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CONTENTS

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Australian Capital Territory Proposed Bill of Rights

Environmental Defender's Office (ACT) Submission to the ACT Bill of Rights Consultative Committee

Introduction

Talk of 'rights' is generally understood to refer to human rights as expressed in the United Nations Universal Declaration of Human Rights and related international treaties and declarations. However, this ignores a new generation of human rights now recognised in international environmental instruments. Human rights and responsibilities in relation to the environment and ecologically sustainable development (**ESD**) are recognised in multilateral and regional international environmental law and policy. In line with this evolving recognition, the EDO (ACT) is making a set of recommendations to the recently convened ACT Bill of Rights Consultative Committee (**BRCC**), based on the interdependence between human rights and responsibilities, and environmental protection.

The recommendations that the EDO (ACT) will make to the BRCC can be summarised as follows:

Recommendation 1:

Human rights and responsibilities in relation to the environment and ESD should be included in any ACT Bill of Rights. The Bill of Rights should provide that everyone has the right to an environment that is not harmful to their health or well being, and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

i) prevent pollution and ecological degradation;
ii) promote conservation; and
iii)secure ESD and use of natural resources while promoting justifiable economic and social development.
(This recommendation is based on section 24 of the 1996 Constitution of the Republic of South Africa).

Recommendation 2:

Procedural rights in relation to environmental issues are generally reasonably well protected in the ACT, however relevant legislation containing procedural rights are not listed in the BRCC's Issues Paper. The EDO (ACT) recommends that the BRCC recognise environment related human rights legislation in its recommendations to the ACT Government.

Recommendation 3:

The *Nature Conservation Act 1980* (ACT) should be amended to better recognise and protect the environment related human rights of indigenous Australians and other local communities in the ACT.

Recommendation 4:

The ACT Government should create a right of enforcement of environment related human rights in ACT Courts by complainants, an ACT Human Rights Commissioner and the Commissioner for the Environment.

Recommendation 5:

The terms of reference of the Standing Committee on Legal Affairs in the ACT Legislative Assembly should be amended to better define human rights, including human rights in relation to the environment or, alternatively, the principles of ESD.

Continued on page 2

Continued from page 1

Recommendation 6:

The *Legislation Act 2001* (ACT) should be amended to require Parliamentary Counsel in the ACT Public Service, to draft legislation in a manner consistent with specified human rights and principles of ESD, which should be specified in that Act.

Background to the Bill of Rights inquiry

On 31 May 2002 the Chief Minister of the ACT, Jon Stanhope MLA, launched an inquiry into whether a Bill of Rights should be enshrined in ACT legislation.

The inquiry is chaired by Professor Hilary Charlesworth, a prominent human rights academic, who is expected to report back to the Government early next year. Professor Charlesworth has stated: "A Bill of Rights should not just be left up to politicians and lawyers ... Canberrans have been given a wonderful opportunity to help decide whether the ACT should be the first Australian jurisdiction to enshrine basic human rights in law."

The inquiry envisages the proposed Bill taking one of three forms; entrenched legislation, ordinary legislation, or a form of unenforceable declaration.

A Bill of Rights will have some impact on the exercise of legislative and executive power within the ACT. The degree of impact will, of course, be determined by the ultimate form chosen for the Bill. For example, ordinary legislation is vulnerable to repeal. Legislated rights are, however, more powerful than rights contained in an unenforceable declaration. It is arguable that any public enshrinement of rights has impact by placing rights dialogue on the public agenda and by setting certain benchmarks.

From the perspective of the EDO, the discourse surrounding the proposed Bill of Rights is an opportunity to raise the link between human rights and responsibilities and environmental protection. If environment related rights are ultimately included in a Bill of Rights, this may go some way towards raising the public's awareness of issues relating to environmental protection, and would potentially, depending on the form in which the Bill is enacted, lead to certain enforceable environmental rights in ACT legislation.

Drawing from international experience

There is a growing recognition in multilateral and regional international law and policy that human rights and responsibilities, and environmental protection, are interdependent. It is recognised that longstanding mainstream human rights, including rights to culture, education, association, due process, information, and freedom of speech, need to be protected so that persons can participate in economic, social and cultural activities that promote ESD. Mainstream rights such as the right to property, are also being narrowly interpreted in some cases so that reasonable restrictions in order to protect the environment are found not to violate the right.[1]

The human rights of social groups that have traditionally been disadvantaged despite longstanding rights to equality and non-discrimination in the international Bill of Rights, including youth, women and indigenous peoples, are also recognised in many international environmental instruments. For example, article 8(j) of the 1992 Convention on Biological Diversity[2] demonstrates the growing interdependence of the human rights norm of non-discrimination on the basis of race, with international obligations regarding ESD. It provides that contracting parties are to respect, preserve and maintain indigenous and local communities' knowledge, innovations and practises relevant to biodiversity conservation and sustainable use, 'as far as possible and as appropriate'. Parties are also to promote such knowledge and practises with the approval and involvement of the holders of such knowledge, and to encourage the equitable sharing of the benefits arising from the use of that knowledge.

As long ago as 1972 the soft-law Declaration of the United Nations Conference on the Human Environment recognised that environmental protection was essential for human well-being and the enjoyment of basic human rights, including the right to life itself.[3] In 1992 the Rio Declaration on Environment and Development included many principles linking human rights and the environment. It proclaims that human beings are entitled to a healthy and productive life in harmony with nature.[4] It also states that the right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations. Many other hard-law international environmental treaties also include human rights norms and principles.[5]

More recently the Ksentini Report[6], commissioned by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in the UN Commission on Human Rights, examined ties between human rights and the environment. The Ksentini Report includes an overview of participatory democracy and the environment, environmental degradation and its impact on vulnerable groups, and an analysis of the effects of the environment on the enjoyment of fundamental rights.

In January this year, a Meeting of Experts on Human Rights and the Environment was convened jointly by the Executive Director of the UN Environment Program and the UN High Commissioner for Human Rights. That meeting examined the close connection between the protection of human rights and environmental protection in the context

Doc. E/CN.4/Sub.2/1994/Corr.1

Continued on page 14

Western Australian Laws
Making a Photographic or Video Recording

Sandra Boulter, Solicitor, EDO (WA)

Introduction

What if you want to take a photo, film or video record of an unlawful activity in Western Australia? Can you make such a record without the consent of the parties to the activity? To whom can you lawfully show such a record and under what circumstances? What are the possible consequences for you for making such a record?

The primary statute that regulates the photographic or video recording of a private activity in Western Australia[2] is the *Surveillance Devices Act 1998* (the **Surveillance Act)**.[3] The Surveillance Act regulates,

- the use of listening devices in respect of private conversations;
- optical surveillance devices in respect of private activities; and
- tracking devices in respect of the location of persons and objects.

The taking of photos or making of video recordings would fall within the second category of optical surveillance.

Interpretation

Under the Surveillance Act, [4]

- *Party* in relation to a *private activity* means a person who takes part in the activity or a person who with the express or implied consent of any person taking part in the activity, observes or records the activity;
- *Principal party* in relation to a *private activity* teans a person who takes part in the activity;
- *Private activity* means any activity carried out in circumstances that may reasonably be taken to indicate that any of the *parties* to the activity desires to be observed only by themselves, but does not include an activity carried out in circumstances in which the parties to the activity ought to reasonably expect that the activity may be observed.5
- *Public interest* 6 includes the interests of national security, public safety, the economic well-being of Australia, the protection of public health and morals, and the protection of the rights and freedoms of citizens.

Private or public activity?

If an activity which is recorded by a photo or video is not a private activity, there is no prohibition under the Surveillance Act against recording or publishing[7] that activity.

