# IMPACT

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## Environmental victory over cotton farm


Chris Norton, Barrister


On 8 March 2002, the Land and Environment Court upheld an appeal by environmentalist Bruce Wilson, represented by the EDO and barrister Patrick Larkin, against a development consent for a large irrigated cotton development on the Barwon-Darling River. The Court replaced the consent issued by Bourke Shire Council with a new consent containing extensive conditions aimed at ensuring the cotton development operates in a sustainable manner.

### Background

The property 'Beemery' lies between Bourke and Brewarrina in North-Western NSW, on the southern side of the Barwon-Darling River. The property is large - 35,320 ha - and is owned by Clyde Agriculture Ltd (**Clyde**), an Australian company that owns many other agriculture concerns throughout the country, and which is part of the international Swire group of companies. Until recently, 'Beemery' was used primarily for grazing sheep and cattle, with a small area under irrigation.

On 1 May 1996, Clyde's consultants lodged a development application with Bourke Shire Council (**the Council**) to construct two above-ground water storages on 'Beemery', with a combined total volume of 21,000ML. The water storages were to be part of an irrigated cotton development, which was proposed to cover some 4,900 ha. Under the planning laws at that time, only the water storages required development consent.

Because of their size, the water storages fell within the definition of "artificial waterbodies" in Sch 3 of the *Environmental Planning and Assessment Regulation 1994* **(EP&A Regulation**). This meant that the water storages were 'designated development' – that is, a type of development which, because of its potential for widespread environmental impact, requires a special level of assessment. Some of the provisions for the proposal being 'designated development' were as follows:

- an Environmental Impact Statement **(EIS**) had to be prepared for the development;
- the development application had to be publicly advertised and submissions invited; and
- if the Council granted development consent, any person who had objected to consent being granted had a right to appeal to the Land and Environment Court against the merits of the Council's decision.

A number of objections were lodged during the submission period, including a submission written by Bruce Wilson on behalf of the Gurrungar Environment Group, a local unincorporated association.

Determination of the development application took a long time, due in part to a number of concerns being raised by various government departments about the proposed development, including the Department of Land and Water Conservation (**DLWC**), National Parks and Wildlife Service and Environment Protection

Authority. Ultimately, Clyde's consultants amended the development application and lodged a supplementary EIS. The supplementary EIS described the modified development as including:

◆ 1,820 ha of flood irrigated cotton paddocks, of which 1,215 ha would be sown annually (a reduction of around 60%); and
◆ a single two-cell above ground 10,800ML water storage (a reduction of almost 50%).

A new Local Environmental Plan for Bourke, covering most of the development site on "Beemery", came into force in December 1998. Under that plan, development for the purpose of both water storage and irrigated agriculture required development consent.

The Council finally granted consent to the development in early May 1999. It notified Clyde's consultants, but, in breach of the *EP&A Regulation*, it did not notify objectors at that time. The notice to objectors ultimately sent out to objectors was dated 13 May 2000.

## Environmental concerns

The development was situated on the Barwon-Darling River, which is significantly impacted upon by overextraction of water and salinity from rising water tables. The section of the river on which 'Beemery' is situated was the subject of an embargo on the grant of new water entitlements under s 22BA of the *Water Act 1912*; however, Clyde arranged to transfer some of their entitlement to take water from another property, 'Rumleigh', upstream from 'Beemery', that was not being used. Accordingly, while there was no increase in the amount of water Clyde was allowed to take overall, they were activating a 'sleeper' entitlement, with the potential for loss of water from downstream areas.

The water storage itself was to be constructed of unlined compacted earth, and irrigation was to take place through soil furrows. Accordingly, water would be lost through the soil that would drain down to the water table, both increasing the salinity level of the table, affecting the amount of salt in surface soils, and raising the groundwater level.

Clyde's hydrological consultant predicted that it should be possible to operate the development for at least 50 years without raising the groundwater table above 5m below the surface. However, an expert hydrologist from the CSIRO engaged by Mr Wilson, Dr Shahbaz Khan considered that conservative levels had been used for the rate at which water would drain through the soil. Dr Khan considered that the area below the reservoir would become saturated in 2-7 years, and a groundwater mound would build and start moving laterally after 5-7 years. He considered the proposed monitoring network was inadequate; and that irrigation should cease if the watertable came within 5m of the surface.

Another CSIRO consultant, Dr Wayne Meyer, predicted that the rate of soil degradation could be much faster than forecast by Clyde's consultants. He expected that the watertable could rise at a rate of 0.5m per year, and that crop yields were likely to decline, perhaps by as much as 32% over 20 years. Dr Meyer recommended that Clyde should be required to keep detailed records of agricultural practices so that steps could be taken to reduce deterioration of the soil where appropriate.

Mr Wilson also submitted evidence from noted wetland ecologist Dr Richard Kingsford, who was of the opinion that the Barwon-Darling River system contains significant areas of wetlands suspectible to small changes in river flow. The development would place further stress on downstream areas by reducing water flow and increasing riverine salinity. The development would further increase annual extraction of water above the 1993/1994 levels of extraction, which is the level used to determine the Murray Darling Basin Cap (a level of extraction which the Murray-Darling Basin Agreement considers should not be exceeded). Dr Kingsford stated that the EIS failed to consider cumulative impacts on river ecology.

The consent was subject to 12 conditions, which were very general in nature and most of which were standard conditions that would have been applied to any development. No conditions dealt with the amount of water to be used by the development, or methods for managing the draining of water through the soil and into the water table, although there was a general condition requiring preparation of a Risk Analysis and Risk Management Plan. There was no provision for re-evaluation of the development after a period of time to see whether targets were being achieved, no time limit was placed on the development, and there were no obligations to remediate the development site once irrigation ceased.

DLWC had placed some conditions on the water licences limiting the amount of water that Clyde could take under various conditions, and imposing monitoring requirements. However, the water licences only lasted five years. It was possible that when the licences came up for renewal, those conditions may have changed. There was also a provision in the licences allowing Clyde to get approval from DLWC to take more water without the need for an environmental impact assessment.

