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EDO Queensland Wins Nathan Dam Case

Major Expansion of Federal Environment Powers

Chris McGrath, Barrister-at-Law

On 19 December 2003, the Federal Court of Australia overturned a decision of the Federal Environment Minister for refusing to consider the impacts of associated downstream agricultural development on the Great Barrier Reef World Heritage Area (**WHA**) when assessing of the impacts of a major dam.[1] This decision has far-reaching implications for the operation of environmental law in Australia.

Justice Susan Kiefel found that when assessing the impacts of a proposal under the Commonwealth Government's principal environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**)[2], the enquiry of the Federal Environment Minister is a wide one and might extend properly to the whole, cumulated and continuing effect of the activity, including the impacts of activities of third parties.

In this case, two conservation groups, the Queensland Conservation Council and World Wide Fund for Nature (Australia), represented by EDO Queensland, sought judicial review of decisions of the Federal Environment Minister in relation to a proposal to construct and operate the 880,000 megalitre Nathan Dam near Taroom on the Dawson River in Central Queensland. The Dawson River joins the Mackenzie River to become the Fitzroy River flowing east to the coast and the Great Barrier Reef WHA.

The purpose of building the dam is to supply water for irrigation of 30,000 hectares of farmland, mostly cotton growing, in the lower Dawson River Valley, and other development in the region. Major concerns were raised regarding the likelihood of agricultural chemicals, particularly endosulfan, polluting water flowing to the Great Barrier Reef WHA. The Fitzroy River catchment is recognised as a high-risk area for activities causing pollution of the Great Barrier Reef WHA.

Despite the likelihood of associated agricultural development causing significant impacts to the Great Barrier Reef WHA, the Environment Minister, Dr David Kemp, refused to consider these impacts. He stated:

"I found that potential impacts of the irrigation of land by persons other than the proponents, using water from the dam, are not impacts of the … construction and operation of the dam."

The EPBC Act provides an offence, assessment and approval system for actions impacting upon matters of national environmental significance (as well as actions impacting on Commonwealth land and actions undertaken by the Commonwealth). Importantly for this case, "matters of national environmental significance" include the world heritage values of a declared World Heritage property and listed migratory species.

A person proposing to take an action that is likely to have a significant impact on a matter of national environmental significance is required to refer the proposal to the Federal Environment Minister, who must then decide whether it is a "controlled action" requiring assessment and approval. If the Minister decides a proposal is a controlled action, it must then be assessed under the EPBC Act and either approved or refused. The Minister may also impose conditions on an approval.

The decision in this case concerned the extent of the enquiry necessary to be undertaken by the Australian Environment Minister under section 75 of the EPBC Act of the impacts which a proposed development or activity may have upon the matters protected by the Act.

In summary, the decision establishes three legal principles of broad application for the future operation of the EPBC Act, namely:

- When assessing the impacts of a proposal under the section 75 of the EPBC Act, the enquiry of the Australian Environment Minister is a wide one and might extend properly to the whole, cumulated and continuing effect of the activity, including the impacts of activities of third parties.

- When assessing the impacts of a proposal under the section 75 of the EPBC Act, the Australian Environment Minister is first to consider 'all adverse impacts' the action is likely to have. The widest possible consideration is to be given in the first place, limited only by considerations of the likelihood of it happening. By that means the Australian Environment Minister should exclude from further consideration those possible impacts which lie in the realms of speculation.

- No narrow approach should be taken to the interpretation of the EPBC Act because of the high public policy apparent in the objects of the Act.

This decision has fundamental and far-reaching implications for development approval and the operation of environmental law in Australia by recognising the broad scope of relevant impacts that must be considered by the Australian Environment Minister under section 75 the EPBC Act.

The EPBC Act provides the overarching legal requirements for environmental impact assessment of development proposals in Australia and, by massively widening the scope of relevant impacts that must be considered for assessment under the Act, the decision dramatically strengthens the ability of the Act to protect the environment.

The decision fundamentally improves the decision-making process for development approval under the Act by establishing that piecemeal decisions are unlawful. State and Territory governments performing environmental impact assessment under bilateral agreements on behalf of the Australian Government under the EPBC Act will also be required to comply with the same principles. The implications of this decision are therefore likely to reverberate for decades in the Australian environmental legal system.

[1] *Queensland Conservation Council Inc v Minister for the Environment & Heritage [2003] FCA 1463.* The full text of the decision is available online at www.austlii.edu.au/au/cases/cth/federal_ct/2003/1463.html.

[2] In relation to the EPBC Act generally, see http://www.deh.gov.au/epbc.

Commonwealth Environmental and Heritage Law Amendments

Larissa Waters, Solicitor, EDO Queensland

New amendments to the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) were assented to on 23 September 2003, following the commencement of Schedule 4 of the *Environment and Heritage Legislation Amendment Act (No 1) 2003* (**the amending Act**).

This article outlines the new heritage laws introduced by the amending Act (which will commence in early 2004) and discusses a number of other changes introduced by the amending legislation, including provisions in relation to staged developments and new penalties for failure to undertake actions in the manner specified by the approval.

1. Heritage Amendments

Schedules 1, 2 and 3 of the amending Act operate in conjunction with the *Australian Heritage Council Act 2003* and *Australian Heritage Council (Consequential and Transitional Provisions) Act 2003* (passed at the same time as the amending Act[1]) to introduce a new heritage protection regime. These laws have not yet commenced, but will do so on proclamation, which is scheduled to occur before 23 March 2004.[2]

New Heritage Lists

The new heritage laws establish completely new lists for heritage places – a National Heritage List and a Commonwealth Heritage List, which will initially contain no listings. Both Lists will eventually include places of outstanding heritage significance to Australia, with the Commonwealth Heritage List including only places with heritage values owned or leased by the Commonwealth.[3] Criteria for listing on the basis of natural, indigenous or historical values will be set by Regulation.

Places currently listed on the Register of the National Estate will be eligible to be transferred to the Commonwealth Heritage List (if in a Commonwealth area or under Commonwealth control) in the first six months of the new laws commencing, and we expect transfers to occur with many of the Commonwealth-controlled National Estate places.

Public Nominations

Once the new laws commence, there will be a public nomination process that will allow individuals, the community and governments to nominate places to the National Heritage List and the Commonwealth Heritage List. Each place nominated for either list will be assessed by the Australian Heritage Council (replacing the current Australian Heritage Commission), which will advise the Minister for Environment and Heritage (the Minister) on suitability for listing. Further public consultation on the proposed inclusion of the place on the list may then take place, before the Minister makes a final decision on whether a nominated place will be entered on the list.

Management of Heritage Places

The amendments require the Minister to make Plans to protect and manage the heritage values of listed heritage places co-operatively with State and Territory governments. The Commonwealth and Commonwealth agencies must not contravene those Plans. Australian government agencies are also now required to prepare heritage strategies for places they own or control.

Protection for Heritage Places

Once the heritage laws commence, the heritage values of a heritage place on the National Heritage List (a 'National heritage place') will be protected as a 'matter of national environmental significance', creating an additional 'trigger' for operation of the EPBC Act.

Normally, actions that have, will have or are likely to have a significant impact on a matter of national environmental significance are subject to the assessment and approval process in the EPBC Act. However, protection for National heritage places is limited by the Constitutional powers of the Commonwealth.

The assessment and approval process for actions likely to have a significant impact on a National heritage place will only be triggered where a constitutional power of the Commonwealth is invoked, such as where the action is for interstate or international trade, or will affect a National heritage place that is in an area which Australia has obligations to protect under the Biodiversity Convention.

When this occurs, members of the public will have the opportunity to make submissions on the proposed action that must be taken into account by the Minister in deciding whether to refuse, approve or condition the proposed action.

