a final win for the CCSA may yet be a hollow victory. The tuna industry will most likely take advantage of new 'fast-track' Regulations, proclaimed by the South Australian government to overcome the original Environment Court decision.

Using the *Development (Amendment) Regulations No. 271 of 1999,* the tuna industry could lodge further applications for development approval for the 2001 tuna feedlot season. These approvals would be immune from public scrutiny, representation and appeal.

On a positive note, the case represents important precedents on the application of the principles of ESD, including the precautionary principle. The Full Supreme Court generally agreed with the Environment Court's approach to this issue. The Court thought that it was appropriate to consider unknown impacts on the environment.

While it did not say so explicitly, the Court's observations could be interpreted as supporting the proposition that if potential environmental impacts are serious and very little is known about the nature and extent of those impacts, then this is sufficient reason to say that the developments may not be ecologically sustainable and should not proceed.

In considering the application of ESD, the Environment Court concluded that an onus lies on the proponent to show that the proposed development would meet ESD requirements. This approach was endorsed by the Full Supreme Court, which stated in its judgment:

> "It is true that generally there is no onus on an applicant for development consent to establish that the development consent should be granted. The relevant authority must simply assess the proposed development against the relevant Development Plan.
>
> But in this case, the Development Plan contains an objective and principle that invokes the concept of ESD. That in turn, in a case like the present, invites the use of the precautionary principle, simply because all of the consequences of the proposed development are not known and fully understood.
>
> In such a case, assessing the proposal against the Development Plan requires a consideration of whether it is a development which is ecologically sustainable. As the longer term consequences of the proposed development are not known, it is appropriate to require measures that will avert adverse environmental impacts that might emerge.
>
> The [Environment] Court did not wrongly impose an onus on the Association in relation to the assessment of the proposal against the Development Plan. The approach of the Court simply reflected what was inherent in one of the matters that the Court had to consider, the issue of ESD [paras 27-29]."

Importantly for the CCSA, the Supreme Court made no orders as to costs. In fact, the CCSA argued strenuously that, although it technically 'lost' the case, its costs should be paid by the Tuna Boat Owners Association on the grounds that it had succeeded on most of the points it made and the industry had lost most of its arguments.

Once the matter has been remitted to the Environment Court, each party will bear their own costs.

The CCSA was represented by Mr Brian Hayes QC and Mark Parnell, instructed by the Environmental Defenders Office (SA).

Note: At the date of writing, this judgment was not yet available on the Australian Legal Information Institute website, however copies are available in printed or electronic format from the author.

### Submission on draft Bilateral Agreements

In response to the release by the Commonwealth government of draft bilateral agreements (between the Commonwealth and States and Territories), to be made under the *Environment Protection and Biodiversity Conservation Act 1999*, a joint submission was prepared by the EDO (NSW) on behalf of the following bodies:

- The National EDO Network
- Conservation Council of Western Australia
- Conservation Council of South Australia
- Humane Society International (Australia)
- Tasmanian Conservation Trust
- Victorian National Parks Association
- World Wide Fund for Nature (Australia)
- Australian Conservation Foundation
- Environment Centre of the Northern Territory

A copy of the submission is available from the EDO website at: edo.org.au/edonsw/policy/policy.htm

# Litigation made easy? The New Federal Magistrates Court up and running

*Andrew Macdonald, Solicitor, EDO(NSW)*

On 3 July 2000, the new Federal Magistrates Court, also known as the Federal Magistrates Service, opened for business. The Federal Magistrates Court (**FMC**) is intended to provide a quicker, cheaper and less complex way of running certain matters which were previously heard in the Federal Court or the Family Court. In particular, the FMC may hear matters arising under the *Administrative Decisions (Judicial Review) Act 1977* (the '**ADJR Act**'), with the exception of immigration matters.

The FMC will deal with straightforward cases. In practice, this will generally mean any matter in which the hearing will last two days or less. Cases may be transferred from the Federal or Family Courts to the FMC, and vice versa. Although the FMC is a Court of law, and is bound by the rules of evidence, it is intended that proceedings will be run on a relatively informal basis.