## Mr Wilson's court case

Given the potential environmental harm of the development, and the failure of the Council to impose conditions to manage the potential harm, the Gurrungar Environment Group decided to appeal against the Council's decision to the Land and Environment Court. Since the Group was not incorporated, and so was not legally recognised, Mr Wilson had to bring the appeal in his own name. In cases of this nature, the Court stands in the same position as the Council, and makes its own decision on whether development consent should be granted. During the case, it is possible to bring new evidence that was not before the Council.

Mr Wilson filed statements from four experts with the Court. As well as statements from Drs Meyer, Khan and Kingsford, he submitted a statement by former town planner Paul Mitchell, who assessed the development against a series of sustainability indicators on the basis of the other experts' opinions and came to the conclusion that the development did not meet a number of those indicators.

## Attempts to restrict the court case

After Mr Wilson had filed his statements, Clyde and the Council tried numerous tactics to limit Mr Wilson's case. One of these was seeking an order from the Court that it only consider the impact of the actual water storages, and not the irrigated agriculture component of the development. Another was seeking to stop Mr Wilson from raising the issue of the impact of extraction of water from the river, on the basis that that had been considered when the water licences were granted.

Both of these attempts were unsuccessful. However, they did have the long-term beneficial effect of establishing that where a person objects to a development that contains some components which are designated development and other components which are not designated development, that person's right to appeal against a development consent granted to the whole development extends to all parts of the development, including the non-designated component.[1]

## A settlement is reached

As part of the court procedure, Mr Wilson was required to provide the Court with a set of draft conditions. These were conditions which Mr Wilson said the Court should impose if the Court decided to grant consent to the development, in order to manage the environmental impacts. An extensive set of conditions was submitted to the Court which went far beyond the Council's original conditions in imposing environmental safeguards.

Clyde ultimately agreed to accept nearly all of the conditions which Mr Wilson had suggested. The Council also agreed to the compromise.

The conditions agreed to deal with the following key areas:

◆ Imposing long-term constraints on the amount of water that can be extracted for the purposes of the development, so that it can never exceed the amounts specified under the current water licences.

◆ Preventing the use of atrazine or its derivatives.

◆ Requiring extensive soil sampling and monitoring in accordance with a Soil Management Plan.

◆ Requiring installation of an expanded network of piezometers, to measure the level of the water table and the progress of groundwater towards the river.

◆ Requiring a risk management plan to be prepared, incorporating a strict regime of monitoring of soil conditions, water use and groundwater impacts; and reducing the duration of irrigation periods.

◆ Shutting down the development and requiring remedial measures to be taken if the water table rises to environmentally important trigger points.

◆ Imposing remediation requirements once the irrigated agriculture use ceases.

◆ Requiring the consent holder to give a bond of $500,000 to the Minister for Land and Water Conservation, which can be used to remediate the property if the consent holder does not fulfil its remediaton obligations.

On 8 March 2002, with the agreement of all parties, the Court upheld Mr Wilson's appeal and imposed the new conditions on the development. Mr Wilson's battle, which had begun in 1996 when the development consent was first lodged, was finally over.

## Impact of Mr Wilson's court case

This case depended on the merits and impacts of the 'Beemery' development. Strictly speaking, it does not set a legal precedent, requiring all other similar irrigated cotton developments to be subject to similar conditions. However, the case is still important as it demonstrates the manner in which the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) allows individuals to

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# Where's Wally?

## The EPBC Act and its impact on local government

Jeff Smith, Director, EDO NSW

## Introduction

The *Environment Protection and Biodiversity Conservation Act 1999 Cth* (**EPBC Act**) has now been in operation for nearly two years (it commenced on 16 July 2000). It has the potential to radically recast Commonwealth, State and local Government responsibilities in relation to the environment and usher in a new era of environmental management. Despite this, the Act remains largely silent on the question of how local government fits into the schema, with the Commonwealth apparently keen to downplay its role.

The present situation regarding the role of local government thus mirrors a "Where's Wally" cartoon: everyone knows it's there, but we still need to find it. This brief paper sketches some of the possible impacts of the Commonwealth laws on local government . The impacts are assessed in terms of the different hats that Councils variously wear – developer, decision-maker, land use planner and as part of the community.

## Old regime

Of course, it is well to remember that projects may predate the existing legislation. In this respect, additional savings and transitional provisions were recently inserted into the Act. A proponent does not need EPBC Act approval for actions which already have approval prior to the new laws coming into force, or if the action is a lawful continuation of a use that was occurring immediately before the commencement of the Act (ss 43A and 43B).[1]

## Council as proponent

The obligations of proponents under the new laws are manifold and are not discussed in detail here. The Environment Australia website (www.environment.gov.au/epbc) provides a great deal of useful information.

However, three aspects of the new Act deserve special mention.

First, it is a feature of the new assessment provisions that the Commonwealth Environment Minister must only consider impacts in relation to the particular "matter of national environmental significance" (**MNES**) that triggered the Environmental Impact Assessment (**EIA**) process in choosing the appropriate level of assessment and deciding whether to approve the activity (ss 82, 85, 136). By virtue of this partial trigger, proponents thus need only prepare their assessments in relation to these "relevant impacts" – for example, World Heritage, wetlands, threatened species. In certain circumstances, the appropriate State Minister can seek a broadening of the impacts assessed (s 97(3), 102(3), 107(3)). This is in contrast to the previous regime – and, indeed, the position under NSW legislation – whereby assessment was (is) not restricted to the class of environmental impacts which operated as the trigger.

Second, another significant change that is evident regarding the assessment and approval provisions is the powers given to the Minister regarding enforcement of approvals. These powers have the potential to promote the legitimacy and transparency of Environmental Impact Assessment (**EIA**). In particular, the following should be noted:

◆ the Minister may revoke EIA approvals where information was inaccurate because of negligence or a deliberate act or omission by the proponent (s 145(2A)); and
◆ false and misleading EIA information is linked to a Ministerial power to remedy environmental damage at the proponent's expense (s 499(3)).