Techniques of statutory interpretation applied to the definition of *private activity* under the Surveillance Act, suggest that at least one *party*, but not all the *parties* to a *private activity*, must subjectively hold the desire that the activity be private. However the phrase, 'ought reasonably expect that the activity may be observed' requires that that desire must in all the circumstance be reasonable when looked at objectively.[8] In determining whether an activity is private, the circumstances as a whole are considered and caution should be exercised before concluding that just because an activity takes place outside a building, it is not private.[9] See the remarks by His Honour Justice Owen at page 5 of *Re Surveillance Devices Act 1998; Ex parte TCN Channel Nine Pty Ltd* [1999] WASC 246 (2 December 1999) (the TCN case),

"…Obviously, the location and physical environment in which the incident took place will be of great significance in deciding what the parties expected…"

Justice Owen in the TCN case was not required to consider the proposition that criminal activity cannot fall within the ambit of *private activity*, and merely suggested that this point was for consideration on another day. As a matter of public policy, it is arguable that certain unlawful activities should not be regarded as *private activities*. Furthermore, it might be suggested that an activity that takes place on public lands such as State forests or public roads could not be expected by a reasonable person to occur in private. There is no doubt that there are competing public interests,[10] the outcome of which would have to be determined in any given set of circumstances.[11] Judicial interpretation of the Surveillance Act may expand our understanding of what is and is not a private activity.

The question to decide now is: "Is the activity I am going to record a private or public activity?"

Making, possessing or publishing a photo, film or video of a private activity

The Surveillance Act prohibits the use of a listening or optical surveillance device to observe private activities.[12]

A person who is unlawfully in possession of *surveillance information* commits an offence for which the penalty is $5,000.[13] Any person lawfully may be in possession of surveillance information if:

- the *surveillance information* was obtained in accordance with Part 5 of the Act; or
- the *surveillance information* was obtained by the person from a person who was lawfully in possession of that information and in circumstances where the publication or communication of the surveillance information to the person was not an offence. [14]

Surveillance information includes photos, films or video recordings (of a private activity by a person) that has been obtained (directly or indirectly) through the use of a surveillance device.[15]

Continued on page 4

The Surveillance Act restricts the publication of records of *private activities*.[16] It is an offence for a person to knowingly publish or communicate a record of a *private activity* that has come to the person's knowledge as a direct or indirect result of the use of an optical surveillance device. [17] The penalties for this offence are:

- for an individual, $5 000 and/or imprisonment for 12 months; and
- for a body corporate, $50 000.

Clearly the making of a photographic, film or video record is an offence under the Surveillance Act. The question then is: "Do I have a defence to this offence?"

Defences against the offence of publishing a photo or video

Publishing a record of a *private activity* is not an offence - [18]

➢ Where the publication is made:

- to a party to the private activity;
- with the express or implied consent of each *principal party* to the *private activity*;
- to any person or persons authorised for the purpose by the Commissioner of Police, the chairman or any two members of the Anti-Corruption Commission or the Chairperson of the National Crime Authority;
- by a law enforcement officer to the Director of Public Prosecutions of the State or of the Commonwealth or an authorised representative of the Director of Public Prosecutions of the State or of the Commonwealth;
- in the course of the duty of the person making the publication;
- for the protection of the *lawful interests*19 of the person making the publication;
- in accordance with Part 5 of the Surveillance Act - "Use of Surveillance Devices in the Public Interest"; or
- in the course of any legal proceedings.

➢ Where the publication is made to a member of the police force of the State or of another State or a Territory in connection with:

- any indictable[20] matter of such seriousness as to warrant the publication; or
- where the person making the publication believes on reasonable grounds that it was necessary to make that publication in connection with an imminent threat of serious violence to persons or of substantial damage to property.

The foregoing exceptions only provide a defence if the publication,

➢ is not more than is reasonably necessary:

- in the *public interest;*
- in the performance of a duty of the person making the publication; or
- for the protection of the *lawful interests* of the person making the publication;

➢ is made to a person who has, or is believed on reasonable grounds by the person making the publication to have, such an interest in the *private activity* as to make the publication reasonable under the circumstances in which it is made.[21]

So if I am planning on committing the offence of making and publishing a recording of an unlawful private activity which is not expressly authorised by the parties, the question I should ask is: "Am I protecting a lawful interest or is it in the public interest?"

Photos or videos taken to protect a lawful interest

Lawful interest is not defined in the Surveillance Act. Judicial interpretation suggests a variety of tests for what might be a *lawful interest* under the Surveillance Act. At the end of the day what is or is not a *lawful interest* will always be a matter to be determined objectively in the particular circumstances, at a time immediately before the recording was made, and balanced against other competing public interests.

Photos or videos taken in the public interest

Part 5 of the Surveillance Act[22] - 'Use of Surveillance Devices in the Public Interest', deals with the use of surveillance devices in the public interest, although it may also apply to law enforcement agencies, see the Surveillance Act and the TCN case.[23]

Part 5 of the Surveillance Act[24] is inapplicable if, during the course of the recording of the private activity, an act is done that is unlawful under any Act other than the Surveillance Act. So for example if the person undertaking the recording broke into premises to make the recording, trespassed on land or photographed restricted material, a defence under Part 5 may not be available.

Any person may take a photo or video of a private activity[25] in the public interest when one or more of the parties to the recording has consented, expressly or impliedly.[26]

Any person may make an emergency use of an optical surveillance device to observe a private activity without the consent of any of the parties to the activity if there are reasonable grounds for believing that the circumstances are so serious and the matter of such urgency that the use of the device is in the public interest.[27]

A photo or video taken[28] of a *private activity* with or without the consent of a party may only be published under the provisions of the Surveillance Act, or by an order of the Supreme Court.[29] Furthermore, if the photo or video is taken without the consent of a principal party a report must be supplied to the Supreme Court along with the photo or video.[30] The relative gravity of the *private activity* recorded may influence the Court's decision as to whether or not it is in the *public interest* that the photo or video be published.[31]

The public interest

There is a wide public interest in the exclusio of evidence illegally obtained. There may be a balancing act to be undertaken to determine which public interest will prevail.[32] For the purpose of Part 5 the use of optical surveillance devices is in the *public interest* if it is in

the interests of national security, public safety, the economic well-being of Australia, the protection of public health and morals, and the protection of the rights and freedoms of citizens.[33] This list is not exhaustive and may include other interests.

Private activity recorded without a parties' consent

Unless another provision of the Surveillance Act applies, a person who takes a photo or video record of a private activity,[34] in the public interest, without the consent of the parties and who wishes to publish that record, must deliver without delay a written report to a Judge of the Supreme Court.

The report must include:
- particulars of the device used;
- particulars of the use of the device and the period during which it was used;
- the name, if known, of any person whose private activity was observed or visually recorded;
- the circumstances that caused the person to believe that it was necessary to observe or visually record the private activity; and
- particulars of the general use made, or to be made, of any evidence or information obtained by use of the device. [35]

An application to the Supreme Court for a publication order[36] is required:
- to be in writing;
- to set out the grounds on which the application is based;
- to include an affidavit by the person making the application, deposing to the facts required by the Judge to enable the Judge to deal with the application;[37] and
- must not be heard in open court.[38]

An application for a publication order may be made upon notice[39] or ex parte[40] as the Judge thinks fit.[41]

I must now decide: "Do I need a publication order? If I do, will I need legal advice and representation to obtain the publication order? To whom do I want to publish the record?"