The FMC has been designed to be as 'user friendly' as possible, and it should be possible to run more matters without legal representation than in is the case in the Federal Court. The (yet to be drafted) Court Rules are supposed to be easy to understand and avoid the confusing mass of forms common to other Courts. In addition, the Court fees are cheaper than those in the Federal Court.

Proceedings in the FMC are meant to run more simply and speedily than in the Federal Court. To this end, magistrates will take a more 'hands on' role in cases than do judges in the Federal Court. For example, on the first Court date the magistrate will attempt to clarify the issues in the case and set a hearing date. It is hoped that most matters would be finalised within 6 months.

Given that the FMC will be dealing with cases previously dealt with by the Federal and Family Courts, and is expected to deal with such cases more quickly and with fewer resources, it will be interesting to see whether the FMC lives up to the high expectations held for it.

The FMC will not have its own premises, rather it will use those of the Federal and Family Courts. ADJR Act cases in the FMC may be commenced at Federal Court Registries in all capital cities.

For more information, contact the FMC Assistance Line on 1300 367 110, or visit the FMC website at www.fms.gov.au.

# No 'duty' of councils to enforce planning laws

## Casenote: Ryde City Council v Echt [2000] NSWCA 108

*Chris Norton, Senior Solicitor, EDO (NSW)*

The NSW Court of Appeal has held that local councils are not under a legal duty to use their statutory powers to enforce planning laws.

### Facts

Mr and Mrs Shallita and Mr and Mrs Echt are neighbours. The Shallitas carried out work on their property under a building approval, but did not comply with conditions requiring them to provide screening from the Echts property.

The Echts sought to have the Ryde City Council take action against the Shallitas to enforce the terms of the building approval. However, the Council decided not to take legal action. The Echts then brought their own proceedings in the Land and Environment Court under the open standing provisions of the *Local Government Act 1993* (the **'LG Act'**) to make the Shallitas comply with the approval. The Council was named as a respondent to the proceedings.

Before the case came on for hearing, the Echts and Shallitas settled most of their differences and agreed on what orders the Court should make. However, they did not agree about who should pay costs. The Echts sought an order that the Council pay their costs of the proceedings.

In a judgment delivered on 21 August 1998, Cowdroy AJ found that the Council had a responsibility to enforce the provisions of the *Environmental Planning and Assessment Act 1979* (the **'EP&A Act'**) (although this case actually concerned the LG Act), had failed to do so, and ordered the Council to pay the costs of both the Echts and the Shallitas. The Council appealed to the NSW Court of Appeal.

### Judgement

The Court of Appeal upheld the appeal and overturned the orders of Cowdroy AJ. Spiegelman CJ (with whom Powell and Heydon JA concurred) noted that while councils have a "responsibility" to administer acts such as the LG Act and EP&A Act, the term "responsibility" is to be understood in an allusive and general sense. In particular, the "responsibility" should not be seen in terms of obligations upon councils that can be enforced by third parties against the councils.

His Honour referred with approval to the decision of Pearlman J in *Payne v Mosman Municipal Council* [2000] NSWLEC 25, in which her Honour stated that Cowdroy AJ's decision should not be accepted as authority for the proposition that the discretion of the Council, in deciding whether or not to bring proceedings in relation to a breach of planning legislation, was fettered in some way.

Having found that a Council has a general discretion to decide whether or not to bring proceedings in relation to a breach, his Honour went on to examine whether there was any legal error committed by the Council in the exercise of its discretion in this case and held that there was not.

### Comments

The Court of Appeal's judgement takes a common sense approach to the question of a Council's discretion to enforce the LG Act and the EP&A Act. Council budgets are, by nature, limited and the bringing of enforcement proceedings can be a costly task. It makes sense to find that Councils have a general discretion to decide how to spend their resources, and whether a particular breach of a planning law should be the subject of enforcement proceedings.

