IMPACT

Public interest environmental law

No 67 September 2002

The quarterly journal of the National Environmental Defender's Office Network

http://www.edo.org.au
Australian Capital Territory
New South Wales
Northern Territory
North Queensland
Queensland
South Australia
Tasmania
Victoria
Western Australia

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Published by Environmental Defender's Office (NSW)
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ABN: 72 002 880 864
ISSN: 1030-3847

Printed on recycled paper

Hindmarsh Island Bridge

Defamation Case

Mark Parnell, Solicitor EDO (SA)

On 21 January 2002, Justice Horton Williams of the South Australian Supreme Court handed down his decision in the matter of *Chapman v Conservation Council of SA & Others*[1]. This defamation action was one of many brought by developers Tom and Wendy Chapman against a large number of defendants including conservation groups, academics, politicians, media operators, printers and individuals who have spoken out against the controversial Hindmarsh Island Bridge. These defamation actions have earned the developers some $850,000 with at least one action still outstanding.[2]

The bridge (now constructed) is the same development that led to the controversial Royal Commission into Ngarrindjeri spiritual beliefs, in particular the so called 'secret womens' business'. The Chapmans have also been involved in unsuccessful litig-ation against former Commonwealth Aboriginal Affairs Minister, Robert Tickner and others over a temporary Commonwealth ban on construction of the bridge. In short, the Hindmarsh Island Bridge is arguably now the most litigated structure in Australia. One judge described it as a "troubled bridge over waters."[3]

In the most recent defamation decision, the Court held that the Conservation Council and three of its volunteer office bearers had defamed Tom and Wendy Chapman. The Court ordered damages of $130,000 plus interest. Damages were ordered in respect of three publications with a further eight publications found not to be defamatory of the Chapmans principally because they were not about them as such.

Whilst an appeal has been lodged with the Supreme Court, the case still has wide-ranging implications for conservationists engaged in public debate over environmental issues. In particular, the case is indicative of a narrow legal viewpoint which sees rights of freedom of expression on public interest matters as strictly contained within set boundaries. Also, the case shows how the informal and flexible organisational arrangements often favoured by conservation campaigners can be interpreted as a virtual conspiracy against law and order.

Defamatory words

Before outlining some of the legal issues involved, it is worth outlining the publications found to be defamatory and the imputations drawn by Williams J.

The three defamatory articles were all published in 1994 and 1995 in the Conservation Council's quarterly journal, 'Environment South Australia'. This journal has a relatively small readership comprising mainly members and supporters of conservation groups. The journal is also distributed to libraries, schools, Members of Parliament and other interested persons.

Publication No. 6

"The legal mechanisms used to silence community groups from expressing valid concerns on the Hindmarsh Bridge issue have profound implications for free speech in Australia.

We were silenced by two different mechanisms. Binalong Pty Ltd and Marine Services Co Pty Ltd acted against the Conservation Council under

Cont. overpage

Section 45D of the Trade Practices Act 1974.

We believe that this legal process is being used simply to silence us ...

The mechanism being used here is one called a 'SLAP suit' commonly used in the United States to silence environmental groups, consumer groups and legitimate viewpoints being put from the community ..."[4]

Publication No.7

"The people of Goolwa have been intimidated by this action and have been prevented from speaking freely on issues of concern. Whilst the Chapmans seek compensation, who compensates ordinary residents of Goolwa who have suffered greatly under the boot of Binalong?"[5]

Context for Publication No. 6 and 7

The context for both these statements was that for a period of three weeks in April 1994, the Conservation Council and certain named office bearers were the subject of interim injunctions granted by the Federal Court.[6] The injunctions (under s.45D of the Trade Practices Act 1974 Cth) were imposed shortly after a public rally on the steps of Parliament House in Adelaide. At the conclusion of the rally, an 'open letter' from the President of the Conservation Council was hand delivered to the head quarters of the Westpac Banking Corporation, the principal financier of the Chapman developments. The letter stated that it would not be in the interests of the Bank "to be seen to be instrumental in this mistaken development."[7]

The terms of the Federal Court injunction are summarised by Williams J as follows:

"The interim order dated 29 March 1994 restrained the respondents from hindering the provision of services to the applicants (namely the construction of the Hindmarsh Island bridge and a water main and water supply via that main). The interim order also contained an injunction against hindering or preventing or attempting to hinder or prevent the provision by Westpac and Partnership Pacific of banking and financial services to the applicants."[8]

As well as criticising the issuing of injunctions against conservationists, the Conservation Council journal also complained about the conduct of the Chapmans themselves in relation to surreptitious observation and filming of people attending anti-bridge meetings. Some 35 individuals identified by the Chapmans as a "person who has been involved in attempts to stop the bridge work"[9] were sent lawyers letters. According to Williams J. "The letter placed the recipient upon notice of the consequences of such conduct in terms of liability."[10] According to the defendants, the letters constituted "harassment" and "intimidation"[11] of protesters and provided a factual basis for the statements made in the publications.[12]

Defamatory imputations of Publications 6 and 7

Williams J. found the following imputations to arise from the publications cited above:

Publication No. 6

That Wendy Chapman was party to the commencement of Court proceedings and the issue of legal letters for the purpose of:
i) suppressing freedom of speech,
ii) stifling debate, and
iii) stopping the Conservation Council from engaging in legitimate expression of opinion in public regarding the Bridge issue.[13]

Publication No. 7

That with respect to the right of freedom of speech upon the Bridge issue, Tom and Wendy Chapman are oppressing the ordinary citizens of Goolwa.[14]

According to Williams J., these publications "impute motive and conduct which the ordinary person would treat as dishonourable."[15]

Publication No.11

"Consultation with the relevant Aboriginal groups throughout the planning process was token. Wendy Chapman has admitted in Federal Court that Binalong never consulted directly with any of the organisations listed as a condition for building the bridge."[16]

Context for publication No.11

Aboriginal concerns over the construction of the bridge largely over took environmental concerns in the media as the anti-bridge campaign gained momentum in the early 1990s. The adequacy of consultation with relevant Aboriginal groups and individuals was clearly an issue. Following an investigation of the importance of the site to Ngarrindjeri people, Federal Minister, Robert Tickner, issued declarations pursuant to the Aboriginal and the Torres Strait Islanders Heritage Protection Act to prevent construction of the bridge for 25 years.[17]

The reference to the admission of Wendy Chapman in an earlier Federal Court hearing was however noted by the Court as relating to other aspects of the Hindmarsh Island development, but not the bridge itself.

Defamatory imputations of publication No.11

The Court's finding of defamatory imputation was as follows:

"That during the planning process for the bridge the developers (Tom and Wendy Chapman) consulted with the aboriginal (sic) people in a less than meaningful way and with respect to the bridge building they failed to consult aboriginals (sic) when they had an obligation to do so."[18]

Williams J. also concluded that "Publication No. 11 attributes to developers a cavalier attitude (at the least) in the discharge of their professional responsibilities."[19]

The line between what is defamatory and what is not can be quite blurry. Williams

J. implied that had the defendants simply said that consultation with Aboriginal people had been "insufficient"[20] or "not comprehensive" [21] without reference to any specific standard of consultation, it would not have been defamatory.[22] Williams J. also noted that "If the Conservation Council had criticised the procedures [for Aboriginal consultation] adopted in connection with the building of stage 1 of the marina project it would have been on firmer ground."[23]

In other words, the problem for the Conservation Council was linking lack of mandatory Aboriginal consultation to the planning of the bridge, when according to Williams J., the real lack of consultation was with the planning of the Marina that was to be serviced by the bridge. In short, the Court determined that the defamatory criticism was misdirected and thereby became indefensible because it was not true and, as shall be seen, because malice defeated other defences.

Free speech and fair comment

The Defendants denied the defamatory imputations, however they also relied heavily on the defence of "fair comment upon a matter of public interest," the defence of qualified privilege for communications between people with a mutual interest and duty, and the so-called "Lange Defence"[24] of qualified privilege for discussion of "government and political matters." It was argued that even if it was found that the statements complained of were false and had the effect of harming the plaintiffs' reputations, they ought to be protected by these defences.