Finally, it is worth noting that the new laws borrow from the concept of a "fit and proper person" – used under NSW pollution laws – in framing decisions about approvals. Section 136(4) provides:

"In deciding whether or not to approve the taking of an action by a person, and what conditions to attach to an approval, the Minister may consider whether the person is a suitable person to be granted an approval, having regard to the person's history in relation to environmental matters."

Such a provision is wide enough to capture a body corporate (such as a Council) within its terms.[2]

## Council as consent authority

Not surprisingly, perhaps, one of the frequently asked questions on the Environment Australia website is: "Does local government have to refer proposals?"

The website states that:

> "The responsibility for referring an action to the Commonwealth Environment Minister lies with the person proposing to take that action. A local government is only obliged to refer an action that the local government itself proposes

to take. It is not responsible for referring the actions of other proponents."

Indeed, under the Act, the only duty is on the proponent. Otherwise, there seems to only be a discretion vested in the following:

- the Minister (to "call-in" a matter)
- a State to refer
- State agency to refer
- Commonwealth agency to refer

(see ss 68-71).

The question remains whether a Council *may* refer an action under section 69 (thus forcing the Minister to accept a referral and make a decision: ss 72, 75). More specifically, is the Council a State agency (s 528)?

Advice on these precise questions obtained in a Queensland context would suggest so (on both counts).[3] Without going into detail, the advice examines the definition of agency under the Act and, in particular, its meaning as "a body corporate established for a public purpose by a law of the State". It concludes that Queensland local councils are thus indeed State agencies with powers of referral. The position in NSW would seem to be the same and it is likely to be so in other States.[4]

Notwithstanding the above, the Commonwealth has stated that it will only deal with the State Government and not local councils in implementing the Act. Section 130 is a manifestation of this intent. It requires the State Government to certify it has assessed all other impacts of an action (above and beyond the assessment on MNES) before the Commonwealth can grant an approval (see, in particular, s 130(1B)(b) and (1C)). In formal legal terms, local council assessment is discounted.

## Council as the public

The structure of the Act arguably means that the Commonwealth is very reliant on others - the States, local government and the community - to monitor its effective implementation. The legislation does provide the usual opportunities to participate in protecting the environment – making submissions, nominating threatened species, ecological communities or key threatening processes – and Councils can obviously engage in such processes. Additionally, a couple of features are worth noting.

First, the legislation is complemented by a very extensive website run by Environment Australia, which has legislative backing (see s 170A). The website provides a great deal of information about the legislation and, importantly, about developments in relation to the legislation (such as referrals). Functions such as the Interactive Map (allowing for tracking of proposals) and online interviews (to apply for a permit or referral application) allow the public to readily use the new legislation. The website is at www.environment.gov.au/epbc.

Second, some provisions under the Act facilitate or at least feed into participatory processes. For example, as noted above, "matters of national environmental significance" can be expanded by regulation *without* the agreement of the States, and must be reviewed every five years to see whether further triggers should be added (but not deleted). These provisions give considerable scope for the addition of further triggers over time, and for the public (and active Councils) to lobby for the inclusion of those triggers.

Third, the Act establishes a public consultation register in relation to licences to take or kill threatened species on Commonwealth land. Any person or organisation can apply to be placed on the Register. People can ask to be notified about permit applications for listed threatened species, ecological communities, listed migratory species, cetaceans and listed marine species. Persons or bodies listed on the Register may make written submissions in response to permit applications, which must be considered in determining whether a permit should be issued.

## Council as land use planner

Despite the new Commonwealth law, the Commonwealth's direct regulatory role will continue to be limited for land use planning matters. However, the new laws have the potential to have significant implications for land use planning over time. The speed and efficiency of this process will depend on the extent to which Councils engage in the process of integrating the EPBC Act and its implications into their land use planning regime. For example, Councils should arguably be overlaying MNES considerations into their plans. This would potentially mean that developments affecting MNES would either not be permitted under local and state planning instruments in the first instance, or be subjected to more rigorous environmental assessment.

## Bilateral agreements

In an attempt to minimise duplication between Federal and State processes in the environmental assessment and approval process, the EPBC Act permits the Commonwealth to delegate its EIA powers to the States by entering into bilateral agreements with each State (Chapter 3 - Part 5). These may be of two types – approval and assessment. Only assessment bilaterals are on the negotiating table at present, with Tasmania the only State to have signed an agreement with the Commonwealth. Otherwise, draft bilateral agreements on assessment

are on the Environment Australia website with the proviso: "This draft bilateral agreement is not endorsed by the State of….".

Relevant matters (that is, actions which have, will have or are likely to have significant impacts on a MNES) must therefore be referred to the Commonwealth. As a practical matter, a referral should be done prior to seeking State approvals.

PlanningNSW has produced a guide in relation to the sorts of changes likely in the event an assessment bilateral is successfully negotiated.[5] The NSW Local Government and Shires Associations has made representations to the State Government regarding, in particular, the duplication that exists in the absence of a signed agreement.

## Ancillary Impacts

The bedding down of the EPBC Act and its operational tentacles reveals what could be described as a number of "second-order" impacts. For example, the Biological Diversity Advisory Committee (**BDAC**) was established under the EPBC Act as a Ministerial advisory body.[6] To this end, the Committee provided advice to the Minister on means of promoting biodiversity conservation to local government. A program of activities was identified to develop a biodiversity conservation "toolkit", which was designed to provide practical support for local councils to implement the National Local Government Biodiversity Strategy (adopted by the Australian Local Government Association in 1998).

## Future developments

The implementation of the legislation – at least in some respects - seems to possess a degree of dynamism. As noted above, it is relatively easy for further triggers to be added over time. The Commonwealth has signalled an intention to add National and Commonwealth Heritage as a MNES and has also released a Discussion Paper on a greenhouse trigger. The addition of land clearing was a Labor election commitment while environmental groups having been arguing for an "unsustainable water use" trigger.[7] Likewise, key threatening processes have almost doubled since the inception of the Act (where six were inherited from the previous regime). Councils will need to ensure they continually apprise themselves of these developments.

