# IMPACT

PUBLIC INTEREST ENVIRONMENTAL LAW NO 81 MARCH 2006

**QUARTERLY JOURNAL OF THE NATIONAL ENVIRONMENTAL DEFENDER'S OFFICE NETWORK**

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**Published by Environmental Defender's Office (NSW)**
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ABN: 72002 880864
ISSN: 1030-3847
Printed on recycled paper


CASE UPDATE

# Tribunal Approves Import of Asian Elephants

In July 2005, the EDO NSW filed proceedings in the Administrative Appeals Tribunal on behalf of the International Fund for Animal Welfare, the Humane Society International and RSPCA Australia seeking review of a decision made by the Commonwealth Environment Minister to allow the import of eight Asian elephants from Thailand to Taronga and Melbourne Zoos.

On 6 February 2006, the Administrative Appeals Tribunal handed down its final decision. The Tribunal decided that permits to import Asian elephants should be granted to the zoos subject to a far more stringent set of conditions than those originally imposed by the Environment Minister.

These conditions require the zoos to trial different types of bedding material in the indoor barns, and Taronga Zoo is required to lay a different floor in its barn prior to the arrival of the elephants. Both zoos are required to install 24 hour closed circuit television cameras throughout the enclosures. Both zoos must install large earth mounds and sand banks for the elephants and the zoos must remove the electric wiring which was covering the trees in the enclosures preventing the elephants from pulling them out.

The zoos are also required to provide a written report to the Department of Environment and Heritage advising of all actions and outcomes in respect of the permit conditions. Although our clients are disappointed that the permits were granted, the outcome for the elephants is better than if the case had not been brought. The implementation of these conditions will go a long way towards providing a much more comfortable environment for these elephants, who will spend up to 60-70 years in urban zoos.

*For more information about the appeal, please visit: www.hsi.org.au.*

ANDERSON V DIRECTOR-GENERAL OF THE DEPARTMENT OF ENVIRONMENT AND CONSERVATION [2006] NSWLEC 12

# EDO Defends Indigenous Cultural Heritage - Angels Beach Victory

Last year, the EDO represented Douglas and Susan Anderson, traditional owners of land at Angels Beach, East Ballina, NSW, challenging the validity of a consent issued by the Director-General of the Department of Environment and Conservation, allowing the destruction of Aboriginal cultural heritage for a residential subdivision.

In this case, the EDO challenged the power of the Director-General to authorise the destruction of Aboriginal cultural heritage for development purposes, having regard to the objects and substantive provisions of the National Parks and Wildlife Act 1974.

During the case, it was also argued that the legal framework for the protection of indigenous cultural heritage in New South Wales offers less protection than the protection afforded to non-indigenous cultural heritage, and therefore contravenes the Commonwealth Racial Discrimination Act 1975.

Furthermore, it was argued that the Director-General failed to properly consider the nature of the proposed development and the heritage significance of the site, as the consent was granted before a development application was lodged, and prior to a cultural heritage report being submitted.

It was also argued that our clients had a legitimate expectation to be consulted in relation to the application for consent to destroy their cultural heritage, and that the decision to grant that consent failed to take into account certain relevant matters.

Justice Pain ruled that the consent was invalid, due to a failure to take into account certain relevant matters. In particular, she found that the decision to grant the consent failed to take into account a supplementary report in relation to the heritage significance of the subdivision site.

Justice Pain also found that the Director-General has failed to adequately apply the principles of ecologically sustainable development, as required by section 2A(2) of the National Parks and Wildlife Act. In particular, Justice Pain addressed the failure of the Director-General to adequately consider the principle of intergenerational equity.

Justice Pain did not find that the consent was issued contrary to the Commonwealth Racial Discrimination Act. However, her judgment provides a useful discussion of the key issues arising in relation to this argument.

*For more information about this case, please contact Ian Ratcliff, EDO Solicitor, on 02 9262 6989 or ian.ratcliff@edo.org.au.*

BOOTH V FRIPPERY PTY LTD AND THOMAS

# Nature Conservation Act 'Flying Fox Case'

The Queensland Court of Appeal has upheld an appeal by conservationist Dr Carol Booth against a judgment that would have allowed farmers to kill wildlife for crop protection without permit.

The three judges of the Court of Appeal have ordered a retrial of Booth v Frippery Pty Ltd & Ors in the Planning and Environment Court. Despite evidence of the electrocution of up to 50,000 flying foxes without permit over a decade, Judge Pack in the original case dismissed Dr Booth's application for an injunction and for orders requiring the dismantlement of the grids and a contribution to flying fox rehabilitation.

If the appeal had failed the Nature Conservation Act would have been rendered ineffective to protect wildlife. For this reason the EPA was also a party to the appeal.

Commenting following the judgment, Dr Booth said the court saga reinforced the need for the government to require the dismantlement of electric grids, not just ban their use to kill flying foxes. "As demonstrated in this case, while grids are allowed to exist, they will be used illegally. As a result, precious community resources are being dedicated to basic enforcement of wildlife laws," she said.

The primary case was the first use of new citizen rights to enforce the Nature Conservation Act. The case highlights the importance of such rights, which are now widely accepted in environmental legislation.

EDO INTERNATIONAL PROGRAM UPDATE

# EDO Connecting IUCN CEL Members in Oceania

The EDO has a commitment to improving the effectiveness of environmental law as a tool for defending the environment internationally. For a number of years, the EDO has worked with partner organisations in Asia and the Pacific, including Papua New Guinea, Vanuatu, the Solomon Islands and Cambodia.

In recent months, the EDO has been collaborating actively with the IUCN Commission on Environmental Law (CEL) to promote regional cooperation in the field of environmental law.

A regional listserve for IUCN CEL members in the Pacific was launched last week – a first for the Commission. This listserve is one small step in a series of exciting initiatives being promoted by the EDO and IUCN CEL in Oceania, in close collaboration with other organisations to help build environmental law capacity and networks within the region. The listserve project is sponsored by the Young Lawyers Committee of the New South Wales Law Society.

There are currently around 30 CEL members in Oceania with a similar number of applications to be considered by the CEL Steering Committee at its next meeting to be held in Bonn, Germany, in April.

# EDO Network Litigation Updates

## COURT INVALIDATES ANGELS BEACH CYCLEWAY DEVELOPMENT

The Land and Environment Court has declared Ballina Shire Council's Development Consent for a controversial cycleway through a 19th century Aboriginal massacre site in the crown reserve at Angels Beach void.

The Application against the Council's decision was brought by Bundjalung Traditional Owners Douglas and Susan Anderson, represented by Al Oshlack of the Indigenous Justice Advocacy Network and assisted by the Environmental Defender's Office.

In making his decision, Justice Cowdroy of the Land and Environment Court, found that the Council had failed to consider the cultural heritage significance of the area.

At paragraph 142 of his Judgment, Cowdroy J stated that: "Given the significance to Aboriginal people of the massacre at the site, it warranted proper evaluation by the Council. Section 79C (of the Environmental Planning and Assessment Act) required more than mere mention of Aboriginal cultural heritage. An evaluation appropriate to the significance of cultural heritage in the area did not take place."

Mr Oshlack proclaimed this decision to be "a very important precedent for the protection of Aboriginal Cultural heritage in NSW."

## CASE AGAINST REEF COVE RESORT, FALSE CAPE

CAFNEC & Save our Slopes v Reef Cove Resort Pty Ltd & Cairns City Council

The EDO-NQ has lodged an application in the Planning and Environment Court in Cairns on behalf of the Cairns and Far North Environment Centre (CAFNEC) and Save our Slopes (SOS) against approvals granted to Reef Cove Resort. Cairns City Council has given Reef Cove Resort approval for a subdivision of 102 residential lots, and 20 other lots including a resort hotel, townhouses and resort village infrastructure. When completed the site will house around 1,500 people on 40.6 ha, which currently is largely undeveloped and contains a number of unique vegetation communities and endangered species.

CAFNEC and SOS seek declarations from the Court that the development approvals are invalid, as Council failed to refuse the development approval despite significant conflicts with the Hillslopes Development Control Plan and the Strategic Plan of the transitional Cairns Planning Scheme.

Reef Cove Resort has applied to strike out part of the case on the basis that it seeks to review the merits of the decision. The strike out was heard in March 2006 and judgement is expected in late May. The hearing of the final case is scheduled for 7-9 August 2006 in Cairns.

## STONEY CREEK APPEAL – MALCOLM BECK & ORS V CAIRNS CITY COUNCIL & HEAVEY LEX NO. 116 PTY LTD

On 9 February 2006, EDO-NQ on behalf of a group of residents from Rainforest Estate lodged a Planning and Environment Court appeal challenging the approval of a residential and tourist development that borders Stoney Creek and the Wet Tropics World Heritage Areas at Rainforest Estate, Kamerunga in Cairns. The proposal is for 8 residential lots and a tourist resort with 102 apartments and associated facilities. The residents contend that the development conflicts with the relevant provisions of the planning scheme, will adversely impact on critical habitat for endangered frogs and ferns, and is an area of cultural significance for the Bulawai/Djabagay people. The case will also raise arguments about the weight to be given to new plans in regard to decisions made under transitional plans.

## PENNINGS V VLAK [2005] WASC 107

This case is an appeal dealing with the dismissal of a prosecution under the Wildlife Conservation Act 1950 (WA). Kevin and Karina Vlak were charged with taking protected flora without a licence under the Act. On several occasions they took a quantity of firewood logs and cut down fire damaged trees on unallocated Crown land.

The sole issue on appeal was whether the Magistrate erred in finding that dead trees and timber taken were not "protected flora" for the purposes of the WC Act, where flora is defined as "any plant." Therefore, it had to be determined whether the definition of "plant" includes dead as well as living plants.

The appeal was dismissed. Jenkins J considered the appellant's argument that problems will arise under the Act if "flora" is narrowly construed. It was argued that wildlife officers' powers would be limited depending on whether the plant in question is alive or dead at the time of seizure, and the selling of dead, dried wildflowers would not be an offence under the Act.

However, as "plant" is not defined in the Act, Jenkins J found that the common meaning of the word should be substituted and that meaning including the plant being living.

## MARINE PROTECTED AREAS PROPOSED FOR SOUTH-EAST MARINE REGION

On 14 December 2005, the federal government released a proposal for an extensive network of Marine Protected Areas (MPAs) covering 171,000 km2 of Commonwealth waters off Tasmania, Victoria, eastern South Australia and far southern NSW.

The proposed MPA network will include Managed Resource Protection Zones (allowing mining, fishing, tourism and recreational activities), Habitat Protection Zones (prohibiting commercial fishing) and Strict Nature Zones (prohibiting mining and fishing activities). A management plan will be developed for the reserve after areas have been finalised.

