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Court Case Challenges Greenhouse Gas Emissions from Coal Mines

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BARRISTER[i]

June Impact briefly reported on Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors [2006] FCA 736. Now junior counsel for Wildlife Whitsunday provides in depth analysis on this important case.

A recent case in the Federal Court shows the need for a specific greenhouse trigger in the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*. The case involved two coal mines in Queensland with greenhouse gas emissions roughly equivalent to 25% of Australia's national greenhouse emissions in a single year. Despite the huge scale of their emissions, the mines were found not to trigger the EPBC Act and no conditions were imposed upon them to reduce or off-set their emissions. While the outcome of the case indicates that there is no effective mechanism in the EPBC Act for regulating even large emissions of greenhouse gases at the present time, this is an issue that is likely to see further litigation and legislative action in the future.

Greenhouse litigation

On 15 June 2006 the Federal Court dismissed a case concerning greenhouse gas emissions from two large coal mines.[ii] In the case a North Queensland conservation group, Wildlife Whitsunday, sought judicial review of two decisions by a delegate of the Federal Environment Minister over the consideration of greenhouse gas emissions from the mining, transport and use of the coal from two large coal mines in Queensland. The mines are expected to produce 48 million tonnes (Mt) of black coal for export over the next 15 years.

The decisions challenged in this case were made under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).[iii] The trigger for assessment under the EPBC Act is whether an action has, will have or is likely to have a significant impact on a matter protected by the Act, such as the world heritage values of a declared World Heritage property.

The case built upon the principles from the Nathan Dam Case, in which the Federal Court ruled the Minister is required to consider direct and indirect impacts of actions, including downstream impacts of a dam due to farmers using water from the dam.[iv] Applying this principle in *Australian Conservation Foundation v Minister for Planning [2004] VCAT 2029; (2004) LGERA 100,* the Victorian Civil and Administrative Tribunal found that a planning scheme amendment to allow an expansion of a coal mine was required to consider the indirect impacts of greenhouse gas emissions resulting from the burning of the coal at a power station.

The case began on the basis that the Minister's delegate simply failed to consider the greenhouse gas emissions from the mines. This would have been a straightforward error under the principles in the Nathan Dam Case. The proponents had not addressed this issue in their referrals[v] but Wildlife Whitsunday raised it in public submissions to the Minister regarding the mines. The delegate made no mention of this issue in his statement of reasons for decisions under s 75 of the EPBC Act that the mines did not require assessment and approval under the EPBC Act. Ordinarily, if a statement of reasons does not set out a finding on some question of fact it indicates that the decision-maker made no finding on

that matter and that, in turn, may indicate that he or she did not consider the matter to be material.[vi]

However, the case changed fundamentally, two weeks prior to the trial, when the Minister filed an affidavit in which his delegate claimed he had given detailed consideration to greenhouse emissions from the mines. The delegate said he concluded that, when judged against the scale of past, present and future global emissions, the greenhouse emissions from the mines would not be measurable or identifiable and, therefore, would not be likely to cause a significant impact to matters of national environmental significance protected under the EPBC Act.

Wildlife Whitsunday responded to the delegate's claim that he considered the greenhouse gas emissions from the mines by attacking his reasoning process as "atomistic". It argued that global warming is an international problem but the EPBC Act can only regulate actions at a national level. The question of significance should, therefore, be addressed by asking whether the contribution to global warming of the likely emissions from these mines are significant at a national level in comparison with other actions in Australia contributing to global warming.

Dowsett J accepted the delegate's evidence, found that his approach was lawful, and dismissed the application for judicial review. His Honour concluded by doubting that the principle in the Nathan Dam Case was correctly applied to greenhouse emissions of actions such as coal mines.[vii] Whether that is correct is a matter that will no doubt be litigated in the future.

For the present time, proponents of coal mines and their lawyers are well advised to address the greenhouse gas emissions of their projects for two very pragmatic reasons. The first reason is that, as this case shows, the Minister treats them as relevant impacts. The second reason is to avoid the delay and expense of becoming entangled in litigation with third parties. Conservation groups are certainly alive to the issue of greenhouse gas emissions and willing to litigate if a suitable case presents itself.

Need for a greenhouse trigger

This case highlights the need for reform of the consideration given to greenhouse gas emissions of large projects such as coal mines. Global warming is likely to have severe, long-term impacts on the environment, including matters protected by the EPBC Act such as the world heritage values of the Great Barrier Reef World Heritage Area.[viii] It is now accepted by the Australian, State and Territory Governments that global warming poses a serious threat to the Australian environment. On 10 February 2006 the Council of Australian Governments (COAG) announced its Plan For Collaborative Action on Climate Change. COAG recognised:[ix]

> "The case for significant reductions in global greenhouse gas emissions to reduce the risk of dangerous climate change is clear. Early action by all nations is needed to make the task of stabilising and then reducing the level of greenhouse gas emissions in the atmosphere easier and less costly to achieve. For the sake of our future economy, as well as our future environment, Australia needs to significantly accelerate our conversion to the low emissions practices and technologies of the future. …
>
> All jurisdictions remain committed to the over-riding goal of the UNFCCC, to prevent 'dangerous' human interference with the climate system. Australia is on track to meet its Kyoto emissions targets to 2012. It will be necessary to achieve significant reductions in emissions beyond that as part of the international effort to avoid dangerous climate change. Early action will be of great value in extending the time for reacting to the threat. …
>
> COAG has agreed that:
>
> all jurisdictions are committed to working collaboratively as well as individually to reduce Australia's emissions of greenhouse gases, adapt to unavoidable climate change and meet our international commitments, making Australia a leader in the global effort to stabilise greenhouse gas levels in the atmosphere;
>
> responses will enable economic development to proceed in a sustainable way, recognising that implementation of climate change policies should be consistent with equity, cost effectiveness, and multiple benefits;
>
> responses to climate change will promote business certainty within the limits created by the uncertainties of climate change;
>
> action on climate change requires a comprehensive policy framework which includes action to promote changed patterns of investment, technology innovation and take up, adaptation, demand management and improved energy efficiency. Within that framework, jurisdictions will pursue policies which respond to their individual needs and which are within their constitutional responsibilities;
>
> all jurisdictions will work collaboratively as well as individually to promote the development and take up of renewable and other low-emission technologies;
>
> action will respond to and foster relevant scientific, technological and socio-economic research;
>
> all governments recognise the importance of adaptation and agree to work together on Australia's ability to develop and implement sound adaptation strategies; and
>
> jurisdictions will continue to communicate with each other, with industry and the broader community to foster a common understanding of greenhouse issues and the importance of addressing the impacts of climate change and to promote consistent and informed policy. …"