Protection for places on the Commonwealth Heritage List will be via the general protection afforded the environment (not just matters of national environmental significance) on Commonwealth land.

Since the amending Act includes the heritage values of heritage places in the definition of "the environment", the effect is that it is an offence to take an action on Commonwealth land (or that affects Commonwealth land) that is likely to have a significant impact upon the heritage values of a Commonwealth Heritage place, without having an approval to do so (or being exempt from the need for an approval)[4] . The public will have rights to make submissions on proposed actions that must be taken into account by the Minister in deciding whether to refuse, approve or condition the proposed action.

The new Commonwealth laws will operate in addition to the State and local government environmental, heritage and planning laws which also currently regulate heritage places.

Public Enforcement

By broadening the definition of "the environment" in section 528 of the EPBC Act, the heritage amendments have extended public rights to challenge decisions made under the EPBC Act or to seek injunctions to stop unlawful actions.

Under section 487, a person or group has "standing" to enforce the EPBC Act if they have engaged in activities for the protection or conservation of, or research into, the environment in the two years prior to the decision they wish to challenge being made.[5]

The amendments mean that active heritage groups will now have the right to challenge decisions or seek injunctions under the EPBC Act in relation to both National and Commonwealth heritage places.

2. Staged Developments and Piecemeal Referrals

Schedule 4 of the amending Act commenced on 23 September 2003, introducing new section 74A of the EPBC Act, which allows the Minister to refuse to accept a referral of a proposed action where the Minister is satisfied that the action is a component of a larger action proposed to be taken, such as in a staged development. If the Minister refuses to accept the referral, the Minister can compel the person to refer the whole larger action to the Minister for assessment under the Act.

This new power will be critical in accurately determining the likely impacts of a total development, in order to make an informed decision on whether all components of a proposal require assessment and approval under the EPBC Act, and could avoid a development slipping under the radar of the Act if its components are individually not likely to have a significant impact on a matter of national environmental significance.

Yet while the Minister is empowered to refuse to accept a piecemeal referral, the Minister is not obliged to do so, as the exercise of the new power is discretionary. However, discretionary powers are to be exercised in a manner that best achieves the object of the Act in question, and the objects of the EPBC Act include protecting the environment and promoting the conservation of biodiversity.[6] It is possible that a judicial review challenge could be mounted by members of the public[7] where the Minister decides to accept a referral that is simply a component of a larger action if that decision does not promote protection of the environment and the conservation of biodiversity.

As the initial decision on whether or not to accept a referral is made prior to the referral being notified on the EPBC notifications web site and thus prior to public comments being made, it is critical that proponents abide by the duty to provide accurate information about their development plans in their referral, since this will be the only source of information upon which the Minister can base the decision on whether the action is part of a larger action. Reflecting the amendment, the referral form and guide for proponents now specifically seek information about:

- the interdependency of the referred action relative to any larger action;
- whether the referred action is stand-alone and viable in its own right;
- the temporal and/or spatial relationship between the referred action relative to any larger action;
- the scope of the proposal that has been put forward for any Local Government or State/Territory authorisation;
- responsibility of the action person or other persons for elements of any larger action; and
- whether protection of matters of national environmental significance can be best achieved through consideration of any larger action compared to a smaller component or staged action.

It is an offence under section 489 of the EPBC Act to provide false or misleading information in a referral document and both civil and criminal penalties apply. The Minister can pursue court action to impose those penalties, and any member of the public[8] can seek a declaration and orders from the Federal Court that the referral is false or misleading[9]. On paper this is good insurance against developers providing false or misleading information about their proposals, but in practice there is still no guarantee that referrals will be made with full disclosure or full consideration of likely environmental impacts.

However, any new information that comes to light about a staged development following a decision on whether approval is required under the Act might provide grounds under section 78 of the EPBC Act for reconsideration of the original decision that Commonwealth approval was not required. Reconsideration can result in the original decision being revoked and substituted with a new decision.

3. Actions exempt if performed "in the manner specified"

The "in the manner specified" provisions of the EPBC Act allow the Minister to decide that because of the way in which an action will be carried out (including things like design features and mitigation measures), it would not be likely to have a significant impact on a matter of national environmental significance, and thus Commonwealth assessment and approval of the action is not required.

Schedule 4 of the amending Act also introduced new section 77A, which strengthens the ability to enforce the Minister's decision that an action does not require approval because that action would be taken "in the manner specified". After the amendments came into effect on 23 September 2003, new civil penalties of up to $110,000 for an individual and $1.1 million for a body corporate apply if a developer does not undertake the action in the manner specified. In addition, if the action is not taken in the manner specified, reconsideration of the decision that Commonwealth approval is not required could be undertaken in accordance with section 78 of the EPBC Act.

Prior to the amendment taking effect, there was no direct route to challenge an action that was not taken in the manner it was specified to be undertaken. Rather, a concerned environmentalist would have to launch injunction proceedings and demonstrate that the action was likely to have a significant impact on the environment because of the different way in which it was performed, an onerous task which would require expert scientific evidence. The amendments mean that there is now a direct avenue for the Minister to pursue civil penalties, or for members of the public who meet the standing test to seek an injunction to stop actions being performed in a manner other than the approved manner specified.

Conclusion

The new amendments introduced by the Environment and Heritage Legislation Amendment Act (No 1) 2002 described above are an extremely positive step forward. We commend the government for taking steps to ensure referrals provide adequate information on the scope of intended actions both current and future, in order to adequately determine whether Commonwealth assessment and approval of component actions or larger actions is required. Also, inserting new penalties for failing to undertake development in the manner specified provides the Minister and the public a direct route to challenge non-complying wayward developers.

The heritage amendments also have the potential to improve the protection for places currently on the Register of the National Estate – presently regulated by a largely unenforceable system lacking direct mechanisms to protect listed places – if those places make it onto one of the new Lists. So before the laws commence next March, get organised to nominate your favourite natural, cultural or indigenous places for inclusion!

ENDNOTES

[1] The controversial set of Bills was originally introduced into Parliament in June 2002, yet only passed by the Senate on 21 August 2003 and the House on 8 September 2003, receiving Royal Assent on 23 September 2003.

[2] Section 2(3) of the amending Act. However, note that Schedule 2 of the amending Act (which provides for certain consultation mechanisms with the Director of Indigenous Heritage Protection) will not commence until that position is established under section 9 of the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998, once the Bill is enacted.

[3] "Place" is defined to include a location, area, region, building or other structure and its immediate surroundings: new section 528 EPBC Act.

[4] See sections 26 – 28 EPBC Act.

[5] To have standing, an individual must also reside in Australia, and a group must be established in Australia and have protection or conservation of, or research into, the environment as one of its objects: section 487 EPBC Act.

[6] Section 3 EPBC Act.

[7] Where they meet the "standing" criteria in section 487 of the EPBC Act.

[8] Again, where they meet the "standing" criteria in section 487 of the EPBC Act.

[9] As occurred in the case of *Mees v Roads Corporation* [2003] FCA 306. See Impact No. 70 June 2003 for discussion of this case.

New Zoning Plan for Great Barrier Reef

World's Largest Network of Marine Protected Areas

The revised Great Barrier Reef Marine Park (**GBRMP**) Zoning Plan was tabled in Federal Parliament on 3 December 2003, after more than 5 years of preparation and two major rounds of public consultation.

The Zoning Plan will protect habitats that are representative of all the 70 bioregions in the GBRMP by establishing a network of no-take marine sanctuaries, known as 'Green Zones', where diving, snorkelling and boating are permitted but not extraction of marine life.

The Zoning Plan increases these Green Zones from currently 4.5% to 33.3% of the total GBRMP, a six-fold increase in protected areas of the GBRMP that will create the largest network of highly protected marine areas in the world.

