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Land clearing: reforming the law in WA

Michael Bennett, Solicitor, EDO (WA)

Introduction

Western Australia is one of the most biologically diverse places in the world. It is also one of the places in which biodiversity is most under threat. In particular, the South West of Western Australia has been identified as one of 25 global biodiversity "hotspots" due to the high number of endemic plant and animal species in the region, and the level of threat they face.

Land clearing has historically been the most significant cause of biodiversity loss in Western Australia, and remains a significant cause of such loss. Clearly, it must be effectively regulated if Western Australia's remaining biodiversity is to be protected. Unfortunately, Western Australia's current laws relating to land clearing do not meet that challenge. There are two key problems:

◆ Western Australia has a patchwork of different laws relating to land clearing, which vary depending on arbitrary factors such as where the clearing takes place, the tenure of the land in question and the purpose of the clearing.

◆ This patchwork has a number of holes, where clearing is either unregulated or where penalties are inadequate to deter illegal clearing.

A patchwork quilt ...

Western Australia has different land clearing laws in a number of areas, including the following.

1. Agricultural clearing outside declared drinking water catchments

Clearing for agricultural purposes in

cont p 2

Stop Press.....

EDO (NSW) is pleased to announce that its former Acting Director, Dr Nicola Pain, has been appointed as a Judge of the Land and Environment Court of NSW.

Nicola was the Principal Solicitor at the EDO from 1987 until 1992, and served as an EDO Board Member from 1994 until 2001. She recently returned to the EDO as Acting Director from May 2001 to January 2002. Nicola has also held senior advisory roles with the NSW Environment Protection Authority and the Federal

Department of Environment, Sport and Territories, and has lectured in environmental law at the University of Technology, Sydney.

The EDO Board and Staff congratulate Dr Pain on her appointment. She is a very capable lawyer with a wealth of experience in the areas of environmental law and international law, and will make a very distinguished judge.

Dr Pain was sworn in on 18 March 2002. ◆

the South West agricultural region of Western Australia is regulated by a mix of laws, coordinated by a non-binding Memorandum of Understanding (MOU). In essence, the process involves:

- ◆ notification of proposed clearing in excess of one hectare;
- ◆ possible issuing of a soil conservation notice by the Commissioner for Soil and Land Conservation (Commissioner) to object to proposed clearing on “land degradation” grounds; and
- ◆ possible assessment of the environmental impacts of the clearing proposal by the Environmental Protection Authority (EPA).

2. Clearing in country drinking water catchments

Within declared country drinking water catchments, a person may not clear more than 0.2 hectares without first obtaining a licence to do so from the Water and Rivers Commission.¹ A maximum fine of \$2 000, and a court order requiring revegetation of the area in question or an equivalent area, may be imposed if this requirement is breached.²

3. Clearing in urban areas

In urban areas, there is no express requirement to seek consent for proposed clearing, and the requirement in the *Soil and Land Conservation Regulations 1992* (WA) to notify proposed clearing is not enforced by the Commissioner.³ However, urban land clearing proposals and their associated biodiversity impacts may be assessed:

- ◆ as part of a local government’s consideration of an application for development approval under the applicable town planning scheme;
- ◆ as part of the Western Australian Planning Commission’s (WAPC’s) consideration of an application for

development approval under the Metropolitan Region Scheme or other regional scheme;

- ◆ as part of the WAPC’s consideration of a subdivision application; or
- ◆ as part of an environmental impact assessment carried out by the EPA.

4. Clearing associated with mining operations

The standard process for regulating clearing associated with mining operations is somewhat unusual. It involves the grant of a mining lease before any assessment of the impacts of mining operations, but with a condition on the mining lease requiring the leaseholder to seek the further permission of the State Mining Engineer before undertaking any productive mining operations. When seeking this permission, the leaseholder will submit a notice of intention to clear under the *Soil and Land Conservation Regulations 1992* (WA). That notice of intent to clear is lodged with the State Mining Engineer, who has delegated powers from the Commissioner for Soil and Land Conservation to receive and deal with the application.⁴ Before the State Mining Engineer makes a final decision the proposed clearing, along with other aspects of the mining operation, may be subject to environmental impact assessment by the EPA.

It should be noted that mining operations and associated land clearing do not require development approval under local town planning schemes,⁵ although somewhat anomalously they do require such approval under the Perth Metropolitan Region Scheme.⁶

It should also be noted that clearing for quarrying operations on private land is not regulated by the *Mining Act 1978* (WA). Instead, it is regulated by a mix of planning laws and the clearing controls applying to clearing under the *Soil and Land*

Conservation Act 1945 (WA).⁷

5. Clearing on Crown land

Land clearing will sometimes occur on Crown land, in circumstances in which it is not regulated under the rules relating to clearing for agriculture, urban development or mining that have been discussed above. For example, an area that is held under a lease from the Crown may be developed for a tourist resort in circumstances in which there is no applicable town planning scheme. In these circumstances, one control on land clearing is imposed by the *Land Administration Act 1997* (WA), which provides that it is an offence, without permission from the Minister for Lands or reasonable excuse, to clear Crown land.⁸ Another control is found in the *Wildlife Conservation Act 1945* (WA), which prohibits the clearing of indigenous flora on Crown land. On the face of it, a notice of intent to clear would also need to be submitted to the Commissioner for Soil and Land Conservation, if more than one hectare was to be cleared. Again, for significant proposals it is possible that the EPA will decide to assess the proposal.

6. Clearing on areas under pastoral lease

Section 109(1) of the *Land Administration Act 1997* (WA) provides that a pastoral lessee must not remove trees or otherwise clear land under the lease or disturb or affect its soil except:

- ◆ as permitted under the lease;
- ◆ as necessary for the construction of improvements permitted under the lease; or
- ◆ in accordance with a permit issued under Division 5.

The *Land Administration Act 1997* (WA) provides that the Pastoral Lands Board may, on an application in

writing from a pastoral lessee, issue a permit for the lessee to remove specified trees or clear specified areas of scrub or other vegetation for the purpose of promoting the growth of indigenous pasture or otherwise facilitating or improving the working of the lease.⁹

...with holes

There are a number of holes in this patchwork of regulation.

1. Clearing of roadside vegetation in agricultural areas is effectively unregulated

The agricultural land clearing laws considered above do not cover clearing of roadside vegetation. Roadsides are often the most significant areas of remnant vegetation in agricultural areas.¹⁰ However, there is no obligation on the Department responsible for main roads, or for local governments, to notify their intention to clear roadside areas.¹¹

2. Penalties are inadequate to deter agricultural clearing

There has been a significant decline in the level of authorised agricultural clearing since controls were introduced in 1986, and in particular since the MOU came into effect. Authorised clearing for agriculture in the south west amounted to less than 1000 hectares in 2000 – 2001. This trend is due to an increasingly strict approach to land clearing by the Commissioner for Soil and Land Conservation and the EPA. However, the encouraging statistics concerning authorised land clearing are balanced by the high level of *unauthorised* land clearing. There is evidence that the existing legislation relating to agricultural clearing, with its maximum penalty of \$2,000 for those failing to notify proposed clearing, is not effective in ensuring that proponents of clearing enter the regulatory process. This was graphically

demonstrated by the clearing that took place in December 2001 on a rural-zoned property at The Lakes, some 50km north east of Perth. A camera crew from one of Western Australia's commercial news programs filmed the clearing of this property, which had been commenced without the required notification and continued even after an officer from the Department of Agriculture requested that it stop. This is not an isolated case. There were 46 substantiated cases of non-urban illegal clearing between January 1998 and July 2001¹² and satellite imagery shows significant unauthorised clearing in the agricultural region during the same period.¹³

3. Development consent is not required for "public works"

While there has been some doubt in the past about the point, it appears that clearing will ordinarily amount to "development" that requires approval under the relevant town planning scheme.¹⁴ However, there are a number of important exceptions to this rule, including development for the purpose of "public works."¹⁵ This exemption means, for example, that clearing for road construction by a local government or the Main Roads Department does not need development approval from local government. The public works exemption has even been applied to a proposal to construct a motor sports complex, on the basis that the complex was being developed by the Western Australia Sports Centre Trust in furtherance of its statutory functions.