Ultimately, the Court rejected the defendants' arguments. In short, the Court found that these defences did not apply because the defendants were motivated by malice. Malice was found because the Defendants were engaged in a "campaign" to stop the bridge, had "targeted" the Chapmans, had ill will towards them throughout the campaign, and that harm to the Chapmans was an inevitable or likely result of the campaign.[25]

Significantly, Williams J. did not confine his examination of the motivation of the defendants to the time of the three actionable publications, but he was prepared to range across all prior and even subsequent activities and statements of the defendants in order to discern their motivation in relation to the three specific and limited actionable publications. In this regard he was assisted by very thorough plaintiffs who had carefully documented the anti-bridge campaign over many years.[26]

SLAPP Suits - Impugning motive

The bulk of the $130,000 damages order related to publications 6 and 7 which may conveniently be summarised as the 'SLAPP accusations'. The difficulty for the defendants was that in absence of any express statement from the Chapmans (i.e. that they were trying to silence their critics), any such accusation will be nearly always impossible to prove. It is not enough that the practical effect of legal action was that the opponents of the bridge felt intimidated and as a result felt they should 'shut up'. What is necessary is to prove (on the balance of probabilities) that it was the intention of the plaintiffs to use their secondary boycott proceedings for an ulterior purpose of silencing people.

In this case, the Judge accepted that the plaintiffs' intention in bringing what the defendants described as SLAPP suits (under s.45D of the Trade Practices Act) was proper. He accepted that the injunctions were narrowly directed to the specific actions complained of and that any "chilling effect" on campaigners or the general community was not intended.

Limits to "legitimate" campaign tactics

The aspect of the judgment of most concern to those involved in community activism, is the Court's apparent distinction between "legitimate" campaign tactics and those which will not be afforded legal protection. In the category of the former are writing letters to or meeting politicians and also non-coercive communications to stake-holders such as banks.

On the other hand, any form of direct action (including non-violent picketing) or attempts to coerce changes of policy or behaviour may not be protected. As in the present case these types of campaign tactics may be used to impute "malice" on the part of those involved, even in relation to later unrelated statements. On Williams J.'s reasoning, many routine campaign activities, such as encouraging the boycott of certain products or services on environmental grounds would be evidence of malice. On this interpretation, the use of "consumer power" to achieve social change is discouraged. The rights or wrongs of the issue in dispute are irrelevant. Even if the boycott is not actionable per se, it can be used in subsequent defamation action to defeat the defence of " comment" or "qualified privilege". The irony in this situation is that subsequent amendments to the Trade Practices Act included an "environmental defence" that would almost certainly have defeated the s.45D injunctions. Nevertheless, even though Williams J was prepared to consider subsequent behaviour as relevant to the question of malice[27], he was still prepared to impute malice from the defendants' threatened breaches of these now repealed laws.[28]

Williams J.'s views on the legitimacy of various campaign tactics would be at odds with those of a great many conservation groups and campaigners. Williams J. seems to afford a level of sanctity to political decisions, regardless of their merit.

"the reality is that in practice a bridge was necessary in order to satisfy the various commercial and governmental requirements."[29]

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Law Review

Victorian Environmental Assessment Review

Rebecca Hoare, Solicitor, EDO (VIC)

Introduction

In November 2000, the then Victorian Minister for Planning, the Honourable John Thwaites, announced that the Victorian Government had initiated a review of the environment assessment system in Victoria.

After establishing and consulting with a Stakeholder Reference Group and with the community, the Government released an Issues and Options Paper. This provided a basis for discussion of the strengths and weaknesses of the current assessment system and suggested various reform possibilities.

Submissions on the Issues and Options Paper were invited and an Advisory Committee was established to consider submissions. The Advisory Committee is currently conducting public hearings until September and is expected to make its recommendations to the current Minister for Planning, the Honourable Mary Delahunty by 2 December 2002.

This article seeks to identify the fundamental deficiencies in the current Victorian environmental assessment system and provide a brief overview of the reform options proposed by the State Government. It is not intended to be a definitive review of the system. For further information on the Victorian review process, please contact the Environment Defenders Office (Vic) on 03 9328 4811.

The Current System

Although such legislation as the *Planning and Environment Act 1987* (Vic)(**PE Act**) and the *Environment Protection Act 1970* (Vic) (**EP Act**) provide for the assessment of certain environmental impacts of proposed development, it is the *Environment Effects Act 1978* (**EE Act**) which allows for the comprehensive environment assessment of public and other works in Victoria.

The EE Act itself is a mere ten sections long and has been described both as flexible and hopelessly deficient, depending upon one's perspective. However, section 10 of the EE Act allows the preparation of guidelines to elaborate on the process and consequently the most recent version of the Guidelines for Environmental Impact Assessment (**EES Guidelines**) were issued in 1995. The EES Guidelines are administrative guidelines only and do not have the force of law.

Under the current system, a formal referral may be made to the Minister for Planning (**Minister**) by either the proponent, another Minister, or by an authority that grants permits, licenses for approvals, such as local government. Where the Minister determines that an Environment Effects Statement (**EES**) is required, no works may proceed and no approval may be granted until the Minister has assessed the EES and the relevant decision-maker has considered the Minister's assessment.

A Consultative Committee is commonly established to advise the proponent on the scope of the EES. Members of the Consultative Committee include the proponent, relevant local and State Government agencies, and community and environment groups. The Department of Infrastructure (**DOI**) has recently trialled the alternative use of technical reference groups, the purpose of which is to advise on the scoping and quality of technical studies undertaken by the proponent. Technical reference groups are generally composed of people with relevant expertise from agencies and authorities, universities and non-government organisations.

Once the EES is prepared, placed on public exhibition and public comments are received, the Minister will usually appoint an inquiry panel, which holds public hearings and provides a written panel report to the Minister. The Minister will then prepare the 'Minister's Assessment', which may or may not incorporate the panel's recommendations, and provide this assessment to the relevant decision-maker.

The Minister's Assessment is not binding on the decision-maker; however, the decision-maker must provide written reasons if she or he makes a decision which varies from the assessment.

Deficiencies in the current system

The Victorian environment assessment system has been broadly criticised, not only by community participants in the process, but also by proponents themselves. The current system lacks transparency, accountability and certainty; deficiencies which have been recognised and accepted by the State Government.

Considerable discretion rests with the Minister as to whether a particular proposal requires environmental assessment and if so, what procedure should be followed. The EE Act does not require the Minister to take into account any particular considerations when making screening decisions or the 'Minister's Assessment'. Nor does it provide for the public notification of, or public comments on, particular proposals. Indeed the procedure described above is predominantly set out in the unenforceable EES Guidelines, rather than prescribed by the EE Act itself.

Therefore it can be very difficult for proponents and decision-makers, such as local governments, to determine

whether a particular proposal should be referred to the Minister for assessment. Further, it is possible for the proponent to prepare an EES and the Minister to make such assessment in the absence of real accountability.

The current system is also considered to be inflexible, as it does not allow for lower level environment assessment of smaller scale projects. Generally, either the full assessment is required, including public panel hearings, or no assessment is required at all.

There is also considerable concern about the community's ability to participate in the process effectively. A substantial imbalance exists between the community and the proponent, in terms of financial and personnel resources, time, and access to expertise. Coupled with the fact that it is the proponent and the proponent's experts who are responsible for the preparation of the EES, this has resulted in extensive skepticism about the process and its stakeholders. It has therefore also become necessary to restore community confidence in the process by ensuring appropriate public notification of proposals, adequate opportunity for public participation and transparent quality assurance mechanisms.

Options for reform

The Victorian Government has acknowledged the deficiencies in the current system and has put forward a possible reform scenario to address these shortcomings.