The Tasmanian government and peak industry bodies do not support the proposed MPAs, claiming that the reserves will have a significant economic impact on the State's fishing industry. The federal government will consult with "key stakeholders" in early 2006, before referring the final proposal to the Director of National Parks to have the MPAs declared as Commonwealth reserves under the EPBC Act. The Director will invite comments on the proposal before making a recommendation to the Minister. For more information see www.deh.gov.au/coasts/mpa.

# Climate Change Policy Developments

LARISSA WATERS
SOLICITOR, EDO QLD

2006 heralds the beginning of the formulation of a Commonwealth government climate change policy. This article discusses recent advancements in climate change policy at both international and national levels.

### International developments – the Montreal Climate Action Plan

From 28 November–9 December 2005, Canada hosted the first meeting of the parties to the Kyoto Protocol since its entry into force on 16 February 2005.

Despite Australia's refusal to ratify the Kyoto Protocol, the federal Environment Minister Ian Campbell attended the conference at which Australia and 188 other attending countries adopted more then 40 decisions (all available from http://unfccc.int/meetings/cop_11/items/3394.php), including:

- Agreement on the compliance regime for the Protocol and election of the compliance commitee;
- Adopting the rulebook of the Protocol (the "Marrakesh accords") which sets the implementation framework and facilitates a global carbon market;
- Agreement on the Convention's first five-year work program (the 'Montreal Climate Action Plan') on adaptation to climate change impacts; and
- Strengthening the governing body and simplifying the process for the Clean Development Mechanism, under which developed countries invest in sustainable development projects in developing countries to earn emissions allowances.

Technology was at the centre of discussions on efforts to reduce emissions and adapt to climate change impacts. A special report by the International Panel on Climate Change (IPCC) on geosequestration, which involves carbon capture and storage underground, was discussed. Conservationists have criticized this technology as it is unproven and diverts attention away from minimising carbon emissions and the development of clean technology. However, there was agreement for further analysis of this option.

### National developments – Asia-Pacific Partnership for Clean Development and Climate

The Montreal Conference was followed by the inaugural meeting of the Asia-Pacific Partnership for Clean Development and Climate (AP6), in Sydney on 11-12 January 2006. AP6 comprises Australia, the USA, China, India, Japan and the Republic of Korea. Together, these countries account for roughly half of the planet's greenhouse gas emissions, energy use, GDP and population.

The aim of AP6 is to develop a "new model" for international climate change and energy collaboration, which the federal government insists is not an alternative but a "complement" to Kyoto. The focus of the AP6 partnership is research and development of technologies to cut global greenhouse emissions. The hallmark of the partnership is its lack of emission reduction targets.

Controversial technologies such as 'geosequestration' and 'clean coal' were discussed, with no mention of demand management. Renewable energy was outshone by a continued focus on fossil fuels. $100 million over 5 years was committed by the Prime Minister on top of existing budget initiatives yet just 25% is earmarked for renewable projects.

AP6 saw 8 government and business taskforces established. Australia will Chair the taskforces on cleaner fossil energy and on aluminium, Co-Chair (with the Republic of Korea) the renewable energy and distributed generation taskforce, and play a "leading role" in the building and applicances taskforce.

The AP6 countries agreed on a Charter (which provides the framework of the partnership), a Communique (which highlights key outcomes from the meeting) and a Work Plan, and agreed to meet again in 2007. The Charter, Communique and Work Plan from AP6 are available from www.dfat.gov.au.

EDO Qld looks forward to seeing the goals and commitments of the taskforce action plans made binding through implementation into national legislation. In addition, EDO Qld suggests that the federal government:

- increase the Mandatory Renewable Energy Target (MRET) which was set at 2% in 2001, and which has not been increased despite compliance with the target by industry and broad public support;
- include a greenhouse gas trigger in the Environmental Protection and Biodiversity Conservation Act requiring referral to and approval by the federal government for new proposals which emit over 500,000 tonnes of greenhouse gases per year; and
- amend the Energy Efficiency Opportunities Bill 2005 (Cth) so that the obligation to assess and report on energy efficiency opportunities applies not only to businesses , but also to the Commonwealth and Commonwealth agencies. The Bill should also include a clear provision requiring implementation of identified energy efficiency opportunities, rather than simply requiring production of a report which is hoped will "encourage implementation of cost effective energy efficiency opportunities".

EDO Qld welcomes the recognition by the Governor-General Michael Jeffery in his 2006 Australia Day address that global warming is one of the greatest threats to Australia's future, and that while mineral resources are important to Australia's economy, they are finite and further research and development of alternative, safe, efficient and clean energy sources need to be encouraged.

## Breakwater Case – Alliance to Save Hinchinbrook v Environmental Protection Agency

On 9 and 10 February 2006 the Supreme Court in Cairns heard an application by the Alliance to Save Hinchinbrook (ASH) for judicial review of decisions by the EPA and Queensland Parks and Wildlife Service under the Marine Parks Regulation 1990 to approve the construction of two breakwater walls in the Hinchinbrook channel at Oyster Point, Cardwell.

ASH was expertly represented by barrister Stephen Keim SC. Judge Jones reserved his decision.

# Legal Frameworks for Joint Management of Aboriginal Owned Conservation Areas in Australia

TOM HOLDEN
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EDO NEW SOUTH WALES[i]

## Introduction

In this article, joint management refers to the sharing of power and responsibility for Aboriginal-owned conservation areas between Aboriginal people and Australian governments.

Joint management is seen by many Aboriginal people as an important mechanism to control land and improve social and economic conditions, and it therefore operates within a broad range of contemporary social justice issues[ii]. It has become closely linked to questions of land rights, self-determination, preservation of culture, and the redress of social disadvantage.

However, there is no single Aboriginal perspective on joint management because the historical experiences of Aboriginal people vary across Australia. Some Aboriginal people are hostile towards the declaration of conservation areas on their traditional lands and the establishment of joint management arrangements because they view this as part of a continuing process of dispossession.

Joint management has primarily occurred in Australia as a result of increasing legal recognition of Aboriginal land rights. In 1981, Gurig National Park (Northern Territory) became the first Aboriginal-owned jointly managed conservation area in Australia. Since that time a large number of other jointly managed conservation areas have developed, particularly in the Northern Territory, NSW and Queensland.

Many Australian governments have legislated to establish joint management arrangements in conservation areas, and several 'models' of joint management are currently in operation. Legislative frameworks focus on establishing joint management structures such as Boards of Management with Aboriginal majorities, plans of management, lease back arrangements and traditional use rights.

This article identifies the legal frameworks for the establishment of jointly managed conservation areas and the form of joint management arrangements in Aboriginal owned conservation areas in Australia, with a focus on Commonwealth reserves and the Northern Territory, NSW and Queensland. It also discusses very briefly some of the reasons why joint management structures established by legislation have not ensured the success of joint management in Australia.

Legal mechanisms for the establishment of jointly managed conservation areas

Increasing legal recognition of Aboriginal land rights has allowed for Aboriginal ownership of conservation areas in Australia. The strength of land rights legislation varies greatly between jurisdictions, with the Northern Territory setting the benchmark and having the majority of jointly managed conservation areas[iii].

## Northern Territory

The Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth) (NT ALR Act) provides for the automatic granting of identified Crown land[iv] and the granting with approval of the Minister for Aboriginal Affairs (Cwlth) of other Crown land[v] to traditional owners entitled by Aboriginal tradition to use or occupy the land.[vi] Claims are assessed by the Aboriginal Land Commissioner.[vii] Over 40 percent of the Northern Territory has currently been granted to Aboriginal people under the Act.[viii] In 1987, a ten-year sunset clause was inserted in the Act making the 5 June 1997 the last date on which a new claim for land could be made.[ix]

Land granted under the Act is held for the benefit of traditional owners by Land Trusts established under the Act.[x] Land Trusts are essentially passive holders of land, and must not exercise their functions in relation to land except in accordance with a direction given by the relevant Aboriginal Land Council.[xi]

Aboriginal Land Councils[xii] are the primary administrative structures for the lands rights scheme under the Act. They perform a liaison role between government, traditional owners and the general public and must ascertain, express and protect the interests of traditional owners within their jurisdictions. They must also consult with traditional owners in relation to any proposed use of Aboriginal land and negotiate with persons wishing to obtain an interest in such land.[xiii]

Under the Act, a Land Trust (with the approval of the relevant Aboriginal Land Council) may lease the land vested in it[xiv] and lands comprising Kakadu and Uluru-Kata Tjuta National Parks must be leased back to the Director of Parks and Wildlife (Cwlth) for use as national parks.[xv]

Jointly managed conservation areas established as a result of land claims under the NT ALR Act include Kakadu, Uluru-Kata Tjuta[xvi] (Ayers Rock) and Nitmiluk (Katherine Gorge) national parks.

The establishment of some other jointly managed conservation areas in the Northern Territory has occurred under specific legislation enacted by the Northern Territory Government. For example, under the Cobourg Peninsula Aboriginal Land, Sanctuary Act and Marine Park Act 1987 (NT) (Cobourg Peninsula Act), freehold title to land comprising Gurig National Park[xvii] was granted to a Land Trust established under the Act[xviii] to hold on behalf of traditional owners.[xix] The Act established the national park in perpetuity for the "benefit and enjoyment of all people".[xx] The Northern Territory Government pays an annual fee to the relevant Aboriginal Land Council for use of the land as a national park.[xxi]

## New South Wales

The 1996 amendments to the Aboriginal Land Rights Act 1983 (NSW ALR Act) and the National Parks and Wildlife Act 1974 (NPW Act)[xxii] have facilitated the establishment of joint management arrangements in NSW by allowing Aboriginal people to claim certain conservation areas.

Under the NPW Act, freehold title to conservation areas listed under Schedule 14, which are recognised as being of cultural significance to Aboriginal people, may be granted to the relevant Local Aboriginal Land Council(s) (LALC)[xxiii] to hold on behalf of traditional owners.[xxiv] The Minister and an Aboriginal negotiation panel determine land claims to Schedule 14 lands.[xxv]

Schedule 14 land was identified through a process of consultation prior to the 1996 amendments.[xxvi] There are currently nine conservation areas listed on Schedule 14.[xxvii] While any person may nominate land to be added to Schedule 14, it is difficult to actually get land added. The Director-General of National Parks and Wildlife Service

*Continued page 6...*

(NPWS) must assess the nomination in accordance with matters specified under the NPW Act and the Minister must be satisfied that the land is at least as culturally significant to Aboriginal people as land already listed in the Schedule. Land may only be added to Schedule 14 by an Act of Parliament.[xxvii]

Land claimed under the NSW ALR Act that is not a conservation area but that is 'needed for the essential purpose of nature conservation' may also be granted to a LALC subject to the creation of a national park under the NPW Act.[xxix] Conservation areas granted under both the NPW Act and the NSW ALR Act must be immediately leased back to the NSW Government for a period of 30 years.[xxx]

An example of a jointly managed conservation area established under the NPW Act is Mutawintji National Park in western NSW.

