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CONTENTS

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False and Misleading Referrals Under the EPBC Act

Mees v Roads Corporation [2003] FCA 306

Chris McGrath, Barrister-at-Law

In *Mees v Roads Corporation* [2003] FCA 306 (8 April 2003), Justice Gray of the Federal Court found that a referral by the Victorian Government of part of the proposed Scoresby Freeway near Melbourne to the Federal Environment Minister under s68 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) contained information that was misleading.[1] The Court found that the failure to state in the referral that it was likely that a further freeway link would need to be constructed across a particular area of environmentally sensitive land in the future as a consequence of the construction of the Scoresby Freeway was misleading in the context of the referral. The referral therefore potentially contravened s489 of the EPBC Act, which makes it a criminal offence to provide false or misleading information to the Minister to obtain an approval under the Act, although issues of Crown immunity and some evidentiary deficiencies arose in that regard.

The decision confirms the ability of conservationists to challenge false or misleading information contained in referrals using s475 of the EPBC Act, which is a remarkably powerful and novel avenue to attack deficiencies in environmental impact assessment procedures and in effect provides de-facto merits review for referrals under the Act. It highlights how the EPBC Act has dramatically improved the integrity of environmental impact assessment in Australia and provides a warning of the dangers of submitting false or misleading information under the Act. Justice Gray emphasised (at para 118):

the referral document must contain information that is truthful and complete, so as not to mislead. The purpose of the EPBC Act, to protect the environment, would be subverted if the Environment Minister were to be called upon to make determinations in relation to proposals without full information of the kinds required by the EPBC Act and the EPBC Regulations.

The essential lesson to be drawn from the decision for developers, environmental consultants and their legal advisors is that documents supplied to the Commonwealth in referrals under the EPBC Act should provide a full and frank description of the proposed action

Continued on page 14

Shelburne Bay Saved from Sand Mining

Matt Patterson, Solicitor/Policy Officer EDO (NQ)

Shelburne Bay lies near the north-eastern tip of Cape York Peninsula in Far North Queensland. It comprises 250 square kilometres of white sand dunes, lakes and forests and has been home to the Wuthathi people for thousands of years.

Shelburne Bay is a diverse, complex and cherished landscape: its waters have been a plentiful source of food for the Wuthathi; its 100 metre white sand dunefields of fine silica have provided sanctuary for time-honoured cultural practices; its small freshwater lakes perched amongst the dunes give way to beautiful wetlands, scrublands and vine forests.

According to the Wuthathi, the massive white sand dunes were created when a legendary giant Manta Ray washed ashore. The white dunes represent the white underbelly of that Manta Ray and the creation place of the Wuthathi people. Large Manta Rays continue to prowl the shallows of the bay.

White Australian dealings with Shelburne Bay, however, have shown little respect for its traditional owners or its natural wonders. The Wuthathi people were forcibly removed from Shelburne Bay in the early twentieth century. A white pastoral leasehold estate was then granted over part of the area and cattle introduced. In 1967, the Queensland Government approved sand mining leases over some of the dunefields.

These leases remained inactive, but in the early 1980's a proposal to mine another two sand dunes led to a challenge in the Mining Warden's Court by members of the Wuthathi and Don Henry, then head of the Wildlife Preservation Society of Queensland and now Executive Director of the Australian Conservation Foundation.

Following that hearing, the Mining Warden's Court took the unprecedented step of recommending to the then Bjelke-Petersen State Government that the proposal not proceed. Cabinet rejected the recommendation and the leases were granted. However, in 1988, the mining plan was thwarted by the Hawke Commonwealth Government, which decided not to provide the necessary export permit due to the conservation significance of the dune fields.

Despite the successes of the Wuthathi and conservationists, the mining leases remained. They were due for renewal on 28 February 2003.

In order to conduct mining operations the leaseholder would need to obtain further approval from the Environmental Protection Agency (EPA) under the *Environmental Protection Act 1994* (Qld) which regulates the environmental impacts of mining in Queensland. Despite this further requirement, the threat of mining the dunes remained.

Section 286(1) of the *Mineral Resources Act 1989* (Qld) states:

286 Renewal of Mining Lease

(1) The holder of a mining lease, including a mining lease that is subject to a condition referred to in section 285, may, at least 6 months (or such shorter period as the Minister in a particular case allows) prior to and not more than 12 months before the expiration of the current term of the mining lease, make application for renewal of that mining lease.

...

(6) The Minister shall not reject an application for renewal of a mining lease until the Minister has, by notice in writing in the approved form served on the holder of the mining lease, called upon the holder to show cause within the time specified therein why the application should not be rejected and such cause has not been shown to the satisfaction of the Minister.

Pursuant to s286(1), an application for renewal of the leases was required to be made no later than 28 August 2002.

The Wilderness Society obtained information that an application for renewal of the sand mining leases was lodged on 9 December 2002. They called on the Minister for

Natural Resources and Mines, Stephen Robertson, to refuse the application for renewal on the basis that it was out of time in accordance with Section 286(1). Minister Robertson responded that it was general practice in Queensland to deal with all applications for renewal right up until the date of expiry. In the circumstances, he said, he could see 'no reason to depart from the general accepted practice in the current circumstances'.

In late 2002, representatives of the Wuthathi (including elders Gordon Pablo, Pedro Wallis, Chairman of the Wuthathi Land Trust, Arnold Wallis and members of the Wuthathi Tribal Council) met with the Cairns and Far North Environment Centre, the Australian Conservation Foundation, the Wilderness Society, staff from EDO-NQ in Cairns and Peter Seidel, Public Interest Law Partner at Arnold Bloch Leibler in Melbourne. A campaign plan was formed to have the leases cancelled.