Despite the fact that Australia's greenhouse emissions are expected to allow Australia to meet its Kyoto[x] target to 2012,[xi] this case shows that Australia lacks a general legal framework for regulating large emissions of greenhouse gases from projects such as coal mines. The lack of any general regulatory system for major new emitters of greenhouse gases is a serious deficiency in the response to climate change if it is genuinely regarded as requiring a comprehensive and effective policy response.[xii]

Wildlife Whitsunday was not allowed to present further evidence to the Federal Court of the likely greenhouse gas emissions from the Isaac Plains Coal Project and the Sonoma Coal Project,[xiii] but calculation of these matters explains their significance on a national and international scale.[xiv] Using the methodology of the Australian Greenhouse Office,[xv] the greenhouse gas emissions from the full fuel cycle[xvi] of 48 Mt of coal for electricity production (thermal or steaming coal) or steel production (coking coal) is 121-161 Mt of carbon dioxide equivalent (Mt CO2–e).[xvii] This is roughly equivalent to 25% of Australia's greenhouse gas emissions[xviii] and 0.6% of global emissions from fossil fuels[xix] in 2003. The Sonoma Project alone, involving 30 Mt of coal, is roughly equivalent to 16% of Australia's greenhouse gas emissions and 0.4% of global emissions from fossil fuels in 2003.[xx]

The economic value of the coal from these mines gives another indication of their scale as well as the potential resources that might be available to reduce or off-set greenhouse gas emis-

sions. The 48 Mt of coal from the Isaac Plains Coal Project and the Sonoma Coal Project is worth between $2,858,400,000 to $4,124,640,000, or roughly $3.5 billion, gross value based on the average export unit value of steaming and coking coal in 2004-2005.[xxi]

Despite the massive emissions of greenhouse gases involved, both the Isaac Plains Coal Mine and the Sonoma Coal Project were determined not to be controlled actions and no conditions were imposed upon them to reduce or off-set their greenhouse gas emissions. The decision in this case shows that the emissions from the use of the coal from the mines are effectively not regulated under the EPBC Act, which indicates an important gap in the ability of that Act to genuinely protect the matters of national environmental significance it recognises as warranting protection.

Were projects such as the Isaac Plains and Sonoma Coal Project regulated under the EPBC Act, the greenhouse gas emissions both within Australia and overseas could be regulated by conditions requiring the use of low emissions technology. Such an approach would complement the other greenhouse emission reduction programs currently being undertaken by the Australian Government. Use of the EPBC Act in this way would also be consistent with the objective of promoting low emissions technology in the recent Asia-Pacific Partnership on Clean Development and Climate[xxii] and the COAG Plan For Collaborative Action on Climate Change. On the basis of these considerations, a greenhouse trigger should be included in Part 3 of the EPBC Act or in the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth).

The need for a greenhouse trigger in the EPBC Act has been debated previously. The Australian Government investigated a greenhouse trigger in 1999-2001. It released a consultation paper and draft regulations on the greenhouse trigger but failed to implement it.[xxiii] Under the draft regulation the trigger proposed was more than 500,000 t CO2–e in any 12 month period. The Australian Network of Environmental Defenders Offices (ANEDO) has also recommended such a trigger based on 100,000 t CO2–e per annum for all greenhouse emissions (that is, including existing emitters and not merely new emitters).[xxiv] Similarly, the Shadow Environment Minister, Anthony Albanese MP, proposed a greenhouse trigger for the EPBC Act in a private members bill, *Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005*. The Bill proposed a new s25AA of the Act to provide a trigger based on emissions of 500,000 t CO2–e and an additional threshold of establishing a "significant impact" on the environment.

The need for a greenhouse trigger in the EPBC Act and how it might be framed is an important topic deserving further consideration both by the Australian Government and in the professional literature. Further analysis in the professional literature might attempt to calculate the greenhouse emissions from projects that have been approved under the EPBC Act since its commencement.[xxv] A cursory glance at the list of referrals under the Act[xxvi] indicates that many coal mines and petroleum projects have been approved. Few appear to have been assessed for greenhouse emissions.

Conclusion

This case shows the need for a specific greenhouse trigger in the EPBC Act. While the outcome indicates that there is no effective mechanism in the EPBC Act for regulating even large emissions of greenhouse gases at the present time, this is an issue that is likely to see further litigation and legislative action in the future. The Australian, State and Territory Governments accept that climate change is a pressing policy issue that requires a comprehensive and effective response. The current legal regime does not provide for effective regulation of even enormous emissions from projects such as coal mines. Clear gaps and deficiencies in regulatory systems tend to be filled over time and this gap is unlikely to be an exception.

FOOTNOTES

[i] Junior counsel for Wildlife Whitsunday in the case discussed in this article. The law and facts in this article are stated as at 26 September 2006.

[ii] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors* [2006] FCA 736 (Dowsett J). Background documents for this case, including the Application for an Order of Review and the affidavit filed by the Minister's delegate, are available at http://www.envlaw.com.au/greenhouse.html (viewed 26 September 2006).

[iii] See the EPBC Act homepage at http://www.deh.gov.au/epbc (viewed 26 September 2006) and McGrath C, "Key concepts of the EPBC Act" (2005) 22 EPLJ 20.

[iv] *Minister for the Environment & Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.

[v] One referral included some information on the greenhouse emissions during the mining process.