Report to a Judge of the Supreme Court

Where a report is provided to a Judge, the Judge may direct that any record of evidence or information obtained by the use of the surveillance device to which the report relates be brought before the Judge.[42] The photos or video brought before a Judge must be kept in the custody of the Court if the Judge is satisfied that it is necessary to protect or further the *public interest*.[43] The Judge may also order that they be returned, made available to any person[44] or destroyed.[45]

A Judge may make an order that a person may publish photo or video of a *private activity* that has come to the person's knowledge as a direct or indirect result of the use of an optical surveillance device,[46] if the Judge is satisfied upon application being made in accordance with the Surveillance Act,[47] that the publication should be made to protect or further the *public interest*.[48]

A Judge, when making an order under the Surveillance Act,[49] may impose such conditions or restrictions as the Judge considers necessary in the circumstances.[50]

If a Court makes an order that a record may be published under[51] the Surveillance Act, that order will apply to the person making the application and not anyone else.[52] This may leave a somewhat peculiar result that a record may be published and become part of the public domain, but anyone else who publishes the record may be in breach of the Surveillance Act.[53]

Evidence

Photographs, films and videos[54] of an actual event may be admitted:
- as real evidence assisting the witnesses testimonial evidence;[55]
- as real evidence standing alone;[56] or
- indirectly by evidence of a person who has seen such a record which is no longer available.[57]

Whatever the provisions of an Evidence Act required, in respect of photographs, films or video recordings, it would be prudent to endorse the original record with:
- a time and date that the record was made;
- the place from which the record was made;
- the name of the person who made the record; and
- the purpose for which the record was made, and have the record signed by a Justice of the Peace as soon as possible.

"If I want the record I have made to be used as evidence what do I have to do to make the evidence admissible?"

Record made in good faith

No civil or criminal proceeding can be taken against a person for or in respect of any act or thing done in good faith under the Surveillance Act. [58]

Furthermore, if a member of the police force or a government department officer threatens certain consequences to a person lawfully making or possessing a photographic or video record, then such a threat may constitute a criminal threat and should quite reasonably generate, at the very least, a written complaint to their superior.

Conclusion

Any person may make a video recording or take a photo of any public activity unless specifically prohibited.

Any person may make a video recording or take photos of a private activity with the consent of one of the parties to the activity.

Any person may make a video recording or take photos of a private activity without the consent of any of parties to the activity, to protect a lawful interest or (if there are reasonable grounds for believing that the circumstances are so serious and the matter of such urgency) the use of the device is in the public interest.

Continued on page 6

Any person may publish a photo or video record, without a Supreme Court order, to a member of the police force, where the person making the publication believes on reasonable grounds that it was necessary to make that publication in connection with an imminent threat of serious violence to persons or of substantial damage to property.

The video recording or photo of a private activity may not be more than is reasonably necessary and must be in the public interest.

The photo or video recording of a private activity (together with a report about the circumstances of the recording if it was taken without consent of a party) must be provided to a judge of the Supreme Court who may then make an order in the public interest concerning the recording.[59]

Neither civil nor criminal proceedings can be taken against a person taking a video or photo in good faith under the Surveillance Act.

ENDNOTES

[1] This paper has been a joint effort. Particular thanks go to Hylton Quail barrister and solicitor, and member of the EDO management committee for his helpful comments; and to Gina Tresidder a Murdoch University law student who as an EDO volunteer, undertook some research and a final edit of the paper. Notwithstanding, the assistance any error is the author's alone. The views expressed in the paper are not necessarily those of the EDO and the paper should not be treated as a substitute for legal advice, especially when a matter is one of a possible criminal offence.

[2] Specific legislation on the subject of privacy, listening and photographic and video recordings include, see The *Privacy Act 1988 (Cth); Telecommunications (Interception) Act 1979 (Cth); the Australian Federal Police Act 1979 (Cth); Customs Act 1901 (Cth); Evidence Act 1995 (Cth);Income Tax Assessment Act 1936 (Cth); the Privacy Committee Act 1975 (NSW); the Listening Devices Act 1984 (NSW); the Invasion of Privacy Act 1971(QLD)*, which is an Act to make provision for the licensing and control of credit reporting agents, for regulating the use of listening devices and for other purposes, in which there are special provision relating to private dwellings, see Part IV Listening Devices, section 48A; and the Listening Devices Ct ? (SA); the *Surveillance Devices Act 1999 (VIC); the Listening Devices Act 1992 (ACT);* and the *Listening Devices Act 1996 (NT)*.

[3] There is no specific privacy legislation in Western Australia. (The publishing or showing of a photographic or video record of an unlawful activity may constitute defamation but the person publishing the record may have the defence of truth to answer such a complaint.)

[4] Where the following definitions are used in the article they will be italicised.

[5] See section 3(1) of the Surveillance Act.

[6] Only for the purpose of Part 5 of the Surveillance Act.

[7] For the purpose of this article publication includes communication.

[8] Also see Re *Surveillance Devices Act 1998*; Ex parte TCN Channel Nine Pty Ltd [1999] WASC 246 (2 December 1999) (the TCN case), paragraph 19.

[9] See Commentary on Order 81H of the Rules of the Supreme Court 1971, at Order 81H.4.2; and the TCN case at paragraph 19'.

[10] The right to privacy versus the need for evidence to prive a criminal offence.

[11] For example *Vale v the Queen* [2001] WASCA 21

[12] See sections 6 of the Surveillance Act.

[13] Regulation 9(1) of the Surveillance Devices Regulations 1999.

[14] Under section 9 of the Surveillance Act.

[15] See regulation 9(3) of the Surveillance Devices Regulations 1999.

[16] Part 3 of the Surveillance Act.

[17] See section 9(1) Surveillance Act, but subject to subsection 9(2) of the Surveillance Act

[18] See subsection 9(2) of the Surveillance Act which provides that subsection 9(1) does not apply in certain circumstances.

[19] There has been judicial consideration of this phrase in a similar context under the Listening Devices Act 1984 (NSW), see Amalgamated Television Services v Marsden [2000] NSWCA 167, para 30; Queen v Eade (2000) 118 A Crim R 449 at 459-460; See v Hardman [2002] NSWSC 234, in which it was held that notwithstanding it was a lawful interest to record a private conversation (to which the recorder was a party) so that the recorder could revisit the conversation for further private consideration, in the particular circumstances it was not a lawful interest; and see *Violi v Berrivale Orchards Ltd* [2000] FCA 797 in which it was held that it is a matter of objective judgement whether a recording was necessary for the protection of an actual lawful interest; and under the Listening Devices Act 1972 (SA) see the T V Medical Board (SA) [1992] 58 SASR 382. In the SA case a recording of a telephone conversation between a doctor and a patient (made by the patient without the doctor's knowledge) was not inadmissible under the Telecommunications (Interception) Act 1979 (Cth) but was inadmissible under the Listening Devices Act 1972 because it was not made to protect a lawful interest nor was it in the public interest. See also the Official Trustee in Bankruptcy v Trevor Newton Small Superannuation Fund [2001] FCA 1267 for lawful interest under the Bankruptcy Act 1996 (Cth) 1996.

[20] An indictable offence is generally an offence triable by a judge and jury and prosecuted by a plea from the Crown. However, there are different classes of indictable offences and some may be dealt with between the parties and determined summarily by a magistrate. The Western Australian Criminal Code makes a distinction between indictable and simple offences. Indictable offences are further categorised into crimes and misdemeanours (thereby indicating the seriousness of the offence) and any offence not otherwise designated is a simple offence.

[21] See section 9(3) of the Surveillance Act.

[22] Sections 24 – 33 of the Surveillance Act.

[23] See paragraph 6.

[24] See section 25 of the Surveillance Act.

[25] See Division 2, Part 5, the Surveillance Act.

[26] See sections 26 and 27 of the Surveillance Act, and the TCN case paragraph 12.

[27] See Division 3 of Part 5 of the Surveillance Act, sections 28 and 29 of the Surveillance Act and the TCN case at paragraph 10;

[28] Under Division 2 or Division 3 of Part 5.