4. Decision-makers are not required to protect biodiversity

Western Australia is a signatory to the *National Objectives and Targets for Biodiversity Conservation 2001-2005*. One of the targets set out in that document is that by 2003, land clearing laws should provide that clearance of ecological communities

with an extent below 30 per cent of that present pre-1750 should not be permitted.¹⁶ Far from protecting ecological communities in this prescriptive manner, current laws lack any consistent requirement to protect biodiversity values. For example:

◆ In respect of town planning schemes, the Model Scheme Text contains the minimalist requirement that local governments have "due regard" in "appropriate cases" to the "likely effect of a development proposal on the natural environment and any means that are proposed to protect or to mitigate impacts on the natural environment".¹⁷

◆ The Western Australian Planning Commission is bound to consider a range of matters in making a subdivision decision, such as access to lots, the provision of services to lots, and the amount of public space to be provided. However it is under no obligation to consider the environmental impacts of clearing. This is despite the fact that a standard subdivision approval functions as a deemed development approval under which the landowner can carry out clearing associated with the building of access roads.¹⁸

◆ The Commissioner for Soil and Land Conservation can only object to clearing on "land degradation" grounds, which does not include loss of biodiversity.¹⁹

These deficiencies are ameliorated to some extent by the environmental impact assessment process established by Part IV of the *Environmental Protection Act 1986*. Section 38(1)(a) of that Act provides that a decision-making authority must refer to the EPA any proposal that appears likely, if implemented, to have a significant effect on the environment. If the EPA does assess a land clearing proposal, it will in practice be guided by a position paper it has adopted

concerning the clearing of native vegetation, which includes the statement that “there would be an expectation that a proposal would demonstrate that the vegetation removal would not compromise any vegetation type by taking it below the 30% of the pre-clearing extent of the vegetation type.”²⁰ After the assessment is completed, the EPA passes on its recommendations to the Minister for the Environment who may decide that the proposal should not be implemented, or should be implemented on specified conditions.²¹ Thus the defects in primary approval processes are compensated for, to some extent, by an overriding environmental impact assessment process. However, the vagueness of the trigger for referral and the reality that the EPA can assess only the most important proposals in the State means that the environmental impact assessment process is not sufficient to plug the gaps identified above.

Conclusions and recommendations

It is clear from the above that there is presently no uniform process governing land clearing in Western Australia. The result is that clearing proposals are dealt with differently, depending on arbitrary factors not related to the environmental impacts of the clearing. Further, there are significant gaps in the various clearing laws. There is a clear case for reform. In light of the analysis set out above, the following recommendations are put forward.

1. New clearing laws

It is recommended that the *Environmental Protection Act 1986* (the Act) be amended to provide that clearing of more than 0.2ha of indigenous vegetation is an offence. The maximum penalties for committing this offence should be equivalent to those currently applying to pollution offences, which include substantial fines and imprisonment. Orders for

revegetation and rehabilitation should also be available. I note that the power to require revegetation and rehabilitation would not require any amendment to the Act, as it is already present in section 99X.

2. Licensing provisions should adopt the “30% rule”

The Act should provide that the general prohibition on the clearing of indigenous vegetation should be able to be lifted by the issuing of a licence by the Department of Environment Water and Catchment Protection (DEWCP). However, the Act should also provide that DEWCP may not issue a licence for proposed clearing where that clearing would involve the clearance of ecological communities with an extent below 30 per cent of that present pre-1750. This would meet the target set by paragraph 1.1.2 of *National Objectives and Targets for Biodiversity Conservation 2001-2005*.²²

3. Offset conditions

The Act should provide that DEWCP may attach conditions to a licence to require offset arrangements to be entered into. The purpose of such a provision would be to ensure that there is no net loss of native vegetation from clearing activity entered into after the amendments to Act come into force. The provision should be wide enough to require the making of a contribution towards the conservation of large areas of off-site native vegetation, as well as to the protection of native vegetation on the land of the licence holder.

4. Open standing for injunctive relief

The Act should be amended to provide that any person may apply for injunctive relief to restrain a threatened breach of the Act, including a breach of the prohibition on clearing of native vegetation.

5. Financial assistance and incentives

While not part of the proposed amendments to the Act, it is recommended that the Government consider establishing a scheme to provide financial assistance in appropriate cases to those industries that are particularly affected by the reforms. That assistance should be provided on an interim basis to assist in restructuring, rather than being paid in the form of compensation for real or perceived loss of property rights. It is also acknowledged that the protection of native vegetation is, in itself, not sufficient to meet biodiversity conservation objectives. The management and restoration of native vegetation is also required. In this area, the focus needs to be less on “command and control” mechanisms and more on the use of incentives to promote positive action.²³

Endnotes

1 *Country Areas Water Supply Act 1947* (WA) s 12B.

2 *Country Areas Water Supply Act 1947* (WA) s 12B(2).

3 pers. comm., Jean-Pierre Clement, Agriculture Western Australia, 23 September 2001.

4 Agriculture Western Australia, *Annual Report 1999-2000*, p65.

5 *Mining Act 1978* (WA) s 120.

6 *City of Cockburn v Boral Resources (Australia) Ltd* (1997) 97 LGERA 232.

7 This is because the *Mining Act 1978* (WA) only applies to “minerals” as defined in that Act. “Minerals” is defined to exclude certain rocks, such as limestone, rock or gravel, on private land: s 8

8 *Land Administration Act 1997* (WA) s 267(2)

9 *Ibid* s 118.

10 Government of WA, *Final Report of the Native Vegetation Working Group* (25 January 2000) p14.

11 The Commissioner for Soil and Land Conservation takes the view that clearing for road construction does not amount to a “change in the use of the land”, and that a soil conservation notice cannot be imposed to prevent clearing because the clearing is carried out by a public authority.

cont p 12

Environmental rights: Are there implications for Australian law?

Dr Nicola Pain, former Co-Director, EDO (NSW)

The concept of environmental rights has received increasing attention in the last ten years at both international and national levels. An environmental right has been defined in numerous ways, commonly as the right to a safe (or clean) and healthy environment.