The following four levels of assessment are suggested, which would complement and support routine planning and approval processes under such legislation as the PE Act and the EP Act:

1) Level One - Integrated Planning Report (**IPR**)
2) Level Two - Public Environment Report (**PER**)
3) Level Three - Environmental Impact Review (**EIR**) and
4) Level Four - Strategic Environmental Study (**SES**)

An IPR would be required in the case of projects or proposals with potential environmental impacts of at least local significance, for example, a major residential subdivision. This assessment level essentially feeds into the current planning permit procedures provided for in the PE Act. Therefore the proponent would be required to exhibit an IPR along with an associated planning permit application or planning scheme amendment. The responsible authority, usually the local government, must then consider the application along with any objections and decide the application accordingly.

A panel would be appointed only if required under the PE Act to consider a planning scheme amendment or a permit called in by the Minister. Aggrieved parties may appeal a decision to the Victorian Civil and Administrative Tribunal (**VCAT**) in accordance with the provisions of the PE Act.

Proposals with potential environmental impacts of regional significance, such as an industrial facility or a power line, may require a PER. Level Two Assessment sits outside the established planning procedures and will often require coordination of approvals under Acts apart from the PE Act, such as the EP Act and Coastal Management Act.

It appears that a technical reference group rather than a Consultative Committee would assist in the scoping of the PER and that, as with an IPR, a panel would only be established if required by the PE Act. Further, there would be no provision for an appeal to VCAT if the statutory decisions were made in accordance with the final assessment.

Level Three Assessment is essentially identical to the current environment assessment system and would be appropriate for proposals with potential environmental impacts of State significance, such as an airport or freeway.

A SES may be required for strategic proposals where there is a high to very high level of risk to environmental values of State or regional significance. The aim of the SES is apparently to assess strategic alternatives in the context of potential cumulative impacts and ecologically sustainable development outcomes, and to provide a clear strategic context for project planning, assessment and manage-ment. It is not proposed to prescribe any assessment procedures for this level of assessment, due to its very broad purpose and the variety of proposals that might be subject to assessment. This has given rise to some concern that Level Four Assessment lacks the certainty and transparency sought to be attained by this very review.

All environment reports would be subject to peer review in order to ensure the integrity and quality of the reports and raise the confidence of participants in the outcome of the assessment process.

It is not clear whether a reformed environment assessment will allow third parties, such as a community or environmental organisation, to enforce any proposed legislation, as currently occurs under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999. Such provisions would certainly enshrine transparency and accountability in the legislation and would be welcomed by the Environment Defenders Office.

Conclusion

In principle, the reform scenarios will go a long way to addressing the weaknesses in the current Victorian environment assessment system. Naturally, more analysis and comment will be required when proposed reform legislation and guidelines are drafted.

The Environment Defenders Office (Vic) will make an oral submission to the newly appointed Advisory Committee and will continue to be actively involved in the review process.

Land Clearing and Law Reform

Synoposis of the paper delivered at the EDO Conference Sydney July 2002.

A full-text version of this paper is available by purchasing the conference proceedings from EDO NSW.

Jo Bragg, Principal Solicitor, EDO (QLD)

All the governments of Australia agree that the decline in the quality and extent of our native vegetation must be reversed.[1] It is widely known and accepted by scientists[2] and politicians alike[3] that native vegetation contains valuable biodiversity, protects soil and water quality and acts as a sink for greenhouse gases. Native vegetation also has cultural values and native title significance although these values will not be addressed in this paper. Yet measures such as revegetation, used to reverse the decline in the quality and extent of native vegetation are severely undercut by continuing broadacre clearing.[4]

This article will examine possible legislative solutions, excluding taxation incentives,[5] to reduce broadacre clearing. The second section briefly outlines the main Australian legislation regulating landclearing[6] to serve as a backdrop for the consequent discussion of possible regulatory changes. The third section begins with an analysis of reforms to Commonwealth legislation proposed by the Australian Conservation Foundation (**ACF**). The final section proposes and briefly discusses desirable features of successful native vegetation conservation legislation.

Regulation of landclearing

Three States have enacted nominate vegetation laws in order of passage being South Australia,[7] New South Wales[8] and lastly Queensland[9]. Queensland's Vegetation Management Act 1999 regulates clearing on freehold land linking into the development assessment system of the Integrated Planning Act 1997[10] (Qld), while Part 6 of Queensland's Land Act 1994 regulates tree clearing on certain State land including leasehold land.[11]

Tasmania, Victoria and the two Territories regulate clearing under planning legislation[12] with Tasmanian Forestry operations regulated under the Forest Practices System. Western Australia has a patchwork of different laws relating to landclearing.[13] There are no Commonwealth laws that directly regulate landclearing,[14] although the Environment Protection and Biodiversity Conservation Act 1999 (Cth) with amendments, could be utilised as a vehicle to arrest broadacre landclearing.

Federal leadership and law reform

There is no doubt that the Environment Protection and Biodiversity Conservation Act 1999 (**EPBC Act**) could be utilised as a suitable vehicle to arrest broadacre landclearing. The statistics showing unacceptably high clearing rates in Queensland, New South Wales, Tasmania and other jurisdictions, has lead to the inescapable conclusion that many key existing State laws are inadequately drafted or implemented. The community expects the Commonwealth to use its powers, take a leadership role and introduce such regulation, due to the adverse impacts of vegetation clearing.

Seven reforms or steps concerning the EPBC Act are proposed by the ACF in a ten-step plan entitled Controlling Landclearing in Australia: A Framework for Federal Leadership and Shared Responsibility.[15] Those steps comprise:

Step 1: Amending the EPBC Act to include landclearing of native vegetation (of greater than 100 hectares, per property, per year) as a matter of national environmental significance, thus requiring approval by the Federal Environment Minister.

Step 2/Step 9: Amending the EPBC Act to stipulate that the Federal Environment Minister is prohibited from approving clearing in areas identified in specially created EPBC Regulations. Step 9 allows addition to those areas after further assessments are carried out.

Step 3: Establishing a science based National Native Vegetation Advisory Committee within the provisions of the EPBC Act.

Step 5: Amending the EPBC Act to remove the exemption from its assessment and approval processes of the Regional Forest Agreement forestry operations.

Step 7: Additions to the listing of species and communities under the EPBC Act. Introducing a threat abatement plan for landclearing and amendments to require an approval from the Federal Environment Minister for actions with a significant impact on vulnerable communities.

Step 10: Entry into special Native Vegetation Protection Bilateral Agreements between Commonwealth and State or Territory Governments on assessment, regulatory and incentive practices and systems, but not delegating approval powers.[16]

The proposal by the ACF is both legally feasible and desirable from a policy perspective. It is urgent that the Federal Government takes such initiatives to protect all values of our native vegetation.

The ACF proposals still require action from the States and Territories, including that each State and Territory Government establishes a legislative native

vegetation management plan. That plan must include (amongst other features) a limit on clearing vegetation over time, to arrest and reverse the decline in the quality and extent of native vegetation by 2005, (Step 8).[17] To successfully implement that type of Statewide comprehensive vegetation planning it is necessary to have special vegetation legislation at a State level, such as the existing South Australian Native Vegetation Act 1991 (SA).

Successful native vegetation legislation

Exemptions

The values of native vegetation cannot be successfully protected by regulation if severely undercut by exemptions to the scope and operation of regulation. Therefore exemptions from the regulatory net need to be to be few, highly constrained, clearly drafted and relate to the values of native vegetation sought to be protected by legislation.

In all jurisdictions, effective clearing controls are appropriate across all land tenures and land use designations without exemption, if the values of native vegetation are to be protected. Unfortunately there are many examples of inappropriate exemptions in various jurisdictions. In Queensland, native vegetation on freehold urban land may be cleared right down to the last 10% of pre-European extent of the relevant regional ecosystem, without necessarily triggering a development application for assessment of the clearing against the State vegetation code.[19]

Strict assessment principles

The current rates of clearing described by former Environment Minister Hill[20] are unacceptably high in Queensland's case, even after passage and nearly three years of implementation of the Vegetation Management Act 1999 (Qld). Past practices have caused and are causing ecosystem destruction, salinity, degradation of productive lands, spoilage of waterways and greenhouse gas emissions. Thus extremely strict controls are justified on vegetation clearing applications as part of a range of measures to address the problem.