The Wilderness Society's Cape York Campaigner Lyndon Schneiders coordinated the various environment groups and representatives of the Wuthathi in a comprehensive campaign which included postcards, lobbying, a photo exhibition, media conferences, trips to Shelburne Bay with politicians and journalists, public rallies and numerous community stalls.

By the time the leases were due to expire on 28 February 2003, there was no clear indication from the Queensland Government whether it planned to renew them or not.

On 24 March 2003, Premier Peter Beattie and Minister Stephen Robertson convened a press conference to announce that the State Government would legislate to protect 'the pristine sand dunes of Shelburne Bay on Cape York Peninsula from mining'.[1] No compensation would be payable to the leaseholder on the basis that the leases were of no commercial value without the further approvals required from the EPA.

The Premier noted that any mining would involve the removal of two dune systems, and the construction of a major port facility on the edge of the Great Barrier Reef.

Minister Robertson stated that the Government had 'consulted the Queensland Mining Council and informed the industry that this decision is isolated to the particular mining leases and area concerned'.[2]

The *Land Legislation Amendment Bill 2003*, introduced by Minister Robertson into the single house of Parliament of Queensland on 25 March 2003, inserted a new Section 418C to the *Mineral Resources Act 1989* (Qld). That section reads:

418C Cancellation of Shelburne Bay mining leases

(1) On and from the commencement of this section-
(a) the relevant mining leases are cancelled; and
(b) without limiting paragraph (a), and despite any entitlement there may otherwise be under this Act for the renewal of the relevant mining leases:
(i) any application made before the commencement for the renewal of the leases must not be further dealt with under this Act; and
(ii) the Minister must not recommend to the Governor in Council to grant a renewal of the leases; and
(iii) the Governor-in-Council must not grant a renewal of the leases.
(2) No compensation is payable to any person because of the operation of subsection(1).
(3) Subsection (2) applies despite any other provision of this Act and despite any other Act or law.
(4) In subsection (1):
"relevant mining leases" means leases 5940 and 5941 over land situated in the Mareeba Mining District.

Finally the threat of mining the dunes of Shelburne Bay was removed.

However, the worries of the Wuthathi are not over. The Queensland Government remains locked in a legal dispute with the Nixon family, the former holders of the pastoral lease over part of Shelburne Bay, who want to remain on the land despite the refusal to renew their holding.

The Wuthathi still await a determination of native title over the area and the return of their traditional land and sea country.

Endnotes on page 14

South Australian Contaminated Land Law: Mobil Refinery Clean-up

Cara Dowling, Volunteer Legal Researcher EDO (SA)

Located in the southern suburbs of Adelaide, on the otherwise picturesque coastline of the Gulf of St Vincent, Mobil Oil Australia Pty Ltd has operated South Australia's only oil refinery since the 1950s. On 8 April 2003, Mobil publicly announced its decision to cease active operations at the Port Stanvac Refinery and to decommission the site indefinitely.[1] Mobil cited inability to sustain business losses as the reason for the closure.[2]

This announcement has resulted in public outcry, particularly over Mobil's intention to maintain the refinery and associated infrastructure in a decommissioned ('moth-balled') state rather than remediate the site. There seems strong public opinion that Mobil should be forced to clean up contaminated land resulting from nearly 50 years of profitable oil refinery operations.[3]

From a legal perspective, there are significant obstacles to any attempt to force Mobil to clean up the site. Mobil has indicated that it will only remediate the site to an agreed standard in the event that the refinery does not resume operation.[4] Detail of any future decision to resume operation is shrouded in ambiguous language such as 'in the event that there may be an opportunity to recommence',[5] 'maintain[ing] the option to resume'[6] and 'should viable operations be sustainable in the future'.[7] But there is no indication from Mobil as to when a final decision will be made about the future of the Refinery. Therefore, it is impossible to say if or when remediation might be expected to occur.

Mobil continues to promote the decision to 'mothball' the refinery as being in the best interests of all parties concerned.[8] Mobil insists this is simply a way of ensuring there is still an opportunity to recommence operations in Adelaide at a later date, subject, of course, to improvement in the international refining business environment.[9] However, concerns have been aired for quite a few years about the ageing infrastructure of the refinery, in particular, that the age of the refinery has the potential to be a contributing factor to a major disaster.[10] Is reopening the ageing refinery even a realistic option?

South Australia's State Treasurer Kevin Foley, has presented a strong response to Mobil's statement, indicating that he will be demanding Mobil either re-open the site or clean up, remediate and vacate.[11] The Premier, Mike Rann has delivered similar messages in opposition to Mobil's intended course of action.[12]

This hard-line rhetoric is in stark contrast to the political climate in which Mobil first began its relationship with the South Australian Government. The refinery at Port Stanvac opened in the mid-1950s during a period in which the South Australian Government, under the leadership of its longest serving Premier, Sir Thomas Playford, was intent on wooing big business to the State. Since that time, Mobil has continued to enjoy substantial operational and financial incentives to conducting its business within South Australia. This has included reduced taxes and charges, and Council rate relief.[13] Indeed, Mobil in their press release expressed appreciation of the South Australian hospitality extended for nearly five decades.[14] However, despite this long and accommodating relationship, Mobil does not seem inclined to comply with the demands of the Government and the local community to clean up their land. And without Mobil's co-operation, it seems they will be hard pressed to enforce remediation of the site.

The difficulty is all in the timing. The South Australian *Environment Protection Act* (the Act) commenced in 1995. The Environment Protection Authority (EPA) is empowered under the Act to make orders, including 'clean-up orders'.[15] Prior to 1995, Mobil was required to comply with a variety of statutes, none of which specifically addressed the issue of land pollution and contamination. Since 1995, Mobil has been licensed under the Act to carry out refining operations at Port Stanvac, but as the Act is not retrospective, it is likely that clean-up orders cannot be issued for any contamination occurring prior to 1995. The problem for the EPA is in establishing what contamination occurred at the site prior to 1995 and what occurred after.