[29] See section 31 of the Surveillance Act; and the TCN case at paragraph 9.

[30] See section 30 of the Surveillance Act; and the TCN case at paragraph 10.

[31] See the TCN case at paragraph 10.

[32] *Violi v Berrivale Orchards Ltd* [2000] FCA 797.

[33] See section24 of the Surveillance Act.

[34] Under Division 3-Emergency use of listening devices and optical surveillance devices, section 28 or 29 of the Surveillance Act.

[35] See section 30 of the Surveillance Act.

[36] Under section 31 of the Surveillance Act.

[37] See section 32(1) of the Surveillance Act.

[38] See section 33 of the Surveillance Act; and Order 81H of the Rules of the Supreme Court Commentary at 81H.4.1.

[39] With notice to the parties to the activity.

[40] Without notice to the parties to the activity.

[41] For an application under section 31, see section 32(2) of the Surveillance Act.

[42] See section 30(3) of the Surveillance Act.

[43] See section 31(3) of the Surveillance Act.

[44] Including to the police force of the State or of another State or Territory; the Anti-Corruption Commission, the Australian Federal Police or the National Crime Authority.

[45] See section 30(4) of the Surveillance Act.

[46] Division 2 or 3 of the Surveillance Act,

[47] See section 32 of the Surveillance Act.

[48] See section 31 (1) of the Surveillance Act.

[49] See section 31(1) of the Surveillance Act.

[50] See section 31(2) of the Surveillance Act.

[51] Under section 31 of the Surveillance Act.

[52] See section 31 of the Surveillance Act.

[53] See the TCN case paragraphs 24 -26.

[54] These are documents for the purpose of the Evidence Act 1906 (WA) see the Interpretation Act 1984 (WA) definition of document. See sections 62 -65A, 79B -79G & 79 of the Evidence Act 1906 (WA) about the admission of documents in Western Australia.

[55] R v Sitek [1988] 2 QdR 284; (1987) A Crim R 421; Halsbury's Laws of Australia [195 - 5035].

[56] R v Sitek [1988] 2 QdR 284; (1987) A Crim R 421.

[57] R v Sitek [1988] 2 QdR 284; (1987) A Crim R 421; Simpson Timber Co. (SASK) Ltd v Bonville [1986] 5WWR 180, at 186.

[58] See section 42 of the Surveillance Act.

[59] Unless it is published to a police officer as described above.

Public availability of information under the IFOA process

Paul Toni, Principal Solicitor, EDO (NSW)

Introduction

The Forestry and National Park Estate Act 1998 (the Act) is the NSW legislation which implements the main objectives of the National Forest Policy Statement (1992), which required each of the States and Territories to establish a world-class reserve system, a viable and value-added timber industry, adopt ecologically sustainable forest management practices and involve the community in forestry related decision making.

The Act established a reserve system and created a scheme for ecologically sustainable forest management practices comprised of three main elements:

1) A regional forest assessment of the environmental, heritage, economic and social values, ecologically sustainable forest management and timber resources of those parts of a forest region considered appropriate by the Resources and Conservation Assessment Council[1];

2) A forest agreement between the Ministers administering the Environmental Planning and Assessment Act 1979 (EPA Act), the Forestry Act 1916, the National Parks and Wildlife Act 1974 (NPW Act), the Protection of the Environment Administration Act 1991 (PEA Act) and the Fisheries Management Act 1994 (FMA Act). The Act required forest agreements to promote ecologically sustainable forest management, community consultation and arrangements in respect of native title or Aboriginal land claims[2].

3) An integrated forestry operations approval (IFOA) granted to the Forestry Commission of NSW (State Forests) by the Ministers administering the EPA Act, Forestry Act, NPW Act, PEA Act and FMA Act for a term of up to 20 years[3].

A forest agreement is a pre-requisite to the issue of an IFOA, and the IFOA is revoked in the agreement is terminated[4]. The primary purpose of the forest agreements to date has been to make more detailed provision for inter-agency co-operation in the management of forestry operations than may have been possible or desirable through conditions of licences issued under the Protection of the Environment Operations Act, the Threatened Species Conservation Act and Part 7A[5] of the FMA Act. In addition, some provisions of the forest agreements describe, or purport to describe, in plain English some of the more technical expressions used in the related IFOA[6].

IFOAs may be subject to licences granted under Protection of the Environment Operations Act, the Threatened Species Conservation Act and Part 7A of the FMA Act[7]. Once granted, the terms of such licences cannot be varied or revoked[8], otherwise than in the course of an amendment of the IFOA[9]. IFOAs may be revoked, suspended or amended at any time jointly by the Ministers[10].

Unlike most other environment-related legislation in NSW, third parties are not entitled to bring proceedings to restrain breaches of the Act or forest agreements or IFOAs made or granted under the Act, or of licences granted in respect of IFOAs[11]. However, the Act does require the public to be consulted prior to the making, amendment or revocation of a forest agreement[12] and in the course of each 5 year review of forest agreements and IFOAs[13]. In addition, s 22 of the Act requires a variety of documents to be available for public inspection. The Minister administering the EPA Act must prepare an annual report on each forest agreement with respect to ecologically sustainable forest management and compliance with any IFOA which must be laid before Parliament[14].

Southern Region IFOA

Forest agreements have been made, and IFOAs granted, for the Eden, Upper North East, Lower North East and Southern Regions[15]. Although the Act purported to establish a general scheme whereby forest agreements and IFOAs were made and granted only after a regional forest assessment had been completed, the forest agreements for the Eden and Upper and Lower North East were required to be made within a very limited period of time[16], the requirement for a regional forest assessment was deemed to be satisfied by existing environmental assessments rather than a dedicated forest assessment[17], and public participation in the making of those agreements was curtailed[18]. As a consequence, the only forest region in NSW that has, to date, been the subject of a dedicated regional forest assessment has been the Southern Region. A dedicated forest assessment is presently being undertaken in respect of the Western Region of NSW[19].

The IFOA for the Southern Region requires State Forests to make a variety of documents available to the public at their regional offices for inspection free of charge and, for a charge, to copy and take away. Those papers include:

- Forest zoning documents and general guidelines[20], including the forest management zoning maps which indicate how land in the Southern Region has been classified under the Forest Management Zoning System described in Forest Management Zoning in NSW State Forests (State Forests of New South Wales, December 1999) together with a copy of that document, and Implementation of IFOA Silviculture in the Southern Forest Agreement Region (State Forests of New South Wales, April 2002), and Cultural Heritage Guidelines (State Forests of New South Wales, December 1999).
- Harvesting plans, including:

Continued on page 12

International Law - Part 2

Precautionary Principle

Gillian Walker, Volunteer solicitor, EDO (NSW)

Following on from Part One of this series, which discussed sustainable development in both international and Australian law, the precautionary principle as a tenet of international environmental law, and its implementation in Australian environmental law is examined.

The Precautionary Principle in International Law

'It is rational… to give the environment the benefit of the doubt'.[1]

Principle 15 of the 1992 Declaration of the UN Conference on Environment and Development (Rio Declaration) codified what has widely become known as the precautionary principle. It states that:
"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capacities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

Put simply, the burden of proof is placed upon proponents of change or development, to demonstrate that their actions will not cause serious or irreversible environmental harm,[2] with decision makers urged to err on the side of caution where science is unable to confidently predict the effects of an activity.[3] The principle advocates a manner of decision making which ensures that the thresholds of environmental safety "should not even be approached, let alone breached".[4]

The precautionary principle cannot be found in the text of the 1972 Stockholm Declaration on the Human Environment.[5] Article 6 contains the closest reference, whereby it provides that the:

"discharge of toxic substances and the release of heat, in such quantities…as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible harm is not inflicted upon ecosystems."