The eleven 'principles of clearance of native vegetation' from the South Australian Native Vegetation Act 1991 provide that native vegetation 'should not be cleared' if in Council's opinion, any of the eleven separate principles are met.[21] Those principles are strongly protective of biodiversity,[22] soil and water,[23] and protective against unsustainable future use of the land.[24] Implementation of those principles also has greenhouse benefits as they severely restrict vegetation clearing. Other jurisdictions can amend their existing legislation or introduce new legislation so as to adopt both the eleven principles and relevant parts of the South Australian Native Vegetation Act (1991). For example, s29(1)(b) under which the decision-maker must not make a decision that is seriously at variance with those principles. For each jurisdiction it would be necessary to consider the adequacy of existing legislation, in some cases such as the general planning legislation, as a vehicle to deliver the strict approach.

Access to expertise

The South Australian Native Vegetation Council, with advisory functions, decision-making functions on applications, and responsibility for management of the Native Vegetation Fund, operates highly successfully. On this basis, the establishment of an independent vegetation council with decision-making functions, is supported.

As evidence of that success, the Annual Report of the South Australian Native Vegetation Council 2001/2 discloses that in that period the Council approved clearance of a total of 278 hectares of degraded scrubland and 2396 trees having a canopy area of 77 hectares[25] in areas that had no hope of recovery. However conditions to be met by landholders on these consents includes a total of 717 hectares to be permanently protected though different mechanisms.[26]

However the Council itself considers:
"The numbers and expertise of departmental staff and contractors working on native vegetation issues are of critical importance to the Council, as it relies almost solely on the Department for administration and technical and scientific advice… the present numbers of staff, with their wide range of skills, are necessary to allow the clearance/ Heritage assessment program to continue."[27]

The questions then is how, and if, other jurisdictions would benefit from the establishment of a similar Council with similar decision-making functions, and how that Council needs to relate to those who provide administrative, technical and scientific advice.

Deter non-compliance

Across jurisdictions there are numerous complaints of illegal clearing,[28] yet relatively few successful prosecutions.[29] Gathering of evidence may be difficult in remote areas and the number and complexities of exemptions adds to the difficulty for an investigative officer to determine whether clearing is within or without the law. Given the values of native vegetation, it is important that we facilitate the success of proceedings for civil enforcement and criminal prosecutions as both a general and specific deterrent.

The South Australian Native Vegetation Act 1991contains some evidentiary presumptions[30] and other provisions[31] that might usefully be considered for adoption in other jurisdictions. Third party civil enforcement provisions[32] are another important feature to assist enforcement of vegetation protection laws. These are not yet adopted by South Australia.

Public access to information

The public has an important watchdog role to play in evaluating how the vegetation protection system is going, including whether stated outcomes are being satisfactorily achieved as a whole or on individual applications. The public has important factual and scientific information, as well as opinions to

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International Law - Part 1

Sustainable Development

Future editions of Impact will explore different aspects of international law including the precautionary principle, public participation and environmental impact assessment and their implmentation into Australian law.

Gillian Walker, Volunteer solicitor, EDO (NSW)

"The interests of all the world's citizens are intertwined in inextricable ways, which environmental law demonstrates almost better than any other…"[1]

In a world where states often view their international legal obligations as optional, it seems that the threat to our environment is one of the few warnings that has been heeded. Although far from achieving its goals, international environmental law has focused attention on the changes that must be undertaken in order to ensure the maintenance and improvement of the global environment. It is clear that although there are some difficulties and inconsistencies in application at a domestic level, international environmental law has had a tremendous impact on the way in which the Australian environment is managed and protected.

The body of international law relating to the environment as it exists today, contains a number of fundamental principles. These are; sustainable development, the precautionary principle, public participation in decision-making, and environmental impact assessment.

Although these principles of international environmental law are important in relation to determining the obligations of States on the international level, it is their implementation at the national level which will ensure that environmental problems faced by the international community are addressed.

Sustainable development (SD)

"The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community."[4]

The 1987 report of the World Commission on Environment and Development (the Brundtland Commission), Our Common Future, articulated the most famous and accepted definition of sustainable development. The report stated that:
"Sustainable development is development which meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:
1) the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
2) the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs."[5]

Within this statement, four elements appear to comprise the legal aspects of the concept of sustainable development. These elements are:
1) the principle of intergenerational equity;
2) the principle of sustainable use;
3) the principle of equitable use; and
4) the principle of integration of environment and development.[6]

The importance of sustainable development in international environmental law was addressed by the International Court of Justice in the Case Concerning the Gabcikovo-Nagymaros Project.[7] The case, which adjudicated one of the longest running environmental disputes in Europe between Hungary and Slovakia over a plan to build a series of locks and dams on the Danube River, was viewed by many as providing the opportunity for the Court to substantially elucidate and develop international environ-mental law.[8] Although the Court focused its attention not on the environmental issues before them but on the questions of treaty inter-pretation, the concept of sustainable development was discussed. The parties agreed in the pleadings that sustainable development was an applicable principle[9] and the majority stated that:
"Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consid-eration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[10]

Vice-President Weeramantry, in a separate opinion, noted that, sustainable development constitutes more than a 'mere concept', but rather 'a principle with normative value' which forms 'an integral part of modern international law… clearly of the utmost importance'.[11] His Excellency traces the development of the principle of sustainable development not only in international law, but also throughout history,[12] and concludes that:
"Sustainable development is thus not

merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law."[13]

Although his Excellency does not explicitly address the issue of whether or not sustainable development has risen to the level of customary international law, he does state that it is 'a principle accepted not merely by the developing countries, but one which rests on a basis of worldwide acceptance'.[14] It is possible that this statement, in conjunction with his positive discussion of sustainable development, can be viewed as evidence of the existence of both the requisite state practice and opinio juris needed to raise a norm to an obligation under customary international law.

Vice-President Weeramantry appears to more directly locate the source of the international obligation within Article 38(1)(c) of the Statute of the International Court of Justice (ICJ), being 'general principles of law recognised by civilised nations'. Following on from his discussion of the historical development and acceptance of sustainable development, His Excellency notes that the ICJ 'constitutes a unique forum for the reflection and the revitalisation of those global legal traditions'. He goes on to say that:
"Living law which is daily observed… and compliance with which is so axiomatic that it is taken for granted, is not deprived of the character of law by the extraneous test and standard of reduction to writing…when a duty such as the duty to protect the environment is so well accepted that all citizens act upon it, that duty is part of the legal system in question. Moreover, when the Statute of the Court described the sources of international law as including the 'general principles of law…', it expressly opened a door to the entry of such principles into modern international law."[15]

Sustainable development is 'a concept at the cutting edge of international environmental law'.[16] It's meaning is undergoing a continual process of evolution, as international instruments, bodies such as the Commission on Sustainable Development,[17] and States themselves, adapt and implement their own variations on the Brundtland Commission's concept of sustainable development. What is clear, however, is that it is a principle which does and will play a crucial role in environmental law at all levels.[18] During its process of development and refinement it will
"Need all the insights available from human experience, crossing cultural and disciplinary boundaries which have traditionally hemmed in the discipline of international law."[19]

Australian law and SD

In Australia, the concept of sustainable development has been slightly modified, and is known as 'ecologically sustainable development' (**ESD**). The Australian government adopted the following definition of ESD:
"… using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased."[20]

Although fundamentally similar to the definition of sustainable development as adopted by the Brundtland Commission, ESD differs in that ecological considerations are placed at the forefront, reminding all decision-makers that development must be sustainable in an environmental sense, in addition to an economic sense.