During its period of operation, the

refinery has been dogged by reports of land contamination and pollution. Recent media reports allege that contaminated material and hard waste has been deliberately deposited on various sections of the Port Stanvac site.[16] The practice of burying contaminated waste in pits apparently continued into the early 1990s.[17] Some of this contaminated material was admitted by Mobil as being a by-product of the cleaning and maintenance of storage tanks,[18] of which there are at least 129.[19] Mobil's response to these claims is that this method of disposal of contaminated material was an old practice that hasn't happened for some time.[20]

Another problem with the lack of retrospectivity of the Act is that Mobil was not required to disclose to the EPA contamination of land that occurred prior to 1995. Furthermore, even under the current Act, Mobil is still under no obligation to disclose to the EPA any more recent contamination of land except in limited circumstances. Section 83 of the Act makes it an offence to fail to notify the EPA of 'incidents causing or threatening serious or material environmental harm'. However, there is a statutory defence to such a charge (civil or criminal), that the pollution resulted in harm (potential or actual) only to that person's own property.[21] This defence doesn't apply where surface or groundwater is contaminated, however it provides an effective defence to soil contamination or 'failure to notify incidents' charges.

The EDO and Conservation Groups have long called for the section 84(c) defence to be repealed.[22] After all, what is contaminated land, if not the pollution of property by owners and occupiers? At present, industry is only obliged to disclose post-1995 pollution that enters surface or groundwater or goes beyond the boundaries of their site. The only other disclosure laws relate to 'vendor's statements' under conveyancing laws and these don't apply unless the land is about to change hands.[23]

It should be noted that the Port Stanvac Refinery is not an isolated problem. Indeed, Mobil's Port Pirie depot was similarly 'mothballed' and is reportedly still contaminated a decade later.[24] Although, given the enthusiastic and prolific courtship of big business by South Australian Governments, it would be wrong to think Mobil is the only company in South Australia entitled to legal protection from the consequences of past poor environmental practices.

Specific land contamination legislation for South Australia has been promised by past State Governments for at least 10 years. The present government has announced a Bill to be introduced by the end of this year, although details are yet to be released. The real test for this legislation will be whether the government is prepared to accept retrospectivity in relation to contaminated land. It will also be important to address situations where industrial sites are sought to be "moth-balled" rather than closed and remediated. In the meantime, the indefinite closure of the Port Stanvac refinery leaves both the government and the company with serious moral as well as legal choices. If the only outcome is that the smell of oil is replaced with the smell of mothballs, then it will be a poor outcome for the State.

ENDNOTES

[1] *Mobil Media Release,* 8th April 2003*: Adelaide Refinery*, www.mobil.com.au

[2] *Mobil Media Release,* 8th April 2003*: Adelaide Refinery,* citing Chris Erickson, Refining and Supply Director, Mobil Oil Australia, www.mobil.com.au

[3] Mobil has released estimates that the refinery products are worth more than $900 million a year with exports comprising over $100 million. *Adelaide Refinery Announcement Q & A's - Overview,* www.mobil.com.au/mobil/mn_mobil_facilities_adelaide.html; Hansard, Monday 28th April 2003, per T.J. Stephens.

[4] *Adelaide Refinery Announcement Q & A's,* www.mobil.com.au/mobil/mn_mobil_facilities_adelaide.html

[5] ibid

[6] *Mobil Media Release,* 8th April 2003*: Adelaide Refinery,* citing Chris Erickson, Refining and Supply Director, Mobil Oil Australia, www.mobil.com.au

[7] ibid

[8] *Mobil Media Release,* 8th April 2003*: Adelaide Refinery,* citing Chris Erickson, Refining and Supply Director, Mobil Oil Australia, www.mobil.com.au; *Adelaide Refinery Announcement Q & A's,* www.mobil.com.au/mobil/mn_mobil_facilities_adelaide.html

[9] ibid

Continued on page 14

South Australian Planning Law: EDO Wins Coffin Bay Appeal

Mark Parnell, Solicitor EDO (SA)

Introduction

The EDO has chalked up another important win in the Environment, Resources and Development Court of South Australia.[1] The case involved an appeal by seven Coffin Bay residents against a local council approval for an 'international health clinic' and 36-lot residential subdivision on 10 hectares of pristine coastal bushland on the outskirts of Coffin Bay township on Lower Eyre Peninsula.

Coffin Bay is a small coastal town surrounded on all sides by the sea and two National Parks. It is a popular holiday and retirement destination and the population ranges from a few hundred in winter to a few thousand in summer. Like all coastal locations, property prices have boomed in recent years. The land in dispute is part of a privately-owned strip between the existing township and Coffin Bay National Park (less than a kilometre away).

The appellants argued that the proposed development would:

1. irreversibly destroy important habitat;
2. over-exploit precarious groundwater resources;
3. increase the bushfire hazard to the township; and
4. undermine proper town planning procedures for determining the appropriate scale of development for the site.

Ultimately, the case was decided on the fourth ground (town planning). The subject land is in a 'deferred urban' zone.[2] The developer argued that the time was now right to develop the land. Much of the developer's argument was based on an alleged shortage of land in Coffin Bay and that the subject land was the next logical extension of the township.

In rejecting this argument, the Court held that the proposed development was 'premature' and that only small-scale development should be considered until a proper study had been undertaken to determine how best to balance the competing demands of native vegetation protection, water availability, bushfire protection and urban development.