## Conclusion

The EPBC Act contains a completely new role for environmental assessment and approval by the Federal Government. The Federal Government may now regulate many land use decisions previously in the domain of State governments in whole or in part where a matter of national environmental significance is triggered. This brief paper has sought to tease out some of the ways that the new laws impact on local government, whose role and status under the legislation has been unclear. One thing does seem clear: until bilateral agreements are signed, the intent under the Act to reduce duplication will not be realised.

### ENDNOTES

1 Continuation does not include enlargement, expansion or intensification, for which approval would be required.

2 See s 22 of the *Acts Interpretation Act 1901* (Cth)

3 Advice of 6 April 2001 kindly supplied by Chris McGrath, Barrister-at-Law with the consent of WWF.

4 Councils in NSW are bodies corporate (s 220) established by a law of the State (*Local Government Act 1993 (NSW)*). Their Charter (s 8), amongst other things, would also suggest they are established for a public purpose.

5 "Commonwealth Environment Protection and Biodiversity Conservation Act: Guide to Implementation in NSW" (available on their website at http://www.duap.nsw.gov.au/).

6 As noted on the website, relevant objects of the EPBC Act include "to promote the conservation of biodiversity" and "to assist in the cooperative implementation of Australia's international environmental responsibilities", which include those arising from Australia's ratification of the Convention on Biological Diversity in 1992.

7 Noted in Bateman B (2001) " The Environment Protection and Biodiversity Conservation Act: A Progress Report" found at http://www.claytonutz.com.au/environment/ under *General Publications*.

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# The Collingwood Bay case

## Protection of the environment and indigenous rights in PNG

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In Papua New Guinea, (**PNG**) the preservation of the environment is linked to the preservation of traditional culture. At the same time, however, the desire for the nation to progress economically and improve the living standards of its people has led to exploitation of PNG's resources in ways that are both environmentally and culturally damaging. These issues have an impact upon the exercise of several fundamental indigenous rights by the customary landholders of PNG, including the right of self-determination.

The right of self-determination includes the right of a people to have control over their natural resources and to determine the appropriate ways of preserving and protecting their culture and way of life. In order for this to operate in a meaningful way, the group must be fully informed in all steps of a decision making process and have final determination in the process. This right can be subverted by a failure, deliberate or otherwise, to provide full information, misrepresentation of facts and through excluding the people from the process altogether.

In PNG, a complex legal system exists for the registration of title and recognition of the interests of customary landowners. The complexity of this system, along with internal governmental problems, including corruption and lack of resources, means that the rights of the customary landowners are often abused.

Increasingly, litigation in PNG is being explored as a tool for protecting indigenous rights and the environment. Recently, in the case of *Ifoki and Ors v The Independent State of PNG and Ors* OS 313 and 556 of 1999 (**the Collingwood Bay case**), the Maisin people of Collingwood Bay in PNG gained a victory which recognises their self-determination over their customary lands and protects 38,000 hectares of rainforest from destruction for the planting of oil palm trees.

## Background law

In Papua New Guinea, a Torrens system of conveyance operates by virtue of the *Land Registration Act 1981*.[1] This Act provides that the title of a registered proprietor is not affected even if prior to registration he or she had actual or constructive notice of unregistered claims, except in the case of fraud.[2] In other words, the title is indefeasible. This is a basic principle of the Torrens system which operates to ensure certainty of title. In the Papua New Guinean context, however, this system on its own does not take into account customary land interests.

Under the *Land Act 1996*, all land is vested in the State other than customary land.[3] Any estates, rights, titles or interests in land, other than customary interests, are held under the State.[4] Approximately 97% of land in PNG is customarily owned and most of this stands outside the title registration system. It is possible to register customary indigenous rights under the PNG Torrens system through a lease/lease back scheme where the customary landowners lease the land to the State and the State leases it back.

Under the *Land Act*, the Minister may lease customary lands for the purposes of granting a Special Agricultural and Business Lease.[5] Any customary land acquired in such a way must be in accordance with s.10 of the *Land Act* which requires the Minister to make reasonable inquiry as to who the customary landowners are and whether the land is required or is likely to be required by the customary landowners. However, if customary land is acquired for the purposes of granting a Special Agricultural or Business Lease, the instrument of the lease executed by the customary landowners is conclusive evidence that the State has good title to the lease. This allows any third parties dealing with that land by virtue of State lease to rely on the lease without going behind it. These leases can then be registered under the *Land Registration Act*.

One difficulty of dealing with customary land is the fact that customary land is generally held collectively rather than by individuals. To deal with this issue, the *Land Groups Incorporation Act* (Chp 147) was enacted which allows the creation and registration of incorporated land groups (**ILG**). An ILG is a group or part of a group of customary landowners who are bound by relevant custom. In this way, the ILG stands as a recognisable entity for dealing with the government and other business. Unlike the *Land Act* neither the *Land Registration Act* nor the *Land Groups Incorporation Act* requires any investigations into other customary interests that may exist in relation to the subject land. The *Land Groups Incorporation Act* proscribes a process for advertisement of applications and submissions in relation to them, but in a country with high levels of illiteracy and difficulties in communication due to isolation, this process is often rendered meaningless. Therefore, the existence of a registered ILG is not a guarantee that this group has power to

have dealings with the land.

## The Collingwood Bay case

### Facts

On 6 January 1998, the State of PNG acquired an interest in the customary lands of the Maisin people in Collingwood Bay for the purposes of granting a Special Agricultural and Business Lease. It was alleged that the Lease/Lease Back Deeds (**the Deeds**) were not signed by the customary landowners for the area. There was no evidence that any investigations were made into whether or not all customary owners signed the Deeds. There were also no investigations into whether any customary owners may require the land either now or in the future. In failing to make the required investigations under s.10 of the *Land Act*, the State of PNG denied the majority of the Maisin people their right to self-determination over their natural resources. This effectively allowed dealings with the land's natural resources without any consideration of rights and views of the customary owners.

On the same day, the State of PNG granted two Special Agricultural and Business Leases (**the Leases**) to Keroro Development Corporation Pty Ltd. Keroro is a registered ILG consisting of two brothers who are customary landowners in the Collingwood Bay region. These Leases were registered on the title. The Leases required that the land be used for 'bona fide agricultural or business purposes'.