### Queensland

The Aboriginal Land Act 1991 (Qld) (Qld AL Act)[xxxi] provides for the claim and transfer of freehold title of certain categories of Crown land, including conservation areas, to trustees appointed by the Minister.[xxxii]

As for NSW, under the Qld AL Act Aboriginal people can only claim certain conservation areas – those that have been gazetted as available for claim.[xxxiii] Cabinet decides which conservation areas are available for claim,[xxxiv] and currently 15 national parks are available.[xxxv]

Successfully claimed conservation areas must be immediately leased back to the Queensland Government in perpetuity for the purpose of use as a national park and subject to any regulation(s) that apply to the park or national parks in Queensland generally.[xxxvi]

Despite the limited conservation areas available for claim, the grounds for claim are considerably wider than under the Northern Territory legislation. Any group of Aboriginal people may claim a conservation area based on the grounds of traditional affiliation[xxxvii] or historical association and economic or cultural viability.[xxxviii] Claims are to be determined by the Aboriginal Land Tribunal.

Currently, all national parks available for claim have been claimed, and the Land Tribunal has validated some of these claims. However, no national park has yet been transferred to Aboriginal ownership.

Legal frameworks for the form of joint management arrangements

Only the Australian, Northern Territory, NSW and Queensland governments have specifically legislated to set out the form of joint management arrangements in Aboriginal owned conservation areas in Australia. In general, the legislation provides a broad framework for joint management only, with further detail provided in leases negotiated separately for each conservation area.

### Commonwealth

Joint management arrangements for Commonwealth reserves such as Kakadu and Uluru-Kata Tjuta National Parks (Northern Territory) are provided for under the Environmental Protection and Biodiversity Conservation Act 1999 (Cwlth) (EPBC Act). The objects of the Act make specific reference to the role of indigenous people in the conservation of Australia's biodiversity and the need for a cooperative approach to the protection and management of the environment.[xxxix] The Act provides for the following:

- **Boards of Management:** Must be established with an Aboriginal majority nominated by traditional owners for all Commonwealth reserves that are wholly or partly on Aboriginal land, if the relevant Aboriginal Land Council and the Minister (Cwlth) agree.[xl]
- **Plans of management**: Must be prepared for Commonwealth reserves. The Act specifies generally the content of the plans.[xli] A plan must consider the interests of any traditional owners and any other Aboriginal person.[xlii] The plan must be publicly exhibited.[xliii] The Director of Parks and Wildlife (Cwlth) must give the Minister a plan of management for approval, but only after approval from the Board and both houses of Parliament (Cwlth) must approve a plan of management.[xliv]
- **Powers and functions of Boards of Management and Director**: A Board has the function of making plans of management for the conservation area in conjunction with the Director, making decisions consistent with the plan of management, and monitoring the implementation of the plan.[xlv] The Director must consult with and have regard to the views of the relevant Aboriginal Land Council in regard to the exercise of his or her functions and powers.[xlvi]
- **Traditional use:** Traditional owners may use Commonwealth reserves for hunting or food gathering (except for purposes of sale) or ceremonial and religious purposes subject to any relevant regulations made for the purposes of biodiversity conservation that expressly prohibit such use.[xlvii]
- **Day-to-day management of conservation areas**: Undertaken by the Parks Division of the Department of Environment and Heritage (Cwlth) in accordance with the plan of management.
- **Dispute resolution**: Applies to disagreements between the Director and the Board. If the Director and the Board cannot agree on the content of a plan of management the Minister must appoint an independent arbitrator to inquire into the matter and make recommendations.[xlviii] The Director and the Board must comply with any directions given by the Minister based on these recommendations. The Act also makes extra rules for approving plans of management for Kakadu and Uluru-Kata Tjuta National Parks.[xlix]

The EPBC Act also establishes an Indigenous Advisory Committee to advise the Minister on the operation of the Act in relation to Aboriginal people. The Minister appoints the members of the Committee.[l]

### Northern Territory

The joint management arrangements for some conservation areas in the Northern Territory are set out in specific legislation. The Cobourg Peninsula Act (applies to Gurig National Park) and the Nitmiluk (Katherine Gorge) National Park Act 1989 (Nitmiluk Act) provide similar joint management arrangements to the EPBC Act. Many of the details of the joint management arrangements for Nitmiluk National Park are provided in a lease.[li]

Under both the Cobourg Peninsula Act and the Nitmiluk Act, Boards of Management are established with Aboriginal majorities to prepare plans of management under which the conservation areas will be managed. These plans must address a number of factors, including the location of Aboriginal residential areas and employment and training of Aboriginal people.[lii]

The powers and functions of the Boards and the Northern Territory Parks and Wildlife Commission are set out under the Acts. Boards must protect the rights of traditional owners to use

and occupy the conservation areas, determine public access rights in consideration of limitations imposed by Aboriginal tradition, ensure adequate protection of sites of cultural significance, and make by-laws for the management of the areas.[liii] The Parks and Wildlife Commission undertakes the day-to-day management of the conservation areas on behalf of, and subject to, the direction of the Board.[liv]

Traditional owners are entitled to use and occupy the national parks according to tradition and subject to the Act and the plan of management.[lv] The Nitmiluk lease grants a number of additional specific use rights, including the right to use any area of the park for hunting, food gathering, ceremonial and religious purposes, and the right to reside at locations specified in the plan of management.[lvi]

Both Acts also set out dispute resolution mechanisms. Under the Cobourg Peninsula Act, any difference of opinion between the Board and the Commission is to be resolved by a resolution of the Board.[lvii] Under both Acts, the Northern Territory Parliament has the ultimate approval of plans of management and Parliament may disallow plans. In such cases, either the Chief Justice of the Supreme Court[lviii] or the Aboriginal Land Commissioner (Northern Territory) or a three-person panel[lix] provides recommendations to Parliament. Both Acts require approval from the relevant Aboriginal Land Council for the plan of management, either prior to providing to Parliament for approval[lx] or after approval by Parliament and before becoming operative.[lxi]

### New South Wales

The NPW Act (NSW) generally provides for similar although weaker joint management arrangements to the EPBC Act and the Northern Territory legislation.

The NPW Act establishes Boards of Management with Aboriginal majorities (members are appointed by the Minister)[lxii] and sets out the functions and powers of the Board and the Director-General of NPWS. The Board has the responsibility of care and control and management of the conservation areas and the preparation of plans of management,[lxiii] which are to be approved by the Minister.[lxiv] A Board must also consider and approve proposals by Aboriginal people to undertake cultural activities within a conservation area.[lxv] Significantly in regard to protecting Aboriginal interests, a Board meeting has a quorum only if a majority of the members present are Aboriginal members.[lxvi]

*Katherine Gorge, Northern Territory*

In the exercise of its functions, a Board is subject to the control and direction of the Minister[lxvii] and where no plan of management is in place it must consult with and have regard to the advice of the Director-General in regard to park management.[lxviii] Plans must be prepared by the Board 'in consultation with' the Director-General,[lxix] while the Director-General must 'have regard to' the interests of the traditional owners when exercising any function under the Act.[lxx]

The NPW Act also provides a process for negotiating a lease (including the selection of Aboriginal representatives to form an 'Aboriginal negotiation group' and a process of mediation if required)[lxxi] and specifies in detail the matters to be addressed in the lease. Such matters include:[lxxii]

- Acknowledgment that the NPWS may undertake any functions imposed on it under the Act, subject to the plan of management.
- Acknowledgment that the traditional owners are entitled to use the land for hunting, fishing, gathering of traditional foods and for ceremonial and cultural purposes in accordance with tradition.
- Acknowledgment that the lease is subject to existing interests in the land and the public has a right to access land subject to the plan of management.
- A requirement that the Minister consult with the LALC before amending any regulations that apply to the conservation area.
- A requirement that the Minister implement an employment and training plan and report to the NSW Parliament from time to time on progress in implementing the plan.

The lease may be amended by an Act of Parliament.[lxxiii]

### Queensland

The Qld AL Act provides a significantly weaker joint management framework than the Commonwealth, Northern Territory and NSW legislation. Under the Act, the Minister[lxxiv] determines the composition of a Board of Management and while the "Aboriginal people particularly concerned with the national park" are to be represented on the Board, the Minister is not required to provide an Aboriginal majority.[lxxv] Boards are not responsible for preparing management plans (although they are responsible for their implementation).[lxxvi] Rather, the Minister is responsible for preparing the plans 'in cooperation with' the Board.[lxxvii] In preparing a plan the Minister must 'consult with, and consider the views of the Aboriginal people particularly concerned with the national park' and 'act in a way that is consistent with any Aboriginal tradition applicable to the national park'.[lxxviii]

Under the Qld AL Act, Aboriginal people have little ability to control public access to a conservation area. A lease and a management plan must not decrease public access rights that existed prior to the conservation area being claimed.[lxxix] In addition, traditional use rights are subject to the provisions of the Nature Conservation Act 1992 (NC Act). While the NC Act provides that conservation areas must be managed 'as far as practicable in a way that is consistent with any Aboriginal tradition applicable to the area, including any tradition relating to activities in the area',[lxxx] traditional use rights may be restricted for conservation purposes. An Aboriginal person may only take, use or keep protected wildlife under Aboriginal tradition outside a protected area and subject to any provision of a conservation plan for native wildlife or habitat or an area of major interest.[lxxxi] In addition, any use of protected wildlife in accordance with Aboriginal tradition must be 'ecologically sustainable'.[lxxxii]

*Continued page 8...*

## Leases

The details of many joint management arrangements are provided in legally binding leases. Leases are the result of negotiation between traditional owners and governments, and importantly contain provisions ensuring their regular re-negotiation.

