



Published by: Environmental Defender's Office (NSW)  
ABN 72 002 880 864  
Level 9, 89 York Street, Sydney 2000, DX 722 Sydney  
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**Quarterly Journal of the  
National EDO Network**

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**Cite as**  
**(2001) 64 Impact**  
**ISSN 1030-3847**

## **Significant Impact**

### **First trial under the Environment Protection and Biodiversity Conservation Act (1999)**

*Elisa Nichols, Solicitor, EDO (Qld) Inc.*

*In Impact No.61, March 2001, my colleague Rob Stevenson and I reported on the case **Booth v Bosworth [2000] FCA 1878**, the first application for an interim injunction under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). The matter proceeded to full trial in the Federal Court before Justice Branson in July 2001. EDO (Qld) acted for the applicant, Dr Carol Booth.*

#### **Facts and Findings**

The case involved an application by a conservationist, Dr Booth, to restrain large scale culling of Spectacled Flying Foxes (*Pteropus conspicillatus*) by electrocution on a lychee farm operated by the Bosworths, near Cardwell in North Queensland. The property is adjacent to the Wet Tropics World Heritage Area and therefore triggers the World Heritage provisions in the EPBC Act. For more detailed information about the facts of this case, please refer to our previous article.

the WTWHA. Therefore, the operation of the electrical grids in the 2000-2001 season had a significant impact upon the world heritage values of the WTWHA.

The judge also found that, unless restrained, the continued operation of the grid at the same rate would cause the Spectacled Flying Fox to become endangered within five years. The judge therefore concluded that the operation of the grids will have, or are likely to have, a significant impact upon the world heritage values of the WTWHA. An order

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was made restraining the Respondent from operation of the electrical grids unless the operation is the subject of an approval by the Minister pursuant to Part 9 of the EPBC Act.

### The Meaning of Significant Impact

The decision clarifies the meaning of ‘significant impact’ which is a crucial issue for the operation of the EPBC Act. The judge accepted that a “significant impact” was an “impact that was important, notable or of consequence having regard to its context or intensity”. In doing so, she followed a number of Australian authorities including Oshlack v Richmond River Shire Council and Iron Gates Developments Pty Ltd (1993) 82 LGERA 222 per Stein at 233; McVeigh v Willara Pty Ltd (1984) 5 FCR 587 per Toohey, Wilcox and Spender JJ at 596; Tasmanian Conservation Trust Inc v Minister for Resources (1995) 55 FCR 516 per Sackville J at 541.

‘Having regard to its context’ is relevant where an action has significance in its cumulative impact, rather than if taken in isolation. In considering arguments by the respondents that it was necessary to weigh the impact of the action of the respondent as one component only of the overall threat to the Spectacled Flying Fox, the judge accepted that mortality rates are additive. Therefore, the mortality in the orchard must be added onto the ‘natural’ mortality of the species, including other impacts upon the species such as shooting, habitat clearing, tick paralysis etc. Therefore, an action which may not appear significant in isolation may be significant when other impacts are taken into account and the effect of that action is added to the other impacts.

It is this issue that is likely to be of most importance in determining whether or not a proponent should refer their proposed action to the Commonwealth. Whether or not the matter seems clear, the safe option is for a proponent to make the referral directly. An application to the Commonwealth is free of charge and a decision by the Commonwealth provides a defence against any potential court action. The potential cost of any delay in commencement of the project is minimal compared to the risk of substantial civil and criminal penalties should a proponent be found in the future to have taken an action which has caused a significant impact to a matter of national environmental significance.

### Discretionary matters

In considering whether or not to exercise her discretion to grant the injunction, the judge considered the limited

nature of any evidence before her in relation to the economic impacts that may be suffered by the respondents and the unavailability of any feasible alternatives to using the electrical grids. The judge accepted that the respondents would suffer a financial loss, although the scale was not apparent from the evidence, and that this may impact upon the local community. It was also accepted that it may not be financially viable to erect full exclusion netting over the entire orchard in the short term.

However, even if the Court had received detailed evidence in relation to these issues, the judge considered that the impact of that evidence on the discretion of the Court would be limited. Her Honour said:

*“In weighing the factors which support an exercise of the Court’s discretion in favour of the grant of an injunction under subs 475(2) of the Act against those factors which tell against the grant of such an injunction, it seems to me that it would be a rare case in which a Court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance.” (para.115)*

This statement indicates the importance of environmental protection in a national and international context.

### Conclusions

The EPBC Act, while not perfect, contains a good framework for protection and conservation of matters of national environmental significance. Importantly, its widened standing provisions allow conservationists to seek an injunction from the Federal Court to halt actions which may have a significant impact on a matter of national environmental significance. This allows the community to adopt a significant role in environmental protection and conservation unrestrained by political or commercial pressures.

The case has clarified the meaning of ‘significant impact’ under the EPBC Act as well as indicating the level of balance which should be applied in weighing up the protection of World Heritage values with the financial interests of an individual. This means that the case has the potential to greatly impact upon the administration of the EPBC Act generally.

The judgment is available on the Federal court website at <http://www.fedcourt.gov.au/gfx/j011453.pdf>

# Velvet Worms Vs Woodchips

## Landmark Decision on Forestry and Threatened Species in Tasmania's Resource Management and Planning System

Stephen Hall, Solicitor, EDO (Tasmania)

### Background

Earlier this year Evan Rolley, Managing Director of Forestry Tasmania<sup>1</sup>, said during an interview for Radio National's *Earthbeat* programme:

*"The reality is, Tasmania produces ten times per capita the timber of any other Australian State. This industry in Tasmania is worth \$1.2 - billion. We supply half the wood. Now we have a moral responsibility to make sure that the jobs of people who work in the timber industry are not threatened by some sort of hypothetical view about what may or may not be happening to some aspect of biodiversity.*

*What we've got to make certain is that there's no impact on any rare and threatened species, that there is no significant adverse impact on biological values and that the planting is done in a way that avoids adverse impacts on the environment..."*

While few would disagree with him on that point, there has been longstanding controversy about the environmental impact of practices employed by the Tasmanian forestry industry. Conservationists have opposed large-scale clearfelling of native forest and replacement with fast rotation monoculture plantations since those practices began in the early seventies. On the other hand the forestry industry has lobbied hard to retain resource security i.e. guaranteed access to native forests for timber production. Throughout the debate, the industry has enjoyed solid support from Tasmania's two major political parties.

The Regional Forests Agreement (RFA) signed by the Tasmanian and Federal Governments in 1997 was meant to end the controversy. Under the RFA, the Tasmanian Government agreed to maintain and improve regulatory systems to secure ecologically sustainable forest management and the State's *Forest Practices System*<sup>2</sup> was accredited as an ecologically sustainable forest management system. In turn the Federal Government removed export licence constraints on the production of unprocessed timber and woodchips from native forests<sup>3</sup>. The result has been an unprecedented acceleration of native forest harvesting. In 2000 more than twice the amount of woodchips were produced from Tasmanian forests than from the rest of Australia combined. The March 2001 prospectus of Gunns Ltd stated, "In 2000, Tasmania surpassed the Southern United States as the

world's largest regional exporter of hardwood chips."