Native Vegetation

The Court accepted the evidence of the three expert witnesses who gave evidence in the trial and who all agreed that the native vegetation that covers the site is in very good condition and has not been adversely affected by weeds, feral animals, fire or human impacts, unlike the nearby degraded Coffin Bay National Park. However, the Court did not offer any opinion as to the importance of preserving this vegetation, preferring to leave that task to the town planning review it believed was necessary to determine the best ultimate use of the Deferred Urban zone.

The local council has now commenced such a review, and not surprisingly, is proposing to rezone the Deferred Urban land as 'Residential'. In South Australia there is no appeal against a re-zoning,[3] so this matter will now be fought out in the political arena.

South Australia's native vegetation laws[4] are often regarded as the best in Australia.[5] This case however highlights some key deficiencies. For example, the Native Vegetation Council (which determines clearance applications) has no rights in relation to development applications such as subdivisions.[6] This means that local councils can approve the carving up of bushland into small blocks, which can then be cleared by the new owners using 'exemptions' such as clearing for house sites, firebreaks, fencelines and access tracks.[7] Such exemptions enable complete clearance of normal residential allotments without reference to the Native Vegetation Council.

The EDO has written to both the Environment Minister and Planning Minister urging them to amend planning laws to provide for a greater role for the Native Vegetation Council. Both Ministers have supported this approach, although details are yet to be finalised.[8]

Water

Coffin Bay, like most of the arid Eyre Peninsula, is dependent upon groundwater resources for town water supply. These groundwater resources are regarded by many to be in a state of crisis, with falling water levels and increasing salinity. Water restrictions are currently in place. Recognising the problem, the government has initiated a study, which is yet to identify a sustainable solution.[9] In this climate, it was disappointing that the publicly-owned water utility – SA Water – was prepared to guarantee to supply water to the proposed Health Clinic and 36-lot residential subdivision, even though it is not within the declared Water District boundaries of the township.

In overturning the development consents, the Court said that developers should normally be able to rely on assurances from water supply authorities as to the availability of supply, although in the present case this was not appropriate. SA Water already extracts more groundwater than allowed under its licence.[10] It is only through ad hoc ministerial 'top-ups' that it has avoided breaching the Water Resources Act.[11]

In these circumstances, the Court agreed with the appellants that until more water is found, the developments should not proceed.

ENDNOTES

[1] McShane & Ors v. District Council of Lower Eyre Peninsula & Crossman [2003] SAERDC 45 (Full Bench).
A copy of the judgment is available on the ERD Court website at: www.courts.sa.gov.au/courts/environment/judgments/2003/mcshane_v_lower_eyre_peninsula.html

[2] South Australian planning schemes (Development Plans) can be downloaded in rich text format from www.planning.sa.gov.au/edp. The plan relevant to this case is the Lower Eyre Peninsula Development Plan.

[3] *Development Act 1993 (SA)* ss 24 –29 sets out how planning schemes are amended.

[4] *Native Vegetation Act 1991 (SA)*.

[5] See the 2002 National EDO Network publication 'I can see clearly now – land clearing & law reform' (available from EDO New South Wales).

[6] Such rights (if they existed) would arise through compulsory referral of development applications to the Native Vegetation Council pursuant to Schedule 8 of the *Development Regulations 1993 (SA)*.

[7] These exemptions are listed in Reg. 3 of the *Native Vegetation Regulations 1991 (SA)*.

[8] Personal commnunication with author.

[9] Eyre Peninsula Water Supply Master Plan, SA Water 2002 (online at www.sawater.com.au/about_sa_water/annual_report/epmaster_plan.pdf).

[10] Eyre Peninsula Water Supply Master Plan, SA Water 2002.

[11] Section 11, *Water Resources Act 1997 (SA)*.

Public Availability of Information under the IFOA Process - Part 2

Paul Toni, Principal Solicitor EDO (NSW)

This article is part two in a two part series looking at the information available to the public under the *Forestry and National Park Estate Act 1998* (the Act) and Integrated Forestry Operations Approvals (IFOAs). The first part of this series appeared in the December 2002 edition of *Impact* (No. 68).

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)*, and requires each State and Territory 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: a regional forest assessment; a forest agreement; and, an integrated forestry operations approval.

The only forest region in NSW that has, to date, been the subject of a dedicated regional forest assessment has been the Southern Region. The Southern Region IFOA 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.

Continued from Impact No. 68

Annual reports on forest products operations

The IFOA requires State Forests to provide annual reports on forest products operations to the Department of Infrastructure, Planning and Natural Resources (DIPNR), National Parks and Wildlife Service (NPWS), Environment Protection Authority (EPA) and NSW Fisheries within 2 months of the end of each financial year. The reports must describe the types of forest products operations that have been authorised during the financial year, the location of each type of forest products operation specified, by reference to State forest name and compartment number and any other matters required by DIPNR.[1] The reports must be made available to the public.[2]

The IFOA obliges State Forests to ensure that the scale and intensity at which it carries out, or authorises the carrying out of, forest products operations in any part of the Southern Region, does not hinder the sustained ecological viability of the relevant species of tree, shrub or other vegetation within the part.[3]

On-going forest management operations reports and plans

After logging operations, the most controversial aspect of State Forests activities is probably forest management operations, in particular, the thinning, culling, poisoning and burning of trees. Thinning, culling and poisoning is carried out with a view to increasing the proportion of high economic value trees in the forest, and diminishing the proportion of lower economic value species. Forest management operations have severe environmental impacts and the economic benefits of such activities have been called into question. No doubt as a consequence of those doubts being shared by some regulatory agencies, the IFOA requires State Forests to carry out scientific trials to assess the economic and environmental impacts of thinning and culling[4] and burning[5] in the Southern Region, including by consulting with DIPNR and NPWS (and in the case of burning, NSW Fisheries) in relation to the design of the trials. Documentation showing the methodology, results and analyses of the scientific trials concerning thinning, culling and burning after they have been carried out must be made available to the public.[6]

The IFOA does not generally permit thinning and culling operations within special management zones and areas zoned Forest Management Zone 2 or 3A,[7] and other restrictions are also imposed.[8]

The forest management documents required to be made available to the public include:[9]

- annual plans of thinning and culling operations,[10] 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.