The Mutawintji National Park (NSW) lease[lxxxiii] sets out the detail of joint management structures (such as the Board of Management), the lease re-negotiation process,[lxxxiv] and dispute resolution mechanisms.[lxxxv] Ultimate resolution of a dispute lies with an independent arbitrator, who must consider a range of matters specified in the lease when making a decision on the dispute.[lxxxvi] The lease has a number of interesting features, including:

- Aboriginal designated employment positions are identified. [lxxxvii]
- All non-Aboriginal Board members and staff are required to undertake cultural awareness training.[lxxxviii]
- A Joint Management Coordinator position is to be established to develop and implement cultural awareness training programs, monitor the implementation of the decisions of the Board, and ensure that the Board has appropriate information on which to base decisions.[lxxxix]
- The Board has the power to restrict public access in any way it considers appropriate, including restrictions based on gender and by temporary and permanent zoning.[xc]
- The Board has the power to develop specific detailed management plans (for example, for kangaroo management[xci] and goat control[xcii]). The Minister must consult with the Board regarding threatened species plans that apply to the national park and must not exercise any power under the Threatened Species Conservation Act 1995 (NSW) which affects the national park without the consent of the Board.[xciii]
- The Minister may only seek World Heritage listing for the park if the Board and the Aboriginal Land Council agree.[xciv]

## Success of joint management arrangements

Despite providing for a significant level of Aboriginal involvement in the management of conservation areas, joint management structures established by legislation remain largely under the control of Australian governments and have not ensured the success of joint management. Many Aboriginal people remain unhappy with joint management.[xcv] Even at Uluru-Kata Tjuta National Park (regarded as the benchmark) there is considerable disillusionment amongst the traditional owners who generally do not see themselves as equal partners.[xcvi]

A number of commentators have argued that the reason for this failure is because Australian governments have put too much emphasis on establishing joint management *structures* and not enough on *processes* of negotiation and consultation, which have typically lacked a recognition of inherent Aboriginal rights, respect for culture, understanding of differences in world-views, and genuine, sincere and open participation. For many Aboriginal people, it is the processes of negotiation, undertaken with a willingness to not only recognise common ground, but to also attempt to reconcile disagreements, which are so important in successful joint management.

This point was made in a review of Aboriginal involvement in the management of the Wet Tropics World Heritage Area:[xcvii]

*It is not sufficient to merely establish a set of formal structures and legal guarantees because these will, more than likely, be developed and implemented from within an institutional culture that is often far removed from the perspective and 'world view' of the Aboriginal minority. [What is needed is] a greater and more consistent commitment to accommodating cultural differences at both the policy and implementation levels of management.*

In speaking about reconciliation, Mick Dodson (a former Aboriginal and Torres Strait Islander Justice Commissioner) highlighted the importance to Aboriginal people of the process of reconciling disagreements:[xcviii]

*We have to try to reconcile…disagreements. After all, that is what fundamentally underpins the whole reconciliation process…From our point of view, it may not be a solution that achieves the reconciliation. What might achieve the reconciliation is having together gone through the process.*

Lawrence makes a similar point: '[w]hat gives life and meaning to joint management is working through complex issues on a day-to-day basis, often in situations of conflict, through conciliation and negotiation'.[xcix]

An important difference in world-views where a willingness to reconcile has been typically lacking relates to views on land and conservation. Aboriginal people care for land through presence and by use.[c] The basis for Aboriginal 'conservation' practices is in cultural and spiritual obligations to country, which are undertaken according to highly developed systems of laws.[ci] For example, the Bama people of Cape York Peninsula assert that the right to burn, access and traverse country, and utilise the natural resources of conservation areas, is fundamental to their religion and culture and to the proper management of the landscape.[cii] When visiting the Mungkan-Kaanju National Park (Queensland), traditional owners 'bemoaned the fact that the country had "gone wild", become scrubby and overgrown and out of [their] material and spiritual control'.[ciii] As Ben Smith identifies 'within this world-view the idea of "wilderness" is at best nonsensical and at worst an aspect of dispossession'.[civ]

In many cases there has also been a failure to recognise that Aboriginal culture is not static and that Aboriginal people's relationship to land has changed post-colonisation. In the Cape York Peninsula, for example:[cv]

*The holy grail of land rights and self-determination for many Aboriginal people is the establishment or take-over of a cattle station and many Aboriginal people speak of cattle as an important aspect of their traditional country and its management within the body of Aboriginal law and custom.*

The Howard Government's redefinition of the concept of reconciliation to mean 'practical reconciliation',[cvi] and its refusal to recognise inherent Aboriginal rights, presenting them as threatening and divisive,[cvii] has also made for a difficult political and social environment for joint management to operate within. There are a number of cases, for example, of national parks staff seeking to make it difficult for traditional owners to use their country on the basis of 'equal treatment' for all park visitors.[cviii]

## Conclusion

Many Australian governments have legislated to establish joint management arrangements in conservation areas, and several 'models' of joint management are currently in operation. Legislative frameworks focus on estab-

*Continued page 15...*

# The Invisible Line Between Modification and Substantial Difference

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It is an established planning principle that a planning authority cannot approve a development that is substantially different from the development that was applied for.

In this case, the Supreme Court was asked to consider whether a decision of the Resource Management and Planning Appeal Tribunal (the Tribunal) to approve some portions of a development and sever others, at the invitation of the developer, amounted to a modification or the approval of an altogether different development.

## Background

In February 2004, Break O'Day Council granted a planning permit to Smartgrowth Integrated Architecture & Urban Design (Smartgrowth) for an ecotourism development involving a 101-lot subdivision, including a vegetation reserve, 78 tourist cabins, an office, caravan park and camping ground. St Helens Area Landcare & Coastcare Group Inc (the Landcare Group) and several other objectors appealed to the Tribunal against the decision on environmental impact grounds.

Following initial mediation between the parties, Smartgrowth prepared revised development plans and applied to have the amended plans accepted by the Tribunal. The amended plans showed a small residential subdivision, a larger 75-lot residential subdivision, a vegetation reserve, 27 'beach retreat' cabins, 21 'eco-cabins', a 17-cabin tourist park, reception area, caravan park and camping ground.

Section 22(3) of the Resource Management and Planning Appeal Tribunal Act 1993 gives the Tribunal power to permit modifications to an application before it. In September 2004, the Tribunal made an order pursuant to s.22(3) that the development application be amended in accordance with the revised plans. The hearing proceeded on the basis of the plans as amended.

At the conclusion of the hearing, counsel for Smartgrowth made the following submission:

*…and finally, Mr Chairman, if the Tribunal is to find that a part or parts of the development are inappropriate in its view I ask that the Tribunal sever those parts rather than reject the whole development. The Tribunal, of course, has a duty to achieve a proper merits outcome in the ultimate scheme of things and a rejection of the entirety of the development on the basis of a small part being inappropriate would not be the right approach, I submit. Thank you, sir.*

Having regard to all the evidence, the Tribunal refused to allow the beach retreats, ecocabins, small residential subdivision and the reception area (effectively, the eastern portion of the development), but permitted the remainder of the development proposal. In its reasons for decision, the Tribunal stated:

[49] Refusal of the proposal in respect of the eastern portion of the site and allowing only the proposed development upon the western portion of the site might be thought to be substantially different from what was proposed, and therefore essentially a refusal. The Tribunal would ordinarily have refused the whole proposal upon that basis. The Tribunal was however invited by Counsel for the applicant, in the event that part of the development was excluded, to nevertheless permit the remainder. Against the event that the Tribunal's conclusion falls within that invitation, the Tribunal will allow those aspects which it has not stated above that it excludes. If counsel's invitation did not extend to so doing, and the Tribunal was required to express a decision in those terms, the Tribunal would refuse the total development.

## Appeal to the Supreme Court

The Landcare Group appealed to the Supreme Court on the ground that the Tribunal had erred in law in granting a permit for a development that was substantially different from:

(a) the development originally applied for, and approved by Council; and

(b) the development described in the revised plans[i].

### *Was there an error of law?*

Counsel for Smartgrowth argued that the question of the extent of differences between the development applied for and that approved by the Tribunal was a question of fact, not of law[ii]. Having regard to a number of decisions since *Addicoat v Fox (No. 2)* [iii], Tennant J discussed the 'invisible line' between a development that has been modified and a different development. Her Honour held that if the facts showed that the Tribunal had stepped over the invisible line, there may be an error on a question of law.

### *Was the development substantially different?*

Tennant J dismissed ground (a) on the basis that the application before the Tribunal was lawfully amended pursuant to s.22(3), therefore any difference from the original development application was irrelevant.

Counsel for Smartgrowth argued that the 'invitation' to the Tribunal to sever inappropriate parts of the development amounted to an application for a further amendment under s.22(3) to conform to what the Tribunal considered appropriate. Tennant J rejected this argument and held that the relevant question was whether the Tribunal had approved a development which differed substantially from that set out in the revised plans accepted in September 2004.

Counsel for the Landcare Group argued that the decision of the Tribunal made it clear that the Tribunal considered that the approved development, without the eastern portion of the proposal, was substantially different from the revised plans. He argued that an invitation on behalf of Smartgrowth to sever portions did not confer power on the Tribunal to grant such an approval.

Tennant J held that the Tribunal decision, though "inelegant", demonstrated that the Tribunal had examined the proposed development part by part and determined which parts were appropriate. In her view, the Tribunal properly considered that the proposal was not "an indivisible whole" and could be viable even if some parts were severed, as confirmed by the invitation from the developer. Therefore, the Tribunal had not gone beyond its powers in approving the development without the eastern portions.

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# Sanctuaries, protected species and politics - How effective is Australia's protection of marine biodiversity under the Environment Protection and Biodiversity Conservation Act ?

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*This article was originally presented at the 2005 IUCN Academy for Environmental Law Colloquium – Biodiversity Conservation, Law and Livelihoods – held at Macquarie University, Sydney, from 10-15 July 2005. The article has been published in two instalments: Parts 1 and 2 were published in the December 2005 edition of Impact, and Parts 3 and 4 appear in this edition.*

## Part 3 - How Effective are the protections afforded?

Part Two of this paper provided an overview of the key Federal laws that exist to protect marine biodiversity and to regulate the sustainable management of marine resources. The EPBC Act has admirable objectives and puts in place legislative mechanisms, such as environmental impact assessment and public participation, that are consistent with well established principles for biodiversity conservation and ecologically sustainable development. As Chris McGrath states "viewed in the context of other laws and initiatives, the EPBC Act is a major step forward that fundamentally improves the Australian legal system. It has made, and no doubt will continue in the future to make, an important contribution to environmental protection and sustainable development in Australia."[i] It must be noted that the EPBC Act is still in its infancy, operating for just 5 years, and therefore the body of case-law applying, enforcing and interpreting the Act is only small. However, the cases that have been and which still are under consideration by Australian Courts and Tribunals provide an interesting insight into the regulatory approach adopted by the Federal Government.

Of the estimated thirteen reported cases that have been brought pursuant to the EPBC Act, only two have been commenced by the Federal Government. The balance of cases have been brought by third parties, being individuals or organisations with conservation objectives. In those cases where proceedings have been brought against a non-Governmental party, such as the Japanese company Kyodo Senpaku Kaisha Ltd, it is arguable that the proceedings could have been commenced by the Minister himself. Therefore, a question about the political will to enforce the EPBC Act arises. In the remaining cases, where actions have been brought against the Minister himself, claiming procedural errors in the decision making process or flaws in the merits of a decision, there is a need to consider the effectiveness of the mechanisms in the Act for the protection of the environment and the strength of the political will to achieve this protection. These questions will be considered in the following review of cases brought under the EPBC Act that deal with the marine environment.