Not surprisingly, the acceleration of logging brought about by the RFA has fuelled rather than ended the controversy over native forest logging. Along with the argument that over 40% of Tasmania is already reserved, the Tasmanian forestry industry and its supporters cite the existence of "stringent" regulation through the *Forest Practices System*, to rebut arguments that the environment, particularly biodiversity is being jeopardised by the industry's expansion of activity.

It is more difficult to legally challenge a forestry operation in Tasmania than other land or resource developments, and the environmental impact of modern forestry has rarely been tested through litigation. A recent challenge to an individual forestry operation in North East Tasmania, however, has provided some insight into the efficacy of the Forest Practices System during what may turn out to be a critical point in the intensifying forestry debate.

### The Case

On 23 July 2001 the Resource Management and Planning Appeals Tribunal handed down its decision in *F. Giles, J. Weston & T. Dudley v Break O Day Council & T. Denney* TAS RMPAT No. J115/2001 ('Dudley'). The Tribunal upheld an appeal against a permit granted by the Break O Day Council to conduct a forestry operation on private land at Lower German Town Road, St Marys in North East Tasmania.

The site of the proposed operation is controlled by the Break O Day Planning Scheme and comprises 67 hectares. The eastern half of the property is zoned *coastal resource management* and adjoins the National Estate listed St Marys Pass Reserve. It contains most of the native forest that was to be clearfelled. The western portion of the site is zoned *rural* and is predominately cleared pasture save for some patches of rare, *Eucalyptus Brookeriana* (Brooker's Gum), which have been identified as having conservation priority under the Regional Forests Agreement. In both zones the Break O Day Council had discretion to allow or refuse a permit authorising the development. The forestry operation was to be carried out by North Forest Products who were taken over by Gunns Ltd (now the largest logging company in Australia and the southern hemisphere as a result of that takeover) shortly before the appeal was heard.

Under the Break O Day Scheme performance criteria, a

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forestry operation could not be considered in either zone until the landowner submitted a “forest practices plan” approved by the Forest Practices Board authorising the operation. Because the proposed development was commercial forestry, the *Forest Practices Act 1985* (TAS) also required the landowner to obtain a certified forest practices plan from the Forest Practices Board before logging could commence. A forest practices plan sets out the manner in which a forestry operation must be undertaken in order to ensure protection to the environment. Prescriptions in a forest practices plan must reflect minimum environmental protection prescriptions in the Forest Practices Code and entail measures such as stream buffer zones to protect water quality and others to protect ecological elements such as threatened species.

The forest practices plan submitted in support of the operation recognised the fact that the coupe fell within the known range of a number of species listed under Tasmania’s *Threatened Species Protection Act 1995*, including the Giant Velvet Worm (*Tasmanipatus barretti*, listed as rare) and the Blind Velvet Worm (*Tasmanipatus anophthalmus*, listed as endangered). However the plan contained no prescriptions for the Velvet Worms on the basis of an assessment by the North Forest Products employee who prepared it that the area was too dry for the worms. As the plan was drafted in reference to the Forest Practices Code rather than the Break O Day Planning Scheme there was also a disparity between the watercourse buffer zones required under the Scheme (30 metres) and the 10 metre buffer zones proposed in the plan and allowed by the Code. Furthermore, the ‘forest practices officer’ who prepared the plan (the North Forest Products employee referred to above<sup>4</sup>) initially failed to carry out an adequate flora survey and as a result the stands of *E. Brookeriana* on the coupe were not identified or protected in the plan.

The proposal was approved by Council, despite a number of formal objections from residents of the area and a permit was granted to conduct the operation in accordance with the forest practices plan submitted to Council. The forest practices plan allowed for clearfelling all the native forest on the property (save for a small ‘habitat clump’ and visual buffer in the eastern section) followed by the establishment of a *Eucalyptus Globulus* (Blue Gum) plantation.

Three of the objectors appealed against the permit.<sup>5</sup> The likely impact on the ecological values of the proposed coupe was the principal basis of their appeal. The appellants argued that the area to be logged was of high conservation value and that those elements of conservation value would be destroyed or degraded by the proposed forest practices. It was also argued that the

proposed forest practices would negatively impact on surrounding residents, visually and through pollution.

In the lead up to the appeal, Giant Velvet Worm specimens were discovered on the coupe; first by an independent scientist<sup>6</sup> employed by the appellants and later by specialists from the Forest Practices Board<sup>7</sup>. A flora survey was undertaken and the *E. Bookeriana* stands were identified. By the time the matter reached hearing the proponents had modified the proposal substantially. The significant *E. Brookeriana* stands were reserved from logging altogether. A large section of forest in the southern section of the coupe was set aside for selective harvesting rather than clearfelling. This was on the recommendation of the zoological expert<sup>8</sup> employed by the proponents. In his opinion, selective logging was not likely to endanger the Velvet Worm population in that section of forest whereas clearfelling and plantation establishment would probably wipe them out.

Thus, even before the appeal was heard, the appellants had succeeded in securing a greater degree of protection for ecological elements within the coupe than had initially been recommended through the Forest Practices System planning process. Nevertheless, they still felt that the conservation values of the coupe were such that clearfelling and selective harvesting should not be undertaken at all, particularly not within the coastal resource management zone area adjoining the St Marys Pass Reserve. Their appeal was therefore maintained and the matter proceeded to a contested hearing on the merits of the proposal.

It is worthwhile noting that it is unclear why the proponents of the operation initially applied for local council approval rather than simply applying for the declaration of a Private Timber Reserve (**PTR**). If they had initially applied to the industry based Forest Practices Board to have the area declared a PTR then they would not have needed a council permit. None of the parties who appealed the granting of the council permit could appeal against the declaration of a PTR. It may have been assumed (correctly) that the proposal would receive council approval and (incorrectly) that there would be minimal risk of an appeal or if there was an appeal, it would fail. Either way, by default or design, a forestry proposal finally found its way to an independent appeal process where it was tested against sustainable development criteria that applied to the general community rather than criteria set by the forestry industry through the Forest Practices System.

The hearing was held at St Helens on the 5, 6 and 7 June 2001. It involved evidence from twelve expert witnesses, ten of whom were employed to give evidence by the proponents. The general thrust of evidence given by and on behalf of the proponents was that whilst it was acknowledged the operation could have adverse impacts on the ecological values of the area, those

impacts would be controlled and minimised through the measures provided for in the Forest Practices Code and forest practices plan. It was argued that the prescriptions in the plan to protect threatened species, particularly the Velvet Worms, were more than adequate.

### The Precautionary Principle

The countering evidence on behalf of the appellants was that the protective measures provided in the forest practices plan would not be effective and that the impacts on fauna within and around the coupe from the operation were not well enough understood to support the development. In this respect the appellants relied on the ‘precautionary principle’ i.e. that lack of scientific certainty as to the extent of risk of environmental harm from an activity should not be used as a justification to allow the activity.<sup>9</sup> Before this case, the precautionary principle had not been applied in a Tasmanian tribunal or court decision. However, the Break O Day Planning Scheme objectives explicitly required decision makers to, “ensure that where there are threats of serious or irreversible harm, lack of scientific certainty is not used as a reason for allowing environmental degradation.”<sup>10</sup>

The proponents’ witnesses were cross-examined extensively on the environmental impact of the forest practices proposed in the operation. All of the relevant scientific witnesses agreed with the proposition that the greatest threat of extinction to threatened species arose from habitat loss and habitat fragmentation and that this operation would be contributing to that phenomenon in North East Tasmania. Dr Sarah Munks, Senior Zoologist with the Forest Practices Board, conceded under cross-examination that many of the Forest Practice Systems environmental protection strategies and measures had never been tested though long-term research.