At the international level, the discussion of environmental rights has been bound up with the debate over new international human rights. Environmental rights have been described as necessary for the attainment and enjoyment of other civil, political, economic, and social rights. 'Traditional' human rights (the preservation of fundamental rights essential to human dignity and freedom) as presently recognised under international law and the right to exist in a safe and healthy environment are arguably indivisible. Without an appropriate environment, human beings cannot fully enjoy other human rights. Examples of the integral relationship between human rights and the environment are numerous. The plight of environmental refugees and their likely increase in numbers, the environmental costs of apartheid and the devastation of indigenous cultures through the destruction of their physical, cultural and spiritual environment, are some of these.

The relationship between human rights and environmental protection can be characterised in several ways. Human rights standards may be achieved through environmental protection, as a poor environment will affect the ability of humans to achieve life, health and livelihood. Alternatively, legal protection of human rights may be a means of achieving environmental protection.¹ A further development beyond these approaches is to conceive of a separate environmental

right to an ecologically healthy environment. On the other hand, some commentators have argued that existing human rights, such as the right to life, can be usefully reinterpreted to include a right to a healthy environment.² For those who argue that a new human right is desirable, views differ between a substantive right and a right focussed on procedural rights. The latter would focus on democratic rights of participation in decision-making.³

Discussion of an environmental right has expanded substantially since the late 1980s, prompted in part by the work of the World Commission on Environment and Development and preparations for the 1992 United Nations Conference on Environment and Development (UNCED). The World Commission on Environment and Development (WCED) Legal Experts Group prepared a draft set of principles adopted by the WCED in its 1987 report *Our Common Future*. The first principle is "All beings have the right to an environment adequate for their health and well-being"⁴

The *1994 Draft Principles on Human Rights and the Environment* were the result of a meeting of international experts held at the UN in Geneva in May 1994 at the invitation of the Sierra Legal Defense Fund acting on behalf of Ms Ksentini, Special Rapporteur on Human Rights and the Environment of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. There are 27 principles that deal with the many facets of an environmental right. The Preamble refers to a number of international instruments including the major international human rights agreements, the *Stockholm Declaration*,

the *World Charter for Nature*, the *Rio Declaration* and *Agenda 21* and the *Declaration on the Right to Development*. The basic environmental right in the Draft Principles refers to 'the right to a secure, healthy and ecologically sound environment, which right is universal, interdependent and indivisible from other human rights'.⁵

The issue of environmental rights has been considered within the UN Commission of Human Rights since the 1994 Principles were drafted. Given the large range of issues on the Commission's agenda at any one time, progress on the issue of emerging environmental rights is unclear. It is hoped that the issues will be canvassed in the lead up to the Rio plus 10 conference currently being organised by the United Nations General Assembly, a follow up to the 1992 United Nations Conference on Environment and Development (the Rio Conference).

Environmental rights at the national level

It is at the national and local level that the establishment and implementation of environmental rights are and will be most actively realised in the shorter term. Constitutional 'bills of rights' are potentially significant legal instruments that can specify and give effect to citizen rights.

Constitutions specify the rules by which those holding the powers of government operate and this will usually be by democratic or popular rule, the separation of powers of the state between the Executive, Parliament and judiciary, and territorial division of powers between national/federal/central and regional/provin-

cial/state governments. Most modern constitutions also limit what the state or any of its officials may do through a list of basic human rights that no Government is to transgress.⁶ Rights commonly included are the fundamental rights of religious expression, life, liberty and free speech. The way constitutions provide for democratic processes in government is clearly significant in providing an environmental rights framework.

A reference to some form of environmental right can be found in over sixty national constitutions.⁷ Whether these provide meaningful rights which citizens can use both legally and practically is often debatable. A sizeable number of constitutions now include environmental provisions. These range from broad provisions specifying State responsibility to protect the environment, individual rights which can include an environmental right such as the right to life and specific reference to an environmental right. It is likely that future constitutions drafted will continue to include environmental provisions and will increasingly include, a specific environmental right. The scope for enforcement varies, however, between countries, reflecting different legal, administrative, political and cultural systems.

Enforcing Constitutional Environmental Rights

Constitutional provisions can be fundamental rights or statements of public policy. A fundamental right guarantees the individual a personal right, such as the right to life, and includes, in some circumstances, rights of participation. These rights of participation can be further divided between original rights and derivative rights. Original rights provide a direct claim to the individual for a particular service; derivative rights only grant participation rights in the framework

for providing the service, leaving the decision on whether this is to be provided to the discretion of the government. Public policy statements are, by their nature, non-binding on governments and unenforceable by citizens.

Effective implementation of constitutional provisions depends in part on how courts interpret them. A key issue for a court to decide is whether a constitutional provision is self-executing, and therefore judicially enforceable, in the absence of implementing legislation.⁸ Constitutional provisions that are not self-executing rely on legislatures to pass appropriate legislation worded to give them effect in law in such a way that citizens can apply them. Given the importance of judicial interpretation of constitutional provisions, access to the courts is an important threshold issue in constitutional litigation and raises the issue of standing to sue by private citizens to enforce their constitutional right. The legal system may not allow these rights to be taken advantage of where there is no access to courts.

Explicit environmental rights contained in constitutions are prevalent in constitutions amended or made since the early 1980s. Other fundamental constitutional rights, such as the right to life, have been interpreted by courts to include such a right to environment in a few jurisdictions. Recognition of environmental rights, whether directly or through interpretation of the right to life, in a number of national constitutions has been demonstrated in several jurisdictions in the Asia-Pacific region. The enforceability of those constitutional provisions varies considerably and depends on the type of provision and structure of the constitution in question.

Significant Constitutional Cases

Recent case law in the Asian region provides some examples of enforceable constitutional rights. The *Oposa* case⁹ represents an important judicial milestone. A decision of the Supreme Court of the Philippines, the Court recognized the right to a healthful and balanced ecology under the national constitution.

The plaintiffs in the case were a number of children, represented by their parents and the Philippines Ecological Network, who argued that the Philippine government's practice of awarding timber contracts in sensitive ecological areas was damaging to the environment and infringed their constitutional rights. The plaintiffs argued they were entitled to the full benefit, use and enjoyment of the country's virgin tropical rainforests, and that the government should cancel the timber licences enabling the deforestation. The Government argued that the issues were not legal matters, but political to be settled by the executive branch of government. The Supreme Court upheld the plaintiffs' claim, holding that the plaintiff had shown a violation of its rights and held that the timber licenses should be cancelled in whole or in part. The case was remanded back to the court of first instance for a re-hearing with the direction that the timber companies, whose concession agreements the plaintiffs were seeking to have cancelled, be joined in the proceedings.

The practical benefit of this case can be questioned, but its symbolic importance and precedent value is clear. The case took a number of years to reach court and the remedies granted have not resulted in the voiding of logging licences issued by the Philippine government the applicants were seeking.