It was alleged that prior to the grant of the Leases, Keroro entered into an agreement with Deegold (PNG) Ltd, a Malaysian logging company, to clearfell 38,000 hectares for the planting of oil palm trees. Oil palm is one of PNG's chief exports. The Papua New Guinea Forest Authority then granted Timber Authorities to Deegold. The Forest Authority granted the Timber Authorities on the basis of the agreement between Deegold and Keroro and the registered title which indicated that Keroro had a valid lease over that land and could deal with it accordingly. These circumstances allowed the rights of the majority of the customary owners to be ignored. These landowners did not want their lands deforested and planted with oil palm but had been excluded from all decision making processes in relation to this by the irregular grant of the leases. The creation of the Deeds and Leases without following procedure under the *Land Act* was at the very least, irregular, and was allegedly induced by fraud.

The first that the majority of the customary landowners, the Maisin people, heard of these dealings with their land was when bulldozers and other logging equipment was landed from barges on their customary lands in Collingwood Bay. Their investigations revealed the circumstances that had led to the existence of Timber Authorities over their lands.

A representative of the Maisin people, who works for Conservation Melanesia, contacted the Environmental Law Centre Ltd (**ELC**) in Port Moresby who launched proceedings on behalf of the customary landowners in the National Court, seeking the following orders:

1. A declaration that the Leases do not vest any interest in the customary lands to the State of PNG or, alternatively, an order that the Deeds be rescinded and set aside;
2. That the Leases be set aside;
3. That the Title be rectified;
4. That the defendants be restrained from entering onto the land or dealing with the forests and forest products on the land.

The plaintiffs consisted of thirty four representatives, mainly the heads of the various clans that make up the Maisin people.

### Results of the Case

The first step in the litigation was to seek interim orders preventing the respondents from entering onto Maisin lands and preventing the landing of any logging equipment on their lands. These orders were granted on the plaintiffs' ex parte application and confirmed at the first inter partes appearances, although an irregularity saw the land unprotected for several months until it could be rectified and brought back to the Court.

Following this, the matter was vigorously defended by Keroro and Deegold who lodged two separate strike out motions on technical grounds. Both were unsuccessful.

Prior to the final hearing in May 2002, legal representatives for Deegold and Keroro contacted ELC to advise that their clients no longer had an interest in the project and would not contest the matter at hearing. Deegold and Keroro agreed to consent orders that both the Deeds and the Leases were void and of no effect and to orders to rectify the title. However, neither defendant would consent to orders restraining them from entering onto or dealing with the plaintiffs' land in the future. Ultimately, this matter was argued before the judge and a ruling was made in favour of the plaintiffs, restraining the defendants from entering onto or dealing with the land and awarding the plaintiffs' costs.

## Conclusions

While this case was not fully heard, it had the effect of awarding self-determination to the Maisin people. It

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# The Clifton Beach Case

## Obstacles for public interest litigation in Queensland

Joanna Cull, Solicitor, EDO Northern Queensland

## Introduction

Late last year, the Environmental Defenders Office of Northern Queensland lodged on behalf of the Cairns and Far North Environment Centre an Application for a Statutory Order of Review under the Judicial Review Act 1991 (Qld) (**JRA**) of decisions made by the Cairns City Council and the Department of Natural Resources and Mines. The decisions were made pursuant to a development application by Amphora Properties Pty Ltd and resulted in the clearing of remnant gallery rainforest, melaleucas and eucalyptus trees, all protected under Cairns City Council Local Law 24. A portion of this clearing occurred in a water feature known as Deadman's Creek, which runs out into the Great Barrier Reef World Heritage Area.

The appeal raised issues about the need for an approval under the *Integrated Planning Act 1997* (Qld), exemptions from the requirement to obtain approval for clearing of vegetation, and considering what constitutes a "watercourse". However, a recent decision of the Supreme Court of Queensland has struck out the appeal, for lack of standing. The article will consider the Court's reasoning on standing, as well as the Court's obiter remark that there is no usefulness in hearing the case because the clearing had already taken place: that is, the issue was "moot".

The matter was heard in the Supreme Court of Queensland by Justice Jones on 25 February 2002, at the same time as an Application by the applicant for an order that each party bear its own costs, irrespective of the outcome of the proceedings.

## Standing

Under the Queensland JRA, only a person aggrieved may make an application for review of the decision.[1] Section 7 of the JRA identifies such a person as one whose interests are, or would be, adversely affected by the decision. In practice this statutory test has been treated as identical to the common law test, which now seems to be whether or not the applicant has a special interest in the subject matter of the application.[2] Where environment groups are concerned, the test involves a consideration of the depth, breadth and longevity of the applicant's involvement with the environment.[3] Often it has been useful to establish a particular connection with the environmental issue in question and with the region/area the subject of the application. The applicant's long involvement in campaigning for conservation in the North Queensland region and in the Cairns area in particular and its engagement on land clearing issues and protection of the Great Barrier Reef was therefore emphasised in submissions.

Standing was contested by the respondents on the grounds that the applicant had failed to show it suffered a grievance beyond that which an ordinary member of the public might suffer or that it had more than a mere intellectual or emotional concern. The respondent distinguished the case law granting standing to conservation organisations on the basis that in those cases, the areas in question were of extraordinarily high conservation value, whereas the site of the Clifton Beach clearing was a small urban area and in the submission of the Second Respondent, of little environmental significance. To quote the Second Respondent, "Clearly Deadman's Gully is no Lake Pedder, Franklin River, nor part of the Wet Tropics Area, nor part of the Great Barrier Reef, nor on the World Heritage List".

In the view of the Environmental Defenders' Office of Northern Queensland, this emphasis on the integrity of the environment the subject of the litigation may be misguided. Whilst it is true that most of the cases where standing has been granted have involved areas of great environmental significance, this is arguably a reflection of the barriers to litigation facing conservation organisations which has historically resulted in their only taking on the most significant of cases, rather than battling environmental damage caused by the cumulative impacts of smaller developments.