The distance traveled in the two decades between Stockholm Conference and the Rio Earth Summit is clear when you compare these two statements, for while Stockholm demands that environmentally harmful activities be halted, Rio demands that such activities never begin.

The middle point between the two positions, and in the development of the precautionary principle, can be found in the World Charter for Nature.[6] Adopted ten years after the Stockholm conference, this UN General Assembly resolution was an ecocentric document which set forth "principles of conservation by which all human conduct affecting nature is to be guided and judged".[7] Although non-binding in nature, the World Charter for Nature set a standard for ethical conduct, and a number of its provisions are now reflected in international treaties.[8]

Principle 11 of the World Charter for Nature states that
"Activities which might have an impact on nature shall be controlled, and the best available technologies that minimise significant risks to nature…shall be used; in particular
a) Activities which are likely to cause irreversible damage to nature shall be avoided;
b) Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination… and where potential adverse effects are not fully understood, the activities should not proceed;…"

The key elements of the precautionary principle, those of fully assessing the possible impacts of an activity and not acting where there is significant uncertainty or risk, are clearly discernable from Principle 11 of the Charter. It can be regarded as the international community's first, albeit embryonic, articulation of the precautionary principle.[9]

There is a strong and cogent argument that the precautionary principle is rapidly becoming customary international law.[10] After its inclusion in the World Charter for Nature, the precautionary approach was adopted in an ever-increasing number of documents. Its first official adoption at an 'international ministerial level' was in the first Ministerial Declaration Calling for a Reduction of Pollution at the 1987 Second International Conference on the Protection of The North Sea,[11] followed shortly thereafter by the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,[12] and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.[13]

The Rio Declaration was a defining moment in the acceptance of the precautionary principle as a fundamental component of international law. Since that time the precautionary principle has been embodied in virtually all treaties relating to environmental protection and management.[14] These include the widely accepted 1992 Convention on Biological Diversity, and the 1992 United Nations Framework Convention on Climate Change, both adopted at the Rio Earth Summit.

The principle, although not explicitly referred to by title, appears to also have been noted with approval by the International Court of Justice in the Case Concerning the Gabcikovo-Nagymaros Project.[15] The Court stated that:
"The Court is mindful that, in the field of

environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage".[16]

This builds upon the comments of Judge Weeramantry in his dissenting opinion in the Nuclear Tests Case (NZ v France),[17] where he noted that the precautionary principle allowed New Zealand to institute legal proceedings prior to the actual commencement of nuclear testing by France and held that the principle was 'gaining increasing support as part of the international law of the environment'.[18]

The inclusion of the precautionary principle in international legal instruments, or the debate as to whether or not it has been elevated to the level of customary international law[19] is, in reality, of little concern. The relevance of the precautionary principle for the practical amongst us is quite simply its inexorable linkage with that age old wisdom, common sense.[20]

The Precautionary Principle and Australian Law

The concept of Ecologically Sustainable Development (ESD) in Australia explicitly includes the precautionary principle, and therefore its incorporation into Australian policy and legislation (which was discussed in Part One of this series), predominantly mirrors that of ESD. As the majority of references to the precautionary principle are to be found in the objects section of legislation, the role of the Courts in interpreting and applying the principle has become extremely important.

The seminal judgment in Australian law in relation to the precautionary principle is that of Stein J (as he then was) Leatch v Director-General of National Parks & Wildlife and Shoalhaven City Council.[21] The decision stands, to this time, as the most extensive judicial treatment of the precautionary principle in Australia.[22] At the time of the decision, the National Parks and Wildlife Act 1974 did not contain any reference to the precautionary principle, however, it did require the Court to take into account 'relevant' matters. The applicant, who sought to prevent the construction of a road through the habitat of endangered fauna, including that of the Giant Burrowing Frog and the Yellow-Bellied Glider, argued that the precautionary principle was a relevant matter. In a statement which constitutes a landmark of Australian environmental law, his Honour concluded that the precautionary principle was relevant in that it was:

"A statement of common sense [that] had already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists…decision-makers should be cautious."[23]

Upon applying the principle to the facts and evidence in the case before him, Stein J was unable to conclude with certainty as to what impact the granting of the subject licence would have upon the species in question, and therefore upheld the applicant's appeal. In concluding, his Honour stated that:

"… caution should be the keystone to the court's approach. Application of the precautionary principle appears to me to be most apt in a situation of scarcity of scientific knowledge…"[24]

These direct incorporations of the precautionary principle into Australian law are further supported by the High Court decision in Minister for Immigration and Ethnic Affairs v Teoh.[25] The Court held that, in the context of discussing the Convention on the Rights of the Child:

"The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law."[26]

It has been widely commented that this decision provides a means by which the precautionary principle, and the wider concept of sustainable development, can be incorporated as relevant matters in decision making.[27]

Since the decision in Leatch, the precautionary principle has been accepted into jurisprudence beyond the Land and Environment Court of NSW,[28] as it has been applied by the Supreme Court of Tasmania,[29] the Full Court of the Supreme Court of Western Australia,[30] and the Federal Court of Australia.[31] The precautionary principle is now accepted as a part of environmental decision-making in Australia and indeed, is seen as 'evolving into a tenet of Australian common law'.[32]

The principles of public participation and environmental impact assessment, and their implementation into Australian law, will be addressed in the next issue of Impact.

ENDNOTES

[1] G Fullem 'The Precautionary Principle: Environmental Protection in the Face of Scientific Uncertainty' (1995) 31 Willamette L Rev 495 at 501

[2] C Barton op cit at 509

[3] Ibid at 513

[4] T O'Riordan & J Cameron, The History and Contemporary Significance of the Precautionary Principle in O'Riordan & Cameron (eds) Interpreting the Precautionary Principle 15 1994 p 17

[5] Adopted by the 1972 UN Stockholm Conference on the Human Environment.

[6] UNGA res 37/7, 28 October 1982. (1983) 23 ILM 455 The Charter was adopted by a vote of 111 in favour, 18 abstentions, and one vote against, being the USA.

[7] Preamble, 1982 World Charter for Nature

[8] Sands Principles of International Environmental Law Vol 1 p 43

[9] 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 515

[10] G Fullem op cit at 500; 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.

[11] (1987) 27 ILM 835

[12] (1987) 26 ILM 1541

[13] (1992) 31 ILM 1312. Other documents in which the precautionary principle was incorporated include the 1990 Ministerial Declaration of the Second World Climate Conference, agreed to by 137 states and the European Com-

Continued on page 11

Sustainable Development and Exercise of Judicial Discretion

Elisa Nichols, Principal Solicitor, EDO (NSW)

This paper is an abridged version of a paper delivered at the Inaugural International Colloquium on Environmental Law in Guadalajara, Mexico on 12 October 2002.

Australia has embraced the concept of ecologically sustainable development (ESD) within its environmental legislative and policy framework. While this is laudable, it is the application and enforcement of policy and legislation that indicates the strength of Australia's commitment to the ideals of ESD. The judicial application of these concepts is one aspect of this. While Australian courts are not often called upon to actually apply the principles of ESD, except in some merits based cases, it can be seen that where a judge is required to exercise their discretion in environmental matters by weighing up various considerations, the task undertaken is akin to the balancing act required in applying the principles of ESD. This can be illustrated by analysing the decision of Justice Branson in Booth v Bosworth (2001) 117 LGERA 168.

Ecologically sustainable development

In 1992, the Council of Australian Governments (COAG) agreed on a National Strategy for Ecologically Sustainable Development. The goal was enunciated as:

"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."

This was supported by a number of core objects and guiding principles. These have been adopted or adapted into Australian environmental legislation in various ways. In the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act), the objects contained in s.3 include:

"to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources."