In November 2003, Federal Cabinet agreed in principle to a structural adjustment package to assist commercial fishers and others adversely affected by the upcoming re-zoning.

The EDO congratulates the Great Barrier Reef Marine Park Authority, the Federal Government, WWF reef campaigners Imogen Zethoven, Richard Leck and Sarah Lowe and all the others who have created this internationally outstanding achievement.

For more information on the revised Great Barrier Reef Marine Park Zoning Plan visit: www.gbrmpa.gov.au.

For more information on the WWF Australia campaign to protect the Great Barrier Reef visit www.wwf.org.au.

Reef Water Quality Protection Plan

The Great Barrier Reef also wins with the release of the **Reef Water Quality Protection Plan**, a joint initiative of the Queensland and Commonwealth governments three years in the making.

Prime Minister Howard and Premier Beattie recently signed the Plan, which will now be implemented in an attempt to reverse the decline in the quality of water entering the reef lagoon within ten years.

The Plan identifies catchments and reefs at risk from runoff and promotes best land management and incentives to protect and restore significant wetlands.

The Plan implements the commitment made by the Prime Minister and the Premier in an August 2002 Memorandum of Understanding, and will be reviewed in 2010.

A copy of the Plan is available from the Commonwealth Department of Environment and Heritage website at www.deh.gov.au/coasts or the Queensland Premier's website at www.thepremier.qld.gov.au/reefwater.

Queensland Commits to Landclearing Laws

On 27 November 2003, Queensland Premier Peter Beattie announced in Parliament that the Queensland government would go it alone on land clearing law reform, after months-long silence from the Federal Government.

In May 2003, Queensland and the Commonwealth agreed to each provide $75 million towards a compensation package for farmers whose clearing rights would be restricted by planned tightening of Queensland land clearing laws.

The EDO congratulates Premier Beattie for promising to introduce new land clearing laws in the first sitting week of Parliament next year (24–27 February 2004) regardless of the Commonwealth's involvement. Premier Beattie has committed to:

- protect "of concern" vegetation on freehold land (currently only protected on leasehold land); and
- phase out clearing of remnant vegetation by 2006.

Premier Beattie's statement is available at www. parliament.qld.gov.au/hansard/Documents/2003.pdf/ 031127ha.PDF.

Mandatory Renewable Energy Target Review

On 16 January 2004, the report of the Mandatory Renewable Energy Target (MRET) Review was released.

The report examines the effectiveness of the scheme, which establishes a national renewable energy market, placing liability on wholesale purchasers of electricity to contribute towards the generation of the additional renewable energy.

The existing MRET, which commenced in April 2001, requires the sourcing of 9,500 gigawatt hours of extra renewable electricity per year by 2010 through to 2020.

The report recommends that this target remain unchanged.

The EDO shares the concerns of a number of conservation groups about this recommendation – described by ACF Executive Director Don Henry as "a totally inadequate and shortsighted response to the impact of climate change in Australia".

The EDO made a number of recommendations for legislative and policy changes in its submission and is currently assessing the MRET Review report in detail.

The Review Report is available at www.mretreview.gov.au.

The EDO submission is available at www.edo.org.au/edonsw/site/policy.asp.

Recent Developments in National Water Policy

Ilona Millar, Principal Solicitor, EDO NSW

The Council of Australian Governments (COAG) has been seeking to deal with the complex issue of water reform since 1994, when the Commonwealth, State and Territory governments agreed on a strategic framework to achieve an efficient and sustainable water industry. Since that time, water resource management in Australia, particularly those states comprising the Murray Darling Basin (New South Wales, Queensland, South Australia and Victoria) has been transformed.

A stated objective of the COAG framework is to establish the true value of water in all Australian states and territories, explicitly linking environmental and economic objectives. This is intended to be achieved by a number of market based measures involving pricing water, establishing secure property rights for water (separate from land rights) and providing for permanent trading in water entitlements. Specific provision was made for water for the environment, for institutional reform (with water service providers to operate on the basis of commercial principles) and for improved public consultation and education arrangements.[1]

Notwithstanding two recent papers published by the Institute of Public Affairs, which claim that the health and water quality of the Murray Darling River is not in decline[2], the Murray Darling Basin Commission (MDBC) has gathered significant scientific evidence that show that the Murray River system is severely degraded. A Communique recently released by the MDBC stated that "this degradation threatens the Basin's agricultural industries, communities, natural and cultural values, and national prosperity".[3] Earlier this year, the former President of the Australian Conservation Foundation (ACF), Mr Peter Garrett, and President of the National Farmer's Federation Peter Corish expressed the view that $200-$250 million per year over 10 years was needed to restore the health of the Murray system.[4] The ACF has also been calling for a return of 1,500 gigalitres of environmental flows to the river Murray.

On 14 November 2003 the Australian Government, the States and the Murray Darling Basin Ministerial Commission announced an Agreement to return environmental flows to the River Murray system. The Agreement will focus on maximising the environmental benefits to six significant sites along the Murray River. Environmental objectives for those sites include:

- The Barmah-Millewa Forest – achieving successful breeding of colonial waterbirds in at least 3 of 10 years and maintaining healthy vegetation in at least 55% of the forest area;
- Gunbower and Perricoota-Koondrock Forests – reinstating at least 80% of permanent and semi-permanent wetlands and maintain at least 30% of total river red gum forest area;
- The Hattah Lakes – restore aquatic vegetation zones around 50% of the lakes and increase successful bird breeding events;
- Chowilla Floodplain (including Lindsay-Wallpolla) – water high value wetlands and maintain the health of the current area of river red gums and at least 20% of the original black box area;
- Murray Mouth, Coorong and Lower Lakes – keep the Murray mouth open, provide more frequent conditions for estuarine fish spawning, and enhance migratory wading bird habitat;
- River Murray channel – enhancing native fish recruitment and habitat and maintain current levels of channel stability[5].

The above environmental objectives are to be achieved by providing for an additional 500 GL of environmental flows down the Murray River, over a five-year period. Those flows are to be 'recovered' from a variety of sources including increased on-farm initiatives to improve efficiency, infrastructure improvements and rationalisation (which will be integrated with an existing $150 million capital works program), market based approaches and purchases water from willing sellers. The final proposal will be put to the next meeting of COAG in early 2004, after a process of community consultation to refine the elements of the package.

The agricultural industry has indicated its support for the initiative on the basis that water will not be compulsorily acquired from farmers[6]. Environment groups have also cautiously welcomed the Government's commitment to improved environmental flows. Executive Officer of the Nature conservation Council of NSW, Brooke Flanagan stated that "the next step must look at improving the entire ecosystem of the Murray rather than dealing with a small number of sites".[7]

COAG will meet again in early 2004 to finalise the National Water Initiative. It is hoped that an implementation program for the return of environmental flows to the Murray will be confirmed and that operational arrangements will be able to commence without delay.

ENDNOTES

[1] COAG Communique, 25 February 1994 in Hobart. See recently Kemp D (2002) "Water – What's It Worth" Paper presented at the Deniliquin MVCAG Summit, 21 November 2002 at pp 4-5.

[2] Marohashy, J "Myth and the Murray, Measuring the real state of the River Murray" (8 Dec 2003 IPA); Marohashy, J "Received evidence for deterioration in water quality in the River Murray" (Oct 2003, IPA).

[3] See www.thelivingmurray.mdbc.gov.au/content/index.phtml/itemId/16196/fromItemId/4440.

[4] Joint Press Release ACF-NFF 23 July 2003

[5] See www.thelivingmurray.mdbc.gov.au/content/index.phtml/itemId/16196/fromItemId/4440.