[vi] See *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5], [37], [69] and [216]; and *Mees v Kemp* (2005) 141 FCR 385 at [58].

[vii] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors* [2006] FCA 736 at [72].

[viii] See generally, Pittock B (ed), *Climate Change: An Australian Guide to the Science and Potential Impacts* (Australian Greenhouse Office, Canberrra, 2003); Pittock B, *Climate Change: Turning Up the Heat* (CSIRO Publishing, Melbourne, 2005); and Allen Consulting Group, *Climate Change Risk and Vulnerability: Promoting an Efficient Adaptation Response in Australia* (Australian Greenhouse Office, Canberra, 2005).

[ix] See the Council of Australian Governments (COAG), *COAG Communique – 10 February 2006, Attachment C – Plan For Collaborative Action on Climate Change* (COAG, Canberra, 2006), p 1. Available at http://coag.gov.au/meetings/100206/attachment_c_climate_change.pdf (viewed 18 June 2006).

[x] Australia has a target of limiting its greenhouse gas emissions between 2008-2012 to 108% of its 1990 emissions levels under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. Done at Kyoto on 11 December 1997. Signed for Australia at New York, 24 April 1998. Entry into force generally on 16 February 2005. Not yet in force for Australia. Reported in [2005] ATNIF 1.

[xi] See the *Australian Greenhouse Office, National Greenhouse Gas Inventory 2004* (*AGO, Canberra, 2006). Available at http://www.greenhouse.gov.au/inventory/2004/index.html (viewed 16 June 2006).*

[xii] In relation to effective environmental policy generally, see Dovers S, *Environment & Sustainability Policy: Creation, Implementation, Evaluation* (The Federation Press, Sydney, 2005) and Gunningham N and Grabosky P, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, Melbourne, 1998), Ch 6.

[xiii] For this reason these facts do not appear in Dowsett J's judgment.

[xiv] The majority of the greenhouse emissions from these projects will occur overseas when the coal is used. The bulk of emissions would, therefore, not be accounted for as part of Australia's greenhouse emissions; however, as indirect impacts of the mines the emissions can still be regulated under the EPBC Act in accordance with the principle in the Nathan Dam Case.

[xv] AGO, *Australian Greenhouse Office Factors and Methods Workbook*, (AGO, Canberra, August 2004). Available at http://www.greenhouse.gov.au/workbook/pubs/workbook.pdf (viewed 30 October 2005).

[xvi] Total emissions resulting from the use of a fuel including those emissions associated with the production and transport of the fuel.

[xvii] Based on the formula, Greenhouse Gas Emissions (GHG) (t CO_2–e) = Q x EC x EF/1000; where: Q = the quantity of fuel burnt in tonnes; EC = the energy content of fuel in GJ/tonne or GJ/kL; EF = the relevant emissions factor. According to Table 1, p 6 of the AGO workbook, the energy content of washed black coal for Queensland electricity generation is 27.0 GJ/t and the full fuel cycle emissions factor is 93.9 kg CO_2-e/GJ.

The energy content of coal used in the steel industry is 30.0 GJ/t and the full fuel cycle emissions factor is 112.8 kg CO_2-e/GJ.

[xviii] Total greenhouse gas emissions, including landuse change, in Australia in 2003 were 550 Mt CO_2–e.

Source: Australian Greenhouse Emissions Information System (AEGIS). Available at http://www.greenhouse.gov.au (viewed 30 October 2005).

[xix] Total global greenhouse gas emissions from burning of fossil fuels in 2003 were 24,983 Mt CO_2–e.

Source: International Energy Agency, *Key World Energy Statistics 2005* (IEA, 2005), pp 44-45. Available at http://www.iea.org (viewed 30 October 2005).

[xx] See the previous three footnotes for the background data for these figures.

[xxi] Australian Bureau of Agricultural and Resource Economics, *Australian Mineral Statistics – June Quarter 2005* (ABARE, Canberra, 7 September 2005), p 8. Available at http://www.abareconomics.com (viewed 20 October 2005).

[xxii] See http://www.asiapacificpartnership.org/ (viewed 1 June 2006).

[xxiii] See http://www.deh.gov.au/epbc/about/amendments/greenhouse.html (viewed 23 November 2005)

[xxiv] ANEDO, "Possible new matters of national environmental significance under the EPBC Act" (ANEDO, Sydney, 2 May 2005), pp 22-28.

[xxv] Building on the work of Fallding M, "Predicted Impacts on Energy and Greenhouse Gases in Hunter Valley Coal Mining Environmental Impact Statements" (1999) 6 AJEM 219.

[xxvi] See the public notice website at http://www.deh.gov.au/epbc/index.html

Is the Precautionary Principle Still Alive in North Queensland?

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Ever since the decision in *Leatch v National Parks and Wildlife Service & Ors (1993) 81 LGERA 270*, there has been some acceptance of the precautionary principle as a matter of common sense applicable to environmental decision making. Recent decisions in the NSW Land and Environment Court have reaffirmed the importance of the concept. In contrast, a recent decision of the Supreme Court in Queensland rejected the application of the precautionary principle in environmental decision making where it was not explicitly referred to in the relevant statute. This article explores those decisions and why those Courts have come to different conclusions about such a key environmental concept.

What is the precautionary principle?

The precautionary principle was accepted internationally in 1992 at the UN Conference on the Environment in the Rio Declaration on the Environment and Development.[i] Following the Rio Declaration in 1992, the Commonwealth and State Governments agreed to the Intergovernmental Agreement on the Environment (IGAE) which accepted the precautionary principle as one of the four principles of ecologically sustainable development.[ii] The IGAE states that where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In application of the precautionary principle, public and private decisions should be guided by:

careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

an assessment of the risk weighed against the consequences of various options.[iii]

Leatch decision

The precautionary principle was first applied in the decision of *Leatch v National Parks and Wildlife Service & Ors (1993) 81 LGERA 270.* In Leatch, Stein J made the following comments:

> "In my opinion the precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision makers should be cautious."[iv]

His Honour went on to hold that while there is no express provision requiring consideration of the precautionary principle, consideration of the state of uncertainty regarding a species is consistent with the purpose of the Act.[v]

Recent NSW judgments on the issue:

Two recent decisions of the Land and Environment Court have further examined the application of the precautionary principle.