The NSW government, which implements ESD across all of its environmental decision-making legislation, defines ESD as:
"Requir[ing] the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:
a) the precautionary principle…
b) inter-generational equity…
c) conservation of biological diversity and ecological integrity namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration
d) improved valuation, pricing and incentive mechanisms namely, that environmental factors should be included in the valuation of assets and services."[21]

The core principles of ESD have been integrated into the regular use of decision-makers at all levels of government in Australia.[22] This has arisen through both governmental policy and practices, and also through the explicit incorporation of ESD into statute law, which has occurred in all the governments within Australia.[23]

The 1992 Intergovernmental Agreement on the Environment[24] set out principles of environmental policy, which in total constitute ESD. The principles are supported by the 1992 National Strategy for Ecologically Sustainable Development, which specifies that decision-making processes should integrate long and short-term environmental, economic, social and equity considerations.[25] Through these documents, governments across Australia have agreed that the concept of ESD should be used in the assessment of natural resources, land use decisions and approval processes.[26]

Unlike the policy approach of Australian governments to ESD, the incorporation of its principles into legislation is not uniform in nature. At the national level, the pre-eminent piece of environmental legislation is the Environmental Protection and Biodiversity Conservation Act 1999. The objects of the Act expressly include the promotion of ESD 'through the conservation and ecologically sustainable use of natural resources'.[27] The legislation of some states does not directly refer to ESD, however, this is often overcome by inclusion of concepts such as conservation and sustainability.[28] Other states, such as New South Wales, Queensland,[29] Tas-

mania[30] and South Australia[31] explicitly make reference to ESD.

As with the rules relating to public participation, NSW environmental law has led the way in the incorporation of ESD into its legislation. In 1999 some 47 NSW Acts included the principles of ESD.[32] The law relating to development and planning in NSW is predominantly located in the Environmental Planning and Assessment Act 1979 and so it is important that the principles of ESD were expressly included within its objects section by the amendment of the legislation in 1997.[33] Since this inclusion in the legislation, it has been accepted by the Land and Environment Court that ESD can constitute a head of consideration for certain developments.[34]

Increasingly, environmental planning instruments such as State Environmental Planning Policies (SEPP's) and Local Environment Plans (LEP's) are incorporating the principles of ESD into their operations. Local government in NSW, where the majority of development consideration and consent occurs, has directed its employees to carry out their responsibilities whilst having 'regard to the principles of ecologically sustainable development',[35] and imposes consideration of ESD as an obligation in the determination of development applications.[36] In addition to planning legislation, those statutes which specifically address environmental considerations, such as the Threatened Species Conservation Act 1995 (NSW) and the Native Vegetation Conservation Act 1997 (NSW), all incorporate ESD into the objects section.[37]

Whilst the incorporation of ESD into Australian legislation is an important and necessary recognition of the validity of the principle at an international level, the manner in which ESD is used in decision-making in Australia is problematic. Australian legislation[38] has largely confined the role of ESD to that of forming the objectives of legislation or agencies which implement such legislation. There has been little in the way of concrete rules, with its inclusion in legislation revealing a tendency towards the aspirational and ambiguous. As a result, the interpretation and application of ESD in Australian decision-making is troublesome, resulting in inconsistencies and uncertainties.[39] It may be that ESD needs to be taken beyond that of the objectives of legislation, and in conjunction with clear definitions and guidelines for application, placed within the substantive body of Australian law. Despite these difficulties, there are those who feel that the obligation of Australian judicial bodies is to, where the legislation does not provide clear guidance:

"apply the common law and assist in the development and fleshing out of the principles… to turn soft law into hard law. This is an opportunity to be bold spirits rather than timorous souls and provide a lead for the common law world. It will make a contribution to the ongoing development of environmental law."[40]

Future editions of Impact will include articles on International law and in particular the precautionary principle, public participation, and environmental impact assessment.

[1] His Excellency Judge Christopher Weeramantry 'Environmental Law Symposium – Foreword' (1998) 22 Melbourne U. L.R. 503 at 505.
[4] Separate Opinion of Vice-President Weeramantry, Case Concerning the Gabcikovo-Nagymaros Project (1998) 37 ILM 162 at 207.
[5] World Commission on Environment and Development Our Common Future 1987 at p 87.
[6] Sands Prinples of International Environmental Law Vol 1 p 208; Boer Ramsay and Rothwell International Environmental Law in the Asia Pacific 1998 p 13.
[7] (1998) 37 ILM 162.
[8] Ida L Bostian 'Flushing the Danube: The World Court's Decision Concerning the Gabcikovo Dam' (1998) 9 Colorado Journal of International Environmental Law & Policy 401 at 403.
[9] Separate Opinion of Vice-President Weeramantry, Case Concerning the Gabcikovo-Nagymaros Project (1998) 37 ILM 162 at 205.
[10] Judgement of the Court, Case Concerning the Gabcikovo-Nagymaros Project (1998) 37 ILM 162 at Paragraph 140.
[11] Separate Opinion of Vice-President Weeramantry, Case Concerning the Gabcikovo-Nagymaros Project (1998) 37 ILM 162 at 204 – 205.
[12] Ibid 208-213.
[13] Ibid 213.
[14] Ibid 208.
[15] Ibid 213.
[16] Boer Ramsay and Rothwell op cit p 15.
[17] The Commission on Sustainable Development was implemented by the Rio Earth Summit. It is responsible for monitoring, reviewing and considering the progress of implementation of international environmental law and policy. For further information see Boer, Ramsay and Rothwell op cit at 33.
[18] Boer Ramsay and Rothwell op cit p 15.
[19] Separate Opinion of Vice-President Weeramantry, Case Concerning the Gabcikovo-Nagymaros Project (1998) 37 ILM 162 at 217.
[20] Ecologically Sustainable Development: A Commonwealth Discussion Paper Canberra AGPS June 1990.
[21] s6(2) Protection of the Environment Administration Act 1991 (NSW).
[22] The Hon Justice Paul Stein 'Are Decision-makers Too Cautious With the Precautionary Principle?' Speech delivered at the Land and Environment Court of NSW Annual Conference 1999. The text of this speech is reprinted in (2000) 17 Environmental and Planning Law Journal 3.
[23] Ibid.
[24] This document is a non-binding agreement made between the Federal, State and Territory governments, as well as the Local Government Australian Association. For further discussion of its relevance see [24] Charmian Barton, 'The Status of the Precautionary Principle In Australia: Its Emergence in Legislation and as a Common Law Doctrine' (1998) 22 Harvard Environmental Law Review 509 at 509.
[25] D E Fisher 'Sustainability – the Principle, its Implementation and its Enforcement' (2001) 18 Environmental and Planning Law Journal 361 at 363.
[26] Ibid.
[27] s3 Environmental Protection and Biodiversity Conservation Act 1999 (Cth). S3A of the Act defines ESD for its purposes.
[28] i.e. Victoria and Western Australia. D E Fisher op cit p 363.
[29] s 1.2.1 Integrated Planning Act 1997 (Qld).
[30] Environmental Management and Pollution Control Act 1994 (Tas).
[31] s3 Development Act 1993 (SA).
[32] The Hon Justice Paul Stein op cit.
[33] see S5 of the Act.
[34] Greenpeace v Redbank Power Co (1995) 86 LGERA 143. See also Carstens v Pittwater Council (1999) 111 LGERA 1 regarding the obligation to take into consideration the objectives of legislation.
[35] s7 of the Local Government Act 1993 (NSW).
[36] s89(1)(c) of the Local Government Act 1993 (NSW).
[37] Other legislation in NSW which incorporates ESD includes the Coastal Protection Act 1979, Fire Brigades Act 1989, Fisheries Management Act 1994, National Parks and Wildlife Act 1974 and the Sydney Water Act 1994.
[38] For a list of legislation which incorporates ESD for states and territories of Australia other than NSW, see the Appendix to The Hon Justice Paul Stein op cit.
[39] Ibid.
[40] Ibid.