[6] Paul Weller, Chairman of the National Farmers Federation water taskforce, quoted in "Murray Agreement Positive First Step" *The Land* 20 Nov 2003 p.7.

[7] "Murray First Step Welcomed" 14 Nov 2003 www.nccnsw.org.au/water/news/media/20031114_msfw.html.

False and Misleading Environmental Impact Statements

Application of the Commonwealth *Trade Practices Act 1974*

Warren Kalinko, Former Solicitor EDO NSW and Jessica Simpson, Solicitor EDO NSW

Can the Trade Practices Act 1974 be used to challenge the validity of Environmental Impact Statements on the basis that they are misleading?

This article discusses the potential use of the provisions of the Commonwealth *Trade Practices Act 1974* (**TPA**) to commence legal proceedings in relation to the preparation and use of misleading environmental impact statements (**EIS**). There are currently no reported cases in which the TPA has been used to challenge the provisions of an EIS.

Section 52 of the TPA prohibits corporations from engaging in conduct, in the course of "trade or commerce", which is "misleading or deceptive or is likely to mislead or deceive".

The EDO envisages that the TPA could be used to bring claims against the author(s) of a misleading EIS, and the proponent of a development or activity on whose behalf the EIS was prepared, in circumstances where the EIS:

(a) contains statements or information which is materially false in relation to the environmental impacts of a proposed development; or

(b) fails to provide full and fair disclosure about the expected environmental impacts of a development proposal.

A claim against the author of the EIS would be initiated pursuant to section 52 of the TPA. It would allege that in providing a faulty EIS to the proponent, the consultant engaged in conduct that is likely to mislead the proponent, the decision-maker and the public, as to the environmental impacts of the proposed development.

The claim against the proponent would also be for a breach of section 52 of the TPA. It would allege that the proponent, in supplying the EIS to the decision-maker, engaged in conduct that is likely to mislead the decision maker and the public, as to the environmental impacts of the proposed development.

Key Principles

The key principles in relation to section 52 of the TPA are as follows:

(a) For a contravention of section 52 to occur, the conduct must be likely to mislead. The conduct is to be judged by reference to the "reasonable person" within the audience likely to be affected.

(b) The question (whether conduct is likely to mislead) is an objective one, and requires an examination of the likely effect of the conduct.

(c) Silence, or a failure to make full disclosure may constitute misleading conduct in circumstances where a "reasonable expectation exists" that if certain matters are known they will be disclosed.

(d) Not all misleading conduct by corporations will be caught by section 52. The impugned conduct must be "in trade or commerce". The High Court has construed this phrase narrowly, so that the wrongful conduct must itself have a trading or commercial character.

(e) The section applies primarily to "corporations". However, most Australian States have similar legislation which extends the prohibition to natural persons and other legal entities.

(f) The application of section 52 is not limited to consumers. It applies so as to protect the public at large.

"Reasonable Expectation"

In our view it could be argued that the New South Wales *Environmental Planning and Assessment Act 1979* (**EPA Act**) gives rise to a "reasonable expectation", on the part of:

- the proponent of a development or an activity who engaged a consultant to prepare an EIS;
- the public; and
- the consent authority

that the EIS will contain a full and fair disclosure of all matters relevant to a consideration of the environmental impacts of the proposed development.

This stems from the function of an EIS, as described by the Court of Appeal in *Prineas v Forestry Commission of NSW* (1984) 53 LGRA 160 at 171:

"an obvious purpose of the EIS is to bring matters to the attention of members of the public, the Department of Environment and Planning and to the determining authority in order that the environmental consequences of a proposed activity can be properly understood".

In the context of an EIS prepared under Part 5 of the EPA Act, an expectation of full disclosure is given added support by section 112 of the EPA Act and clause 229 of the Environmental Planning Assessment Regulation 2000 (EPA Regulation). Clause 229(f) of the Regulation requires a person who prepares a Part 5 EIS to declare that the EIS:

"(ii) …contains all available information that is relevant to the environmental assessment of the activity to which the statement relates, and

(iii) that the information contained in the statement is neither false nor misleading."

If a reasonable expectation arises that an EIS will disclose all matters that are material to an assessment of the environmental impacts of a proposed development, then it is arguable that there has been a failure to make "full and fair disclosure" and that accordingly, the EIS is likely to mislead because it creates the impression that the omitted matters do not exist.

A Closer Analysis of the TPA Provisions

Section 52

There are a number of elements to the prohibition in section 52. Each of these are dealt with separately below in relation to the establishment of a challenge to the validity of an EIS.

"In trade or commerce"

Section 52(1) of the TPA requires that the relevant conduct must have taken place "in trade or commerce". Dealings "in trade or commerce" are not limited to contractual relationships between parties.

In the context of the publication and use of an EIS, the action of a consultant, in providing the EIS to the proponent, is likely to be in "trade or commerce". This is because preparing and publishing the EIS is done in exchange for money between the proponent of the development or activity and the consultant.

The position is less clear in relation to the proponent's use of the EIS. On one hand, submitting an EIS to a consent authority is arguably part of a statutory approval process, rather than a trading activity or a commercial activity. On the other hand, the EIS forms part of a development application, which is lodged by a proponent with a fee. This, and the fact that obtaining approval is a fundamental part of the proponent's business, may give the act a commercial character.

Opinion and representations with respect to future matters

It could be argued that an EIS is nothing more than:

a. an "opinion", and that it is defensible if the opinion is genuinely held and if there is a basis for the opinion; or

b. a representation with respect to a future matter, and that the statements made will be defensible if there are reasonable grounds for making them: s51A.

To the extent that an EIS contains opinion or predictions that are genuine and reasonably based, it may be difficult to impugn an opinion as misleading. It remains unclear how a court would determine this question.

"Engage in conduct"

In accordance with section 4 of the TPA, this phrase includes actions as well as deliberate omissions.

"A person involved in a contravention"

Furthermore, section 75B of the TPA provides that "a person involved in a contravention" of the TPA is a person who:

"(a) has aided, abetted, counselled or procured the contravention;

(b) has induced, whether by threats or promises or otherwise, the contravention;

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention."

This provision may be used to establish a cause of action against an individual author of an EIS for a breach of section 52 of the TPA, even if that person made a statement in an EIS which he or she believed to be true, if it can be demonstrated that the individual knew that a statement made in an EIS would be misleading or deceptive.

"Misleading or deceptive or likely to mislead or deceive"

In *Equity Access Pty Limited v Westpac Banking Corporation* (1990) ATPR 40-994 the Federal Court summarised the meaning of the phrase "misleading or deceptive" as follows (per Hill J):

"1. For conduct to be misleading or deceptive the conduct must convey in all the circumstances of the case a misrepresentation…

2. There will… be no contravention… unless error or misconception results from the conduct of the corporation and not from other circumstances for which the corporation is not responsible…

3. …The question of whether conduct is misleading or deceptive, or likely to mislead or deceive is an objective question which the court must determine for itself.

4. The court must consider whether a reasonably significant number of potential purchasers would be likely to be misled or deceived…

6. Section 52 is not confined to conduct which is intended to mislead or deceive… and a corporation which acts honestly and reasonably may nonetheless engage in conduct that is likely to mislead or deceive…"

General questions arising under the provisions of Section 52

Is the protection offered by section 52 limited to consumers?

Despite being located in Part V of the TPA, entitled "Consumer protection", section 52 is not limited to "consumer protection", in fact it protects the public at large.

In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, the High Court said (at 601-2):

"As a matter of language, section 52 prohibits a corporation from engaging in misleading or deceptive conduct "in trade or commerce" regardless of whether the conduct is misleading to, or deceptive of, a person in the capacity of a consumer."