### 1080 Poisoning

As with most forestry operations, 1080 poison would be used to kill all native mammals in the area that could browse seedlings in the plantation’s first year. Julia Weston (one of the appellants) gave evidence that a pair of endangered Wedge Tailed Eagles were regularly seen in the vicinity of the coupe. Under cross examination it was ostensibly conceded by most expert witnesses that it was not known if 1080 would harm non-target species (such as the Wedge Tailed Eagles) that happened to consume contaminated prey. The general opinion was that it probably would; but no witness could say to what degree as no thorough testing had ever been done. Besides 1080, plantation establishment would involve the use of pesticide/herbicide chemicals such as Atrazine/Cimazine and Glyphosate. No witness could say what effect any of these chemicals would have on the Velvet Worms.

### The Decision

The Tribunal accepted evidence given by Dr Peter

McQuillan that selective harvesting in the southern portion of the coupe would still harm the Velvet Worm population, primarily through damage to soil hydrology. It also found that chemical usage on other sections of the coupe would possibly have a detrimental impact on the Velvet Worms and, in the absence of evidence to the contrary, forestry ought not be allowed within the coastal resource management zone section. This was a clear application of the precautionary principle. The Tribunal also found on the evidence that the use of 1080 presented a risk of harm to Wedge Tailed Eagles but that the degree of risk could not be quantified. With respect to watercourse buffer zones, the Tribunal found (at paragraph 52):

*“The Tribunal considers that while it may be inferred in general circumstances that the Forest Practices Code criteria are adequate to prevent erosion and increased sediment flows, there is no evidence sufficiently specific to show that following the prescriptions of the Code “show(s) that such removal (of vegetation in or within 30 metres of the boundary of a waterway) will not adversely affect the capacity of the remaining vegetation to act as natural filters for nutrients and soluble pollutants ...” Specifically, there was no evidence as to the nature or extent or capacity of the remaining vegetation with respect to acting as a filter. On the above evidence the basis for the 30 metre streamside reserves being replaced with the proposed 10 and 20 metre reserves has not been established.”*

The Tribunal overturned the Council’s decision to allow a permit for forestry in the coastal resource management zone. The permit was allowed to remain for the portion of the coupe in the rural zone however, given this consists predominantly of cleared pasture; that effectively restricted the proponents to only establishing a plantation on cleared land. Even in the rural zone the Tribunal imposed a further restriction on the development; it required the proponents to provide 30 metre buffer zones for all watercourses within the operational area; significantly greater than the 10 metre buffer zones allowed for in the Forest Practices Code and plan.

The proponents’ evidence during the hearing was that harvesting of the forest in the coastal resource management zone was essential to the commercial viability of the operation. In effect, the appeal and the Tribunal’s decision protected virtually all the native forest on the coupe and rendered the establishment of a monoculture plantation economically futile. Despite this, the Tribunals decision will become irrelevant if the Forest Practices Board declares the coupe a Private Timber Reserve because, as stated earlier, forestry on Private Timber

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Reserves are exempt from the normal requirement for a planning permit. There is now an application to have the coupe declared a PTR before the Forest Practices Board.

### Implications of the Case

The case has set an important planning precedent because it involved application of the precautionary principle, possibly for the first time in Tasmanian environmental litigation; and it is the first Tasmanian case where protection of a threatened species was the determining factor in the outcome of a planning appeal.<sup>11</sup> It thus represents the first definitive determination recognising biodiversity as an important element of the “sustainable development” objectives that underpin Tasmania’s Resource Management and Planning System (**RMPS**)<sup>12</sup>.

Ironically the forestry industry is supposed to be exempt from all this. The Forest Practices System is not part of the RMPS and therefore not subject to the RMPS integrated planning and sustainable development objectives. The Forest Practices System’s own objectives emphasise self-regulation and resource security and are aimed at maximising the availability of forests for commercial exploitation. The decision in Dudley provides a clear demonstration of the discrepancy between environmental outcomes allowed under the two systems. The fact that the proponents can overcome the decision by having the coupe declared a Private Timber Reserve highlights the special status afforded to the forestry industry by law.

The protection of biodiversity and the environment cannot be achieved through a piecemeal approach with conflicting legislation and objectives. The Tasmanian Government’s recognition of this led to the establishment of the integrated Resource Management and Planning System in the early 1990’s. The Commonwealth’s recognition of this led to the introduction of the *Environmental Protection and Biodiversity Conservation Act(Cth) 1999 (EPBC Act)*. Yet, the disproportionate degree of political influence enjoyed by the forestry industry has led to its activities being exempt from the operation of both the RMPS and the EPBC Act. In Tasmania at least, this has led to record levels of land clearing and possibly irreversible impacts on threatened ecological communities.

At the end of the day, Dudley should have been just another planning appeal; but because it involved a forestry operation, in North East Tasmania, in 2001, it is more than that. It is a seminal example of truly integrated environmental planning and it stands as a successful challenge to the myth that Tasmanian forests can be managed in an ecologically sustainable manner by the forestry industry alone.

### Endnotes

<sup>1</sup> Forestry Tasmania is Tasmania’s government forestry enterprise, incorporated under the *Forestry Act 1920*

<sup>2</sup> The Tasmanian Forest Practices System was established in 1985 under the *Forest Practices Act 1985*. It is largely a self-regulatory system and is the principal mechanism by which measures to protect the environment from forestry activities are employed.

<sup>3</sup> Imposed via the *Export Control Act 1982 (Cth)* and associated regulations.

<sup>4</sup> Forest Practices Officers have the delegated responsibility (from the Forest Practices Board) of certifying forest practices plans and monitoring compliance. Most forest practices officers are also employees of the forest companies carrying out the operations.

<sup>5</sup> Frank Giles and Julia Weston, owners of a nearby farm and guesthouse; and Todd Dudley, chairperson of the St Helens Landcare/Coastcare group and community representative on the National Parks and Wildlife Consultative Committee.

<sup>6</sup> Dr Peter McQuillan, Lecturer in Ecosystems, School of Geography and Environmental Studies, University of Tasmania.

<sup>7</sup> The Forest Practices Board Senior Zoologist conceded under cross examination that if the coupe had not been subject to a planning appeal, it was doubtful that further fauna assessments would have been undertaken.