Section 3A of the EPBC Act goes on to identify the "principles of ecologically sustainable development" in the following terms:

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
(c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
(e) improved valuation, pricing and incentive mechanisms should be promoted.

The decision in Booth v Bosworth

Booth v Bosworth involved an application in the Federal Court for an injunction to prevent the killing by electrocution of tens of thousands of spectacled flying foxes on a lychee farm in far North Queensland. It was argued that this action breached s.12 of the EPBC Act, which makes it an offence to take an action which would have a significant impact on the world heritage values of a declared World Heritage Area. The spectacled flying fox is resident in the Wet Tropics World Heritage Area which borders the farm and is protected as part of the biodiversity of the world heritage area. Justice Branson found that the action of electrocuting approximately 18,000 spectacled flying foxes per season breached s.12 of the EPBC Act. It was then a matter for Her Honour's discretion whether or not she granted the application for an injunction.

Operation of discretion

The operation of a judge's discretion in environmental cases is not an exercise in applying ESD principles. However, the application of discretion in environmental cases involves a weighing up of factors which can be seen as a similar exercise to the balancing act performed when deciding whether an activity is ecologically sustainable.

In Booth v Bosworth, the judge was required to weigh up various factors including:

- the economic impact of granting the injunction on the respondent and the local community;
- the viability of alternative forms of crop protection (namely netting);
- the impact on the Wet Tropics World Heritage Area.

The evidence available to the Court in relation to the first factor was fairly limited. The respondents relied on an application that they had submitted for a permit to kill the flying foxes in which they had stated that they lost $200,000 worth of lychees annually to spectacled flying foxes and rainbow lorikeets. No evidence of the profitability of the farm or its contribution to the local economy was submitted although it was argued in submissions that an injunction should not be granted because of the economic impact on the respondent and the local community. While the judge was willing to accept that there would be some economic impact on the respondent and the community, she was not able to assess how much.

Evidence was brought about the availability of an alternative means of crop protection by erecting full exclusion

netting. However, the evidence showed that the netting of the entire farm would cost over $1 million and that the respondent had obtained a quote to net only part of the farm. The judge accepted that while there was an alternative means of crop protection available, it was not likely to be economically viable to net the whole farm at once.

Her Honour expressed the view that even if the Court had received evidence that demonstrated that the respondent and the local community would suffer 'severe financial harm' if unable to operate the electrocution grids, "the impact of the evidence on the exercise of the Court's discretion would…be limited."[1]

Against these factors, the judge weighed the impact of the activity on the Wet Tropics World Heritage Area. She pointed out that the EPBC Act, amongst other things, reflects a recognition by the Australian Government of Australia's international responsibilities in relation to the Convention for the Protection of the World Cultural and Natural Heritage. In doing so, she concluded:

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

Accordingly, her Honour granted the application for an injunction.

If this case were not an application for an injunction before the Federal Court but an application for an approval under the EPBC Act, the Minister for the Environment is required to consider matters relevant to the world heritage values of the Wet Tropics World Heritage Area and economic and social matters.[3] In considering those matters, the Minister must take into account a number of factors including the principles of ESD.[4] It is suggested that the decision making process for the Minister involves very similar considerations to that undertaken by the judge when balancing environmental, economic and social considerations.

It should be noted that the Minister must take into account further matters including the precautionary principle. The judge in Booth v Bosworth did not expressly refer to the precautionary principle in her judgment although during the course of the hearing she indicated that she could take the precautionary principle into consideration as a factor going to her discretion. This supports the idea that an exercise of discretion in environmental cases is similar to the balancing act required in applying the principles of ESD.

The concepts of ESD in public environmental law are still relatively new. As a consequence, they have not been applied judicially in many instances. It is suggested, however, that the exercise involved in applying the principles of ESD is not so different to the application of discretion by a judge. The decision in Booth v Bosworth illustrates that those principles can be applied successfully for an environmentally sustainable decision.

ENDNOTES

[1] Booth v Bosworth [2002] 117 LGERA 168:196

[2] Ibid p.168

[3] s.136(1) EPBC Act. It is noted that an application for approval of killing 5,500 spectacled flying foxes by electrocution is currently under assessment by Environment Australia.

[4] s.136(2) EPBC Act.

Continued from page 9

munity, the Bamako Convention on Hazardous Wastes Within Africa (1991) 30 ILM 773, and the Treaty on the European Union (1994) 31 ILM 247. See Hickey & Walker 'Refining the Precautionary Principle in International Environmental Law' (1995) 14 Virginia Environmental Law Journal 423 for a decision of these documents in more detail.

[14] Barton op cit at 516

[15] (1998) 37 ILM 162

[16] at Paragraph 140

[17] 1995 ICJ Rep 288

[18] at 342

[19] Stein JA states that 'The great preponderence of opinion nowadays is that the principle has become part of international customary law'. The Hon Justice Paul Stein op cit

[20] Fullem op cit 521; per Stein J in Leatch v Director-General of National Parks and Wildlife and Shoalhaven City Council (1993) 81 LGERA 270; The Hon Justice Paul Stein op cit

[21] (1993) 81 LGERA 270

[22] Lisa Wyman 'Acceptance of the Precautionary Principle – Australian v International Decision-makers' (2001) 18 Environmental and Planning Law Journal 395 at 397

[23] Leatch v Director-General of National Parks and Wildlife Service and Shoalhaven City Council (1993) 81 LGERA 270 at 282

[24] IBID at 284

[25] (1995) 183 CLR 273

[26] Per Mason CJ and Deane J at paragraph 28

[27] The Hon Justice Paul Stein op cit. See also L Pearson 'Incorporating ESD Principles in Land Use Decision Making: Some Issues after Teoh' (1996) 13 Environmental and Planning Law Journal 47, Mason, Sir Anthony 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7 Public Law Review 20

[28] See Jeffery Nicholls v Director-General of National Parks and Wildlife (1994) 84 LGERA 397, Alumino (Aust) Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 Land and Environment Court, unreported 29 March 1996, Greenpeace Australia v Redbank Power Co (1995) 86 LGERA 143, Miltonbrook Pty Limited v Kiama Municipal Council (Land and Environment Court, unreported 11 November 1998).

[29] R v Resource Planning and Development Commission (1998) 100 LGERA 1

[30] Bridgetown/Greenbushes Friends of the Forests Inc v Department of CALM (1997) 94 LGERA 380

[31] See Friends of Hinchinbrook Society Inc v Minister for Environment (1997) 142 ALR 622. For further discussion of this case see Wyman op cit.

[32] C Barton op cit 509

Continued from page 7

- annual plan of logging operations[21], a document which must be prepared for each financial year by 1 June of the preceding financial year. The plan is required to specify the intended timing and location by reference to State forest name and compartment number[22] of the logging operations and the predicted kinds and quantities of timber products that will be yielded, and any other matters required by Planning NSW[23].
- site specific plans of harvesting operations[24], which must be prepared prior to any harvesting operations being carried out. The IFOA requires site specific plans to identify the location of the proposed harvesting operation, including the relevant State forest name and compartment number[25], and any areas where harvesting is not to be carried out because it is prohibited under the IFOA or otherwise. The plans must specify whether timber is proposed to be produced by means of thinning and, if not, except in limited circumstances[26], the plans must specify which of the following silvicultural selection methods is proposed to be used: Single Tree Selection; AGS Light; AGS Medium or AGS Heavy[27]. If a harvesting operations vary from the site specific plan, State Forests must prepare a document that sets out the reason for such variation[28].
- monthly advance notice of harvesting operations[29] which specify each new harvesting operation proposed to be commenced, and each suspended harvesting operation proposed to be recommenced, within that month and the following month, the date of the relevant site specific plan or plans, the location of the harvesting operations and the quantity of timber proposed to be yielded[30].
- monthly reports[31] which specify each harvesting operation commenced or continued in the financial year in which the month falls by reference to the date of the relevant site specific plan, the location of the operation, and the date upon which it was commenced, suspended or completed[32].
- annual reports on logging operations[33] which record the quantity of each harvested timber product described in clause 5(2) of the IFOA[34] in the course of thinning and the quantity of each timber product harvested other than in the course of thinning, the total area subject to thinning, the total area selected for logging using AGS Light, AGS Medium, AGS Heavy and Single Tree Selection respectively and the location of the relevant logging operations[35]. Where harvesting has been completed, the annual report must specify the area that has been logged together with the total area of the relevant net harvestable area[36].