### *3.1 Domestic regimes – EPBC Act cases relating to marine protection*

There have been very few cases brought under the provisions of the EPBC Act which relate to marine protection. Both civil and criminal sanctions are available to DEH to enforce the provisions of the EPBC Act. However, since the Act came into force in July 2000, only four prosecutions have been commenced by the Minister, three of which relate to the offence of harm caused to protected marine species, only one of which has been reported.[ii]

The DEH has a compliance and enforcement policy which includes:[iii]

- the carrying out of regular and random patrols;
- the conduct of audits and investigations into possible breaches of the EPBC Act;
- random inspections; and
- the requirement for licence and permit-holders to regularly report on their compliance with their licence conditions.

In determining the appropriate response to suspected contraventions of the EPBC Act, the DEH will consider certain matters including:[iv]

- the seriousness of the harm caused by the alleged contravention;
- whether the contravention was intentional, reckless, negligent, or a mistake;
- whether the suspect has a history of prior contraventions;
- the cost to the Australian Government or general community of the contravention;
- the commercial value of the contravention to the suspect;
- the time which has elapsed since the contravention;
- the extent of the evidence of the contravention;
- the likelihood of the contravention continuing or being repeated;
- the prevalence of the type of contravention;
- the likely public perception of the breach and the manner with which it is dealt; and
- whether the use of the response option in a specific case would create a desirable precedent.

Where the DEH obtains evidence of a serious contravention of the EPBC Act it may commence a civil or criminal prosecution against the offender. Criminal proceedings will only be brought where the elements of the offence can be proved beyond a reasonable doubt. A serious civil or criminal offence involves at least one of the following:

- a blatant disregard for or significant degree of indifference to the law or a significant degree of criminality on the part of the offender; or
- where previous administrative or civil actions have not resulted in compliance; or
- where the Australian Government or the community expects the offence to be dealt with by prosecution; or
- where the offence had resulted in or had the potential to result in significant harm or detriment to the Australian Government, the community or the environment, including cultural heritage, economy, resources, assets, or the well being of Australia; or
- where the nature of the crime is such that the prosecution will act as a deterrent.[v]

Where there are breaches of the marine protection provisions of the EPBC Act, the location of the breach and the significance to the community

of the marine animals or the environment which is harmed are important factors which will be considered by the DEH in determining whether to prosecute. In the case of two recent unreported judgments of the Magistrates Court in the Northern Territory in which Indonesian fishermen were imprisoned for killing dolphins to use their flesh as shark bait, the decision to bring criminal proceedings would not have been a difficult one to make. The fishermen were fishing illegally in Australian waters, in which they intentionally killed protected cetaceans, namely dolphins, which have special significance to the Australian community, and they used them to catch other species illegally, species which may also be protected.

Australia treats illegal fishing in its waters very seriously. The Australian Fisheries Management Authority ("AFMA") recently deployed an armed vessel to patrol the Patagonian toothfishery located in Australia's EEZ around its external territories of Heard and McDonald islands in the sub-Antarctic.[vi] This fishery is subject to extensive overfishing and illegal fishing. In January 2004 the AFMA seized an Uruguayan vessel and charged the entire crew for illegally fishing in the Australian EEZ off Heard and McDonald islands.[vii]

The approach of the Commonwealth Government taken to the management of the patagonian toothfishery in the sub-Antarctic is dramatically different to that taken by the Government to protect cetaceans from illegal whaling in Australian waters adjacent to the Australian Antarctic Territory, which is also an external territory of Australia.[viii] Here Japanese vessels are permitted to kill protected whales in the Australian Whale Sanctuary without being patrolled, arrested or even chased out upon sighting. As a result of government inaction in relation to illegal Japanese whaling in Antarctica, a non-government organisation, HSI, has used its own resources to bring proceedings against a Japanese whaling company in an attempt to restrain it from continuing to breach the provisions of the EPBC Act which protect whales in Australian waters.[ix]

The ability of individuals and conservation groups to bring proceedings to enforce the provisions of the EPBC Act is a matter which the DEH will also consider in determining whether to initiate civil or criminal proceedings.[x] As noted above, the majority of civil actions under the EPBC Act have been instituted by individuals and conservation groups. This has been made possible by the broad standing provisions in section 475 of the EPBC Act, which permits an "interested person"[xi] to apply to the Federal Court for an injunction to restrain a breach of the Act.

### 3.2 Protection of Cetaceans: law, politics and enforcement - A case study of Humane Society International Inc v Kyodo Senpaku Kaisha Ltd

Although Australia has a long history of whaling prior to the closure of the last whaling station in 1978, since the declaration of an international moratorium on commercial whaling under the Whaling Convention in 1982, Australia has been one of the most vocal anti-whaling nations at the IWC.

Australia's anti-whaling stance is reflected in its legislation. As outlined above, the EPBC Act contains a very comprehensive and powerful regime for the protection of whales and other cetaceans. However, the gap between the existence of these legislative provisions and the practice of the Australian government in enforcing its laws has recently been demonstrated in the case of *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*.[xii] The case has been followed with interest by both academia and by the popular media both because of the high profile status of whales and the recent developments at the IWC, and because the case gives rise to a number of interesting issues about the interaction of Australian and international law and the role of politics in law enforcement.

While Australia has been quick to enforce the laws protecting cetaceans in the EEZ surrounding Australia's mainland, as was indicated in the prosecution of the two illegal Indonesian fishermen who killed dolphins in Australian waters, the same level of protection has not been afforded to cetaceans in Australian waters adjacent to Australia's external territories.

In October 2004 HSI, represented by the NSW Environmental Defender's Office, commenced proceedings against Japanese whaling company, Kyodo Senpaku Kaisha Ltd ("Kyodo") for breaching the provisions of the EPBC Act by illegally killing whales in waters adjacent to the Australian Antarctic Territory ("AAT"), which forms part of Australia's EEZ and the AWS.

Photographic evidence of whaling by Kyodo was collected by Greenpeace, which conducted an expedition to the Antarctic to photograph illegal whaling in Australian waters during 2001 to 2002.[xiii] Evidence as to the details of the location of the whaling and the numbers of whales caught by Kyodo in Australian waters was obtained from reports co-authored by Kyodo, the Institute for Cetacean Research based in Tokyo and the Obihiro University of Agriculture and Veterinary Medicine. Those reports were presented to the IWC.

The basis of HSI's claim is that between December 2000 and March 2004 Kyodo killed approximately 428 Antarctic minke whales within the AWS adjacent to the AAT. Kyodo did not hold a permit to kill whales under sections 231, 232 or 238 of the EPBC Act allowing it to kill whales in the AWS. Furthermore, Kyodo has indicated in its reports that it intends to continue to return to the AWS to kill whales.[xiv] HSI is seeking a declaration that the activities of Kyodo are in breach of sections 229-230 of the EPBC Act and an injunction under section 475 of the EPBC Act restraining Kyodo from further unlawful activities.

Although HSI objects to Japan's insistence on killing whales despite the moratorium and in spite of the creation of the Southern Ocean Sanctuary by the IWC in 1994, there is no claim made in the proceedings that Japan does not have authority under the Whaling Convention to issue itself with a permit to kill whales for what Japan claims to be scientific research. The permit that Japan issues to itself for the purpose of killing Antarctic minke whales in the Southern Ocean is known as the Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA"). This permit is issued in purported compliance with Article VIII of the Whaling Convention which allows parties to conduct scientific research on whales; such research may involve the killing of whales. Japan has been issuing permits to itself under this provision since 1987. The whale meat is sold in Japan.

Kyodo is not a registered company in Australia and it does not have a registered company office in Australia. Accordingly, HSI is required pursuant to the Federal Court Rules to seek leave to serve the proceedings on Kyodo in Japan.[xv] In order to grant leave to HSI to serve the proceedings outside of Australia, the Court must be satisfied of the following matters:

1. that it has jurisdiction to hear the proceedings;
2. that the proceeding are founded on a breach of an Act committed in the Commonwealth;
3. that HSI has a prima facie case on findings of fact; and
4. that the Court is the appropriate forum in which to bring the proceedings.

Whilst the cause of action in the proceedings is based solely upon a breach of the EPBC Act which was relatively straightforward to establish on the facts, a number of international legal issues are raised by the case by virtue of the fact that the EPBC Act implements a number of Australia's international obligations.

The creation of the AWS in the EPBC Act reflects Australia's rights and obligations under both UNCLOS and the Antarctic Treaty System, which includes the Antarctic Treaty 1959, the Convention on the Conservation of Antarctic Marine Living Resources 1982 and the Protocol on Environmental Protection to the Antarctic Treaty 1991 ("Madrid Protocol"). The claim of an EEZ on the waters adjacent to the AAT is based on Australia's claim to sovereignty in Antarctica pursuant to a transfer of title to the land from the United Kingdom.[xvi] Although Australian sovereignty over the AAT is only recognised by the United Kingdom, New Zealand, France and Norway, Australia has established sovereignty over the AAT by virtue of Australia having effective occupation of the coastline surrounding its three permanent Antarctic bases, which are Mawson, Davis and Casey. It is effective occupation, not sovereignty which gives rise to the establishment of sovereignty at customary international law.[xvii] Australia has asserted its sovereign rights over the waters adjacent to its AAT by claiming an EEZ there under UNCLOS.

It is this sovereignty of the AAT which gives rise to the ability of the Australian Government to declare a sanctuary for whales in the waters adjacent to the AAT and which allows the Government to enforce its laws protecting whales. Specifically, Article 65 of UNCLOS allows States to regulate whaling within the EEZ. It was on the issue of the enforcement of the AWS in Australia's Antarctic EEZ that Justice Allsop called for submissions from the Commonwealth Attorney-General.