<sup>8</sup> Dr Robert Mezibov, the scientist who discovered the Blind and Giant Velvet Worms and nominated both species for listing under the *Threatened Species Protection Act 1995*

<sup>9</sup> The precautionary principle has been considered in a number of Australian cases, e.g. *Green v Redbank Power Company (1994) 86 LGERA 143*; and *Leatch v National Parks and Wildlife Service and Shoalhaven City Council 1993 81 LGERA 270*

<sup>10</sup> Break O Day Planning Scheme, paragraph 1.3.2(j)

<sup>11</sup> In *Elude Owen Nominees P/L v Kingborough Council [1996] 263 TASRMPAT* (22 November 1996) the Tribunal took into account the impact of a subdivision proposal on the habitat of the endangered Forty Spotted Pardalote in refusing a permit however it was not the primary basis of the decision.

<sup>12</sup> The objectives of the resource management and planning system of Tasmania are -

*(a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and*

*(b) to provide for the fair, orderly and sustainable use and development of air, land and water; and*

*(c) to encourage public involvement in resource management and planning; and*

*(d) to facilitate economic development in accordance with the objectives set out in paragraphs (a), (b) and (c); and*

*(e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.*

**2.** In clause 1, “*sustainable development*” means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while -

*(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and*

*(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and*

*(c) avoiding, remedying or mitigating any adverse effects of activities on the environment.*

# The new law governing genetically modified organisms

Warren Kalinko, Solicitor, EDO (NSW)

## Introduction

A new system for the regulation of genetically modified organisms (**GMOs**) in Australia commenced operation on 21 June 2001. The law governs the growing of genetically modified (**GM**) crops, the breeding of GM animals, experiments with GMOs and a variety of other dealings with GMOs (whether for medical, agricultural or other purposes). The regime is established by the *Gene Technology Act 2000 (Cth)* (the **Act**) and the *Gene Technology Regulations 2001 (Cth)* (the **Regulations**).

**Part A** of this article contains a description of the new system. **Part B** focuses on specific aspects of the law, including: (a) the range of dealings potentially permissible under the Act; and (b) the Regulator's power to decide whether an activity proceeds. The principal conclusions are these:

- An extensive range of activities relating to GMOs are potentially permissible under the Act, including the broad release of GMOs into the environment, and the cloning of human beings (where the progeny are not genetically identical to the forbear).
- The Act establishes the Office of the Gene Technology Regulator (the **Regulator**), which decides whether or not licences to authorise dealings with GMOs should be granted. The Regulator has broad discretion in the exercise of its powers. All tests to be satisfied under the Act with respect to the granting of licences are subjective, to be determined by a value judgment of the Regulator. The Regulator is not required to consult the Ethics Committee or the Community Consultative Committee created by the Act; and whilst the Regulator must consult the expert Technical Advisory Committee, it is free to choose not to follow the committee's advice.
- Neither the public nor affected stakeholders (such as adjoining farmers) have merit appeal rights to challenge a decision of the Regulator to grant a licence. This is despite the implications of such a licence being significant for such persons. However, proponents whose licence applications are rejected (or approved on unfavourable terms) do have merit appeal rights to the Administrative Appeals Tribunal.
- There is no requirement that insurance be held by persons who carry out dealings with GMOs. This is a matter that has been left to the discretion of the Regulator.
- The Act and Regulations do not apply to Norfolk Island (a territory of Australia).

## Part A - The scope of the Act

The legislation regulates "dealings" with "genetically modified organisms".

"Dealings" are defined to include:

- conducting experiments with GMOs;
- breeding or growing GMOs;
- using GMOs to manufacture products;
- importing GMOs,

as well as the possession, transportation and disposal of GMOs for any of these purposes.

A GMO, for the purposes of the Act, is any organism<sup>1</sup> whose genetic material has been modified by gene technology. For example, if a gene is added to a plant, or if one of its genes is altered or deleted, and this is done by gene technology (as opposed to by natural means, such as sexual reproduction), then the organism will be a GMO and be regulated by the Act<sup>2</sup>.

The Act does not, as a general rule, regulate products derived from genetically modified organisms (GM Products)<sup>3</sup>. These products are intended to be regulated by other legislation<sup>4</sup>.

## What does the Act do?

The Act prohibits all dealings with GMOs, unless:

- the dealing is authorised by a **GMO licence**;
- the dealing is a **notifiable low risk dealing**;
- the dealing is included in the **GMO Register**;
- the dealing is an **exempt dealing**.

GMO licences are the principal form of approval under the Act. The other three types of authorisation are intended to apply only to low risk dealings.

## GMO licences

GMO licences are issued by the Office of the Gene Technology Regulator (the **Regulator**).

## Assessment process

The assessment process applicable to an application for a licence depends on whether or not the proponent intends to release a GMO into the environment.

If it does (as would be the case where GM crops are to be grown in the open), then a comprehensive assessment procedure applies, involving stakeholder and community participation. The process is as follows:

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1. If the Regulator believes that the proposed dealing “may pose significant risks to the health and safety of people or to the environment”, then it must publicly notify the application<sup>5</sup> and invite submissions from the public.
2. The Regulator must prepare a risk assessment and a risk management plan. These are intended to identify risks posed by the dealing and ways in which those risks can be managed.
3. The Regulator must advertise the risk assessment and risk management plan, and invite submissions from the public<sup>6</sup>.
4. The Regulator must seek advice from the States and certain other bodies.
5. The Regulator has 170 days from the date of lodgement to determine the application<sup>7</sup>.

If the proponent does not intend to release a GMO into the open (as with experiments within a contained laboratory), then the process involves step 2 above only, and the Regulator has 90 days to determine the application. Such applications do not involve public notification or provide an opportunity for stakeholder submissions.

### **The test for grant of a licence**

A licence may only be issued, if the Regulator is satisfied that:

- (a) the proposed dealing is able to be managed in such a way as to protect the health and safety of people and the environment;
- (b) the applicant is a suitable person to hold the licence; and
- (c) the licence would not be inconsistent with any policy principles published by the Ministerial Council<sup>8</sup>.

### **Other categories of authorisation**

The remaining three categories of authorised dealing are not examined in this paper in detail. Broadly:

- ‘notifiable low risk dealings’ and ‘exempt dealings’ are dealings of a type listed in the Regulations. Such dealings must comply with requirements set out in the Act (e.g. they must be carried out in a contained facility).
- The final category of dealings are those which the Regulator believes to pose minimal risk to human health and the environment and which the Regulator has listed on a register called the GMO Register.

### **Access to information on authorised dealings**

The Regulator is required to maintain a “Record of GMO and GM Product Dealings”. This Record is available to the public and is intended to be a comprehensive record of all dealings in Australia that involve GMOs or GM Products<sup>9</sup>.

The Act permits the Regulator to declare information to be “confidential commercial information” for the purposes of the Act, in which event it will not be included in the Record or otherwise disclosed to the public.

The Regulator must not make such a declaration:

- (a) if satisfied that the public interest in disclosure outweighs the prejudice that the disclosure would cause<sup>10</sup>; or
- (b) if the information relates to locations at which field trials involving GMOs are occurring or are proposed to occur. Information regarding the location of field trials must be made public, unless the Regulator is satisfied that significant damage to the health and safety of people, the environment or property would be likely to occur if the locations were disclosed<sup>11</sup>.

## **Part B - Analysis**

### **The power of the Regulator**

The legislation gives broad discretion to the Regulator to decide if, and on what terms, licences should be granted.