- annual plans of burning operations,[11] specifying the intended timing and location of proposed burning operations, by reference to State forest name and compartment number. Prior to burning operations being carried out, State Forests must carry out a comparative assessment of the potential impacts on the environment of proceeding with the operations and the potential impacts on the environment of not proceeding with the operations.[12] State Forests is required to prepare a model site specific plan of burning operations,[13] which must be submitted to DIPNR for its approval by 30 April 2003.

- site specific plans of thinning or culling operations[14] and burning operations,[15] which must be prepared prior to any thinning or culling or burning operations being carried out, and which must contain information similar to that contained in the site specific plans of harvesting operations referred to in Part 1 of this article.

- monthly advance notice of thinning or culling operations,[16] which must be provided to DIPNR, NPWS, EPA and NSW Fisheries by the first working day of each month, which specifies each new (or previously suspended) thinning or culling operation proposed to be commenced (or recommenced) that month or the following month, and the size, location and timing of such operations.

- monthly reports on thinning or culling operations,[17] which are to be submitted to DIPNR, NPWS, EPA and NSW Fisheries by the first day of each month.

- financial year reports on thinning or culling operations,[18] 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).

- reports of assessments of the extent and nature of regeneration following the cessation of logging operations or culling, the first of which must be completed by 31 December 2006.[19]

The IFOA requires a variety of other plans and documents to be made publicly available, including grazing management plans,[20] weed management plans,[21] feral and introduced animal management plans[22] and road and fire trail management plans.[23]

In many cases, the IFOA permits State Forests to amend plans of operations after their creation.[24] However, generally it is required to notify the various regulatory agencies in advance.[25]

Conclusions

The IFOA is likely to lead to the more widespread implementation in the Southern Region of the silvicultural practices called AGS (Australian Group Selection) Heavy, Medium and Light rather than Single Tree Selection (STS). AGS Heavy involves the clear-felling of discrete clusters of trees in a staged process over a period of time. In the South Coast Subregion of the Southern Region, AGS Heavy is defined as permitting the clear-felling of 0.79 hectare[26] clusters to maximum amount 22.5% of the forested land the subject of the operations. In the case of AGS Medium and Light, the clearing of clusters of 0.39 and 0.13 hectares[27] (to a maximum of 22.5% of the land) is permitted.[28] AGS Medium is defined differently in the Tumut Subregion of the Southern Region.[29] Single Tree Selection, as the name implies, involves the cutting and removal of individual high-value trees.

AGS is based on two fundamental assumptions: that over time an uneven-aged forest comprised of clusters of even-aged trees (and gaps where trees have been removed) will be created; and that the cleared gaps will regenerate

Continued on page 15

A New Model for Landscape Conservation in New South Wales

The Wentworth Group of Concerned Scientists' Report to Premier Carr

Jeff Smith, Director EDO (NSW)

Natural resource degradation throughout Australia's agricultural regions is one of the most severe environmental problems facing Governments today, with immense social consequences for rural and urban communities. In response to a growing appreciation of this fact, the Premier of New South Wales, Bob Carr, commissioned the so-called Wentworth Group of Concerned Scientists to prepare a report on landscape conservation in late 2002. In February 2003, the *Wentworth Group of Concerned Scientists' Report to Premier Carr: A New Model for Landscape Conservation in NSW* was presented to the Premier and public comments sought. The Wentworth Model was quickly endorsed by the Labor Government.

There are five pillars to the Wentworth Model. It advocates:

- strengthening and simplifying native vegetation laws and ending broadscale clearing of remnant vegetation and protected regrowth;
- setting environmental standards and clarifying responsibilities for native vegetation management;
- using property management plans to provide investment security, management flexibility and financial support for farmers;
- providing significant levels of public funding for farmers to help meet new environmental standards and support conservation results;
- restructuring institutions by improving scientific input into policy setting, improving information systems and regionalising administration.

As set out in the Labor Government's election policy, the Wentworth Model will be implemented in two stages. Following its March 2003 election victory, as part of stage one, the Labor Government established a high level implementation group to move the model from theory to practical application. The implementation group is chaired by Ian Sinclair and comprises senior representatives from the NSW Farmers' Association, the environmental groups, the Wentworth Group and Government. The Environmental Defender's Office (NSW) has been retained by WWF Australia to provide legal and policy advice in relation to the stage one reforms. Stage two will involve setting up the new institutional and legislative framework for the reforms.

In responding to the Premier's request for submissions, the EDO endorsed the general direction of the Wentworth Model. The Wentworth Model takes an innovative approach to natural resource management, balancing the multifarious interests and issues involved through sound legal and policy frameworks, investment security, community/ catchment-based solutions, financial assistance, good science and institutional reform.

The starting point for the Wentworth model is the need for an overhaul of existing institutional arrangements. The EDO agreed with this premise in its submission, noting the complexity, unworkability and lack of support for the present regime across the political spectrum. From a public interest point of view, the present approach to natural resource management is also clearly unsustainable. Rural and regional communities – often represented by the same people across a plethora of community-based arrangements - have invested heavily in these matters with little reward or direction.

The Wentworth Model is an impressive manifesto that puts forward five interdependent components to break the impasse in natural resource management in NSW and provides a snapshot of what the 'new way' would look like. The proper management of natural resources will require the development of a range of tools including tough and enforceable laws, economic incentives, business security, community education programs, structural adjustment assistance, partnerships between industry, community and the Government and public participation. The task will be to get the balance right.