However, the Court appears to have given significant consideration to the argument of the Second Respondent. His Honour referred to *Australian Conservation Foundation v Minister for Resources*[4] as authority for the proposition that in every case it is necessary to examine the question of standing of the applicant in light of the issues to be considered. He also referred to Stephen J's comments in *Onus v Alcoa of Australia Limited*[5] that "As the law now stands it seems rather to involve in each case a curial assessment of the importance of the concern which the plaintiff has with the particular subject matter and the closeness of that plaintiff's relationship to that subject matter" (at p. 42) and stated that in light of these authorities attention must be focused upon the subject matter of the litigation, irrespective of the finding that the applicant was a peak body with a

special concern for the environment. Justice Jones then considered the significance of the site the subject of the litigation and concluded that "the cases in which a peak environment group has been found to have standing concern much larger environmental impacts and a more obvious need to press public interest in controlling those impacts. The scope of interest in this small piece of land which is undergoing controlled development must necessarily be very limited…In the end result I am not persuaded that the development will have any long term detriment on the coastal environment or the nearby seas. I can find no basis for the applicant as a peak body to have any particular close relationship with the subject matter of this development, including the impacts on Deadman's Gully."

The Supreme Court's consideration of the environmental significance of the subject matter of the litigation, and the level of the environmental impact on that subject matter, as key factors in determining the existence of the special interest of the applicant is problematic. The decision has significant implications for the capacity of any conservation organisation to review a decision which in isolation may not have substantial environmental impacts but which may be part of a trend in decision making which, over time, could have significant cumulative impacts for an area.

Further, one of the main roles of peak regional conservation organisations such as the Cairns and Far North Environment Centre is to ensure Federal, State and Local Government agencies follow due process in their decision making and enforcement roles. This is a major component of the "public interest" work of conservation organisations. Justice Jones' comment that cases where standing has been granted in the past "concern much larger environmental impacts and a more obvious need to press public interest in controlling those impacts" appears not to take this into account. The precedent set by this aspect of decision has the potential to directly impact upon the already limited ability of conservation organisations to undertake public interest monitoring and enforcement activities.

## Proceedings of no practical effect because clearing has taken place (mootness)

The argument that the application was moot was based on the fact that the consequences arising from the decisions challenged by the applicants had already passed, as the clearing had occurred. It was submitted by the Second Respondent that "For all practicable effects, the decision has long lapsed, and passed into history as a fait accompli. The flora (however exotic) and fauna, as well as the feature itself are no longer extant. Any genuine environmental concerns have been superseded by the completion of permanent works". It was therefore argued that any review of the decisions the subject of the application would serve no practical effect and would be purely hypothetical, theoretical and academic. The long line of authority that the Court will not give advisory opinions was cited.

These arguments were contested by the Applicant on the basis that by setting aside the permit, the Court would open the way for enforcement action, such as remediation under the *Water Resources Act 1989* (Qld) (**WR Act**). It was also submitted that the Court should exercise its discretion to review the decision because of the significant public interest in correcting the mistaken decisions made by the respondents.

Whilst Justice Jones did not have to consider this issue because of his decision as to standing, His Honour did comment that he would have dismissed the proceeding under section 48(1) of the JRA "on the grounds that its proceeding would, in the circumstances, serve no useful purpose". This obiter remark is problematic for the work of conservationists in Northern Queensland. There is a widespread practice in the region of undertaking activities, particularly land clearing, without approval and retrospective approval of such actions occurs frequently. Whilst the decisions of Cairns City Council and the Department of Natural Resources were not retrospective in this case, the precedent set by Justice Jones' ruling that once an activity has occurred there is no purpose in challenging it is regrettable, and may encourage developers to engage in activities without first obtaining approval.

The court's rejection of the plaintiff's argument that the public interest required correction of the decisions of the respondents under review, so as to prevent similar errors occurring in the future, is also disappointing. Justice Jones' obiter comment that "any concerns about future decisions of a similar kind can be appropriately dealt with by persons aggrieved thereby within the framework of appeal and review procedures available" does not give due weight to the need to avoid the environmental damage that could arise from such decisions. In addition it does not give due weight to the limited resources available to conservation organisations, which significantly restricts their ability to participate in the "available" review and appeal processes.

## Costs

The costs application that the Environ-

ment Council bear only its own costs was argued on the basis that the case was a matter of public interest, that the limited assets of the applicant would prevent its undertaking the litigation but for the order and that there was a reasonable basis for review. These arguments were all contested by the Respondents.

The Cairns and Far North Environment Centre was successful in its application as to costs and Justice Jones granted an order pursuant to section 49(1)(c) of the JRA that the applicant bear only its costs of the proceeding. In granting this order he referred to the limited financial resources of the applicant, the public interest nature of the proceedings, the fact that the applicant acted in good faith and that it was reasonable for the applicant to test its right to be heard.

This aspect of the decision has positive implications for the conservation movement and for all public interest litigants. It demonstrates that the Supreme Court of Queensland recognises the financial barriers to litigation faced by public interest litigants.

## Conclusion

The Court's reasoning that standing in public interest matters depends on the environmental significance of the subject matter is questionable. It leads to the untenable conclusion that environmental groups will be unable to challenge unlawful activities on lands, unless the subject lands are stand-alone significant sites such as Lake Pedder or the Franklin River. The Court has not given due weight to the public interest role played by conservation organisations in monitoring decision making and enforcement by government agencies, and ensuring the lawfulness of government, regardless of the environmental significance of its decisions.

It is unreasonable that an environmental or community group should have had to expend its resources in this manner, when the case was taken on purely public interest grounds, there were reasonable grounds for review, and the case was not an abuse of process The Court's decision is not in accordance with the judicial trend towards relaxing the strictness of the standing test (see Stevensen R, v59 Impact, Sept 2000). The decision also highlights to the Queensland Parliament the benefits of open standing provisions, widely used in NSW environmental legislation for instance.

Important issues concerning the administration of the *Integrated Planning Act* 1997 (Qld) and local laws by the Cairns City Council, and the meaning of the term "watercourse" under the *Water Resources Act* 1989 (Qld) and its replacement *Water Act* 2000 (Qld) will not be determined as a result of the decision as to standing. Had the Queensland JRA contained open standing provisions, the resources that were expended in vain in the attempt to obtain standing could have been usefully employed in obtaining a judicial determination of the above substantive issues.