To illustrate:

- (a) all tests to be satisfied under the Act with respect to the granting of licences are subjective, to be determined by a value judgment of the Regulator. Essentially, it is up to the Regulator to decide what level of risk is acceptable;
- (b) there is no requirement for a licensee to hold insurance. Whether or not a licence condition requiring insurance is imposed is a matter for the discretion of the Regulator;
- (c) whilst the Act creates an expert Technical Advisory Committee to advise on risks posed by potential dealings, it is up to the Regulator to decide whether, and to what extent, it will follow that advice;
- (d) there is no requirement that licences be limited in duration. This is a matter for the Regulator’s discretion; and
- (e) the Act creates a Community Consultative Committee and an Ethics Committee. However, the Regulator can decide if, and to what extent, these committees are consulted.

In essence, complicated issues such as:

- the level of risk which is acceptable;
- the level of precaution which should be taken; and
- ethical considerations,

are reserved as a value-judgment for the determination of the Regulator.

The Regulator's discretion could have been limited in any of a number of different ways. For example, the Act could have provided as follows (no doubt, other tests could be formulated by experts):

- (a) if the proposed dealing may pose significant risks to the health and safety of people or to the environment (a test used elsewhere in the Act (s49)), then the Regulator may not grant a licence for the dealing without the concurrence of the Technical Advisory Committee;
- (b) the Regulator may not grant a licence permitting a release of a GMO into the environment, if the Technical Advisory Committee advises that there is a material risk the GMO will spread beyond the area the subject of the licence;
- (c) insurance could have been made mandatory.

### No merit appeal rights

The Regulator's decision to grant a licence cannot be appealed on the merits. In other words, the Regulator's value judgment (or preparedness to accept risk) cannot be appealed to any more senior body.

This is despite the fact that the Regulator's decision making is largely unchecked<sup>12</sup>, and that the grant of a licence can have significant implications for people living in the relevant area or for the livelihood of GM-free farmers<sup>13</sup>.

However, applicants have merit appeal rights to the Administrative Appeals Tribunal to appeal any decision by the Regulator to refuse a licence or to issue a licence on conditions opposed by the applicant<sup>14</sup>.

### Range of potential dealings

All experiments and other dealings with GMOs, whether for scientific, medical or agricultural purposes, require a form of authorisation under the Act.

The Act places no limit on the range of dealings potentially permissible under the Act, with three exceptions:

- 1) The Act prohibits the cloning of a whole human being (section 192B). The Act defines this as "*the use of technology for the purpose of producing, from one original, a duplicate or descendant that is, or duplicates or descendants that are, genetically identical to the original*".

This prohibition would appear to allow human cloning so long as **one** genetic difference (no matter how minor) can be shown.

- 2) The Act prohibits experiments or research putting human cells, or a combination of human and animal cells, into animal eggs (section 192C).

This prohibition is limited to experimentation and research. It does not prevent **other** dealings with such organisms (such as the breeding of these organisms), where the experimentation or research is done overseas (or on Norfolk Island – which is not covered by the Act or Regulations).

- 3) The Act prohibits experiments or research that involves putting a combination of human cells and animal cells into a human uterus (section 192D).

Again, this appears to allow the breeding of such organisms - where the research and experimentation is done overseas or on Norfolk Island.

### Efficacy of public notification

Where public notification is required by the Act, the obligation is to publish a notice in: (a) the Government Gazette; (b) a newspaper circulating in all States (i.e. The Australian); and on the Regulator's website. These are a surprising choice of publications, given that the Government Gazette is not generally read by the public, The Australian has a limited readership, and few people can be expected to regularly visit the Regulator's website, unless aware a licence application has been made.

A preferred approach would have been to notify neighbors or those in the immediate locality of the proposed activity directly, in addition to publishing notices. As it stands, a person is more likely to be notified of a home extension on a neighboring property, than a proposal to release genetically modified organisms onto adjoining land.

### The assessment process for licences

The distinction described in Part A between dealings which involve a release of a GMO into the open environment and dealings which do not, is problematic, because a number of dealings may fall somewhere in-between. Taking the following dealings, for example:

- the growing of GM plants in a greenhouse with an earthen floor (allowing drainage of water into the open environment) or with louvres that periodically open and close;
- the growing of GM plants in a garden leading off a

Cont..p 10

*Cont from p 9*

laboratory, if the garden has a high brick wall surrounding it;

➤ an experiment in a laboratory, where waste water leaves via a drainage system into the open environment.

If the Regulator considers these dealings not to involve an intentional release of a GMO into the open environment, then they will not be publicly notified, and will not be subject to stakeholder scrutiny.

Given the risks potentially involved with GMO dealings, it would have been preferable for one assessment process to apply to all licences, and for that system to provide persons likely to be affected and the public at large an opportunity to express concerns and make submissions.

### **Why are GMO Bills also being considered by State and Territory parliaments?**

It is unclear whether the Commonwealth has the constitutional power to legislate on GMOs in respect of all dealings, by all persons, all over Australia. According to the Explanatory Memorandum, gaps in constitutional coverage may include dealings with GMOs by certain individuals, State departments and universities who are not involved in cooperative arrangements with corporations or in interstate trade and commerce.

To ensure the Commonwealth's GMO laws cover the entire country (other than Norfolk Island), it is intended that each State and Territory will pass "mirror legislation", consistent with the Act and Regulations. It is intended that these laws will be centrally administered by the Commonwealth Regulator.

### **Conclusion**

The wide range of dealings potentially permissible under the Act; the broad discretion given to the Regulator to license activities to proceed; the absence of objective limits on the risks that can be taken; the lack of supervision of the Regulator; and the inability to appeal the Regulator's value judgment in deciding to approve a dealing, make for a permissive (as opposed to a precautionary) scheme; one which places enormous responsibility in the hands of the Regulator.

### **Endnotes**

The author thanks Andrew Macdonald (solicitor) and Aviva Gulley (volunteer) at the EDO for their assistance with aspects of this article. Opinions are those of the author, alone.

1. Strictly, the Act covers "biological entities" (which includes organisms as well as entities (such as viruses) which are not organisms).

2. The Act does not apply to somatic cell nuclear transfer if the transfer does not involve genetically modified material (clause 4 of the Regulations). The Act does not apply to humans which have been genetically modified solely by reason of having undergone

somatic cell gene therapy (section 10).

3. The Act extends to GM Products in two ways. First, the Regulator, in granting a licence to deal with GMOs, may make the licence subject to conditions concerning GM Products which are derived from GMOs the subject of the licence (section 62(1)). Second, the Act requires the Regulator to maintain a record of dealings with GM Products (refer section 4 above).

4. GM foods are regulated under State and Territory food Acts with the role of developing food standards resting with the Australia New Zealand Food Authority under the *Australia New Zealand Food Authority Act 1991*; GM therapeutic goods are regulated under the *Therapeutic Goods Act 1989* administered by the Therapeutic Goods Administration; GM agricultural and veterinary chemicals are regulated through a national scheme administered by the National Registration Authority under the *Agricultural and Veterinary Chemicals (Administration) Act 1992* and the *Agricultural and Veterinary Chemicals (Code) Act 1994*; and industrial chemicals are regulated through the National Industrial Chemicals Notification and Assessment Scheme under the *Industrial Chemicals (Notification and Assessment) Act 1989* and accompanying State/Territory legislation: Explanatory Memorandum p46.