What this case does not mean, however, is that those breaching planning laws have free rein to do so unchecked. There are two matters worth bearing in mind:

- Although councils are not legally required to take legal action to enforce every breach of a planning law, they certainly have the right to do so. Where a significant breach of a planning law which impinges upon the environment, including the amenity of other residents, is drawn to its attention, a responsible Council should take the complaint seriously and make an informed decision as to whether to bring enforcement action based on the circumstances of the case.

- Even if a Council decides not to take any action, open standing provisions in Acts such as the LG Act and EP&A Act mean that third parties can still bring enforcement proceedings and seek orders requiring the law to be complied with.

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## New National EDO Network Publication

# Disappearing Acts

## A Guide to Australia's Threatened Species Law


This new publication from the Environmental Defender's Office Network gives an plain English guide to the laws that protect threatened species in Australia.

Written by EDO solicitors from around Australia, its shows where the gaps are and where the laws are effective in preventing extinctions.

- **State, Territory, and Commonwealth laws** are reviewed and compared to give a snapshot of how native species under threat are protected.
- The guide **compares listing processes**, threat management regimes and enforcement across Australia.
- **Other laws affecting threatened species**, such as land management laws, are covered and **case studies** provided.
- The guide includes information of **how the public can get involved** in the listing process and how to take action to protect threatened species.

**This publication is a must for anyone with an interest in threatened species protection.**

*Cost: $20 (plus postage). 106 pp.*

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# Trees 1, Sports Centre 0

## Endangered community scores a win

*Chris Norton, Senior Solicitor, EDO (NSW)*

In August, the Sutherland Shire Environment Centre Inc (**SSEC**) had a resounding victory in its campaign to stop an indoor sporting complex being built on an area of sensitive bushland at Menai, in Sydney's south.

The land on which the sports complex was to be built contained Shale-Sandstone Transition Forest (**SSTF**), an endangered ecological community listed under the *Threatened Species Conservation Act 1995*. The diversity of the SSTF on the Menai site has been widely recognised, including by Sutherland Shire Council's own consultants and officers.

However, the Council applied to itself for development consent to build an indoor sporting complex on the site. When the Council first submitted a development application, it prepared a species impact statement (**SIS**) for the development. However, the Director-General of National Parks and Wildlife refused to grant concurrence to the development.

The Council then prepared a second development application, locating the complex in a different part of the site. The Council considered that in this location, no SIS was needed; and it granted itself development consent.

SSEC, represented by the EDO, brought proceedings in the Land and Environment Court alleging that the development consent was invalid because a SIS should have been prepared, and the Director-General's concurrence should have been sought.

The proceedings were listed for hearing in the Court on 17-18 August 2000. On 10 August 2000, however, the Council voluntarily surrendered its development consent.

Ms Miriam Verbeek, a spokesperson for SSEC, said:

> "The potential of the Sports Complex to impact upon the bushland has been recognised by many experts, including the Council's own officers. The National Parks and Wildlife Service has said that all of the bushland on the site should be retained to increase the viability of the endangered community."
>
> "We now hope to be able to work with Council on any future proposal for an indoor sporting complex at a more suitable site – a site that does not lose a significant bush area to the Shire."

# The more you give, the more you save

The Environmental Defender's Office exists to help the public enforce the laws which are meant to protect the environment, and to ensure those laws become even stronger.

EDOs rely on assistance from the public to help defend important test cases and to ensure the public has access to legal information that can help them protect the environment.

You can ensure that the work of the EDOs continues by making a tax deductible donation to the EDO in your State or Territory. Call the EDO closest to you to find out how to make a donation.

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# EDOs and ABNs

Each EDO in the National EDO Network is a separate legal body. The EDOs have each received an Australian Business Number, as required under new taxation law.

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| Environmental Defender's Office North Queensland | 32 017 484 326 |
| Environmental Defender's Office (ACT) Ltd | 32 636 009 247 |
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# National EDO Network News

## New Solicitor for EDO Victoria

**Megan Bowman** has joined EDO Victoria as their second solicitor. Megan has practised, consulted and published in the area of environmental and planning law and policy since 1996. She has been a private practitioner in Melbourne, Assistant Lecturer in Law at Monash University and a consultant and researcher with Dr Gerry Bates in Sydney.