In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11 (9 Mar 2000), Kirby J said (at para 141), with reference to the public policy of the TPA:

"It is a public policy larger than the protection of particular consumers. Relevantly, it is one aimed at promoting a culture of honesty in the representations made by trading corporations and the elimination of misleading and deceptive conduct from their dealings."

On the basis of these decisions there is potential for third party objectors to challenge the validity of an EIS on the grounds that they were mislead by the content of the EIS.

Can predictions about the future fall foul of section 52?

Predictions that are not based on reasonable grounds are deemed to be misleading under section 51A of the TPA,

which provides that where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading".

Whilst section 51A assists an applicant by deeming certain conduct to be misleading, query whether the section could work in reverse, so as to assist a respondent. Could an EIS be considered to be comprised largely of predictions, such that it will be defensible, provided the predictions are based on reasonable grounds? The first point to note is that the defence only arises to the extent statements are actually made. If the EIS fails to disclose material information, it is hard to see how the defence could apply.

Can it be said that an EIS is opinion only, and defensible, if the opinion is reasonably founded?

Certainly, an opinion will be misleading if it is not genuinely held. But what about a case where the opinion is genuinely held and there is a basis for holding that opinion? The answer is unclear. It may be the case that opinions in an EIS will be defensible if they are genuinely held and reasonably based. Accordingly, the EDO is of the view that, for this reason, it would not be advisable to run a case based solely on statements which can clearly be the subject of legitimate disagreement between experts.

What is the relationship between the Trade Practices Act *and the law governing EISs?*

Clause 283 of the EPA Regulation contains a prohibition against false or misleading statements. This provision is narrower than section 52 of the TPA, in that it requires knowledge or intent to be proved, whereas section 52 does not. Furthermore, there is no requirement for the conduct in question to be in trade or commerce.

In our view, it is more likely that the courts would read the two laws together, so that they would both need to be complied with. In any event, to the extent of any inconsistency between the TPA and NSW law, the former would prevail in accordance with section 109 of the Commonwealth Constitution.

The desirability of commencing proceedings before the development application the subject of the EIS is determined

It would be preferable to commence proceedings in respect of a misleading EIS before the relevant development application is determined. An applicant in such a case could seek injunctive relief to prevent the proponent using the EIS for the purposes of the development application. If the DA has been approved, but construction not commenced, it may be possible to seek an injunction to restrain use of the consent.

Standing

The High Court established in *Truth About Motorways* that any person even one with no private right, or special interest, has standing to bring proceedings to seek a remedy for a breach of the TPA.

Conclusion

In Australia, environmental law is generally process driven, rather than outcome oriented. The law prescribes detailed procedures for assessing the likely impacts of a proposal; it does not guarantee a good environmental outcome. The general position is that decision makers have broad discretions in determining whether or not to approve a development. Even developments with substantial adverse impacts can be approved, so long as due process is followed.

In a legal system where the assessment process is the only substantive protection it is essential that the process functions properly.

If EISs constitute merely the "yes" case for proposed developments, merely serving as advocacy documents in favor of development, as opposed to being objective assessments of the likely impacts of development, then the system is fundamentally flawed.

In this context, a case establishing that EISs are subject to the provisions of the TPA would make a valuable contribution to environmental law in Australia. If a penalty is obtained against a company contravening the Act, this would send a powerful message to consultants preparing EISs. It would also give them something to hold up to proponents which put pressure on their EIS findings, so that the quality of environmental assessment can improve.

Federal Court Decision – False and Misleading Environmental Claims

A recent decision by the Federal Court sends a clear warning to businesses seeking to promote their products or services using false or misleading environmental claims.

The Australian Competition and Consumer Commission (ACCC) began legal proceedings against Sanyo Airconditioning Australia, alleging that it had made misleading claims about the environmental benefits of the gases used in its air conditioning units.

A promotional brochure for the air conditioners claimed the units were 'for a new ozone era - keeping the world green' with 'environmentally-friendly HFC R407C added'.

HFC R407C and HCFC refrigerant R22 are in fact powerful greenhouse gases which contribute to global warming, and do not benefit the environment.

The Federal Court found that the company had breached the Commonwealth *Trade Practices Act 1974* by making false, misleading and deceptive representations.

The court ordered that the company:

- be restrained from engaging in similar misleading conduct;
- implement a trade practices compliance program; and
- pay the ACCC's costs.

"This outcome sends a warning to businesses attempting to promote their products or services using misleading environmental claims", said ACCC Chairman, Mr Graeme Samuel.

"Environmental claims, including those in the form of statements, logos and images, must be accurate, clearly identify the environmental benefit to which the claim refers, and must be verifiable."

"In light of the court's orders, extra care should be taken by businesses intending to promote the environmental aspects of their products or services to accurately specify the environmental benefits claimed."

Tasmania: Environmental Assessment of Meander Dam Proposal

Nick Mackey, Solicitor, EDO Tasmania

1 Meander Dam Proposal

1.1 Initial Studies

The Meander River catchment covers 16,000 ha of Tasmania's Central North. The catchment is situated at the base of the Great Western Tiers Conservation Area. Whilst a formal proposal to dam the Meander River was made in 1968, a detailed feasibility study on a dam for the river was not conducted until 1984. Over the next 11 years, eight major economic, financial and/or engineering feasibility studies were conducted. None of these studies resulted in any commitment to proceed with the dam. However, when a new Water Development Plan[1] was released in 2001, a dam at Meander was considered a priority for development.

The Assessment Committee for Dam Construction (**ACDC**) approves all dams in Tasmania. Constituted under section 138(1) of the *Water Management Act 1999*, the ACDC is a statutory body with direct responsibility for managing water and dams in Tasmania. The proponent for the Meander Dam is the Rivers and Water Supply Commission (**RWSC**)[2], a government business enterprise responsible for the commercial operation of government owned water schemes. In this case, the RWSC owns the majority of the land likely to be inundated by the dam. Promotion of the dam, as well as coordination and funding of all feasibility studies, appeals and lobbying, has been conducted by the Water Development Branch of the Department of Primary Industries, Water and Environment (**DPIWE**).

1.2 Referrals and Assessments

The Meander Dam proposal was referred under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) for assessment as a controlled action on 6 February 2002. A delegate of the Commonwealth Environment Minister determined that the dam was a controlled action on 27 February 2002.

In March 2002, the Tasmanian Minister for the Environment advised that the action would be assessed under the Tasmanian *Environmental Management and Pollution Control Act 1994* (**EMPCA**), in accordance with the Bilateral Agreement between Tasmania and the Commonwealth.

The Meander Dam Development Proposal and Environmental Management Plan (**DPEMP**) was released in March 2002.[3] The release of this document signalled the start of the formal public comment stage of the assessment of this proposal under Tasmanian law.[4] The DPEMP described a 43,000 ML capacity dam, 48 metres high and 170 metres long. The dam's supply would be 24,000 ML of irrigation water per year with an inundation area of 332 hectares. The cost was then estimated at $29.4 million. Justifications advanced by the RWSC in the DPEMP were that the proposed dam would:

- reduce flooding in townships along the river;
- provide an environmental flow regime for the Meander River;
- secure town water supply; and
- provide water to facilitate an increase in irrigated agriculture in the Meander Valley.

An Environmental Assessment Report (**EAR**) was required to be prepared by the Environment Division of DPIWE.[5] The EAR was to take into account the DPEMP submitted by the proponent, any supplementary information supplied by the proponent, public submissions and internal expert advice.