There has been substantial litigation in the Supreme Court of India on environmental rights under the Indian

Constitution. This has been due to the wide interpretation by the Indian Supreme Court of the right to life provided under Article 21 of the Indian Constitution. There are now in excess of twenty cases in which the Supreme Court has used the right to life provisions in the Indian Constitution to imply an environmental right.¹⁰ The precise nature of the right is somewhat unclear as the reasoning provided in the judgements does not always spell out precisely the nature of the right being enforced. *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh* AIR 1985 SC 652 was the case in which the Fundamental Rights chapter of the Constitution was first applied to ensure the protection of the environment from the operation of limestone quarries. The Supreme Court ordered that certain limestone quarries in the Doon Valley be closed because of the soil erosion, deforestation and river siltation caused by their operation. This case laid the basis for later recognition of a constitutional right to environmental protection but did not make explicit what fundamental right the court was providing a remedy for.¹¹

In *MC Mehta v Union of India* AIR 1988 SC 1037 and AIR 1988 SC 1115 concerning litigation to prevent tanneries polluting the Ganges River, the Supreme Court found that the right to life in Article 21 of the Constitution included the right to an unpolluted environment. This case also demonstrates the broad remedies the Supreme Court is prepared to grant on the basis of finding vaguely defined environmental rights. The Court ordered that all educational institutions in India set aside one hour per week for environmental education.¹²

It was in *Charan Lal Sahu v Union of India* AIR 1990 SC 1480 that the Supreme Court made the specific link between environmental quality and the right to life in a case reviewing the

constitutional validity of the Bhopal Act.¹³

In *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715 the applicant was petitioning the Supreme Court to stop tanneries in the State of Tamil Nadu from discharging untreated effluent into agricultural fields, waterways and open lands. The Court held that the industry did not have the right to destroy the ecology, degrade the environment or create health hazards. Its decision was based in part on the interpretation of Article 21 on the right to life of the Constitution of India as providing the right to a healthy and ecologically sound environment.¹⁴ The case was also significant in that the Supreme Court held that sustainable development is a part of customary international law 'though its salient features have yet to be finalised by the international law jurists.'¹⁵

The Indian Supreme Court has applied a constitutional interpretation of Article 21 of the right to life to include environmental aspects. In this respect, it has been one of the most expansive courts in the region in broadly interpreting the right to life. Coupled with the unusually wide range of judicial remedies available to the Indian Supreme Court, its judgements in this area can be seen as groundbreaking in scope in terms of the development of domestic law in India. Whether the Indian cases can be used as grounds to suggest the development of customary international law principles is more debatable.

It has been noted that the international environmental principles incorporated into domestic Indian law by the Supreme Court are very general and their precise scope is uncertain.¹⁶ The early jurisprudence appeared to be based on domestic authority, rather than a clear attempt to incorporate international jurisprudence.

Notwithstanding the sometimes questionable reasoning in the judgements, the Indian jurisprudence can be regarded as important in adding to a slowly expanding body of practice at the national level to include environmental rights within national frameworks.

The 1973 *Constitution of the Islamic Republic of Pakistan* Article 9 provides that no person shall be deprived of life or liberty save in accordance with the law.¹⁷ This right to life has been interpreted in the Supreme Court of Pakistan to include the right to a clean environment.¹⁸

In *Shehla Zia v WAPDA* a group of citizens was seeking to stop construction of a grid station in their neighbourhood and petitioned the Court by letter. The Court accepted the case as one enforcing fundamental rights under Article 184(3) of the Pakistan Constitution.

The case has been described as probably the best known public interest case in Pakistan based on the right to a healthy environment and as revolutionary in the development of the law in Pakistan.¹⁹ The importance of the case goes beyond the recognition of such a right as, in this regard, it follows Indian case law referred to the Court by petitioners.²⁰ The case is also significant because it demonstrates that a right to a healthy environment can be established in an Islamic state, confirming that the courts interpretation of constitutional provisions has resulted in an enlarged scope for human rights.²¹

Most of the national legal systems covered in this paper are based on the Westernised model encompassing individual rights and broadly based on Judeo-Christian concepts. It is noteworthy to see a system developed in a different religious cultural context also embracing this significant jurisprudential development.

There have now been several cases in Pakistan in which the Supreme Court has applied Article 9 to a variety of environmental issues and required remedial action by governments and public authorities.²² This has served not only to provide court remedies in particular circumstances but also to alert the public to the issues of preserving and protecting the environment.²³

What is happening in Australia?

In contrast to many recent constitutions, the Australian Constitution has no specific mention of the environment. Given the period, 1901, when the Australian Constitution was passed this is not surprising. The Constitution does not contain a specific bill of rights for citizens, as does, for example, the US Constitution.²⁴ Its primary goal is to define the powers of the national government, an essential issue in a federal system of government where powers and responsibilities are shared with state governments. Whilst it makes no mention of the environment in defining the Commonwealth government's powers, there are several significant pieces of Commonwealth government environmental legislation based on heads of power in the Australian Constitution.

One of the important powers of the national government in this context is the power to make laws with respect to external affairs.²⁵ In several areas of international law, including human rights and environmental protection, the Australian government has passed laws importing international treaty obligations into Australian domestic law.²⁶

Compared to the large number of modern constitutions passed in the last two decades, the Australian Constitution lacks a 'rights' frame-

work to protect its citizens. This has been the subject of extensive academic discussion with arguments put for and against the wisdom of amending the Constitution to provide for fundamental citizen rights. Amending the Constitution is onerous and referenda held on issues of constitutional reform are generally lost. The most recent example of this is the failed referendum to change the Constitution to provide for a republican framework of government rather than a monarchy.

There are other means of implementing a rights framework in Australia, notably through a statutory Bill of Rights.

In the NSW Legislative Council Standing Committee on Law and Justice report 'A NSW Bill of Rights', issued in October 2001, the majority view was that there was no need to enact a statutory Bill of Rights for NSW. Instead, parliamentary scrutiny as a means of enhancing respect for human rights by both the Parliament and Executive was focussed on. The terms of reference for the Committee included to consider broadly whether it was in the public interest to enact a statutory NSW Bill of Rights; whether the rights declared in the International Covenant on Civil and Political Rights should be incorporated into domestic law by such a Bill of Rights; and whether economic, social or cultural rights, group rights and the rights of indigenous people should be included in a Bill of Rights, amongst other matters. The Committee focussed on existing human rights recognised under international law. While there was little specific consideration of new rights, such as an environmental right, a number of the observations of witnesses before the committee who spoke in favour of a Bill of Rights are significant. Given trends overseas towards enacting Bills of Rights in countries such as the United Kingdom, Canada and New Zealand, the

finding of the Committee report is a conservative approach to this issue.

Given the reluctance to enact Bills of Rights in NSW and elsewhere, it is likely Australia will lag behind other OECD countries in embracing recognised human rights, let alone emerging new rights such as environmental rights. This is a pity as Australia will miss the opportunity to be part of a dynamic area of discussion and debate at the international human rights level and its citizens will lack legal rights available elsewhere.

Endnotes

¹ Anderson M, *Human Rights Approaches to Environmental Protection: An Overview* in Boyle A & Anderson M (Eds) *Human Rights Approaches to Environmental Protection* (Oxford Clarendon Press) p 3.

² Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment' in Boyle A & Anderson M (Eds) *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press 1996)

³ Cameron J & McKenzie R, "Access to Environmental Justice and Procedural Rights in International Institutions" in M Anderson & A Boyle (Eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996).

⁴ World Commission on Environment and Development Legal Experts Group *Environmental Protection and Sustainable Development Legal Principles and Recommendations* (Boston: Graham & Trotman, 1986) p 151.

⁵ Part I principle 2.

⁶ Beatty D, *Constitutional Law in Theory and Practice*. (Toronto: University of Toronto Press, 1996) pp 4-5.