5. The notice must be placed in the Government Gazette, a newspaper circulating generally through all States and on the Regulator's website (section 49).

6. The application must also be made available to the public (section 54), unless declared confidential (refer part 4 below).

7. This can be extended in certain circumstances, such as where the Regulator is awaiting further information from the applicant (Clause 8 of the Regulations).

8. The Ministerial Council is yet to be formed, and cannot be formed until at least four States and the Commonwealth have signed the "Gene Technology Agreement".

9. Refer section 138 of the Act. In relation to licences, the Record must contain the name of the licence holder; persons covered by the licence; dealings authorised by the licence; the GMO to which those dealings relate; any licence conditions and the dates on which the licence was issued and will expire.

10. Section 185(2) Act.

11. Section 185(2A) of the Act. (The Regulator must publicly provide written reasons for any decision not to disclose the location of field trials.)

12. Refer section 30 of the Act which states that "the Regulator is not subject to direction from anyone in relation to whether or not an application for a GMO licence is issued or refused"

13. Contrast this with NSW planning law, where merit appeals are available to objectors to certain types of developments; e.g. poultry farms over a threshold size.

14. If the Regulator grants a licence in breach of the Act (for example, because it has not followed the Act's procedural requirements) then "aggrieved persons" (undefined) can take judicial review proceedings to remedy the breach.

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# Court Inquiry leaves Unanswered Questions

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

*The 20-year-old Land and Environment Court of NSW is the subject of a recently released report, which will do little to satisfy the Court's trenchant critics. Is the report a smokescreen, as the critics claim, or does it instead fail to address the real issues of concern?*

## Background – The Calling of the Inquiry

At the time of its opening in 1980, the Land and Environment Court of NSW (the **Court**) was seen as revolutionary. A superior court of statutory jurisdiction, the Court was given exclusive jurisdiction over a number of different types of proceedings brought under environmental legislation. This included criminal prosecutions, civil enforcement proceedings, and merits appeals against various decisions of governmental authorities.

The single greatest number of proceedings in the Court are those filed in Class 1 of its jurisdiction, which mostly comprise merits appeals against decisions of local councils in relation to development applications. Any applicant for development consent has the right to appeal within 12 months of the determination of the consent authority against that authority's determination. This may take the form of an appeal against an actual or a deemed (when the consent authority exceeds the statutory time for determining the application) refusal or against the conditions imposed on a consent. Third parties only have a right of merits appeal against such decisions where they relate to a specific set of prescribed developments (called designated developments).

On 7 April 2000, the NSW Attorney-General announced an Inquiry into the Review of Development Applications by the Court. Although not explicitly stated in the announcement of the Inquiry, it is fair to say that the announcement coincided with an unprecedented level of criticism of the Court's exercise of its merits review jurisdiction, mostly from local government. Such criticisms included:

- claims that the Court was 'biased' against councils;
- claims that the Court approved inappropriate developments;
- claims that the Court 'overrode' planning policies and instruments; and
- claims that the Court was fundamentally undemocratic because of the way it could override decisions of elected administrators.

The terms of reference of the Inquiry were to "examine the legislative basis upon which decisions in relation to development applications are currently reviewed by the [Court] in accordance with the provisions of the *Land and Environment Court Act 1979* and the *Environmental Planning and Assessment Act 1979*". This examination was stated to include, but not be limited to, matters such as:

- i) the most appropriate manner to review such decisions
- ii) the constitution of the Court in reviewing the decisions
- iii) whether the Court should have regard to any additional matters in reviewing council decisions; and
- iv) whether greater reliance could be placed on alternative dispute resolution mechanisms.

## The Recommendations

The majority of the Working Party made 37 recommendations, including the following:

- the right of an applicant for development consent to full merits review by the Court should be retained;<sup>1</sup>
- greater use should be made of alternative dispute resolution for settling development disputes;<sup>2</sup>
- appeals relating to 'minor matters' (where the value of the development is less than half the median house price in the area) should be dealt with by way of a streamlined system, involving compulsory on-site conferences with minimal formality;<sup>3</sup>
- the Court should retain all the powers and functions of a Council when dealing with development applications, including:
  - the ability to apply State Environmental Planning Policy 1 (SEPP 1) permitting departure from development standards<sup>4</sup>, and
  - the ability to depart from the provisions of a Development Control Plan or other council policy<sup>5</sup>, just as a council may do; and
- The Court should no longer determine matters by consent orders – where a developer and council agree on a resolution of a matter, the council, and not the Court, should make the final determination on the matter.<sup>6</sup>

The majority report also rejected allegations of systemic bias within the Court.<sup>7</sup> The report noted that 3,292 development appeals were disposed of between 1996 and October 2000. Of these, 52% were discontinued, upheld or dismissed by consent – that is, either the developer withdrew the matter, or the developer and council reached agreement on the outcome before the Court determined the matter. Of the remaining 48%, 56% were upheld and 44% were dismissed.<sup>8</sup> This means that 73% of all appeals were either withdrawn, or determined in a way that was acceptable to the relevant council. When this is added to the fact that less than 1% of all development applications in NSW are determined by the

*Cont...page 12*

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Land and Environment Court,<sup>9</sup> this indicates that only a very minor percentage of applications are determined by the Court against the wishes of councils.

A minority report was provided by Peter Woods, President of the Local Government and Shires Association, which disagreed with a number of recommendations of the majority report. In particular, the minority report advocated judicial review rather than merits review, advocated that the Court return to a conservative interpretation of SEPP 1 and that the Court be required to “have regard to” a council’s planning policies.<sup>10</sup>

## **Comments**

While the EDO concurs with many of the comments and recommendations made by the working party, we consider the report is fundamentally unhelpful as it declines to address the real source of community disquiet with some of the Court’s decisions.

### ***Flexible planning left untouched***

The article “Plan First, Court Case Later”<sup>11</sup> in the June issue of Impact put forward the EDO’s view that the perceived problems with the Land and Environment Court were in fact at least partly attributable to the growing trend towards flexibility in the planning system. The EDO sought in its submission to have the Working Party address the issue of flexible planning laws, and particularly SEPP 1. The EDO considered that the review of a portion of the development approval process was linked inextricably to the current ‘PlanFirst’ review of environmental planning.

In particular, the EDO considered that ‘flexible’ planning instruments resulted in little guidance being given to consent authorities and the Court on what sorts of development were appropriate in particular locations. Where a decision is made not to prohibit a particular type of development but instead to merely make it the subject of a non-binding policy or development control plan, that sends a clear message that in certain circumstances a development of that nature should, in some circumstances, be suitable for approval.

The Working Party has not dealt with this issue directly. The EDO concurs with the recommendation that the Court should retain the same powers that are given to councils to apply SEPP 1 and to depart from development control plans and council policies – for the reason that if the Court is given different powers it is not able to truly ‘review’ the decisions of councils on the same basis as the original decision was made. However, the Working Party has not considered the general appropriateness of flexible instruments in the planning system.