1.3 Community Response

The Tasmanian Conservation Trust (**TCT**), submitted a formal response to the DPEMP in March 2002.[6] The response from the TCT detailed concerns with the proposal, including:

- serious errors in the differentiation of land suitable for increased irrigation in the catchment;
- no fluvial geomorphological assessment;
- no assessment of the impacts of sediment on the ecology of the impoundment or on the operation of the dam;
- virtually no information on the financial viability of the proposal;
- no cost benefit-analysis and no economic viability study;
- no assessment of the alternative farm dam scenario, despite earlier feasibility studies determining that this was the most viable option;
- significant impacts on the threatened species Dasyuris maculates (spotted-tailed quoll).
- significant impacts on the threatened species Epacris aff. exserta 'union bridge' (subspecies of the South Esk heath); and
- lesser impacts on numerous other species of flora and fauna.

In summary, the TCT's response to the DPEMP concluded that:

- the proposal was not ecologically sustainable;
- minor changes to the proposed economic model would result in the proposal making an economic loss;
- major problems with the financial viability of the proposal existed, and on a stand alone basis was not viable;
- although deeply flawed, the on-farm storage study revealed that there are still sufficient options to more than compensate for any increased environmental flow regime in the Meander River;
- the social impacts study was superficial and inconclusive; and
- the proposal did not comply with National Competition Council water reform guidelines.[7]

Despite the many potential problems raised by the opponent's to the proposal, the Premier, the Minister of DPIWE and senior departmental staff all expressed their exuberant confidence in the dam.

1.4 Supplementary DPEMP

In May 2002, the RWSC released a supplementary DPEMP. This document contained responses to the original public comments and contained various studies.

Downstream Fluvial Geomorphology Report

- Confirmed that certain reaches of the Meander River would suffer long term changes such as channel widening and deepening.
- Confirmed that the impacts on Epacris aff. exserta were potentially very serious.

Agricultural and Economic Report

- Revealed for the first time a detailed financial justification for the dam consisting of a mail survey of 346 water users in the Meander Valley (conducted by DPIWE in 2001).
- Indicated a general interest in water from the scheme. Follow up visits were then conducted to gain further information. Whilst the total potential demand for water was found to be 24,000 ML, only about 11,000 ML of this demand was on the main channel.
- Substantial investment (in excess of $4 million) in infrastructure would be required to realize the remainder of this demand.

Financial Analysis

- Found that to achieve a commercial rate of return, a price of around $150/ML would have to be charged at 13,000 ML pa demand. Returning to the irrigator survey, at a price of $110/ML there was only about 5,000 ML of demand.

1.5 State Approval Process

The Board of Environmental Management and Pollution Control gave the dam approval after their assessment of the EAR on 10 October 2002.[8] Subsequently, the approval was formalised at State level when the EAR was finally passed to the ACDC.[9]

On approval, a number of conditions were placed on the dam, including:

- preparation and implementation of a Weed and Disease Management Plan;
- monitoring and reporting of all impacts;
- preparation and implementation of an Epacris Management Plan; and
- preparation and implementation of a Fauna Habitat Management Plan, including provisions for 'no net loss of the ecological values of Spotted-Tailed Quoll habitat'.

Finally, the Meander Valley Council approved the development and the Tasmanian Parliamentary Standing Committee on Public Works approved the allocation of $7 million to the proposal.[10]

2 The TCT's Appeal

On approval of the dam by the ACDC, an appeal was promptly lodged by the TCT with the Tasmanian Resource Management and Planning Appeal Tribunal (**the Tribunal**). Under s278(2) of the Water Management Act, the appeal has to be referred in the first instance to a mediation conference.[11] A full hearing was set down for 11 January 2003 after mediation failed.[12]

The principal issues raised by the appellant in the appeal were:

- the failure of the proponent and of the two principal approving bodies to properly assess the impacts of the proposal on spotted-tailed quoll and Epacris aff. Exserta;
- the failure to propose adequate mitigation measures for these impacts;
- submissions by the TCT regarding the economic viability of the proposal.

After receiving the draft EAR from the State Government, the Commonwealth continued to liaise with DPIWE and provided comments on the draft before it was finalised and accepted by Tasmania's Environment Management and Pollution Control Board on 10 October 2002.

There was some concern by the opponents of the dam that the EPBC Act approval process should have been stopped until the Tribunal hearing had been resolved. Nevertheless, the Commonwealth determined that the Bilateral Agreement did not alter the effect of Part 9 (approval process) and therefore in this case no significance needed to be given to any decisions made by the State subsequent to the provision to the Commonwealth of the final copy of the EAR. The Commonwealth had received a copy of the notice pursuant to ss130(1B) on 18 October 2002 and the final EAR had been received on 10 October 2002.

It was clear that the Tribunal decision was not strictly relevant to the Commonwealth's determination of whether the provision of the EAR met the requirements of the Bilateral Agreement, thereby triggering the approval process under of the EPBC Act. However, because the decision did affect matters the Minister was required to consider in making his decision, the Minister decided to wait until the Tribunal's decision was made. Accordingly, the 'clock was stopped' on the approval of dam under s130(5).

2.1 The Tribunal's Decision

In what seemed to be a triumph for the opponents of the dam, the Tribunal ruled comprehensively in favour of the appellants. The Tribunal's opinion was that:

- the true economic value was not as high as the proponent had suggested, and was in all likelihood somewhere between the two models presented;
- the impacts on Spotted Tailed Quoll were likely to be more significant than the proponent claimed, but needed further work to be substantiated; and:
- proposed mitigation measures on the listed species were questionable. Impacts on the Epacris were undoubtedly significant, and the Tribunal stated that it appeared that 'no way was apparent of avoiding or even substantially mitigating those impacts'.

In summary, the Tribunal refused the project in decision J12/2003, saying that:

"Upon the present state of evidence the Tribunal is satisfied that the certain and further likely environmental harm arising from construction of and the existence

of the dam, clearly outweigh the less certain benefits. The Tribunal is satisfied that the proper decision is to refuse a permit for the dam."[13]

Following the Tribunal decision, the State Government provided more information to the Commonwealth relating to the impacts imposed by the conditions of the proposal under State law. The Commonwealth Minister was then required to take into account this information under ss134(4) when deciding whether to approve the action. The information given covered the following issues:

- mitigation strategies for the two threatened species;
- further information on those populations of Epacris aff. exserta 'union bridge' found on the Mersey River;
- the social benefits of the proposal;
- more information on the economic benefit of the proposal; and
- an assessment of the capacity of farm dams in the Meander Valley.

Amongst the issues that the EPBCA obliged the Commonwealth Minister to take into account when deciding whether or not to approve the Meander Dam were:

- the impacts on the two nationally listed threatened species;
- economic and social matters; and
- the principles of ecologically sustainable development.

The Minister was also obliged not to act inconsistently with the Biodiversity Convention, the Apia Convention, CITES and any relevant recovery plan or threat abatement plan.

3 Conclusion

Simply put, the Tasmanian Tribunal's decision sent shockwaves through the whole state. Decisions of the Resource Management Planning Appeal Tribunal are only appealable on points of law to the Supreme Court of Tasmania.[14]

The Tasmanian Government reacted swiftly to the ailing dam project and proceeded to introduce the Tasmanian public a new plan. The plan was to simply bypass the entire Tasmanian Resource Management Planning System, eliminating any further rights of appeal in the process. Accordingly, to cement the fulfilment of the plan, the *Meander Dam Project Bill 2003* was introduced to Parliament in late April, 2003.[15]

Simply described and simplistically worded, this Bill reinstated approval to the dam. However, not only did it unqualifiedly approve the entire project, it deliberately eroded all further appeal rights. There was little parliamentary debate over the merits of the proposal, or the reasons for the Tribunal's decision. The enabling legislation was passed 21-4 in the Lower House and 14-1 in the Upper House.