⁷ *Final report on Human Rights and the Environment* Note 1 p 7.

⁸ Brandl E, Note 470 p19 quoting Mandelker D, *Environment and Equity: A Regulatory Challenge* (1981) p 111.

⁹ *Oposa et al v the Honourable Fulgencio S. Factoran, Jr.* 33 ILM 166.

¹⁰ Anderson M, "Individual Rights to Environmental Protection in India" in Boyle A & Anderson M (Eds), *Human Rights Approaches to Environmental Protection*. (Oxford: Clarendon Press, 1996)

¹¹ Anderson M, Note 65 at page 216.

Endocrine disruption: gambling with human health?

Steve Wawrzonek, volunteer, EDO (NSW)

“Endocrine disruption” is a theory that links the presence of synthetic chemicals in the environment to a variety of adverse effects in wildlife and humans. It involves the interference to hormone regulators during the early development or at various stages in the life of an organism.¹ Studies of wildlife show associations between hormone-disrupting chemicals in the environment and declining populations, thinning eggshells, and decreased viability of offspring. Scientists have also postulated a relationship between these chemicals and abnormalities in humans, including declining sperm counts; breast, testicular, and prostate cancers; and neurological disorders, including cognitive and neurobehavioral effects.²

In Australia, Commonwealth agencies are responsible for the assessment of synthetic chemicals. While the existing regime provides for rigorous testing, the testing process is based on a traditional toxicological approach, which has difficulties detecting endocrine disruption. While many aspects of the theory still remain controversial, the existing legislative regime could be modified to deal with this scientific uncertainty and implement the principles of ecologically sustainable development (ESD). However, the federal government is relying upon the existence of a scientific controversy as justification for not proposing any changes to the regime. As a consequence of this, some chemicals remain in use or are being introduced into Australia even though evidence exists which indicates that they are harmful.

Endocrine disruption theory and its scientific status

Many organisms, including humans, have an endocrine system composed of hormones that flow through the blood stream at extremely low concentrations and which regulate development and behaviour. Disruption of this system can result in various effects. Some chemicals may mimic a natural hormone, “fooling” the body into over-responding to the stimulus or responding at inappropriate times. Other chemicals may block the effects of a hormone in parts of the body normally sensitive to it, whilst others may directly stimulate or inhibit the endocrine system, causing overproduction or underproduction of hormones.³ The fact that there are a multitude of synthetic chemicals in the environment which many organisms are exposed to, is, according to the theory, thought to be a mechanism that causes this disruption.

The scientific community is still debating the theory. Although scientists have produced uncontested results that high levels of synthetic chemicals introduced into the environment are capable of disrupting the endocrine system of wildlife,⁴ there is no critical experiment that has universally linked low (ambient) levels of a specific endocrine disrupting chemical to a specific disease.⁵ This has arisen due to two factors. The first factor is that there are multiple explanations for how synthetic chemicals behave with endocrine systems at the molecular level. The second factor is that traditional toxicology standards cannot capture a clear cause-and-effect relationship for endocrine disruption.

The traditional toxicological paradigm focuses on exposure of adult individuals to a high dose of a single chemi-

cal. It relies upon the results of cancer or death as an indication of contaminant effects. It also relies upon the presumption of a “threshold,” below which no adverse effect is evident. In contrast, the endocrine disruption theory focuses on cumulative low dosages of a chemical with a delayed response. Some chemicals naturally exceed threshold levels for endocrine effects and will operate in a synergistic way with other compounds.⁶

Different conceptual models of chemical assessment

A theory can remain in limbo many years before it is confirmed, falsified or abandoned. However, chemical regulators cannot wait for a scientific resolution before making a decision. In the context of scientific uncertainty, the key issue is determining what model is appropriate to manage decision-making error.

In assessing the validity of a controversial theory that a certain synthetic chemical causes particular kinds of harm, it is possible for a chemical regulator to make one of two types of errors. A type I error is committed when the prevailing evidence allows the regulator to believe a causal connection exists, when in reality it fails to exist. A type II error is committed when the evidence allows the regulator to believe that no causal connection exists, when in reality it does.⁷ A chemical regulator is forced to decide which type of error is more serious and consequently which one needs to be avoided. Avoidance of a type I error is consistent with a ‘hard science’ model,⁸ which emphasises the danger of overestimating risk. It argues that a decision should only be

made when science is completely certain about a risk. Avoidance of a type II error is consistent with the 'precautionary principle' model. This model seeks to avoid underestimation of risk, and encourages a policy decision even if science has not yet reached a resolution.

The chemical assessment regime in Australia

In Australia the assessment of chemicals involves four separate schemes which correspond to the most common applications of chemicals; Industry; Agriculture; Pharmaceuticals; Food. The two most significant schemes, in terms of potential impacts on the environment and the number of chemicals that are assessed, are the National Registration Scheme for Agricultural and Veterinary Chemicals (NRSAVC) and the National Industrial Chemicals Notification and Assessment Scheme (NICNAS).⁹

The National Occupational Health and Safety Commission (NOHSC) administers NICNAS under the *Industrial Chemicals (Notification & Assessment) Act 1989 (Cth)* (ICNA Act 1989 (Cth)). The National Registration Authority (NRA) administers the NRSAVC under the *Agricultural and Veterinary Chemicals (Administration) Act 1992 (Cth)* and the *Agricultural and Veterinary Chemicals Code Act 1994 (Cth)*. Other regulatory agencies are also involved with both schemes. The Therapeutic Goods Administration (TGA) of the Department of Health and Family Services reviews the potential of a chemical to affect human health. Environment Australia (EA) provides environmental assessment reports and advice in respect to the potential of a chemical to affect non-human aspects of the environment.

Under the industrial chemicals scheme (NICNAS) the legal device that determines whether an industrial

chemical¹⁰ can be used commercially in Australia is the Australian Inventory of Chemical Substances (AICS). The legislation distinguishes between an 'existing' chemical that is listed on AICS, and a 'new' chemical, which is not on the list. The legislation makes it an offence to manufacture or import a 'new' chemical without first having had the chemical assessed and an assessment certificate granted by the Director of Chemicals Notification and Assessment (the director). The assessment certificate simply certifies that the chemical has been assessed under the provisions of the legislation, and does not indicate that the chemical is safe.

As part of the assessment process the applicant must provide specified information, including the results of human and animal toxicity tests. Before granting a certificate the director is required to produce a report that includes the risk assessments made by the appropriate regulatory bodies and to publish it in the *Chemical Gazette*. In producing this report the director is not required to seek information from anyone other than the applicant. The public is also unable to instigate a challenge to the original findings and recommendations of the assessment. The legislation requires that if additional information becomes available to the applicant, post-assessment, as to adverse health or environmental effects of the chemical, there will be a notification requirement on the applicant.

The legislation provides for assessment of 'existing' chemicals under the Priority Existing Chemicals (PEC) program, if the director has reasonable grounds for believing that there is a risk of adverse health or environmental effects. It is an offence to import or manufacture a chemical nominated for a PEC assessment until an assessment certificate is issued. The public has no enforceable right to

participate in the selection or assessment process, but the director is able to permit anyone to be involved. The legislation also excludes the Commonwealth from being the subject of any legal action by those who suffer damage as a result of relying upon the results of any assessment or report made under the Act.