An informative discussion of the case law on the precautionary principle is set out by McClellan CJ in *BGP Properties v Lake Macquarie CC [2004] NSWLEC 399; 138 LGERA 237*. After discussing Leatch and *Greenpeace v Redbank Power (1995) 86 LGERA 143*, the Chief Justice said:

"In *Nicholls v Director-General of National Parks & Wildlife (1994) 84 LGERA 397*, Talbot J was apprehensive about the role of the precautionary principle in environmental decisions. Describing it as being "framed appropriately for the purpose of a political aspiration," his Honour said that "its implementation as a legal standard could have the potential to create interminable forensic argument" (at LGERA 419). With respect, I do not share his Honour's perspective. In *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources [2004] NSWLEC 122* I said that statutory recognition of the precautionary principle has made it:

> … a central element in the decision making process and cannot be confined. It is not merely a political aspiration but must be applied when decisions are being made under the *Water Management Act* and any other Act which adopts the principles...In my opinion, by requiring a consent authority (including the Court) to have regard to the public interest, s79(C)(e) of the EP&A Act obliges the decision-maker to have regard to the principles of ecologically sustainable development in cases where issues relevant to those principles arise. This will have the consequence that, amongst other matters, consideration must be given to matters of inter-generational equity, conservation of biological diversity and ecological integrity. Furthermore, where there is a lack of scientific certainty, the precautionary principle must be utilised. As Stein J said in *Leatch*, this will mean that the decision-maker must approach the matter with caution but will also require the decision-maker to avoid, where practicable, serious or irreversible damage to the environment."

A recent decision of Preston CJ in Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133 considered the precautionary principle at length in its application to a dispute involving public health, safety and the environment. His Honour's judgment which was reproduced in part in the June 2006 edition of Impact, sets out a detailed explanation of the precautionary principle, its history and application. In particular, he stressed the need for scientific evidence to analyse the threat at issue. His Honour stated that the function of the precautionary principle is to assume that there are serious threats and take those into account in decision making.[vi] It shifts the burden of proof to a proponent to show there are no threats of serious environmental damage.[vii] The precautionary principle also permits the taking of preventative measures, sometimes dictating an adaptive management approach related to proportionality of the harm.

Alliance to Save Hinchinbrook v Environmental Protection Agency

In the *Alliance to Save Hinchinbrook (ASH) v Clive Cook, Director QPWS Northern region as delegate of CEO of Environment Protection Agency & Ors [341 of 2005],* ASH argued that given the principles espoused in *Leatch* and *BGP Properties v Lake Macquarie CC* decision amongst others, that the precautionary principle should be a relevant consideration for a decision maker making a decision under the *Marine Parks Act 1982*. This argument was rejected by the Court.

The ASH case related to the approval by the EPA of the building of two breakwaters some 100 metres long and 200 metres long respectively at the Port Hinchinbrook resort and boat harbour to reduce silt deposition in the harbour access channel and reduce the requirement for maintenance dredging. The breakwater has been designed to reduce the ongoing maintenance dredging without excessive capital costs. However ASH has been concerned about whether there is any evidence to show that the dredging will be reduced and whether or not the breakwater will increase boat usage in the area which will lead to greater risks for dugongs and other marine species in the area. The breakwater will be placed into the Hinchinbrook channel and is adjacent to the Great Barrier Reef World Heritage area and known breeding ground for dugong and other marine species. The case is the latest litigation in which the EDO has been involved relating to the Port Hinchinbrook development at Cardwell in Far North Queensland.[viii]

ASH, in its appeal argued that the decision maker should have considered the precautionary principle under the *Marine Parks Regulation* at s.9AB(2)(g), namely, to have regard to the likely effects of any proposed use in the location for which the application is made on the areas adjacent to the location and the environment in that:

(i) In determining the effects of the proposed breakwaters on net dredging in the vicinity, the first respondent purported to make conclusions on likely effects of the proposal when the information on which the purported conclusion was made was indicative only and did not allow a conclusion as to what were the likely effects;

(ii) In determining such likely effects, the first respondent failed to apply the precautionary principle which was a requirement arising by application of the common law and/or as a matter of statutory construction;

In particular, the information provided by the developer indicated that it was not known how much less dredging would be required by the building of the breakwaters. ASH submitted that subsection 9AB(1), by its reference to "may consider any relevant matter" makes it less likely that the precautionary principle will be held to be extraneous. The *Marine Park Act* and the Regulation are concerned with the orderly and proper management of a State Marine Park and the protection of the environment in that park and beyond. It is unlikely that it would be held to be extraneous to decision making under that legislation that the decision maker apply an appropriate degree of caution, the precautionary principle, to that decision making. ASH submitted that the second respondent has shown a cavalier attitude to the need for properly field researched evidence and an appropriate degree of certainty in that decision making so far as it relates to the issue of the reduction in maintenance dredging which would ensue if the breakwaters were built.

Judgment in ASH case

His Honour Justice Jones found there was no specific requirement to consider the precautionary principle in the *Marine Parks Act* and *Marine Parks Regulations*. His Honour found that most of the earlier decisions *(Greenpeace v Redbank Power, BGP Properties)* applied the precautionary principle because there were specific statutory provisions which required its consideration.[ix] His Honour discussed the Respondent's contention that to include the precautionary principle would give rise to an irrelevant consideration. In particular reference was made to the judgment of Sackville J in *Friends of Hinchinbrook Society Inc. v Minister for Environment (1997) 142 ALR 632*, where the court found that the precautionary principle relates only to the proper construction of the legislation rather than a policy that flows from a national strategy.[x] His Honour Justice Jones found that where no statutory definition of the precautionary principle existed and no express obligation to consider it was contained in the legislation, there was no error in failing to apply the precautionary principle.[xi] ASH's other grounds of appeal were also dismissed.