Megan is an executive committee member of the National Environmental Law Association (Victoria) and is active in community environmental projects. Megan replaced Don Anton at the EDO.

## EDO NSW gains new Education Coordinator

**Natalie Ross** is the new Education Coordinator at EDO NSW, job sharing with Debbie White. Natalie has worked as a solicitor and education worker at Marrickville and Campbelltown Community Legal Centres in Sydney from 1989 until 2000.

She has also been a volunteer and management committee member at Redfern Legal Centre, Immigration Advice and Rights Centre, Disability Discrimination Legal Centre (NSW) and Campbelltown Legal Centre.

Natalie replaced Tessa Bull and, besides organising conferences, workshops and publishing materials for the community on environmental law, will be a regular editor of *Impact*.

## Change of guard in North Queensland

**Michael McNamara,** solicitor at EDO North Queensland, in Cairns, is leaving the EDO Network in September. Over the past 2 years, Michael has worked on many critical cases in North Queensland, particularly relating to threatened species and habitats. Michael was previously a solicitor with EDO Victoria.

Michael is returning to Victoria to pursue a new challenges, including a well deserved rest on his farm. We wish Michael all the best and thank him for his great contribution to the EDO Network over the past 5 years.

**Joanna Cull** is the new solicitor at EDO North Queensland. Joanna is from Brisbane, having studied for her Arts/Law degree at Queensland University and done articles in the litigation section of Ebsworths in Brisbane. She is currently doing a Masters in Environmental Law at the Queensland University of Technology, and adjusting to life in North Queensland.

## Susan Gunter leave Tasmanian EDO

**Susan Gunter,** solicitor, is leaving EDO Tasmania to take up a position with the Commonwealth DPP in Tasmania. Susan has been at EDO Tasmania for 3 years, working on a wide range on environmental law issues, providing advice, leading litigation, working on policy and law reform.

Susan also over-saw the production of EDO Tasmania's guide to Tasmanian environmental law, *"The Environmental Law Handbook"*. We wish Susan every success in her new role.

## Temporary changes at Brisbane EDO

**Jo-Anne Bragg**, solicitor, is taking 12 months leave from EDO Queensland from November 2000. During her absence Rob Stevenson will be principal solicitor.

## EDO NSW Conference

***"I have a cunning plan ……."***
EDO NSW will be holding a conference on integrated planning, in Sydney in March 2001. The conference will provide a forum for debate and discussion around a review of Part 3 of the Environmental Planning and Assessment Act 1979 NSW and an anticipated discussion paper on integrated natural resource management in NSW. For further information contact Natalie Ross at EDO NSW on (02) 9262 6989.

## EDO NSW Workshops

EDO NSW is running an expanded version of the popular *"Environmental Law for Green Campaigners"* course in November 2000. The course provides a comprehensive introduction to State and Federal environment laws, and a brief overview other laws of interest to activists such as freedom of information and defamation. For more information contact Natalie Ross at EDO NSW on (02) 9262 6989.

# Want to protect the Environment?
# *Leave it to us!*

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For free confidential advice on including the EDO in your will, please contact Lisa Ogle, Director, at the NSW EDO on (02) 9262 6989, or talk to a solicitor at your State or Territory EDO (see front page for contact details).

A suggested wording for your will is:

*"I bequeath the sum of $_____ ( you can also include part or all of any property that you own), to the Environmental Defender's Office Ltd for its general purposes, and declare that the receipt of the Treasurer of the time being of the Environmental Defender's Office Ltd shall be a complete discharge to my executors in respect of any sum paid to the Environmental Defender's Office Ltd".*

*IMPACT is published by the Environmental Defender's Office (NSW) Ltd, a Sydney based independent community legal centre specialising in environmental law, on behalf of the National EDO Network.*
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