In response to Justice Allsop's invitation, the Commonwealth Attorney-General made written submissions to the Court.[xviii] In those submissions the Attorney-General conceded that HSI had established that Kyodo had breached the EPBC Act and acknowledged that the lack of recognition by Japan and other States of Australia's AAT does not preclude the application of the EPBC Act in the EEZ off the AAT. However, the Attorney-General refused to lend support to the leave application on the basis that the "Commonwealth Government considers that it is generally more appropriate to pursue diplomatic solutions in relation to activities by foreign vessels in the EEZ off the AAT".[xix]

Annexed to the Attorney-General's submissions is an extract from instructions to Australian Antarctic Division Voyage Leaders. The instructions direct voyage leaders who sight vessels involved in whaling activities within the Australia's EEZ adjacent to the AAT to advise those vessels that they are within the AWS and to ask them to leave. The instructions state that in the event that Japanese whaling vessels are encountered in those waters, no enforcement action may be taken against them in the event that they refuse to leave. This is an explicit instruction made by an executive body to its employees to ignore a breach of an Australian law by a foreign national. This decision of the executive is directly contrary to section 5(4) of the EPBC Act which provides that the Act applies to everyone in the Australian EEZ including persons who are not Australian citizens and vessels that are not Australian vessels.

In its reply to the submissions of the Attorney-General,[xx] HSI refers to the 1992 House of Representatives Standing Committee on Legal and Constitutional Affairs report to Parliament on Australian law in Antarctica[xxi] which stated that:

*"2.31 The Committee is of the view that there exists a strong misconception about the scope of Article 4(2) of the Antarctic Treaty and the degree to which it constrains Australia in applying Australian law to foreign nationals in the Australian Antarctic Territory. The Committee agrees … that Australia is not prevented by Article 8(1) or Article 4(2) of the Antarctic Treaty from applying Australian laws to foreign nationals in the Australian Antarctic Territory.*

*2.32 It is both in Australia's sovereign interests and consistent with Australia's obligations under the Antarctic Treaty to extend and apply Australian law to foreign nationals in the Australian Antarctic Territory who are not otherwise exempted by Article 8(1) of the Antarctic Treaty.*[xxii]

*2.33 This conclusion is consistent with the stated intention of the Australian Government at the time of implementing the Antarctic Treaty obligations in Australian legislation. In speaking on the second reading of the Antarctic Treaty Bill 1960 the Hon Fredrick Osborne, the then Minister for Air, stated:*

*In exercise of her sovereignty Australia has applied a complete code of law to the Australian Antarctic Territory. That law is, in our view, applicable to all persons in the Territory, and a breach of the criminal law, for example, would be punishable in an Australian court.*[xxiii]

*RECOMMENDATION 1*

*The Committee recommends that, as a matter of principle, Australian law be extended and applied to those foreign nationals in the Australian Antarctic Territory who are not otherwise exempt under Article 8(1) of the Antarctic Treaty.*

*…*

*3.10 The Committee is greatly concerned at the practice of not applying to foreign nationals Commonwealth legislation expressly relating to the Australian Antarctic Territory, particularly in relation to legislation which implements Australia's international obligations in Antarctica. Not only is it in contravention of the express intentions of the Parliament but it, as least arguably, sits ill with Australian claims to sovereignty over the Territory. …"*

HSI's submissions also noted that it was significant that the Parliament has provided standing to a class of persons including HSI in s 475 of the EPBC Act to seek an injunction to restrain a breach or other contravention of the Act, thereby by-passing the Attorney-General's traditional discretion to grant his fiat to support a relator action to enforce public laws.[xxiv]

Justice Allsop of the Federal Court found, in his interim judgment, that HSI had established a prima facie case for the relief sought in that the evidence disclosed a clear breach of the EPBC Act.[xxv] In his final decision on HSI's leave application Justice Allsop was swayed by the submissions of the Attorney-General and His Honour declined to grant leave to HSI to serve the proceedings on Kyodo.[xxvi] The basis for the decision was that the enforcement of the prohibition of whaling in the AWS established in the EPBC Act would be likely to give rise to an international disagreement between Australia and Japan. His Honour agreed with the view of the Attorney-General that "*the attempt to enforce the EPBC Act may upset the diplomatic status quo under the Antarctic Treaty and be contrary to Australia's long term national interests, including its interests connected with its claim to territorial sovereignty to the Antarctic*".[xxvii] Furthermore, His Honour also determined that the proceedings would be futile because the remedy of an injunction could not be enforced by HSI and furthermore, "*the making of a declaration alone a course suggested by the applicant) might be seen as tantamount*

*to an empty assertion of domestic law (by the Court) devoid of utility beyond use (by others) as a political statement*."[xxviii]

The EDO lodged an appeal to the Full Federal Court on behalf of HSI on 17 June 2005. The grounds of the appeal include failure to consider the intention of the legislature that the EPBC Act be applied to foreign nationals and the consideration of irrelevant matters, including political and diplomatic issues.

Although the Australian government is very vocal in support of a permanent ban on whaling, it refuses to enforce its own laws against foreign nationals in Australian waters in Antarctica and it does not support the court action by HSI. Swayed by public pressure and a concerted media campaign following the announcement that Japan would overhaul JARPA by doubling the quota of Antarctic minke whales and to begin targeting Humpbacks and Fin whales,[xxix] both of which are listed threatened species under the EPBC Act,[xxx] the Prime Minister Mr John Howard, was moved to write a letter to the Japanese Prime Minister Junichiro Koizumi, asking Japan to stop killing whales in the name of science.[xxxi] Mr Koizumi ignored the letter and from December 2005 Japan will commence the killing 850 Antarctic minke whales, as well as 50 Humpback and 50 Fin whales, most of which will be in protected Australian waters.

### 3.3 Southern Bluefin Tuna case

HSI has also recently brought proceedings in the Administrative Appeals Tribunal ('the Tribunal') in an attempt to protect Southern Bluefin Tuna ('SBT') from continued over exploitation by the Australian fishing industry.

The SBT is listed in Annex I of UNCLOS as a highly migratory species of pelagic fish. The species is found throughout the high seas of the Southern Hemisphere, as well as within the EEZ and territorial seas of Australia in the South Pacific. As Sturtz notes, the fish is extremely valuable as a food source, especially in Japan where it is coveted as a delicacy for sashimi.[xxxii] The SBT is on the IUCN's Red List of Threatened Animals, and conservationists are urging its inclusion as an endangered species internationally under CITES and domestically under the EPBC Act. In July 2005 the Scientific Committee that advises the Federal Minister on applicability for listing of species under the EPBC Act indicated that SBT met the Act's criteria for listing as endangered. However, the Minister has not amended the list of threatened species to include SBT.

The international SBT fishery is managed by the Commission for the Conservation of Southern Bluefin Tuna ('CCSBT'). Allocations for member nations' SBT take have been set through the CCSBT. Australia's long-standing national allocation is 5,265 tonnes of a current total of 16,113 tonnes in national allocations for CCSBT members (ie 32%). These figures do not include catches outside the formal control of the Commission. Due to an impasse at the Commission over national allocations, Australia's national allocation has remained unchanged since 1989 over which time the status of the stock and prognosis for its recovery has, in HSI's opinion, worsened.

The proceedings brought by HSI challenge a decision made by the Minister on 10 November 2004 to declare the SBT fishery an approved wildlife trade operation ("WTO") pursuant to section 303FN of the EPBC Act (the Decision). HSI considers the Minister's decision to be contrary to Australia's domestic policy and legal obligations to ensure its fisheries are ecologically sustainable.

The Australian Government acknowledges that "*the stocks are seriously overfished and the stocks are unlikely to rebuild at current fishing levels*."[xxxiii] Further, the latest Australian Government Fishery Status Report summarises the status of SBT as follows: "*Overfished, and overfishing is occurring; spawning stock severely depleted and current catches severely limit probability of rebuilding*."[xxxiv] Recent assessments by Australian scientists estimate the current parental SBT biomass to be between 4 and 19% of its unfished size.[xxxv]

Notwithstanding this evidence, the Minister justified the Decision largely on the basis of the argument that the domestic management regime is effective in controlling, monitoring and enforcing the level of take from the Australian fishery within the catch quota set by the CCSBT and that the recognised need to reduce catch is best addressed through the CCSBT. In his reasons for the Decision the Minister states that "*I was satisfied that the management of the stocks, including the rebuilding of the stocks to ecologically sustainable levels, through proactive engagement with the fishing nations taking SBT and within the framework of the CCSBT was most likely to provide for sustainability in the long term*."

It is the Australian Government's long-standing position that "*Any unilateral reduction in take by Australian fishers is unlikely to provide any significant protection to the SBT stock or allow for rebuilding as other nations would almost certainly take up Australia's allocation*."[xxxvi] The Government argues that any unilateral action by Australia to reduce its SBT take would be ineffective in achieving the conservation of the stock because it would allow other nations (who it is argued use less sustainable fishing methods than Australia) to catch the fish Australia refrains from taking.

It is interesting to note that Australia and New Zealand have previously instituted arbitral proceedings against Japan in the International Tribunal for the Law of the Sea ("ITLOS") under Part XV of UNCLOS in relation to over fishing SBT in breach of their CCSBT quota on the basis that the over-fishing posed serious harm to the environment.[xxxvii] In that case, ITLOS ultimately determined that it did not have jurisdiction to hear the case and therefore, protective measures compelling Japan to act in accordance with the CCSBT could not be imposed. It is perhaps this experience that makes the Australian government wary of taking any action that may impact upon the CCSBT regime.

HSI does not dispute the importance of Australia's involvement in the international negotiations regarding the management of SBT which occur through the CCSBT. However, in the proceedings before the Tribunal challenging the Minister's Decision, it has argued that unilateral action by Australia - namely a reduction in Australia's SBT catch - is both lawful and would significantly contribute to the conservation of SBT. HSI argued that as a matter of international law it is open to Australia to reduce the amount of SBT it takes and to deny other SBT fishing nations the right to take the remainder of Australia's quota by asserting a claim over the remainder of its allocation for stock conservation purposes.

In addition, HSI asserts the Minister's decision to declare the SBT fishery a WTO was not the correct or preferable decision, principally because the Minister erred in being satisfied that Australia's commercial SBT fishery operation will not be detrimental to the survival and conservation status of the SBT stock, and that the operation is consistent with the objectives of sustainable fisheries management.

This case was heard by Tribunal in late September 2005, during which time the Tribunal heard expert evidence from the leading SBT fisheries scientists which addressed the conservation status of the species, the inter-

national and domestic management regimes for the SBT fishery and the likely impacts of the WTO declaration upon the species. As a result of the hearing taking place immediately before the twelfth meeting of the CCSBT, final submissions were adjourned pending the outcomes and recommendations of the CCSBT meeting. Those submissions will be presented in early November 2005. In reviewing the Minister's decision, the Tribunal stands in the shoes of the Minister and can make its own decision about whether the SBT fishery should be excluded from the need for further environmental impact assessment before trade in that species takes place.

Similar to the whaling case, HSI's challenge to the approval of the SBT fishery as a WTO raises interesting issues about the political will of the Federal government to take bold steps to protect marine species which are subject to international management regimes. In the SBT case, the government's basis for refusing to take domestic action to reduce the Australian catch is based on an argument that it is uncertain whether unilateral action by Australia would make a positive contribution to stock recovery. However, HSI considers the Government's argument that it should not take unilateral action and reduce Australia's SBT catch to be seriously flawed, and to demonstrate a lack of political will to take strong action to conserve a species under threat.