Conclusions

Queensland jurisprudence on environmental law is still in its early stages. The experience of the EDO to date has shown that it is necessary to have legislation that is as prescriptive as possible on issues like the precautionary principle. The absence of the precautionary principle from legislation can otherwise be fatal in the environmental decision making process. Unfortunately there is still legislation such as the *Biodiscovery Act 2004*, and other Queensland legislation such as the *State Development and Public Works Organisation Act 1974* that have no references to the precautionary principle. However as NSW Courts have been able to interpret legislation to imply a reference to the precautionary principle, it is hoped over time that this will assist in the development of Queensland law on the issue.

FOOTNOTES

i Rio Declaration- principle 15.
ii IGAE can be accessed at http://www.deh.gov.au/esd/national/igae/index.html
iii IGAE at 3.5.1
iv At 282
v At 282-283.
vi At 152
vii At 154
viii See in particular Friends of Hinchinbrook Society Inc v Minister for Environment (1997) 142 ALR 632.
ix At 31.
x At 32

Environment and Planning: Community involvement and appeal rights limited by Part 3A of the EP&A Act

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THE TERMS OF THE *Environmental Planning and Assessment Act 1979 (NSW)* (the Act) have encouraged involvement in planning decisions – through public participation rights with respect to the original decision-making process, merits appeal rights for objectors in relation to "designated development", opportunities to be heard when a developer appeals against refusal and open standing for any person to seek an order from the specialist Land and Environment Court to remedy or restrain a breach of the Act. This legislation recognises that the community can and should have a significant voice in planning decisions.

Increasingly, however, the NSW Government is moving away from the recognition that local communities have relevant expertise and interests in planning outcomes, that decision-makers sometimes get it wrong, and that preservation of the environment sometimes outweighs the importance of economic growth. The introduction of Part 3A into the Act by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* reflects the philosophy that 'government knows best' and the idea that planning decisions are technical matters that do not gain from substantial community involvement.[i]

In effect, Part 3A of the Act dramatically reduces the involvement of the community in the original decision-making process and seeks to reduce any risk of concerned individuals or groups delaying or preventing significant development by limiting the grounds on which, or the circumstances in which, they can seek merits or judicial review. Instead, the Minister for Planning and the Director General, Department of Planning, maintain the power to make all key decisions regarding significant development, with advice from 'expert panels', limited input from other key agencies and little opportunity for effective criticism where the bureaucracy 'gets it wrong'.

Classification of major projects

The assessment process under Part 3A of the Act will apply to the most significant types of development. These are also generally the types of development that will have the greatest impact on the environment. Development can be declared as a project to which Part 3A applies in two circumstances:

- where the development is major infrastructure development or other development that, in the opinion of the Minister, is "of State or regional environmental planning significance"; and
- matters that would previously have been dealt with under Part 5 of the Act where the proponent is also the determining authority and would otherwise have to prepare an environmental impact statement (s.75B(2)).

To capture most significant types of development, the government amended the State Environmental Planning Policy (State Significant Development) 2005 and renamed it the State Environmental Planning Policy (Major Projects) 2005. Under this SEPP, development, that is, in the Minister's opinion, of a kind described in Schedules 1 to 3 or 5, will generally be treated as development to which Part 3A applies (cl 6).

The new approval process is characterised by a departure from the principles that the community would expect to find in a good decision-making process: that is, consistency, transparency, accountability and certainty. The loss of principle from the decision-making process itself limits the extent to which the community can become involved in that process.

Finding out about the proposal

The new provisions potentially limit how much the community can discover about the proposed development.

First, the need for advertisement of Part 3A projects in the local area, rather than their appearance on the Department of Planning's website, is limited to circumstances where the owner's consent is not required (cl 8F).[ii]

Under the Environmental Planning and Assessment Regulation 2000 (the Regulation), the information and documents that must accompany an application for development consent are clearly set out (cl 50 and Sch 1). However, these requirements may not apply to applications for approval under Part 3A. Rather, the proponent only has to include a description of the project and "any other matter required by the Director General" (s.75E).

There is neither further explanation in the Act or Regulation of what such requirements might be, nor guidelines that cover this issue. Members of the community can therefore have no expectation that certain information will be found in the application, or that documents addressing particular concerns will be attached. This can leave members of the community 'out in the cold' and result in increasing suspicion and antipathy towards major development and government.

Concept plans

The capacity for the community to give meaningful input is further weakened where the Minister authorises or requires the proponent to submit a concept plan for approval. Concept plans are new to NSW planning law and, as the name suggests, are premised on the basis that "a detailed description of the project is not required".

Concept plans only need to outline the scope of the project and development implementation and provide any further details required by the Director General. While the environmental assessment requirements apply to the concept plan itself, once approved it is up to the Minister to determine what further environmental assessment might be required for particular aspects of the project (s.75P).

The problem for the community can be that the concept plan is itself so broadly drawn and leaves so much detail for later in the process that only broad comments (that consequently hold little weight) can be made. Moreover, it is the larger, more complex proposals that are likely to be the subject of a concept plan at the first stage.

An example of this was provided by the recently proposed desalination plant at

Kurnell, the environmental assessment for which dismissed potential impacts with broad statements that measures would be developed to minimise impacts. Other than raising concerns that the yet-to-be developed measures might not have this effect, such assessments leave little room for meaningful community input.

Setting the agenda: defining what impacts the proposal should address

In a similar vein, expectations of what will form part of any environmental assessment disappear under Part 3A. The provisions of the Regulation pertaining to Parts 4 and 5 of the Act set out clearly the matters that must be addressed in an environmental impact statement (or statement of environmental effects). This allows the community to prepare accurate information about the impact on the local environment that can be referred to at the submission stage. Early preparation is particularly important for the types of significant, often complex, developments that are subject to a requirement for an environmental impact statement.