Trade Practices Act review

A full EDO submission on the Trade Practices review can be downloaded from the EDO website at: http://www.edo.org.au.edonsw.edonsw.htm

Paul Toni, Principal Solicitor, EDO (NSW)

On 15 October 2001, the Prime Minister announced that there would be an independent review of the competition provisions of the Trade Practices Act 1974 and their administration. The Environmental Defender's Office (NSW) lodged a submission to the review committee.

The Trade Practices Act

The Trade Practices Act (the Act) is the main Commonwealth legislation regulating competition, fair-trading and consumer protection. The Act is administered by the Australian Competition and Consumer Commission (**ACCC**).

Part IV of the Act prohibits contracts, agreements or understandings that would or might have the effect of substantially lessening competition and other anti-competitive conduct, or misuse of market power.

Part VII of the Act provides the ACCC with the power to grant a corporation immunity in relation to contracts, arrangements or understandings that might otherwise breach provisions of Part IV (other than the misuse of market power). The ACCC also has the power to revoke immunity.

The EDO submission

The EDO's submission suggested that the ACCC and the anti-competitive provisions of the Act could both perform a valuable role in the implementation of ecologically sustainable development in Australia.

Ecologically sustainable development and the economy

A healthy and sustainable environment is an essential component of a successful economy.[1] That fundamental truth was recognised by the Council of Australian Governments when it endorsed the National Strategy for Ecologically Sustainable Development (**NSESD**) in 1992[2]. One of the guiding principles of the NSESD included that "decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations."

Unfortunately, difficulty has been experienced in implementing the guidelines requiring the integration of economic and environmental considerations and indeed the principles of ecologically sustainable development generally. The Productivity Commission's Report on the Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies, found that it was uncommon for ecologically sustainable development principles and objectives to be fully taken into account by Commonwealth departments and agencies through the decision-making, implementation and monitoring process[3]. That finding lead to the inclusion of section 516A in the Environment Protection and Biodiversity Conservation Act 1999, which requires Commonwealth departments, authorities and companies to report annually on their implementation of the principles of ecologically sustainable development.

The ACCC

The ACCC is uniquely placed to a play a significant role in the implementation of ecologically sustainable development and the protection of the environment in Australia. The ACCC has jurisdiction over the business activities of the Commonwealth, the States and Territories as well as most commercial organisations. It is an independent statutory authority and therefore not subject to the political imperatives that frequently lead Commonwealth, State and Territory Governments to prefer short-term economic advantage over-long term environmental health.

Define 'benefit to the public'

Division 1 of Part VII of the Act provides the ACCC with the power to grant a corporation immunity in relation to contracts, arrangements or understandings that might otherwise breach provisions of Part IV. The applicant must satisfy the ACCC that the contract, agreement or understanding, would result in a benefit to the public, which outweighs the detriment to the public by any lessening, of competition.[4]

Division 2 of Part VII provides automatic and immediate immunity against liability for exclusive dealing, save in the case of third line forcing, in which case the immunity arises after 14 days. The ACCC may revoked immunity at any time[5] by giving notice in writing, if it is satisfied that the conduct would or is likely to have the effect of substantially lessening competition, or that the benefit to the public would not outweigh the detriment to the public caused by the lessening of competition.[6]

The Act does not define 'benefit to the public', however the ACCC, the Australian Competition and Consumer Tribunal and the Federal Court have accepted that it is a term of wide ambit that extends, amongst other things, to "steps to protect the environment".[7] That principle has received recognition on a number of occasions, including in the authorisation granted by the ACCC

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in 1998 to the Association of Fluorocarbon Consumers and Manufacturers Inc for voluntary agreements to limit the imports of hydrochlorofluorocarbon gases.[8] In that decision the ACCC noted:

"The Commission notes that the effects of increased levels of greenhouse gas emissions are well known and well documented, as are the consequences for public health and the environment of a damaged ozone layer and an increased potential for global warming.

In addition, the Commission holds the view that a scheme or arrangement which contributes to limiting the risk to human health and the improvement of the environment would benefit the Australian public, and may also benefit the total world population and environment."[9] …

The ACCC has also noted that measures to encourage ecologically sustainable industries may constitute a benefit to the public. For example, in Tasmanian Oyster Research Council[10] the ACCC granted authorisation to an agreement which required purchasers of oyster spat to pay a research levy, because it accepted that, amongst other things, the money would be used to develop new export and employment opportunities in an 'environmentally-friendly' industry.

The ACCC and the Australian Competition and Consumer Tribunal have granted authorisations, or declined to revoke the immunity for exclusive dealing in numerous cases, where the conduct proposed was likely to have a significant impact on the environment. Such cases include authorisations relating to aluminium smelters,[11] electricity generation, transmission and supply[12] and gas recovery, transfer and supply,[13] amongst others.[14]

The NSW EDO submitted that the Act be amended to require the ACCC to consider the principles of ecologically sustainable development[15] in the course of considering whether to grant, refuse, vary or revoke authorisations under the Act. The EDO also submitted that the Tribunal should be required to consider those principles in reviewing a decision of the ACCC. This could be achieved by, amongst other things, defining the term 'public benefit' as including steps that would be likely to comply with the principles of ecologically sustainable development, in particular, by encouraging capital investment in ecologically sustainable industries.

The NSW EDO further submitted that the Trade Practices Act should be amended to provide the ACCC with the power to invite corporations to agree to conditions requiring them to identify and measure the extent of 'unsustainability' of their developments. Also that the corporation take steps to reduce the lack of compliance with the principles of ecologically sustainable development, or reduce its impact on the natural environment. The ACCC could then take any agreement to that effect, into account when determining whether or not to grant the authorisation.

The NSW EDO suggested that the steps referred to above might include an agreement by the corporation to participate in an environmental offset or trading scheme.

Consideration of externalities

Some corporations (or industries) benefit from the failure to include externalities which have a high environmental impact in the price of the goods or services produced by them. The failure to include externalities provides such corporations with a substantial commercial advantage over producers who include, or cannot exclude, the externalities (or the cost of them). For example, the coal-fired electricity generating industry benefits from the failure to include the cost of consumption of a finite resource and the cost of release of large quantities of greenhouse gases into the atmosphere in the price of the electricity sold by it. The failure to include those externalities, provides coal-fired electricity generators with a substantial commercial advantage over renewable energy generators, such as solar and wind generators, and even over less environmentally harmful conventional sources of energy such as natural gas. As a consequence of that unfair advantage, ecologically sustainable forms of electricity production, and less environmentally harmful forms of electricity production, find it difficult to compete on price, or to achieve the economies of scale that might make their product less expensive.

The NSW EDO submitted that the Act be amended to require a sum, representing the fair value of externalities, be included in the price of a good or service, at least where the production involves a significant impact on the environment. The failure to include the cost of those externalities is likely to be preventing less environmentally harmful, forms of production from competing in the same (or similar) markets.

It is to be noted that, if that recommendation was adopted, it would lead directly to the implementation of one of the most important principles of ecologically sustainable development, namely, the promotion of improved valuation, pricing and incentive mechanisms.[16]

Disclosure of Gov. subsidies

Many high environmental impact industries receive significant undisclosed direct and indirect government subsidies. For example, forestry industries continue to receive direct and indirect government subsidies which are not publicly disclosed, usually on the basis that such arrangements are commercial-in-confidence. The payment of direct or indirect subsidies, particularly ones that are not disclosed, provides the recipients with a substantial commercial advantage over competitors and is likely to inhibit the formation of a more ecologically sustainable industry.

The NSW EDO submitted that the Act be amended to require the disclosure of all direct and indirect government subsidies to high environmental impact industries, whether or not those industries are public or privately owned.

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contribute to proposed plans, proposed policies and assessments on individual applications. Submission rights for third parties on applications and equivalent appeal rights for third parties to those of applicants, are a necessary part of ensuring that applications to clear do not gain an inappropriate level of influence over the decisions making process.