There is a tremendous amount of work to be done in translating the model into a workable system on the ground. EDO is excited to be part of this process.

Land Clearing Moratorium Announced for Queensland

Vegetation (Applications for Clearing) Act 2003

Jo Bragg, Principal Solicitor and Larissa Waters, Solicitor EDO (Qld)

In a long-needed measure to address the staggering rate of land-clearing in Queensland, Premier Peter Beattie announced on Friday 16 May 2003 that as and from midday on 16 May 2003 no new land-clearing applications will be *accepted* until negotiations are concluded with the Commonwealth government on joint funding of a compensation package for landholders who have their land-clearing rights restricted. The Premier's announcement has now been given legal effect with the passage by State Parliament of the *Vegetation (Applications for Clearing) Act 2003*, which commenced on 2 June 2003.

However, bear in mind that this change in legislation does not mean a moratorium on all land-clearing. Some clearing has never needed an application, so is unaffected. Under exemptions in the Act, applications may still be accepted and processed if the land-clearing is for certain listed purposes, two examples of which are land-clearing for projects of State significance or for necessary infrastructure where there is no alternative site.

Ongoing Negotiations

A media release by Federal Environment and Heritage Minister David Kemp on Thursday 22 May 2003 notes that key elements of the joint package are:

- protection of 'of concern' regional ecosystems on freehold as well as leasehold land (*apparently this will not apply to urban land*);
- phasing out clearing of remnant vegetation (non-regrowth) by 2006 under a transitional cap of 500,000 hectares (*it appears that this will not to apply to urban land, however we understand most importantly that this cap will include all clearing applications already in the system prior to midday 16 May 2003*);
- continued clearing of regrowth vegetation;
- continuation of some exemptions, including woody weed control, infrastructure development, fire breaks, legitimate forest practices, and fodder harvesting under permit; and
- a joint Commonwealth-Queensland adjustment package of up to $150 million, comprising $130 million for incentives to assist with the transition, $12 million for incentives to improve management of valuable remnant vegetation and $8 million for incentives to develop best practice farm management plans (*we understand that the Commonwealth contribution to this package is Greenhouse money negotiated by the Democrats as part of the GST package four years ago*).

Community Consultation

Minister Kemp indicated that consultations on these key elements will occur with farming and industry groups, regional bodies, local government, the finance sector and conservation groups. Peak environment groups were consulted last week and provided feedback and comments on the package.

For more information contact EDO Qld, EDO NQ, or visit the Department of Natural Resources and Mines website at www.nrm.qld.gov.au/vegetation/applications.html.

For a copy of the Act, go to www.legislation.qld.gov.au/Legislation%20Acts&SLs/Act2003.htm.

Lawyers Against Landclearing

A group of Queensland lawyers, including EDO solicitors, met recently to establish *Lawyers Against Land Clearing,* a group aiming to play a constructive part in the public debate surrounding the Commonwealth/Queensland package to control land clearing.

Lawyers Against Land Clearing comprises barristers, private solicitors and community legal centre solicitors.

Lawyers Against Land Clearing will call a public meeting of Queensland lawyers later this month, inviting members of the profession to attend and express their support for the proposed land clearing reforms.

For more information contact David Fahl on (07) 5479 0155.

For lawyers in North Queensland who would like to get involved with Lawyers Against Land Clearing, please contact Joanna Cull at EDO NQ on (07) 4031 4766.

Western Australian Protected Areas Law: Class A Reserves

Lee McIntosh, Solicitor EDO (WA)

Class A reserves are the most protected type of Crown (public) land in Western Australia. Class A reserves can be created in both land and marine areas. Existing Class A marine reserves include Marmion, Ningaloo, Rowley Shoals, Swan Estuary, Shoalwater Islands and Shark Bay. Class A reserves on land can include such areas as nature reserves, conservation parks and national parks.

Class A reserves on land are proposed by the Minister for Lands and created under the *Land Administration Act 1997*. However, marine Class A reserves are proposed by the Minister for the Environment and created under the *Conservation and Land Management Act 1984*. (Note also that marine reserves cannot be created without the consent of the Minister for Mines and the Minister for Fisheries. If there is a dispute between these Ministers, the matter is decided by Cabinet.)

Difficulties may arise because of the fact that land and marine Class A reserves are created under two different statutes. For example, marine reserves under the *Conservation and Land Management Act 1984* cannot include islands within their boundaries because marine reserves can only extend to high tide mark. Therefore if the islands within a Class A marine reserve are to be protected as well as the marine areas, the Minister for Lands must propose and classify the islands as a Class A reserve under the *Land Administration Act 1997*. Difficulties also arise because of the different laws which apply to changes to marine and terrestrial Class A reserves. This paper deals only with the laws relating to terrestrial reserves.

Class A reserves are usually created for a specific purpose. Once created, the reserve cannot be used for anything other than that specific purpose unless a proposal to change the use is advertised in a State-wide newspaper at least 30 days before the change is made. The change must then be laid before both Houses of Parliament. Either House can disallow the proposed change if a member of Parliament gives a notice of disallowance within 14 sitting days and the notice is passed within 30 sitting days.

Other protection which applies to Class A reserves includes:

- No mining activities can take place in any Class A reserve without the consent of the Minister for Mines and the Minister for the reserve. In addition, no mining leases (or general purpose leases associated with mining leases) can be granted in a Class A reserve unless the parliamentary disallowance procedure described above is followed.
- If the Minister for Lands wishes to grant an easement in a Class A reserve, a similar process operates to that which applies to a proposed change to the purpose of a reserve. However, additional protection is provided by the fact that the Minister must have the consent of every management body concerned with the land and every other person who has a legal interest in the land before she can grant the easement.
- Some public works which are permitted without consent on Crown land have to get consent before they are allowed on a Class A reserve.