However, under Part 3A the consistency of what will be required has been removed. The Director General now has largely unfettered discretion with respect to the environmental assessment process. It is the Director General who prepares the environmental assessment requirements for the proponent (s.75F(2)). Section 75F does require the Director General to "have regard to" any ministerial guidelines that have been published on this topic. The Director General must also consult with "relevant public authorities" and "have regard to" the need for the environmental assessment requirements to assess key issues raised by those authorities. Unsurprisingly, there is no formal mechanism for the community to propose that particular issues should be included at this stage.

Despite these vague obligations, the discretion of the Director General is almost unfettered in this regard. There is no obligation on the Minister to publish guidelines, the circumstances under which public authorities will be considered "relevant" is not set out in the legislation and the failure of the Director General to consult with the public authorities or have regard to these issues will not be treated as a procedural error that might invalidate an approval (s.75X(5)).

Limited impact of community involvement: the effect of submissions

The Director General will notify the proponent of the environmental assessment requirements, and the proponent will then conduct the necessary environmental assessment. Again, it is the Director General who determines the adequacy of the environmental assessment and decides whether to require the submission of a revised assessment. The community will only have an opportunity to raise its concerns after the environmental assessment has been "accepted" by the Director General, who will then make the assessment publicly available for at least 30 days, during which any person or public authority may make a written submission (s.75H).

Given that the Director General has already concluded that the environmental assessment is adequate by this stage, it is questionable how much impact any submission would have. The evidence for this will be the extent to which the Director General requires proponents to respond to the issues raised or requires a preferred project report to outline proposed changes to minimise environmental impacts, or a revised statement of commitments (s.75H(6)).

It is true that the submissions (or a summary of submissions) will be attached to the Director General's environmental assessment report, which provides the information on which the Minister will make a decision to approve or disapprove the carrying out of the project (ss.75I, 75J, cl 8B(d)). However, it is unrealistic to expect that the Minister will place more weight on community submissions than will the Director General, given that the Minister will be guided by the Director General's report when making the decision to approve or disapprove the project.

Technocratic decision-making

The move towards in-house governmental, technocratic decision-making which sidelines the significance of local community input is equally evident in the Minister's ability to constitute a panel of experts or officers to assess particular aspects of a project.

There are no criteria for the appointment of 'experts' to a panel, excepting that they are not to include officers having regulatory functions in connection with the project. The panel of officers will simply be made up from nominees of the CEOs of the public authorities that the Minister nominates to constitute the panel.

There is discretion for such a panel to receive or hear submissions but no specific requirement to do so (s.75G(4)). So the panel can report back after looking at generalist, paper-based evidence but, presumably, without reference to local conditions or knowledge, if it chooses.

Significance of the assessment

The capacity for the local community to influence the final outcome of major development becomes even more important when it is recognised that Part 3A projects are exempted from the need to obtain many of the authorisations required under other legislation (s.75U). These projects will therefore be able to effectively ignore such matters as local heritage, Aboriginal objects and places and controls on native vegetation, to the extent that no conditions are imposed dealing with these matters.

These exemptions indicate the emphasis of the NSW Government on ensuring that major infrastructure and other development occurs over and above the preservation or enhancement of the NSW environment. Indeed, even where authorisations or licences are still required (such as environment protection licences), s.75V ensures that they cannot be refused and must be substantially consistent with the approval, notwithstanding that this might permit considerable pollution, for example. Proper assessment of these issues relies on effective inter-agency protocols regarding consultation during the assessment process.

Appeal rights for objectors

Part 3A does continue, generally speaking, to permit merits appeal rights for objectors with respect to development that would amount to designated development if it were not being dealt with under Part 3A (s.75L). The time limit for such an appeal is 28 days from notice of the determination. Likewise, if the proponent appeals against a refusal, the Minister is to give notice of that appeal to each objector who may then, within 28 days, apply to the Land and Environment Court to be heard as if they were a party to the appeal (s.75K(3)).

However, these appeal rights are subject to a number of exceptions. No such appeal rights will apply if:

- there has been approval of a concept plan;
- the project has been the subject of a commission of inquiry or a report by a panel of experts;[iii] or
- the project is a "critical infrastructure" project.

Where a concept plan or an expert report is concerned, the Act does not prevent an objector seeking a judicial review of the decision. However, in keeping with the vague, discretionary nature of the Part 3A decision-making process, the Act reproduces the constraint on procedural grounds for review that previously applied to state-significant development.

Section 75X(5) states: "The only requirement of this Part that is mandatory in connection with the validity of an approval of a project or of a concept plan for a project is a requirement that an environmental assessment with respect to the project is made publicly available under section 75H".

It is clear from this analysis that the greater the potential environmental impact of a proposal, the fewer rights of involvement the community has, either through the decision-making process, or through legal remedies where environmentally damaging proposals are approved.

Critical infrastructure

This trend reaches its high point with the concept of "critical infrastructure projects". Projects may be declared critical infrastructure projects if they are of a category which the Minister considers "essential for the State for economic, environmental or social reasons".

Because these projects are viewed as essential, the government wants them to go ahead in some form or other, despite any objections. Effectively, submissions are limited to the form in which they will be approved, rather than whether they will be approved. Naturally, the scale and impact of these proposals are often likely to be contentious in at least the local area, if not statewide. The scale of opposition to the Kurnell desalination plant, declared to be a critical infrastructure project, is a case in point.

In these circumstances, Part 3A attempts to remove both appeal and judicial review rights through what is effectively a privative clause. Section 75T attempts to prevent the use of the open-standing provisions of the *Environmental Planning and Assessment Act 1979, the Protection of the Environment Operations Act 1997* and the general jurisdiction of the Land and Environment Court in relation to planning and environmental laws. Proceedings can only be taken in these circumstances with the approval of the Minister. The likelihood of such approval being granted would appear slim, especially where it is in respect of the Minister's decision.

Section 75T extends to attempts to remedy or restrain breaches of the Act in respect of a critical infrastructure project (including its declaration as either a project to which Part 3A applies or a critical infrastructure project); the enforcement of conditions of approval; and attempts to remedy or restrain breaches of other Acts, where some form of authorisation had to be obtained (such as an environment protection licence).