## 4. Conclusion

Australia has adopted a relatively progressive approach to integrated marine resource conservation and management through its Oceans Policy and the EPBC Act. However, whilst there are sound legal protections for marine species, the application of relevant laws has been limited. Clearly there are difficulties in policing activities in Australia's vast marine territory. However, where evidence of breaches is readily available, such as in the example of Japanese whaling in Antarctic waters, the failure of the Federal government to take legal action is disappointing. The intervention by the Attorney-General in the HSI v Kyodo case is demonstrative of the political complexity of enforcing marine laws in external territories and the EEZ and foreshadows the possibility that marine species in those areas may be afforded lesser protection than species in Australian coastal waters. This approach, the authors submit, is not consistent with the provisions and intent of the EPBC Act.

The Federal government's approach to the management of the SBT fishery is also, in the authors' opinion, at odds with the intent of the EPBC Act. In that case, again, it appears that the political ramifications of managing the fishery in a manner which involves the reduction of take allocation under the CCSBT have outweighed the requirement for the Minister to be satisfied that the accreditation of the fishery as a WTO is ecologically sustainable.

Marine management is one of the few areas where international and domestic laws intersect. The Australian government takes the view, as demonstrated by the above cases, that it is in the best interest of marine biodiversity conservation as a whole for disputes relating to species management to be solved diplomatically through fora such as the IWC and the Secretariat of the CCSBT. However, in circumstances where strong laws with express application to foreign nationals have been promulgated, the failure to rely upon those laws sends a message that Australia lacks the political will to address some of the most pressing threats to the environment.

FOOTNOTES

ii. McGrath, C "Key Concepts of the Environment Protection and Biodiversity Conservation Act 1999 (C'th)" (2004) 22 EPLJ 20 at p.39.
ii. Minister for the Environment and Heritage v Wilson [2004] FCA 6; Minister for the Environment & Heritage v Greentree (No 2) [2004] FCA 741 and two unreported decisions from the Magistrates Court in the Northern Territory resulting in the conviction and subsequent imprisonment of Indonesian fishermen who caught dolphins in Commonwealth waters to use for shark bait.
iii. Department of Environment and Heritage Compliance and Enforcement Policy, August 2004. Available at <http://www.deh.gov.au/about/compliance/index.html#responding> . The Prosecution Policy of the Commonwealth, which is Management by the Commonwealth Department of Public Prosecutions also applies to the DEH at <http://www.cdpp.gov.au/Prosecutions/Policy/ProsecutionPolicy.pdf.>
iv. Ibid.
v. Ibid.
vi. The Attorney General's Department Oceanic Viking Started patrolling the area December 2004 <http://www.ag.gov.au/agd/WWW/justiceministerhome.NSF/Page/Media_Releases_2004_3rd_Quarter_31_August_2004_-_Dedicated_armed_vessel_to_toughen_crackdown_on_fish_poachers> <http://www.ag.gov.au/agd/WWW/justiceministerHome.nsf/Page/Media_Releases_2004_4th_Quarter_19_November_2004_-_Warning_to_Fish_Poachers_as_Armed_Patrols_Begin>
vii. See AFMA media release 12 February 2004. Available at http://www.afma.gov.au/news/media/2004/mr120204.php. See also Olbers v Commonwealth (No. 4) (2004) 136 FCR 67.
viii. Leary, D "The Interaction of Domestic and International Law and the Conservation and Sustainable Management of Marine Biodiversity in Australia. Two case studies in conflict and convergence" (2005) Copy provided by Author.
ix. Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2004] FCA 1510.
x. Department of Environment and Heritage website <http://www.deh.gov.au/about/compliance/index.html#responding.>
xi. Environment Protection and Biodiversity Conservation Act s. 475(7). An "interested person" is defined as:
- an organisation whose interests have been, are, or would be affected by the conduct or proposed conduct to which the injunction relates;
- an organisation whose objects or purposes included the protection, or conservation of, or research into the environment during the 2 years immediately before the conduct; and
- the organisation engaged in a series of activities related to the protection, or conservation of, or research into the environment.

xii. [2005] FCA 664.
xiii. Refer to the Affidavit of Kieran Mulvaney sworn 9 November 2004 available at <http://www.hsi.org.au/news_library_events/Japanese_Whale_Case/Court_Documents.htm>
xiv. Refer to the Affidavits of Nicola Beynon sworn 18 October 2004 and Kieran Mulvaney sworn 9 November 2004 avaiable at <http://www.hsi.org.au/news_library_events/Japanese_Whale_Case/Court_Documents.htm>
xv. Federal Court Rules, Order 8, Rules 2(2).
xvi. The Commonwealth declared the AAT to be a Territory under the authority of the Commonwealth on the commencement of the Australian Antarctic Territory Acceptance Act 1933 in 1936. The Australian Antarctic Territory Act 1954 provides for the government of the AAT.
xvii. Professor Gillian Triggs, International Law and Australian Sovereignty in Antarctica in Legal Books Pty Ltd, Sydney, 1986.
xviii. Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2005] FCA 664 Outline of Submissions of the Attorney-General of the Commonwealth as Amicus Curiae dated 25 January 2005 available at <www.hsi.org.au >
xix. Ibid., paras. 20-21.
xx. Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2005] FCA 664 Applicant's Reply to the Submissions of the Attorney-General and to the Court's Questions dated 10 February 2005 available at <www.hsi.org.au>
xxi. House of Representatives Standing Committee on Legal and Constitutional Affairs, Australian Law in Antarctica: The report of the second phase of an inquiry into the legal regimes of Australia's external Territories and the Jervis Bay Territory (AGPS, Canberra, 1992), pp 15-18.
xxii. Article 8(1) of the Antarctic Treaty provides for designated observers & scientific exchange personnel.
xxiii. House of Representative Debate, 28 September 1960, p 1432.
xxiv. There is no doubt the Attorney-General and the Commonwealth Director of Public Prosecutions retain a discretion whether to prosecute any person for a breach of Commonwealth law that the courts will not normally question: Hinchcliffe v Commissioner of Police of the Australian Federal Police (2001) 118 FCR 308 at [33]-[35] per Kenny J.
xxv. [2005] FCA 664 at para 30.
xxvi. [2005] FCA 664.
xxvii. Ibid., para 27.
xxviii. Ibid., para 34.
xxix. Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources released at the 57th Meeting of the IWC during 20-24 June 2005.
xxx. See See Department of Environment and Heritage website at <http://www.deh.gov.au/biodiversity/threatened/species/index.html>
xxxi. On 24 May 2005.
xxxii. Sturtz, L "Southern Bluefin Tuna Case" Australia and New Zealand v Japan" (2001) 28 Ecology Law Quarterly 455 at 460.
xxxiii. Minister's Statement of Reasons for Decisions of 10 November 2004 (to declare the Southern Bluefin Tuna Fishery under section 303FN of the Act) and 26 November 2004 (to include Southern Bluefin Tuna on the List of
Exempt Native Specimens under section 303DC of the Act) dated 11 February 2005.
xxxiv. 2004 Fishery Status Report by the Australian Government Department of Agriculture, Fisheries and Forestry, Bureau of Rural Sciences, p85.
xxxv. Strategic Assessment of the Southern Bluefin Tuna Fishery, published by the Approval and Wildlife Division of the Australian Commonwealth Government's Department of Environment and Heritage in 2004, p.6.
xxxvi. Department of Environment and Heritage 'Strategic Assessment of the Southern Bluefin Tuna Fishery', 2004, p11.
xxxvii See Sturt, L , above n147. Australia and New Zealand specifically alleged that Japan: (1) neglected to adopt necessary conservation measures to protect the southern bluefin tuna from its nationals fishing on the high seas; (2) carried on unilateral experimental fishing above its TAC; (3) took unilateral actions contrary to the rights of Australia and New Zealand; (4) failed to cooperate with Australia and New Zealand in an effort to protect the southern bluefin tuna; and (5) otherwise fell short of meeting its obligations under UNCLOS to conserve and manage the fish populations.

Pending the formation of the arbitral tribunal, the governments of Australia and New Zealand sought and obtained several provisional measures from ITLOS to protect their rights and the environment, including orders that Japan: (1) refrain from further experimental fishing; (2) negotiate and cooperate with Australia and New Zealand in an effort to agree to future conservation efforts; (3) ensure that its nationals do not take more than the total annual catch that Japan is allotted; and (4) restrict its total southern bluefin tuna catch to its national allocation as last agreed. Unfortunately, when the dispute reach final hearing, ITLOS determined that the dispute resolution procedures under the CCSBT were exhaustive and therefore ITLOS did not have jurisdiction to hear the dispute under Part XV of UNCLOS.

*Continued from page 9...*

## Implications

Previous decisions have acknowledged that what amounts to a substantial difference, rather than a modification, is a matter of degree and a planning authority is often best placed to determine where the invisible line is drawn. This decision pushes the line further back and gives a very broad power to the Tribunal (and ultimately to councils) to modify a proposal by severing parts which it does not consider to be appropriate.

A broad approach to modification may lead planning authorities to alter development applications to bring them into line with a planning scheme, where previously a non-compliant application would have been refused and the developer sent back to the drawing board. While in this case the approach taken by the Tribunal was supported by the developer, in other situations developers may consider that the exclusion of significant portions from a development proposal is effectively a refusal of the application. The invisible line remains hard to find!

*Note: St Helens Area Landcare & Coastcare Group Inc has lodged an appeal against this decision.*

FOOTNOTES

*i The Landcare Group also appealed on the ground that the Tribunal failed to have regard to relevant clauses of the State Coastal Policy. Tennant J was not satisfied on the evidence that, even though it had not specifically referred to particular clauses of the State Coastal Policy, the Tribunal had not given effect to the policy.*

*ii Section 25(1) of the Resource Management and Planning Appeal Tribunal Act 1993 provides:*
*(1) A party to an appeal before the Appeal Tribunal may appeal to the Supreme Court, on a question of law, from any decision of the Appeal Tribunal in the appeal.*

*iii [1979] VR 347. Other cases referred to include Azzopardi v Tasman UEB Industries Ltd (1985) NSWLR 139 and Bernard Rothschild Pty Ltd v City of Melbourne & Ors (1982) 52 LGRA 44*

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*Continued from page 9...*

lishing joint management structures such as Boards of Management with Aboriginal majorities, plans of management, lease back arrangements, and traditional use rights. Despite providing for a significant level of Aboriginal involvement in the management of conservation areas, these structures have not ensured the success of joint management in Australia.