The Court's obiter remarks that the proceedings would have served no useful purpose because the works had already been completed is questionable, given that the Court has powers to order remediation. The implication is that the public might not have an avenue to ensure that government decisions are made in accordance with the law, if the activities have been carried out quickly before an appeal can be brought.

### Endnotes

1 s. 20(1) JRA
2 Taken from *Onus v Alcoa* (1981) 149 CLR 27, 35-6 per Gibbs CJ.
3 *North Coast Environment Council Inc v Minister for Resources* (1994) 127 ALR 617; *Tasmanian Conservation Trust Inc v Minister for Resources* (1994) 55 FCR 516 and *North Queensland Conservation Council Inc v The Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 per Chesterman J.
4 (1989) 19 ALD 70.
5 (1981) 149 CLR 27.

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### Collingwood Bay case

from p8

was acknowledged by the Judge that the plaintiffs were the customary owners of the land and in a position of less power than the government. The order restraining the defendants from entering onto or dealing with the land was essential to ensure the Maisin peoples' rights of self-determination, as it confirmed the rights of the customary owners to regulate dealings with their land and natural resources. This was essential because on the face of the title, these rights had been denied to the majority of the Maisin people. While it was not necessary for a full judgment to be delivered, the case is important as it is one of only a few instances, all in recent years, where customary landowner rights have been upheld in the Courts of PNG. This increasing jurisprudence is indicative of a swing towards the enforcement of the rights of customary landowners which will have a positive impact upon governmental processes and the environment.

### Endnotes

1 All legislation mentioned in this article is Papua New Guinean legislation.
2 s.45 *Land Registration Act (Chp191)*
3 s.4(1) *Land Act 1996*
4 s.4 (2) *Ibid*
5 s.11 *Ibid*

# The Commonwealth and land clearing

Jeff Smith, Director, EDO NSW

This short paper seeks to address two questions relevant to current debates about land clearing, property rights and compensation. In particular, it looks at the question of the potential Commonwealth role in relation to the control of land clearing and, in light of this role, how it might dispense it.

## Commonwealth powers

Under s 51 of the Commonwealth Constitution, the Commonwealth Government has the power to make laws for the peace, order and good government of the Commonwealth with respect to a number of designated matters. These include external affairs (s 51(xxix)), trade and commerce (s 51(i)) and corporations (s 51(xx).

Any Commonwealth legislation in relation to controlling land clearing or modifying property rights at a national level would need to be based on a Constitutional head of power such as the above. For example, the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) relies heavily upon the external affairs power for its Constitutional foundation. The Act purports to implement – through provisions such as s 303BA - a number of international treaties, such as the *Ramsar Convention*, the *Convention on Biological Diversity*, the *World Heritage Convention* and the *Convention on International Trade in Endangered Species*. (It is noted that the *EPBC Act* also relies on other Constitutional heads of power, including the territories power (s 122), the incidental power (s 51(xxxix)), the corporations power (s 51(xx), and the trade and commerce power (s 51(i))).

### External affairs power

The High Court has taken an expansive view of the ambit of the external affairs power following a series of cases in the 1980s: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 (the *Tasmanian Dams* case); *Richardson v Forestry Commission* (1988) 164 CLR 261.

In the *Tasmanian Dams* case, the majority held that a matter may be an external affair on two independent bases: either because it is a matter of international concern, or because it implements a treaty which Australia has ratified. To legislate to control land clearing, therefore, the Commonwealth would have to satisfy this test. On the one hand it could be argued that land clearing legislation and/or modification of property rights was a matter of international concern, for example, by virtue of its implications for climate change.

Alternatively, the Commonwealth could show that its regulatory activity gives effect to an international treaty which Australia has ratified. One such treaty would be the *Convention on Biological Diversity*. This treaty contains provisions relevant to the regulation of land clearing. Article 8 states, inter alia:

Each Contracting Party shall, as far as possible and as appropriate:

(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies;

(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;

(l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities.

Australia could rely on the treaty obligations contained in provisions such as these to regulate land clearing at a Commonwealth level. In any event, the court held in the *Tasmanian Dams* case that, as a matter of principle, a strict obligation is not necessary to bring a matter within the external affairs power. Deane J (at 258-9) noted that it could be sufficient that domestic legislation merely observe the spirit of international agreements.

### Limits on power

Two limits on the external affairs power should be noted. Firstly, legislation promulgated under the external affairs power needs to be proportionate to the subject matter and concerns of the treaty: (*Tasmanian Dams* case per Deane J at 259-60). Furthermore, the treaty must have been entered into for a bona fide purpose and not simply to increase the Commonwealth's legislative power: (*Tasmanian Dams* case per Brennan J at 218-9; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 per Stephen J at 216).

## What can the Commonwealth Government do?

## Land clearing trigger under the EPBC Act

The most obvious approach would be to expand the ambit of the *EPBC Act*. Under the Act, certain "actions" relating to the Commonwealth which are likely to have a significant effect on the environment trigger the need for assessment. These include actions by the Commonwealth inside or outside Australia, actions on Commonwealth land and actions outside Commonwealth land which affect Commonwealth land (see s 26). There are a number of activities that are exempted from the need for approval.

However, actions that are likely to have a significant effect on specified "*matters of national environmental significance*" may also trigger the need for assessment. So far, six matters of national environmental significance have been listed. These are:

- Ramsar wetlands
- listed threatened species and communities
- World Heritage properties
- listed migratory species
- the Commonwealth marine environment
- nuclear actions (including uranium mining)

Matters of national environmental significance can be expanded by regulation *without* the agreement of the States, and must be reviewed every five years to see whether further triggers should be added (but not deleted).

Therefore, a further trigger for land clearance could be added as a matter of national environmental significance by regulation.[1] This would mean that any development proposal which fell within the terms of the trigger would require assessment and approval from the Commonwealth Environment Minister before proceeding.

As with other matters of national environmental significance, administrative guidelines would be developed and published as to how to assess "significant impact".