Conclusion

The removal of certainty, consistency, and accountability from the planning process with respect to major projects is unlikely to result in better decisions. Part 3A inherently admits that there will be controversy surrounding many of these developments and then sidelines the objectors, rather than properly engaging with them. There has been a move towards a discretionary, technocratic form of decision-making that places little value on local knowledge or concerns.

The limited capacity for members of the community, or even other environmental agencies, to have their voices heard and the reduced rights to seek justice in the Land and Environment Court also suggest that the NSW Government considers that development ranks ahead of the environment, whether that development is sustainable or not.

The irony of this new technocratic approach is that the lack of procedural or legal remedies means that objectors are increasingly likely to use the political arena to fight development proposals. The declaration of the Kurnell desalination plant as critical infrastructure and use of the Part 3A process, resulting in public outcry and opposition in several forms, and the subsequent political debate and 'shelving' of the project, highlights the ineptitude of a process that seeks to exclude public participation from the outset. Such public campaigns may, however, prove to be the means of influencing the major planning decisions of the future.

FOOTNOTES

i. In a further development, the *Environmental Planning and Assessment Amendment Act 2006* received its assent on 3 April 2006. The Act provides, among other matters, for the Ministerial appointment of "planning assessment panels" to take over councils' planning and development functions where the council's performance is "unsatisfactory". The amendments give the panel discretion to carry out meetings in public, (unless the order appointing it requires the public conduct of specified business).

ii. This applies where a public authority is the proponent, or the project is a critical infrastructure project or a mining or petroleum production project.

iii. But note that the exceptions do not specifically mention reports by a panel of officers under s.75G.

Community Litigants in the Queensland Planning and Environmental Legal System

JO-ANNE BRAGG

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Who are community litigants and why are they important?

Community litigants are parties to court proceedings who are motivated to protect environmental values or to advocate for a feature of value to the community. They may be individuals or groups. They are not there to gain financially from development or to fulfil a statutory obligation.

Community litigants most frequently use the Court to defend or challenge a local government's decision to approve an impact assessable development application. The perspectives and issues of community litigants in relation to the Court are often overlooked or at least overshadowed by the views of more frequent users[i] of the Court such as councils and developers.

This article seeks to reduce that imbalance and will:

- give examples of the outcomes community litigants achieve;
- look at impediments to community litigants launching appeals/applications in Court and issues pertaining to the Court process; and
- propose improvements to the Court processes that might benefit community litigants.

1. Outcomes for Community Litigants

1.1 Development application is modified or conditions improved

The community litigant rarely defeats the development application in Court, however, often achieves changes to the development application or improvements to conditions.[ii] This was the case in *Friends of Springbrook Alliance Inc. and Ors v Gold Coast City Council & Anor*.[iii] This matter concerned a 14 hectare parcel of land on Springbrook plateau which was mostly covered with rainforest. The site already contained 4 tourist cabins in that part of the forest nearest the road and a nursery on cleared ground. Springbrook is widely recognised by ecologists as having biodiversity values equivalent to the natural values of the nearby World Heritage Areas.

After Friends of Springbrook Alliance, ("FOSA"), launched the appeal, their ecologist Dr Mike Olsen inspected the site and identified thousands of rare plants which would have been destroyed by the construction of the proposed additional cabins and road extension. In consequence, the developers changed the development application so as to move the location of the tourist cabins out of the forest and into already cleared land, preventing the destruction of thousands of rare plants. The application was further modified after the community litigants' experts noticed, during a site inspection, that part of the wastewater system for existing cabins was malfunctioning. The wastewater system was then proposed to be improved and relocated.

At the hearing, Judge Newton considered the modified application and heard arguments on behalf of FOSA based on provisions in the local structure plan that expressed the importance of natural values in that Springbrook locality. His Honour dismissed the appeal by FOSA. The developer then changed the development application again, including proposing to roof the proposed recreation facility. A number of the original conditions were varied, including insertion of a new condition that the proposed ancillary recreational facility for the site could only be used by a maximum of 12 guests staying at the cabins. The result was disappointing for FOSA. While the extra tourist cabins and recreation facility might seem to have a small footprint, the decision gave further encouragement to other similar ventures on the narrow plateau. Cumulatively those developments were eroding the natural values of the area and altering the type of tourism.

1.2 General Benefits of Submitter Appeals

Well-run submitter appeals have other more general benefits to community litigants as a whole. Councils and developers are reminded that it may be worthwhile to meet the valid concerns of submitters to avoid appeal rather than doing a quick job. An experienced planner who is employed by a local government in development assessment wrote to Environmental Defenders Office (Qld) in April 2006. The planner stated that submitters' views were routinely overlooked by planners during the development assessment process as submitters generally lacked the resources to back up their submission in Court. The planner opined that the whole development assessment process was heavily biased towards the developers and those with the biggest financial backing.

1.3 Occasional Wins

Some of the most prominent wins by Queensland community litigants in recent years on environmental matters have been in the Federal Court,[iv] however community litigants occasionally successfully defeat development proposals in the Queensland Planning and Environment Court. For example in Northern Queensland in 2004 the Yorkey's Knob Residents Association successfully appealed against the approval of a coastal development as the site was in a constrained development area under the planning scheme and the height and bulk was held to be against residents' reasonable expectations.[v] Also in 2000, a community group, Save Our Riverfront Bushland,[vi] was instrumental in defeating a major development application approved by the Brisbane City Council which included unsightly development on a prominent ridgeline. In 2002 Stradbroke Island Management Organisation[vii] successfully opposed an application to develop a tourist resort on the site of the Point Lookout Hotel on North Stradbroke Island, though only after going to the Court of Appeal. The proposal failed to comply with development standards in the Development Control Plan regarding vegetation retention, building height, building length, boundary clearance and site coverage.