Conclusion

There is no doubt that the Environment Protection and Biodiversity Conservation Act 1999 could be utilised as a suitable vehicle to arrest broadacre landclearing if relevant parts of the ten point plan proposed by the ACF were implemented. The need for Federal leadership in this respect was discussed in Section three of this paper. However Federal initiatives do not replace the need for reforms to State laws that deal with vegetation clearing based around the five proposals in this article. These proposals address exemptions, assessment principles, decision-makers, enforcement and public access to information.

ENDNOTES

[1] The National Strategy for Conservation of Australia's Biodiversity 1996 stated that by 2000 Australia would have arrested and reversed the decline of remnant native vegetation. The Commonwealth, State and Territory Governments committed themselves, through the National Heritage Trust Partnerships agreements, to the national goal of reversing the decline in the quality and extent of Australia's native vegetation cover by June 2001.

[2] For example McAlpine C.A., Fensham R.J., and Temple-Smith D.E. Biodiversity Conservation and Vegetation Clearing in Queensland: Principles and Thresholds; Williams J. Economic and Social Implications of Landclearing paper delivered to EDO Landclearing Conference, Sydney, July 2002.

[3] Hill, Robert, former Federal Minister for Environment and Heritage, National Vegetation Policy Reversing the Decline in the Quality and Extent of Australia's Native Vegetation Cover September 2001 at http://www.ea. gov.au/land/vegetation/policy/index.html Robert Hill singled out New South Wales, Tasmania but above all, Queensland for high clearing rates and stated:

The exceptionally high rate of landclearing in Queensland is still the single most substantial factor in the failure to achieve the national goal. The Queensland Statewide Land cover and Trees Study estimates that an average of 425,000 hectares of remnant and regrowth native vegetation has been cleared each year over the 1997 to1999 period. Indications are that there has been little abatement in the rate over the subsequent two years."

[4] See footnote 3.

[5] Taxation incentives are part of the solution to landclearing and deserve detailed treatment in a separate paper however the focus of this paper is upon regulation.

[6] 'Landclearing' is used interchangeably with 'native vegetation clearing' in this paper.

[7] Native Vegetation Act 1991 (SA) this repealed and replaced the Native Vegetation Management Act 1985 (SA).

[8] Native Vegetation Conservation Act 1997.

[9] Vegetation Management Act 1999 (Qld) covering freehold land and Part 6 Land Act 1994 (Qld) concerning tree management on certain State land, including leasehold land.

[10] Vegetation clearing, subject to exceptions, is assessable development under Schedule 8 of the Integrated Planning Act 1997 (Qld), and is processed under a modified version of the Integrated Development Assessment System from the Integrated Planning Act 1997. However applications are assessed against the code in the State policy for vegetation management made under s10 (1) Vegetation Management Act 1999 (Qld).

[11] Section 252 Land Act 1994 (Qld).

[12] Land Use Planning and Approvals Act 1993 (Tas.); s222 Land (Planning and Environment) Act 1991 (ACT); s3 Planning Act (NT). Also in the NT it is a condition of pastoral leases that the lessee will not clear any pastoral land except with permission of the Pastoral Land Board and in line with the guidelines published by it.

[13] Including for example the Soil and Land Conservation Act 1945 (WA); Land Administration Act 1997 (WA); and the Wildlife Conservation Act 1945.

[14] Landclearing is listed as a 'key threaten-ing process' under the Commonwealth EPBC Act 1999. However this has not yet led to a threat abatement plan relating to landclearing. Landclearing is not listed as a matter of national environmental significance under that Act. However the Commonwealth has the power to add a landclearing trigger to those matters of national environmental significance.

[15] ACF, Controlling Landclearing in Australia: A Framework for Federal Leadership and Shared Responsibility September 2001.

[16] The other three steps comprise amendments to the Income Tax Assessment Act 1997 (Cth) to provide for taxation incentives to promote the conservation of native vegetation (Step 4); national assessments of vegetation, biodiversity status, salinity and degradation to meet information needs of the regulatory structure (Step 6) and each State establishing a legislative native vegetation management plan with specified features that covers their entire jurisdiction (Step 8).

[17] p7,8 ACF, Controlling Landclearing in Australia: A Framework for Federal Leadership and Shared Responsibility September 2001.

[19] s3A Schedule 8 Integrated Planning Act 1997 (Qld). If either a regional vegetation management plan or declaration made under the Vegetation Management Act 1999 (Qld) identified high nature conservation value land on urban land, only then would that veg-etation clearing on urban land be assessable development and require an application and assessment. The one exception to that statement is that clearing of endangered regional ecosystems on urban land is assessable development. However there are no regional vegetation management plans as yet in Queensland and no declarations.

[20] See footnote 3.

[21] Sched 1, Native Vegetation Act 1991 (SA)

[22] s(a)-(f) Schedule 1, Native Vegetation Act 1991 (SA).

[23] s(h)-(i) Schedule 1, Native Vegetation Act 1991 (SA).

[24] s(k) Schedule 1, Other grounds for refusal concern amenity and flooding, s (g) and (j) Native Vegetation Act 1991 (SA).

[25] p8 Dunn P. (Presiding Member) Annual Report of the Native Vegetation Council (SA) 2001/2.

[26] p8 717 hectares is obtained by adding up the four amounts in dot points under paragraph 2, in the above Annual Report.

[27] p3, in the above Annual Report.

[28] Bennett M, Landclearing: Reforming the Law in WA Impact No 65 March 2002. See also complaints of over 80,000 hectares of illegal clearing in New South Wales made by Kathy Ridge of the Nature Conservation Council on SBS Insight program 20 June 02.

[29] At the date of publication, New South Wales has not completed any successful prosecutions for breach of the Native Vegetation Conservation Act 1997 (NSW). SBS Insight program dated 20 June 2002.

[30] For example that vegetation cleared was indigenous to Australia, that where it is proved that vegetation was cleared that the occupier cleared it, that vegetation was not intentionally sown or planted by a person, s34(1)-(3) Native Vegetation Act 1991 (SA).

[31] For example requirement to order that native vegetation be established on actual land on which the original vegetation was growing if vegetation is found to have been cleared in contravention of the Act, s34(1), (4) & (5) Native Vegetation Act 1991 (SA).

[32] Any person make take Court action to stop illegal clearing in the face of official inaction. A recent example of effective use of these types of provisions, though not for illegal clearing, is Booth v Bosworth Federal Court Q163 of 2000, Impact Dec 2001.

Hindmarsh Island Bridge Defamation Case - Cont. from p3

Given that many of the problems facing the environment are the direct result of "commercial and government requirements", this approach invites conservation groups to accept a version of "reality" which many will be unable to accept.

"However, Mr Owen (and others with him) chose to oppose a decision of an elected government; this decision was effectively beyond recall (in the absence of intervention by the Federal Government) unless the parties entitled to the benefit of the commercial agreements could be persuaded to give way. A significant feature of the anti bridge campaign was therefore the attempt to coerce. Such a campaign is necessarily different from a normal political lobby."[30] ...

"My criticism of Mr. Owen is that he does not seem to know where to "draw the line" in the promotion of his cause." [31] ...

The difficult aspect of these passages for conservationists is that Williams J. is setting a threshold for campaign activity that is extremely low. In the judgment, Williams J. refers to a "normal political lobby" and a "proper lobbying situation".[32] Presumably, once these "legitimate" avenues have been exhausted, the prudent, responsible campaigner simply gives up, or as in the present case, loses the protection of the law.