The agricultural and veterinary chemical scheme (NRSAVC) is legally controlled by the *Agvet Code*, which is part of a co-operative legislative arrangement by the Commonwealth, States and Territories. Under the *Agvet Code* it is an offence to possess, supply or sell an agricultural or veterinary chemical unless it is registered by the NRA.¹¹ A person can apply to the NRA to have a chemical registered, but they must provide information that shows that the chemical would not be harmful to humans or the environment. The NRA has the power to place certain restrictions upon the use of the chemical or alternatively, to not register it, if it is shown to be harmful. The NRA can only register a chemical after considering its toxicity. Before registering a chemical the NRA must publish a notice in the *Chemical Gazette*, that invites the public to make submissions within 28 days. The NRA must take the submissions into account when making its decision.

In terms of a chemical that is registered, the NRA can place restrictions upon its use or cancel its registration, if it is shown to be harmful to humans or the environment. This is done under the Existing Chemical Review Program (ECRP). Although the NRA can invite the public to make submissions about which chemicals should be assessed under ECRP, the public is not able to directly challenge an existing registration. The *Agvet Code* also excludes the NRA from any liability for damage suffered as a result of relying upon the registration of a chemical.

How Australia is dealing with the theory of endocrine disruption

Australia's response to the issue of endocrine disruption essentially amounts to waiting for more scientific evidence from overseas. Because they have sufficient resources, the United States, European Union and Japan are working on a research-based response, involving the design, coordination and implementation of screening programs.¹² While Australia does not have the resources to do any significant research into the issue, its response has been limited to the publication of an information paper¹³ and participation at international¹⁴ and domestic¹⁵ discussions. An appropriate response for Australia must also involve addressing the problematic aspects of the existing legislative regime.

The first problematic aspect of the regime is that there is no mechanism for effective public debate. While the legislation requires an applicant to show that the chemical is not harmful, it only gives an objector 28 days to respond¹⁶ or no right to comment at all.¹⁷ As a consequence, the regulator is only supplied with limited evidence from the applicant. The provisions in the *ICNA Act 1989* (Cth) and the *Agvet Code* also do not allow open or limited standing to challenge the substantive results of a chemical assessment.

While the regime requires toxicity studies to be carried out, the tests are based on the OECD testing guidelines,¹⁸ which reflect the traditional toxicological approach. The tests are not designed to detect synergistic effects, delayed response, chronic low-dose exposure or the absence of a threshold effect, which are proposed aspects of endocrine disruption.

The regime also does not require any consideration of ESD. At a practical level, this omission means that the

regime provides no guidance about how to deal with scientific uncertainty. The current regime only contemplates a situation where evidence of harm is conclusive either way.¹⁹ The scientific reality with endocrine disruption is that uncertainty exists and may always exist. It is unrealistic for the legislation to assume that conclusive evidence about harm will always be available for a chemical.

How Australia should deal with the endocrine disruption theory

One reason behind maintenance of the current regime is that it ensures that nothing interrupts the production, importation and use of synthetic chemicals or the profits that are generated. However, it is not appropriate to do nothing and place humans and the environment at risk, just because there is a degree of scientific uncertainty and economic interests might be harmed. The appropriate way to deal with the endocrine disruption theory would be to amend the current legislative regime.

Firstly, the legislation should be modified to give open standing to challenge the outcome of a chemical assessment decision. Alternatively the regime could grant limited standing in a similar fashion as the "aggrieved person" provision in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)²⁰ (EPBC Act). Furthermore, the provisions of the *ICNA Act 1989* (Cth) should be brought into line with the provisions of the *Agvet Code*²¹ and allow the public to make submissions to the director before a chemical assessment certificate is given.

Secondly, the legislation should integrate the principles of ESD. This could be achieved in a similar way as the *EPBC Act 1999* (Cth), which makes the promotion of ESD a legislative aim,²² and also requires a

decision-maker to take into account the precautionary principle in certain circumstances.²³ Forcing the regulatory bodies to take into account the precautionary principle would address the scientific uncertainty with endocrine disruption. Regulators would have the explicit statutory power to prohibit a chemical when evidence of harm to the environment or human health is inconclusive. Absolute scientific certainty would no longer be a barrier for environmental protection.

The precautionary principle asserts that when conditions of scientific uncertainty exist, the law can anticipate and act to prevent environmental harm.^{24 25} It has been used in a multitude of international and domestic instruments,²⁶ and is being used at an escalating rate.²⁷ Critics of the principle claim that an element of scientific uncertainty exists in almost all environmental disputes²⁸ and it is just a choice to rush to premature conclusions.²⁹ In regards to endocrine disruption though, there is a choice between a chemical assessment regime that promotes overestimation or underestimation of risk. The precautionary principle places the environment and human health before economic growth. Scientists have also substantiated the principle, by recognising the multiple and subtle linkages connecting the biological units of the world and that sometimes scientific consensus will never be reached, because controlled and replicated experiments cannot be performed in large-scale systems over large time periods.³⁰ Science may be unable to ever provide certainty in relation to some things.

By not addressing the problems with the existing regime the Federal Government has ignored the possibility that harm can occur during a period of scientific uncertainty. While they appear to be merely awaiting more conclusive evidence, by doing noth-

ing, they have shown that they prefer to underestimate the risk rather than overestimate it. They have placed the possibility of wealth reduction before the possibility of harm to the environment or human health.

Endnotes

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- 4 Bantle, J., Bowerman, W.W., Carey, C., et al., Consensus statement from the Work Session on "Environmentally Induced Alterations in Development: A focus on Wildlife" (1995) *Environmental Health Perspectives* 103 (suppl.4): p3-5.
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- 7 See Cranor, C.F., "Regulating Toxic Substances" (1993) New York, Oxford

University Press.

- 8 As above.
- 9 National Profile of Chemicals Management in Australia, Environment Australia, November 1998.
- 10 Definition of "industrial chemical" is given in s.7, *ICNA Act 1989* (Cth).
- 11 ss.74-83, 121, *Agvet Code*.
- 12 As above n.1, p 90.
- 13 Commonwealth Government, "Endocrine Disrupting Chemicals Information Paper," April 1998.
- 14 *Intergovernmental Forum on Chemicals Safety*, second meeting in Ottawa in February 1997 (IFCS was established as a response to Agenda 21 Chapter 19 of the *Rio Declaration* 1992)
- 15 *National Science & Industry Forum*, April 1998, "Endocrine disruption: Australia's role in an international issue."
- 16 ss.12, 13, *Agvet Code*.
- 17 See the *ICNA Act 1989* (Cth).
- 18 As above n.33, pp 8-11; (Normal testing under NICNAS include lethal dose studies, repeat dose toxicity up to 28 days, genotoxicity, neurotoxicity and exposure reports; PEC assessments and Agvet assessments are more extensive and include lethal dose studies, repeat dose toxicity up to 13 weeks, carcinogenicity, developmental toxicity and exposure reports).
- 19 s.32, *ICNA Act 1989* (Cth); s.14(6), *Agvet Code*.