Needless to say, many Tasmanians were disgusted by the way the State Government bypassed all the legitimate scientific research that had formed the basis of the Tribunal's decision. In effect, the State government's decision to legislate against a decision of the central planning decision-making arena in the State works against the sustainable development objectives of its own lauded integrated planning scheme. It has taken precious rights of appeal away from the community and can only undermine the efficacy of the Tribunal in relation to politically charged decisions.

After the Tribunal's decision, Environment Australia decided to approve the project with conditions.[16] The Commonwealth Environment Minister has given conditional approval for the proposed Meander Dam.[17] The extensive conditions include requirements prior, during and after construction. Interestingly, the Commonwealth did not produce any further evidence that the proposed dam is ecologically sustainable.

The Tasmanian Conservation Trust, with the financial support of the Humane Society International, have recently launched proceedings in the Federal Court against the approval of the proposed Meander Dam by the Commonwealth Government. Many concerned citizens await the result of this latest appeal.

ENDNOTES

The author would like to acknowledge Craig Woodfield, Water Policy Officer with the Tasmanian Conservation Trust for his expert advice and assistance with this article.

1 See www.dpiwe.tas.gov.au/inter.nsf/ThemeNodes/LBUN-4Y53BQ?open

2 See www.dpiwe.tas.gov.au/inter.nsf/WebPages/RPIO-4YJ88E?open

3 See www.dpiwe.tas.gov.au/inter.nsf/WebPages/LBUN-57C7BM?open#MeanderDamProjectDPE.

4 See www.dpiwe.tas.gov.au/inter.nsf/WebPages/LBUN-57C7BM?open

5 The report is available at www.dpiwe.tas.gov.au/inter.nsf/WebPages/LBUN-58EVTB?open

6 See www.tct.org.au/mean4.htm# Tasmanian and/or http://www.tct.org.au/rsub01.htm#Tasmanian.

7 See www.tct.org.au/mean3.htm# Tasmanian

8 This five member board has amongst its members: the Manager of the Environment Division of DPIWE, the principal authors of the EAR and the Secretary of DPIWE.

9 This statutory committee has a membership of six, which includes: the Chairman of the RWSC (the dam proponent); the Manager of the Environment Division of DPIWE, the principal authors of the EAR, the Manager of the Water Resources Division of DPIWE, which oversees the WDB of DPIWE, and also contributed to the EAR.

10 Established under the *Public Works Committee Act 1914*, this five member committee included two members of the Government and an independent from the Meander Valley who campaigned publicly for the dam.

11 In accordance with *Resource Management Planning Appeal Tribunal Act 1993*, s17.

12 *The Tasmanian Conservation Trust v Director of Environmental Management and Rivers and Water Supply Commission; The Tasmanian Conservation Trust v Rivers and Water Supply Commission and Assessment Committee for Dam Construction; SA Tiffin v Rivers and Water Supply Commission and Assessment Committee for Dam Construction* [2003] TASRMPAT 12 (22 Jan 2003)

13 The full text of the Tribunal decision can be found at www.rmpat.tas.gov.au/decisions/0000%20J12-2003.htm

14 Resource Management Planning Appeal Tribunal Act 1993, section 25.

15 See www.parliament.tas.gov.au/bills/Bills2003/pdf/29_of_2003.pdf

16 See www.deh.gov.au/cgi-bin/epbc/epbc_ap.pl?name=referral_detail&proposal_id=565

17 For the full text of the submissions see www.deh.gov.au/cgi-bin/epbc/epbc_ap.pl?name=show_document&document_id=11412&proposal_id=565

Queensland: Draft Biodiscovery Bill 2003

Stephen Hall, Solicitor, EDO North Queensland

Introduction

"Biodiscovery" is the collection and study of natural biological material for the commercial development of bio-products such as pharmaceuticals and agrochemicals. Advances in modern biotechnology and research methods have increased the commercial potential of biodiscovery and the Queensland Government is seeking to capitalise on that potential as part of its agenda to transform Queensland from the "Sunshine State" to the "Smart State".

In May 2002, the Government released the *Queensland Biodiscovery Policy Discussion Paper.*[1] The paper states that the Government's biodiscovery "vision" is based on the following three aims:

- to facilitate access to, and the use of Queensland biological resources for biodiscovery;

- to capture an equitable share of benefits arising from access to, and in the use of, Queensland biological resources for biodiscovery (including employment generation, research and training opportunities and research and development infrastructure) for the Queensland economy and community; and

- to ensure that access to, and use of, Queensland biological resources for biodiscovery is ecologically sustainable, respects traditional knowledge and is consistent with codes of ethical practice.[2]

There are compelling reasons for the Queensland Government to be encouraging development of biodiscovery in the State. As it points out in its policy discussion paper, Australia is recognised internationally as one of only twelve "mega" bio-diverse countries on Earth. Queensland, with its huge landmass and bio-rich habitats like the Great Barrier Reef, Fraser Island and world heritage-listed wet tropics holds a substantial portion of that biodiversity.[3]

The development of a world-class biodiscovery industry could yield substantial benefits both economically and scientifically. Moreover, from an environmental standpoint, the knowledge and techniques acquired through biodiscovery research could be applied to conservation of species and habitats; and an industry seeking to commercially exploit biodiversity (and thus reliant on biodiversity integrity) could, like the eco-tourism industry, become an influential, conservation-oriented industry stakeholder.

The Draft Biodiscovery Bill 2003

Queensland's existing regulatory frameworks are not conducive to the expansion of biodiscovery. Access to biological material is controlled by a complex array of legislation, which imposes on applicants sometimes inconsistent requirements to obtain multiple permits from different agencies in order to access the same biological resource.

The most important piece of State legislation is the *Nature Conservation Act 1992* (NCA) and regulations, which controls access to Queensland's protected areas and national parks and the taking of protected animals and plants. There are currently no specific State regulations for the taking of insects and micro-organisms. In Queensland's national parks, NCA management prescriptions prohibit collection of biological material for overtly commercial research.

To address the regulatory gaps and inconsistencies, the State Government released the *Draft Biodiscovery Bill* in June 2003. On enactment, the Bill will be the first biodiscovery specific legislation in Australia.[4] Key features of the Bill include:

- A single, streamlined permit process for biodiscoverers seeking to collect biological resources within Queensland.

- Mandatory identification, registration and provision of samples to the State of biological material collected from State land or waters (though not from private land).

- A mandatory requirement for biodiscovery entities to enter into "benefit sharing agreements" with respect to biological material (and the knowledge gained from it) taken from State land or waters.

The commercial development and benefit sharing processes established under the Act will be administered by the Queensland Department of Innovation and Information Economy, while the Environmental Protection Agency will be responsible for the collection permit system.

Biodiscovery permits will operate to the exclusion of all other State legislation, which means that NCA restrictions on the taking of protected wildlife will be overridden. For example, at present it would not be possible under Queensland law to take a Cassowary or Mahogany Glider for commercial research. The *Biodiscovery Act* will make commercial collection of such species possible; even though the collection is inconsistent with management prescriptions developed under the NCA.

Biodiscovery permits issued under the new legislation ('collection authorities') will only be available for collection of biological material for *commercial* research and development. Collection for other purposes, such as pure academic research, will continue to be subject to restrictions under existing permit application processes.

The *Biodiscovery Bill* therefore carries with it some significant and potentially dangerous ramifications from a conservation point of view. First, the new laws might expose protected areas and wildlife to adverse impacts from hitherto illegal activities, such as "bioharvesting" in national parks. Secondly, commercial scientific research activities, facilitated by a streamlined permit process under the *Biodiscovery Act*, might take priority over important conservation (or nature-based) research.