Improper advantage

One of the hallmarks of a "public interest" environmental dispute is that the motivation of those challenging what they see as inappropriate development is the protection of the environment and NOT personal gain. Williams J. refers to this motivation[33], but curiously resorts to the language of more traditional commercial disputes in characterising the campaign as one actuated by malice:

"However, the case for the plaintiffs (which I find to have been proved) is that the campaign involved a preparedness (by Mr. Owen and some other protagonists) to seek ***improper advantage*** in any way possible (short of physical violence) and to "target" the developers as part of this scheme. The course of conduct (and particularly the "underground activity" of the Kumarangk Coalition) coupled with Mr. Owen's acknowledgment in his evidence that he would resort to civil disobedience is relied upon as circumstantial evidence which I find to be compelling. Upon the plaintiffs' case Mr. Owen's preparedness to seek ***improper advantage*** when coupled with other evidence (see Part 8 of these reasons) makes it easier to discern malice as now relevant.[34] ***[author's emphasis]***

Curiously, nowhere in the judgment is there any suggestion that any of the defendants or any of the other people associated with the anti-bridge campaign stood to gain any financial advantage by their possible success. In fact, for many, the campaign represented an enormous drain on their time, financial and personal resources.

Underground campaigns

In reaching his conclusions as to malice on the part of the defendants, Justice Williams drew on the fact that much of the campaign against the Hindmarsh Island Bridge was conducted in the name of an unincorporated body known as the Kumarangk Coalition.

"Upon the whole of the evidence I conclude that Kumarangk Coalition was a device which was put in place (inter alia) to facilitate the harassment of the Hindmarsh Island marina developers and bridge builders and to frustrate any attempt to enforce the law in the event that the acts of harassment might involve an allegation of tortious or criminal action. I infer that the device must have been intended to lessen the likelihood that those involved in anti-bridge protests could be dealt with for aiding and abetting the breach of any injunction and thus provide them with some measure of comfort." [35]

Williams J. also had before him evidence of the large number of people and organisations who had been sued by the Chapmans. He also had evidence of the effect on recipients of Chapman legal letters and writs. Williams J. also commented adversely on the tendency of the defendant witnesses to avoid naming others associated with the Hindmarsh Island Bridge campaign. His Honour interpreted the motivation of those involved in the Kumarangk Coalition as one bent on disregard for the law and seeking to avoid natural consequences of the campaign. In this regard, Williams J.'s reasoning is entirely, if regrettably, consistent with his comments on the limits of legitimate protest.

Despite these conclusions, it is unlikely that the judgment will result in less "underground campaigns". In fact, the opposite is likely to be the case. If the Court's findings are not overturned on appeal, then a more likely scenario is for more campaigns in the future to be structured around impecunious or asset-protected spokespeople supported by an amorphous unincorporated group with no membership lists, no assets and no records. Whilst such a group should be effective in dealing with defamation threats (by ignoring them), it is also likely to result in less disciplined and publicly credible campaigns and that could be to the ultimate detriment of the conservation movement and the general community.

Law Reform

The topic of defamation law reform has been continuously on the agenda for the last 20 or 30 years. Calls for reform are made whenever a high profile case reaches the newspapers or electronic media.[36]

The Environmental Defenders Office in South Australia has prepared a discussion paper calling for the

introduction of a "Protection of Public Participation Act" for South Australia. Based on similar legislation in North America, the proposed Act would ensure that those engaged in non-violent public participation are protected from threats or suits that infringe their right of free speech. Copies of the paper are available on request from EDO South Australia at edosa@edo.org.au ph: (08) 8410 3833 or fax: (08) 410 3855.

ENDNOTES

[1] 2002 SASC 4 (available on-line at http://www.scaleplus.law.gov.au/ [unless otherwise stated, all references to paragraphs that follow are to this judgment.]
[2] Adelaide Advertiser 11th February 2002 reporting the partial lifting of suppression orders relating to 10 defamation actions in which the Chapmans were successful or obtained settlements.
[3] Heerey J, Federal Court 19th April 1994 during the s.45D injunction hearing.
[4] at para 288
[5] at para 305
[6] Federal Court (Matter No SG 23 of 1994)
[7] at para 170
[8] at para 166
[9] at para 171
[10] at para 171
[11] at para 172
[12] at par 173
[13] at para 77
[14] at para 77
[15] at para 78
[16] at para 324
[17] Issued on 9th July 1994 - see Part 19 of judgment - Schedule of background facts.
[18] at para 77
[19] at para 78
[20] at para 88
[21] at para 175
[22] at para 88
[23] at para 176
[24] *Lange v Australian Broadcasting Corporation (1997)* 189 CLR 520
[25] at para 146 to 160
[26] at para 109 and para 94 to 145
[27] see paras 107 to 114
[28] at para 151. (The amendments to the Trade Practice Act 1974 included the inclusion of an environmental defence at s.45DD in 1996)
[29] at para 95
[30] at para 94
[31] at para 106
[32] at para 94, 94 & 101
[33] at para 157
[34] at para 112
[35] at para 140
[36] Two recent examples: "Talk is Cheap, But Not if you Cross the Defamation Laws", by Hon. Bob Such MP, Adelaide Advertiser, January 23 2002, p.18 and "Developers: fears over free speech", Melbourne Age February 2 2002, p.1

Trade Practices Act review

Cont. from page 12

ENDNOTES

[1] Australia State of the Environment 2001 noted at page 3: "… the state of the Australian natural environment has improved very little since 1996, and in some critical aspects has worsened. … Improvements are still needed because the environment provides us with essential processes that are critical to life on Earth. These processes are known as ecosystem services …Without these ecosystem services, the world's economy would grind to a halt".
[2] The NSESD stated that the goal of ecologically sustainable development was "to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations". It's core objectives were: to enhance individual and community wellbeing and welfare by following a path of economic development that safeguarded the welfare of future generations; to provide for equity within, and between, generations; and, to protect biological diversity and maintain the essential processes and life support systems. A copy of the document is at http://www.ea.gov.au/esd/national/strategy/index.html.
[3] Page 63. A copy of the Report is at http://www.pc.gov.au/inquiry/esd/finalreport/index.html.
[4] Section 90(6).
[5] Subject to procedural requirements.
[6] Section 93(3) or in the case of third line forcing that the likely benefit to the public would not outweigh the likely detriment to the public: s 93(3A).
[7] Re Rural Traders Co-operative (WA) Ltd (1979) 37 FLR 244.
[8] Authorisation A9068.
[9] At paragraphs 6.5 & 6.7.
[10] (1991) ATPR (Com) 50-106.
[11] Re Comalco Ltd (1994) ATPR (Com) 50-142.
[12] See numerous authorisations reproduced on the ACCC website at http://www.accc.gov.au/electric/fs-elec.htm or in the authorisation indexes.
[13] See numerous authorisations reproduced on the ACCC website at http://www.accc.gov.au/gas/fs-gas.htm and the authorisation indexes.
[14] For example, A30204 proposed joint venture of 11 Sydney Councils with a recycling contractor.
[15] As defined in s 3A of the Environment Protection and Biodiversity Conservation Act.
[16] NSESD guiding principle "cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms", s.3A(e) of the Environment Protection and Biodiversity Conservation Act.

EDO Network News

New South Wales

NSW hosted the EDO network conference on Landclearing and law reform titled 'I can see clearly now...". Speakers included Carl Binning, (Greening Australia), Dr Sharman Stone, (Parliamentary Secretary to the Minister for Environment and Heritage) Professor John Williams (CSIRO) and Mick Keogh (NSW Farmer's Association). Conference proceedings can be ordered from the EDO NSW office.

EDO NSW farewells Marc Allas and Warren Kalinko as they move on to new careers. We wish them all the best for the future.

Tasmania

EDO Tasmania in conjunction with the Planning Institute of Australia, held a very successful conference on forestry law reform called 'Unlocking the gates...public participation in forest managment'.
For more information contact Jane Brown as EDO Tas on 03 6223 2770

Tasmanian solicitor Steven and his partner Arianne are the proud parents of Beatrice, born on 27 June. Congratulations

North Queensland

Please note that EDO Nth Queensland has moved offices. Their new details are on the back cover of Impact.

For information on environmental law in each state and territory, visit the National EDO Network website:

www.edo.org.au

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