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- 21 ss.12, 13, *Agvet Code*.
- 22 s.3, *EPBC Act 1999* (Cth).
- 23 s.391, *EPBC Act 1999* (Cth).
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- 25 Fullem, G.D., "The Precautionary Principle: Environmental Protection in the face of Scientific Uncertainty" *Willamette Law Review* 31(2) (1995) 495, p 497.
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- 27 As above n.44 p 500.
- 28 See arguments of critics in article written by Lyster, R., "The Relevance of the Precautionary Principle: Friends of Hinchinbrook Society Inc v Minister for the Environment" *Environmental and Planning Law Journal* 14 (1997) 390, p 394.
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- 30 Ludwig, D., et al. "Uncertainty, Resource Exploration, and Conservation: Lessons from History," *Science* 260 (1993) 17, p 17. ♦

from p4

Land clearing laws in WA cont

- 12 Hon. Christine Sharp to the Minister for Housing representing the Minister for the Environment and Heritage, Legislative Council, 31 July 2001.
- 13 McKenzie and Madgwick, *Vegetation Clearance – Western Australia: A case study on vegetation clearance in the West Midlands Region of Western Australia* (WWF Perth, September 2001), 7.
- 14 *Trevor Perkins v Soiland Garden Suppliers Pty Ltd and Peter Wayne Pollock* (Unreported, Malone SM, Perth Court of Petty Sessions, 12 February 2002).
- 15 *Town Planning and Development Act 1928* (WA) s 32. This exemption does not apply in cases in which the development approval is required under the Metropolitan Region Scheme, as opposed to under a local town planning scheme: *City of Bayswater v Minister for Children and Family Services* [2000] WASCA 151.

- 16 Environment Australia, *National Objectives and Targets for Biodiversity Conservation 2001-2005* (2001),
- 17 *Town Planning Regulations 1967* (WA), Appendix B, s 10.2(1).
- 18 A standard subdivision approval for a residential subdivision contains conditions designed to ensure vehicular access for the new lots: see WAPC, *Policy DC.1 – Subdivision of Land – General Principles*, Part 2. Section 20D of the *Town Planning and Development Act 1928* (WA) provides that such a condition operates as a deemed approval by the responsible authority under the town planning scheme of the development which is, in the opinion of the Commission, necessary or desirable for compliance with the condition. Of course, the conditions of subdivision may impose some restriction on when roadworks may be carried out. For example, there may be a requirement that plans of the proposed roadworks be

- approved by the local government before they are implemented.
- 19 *Soil and Land Conservation Act 1945* (WA), s 32(1), 4.
- 20 EPA, *Environmental Protection of Native Vegetation in Western Australia: Native Vegetation Clearing in Western Australia, with Particular Reference to the Agricultural Area (Position Statement No. 2)*, December 2000.
- 21 *Environmental Protection Act 1986* (WA) s 45.
- 22 Above, n 15.
- 23 See generally ANZECC, *National Framework for the Management and Monitoring of Australia's Native Vegetation*, 26-31; Young et al., *Reimbursing the Future: an evaluation of motivational, voluntary, price-based, property-right, and regulatory incentives for the conservation of biodiversity* (Environment Australia, 1996). ♦

Security for costs revisited

Melville v Craig Nowlan & Associates Pty Ltd & Anor [2002] NSWCA 32

Debbie Phillips, Volunteer, EDO NSW

Background

This was an appeal from a decision in the Land and Environment Court of Cowdrey J granting an order for security for costs in proceedings brought against the Respondents under s123(1) of the *Environment Planning and Assessment Act 1979* (NSW) (*EPA Act*). (See “Security for costs – a worrying trend? 64 Impact December 2001 p13). The Claimant claimed that the First Respondent’s development did not comply with the Local Environment Plan and therefore the consent of the Second Respondent, Maclean Shire Council, was invalid.

The First Respondent sought security for costs against the claimant in interlocutory proceedings. Under s69(3) of the *Land and Environment Court Act 1979* (NSW) (*LEC Act*):

“the Court may order a party instituting proceedings in the Court to give security for the payment of costs that may be awarded against the party.”

It was agreed by the parties that the claimant was an impecunious natural person. It was also agreed that the case was regularly commenced, that it was arguable, and that the proceedings were not vexatious or an abuse of process.

Decision

The Court of Appeal in a 2/1 decision dismissed the appeal and granted the security for costs order.

The three justices, Heydon JA, Young CJ in Equity and Stein JA found that the primary judge had made errors of law giving relevance to the prospects

of success of the matter and in equating security of costs with costs in general in making the order. They determined that the discretion to grant the order should be re-exercised.

Heydon JA and Young CJ in Eq in re-exercising the discretion found that the factors in favour of granting a security for costs order outweighed those against and they granted the order. The leading judgment was delivered by Heydon JA.

Stein JA, in re-exercising the discretion, did not grant the order and stated, “When the factors relevant to the discretion are examined, I am firmly of the opinion that the application for the security of costs should be refused.”

While all three judges agreed that the broad general wording of s69(3) of the *LEC Act* should not be read down so that an order for costs can never be made against an impecunious person, the reasoning behind the findings in the leading judgment and that of Stein JA were completely at odds.

Stein JA gave great weight to the impecuniosity of the Claimant as a factor in refusing the order as the Claimant being unable to meet the security would be effectively barred from proceeding. This accords with the basic rule that poverty should not be a bar to litigation. He also stressed that the context of the action in the Land and Environment Court under the broad open standing provisions of the *EPA Act* should be taken into account.

On the other hand, in the leading majority judgment, Heydon JA states that impecuniosity is a factor in favour of granting the order because the Respondent could be materially

damaged should the claim fail and the Respondent be unable to recover costs from the impecunious Claimant.

Other factors which supported the granting of the order in the view of the majority were the fact that the Claimant does not live adjacent to the property, the sum ordered by the primary judge is relatively low and that the Claimant has not shown that the order would terminate the litigation. Stein JA specifically disagreed with this last point. The fact that someone else may be able to take up the matter was irrelevant in his view.

Heydon J examined in depth the relationship between the “general” or “basic” rule as expressed in *Harpur v Ariadne Australia Ltd* 1[1984]2 Qd R 523 that “the law required the defendant to accept the risk that the plaintiff might not be able to satisfy the order as to costs” and various statutory prescriptions in similar broad terms to s69(3) of the *LEC Act*. These provisions are found in s56 of the *Federal Court of Australia Act 1976* (Cth) (*FCA Act*) and s77S(1) of the *Judiciary Act 1903* (Cth). He did not find that the matter had been finally concluded. Despite the broad terms of the sections, he did not find that the basic rule has been overruled by these provisions in these statutes. He set out various statements made by the Federal Court of Australia that the basic rule survives despite the general language of s56 of the *FCA Act* in particular. He then pointed out that these statements did not explain how the rule survived, and were merely dicta in any case.

Heydon JA also stated that litigation under s123 of the *EPA Act* is different

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Animal activism trumps corporate privacy

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2201] HCA 63

Steven Wawrzonek, volunteer, EDO NSW

A recent decision by the High Court has overturned an interlocutory injunction imposed against the Australian Broadcasting Corporation (ABC). The injunction prevented the broadcasting of video footage showing the internal operations of Lenah Game Meats Pty Ltd (Lenah), a possum slaughtering abattoir in Tasmania that was filmed illegally by unknown trespassers. The decision was a positive outcome for animal rights activists. It also has implications for parties who possess information with a public interest value where the method of obtaining that information involved illegal behaviour.