Minor alterations to Class A reserves on land can be made by the Minister for Lands without her having to lay the proposed change before Parliament (though she is still required to advertise the change in a State-wide newspaper at least 30 days before she makes the change). Specifically, the Minister has the power to:

- Add land to a Class A reserve;
- Correct an unsurveyed boundary as long as the correction does not mean more than 5% of the reserve is removed;
- Excise 5% of the reserve or 1 hectare, whichever is less, for a 'public utility' (such as telecommunications, sewerage, drainage and electricity);
- Adjust the internal boundaries of the reserve; and
- Amalgamate 2 or more reserves, as long as the reserves have similar purposes and are managed by the same government agency.

If the Class A reserve is a conservation park, national park or nature reserve, the Minister for Lands must have the consent of the Minister for the Environment before taking any of the actions above.

If you want to find out whether a reserve is Class A or not, and therefore whether it has special protection or not:

- For land reserves – contact the Department of Land Administration
- For marine reserves – contact the Department of Conservation and Land Management.

Commonwealth EPBC Act Audit and Enforcement Policy

Commonwealth EPBC Act Audit

The National Audit Office has completed the first performance audit of Environment Australia's administration of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The Audit found, among other things, that:

• Environment Australia's responses to potential breaches of the EPBC Act have been *less than robust*;

• there have been no prosecutions under the Act; and

• monitoring of compliance with environmental conditions on approvals is still at an *early stage* and not ideal.

The Report makes a number of recommendations which should be adopted, not only by Environment Australia, but also by state environmental protection agencies and any other relevant state government authorities. These include:

• improving the quality of referrals and avoiding over reliance on preliminary documentation produced by proponents through establishing a "consultants' accreditation scheme", and specific guides for each industry sector about what information is required from industry when referring actions;

• minimising the risk that staged developments may circumvent the requirements of the Act, by requiring mandatory disclosure when proposals are part of a wider staged development; and

• strengthening monitoring and review of compliance with environmental conditions by mandatory action progress reporting by recipients of approvals and better tracking of activities.

The Audit Report can be obtained by emailing cwealthcopyright@finance.gov.au or writing to: Manager, Legislative Services, Ausinfo, GPO Box 1920, Canberra, ACT 2601.

EPBC Enforcement Policy

Environment Australia has released its *Compliance and Enforcement Policy* which sets out the policy framework for Environment Australia when it deals with possible contraventions of Commonwealth environment and heritage legislation.

The Policy sets out the factors that Environment Australia should take into account when determining its responses to possible or actual EPBC Act contraventions, including whether or not legal action will be commenced. In recommending responses to suspected contraventions of Commonwealth environment and heritage legislation, the Policy provides that Environment Australia should consider factors such as:

• the seriousness of the harm to people, the environment or cultural heritage;

• the level of malice or culpability of the offender: was the contravention intentional, reckless, negligent, or a mistake?;

• whether or not the offender has a history of prior contraventions;

• whether or not the offender has cooperated with authorities when the contravention was detected;

• the cost to the Commonwealth or general community of the contravention;

• the commercial value of a contravention to the offender;

• whether or not the proposed response option could be counter-productive in terms of maximising compliance with legislation; and

• whether or not prosecution or civil enforcement would create a desirable precedent.

Copies of the policy are available at: www.ea.gov.au/about/compliance/index.html.

False or Misleading Referrals
Continued from page 1

and associated actions while analysis of the likely impacts should be clear, accurate and supported by adequate sampling and investigation to justify any comments, conclusions or recommendations made.

The decision should also be seen in the context of a case that is pending in the Federal Court concerning the EPBC Act, *Queensland Conservation Council & Anor v Minister for the Environment and Heritage* (No Q203 of 2002), which challenges a decision of the Minister not to consider major associated downstream development in assessing the impacts of the Nathan Dam, which is proposed to be built on the Dawson River in central Queensland. If the conservationists succeed in the Nathan Dam Case then, together with the decision in *Mees v Roads Corporation*, environmental impact assessment under the EPBC Act will require a level of integrity and rigour that is unprecedented in Australia.

[1] The decision is available on the internet at www.austlii.edu.au.

Shelburne Bay Saved
Continued from page 3

ENDNOTES

[1] Queensland Government Press Release, 'Beattie Laws will Protect Shelburne Bay', 24 March 2003 (Premier, Peter Beattie and Minister for Natural Resources and Mines, Stephen Robertson).

[2] Queensland Government Press Release, 'Beattie Laws will Protect Shelburne Bay', 24 March 2003 (Premier, Peter Beattie and Minister for Natural Resources and Mines, Stephen Robertson). See also: Queensland Government Press Release, 'Government Honours Pledge to Protect Shelburne Bay', 1 May 2003 (Minister for Natural Resources and Mines, Stephen Robertson).

Mobil Oil Refinery
Continued from page 5

[10] *Senate Inquiry into Gulf St Vincent: Submission by The Conservation Council of South Australia Inc. 3 February 2000,* Michelle Grady, James Brook, www.ccsa.asn.au/campaigns/marine/gulfstvincent.html.

[11] Hansard, House of Assembly, Tuesday 29th April 2003

[12] Greg Kelton, 'Port Stanvac Ultimatum: Act now', *The Advertiser,* 30th April 2003.