## Land clearing as a key threatening process

Land clearing has been added as a key threatening process under the EPBC Act. Key threatening processes are processes which threaten the survival, abundance or evolutionary development of a native species or ecological community in that it affects an already listed species, or because it might result in an unlisted species becoming listed (s 188).

Land clearing is one of 11 key threatening processes listed. Unlike recovery plans - which must be put in place when a species is listed as threatened - there is a discretion to put in place a *threat abatement plan* to address key threatening processes. Once in place, a Commonwealth agency must not take any action that contravenes a recovery or threat abatement plan (s268).

The Minister has not prepared a threat abatement plan in relation to land clearing. This course of action is presumably based on the conclusions of the Threatened Species Scientific Committee (**TSSC**) who noted:

"a threat abatement plan would not contribute any additional threat mitigation over and above current initiatives, would involve setting up further consultative working groups (as suggested by the nominator), and would be duplicative of best practice already stated in the National Framework. TSSC therefore consider that a threat abatement plan would not be a feasible, effective or *efficient* way to abate the process at this time".

It is, of course, open to the Minister to prepare such a plan, in the exercise of his discretion. It is suggested that, as a matter of priority, a threat abatement plan should be prepared by the Minister. This would immediately embed land clearing and its impacts within the current EPBC Act.

# Conclusion

This paper has sought to show how the Commonwealth could practically and constructively begin to address the issue of land clearing. In summary, the two main recommendations are to introduce a land clearing trigger into the EPBC Act and to prepare a threat abatement plan for land clearing as a key threatening process. These steps would complement State measures for addressing land clearing and assisting in reversing the decline in the Australian landscape.

### Endnotes

1 A joint submission from a number of environmental groups sought the addition of a land clearance trigger in the following terms — a trigger for the clearing of native vegetation over 100 ha in any two year period, and for the clearing of any area of native vegetation which provides habitat for listed threatened species or ecological communities, or listed critical habitat.



more details on page 15

Environmental victory over cotton farm
from p 3

fight for rigorous environmental controls to be placed on developments where the relevant government authorities fail to do so. In particular, it demonstrates the type of 'best practice' that should be applied to the management of future cotton farm developments to ensure they operate sustainably. Bourke Shire Council is legally required to provide a copy of the agreed conditions to any person who asks for them.

Mr Wilson's case was supported with funding from the NSW Legal Aid Commission, under their system of public interest environmental law grants; and World Wide Fund for Nature (Australia), who recognised the importance of proper regulation of irrigated agriculture industries on the sensitive Barwon-Darling River. The case and its result send an important message to developers, councils and other government agencies that their performance in environmental regulation is being scrutinised. Where a development under consideration is a designated development, concerned members of the public can and will exercise their rights to ensure that environmental impacts are adequately addressed.

## Potential for law reform

The Beemery cotton farm, like many other irrigated agriculture developments, has a limited life span and, in its original form, may have left behind a landscape effectively sterilised by salt once irrigated agriculture concluded. The approval of such a development appears to be contrary to the principles of ecologically sustainable development (**ESD**), especially the principle of inter-generational equity. However, a consent authority is not required to consider the principles of ESD before granting development consent. In order to reduce the likelihood of these principles being infringed in the future, the *EP&A Act* should be amended to require consent authorities to consider the compliance of a proposed development with the principles of ESD when determining development applications.

Another area where law reform would be desirable is the addressing of the issue of salinity in relevant environmental planning instruments, such as local environmental plans. At present, even though salinity is one of the greatest environmental problems facing rural NSW, it is rare that such instruments directly address potential salinity problems. PlanningNSW should take a proactive stance to ensure that planning controls are enacted identifying areas sensitive to salinity impact, and requiring steps to be taken to minimise the impact of developments on salinity levels.

### Endnotes

1 See *Wilson on behalf of Gurrungar Environment Group v Bourke Shire Council and ors* (2001) 114 LGERA 35. For a more detailed discussion of this case see "Win for Objector Appeals" 2001 62 Impact p9

# Court challenge to threatened species listing in New South Wales

Elisa Nichols, Solicitor, EDONSW

In *VAW (Kurri Kurri) Pty Ltd v Scientific Committee* [2002] NSWLEC 60, the Applicants, the owners of an aluminium smelter, challenged the listing of the Kurri Sand Swamp Woodland as an endangered ecological community under the *Threatened Species Conservation Act 1995* NSW (**TSC Act**).

The listing was challenged on fifteen grounds including differences between the nominated and the listed ecological community, that the Applicant was not notified that the Scientific Committee was considering the impact of the Applicant's aluminium smelter on the ecological community and that the consideration of the impact of smelter was irrelevant.

Justice Cowdroy of the NSW Land and Environment Court dismissed each of these grounds, finding that the Scientific Committee had complied with all necessary legal requirements in making its determination.

The Kurri Sand Swamp Woodland therefore remains listed as an endangered ecological community under the TSC Act.

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# EDO Network News

Kath Taplin is the new solicitor at EDO ACT from 12 June 2002. Kath was a volunteer at the Environmental Defender's Office years ago while studying at ANU, and has since worked at the Supreme Court of NSW as the judges' legal research officer, and more recently at Minter Ellison lawyers' Melbourne and Canberra offices. Kath will be working three days a week.

Robin Dyall has resigned as Principal Solicitor at EDO Victoria. The new Administrator at EDO Victoria is Beth Mellick.

Jeff Smith (previously Policy Director and Acting Director) has been appointed as Director of EDO NSW and Paul Toni has been appointed as Principal Solicitor. Paul was admitted to practice in July 1991. Between July 1996 and May 2002 he was a solicitor in private practice working primarily in the field of Aboriginal land rights and native title law and associated fields of resource and administrative law. In 1999 he was seconded to the New South Wales Aboriginal Land Council as the Principal Legal Officer of the Native Title Unit. Before July 1996 he practised in Sydney, primarily in the field of commercial litigation.

Marc Allas has returned to EDO NSW after extended leave travelling in India. Natalie Ross, Education Coordinator, will be leaving EDO NSW at the end of June to go to Inner City Legal Centre.

**The new National EDO Network publication on Commonwealth environment law will soon be available.**
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