Note: the IFOA permits State Forests to derive the information referred to in subclause (1) (d) and (e) from information contained in plans prepared prior to the commencement of this approval, site specific plans prepared under clause 28 and the compartment histories referred to in clause 56.

Paragraphs (d) and (e) of subclause (1) do not apply to logging operations involving thinning or those carried out for the purposes of producing timber for fencing or sleepers, or firewood or craftwood, but no other kinds of timber.

- Annual reports on forest products operations
- On-going forest management operations reports and plans
- annual plan of thinning and culling operations, which must be prepared by 1 June in respect of the following financial year, specifying the intended timing and location of proposed thinning and culling operations, by reference to State forest name and compartment number or other identifying particulars, and any other matters required by Planning NSW.
- site specific plans of thinning or culling operations [cl 41], which must be prepared prior to any thinning or culling operation being carried out, and which must contain information similar to that contained in the site specific plans of harvesting operations referred to above.
- monthly advance notice of thinning or culling operations [cl 42], which must be submitted to the regulatory agencies by the first working day of each month, which specify each new thinning or culling operation proposed to be commenced that month or the following month, and each suspended thinning or culling operation proposed to be recommenced that month or the following month; the date of the associated site specific plan or plans; the location of each thinning or culling operation specified, by reference to State forest name and compartment number or other identifying particulars; the proposed commencement or recommencement date of each thinning or culling operation specified; the approximate size of the area proposed to be culled or thinned for each operation specified.

Note: State Forests may carry out a thinning or culling operation other than at the time or location specified in a written notice submitted to the regulatory agencies under subclause (2), provided that the regulatory agencies are notified in writing and in advance of any such variation being implemented.- but can be checked against later reports

- monthly reports on thinning or culling operations [cl 43], which are to be submitted to the regulatory agencies by the first day of each month, which specify each thinning or culling operation commenced or continued in the financial year within which that month falls, the date of the associated site specific plan; the location of each operation specified, by reference to State forest name and compartment number or other identifying particulars; the date on which any such operation was commenced, suspended or completed (as the case may be).

- 1 July monthly reports which specify each thinning or culling operation that was commenced or continued in the preceding financial year by reference to the date of the relevant site specific plan, the location of the operation, and the date upon which any

such operation was commenced, suspended or completed (as the case may be). [cl 43]
reports in relation to scientific trials to assess the economic and environmental impacts of thinning and culling. [cl 39]

♦ annual plan of burning operations [cl 44] for the purposes of bush fire hazard reduction or regeneration ("burning operations") which is to specify the location and timing (including season and frequency) of proposed burning operations by reference to State forest name and compartment number, and any other matters that Planning NSW requires be specified.
♦ model site specific plan of burning operations [cl 44], which must be submitted to Planning NSW for its approval by 30 April 2003.
♦ site specific plan of burning operations [cl 44], which must be prepared prior to burning operations being carried out, which specify the measures to be taken to minimise any adverse impacts of the operations on the environment and the risk of wildfire, and the steps to be taken to monitor the impacts of the operations on the environment. Site specific plans only have to be prepared in respect of burning operations carried out on or after 12 months after the model plan has been approved by Planning NSW.

Note State Forests may, from time to time, amend the annual plan of burning operations, and where it does so, burning operations may be carried out in accordance with the amended plan.

♦reports in relation to scientific trials to assess the impacts on the environment of burning for the purposes of bush fire hazard reduction or regeneration in the Southern Region.

♦ grazing management plans [cl 47] which specify strategies to be adopted in relation to controlling any adverse impacts on the environment of grazing domestic animals in the Southern Region.
♦ model document setting out the proposed format and general contents of the grazing management plan (or plans).
♦ weed management plans [cl 48] which specify strategies to be adopted in relation to the control of weeds.
♦ feral and introduced animal management plan [cl 49] which specify strategies to be adopted in relation to the control of feral and introduced animals, where the presence of those animals in the Region may have an adverse impact on the environment.
♦ road and fire trail management plans [cl 54] each of which contain a 1:25,000 scale map which identifies the location of any existing or proposed roads and fire trails and any mapped drainage features within the meaning of the terms of the licence under the Protection of the Environment Operations Act 1997 set out in this approval, and the uses to which it is intended that those roads and fire trails be put.

♦ reports of assessments of the extent and nature of regeneration following the cessation of logging operations or culling, the first such assessment is to be completed no later than 31 December 2006 (and after consultation with Planning NSW and NPWS regarding the nature, collection (including timing) and analysis of data on which each such assessment is to be based).

♦ compartment histories [cl 56] which identify: any land within the compartment comprising, or forming part of, a tract of forested land on which AGS Light, AGS Medium or AGS Heavy or Single Tree Selection has been, or is intended to be, carried out, together with a description of the remainder of the land in the tract of forested land; the matters, applying to the compartment, required to be the subject of the annual reports on logging operations and annual reports on forest products operations; any thinning or culling undertaken in the compartment concerned; any fires or burning operations that have occurred in the compartment concerned; any activities undertaken in the compartment concerned to control weeds and pests; and any activities undertaken in the compartment concerned to promote regeneration following timber harvesting or forest products operations.

The IFOA requires State Forests to undertake much greater levels of forest planning and data collection than has been its practice to date. At the same time the IFOA permits State Forests to harvest trees using mechanical harvesters grapple snigging, operations that have not previously been widely used in native forests in the Southern Region. The Southern IFOA is also likely to lead to more widespread use of the silvicultural practices known as Australian Group Selection (AGS) Heavy and Medium in the Southern Region, those practices being essentially comprised of the systematic clear felling of patches of a tract of forested land in a staged process over a period of time. The IFOA defines AGS Medium and Heavy in the South Coast Subregion of the Southern Region as the clearing of 0.39 ha (or a circle with a radius of approximately 35 metres) and 0.79 ha (circle radius 50 metres) with an average return time of 10 years over any 4 consecutive harvests and 10% of the total tract to remain unharvested over any 4 consecutive harvests. The silvicultural practice is based on two fundamental assumptions: that over time an uneven aged forest will be created comprised of clusters of even-aged trees and gaps where trees have been completely removed and that more rapid regeneration of the removed trees will take place if trees are completely cleared from a patch of the tract of forested land. Whether both those assumptions will be borne out remains to be seen. However, the IFOA provides environmentalists with the opportunity to monitor State Forests implementation of ecologically sustainable forest management practices by gaining access to the documents ** .

[11] s 15.

Continued on page 15

Continued from page 2

7 See for example the 1992 Rio Declaration on Environment and Development, the 1992 Convention on Biological Diversity and the 1992 Framework Convention on Climate Change.

8 Discussed in P.M. Wood, Biodiversity and Democracy: Rethinking Society and Nature, UBC Press, Vancouver, 2000, Ch.7.

9 ANZECC Review of the National Strategy for the Conservation of Australia's Biological Diversity, June 2001, pp. 28-30. Note that this issue is also recognised in the National Objectives and Targets for Biodiversity Conservation 2001-2005, Environment Australia, Canberra, 2001, pp24-25. These objectives have been agreed to by the Commonwealth, NSW, WA, ACT, SA and Victoria.