[13] *Media Release, Hon Rob Lucas MLC: Agreement Reached on Port Stanvac Rates*, Tuesday 23rd October 2001, *Oil Refinery (Hundred of Noarlunga) Act* 1958 (SA); *Adelaide Refinery Announcement Q & A's,* www.mobil.com.au/mobil/mn_mobil_facilities_adelaide.html

[14] *Mobil Media Release,* 8th April 2003*: Adelaide Refinery,* citing Chris Erickson, Refining and Supply Director, Mobil Oil Australia, www.mobil.com.au; *'Adelaide Refinery Announcement Q & A's',* http://www.mobil.com.au/mobil/mn_mobil_facilities_adelaide.html

[15] S.99

[16] Catherine Hockley, 'Four Pits of Toxic Sludge', *The Advertiser*, 28th April 2003

[17] ibid

[18] ibid, citing Mr Alan Bailey, Adelaide Media Contact, Mobil.

[19] *Adelaide Refinery Announcement Q & A's,* www.mobil.com.au/mobil/mn_mobil_facilities_adelaide.html

[20] see n.18 above.

[21] S.84(c)

[22] Most recently in April 2003 as part of submissions to an EPA amendment Bill.

[23] S.7(1) of the *Land and Business (Sale and Conveyancing) Act* 1994

[24] Catherine Hockley, 'Years Later, no Mobil Clean-up', *The Advertiser*, 1st May 2003

IFOA Information - Part 2
Continued from page 9

more rapidly if trees are completely removed (rather than, for example, if the method used was Single Tree Selection). Whether those assumptions will be borne out on the South Coast remains to be seen.

The IFOA also envisages the use of mechanical harvesting and grapple snigging logging operations in the South Coast Subregion, neither of which have previously been used in the Subregion (and only rarely before in native forests). As a consequence of the weight and limited maneuverability of mechanical harvesting, mechanical harvesting is likely to lead to more post-logging tree mortality than the existing South Coast native forest logging operations. The extent and acceptability of the environmental effects of such harvesting methods also remains to be seen.

Be that as it may, the IFOA requires State Forests to undertake much more comprehensive forest planning and management than it has undertaken in the past, and the planning and management process has been made much more transparent. While it would be

impracticable to exercise oversight of all South Coast operations, the public availability of planning documents and environmental and management reports will provide environmentalists with another tool in their endeavours to see the implementation of truly ecologically sustainable forest management in the Southern Region.

ENDNOTES

[1] Cl 34.
[2] Cl 63(1)(j).
[3] Cl 33.
[4] Cl 39.
[5] Cl 45.
[6] Cl 63(1)(k) and (p)
[7] Cl 35.
[8] Cls 36, 37 and 38.
[9] Cl 63(1)(l)-(o) amongst other provisions.
[10] Cl 40.
[11] Cl 44(1)-(3).
[12] Cl 44(5).
[13] Cl 44(11)-(14).
[14] Cl 41.
[15] Cl 44(7)-(10).
[16] Cl 42.
[17] Cl 43.
[18] Cl 43.
[19] Cl 52; 63(1)(u).
[20] Cl 47; 63(1)(r).
[21] Cl 48; 63(1)(s).
[22] Cl 49; 63(1)(t).
[23] Cl 54; 63(1)(v).
[24] See, for example, cl 44(4) in respect of burning operations.
[25] See, for example, cl 42(5) in respect of monthly notice of thinning and culling operations.
[26] 0.79 hectares is a circle with an approximate radius of 50 metre.
[27] 0.39 and 0.13 hectares are circles with radius of approximately 35 and 20 metres respectively.
[28] Cl 5(11).
[29] Cl 5(11)(A)(c).

EDO Network News

New South Wales

EDO New South Wales has recently expanded its staff with the arrival of Rachel Walmsley as Policy Officer. Rachel was previously working for the peak NSW environment groups as Environment Liaison Officer.

We also welcome Todd Neal as our new Policy Intern, who will be working with us for 16 weeks.

North Queensland

Matt Patterson has recently left his position as Solicitor/Policy Officer at EDO North Queensland and is heading to Europe for an extended cycling trip with his partner.

Stephen Hall, previously of EDO Tasmania, has now commenced work with EDO North Queensland as Casework Solicitor.

Northern Territory

Position Vacant - Solicitor

EDO (NT) seeks a lawyer to undertake the work of the Office and to supervise its administration.

Applicants should be eligible to obtain an unrestricted practising certificate in the Northern Territory and have a commitment to the protection of the environment.

Salary $45,000 pro rata for 30 hours per week plus superannuation and six weeks annual leave.

For position description, selection criteria and enquiries please telephone (08) 8982 1182 or email edont@edo.org.au

Queensland

Terri Westacott, who has done a wonderful job as Administrator for EDO Queensland for the last year, has left the EDO to pursue full time studies in professional photography.

We are fortunate that Eva Illuk, an experienced legal administrator, has recently taken up the role of EDO Queensland Administrator.

South Australia

Mark Parnell, EDO (SA) Solicitor, and Chris Hales, EDO (SA) Administrator, are both entering their eighth year with the EDO.

Tasmania

Stephen Hall has left EDO Tasmania to join EDO North Queensland.

Nick Mackey is currently working as Interim Lawyer during the application process.

Victoria

Beth Mellick is now Projects Coordinator for EDO Victoria, focussing on grants and funding. Beth will start maternity leave in October 2003 for six months.

Diva Guash has joined EDO Victoria as part-time Administrative Assistant.

Western Australia

Sandy Boulter has left her role as Project Solicitor with EDO Western Australia.

Fact Sheet Coordinator, JP Clement, will be leaving EDO (WA) in mid-July.

Lee McIntosh has been appointed Principal Solicitor.

Marilyn Ashton has been appointed Coordinator (Finance and Reporting).

Linda Schur has been appointed Coordinator (Special Projects and Promotions).

SUPPORT US!

EDOs provide legal advice and representation to individuals and community groups who are working to protect the environment; contribute to law reform; run community education programs and develop plain English resources on environment laws and public participation.

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Don't forget to visit the EDO website at www.edo.org.au for the latest workshops, conferences, publications, events and law reform submissions.

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