### ***No expanded role for third parties***

At present, a third party can only become a party to a merits appeal if the appeal is about one of a set of

scheduled developments (“designated developments”) to which that third party has objected. The EDO argued that while full merits appeal rights for all third parties was inappropriate, third parties should also have a right to be joined to appeals where there was a significant impact on the environment.

The Working Party briefly discussed suggestions for broadening merits appeal rights, but made no recommendation on the basis that this was beyond the Working Party’s terms of reference.

This stance does not seem justified. The Working Party was charged with examining the legislative basis upon which decisions in relation to development applications are reviewed. The Working Party obviously considered this broad enough to consider whether merits appeal rights for developers should be altered, but, inexplicably, not broad enough to consider whether provisions for third parties to participate were appropriate. The failure to address this issue is a great missed opportunity.

### ***Consent orders***

The recommendation that the Court no longer make consent orders is also one that is not necessarily beneficial to public participation. A benefit of making this change would be that councils would no longer be able to consent to a development being approved but place the ‘blame’ for the approval on the Court on the basis that, technically, it was the Court that approved the development.

However, the review of proposed consent orders by the Court is often an opportunity for third parties to put dissenting views before the Court, if they consider their interests are not adequately represented in the proposed orders. Where the parties propose to enter into consent orders, the Court requires objectors to be notified, and objectors can seek leave to appear to make representations in relation to the proposed consent orders.<sup>12</sup> On some occasions, the Court has declined to make consent orders purely on the basis of the submissions of the parties, and has proceeded to a hearing of the matter.<sup>13</sup> If the resolution of a matter by consent is henceforth to be effected by a resolution of the relevant council, objectors will lose the right to have their concerns independently considered.

### ***Conclusion***

On the whole, the majority report gives a fair consideration of the operation of the Land and Environment Court. Its recommendations are generally sound, and it dispels a number of the myths and misleading statements that have been made against the Court by its detractors.

However, the report is fundamentally unhelpful in that it does not address the primary reason underlying dissatisfaction with the Court, which is the large discretion given to all consent authorities (including the

Court on appeal) under flexible planning laws which provide little guidance on the appropriateness of developments, leaving decisions highly subjective. It is also disappointing that the Working Party avoided addressing the important issue of third party rights in merits appeals; an issue which the EDO considers was plainly open for it to consider under the terms of reference.

It is time that criticism moved from the Court. For too long, vocal local government interests have fostered a community perception that the Court is usurping the development assessment processes laid down by the law by making inappropriate decisions that 'override' planning laws and policies. This is simply untrue. The Court must always act within the bounds of the law, and is no less constrained than councils in approving most development applications. Furthermore, the Court actually determines a minute percentage of development applications in NSW. Some of the Court's subjective decisions may provoke the view that the approved development is inappropriate; however, the EDO receives far more complaints each year from members of the public dissatisfied with decisions of local councils than it does from persons dissatisfied with Court decisions.

The cause of this public dissatisfaction is, in part, a planning system that is becoming more and more flexible and accommodating an ever widening class of developments. This includes the notorious SEPP 1, which allows

developments to be approved which do not comply with development standards set down in environmental planning instruments. If public confidence in planning is to return, we need a system that makes clear to the public exactly what is and is not allowed to be built on any particular site. Not only does this avoid false expectations from being created, it also allows for public lobbying for changes to planning instruments if it is considered that the provisions are inadequate.

### Endnotes

1. *Report of the Land and Environment Court Working Party – Majority Report*, Attorney-General's Department, NSW, September 2001 Rec 14, p50
2. *Ibid.* rec 3, p20; rec 9 p33; rec 32 p74
3. *Ibid.* Recs 25-26, pp65-66
4. *Ibid.* Rec 33 p75
5. *Ibid.* Rec 34 p76
6. *Ibid.* Rec 36 p81
7. *Ibid* p13
8. *Ibid* p13
9. *Ibid* p iv
10. *Ibid.* pp6-7
11. Holden, T and Norton, C "Plan First, Court Case Later" *Impact* 62 (June 2001) p1
12. Land and Environment Court Practice Direction 1993, cl 9
13. See eg *ADI Ltd v Hawkesbury City Council* (2000) 110 LGERA 406

## Security for costs - a worrying trend?

*Dr Nicola Pain, Acting Director, EDO (NSW)*

An important issue for public interest litigants before the courts are the procedural hurdles which can be placed in their path in the course of litigation. A key example is action by respondents seeking security for cost orders against applicants in the early stages of proceedings. The usual order for costs in litigation in the Land and Environment Court of NSW (**LEC**), as for most Australian courts, is that the loser will be liable to pay their own legal costs and the costs of the successful party(s).

The purpose of security for costs orders is to provide a guarantee to a respondent that some of his or her costs will be paid at the end of proceedings in the event that the applicant loses. It is increasingly common for respondents to seek orders in civil enforcement proceedings that applicants provide security for costs. Section 69(3) and (4) of the *Land and Environment Court Act 1979* provides that the LEC may order an applicant to give security for the payment of costs that may be awarded against it. Part 53 r 2 of the Supreme Court Rules 1970 (adopted by virtue of Part 6 rule 1 LEC rules) provide that a Court may make an order for security for costs and stay proceedings until security is given.

Various cases concerning security for cost applications were discussed by Chris Norton, EDO Senior Solicitor, in

an article in the June 1999 IMPACT. Chris stated in his article 'If the trend towards applications for security continues, actions brought under the open standing provisions of the *Environmental Planning & Assessment Act 1979 (EP&A Act)* could become the exclusive realm of the wealthy and of corporations, rather than the community groups and concerned environmentalists who have been responsible for many important decisions interpreting the EP&A Act'.<sup>1</sup> This statement is worth revisiting in light of a recent case in the LEC, *Melville v Craig Nowlan & Associates & Anor*<sup>2</sup> concerning security for costs.

In *Melville*, the applicant is seeking declaratory orders that a development consent granted by MacLean Shire Council is null and void. The first respondent filed a notice of motion in May 2001 seeking orders that security for costs for \$23,500 or such sum as the Court determined be awarded and that the proceedings be stayed until such security was provided. Cowdroy J found that that applicant was impecunious and would not be able to meet any order for costs in view of her financial circumstances. He also accepted that the proceedings were public interest litigation pursuant to section 123 of the EP&A Act. Cowdroy J held that the respondent was entitled to a

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security for costs order in the sum of \$12,500 with proceedings stayed until the security was given.

Special circumstances can be considered by the Court in deciding whether to depart from the usual rule that costs will generally follow the event. In his decision Cowdroy J referred to the High Court decision in *Oshlack v Richmond River Council*<sup>3</sup> where the High Court confirmed that whether an applicant was acting in the public interest was a relevant factor which could be considered in choosing not to award costs against an unsuccessful applicant. Cowdroy J states that such a factor may not be sufficient in its own right to warrant an exception to the usual costs rule and appears to follow the reasoning of Lloyd J in *Razorback Environment Protection Society Inc v Wollondilly Council & Anor*<sup>4</sup>. In that case, Lloyd J determined that a security for costs order ought be made despite the proceedings being characterised as public interest litigation. Pearlman CJ in *Town Watch Incorporated v Grafton City Council*<sup>5</sup> was also referred to approvingly by Cowdroy J. In that case the Chief Judge stated that the mere fact that proceedings are brought pursuant to the open standing provisions of section 123 of the EP&A Act was not sufficient to refuse a security for costs application.