EPBC and Land Clearing

Jo Bragg
Principal Solicitor, EDO Qld

The Commonwealth Environment Protection and Biodiversity Conservation Act 1999 ('EPBC Act') regulates, (amongst other things), the assessment and approval of actions that are likely to have a significant impact on matters of national environmental significance. While land clearing is not included as a matter of national environmental significance, there are recent Queensland examples where the Sunshine Coast Environment Council ('Environment Council') is attempting to use the EPBC Act in cases of proposed development that include extensive vegetation clearing.

Cooloola Cove Airpark-Tin Can Inlet

The Environment Council became aware of this development proposal and approached EDO Queensland for assistance in using the EPBC Act. This proposed development at Tin Can Inlet, Queensland includes clearance of 74.1 ha of native vegetation and subsequent subdivision, residential development, golf course and up grading of a currently unlicensed airstrip. In advertising material it is called Cooloola Cove Airpark.

The Environment Council obtained a copy of the State clearing permit (development approval) from the regional Department of Natural Resources ('DNR') office and looked up the Environment Australia interactive Website to check the location of Ramsar wetland areas and listed migratory species (both matters of national environmental significance) in relation to the development. It was confirmed that the development abuts Tin Can Inlet (separated only by an Esplanade), a Ramsar listed wetland and the roosting site of listed migratory species. Additional to the extensive coastline boundary of the development, it also has a watercourse running through its centre that discharges to the wetland.

EDO wrote to the Commonwealth Environment Minister in February 2002 on behalf of the Environment Council, asking that he require the developer to refer the matter to him under s70 of the EPBC Act. Any State agency or local council or person taking the action can refer the matter to the Environment Minister under the EPBC Act, however other members of the public can only request the referral. Once the matter is referred Minster Kemp then decides if the matter is a controlled action, thus requiring assessment and approval under the EPBC. The Minster must also decide upon the level of assessment.

Environment Australia ('EA') advised EDO that a letter was sent to the developer in February 2002 alerting them to the possible application of the EPBC Act, and of penalties that might apply. When no reply was received as at May 2002 EA then planned to send a follow up letter and arrange a site visit in company of the developer. So far as EDO is aware, no clearing has occurred on the site and no site visit has yet occurred.

Peregian Springs Development

This is a major residential development with associated uses by Forrester Residential Development on the Sunshine Coast, Queensland. The Environment Council estimates that several hundred hectares of land is yet to be cleared to implement development on the total of three parcels of land. The clearing did not require a State clearing permit (development approval) under the Vegetation Management Act 1999 (Qld) as it fell through one of the broad exemptions, being urban land.

The developer made two referrals to Environment Australia under the EPBC Act in 2001 in relation to two of three geographically distinct parcels of land due to potential impacts on listed threatened species. Then the Commonwealth Environment Minister decided that both actions were controlled actions requiring assessment and approval under the EPBC Act. The controlling provisions for each referral were sections 18 and 18A (listed threatened species and communities).The approach for assessment decided was by Preliminary Documentation which involves an opportunity for the public to make comments but which is less rigorous form of assessment than a Public Environment Report or an Environmental Impact Statement ('EIS').

The Environment Council advises that additional listed species have been discovered on or near the site and included this information in its submissions on the Preliminary Documentation. The Environment Council considers an EIS is a more appropriate form of assessment for a development of this scale.

In May 2002 one of the two controlled actions, relating to the Emu Mountains part of the site, was approved on conditions (EPBC 2001/165). Those conditions included setting aside 6.78 hectares of that site as a conservation area to protect the habitat of the Wallum Sedge Frog. The conditions also included preparing and implementing an environmental management plan (with specified content) for managing the impacts of the action on the Wallum Sedge Frog. Decisions on the remaining referral (EPBC 2001/164 is yet to be made.

Lessons from the Case Studies

1. Minster Kemp is reluctant to require developers to refer actions to him under s70 EPBC Act, even though he has the power but instead puts pressure on the developers to refer the action. Presumably he sees using s70 as unnecessarily confrontational. It is worth asking your local council or State agency to refer an action to Minster Kemp as then the action must be assessed. It is unknown if Queensland DNR has any consistent policy for referring matters to Environment Australia.
2. Environment Australia tells us

that they do monitor the DNR website to see what land clearing permits are granted under the Queensland Vegetation Management Act 1999. However they do not routinely require referral of developments adjacent to Ramsar, even for clearing of as much as 74 hectares with attendant impacts as in Cooloola Cove Airpark.

3. Once aware of clearing that might affect matters of national environmental significance, Environment Australia does send warning letters to developers about breaching the EPBC Act, but still needs the public to tell them if the bulldozers go in. There seems to be a risk that a developer might ignore the warning letter and do some damaging land clearing before EA knew about it. Evidence of endangered species on site might be lacking after the clearing, making prosecution difficult. We emphasize these comments are general only and are not suggesting that this has occurred or will occur in our case examples.
4. Extensive clearing may occur in Queensland without the need for a permit under the Vegetation Management Act 1999 due to the breadth of exemptions, as in the Peregian Springs case which concerns urban land. However some restrictions on clearing may be imposed by Environment Australia to protect habitat of listed species.
5. Environment Australia has been active on the Peregian Springs Development and one referral is still under assessment. As this case progresses is might prove a valuable case study of the usefulness of the EPBC in protecting listed threatened species and incidentally vegetation in general.

Continued from page 13

[2] ss 14 16.

[3] ss 27; 30.

[4] s 28.

[5] Which relates to threatened species of fish.

[6] For example, clause 24 of the Southern Region IFOA defines "residue timber" as "timber remaining in individual trees after logs have been cut and removed from those trees" whereas cl 7.1 of the forest agreement defines it has "timber remaining from a tree after a log (being a high quality large log, high quality small log or low quality saw log) has been removed from that tree" The difference in definition may be material because the agreement does not include pulpwood or pulp logs in the definition.

[7] s 33.

[8] s 35.

[9] s 31.

[10] s 31.

[11] ss 36; 40.

[12] ss 17; 19.

[13] s 20.

[14] s 21.

[15] For maps of the various regions see http://www.racac.nsw.gov.au/rfa/.

[16] Three months after the date of commencement of the relevant portion of the Act: s 14.

[17] s 15.

[18] s 17.

[19] See http://www.racac.nsw.gov.au/rfa/wra/.

[20] Cl 63(1)(a)-(d).

[21] Cl 63(1)(f).

[22] Or, in the case of Crown-timber lands other than State forests, by other identifying particulars.

[23] Cl 27

[24] Cl 63(2)(b)

[25] And see footnote 22 in respect of Crown-timber lands other than State forests.

[26] Because it is proposed to use the timber for fencing or sleepers, or firewood or craftwood: cl 28(3).

[27] Australian Group Selection (AGS) as defined in clause 5 of the IFOA.

[28] Cl 28. Note site specific plans are only required to be available at the regional office of State Forests responsible for managing the land to which the plan applies: cl 63(2).

[29] Cl 63(1)(g).

[30] Cl 29.

[31] Cl 63(1)(h).

[32] Cl 30.

[33] Cl 63(1)(i)

[34] The descriptions are: High Quality Large Logs from the South Coast Subregion and Tumut Subregion respectively; high quality sawlogs of a specified minimum size from the Tumut Subregion; timber for converting into charcoal; timber products from the Southern Region other than the Ingebirah State Forest and certain Crown-timber lands in the Tumut Subregion; timber products from the Ingebirah State Forest and certain Crown-timber lands in the Tumut Subregion.

[35] By reference to State forest name and

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