Ecological Sustainability

It is the expressed intent of the legislation to only allow ecologically sustainable access to biological resources.[5] Biodiscovery permits should only authorise the taking of "minimal quantities" of biological material.[6] Minimal quantity is defined in Schedule 2 of the Bill:

"Minimal quantity" for a native biological resource, means the quantity of the resource that, if taken from land or waters the subject of a collection authority, will cause no more than minor or inconsequential destruction of the biological diversity of the land or waters.

A collection permit must also incorporate, as standard conditions, the provisions of a *compliance code* and relevant *collection protocols* for particular biological material published pursuant to the new legislation.[7] The code and collection protocols will be statutory instruments, not subordinate legislation and will set down practical measures to "ensure that the impacts of the collection (of biological material) are ecologically insignificant both to species and their ecosystems."[8]

It should be noted that the full impact of "cutting edge" biodiscovery research practices, and what amounts to a "minimal quantity" may not be initially appreciated or ascertainable; a factor warranting inclusion of the precautionary principle. However, the precautionary principle is not mentioned – a significant omission from the Bill as far as sustainability is concerned.

There are repeated references throughout the policy discussion paper and in the explanatory material accompanying the Bill to the United Nations *Convention on Biological Diversity* (CBD) and the sustainability obligations it imposes on signatories, including Australia.[9] There are however some elements of the sustainability principles contained in the CBD that failed to make it into the first draft of the Bill. There is, as indicated, the absence of any mention of the precautionary principle as well as an absence of any avenues for public participation. Article 14(1)(a) of the convention provides that contracting States must:

"Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures".

Despite effectively giving biotechneology and pharmaceutical companies exclusive commercial research access to Queensland's national parks and wildlife, the Bill contains no public participation mechanisms. There are no public notification requirements with respect to the permit application processes and there are no third party enforcement provisions with respect to breaches of the legislation.

There are also special provisions in the Bill which would exclude application of the *Freedom of Information Act 1992* to ensure that various instruments and information relating to biodiscovery activity are not publicly available. Some information relating to biodiscovery is likely to be highly sensitive and confidential, but protection is already provided against public release of such information under divisions 2 and 3 of the *FOI Act*. Special secrecy provisions in the *Biodiscovery Act* will undoubtedly be welcomed by bio-tech and pharmaceutical companies, but they could also foster community suspicion and misapprehension about biodiscovery activities.

The Bill can be contrasted with the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* which provides for the publication of information relating to permits and permit applications on the Federal Department of Environment and Heritage website and which gives extended standing to members of the public to enforce key provisions of the Act.

The Bill is also out of step with the Queensland *Environmental Legislation Amendment Bill 2003* which introduces amendments to the NCA that will significantly increase scope for members of the public to enforce compliance with NCA provisions protecting native wildlife and protected areas.

Indigenous Issues

The United Nations *Convention on Biological Diversity* states:

"Each party shall, as far as possible and appropriate: subject to its national legislation, respect preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices." (Article 8(j))

The recognition and protection of Queensland indigenous communities' traditional knowledge is a complex but essential requirement of any specific biodiscovery legislation for it to be consistent with the CBD. The State Government acknowledged in its policy discussion paper the important role traditional knowledge can play in the biodiscovery process.

The importance of indigenous traditional knowledge is also acknowledged in the 1996 *National Strategy for the Conservation of Australia's Biological Diversity* which requires State and Federal Governments to:

"Ensure that the use of traditional biological knowledge in the scientific, commercial and public domain proceeds only with the cooperation and control of the traditional owners of that knowledge and ensure that the use and collection of such knowledge results in social and economic benefits to the traditional owners. This will include (a) encouraging and supporting the development and use of collaborative agreements safeguarding the use of traditional knowledge of biodiversity, taking into account existing intellectual property rights; and (b) establishing a royalty payments system from commercial development of products resulting at least in part, from the use of traditional knowledge".

Unfortunately, in its current form the proposed biodiscovery legislation will not achieve any of the objectives mentioned above. Queensland indigenous communities are given no special recognition or opportunities to participate in (or benefit from) biodiscovery activities. The Bill only refers, almost in passing, to holders of native title exclusive possession determinations (a small proportion of the indigenous population) but would give no further protection to their interests beyond what they have anyway at common law as private land holders.

The Queensland Government had already produced the *Code of Ethical Practice for Biotechnology in Queensland.* This is a voluntary code which aims to declare the fundamental ethical principles for activities involving biotechnology research and practice in Queensland. One such principle is in Paragraph 11:

"Where in the course of biodiscovery and research we obtain and use traditional knowledge from indigenous persons or communities, we will negotiate reasonable benefit sharing arrangements with these persons or communities."

As the ethical code of practice is voluntary; it does not have legal force. The *Biodiscovery Bill* contains nothing to remedy this lack of legal enforceability. The failure to legislatively recognise and protect Queensland's indigenous traditional knowledge holders is perhaps the greatest disappointment of the *Draft Biodiscovery Bill.*

One would have thought that consistency with the article 8(j) of the CBD could only be achieved by the inclusion of, at the very least, a legislative requirement similar to the ethical requirement in Paragraph 11 of the *Code of Ethical Practice*. However, for the time being, the Queensland Government appears to prefer keeping respect and recognition of traditional knowledge a matter of conscience rather than law.

Conclusion

With the *Draft Biodiscovery Bill 2003,* the Queensland Government has produced legislation that will facilitate access to, and use of, Queensland's biological resources for biodiscovery. Whether the Bill will be sufficient to ensure that access to those resources is ecologically sustainable is debatable, and the draft Bill cannot be said to recognise traditional knowledge.

A lot more work needs to be done to achieve, in this respect, consistency with article 8(j) of the CBD. At the time of writing this article the Queensland Government is in the process of reviewing the first draft of the Bill in light of public submissions that contain many of the criticisms outlined here.

In taking the initiative to develop specific biodiscovery legislation Queensland has an opportunity to be an international groundbreaker. The opportunity will be wasted if the State is left with laws that free up access to biodiversity for multi-national corporations without also safeguarding that biodiversity and the knowledge indigenous communities have gained from it over thousands of years.

ENDNOTES

[1] Information on the Queensland Government's biodiscovery initiatives is available online at: www.iie.qld.gov. au/research/regulation.asp.

[2] Queensland Government, *Queensland Biodiscovery Policy Discussion Paper*, May 2002, p. viii

[3] Ibid, p. 4

[4] The Commonwealth has prepared draft regulations under the EPBC Act concerning biodiscovery in Commonwealth areas, these can be accessed at www.ea.gov.au/epbc/about/amendments/draftregulations.html.

[5] *Biodiscovery Bill 2003* S. 3(2) (a) (i)

[6] ibid, S. 3(1)(a) and S. S. 8(a)

[7] ibid, S. 12 (2) (b) (ii) & S. 47

[8] *Draft Code of Compliance for Collection of Native Biological Material for Biodiscovery Purposes 2003*, para. 1.3

[9] Information on the CBD (including the full text of the Convention) is available online at: www.biodiv.org.

EDO Network News

EDO Northen Territory

Position Available - Solicitor

The EDO is a community legal service practising public interest environmental law in the NT.

EDO seeks a lawyer to provide legal advice, educational activities, promote law reform and supervise office administration.

This is an exciting role for a suitably qualified person with a passion for environmental protection.

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Salary $68,000 full time (including superannuation).

Please call (08) 8982 1182 or email edont@edo.org.au for further details.

EDO Western Australia

EDO Western Australia is pleased to announce the appointment of Katrina Strong as Coordinator (Special Projects and Promotions).

Katrina has a background in information technology and film production. She will be responsible for promoting the EDO, organising events and fundraising.

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.

You can support the work of the EDOs by volunteering, providing pro bono services, making tax deductible donations, including EDO in your will or subscribing to Impact. Contact your nearest EDO for more information.

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