A troubling statement in the judgment is 'There is no reason, in principle, to treat an application for security for

costs differently to an application for costs.'<sup>6</sup> Given that a security for costs application is heard early in proceedings before the full case has been determined, as Cowdroy J specifically finds in his judgment, it is arguable this approach is inappropriate. Cowdroy J stated in his judgment that at this preliminary stage it was not possible to assess the strength of the applicant's case before making the security for costs order. It is for this very reason that a more cautious approach to awarding security for costs orders in public interest matters is warranted. Given that the impact of awarding such orders in public interest litigation is often likely to be the end of worthy cases, the decision is unfortunate.

The decision has been appealed and heard in the NSW Court of Appeal and judgment is reserved. If the decision is not overturned, it must be said that the trend identified by Chris Norton in 1999 appears to be the reality for public interest litigants in the Land and Environment Court of NSW.

### **Endnotes**

<sup>1</sup> Norton C 'Security for costs-restricting justice to the wealthy? 1999 54 IMPACT 3.

<sup>2</sup> [2001] NSWLEC 109, decision date 18.6.01.

<sup>3</sup> (1998) 193 CLR 72

<sup>4</sup> [1999] NSWLEC 8

<sup>5</sup> 919970 93 LGERA 401

<sup>6</sup> [2001] NSWLEC 109 at paragraph 11

## **World Summit on Sustainable Development (Rio +10)**

*Dr Nicola Pain, Acting Director, EDO (NSW)*

Next year will be ten years since the groundbreaking United Nations Conference on Environment and Development, UNCED (the Rio Conference). Held in 1992 in Rio de Janeiro, UNCED was a significant milestone in terms of raising sustainable development principles as an important part of international environmental law and policy. Key documents negotiated in the lead up to UNCED were the Rio Declaration on Environment and Development, the Agenda 21 Action Plan and the Statement of Forest Principles. Two Conventions, the Framework Convention on Climate Change and the Convention on Biological Diversity were also opened for signature by UN member countries at UNCED. Following UNCED, the Commission on Sustainable Development was established within the United Nations (UN) system to oversight the implementation of sustainable development within the UN system.

Much has been written since UNCED on the ways sustainable development can be implemented at the international, national and local level. While acceptance of the various principles of sustainable development under international law continues to be a matter of debate, the

principles are found in the objects clauses of most NSW environmental protection legislation passed in the last ten years. The Commonwealth *Environment Protection and Biodiversity Conservation Act* (1999) (**EPBC Act**) also includes sustainable development principles in its objects clause.<sup>1</sup> Implementing sustainable development has been an important focus of governmental, industry and community activity at international, national and local level since UNCED. Views will differ on how effective those efforts have been.

Continuing the tradition of holding a major conference on the environment every ten years, the United Nations is organising the World Summit on Sustainable Development (WSSD), to be held in Johannesburg in September 2002. It is expected this will be a high-level governmental negotiating forum, as was UNCED. Part of the conference will be spent on assessing progress in achieving the implementation of sustainable development. Key themes of the WSSD are likely to focus on barriers to implementing sustainable development.

Preparations at governmental level have commenced in Australia and the region. An Environment Australia (**EA**) discussion paper<sup>2</sup> mentions themes such as:

- a) international environmental governance, including good management and accountability in domestic resource use decision-making;

- b) trade and environment, including discussions on how to ensure that trade, environment and development policies remain mutually supportive;
- c) financing for development in developing countries; and
- d) globalisation, particularly the inequity between and within countries in realising the benefits of globalisation and the increasing importance of the private sector in pursuing sustainable development.

The EA discussion paper flags that one issue needing greater examination is the role of the corporate sector in implementing sustainable development.

Consultations with the public were held in August and September 2001 around Australia by Environment Australia. Further information on the WSSD can be obtained from the official UN website on

<http://www.johannesburg.org>. Environment Australia also provides information on its website at

<http://www.ea.gov.au/>.

While it is early in the preparations for the WSSD and the instruments to be agreed are not yet clear, the focus of discussions to date are on implementation of sustainable

development issues rather than new directions for influencing the development of international law. This would seem appropriate given the on-going debate about the effectiveness of measures to implement sustainable development in Australia, let alone across developing countries.

### Endnotes

1. Section 3A EPBC Act 1999 has the following as principles of ecologically sustainable development:

a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; and

e) improved valuation, pricing and incentive mechanisms should be promoted.

2. Discussion Paper on World Summit on Sustainable Development (2-12 September 2002) Environment Australia, August 2001, <http://www.ea.gov.au>.

# National EDO Network News

## PEOPLE

### QLD

**Rob Stevenson** is leaving the QLD EDO to set up his own legal practice.

### NSW

After five years as Chair of EDO NSW, **Bruce Donald** has stepped down from the position. All of us at EDO NSW would like to express our gratitude for the work Bruce has done in that time. **Andrew Chalk**, Solicitor has been elected Chair.

**Marc Allas** has taken 6 months leave to explore India and is due back at EDO NSW April 2002.

**Tim Holden** has left the NSW EDO office to take up a position with the Environment Protection Authority.

**Andrew Macdonald** has taken a position in strategic litigation at the Department of Land and Water Conservation.

EDO NSW would like to thank **Justine de Torres** a regular volunteer, for stepping in to fill some of the vacuum left by these departures.



*Andrew Chalk, a partner in the Sydney firm of Chalk & Fitzgerald and the newly elected Chair of the NSW Environmental Defender's Office, pictured here with son Gaelan*

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*Editors: Natalie Ross & Lucy Sharman  
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<b>Impact:</b>	Full	\$71.50	<input type="checkbox"/>
	Concession	\$55	<input type="checkbox"/>
<b>Friend:</b>	Full	\$55	<input type="checkbox"/>
	Concession	\$38.50	<input type="checkbox"/>

**Impact AND Friend:**

Full	\$88	<input type="checkbox"/>
Concession	\$66	<input type="checkbox"/>

**Additional Donation...**      \$ \_\_\_\_\_

**TOTAL AMOUNT enclosed**      \$ \_\_\_\_\_

**Note:** Concession :Pensioner, full-time student, unwaged. Additional postage charges apply for overseas subscribers.

Please send this form with payment to:  
Environmental Defender's Office Ltd  
Level 9, 89 York Street, Sydney 2000 DX 722  
Tel: 02 9262 6989 Fax: 02 9262 6998  
ABN 72 002 880 864

## YOUR DETAILS

Name \_\_\_\_\_

Organisation \_\_\_\_\_

Address/DX \_\_\_\_\_

Postcode \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_

Email \_\_\_\_\_

## PAYMENT DETAILS

I enclose a cheque/money order  or please debit my credit card as detailed below

Bankcard  Visa  Mastercard.

Card No: \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

Expiry date \_\_\_\_\_

Cardholder's Name \_\_\_\_\_

Signature \_\_\_\_\_

Amount enclosed \$ \_\_\_\_\_ or debited