Facts

Prior to March 1998 someone unknown to Lenah broke into and entered their premises and installed video cameras with audio recording facilities. This equipment was used to collect footage about aspects of the brush tail possum processing operations, in particular the stunning and killing of possums. Someone also entered the premises and retrieved the videotapes. The tapes were given to Animal Liberation Ltd, an organisation that lobbies against all forms of cruelty to animals, who in turn gave the ABC a 10 minute video tape, that showed Lenah's operations. Lenah alleged that it was the intention of the ABC to incorporate excerpts of this video in the programme known as the "7.30 Report."

Lenah sought an injunction against the ABC but was unsuccessful. In the Tasmanian Supreme Court Underwood J found that an injunction was not supported by a cause of action against the ABC, particularly given that "there [was] no evidence to suggest that either [the ABC] or [Animal Libera-

tion]... were the trespassers." Lenah successfully appealed to the Full Court of the Tasmanian Supreme Court. A majority granted an injunction because "an injunction is not dependent upon the existence of an enforceable cause of action by [Lenah] against the [ABC]," and was valid on the basis of "unconscionable conduct," in terms of the ABC showing a video that had been gained illegally. The matter then went to the High Court.

Arguments of Lenah

To support the imposition of an injunction against the ABC, Lenah argued that:

- (1) There is an enforceable cause of action against the ABC for an invasion of privacy, which is a developing tort;
- (2) Even if there is no enforceable cause of action against the ABC, an interlocutory injunction operates at large on the basis of "unconscionable conduct."

Arguments of the ABC

The ABC resisted the injunction by arguing that:

- (1) It is inappropriate to consider whether the common law of Australia recognises an action to protect privacy, because "privacy" is not a "right" enjoyed by corporations;
- (2) Granting an injunction on the basis of "unconscionable conduct" must be based on an enforceable cause of action in law or equity;
- (3) The Tasmanian Supreme Court did not properly consider the effect of the constitutional protection of the freedom to disseminate information respecting government and political matters which was identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Decision of the High Court

By a majority of 5:1, Callinan J dissenting, the High Court set aside the injunction. Although the reasoning of all the judges in this case was different, Gummow and Hayne JJ submitted a joint judgement that Gaudron J and Gleeson CJ substantively agreed with.

The majority accepted the ABC's argument that it was an inappropriate circumstance to consider the status of the right to privacy in the common law of Australia. The main reason for this reluctance was based on the fact that Lenah was a corporation. The majority did not exclude the existence of the right but favoured the approach taken in the US, which excludes the right to privacy for corporations and commercial activities.

Apart from Kirby J, the judgements of the majority found that the presence of an enforceable cause of action is essential to the grant of an interlocutory injunction, and that the "unconscionable conduct" basis for granting an injunction is constrained by this requirement. The fact that the ABC had nothing to do with the trespass into Lenah's property, and that the invasion of privacy right was excluded by the court, meant that Lenah had no cause of action, and consequently was not entitled to an injunction.

Out of the majority only Kirby J considered the effect of the constitutional freedom of communication as expressed in *Lange*. He thought that the video footage attracted the constitutional freedom. Although the freedom in *Lange* did not take away the power to grant an injunction, it did control the exercise of it. Kirby J allowed the ABC's appeal on the basis that the majority of the Full Court of

the Tasmanian Supreme Court did not give the freedom appropriate weight.

Implications of the decision

It is significant to note that the *Lenah* decision does not mean that everyone is able to communicate material gathered as a result of illegal behaviour. The decision will only apply where the person communicating the material has done nothing actionable in law, including conspiracy, breach of confidence or copyright infringement. Although, in this case, the ABC did not breach the right to privacy, as the video concerned a commercial matter, the outcome would have been different if the dignity of a natural person was at stake. The decision offers a limited opportunity for activist groups to have public interest material communicated by a third party, even if it was collected illegally. ♦

from p 13

Security for costs revisited cont.

to other litigation because there are a very large number of potential litigants. Thus, in his view, impecunious plaintiffs can be replaced by others with funds. Stein JA disagreed with this opinion. He stated “the reasoning of [Heydon JA] may be seen to support the retention of the rule to s123 proceedings and the like.”

In his concluding remarks to his short judgment, Young CJ compared an impecunious Claimant with fictional penniless characters from Dickens who hired themselves out as plaintiffs. He finds that the imposition of a Security for Costs Order “avoids the same sort of procedural farce as Dickens and others criticised in the early 19th century”. ♦

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Environmental rights cont

¹² *M C Mehta v Union of India* (1988) 1 SCC 471 p 491.

¹³ Anderson M, Note 65 p216.

¹⁴ Reflecting the substantial powers the Supreme Court has, the Court ordered the central government to establish an authority to regulate the tanneries and other polluting industries in the State of Tamil Nadu.

¹⁵ AIR 1996 SC 2715 at p2720. The court further held that the precautionary principle and the polluter pays principle are ‘accepted as part of the law of the land’.

¹⁶ Anderson M, Note 65 p27.

¹⁷ Provisional Constitutional Order No 1 of 1999 places the Constitution of Pakistan in abeyance but provides that the fundamental rights in Chapter 1 Part II, which include the right to life, continue where these are not in conflict with the Proclamation of the Emergency.

¹⁸ A number of cases in which an environmental right to a healthy environment are discussed by Lau M, “Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan” in Boyle A & Anderson M, (Eds) *Human Rights Approaches to Environmental Protection*. (Oxford: Clarendon Press 1996)

¹⁹ Lau M, Note 77 p296. See also Zafar SA, Hassan J. Pakistan, “Environmental Law” (1995) 1(2)*Middle East Commercial Law Review* pp10-11.

²⁰ Indian caselaw cited included *Rural Litigation & Entitlement Kendera and others v State of U.P. and others* (AIR 1985 SC 847), *M.C. Mehta v Union of India* (AIR 1988 S.C. 1115), *M.C.Mehta v Union of India* (AIR 1988 S.C. 1037)

²¹ Lau M, Note 787 p299.

²² Judge Afrasiab “Country Presentation-Pakistan” in D Kaniaru, ed. *Report of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development*. (Colombo: SACEP UNEP NORAD, 1997) pp99-104.

²³ As above.

²⁴ For discussion see Lane P H, *An Introduction to the Australian Constitution*. (Sydney: Law Book Company Ltd 1987) pp 191-202.

²⁵ Section 51(xxix) *Constitution of Australia*; the Australian Parliament can make laws with respect to external affairs.

²⁶ A High Court of Australia decision has potentially expanded the impact of international law on Australian domestic law. See *Minister for Immigration v Teoh* (1995) 183 CLR 273. ♦

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♦ Elisa Nichols, solicitor, has left EDO Qld and joined EDO NSW

♦ Jeff Smith is the new Policy Director at EDO NSW

♦ Jo Bragg has returned from leave to EDO Qld and Larissa Waters joins her as the second solicitor

♦ Chris Norton has resigned as Senior Solicitor at EDO NSW and is now at the Bar

♦ Mark Douglas has resigned as solicitor at EDO ACT

♦ Michael Bennett from EDO WA has taken leave for six months and is being replaced by Lee McIntosh

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