FOOTNOTES

i. This article is based on part of a paper completed in 2004 in fulfillment of a Master of Environmental Law degree at the University of Sydney.

ii. David Lawrence Managing Parks/Managing 'Country': Joint Management of Aboriginal Owned Protected Areas in Australia Social Policy Group Research Paper 2 (Parliament of Australia, Department of the Parliamentary Library, Canberra, 1996-97)

iii. G. Nettheim "Australian Land Rights Legislation" in G. Nettheim, G. Meyers and D. Craig (eds) Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights (Aboriginal Studies Press, Canberra, 2002)

iv. Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (ALR Act) s 12; Most of this land comprises former Aboriginal reserves

v. NT ALR Act s 11

vi. NT ALR Act s 4(1); Traditional Aboriginal owners are defined under the Act as a local descent group of Aboriginals that (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land (NT ALR Act s 3)

vii. Nettheim above n 2

viii. Fiona Dawson "The Significance of Property Rights for Biodiversity Conservation in the Northern Territory" (1996) 3 Australasian Journal of Natural Resources and Policy 179

ix. Nettheim above 2

x. NT ALR Act s 12

xi. NT ALR Act s 5

xii. Currently there are two large Aboriginal Land Councils that cover the Northern Territory – the Northern Land Council and the Southern Land Council – and two small Aboriginal Land Councils that cover off-shore islands (Nettheim above n 2)

xiii. NT ALR Act s 23(1)(a)(b)(ba)(c)(e)

xiv. Uluru-Kata Tjuta National Park Board of Management and Parks Australia Uluru-Kata Tjuta Plan of Management (AGPS, Canberra, 2000)

xv. NT ALR Act s 12 (2B) (2C) (2D)

xvi. Uluru-Kata Tjuta National Park was subject to an unsuccessful claim under the ALR Act, although the claim to land surrounding the park was successful. However, traditional owners lobbied the Australian Government for freehold title to the land within the park, which was granted in 1985 through amendments to the ALR Act (Trevor Power "Joint Management at Uluru-Kata Tjuta National Park" (2002) 19 Environmental and Planning Law Journal 284)

xvii. Joint management of Gurig National Park arose as a result of a pending land claim by traditional owners under the ALR Act. Rather than proceed with the claim, the traditional owners came to an agreement with the Northern Territory Government which was formalised under the Cobourg Peninsula Act (Nettheim above n 2)

xviii. Established under the Acts

xix. Cobourg Peninsula Aboriginal Land, Sanctuary Act and Marine Park Act 1987 (NT) (Cobourg Peninsula Act) s 5(2); The relevant Aboriginal Land Council determines who is a traditional owner (s ) (Cobourg Peninsula Act 5(2))

xx. Cobourg Peninsula Act s 12(1)

xxi. Cobourg Peninsula Act s 15(1)

xxii. By the National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996 (NSW)

xxiii. Established under the Aboriginal Land Rights Act 1983 (NSW)

xxiv. A traditional owner must be directly descended from the original inhabitants of the area in which the land is situated and must have a cultural association with the land that derives from the "traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land" (Aboriginal Land Rights Act 1983 (NSW) s 171(2)(a)(b))

xxv. Aboriginal Land Rights Act 1983 (NSW) (NSW ALR Act) s 71I

xxvi. Reconciliation and Social Justice Library ("Understanding Country – Land Rights") <http://www.austlii.edu.au> (last accessed 15 September 2004)

xxvii. NPW Act Schedule 14

xxviii. National Parks and Wildlife Act 1974 (NSW) (NPW Act) s 71 (AS) (AT) (AU)

xxix. NSW ALR Act s 36A

xxx. NPW Act s 71(X) (Y) (Z) (AA) (AB); NSW ALR Act s 36A

xxxi. There is also a Torres Strait Islander Act 1991 (Qld) which is similar to the Qld AL Act but it applies to Torres Strait Islander People

xxxii. Aboriginal Land Act 1991 (Qld) (Qld AL Act) ss 24 and 28(1)

xxxiii. Dermot Smyth 'Joint Management of National Parks in Australia' in R. Baker, J. Davies, and E. Young (eds) Working on Country – Contemporary Indigenous Management of Australia's Lands and Coastal Regions (Oxford University Press, Oxford, 2001)

xxxiv. Smyth above n 32

xxxv. James Cook University School of Tropical Environment Studies and Geography <http://www.tesag.jcu.edu.au> (last accessed 12 September, 2004)

xxxvi. Qld AL Act s 83(1)(a)(b)

xxxvii. An Aboriginal group must show that they "have a common connection with the land based on spiritual and other associations with, rights in relation to, and responsibilities for, the land under Aboriginal tradition" (Qld AL Act s 53(2))

xxxviii. An Aboriginal group must show that they or their ancestors have lived on or used the land (or land in the district) for a substantial period (Qld AL Act s 54(3))

xxxix. Environmental Protection and Biodiversity Conservation Act 1999 (Cwlth) (EPBC Act) s 3(1) (d) (f) (g)

xl. EPBC Act s 377(1) (4)

xli. EPBC Act ss 366, 367

xlii. EPBC Act s 368 (3) (c)

xliii. EPBC Act s 368 (1)

xliv. EPBC Act s 370 (1)

xlv. EPBC Act s 376 (1) (a) (b)

xlvi. EPBC Act s 514D (2) (b)

xlvii. EPBC Act s 359A(1)(2)

xlviii. EPBC Act ss 369 (3) (4) (6), 390(2)(7), 370(5)(b)

xlix. If the Minister believes there is a substantial difference of opinion between the Aboriginal Land Council and the Director and/or Board regarding a plan of management, the Minister must return the plan with recommendations to the Director for further consideration. The Minister may also appoint an independent reviewer to consider the plan and make recommendations. The Minister must then consider these recommendations and approve the plan with any modifications that the Minister considers appropriate (EPBC Act ss 370(5)(b) and 390(2)(7))

l. EPBC Act ss 505A, 505B

li. See Parks and Wildlife Commission of the Northern Territory Nitmiluk National Park Plan of Management 2002 Northern Territory Government <http://www.nt.gov.au> (last accessed 12 October 2004); Cobourg National Park is not subject to a lease agreement.

lii. Cobourg Peninsula Aboriginal Land, Sanctuary Act and Marine Park Act 1987 (NT) (Cobourg Peninsula Act) s 27(4) (a) (b) (c) (e) (h); Nitmiluk (Katherine Gorge) National Park Act 1989 (NT) (Nitmiluk Act) s 16.

liii. Nitmiluk Act s 16(a)-(e); Cobourg Peninsula Act s 24(a)(b)(c)(d)(e)

liv. Cobourg Peninsula Act s25(1)(a)(b); Nitmiluk Act s17(a)(b)

lv. Nitmiluk Act s 8; Cobourg Peninsula Act ss 11 and 12

lvi. Nitmiluk Act Schedule 1 cl. 2(1)(2)

lvii. Cobourg Peninsula Act s 25(2)

lviii. Cobourg Peninsula Act s 28(8)

lix. Nitmiluk Act s 21(6)(7)(8)

lx. Nitmiluk Act s 20(9)

lxi. Cobourg Peninsula Act s 27(6)

lxii. NPW Act s 71AO(1)(a), S71AN

lxiii. NPW Act s 71AO(1)(b)

lxix. NPW Act s 73 B

lxx. NPW Act s 71AO(2)

lxxi. NPW Act s 71AN(6)

lxvii. NPW Act s 71AO(4); the Minister may not give directions to a Board in relation to: (a) the contents of any report, advice, information or recommendation that is to be or may be made or given by the board, or (b) any decision of the board, that is not inconsistent with this Act and the plan of management for the lands for which it was established, relating to the care, control and management of Aboriginal heritage and culture within the lands (NPW Act s 71AO(5))

lxviii. NPW Act s 71AO(6)

lxix. NPW Act s 72 (1C)

lxx. NPW Act s 71 (BH)

lxxi. NPW Act ss 71E – 71L

lxxii. NPW Act s 71AD(1)(2)(3)

lxxiii. NPW Act s 71AK

lxxiv.. The Minister administering the Nature Conservation Act 1992 (Qld AL Act s 83(11))

lxxv. Qld AL Act s 83 (2)(3)(4)

lxxvi. Qld AL Act s 83(8)(b)

lxxvii. Qld AL Act s 83(5)

lxxviii. Qld AL Act s 83(7)(a)(b)

lxxix. Qld AL Act s 83(10)

lxxx. Nature Conservation Act 1992 (Qld) (NC Act) s 18 (1)(2)

lxxxi. NC Act s 93 (1) (2) (3) (4)

lxxxii. NC Act s 73(b)(iii)

lxxxiii, Australian Legal Information Institute (Mutawintji National Park Lease Agreement 1998) <http://www.austlii.edu.au> (last accessed 13 September 2004)

lxxxiv. Mutawintji Lease cl 5.8

lxxxv. Mutawintji Lease cl 13.1 – 13.4

lxxxvi. Mutawintji Lease cl 13.4

lxxxvii. Mutawintji Lease cl 11.3

lxxxviii. Mutawintji Lease cl 10.18

lxxxix. Mutawintji Lease cl 11.1

xc. Mutawintji Lease cl 12.2

xci. Mutawintji Lease cl 12.16

xcii. Mutawintji Lease cl 12.9

xciii. Mutawintji Lease 12.17(3)

xciv. Mutawintji Lease 12.10

xcv.. Lawrence above n 1; Power above n 15

xcvi. Power above n 15

xcvii. Review Steering Committee Aboriginal Involvement in the Management of the Wet Tropics World Heritage Area (prepared for the Wet Tropics Board of Management, 1998)

xcviii. Parliament of Australia Legal and Constitutional References Committee "Reconciliation Off Track" (Department of the Senate, Parliament House, Canberra, 2003)

xcix. Lawrence above n 1

c. Ben Smith (2002) 'Differences and opinions: Aboriginal people, pastoralism and national parks in Central Cape York Peninsula" Queensland Environment Groups Native Title and Protected Areas Project <http://www.indig-enviro.asn.au> (last accessed 13 September 2004)

ci. Nettheim above n 2

cii. Review Steering Committee above n 96

ciii. Bruce Rose (1995) "Aboriginal Land Management Issues in Central Australia" Central Land Council <http://www.clc.org.au> (last accessed 12 October 2004)

civ. Smith above n 99

cv. Smith above n 99

cvi. Parliament of Australia above n 97

cvii. Mick Dodson November 1998 Aboriginal and Torres Straight Island Commission <http://www.atsic.gov.au> (last access 22 October 2004)

cviii. Smith above n 99

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