1.4 Co-responding to support and check local government

Occasionally a community litigant elects to become a co-respondent when the local government has reject-

ed an application and the developer appeals. This is often to support the local government but also to ensure that the community view point is still represented if the local government decides for political or financial reasons to settle the appeal with the developer. So for example, the Karawatha Forest Protection Society joined as co-respondent to a developer appeal after the Brisbane City Council rejected a residential development in land subject to environmental constraints over the road from the 900 ha Karawatha Forest.

1.5 Outcomes helped by costs rules and legal standing provisions

Community litigants would rarely venture into Court if there were not legislative provisions to the effect that each party pays his or her own costs, rather than the general rule in other jurisdictions that costs follow the event. These favourable costs provisions[viii] are essential for community participation in a public interest jurisdiction. None of the above outcomes could be achieved if there were not favourable legal standing rules under the *Integrated Plannng Act 1997 (Qld)* pertaining to submitter appeals[ix] and enforcement[x] in the Planning and Environment jurisdiction. However, impediments to community litigants using the Queensland Planning and Environment Court include the overwhelming number of development applications and the lack of legal and expert resources.

2. Impediments to Court and issues with Court Process

2.1 Number of development applications

The rate of development in Queensland is overwhelming with South East Queensland the fastest growing region in Australia.[xi] During March 2005, a total of 591 development applications (all categories) were lodged with local governments in Queensland alone, of which 279 were in South East Queensland.[xii] The environmental impacts include: increasing degradation of Moreton Bay;[xiii] unsustainable demands on our water resources evident in current public discussion of the water crisis; and koalas approaching extinction in our region. The number of development applications means that many volunteer community groups are unable to fully respond to even major development proposals, even though once built the developments are effectively permanent. To give an example, in 2003 the Gold Coast and Hinterland Environment Council ('GECKO') lodged three planning appeals that I am aware of but only had the resources to pursue one to a major hearing and that was jointly with FOSA in the Springbrook case as described earlier. GECKO cannot handle many major projects at the one time as they also make submissions on numerous development applications, prepare detailed responses to draft planning documents, engage in public debate on environmental issues, and recently, lodge submissions with the Crime and Misconduct Commission. The Wildlife Preservation Society of Queensland Bayside Branch (Qld) Inc. ("WPSQ Bayside") is equally overworked.

In 2005/6 the WPSQ Bayside lodged two planning appeals and considered declaration proceedings in a third matter. Mr. Simon Baltais of the WPSQ Bayside said;

"The pace of development is too fast and disenfranchises our community. While our group has a lot of experience in the planning process we are a volunteer organisation and it is a great difficulty to go to Court opposing even a fraction of the developments.

The South East Queensland Regional Plan redirected population growth but made no effort to ensure it is ecologically sustainable or to slow it down so a continuation of the rate of development applications is expected. EDO Qld has asked for that Plan to be amended to reflect reduced population increase. The EDOs have also made a number of suggestions for amendment to the *Integrated Planning Act 1997 (Qld)* ('IPA') to increase the accountability of applicants for development approval in the development assessment process and reduce the demands on both council staff and community group time.[xiv] Local governments and State government alike are lacking resources to deal effectively with the rate of development and would benefit from less rapid development. Another major impediment to community litigants participation is the lack of legal and expert resources to assist them.

2.2 No Legal Aid for any planning or environmental matters in Queensland

WPSQ Bayside and GECKO mentioned above cannot afford to brief a legal team and bevy of experts in relation to all major development applications of concern to the community. Instead they rely on pro bono and reduced price assistance in order to run even a few cases. The funds they raise are from after-tax dollars donated by mums and dads supporters. The developers on the other hand can claim legal fees as a tax deductible business expense and often have a full team of lawyers and experts engaged prior to the lodgement of the development application. Lack of resources is a barrier to many cases being initiated or run to a hearing by community litigants in the Planning and Environment Court.

Queensland, in effect, does not grant legal aid in environmental or planning cases, even for important public interest cases. The last legally aided planning appeal dates back to 1992 and concerned a concrete batching plant at Maleny. A community group or individual seeking legal aid for a public interest planning case has next to no chance of aid. This is partly because other areas of law are given priority but also because the applicant for aid must pass not merely a test of the merits of the case but also a means test of income and assets with a very low threshold. For a group to pass the means test, Legal Aid adds up all the resources of members of the group and checks to see if the total is below the means test. To see whether Legal Aid might grant aid for a very important test case concerning nature conservation laws, EDO Qld assisted client Dr Carol Booth to lodge an application to Legal Aid Queensland. The application was for funds for an appeal to the Court of Appeal relating to a decision of the Planning and Environment Court on the first third party enforcement action under the *Queensland Nature Conservation Act 1992*. The merits of the case were not an issue as we had Senior Counsel's opinion, however, aid was refused on the means test. That Court of Appeal case[xv] was successful but other similar cases are not run at all due to the absence of legal aid.

By contrast, New South Wales does have legal aid for environmental matters which explains in part why community litigants in New South Wales over time have been able to effectively run a large number of important test cases in the Land and Environment Court. Legal Aid Queensland in 2005 conducted a review of its Civil Law Services and the EDOs lodged a submission calling for public funding for public interest environmental test cases. The Queensland Public Interest Law Clearing House, known as "QPILCH", lodged a submission calling for a more general public interest test case fund.

So now it is established that where community groups do make it to the Planning and Environmental Court it has been hard to get there and usually they lack the resources to engage experts on all relevant issues - how is their experience with the Court process?

2.3 Cost of Experts and link between Client and Expert

Some of the gravest problems with the Planning and Environment Court from the perspective of community litigants relate to expert evidence. As previously mentioned, affording to pay for experts is a barrier to participation in the Court by community litigants. Often the only way that experts are retained is by obtaining a vastly reduced price or free assistance which is available usually only from a small number of generous experts or where the client already has a good contact. Many community litigants come to Court with either no experts or with far fewer than their well resourced opponent. So for example, in the FOSA case mentioned above, the Appellants' experts accepted very reduced fees. Waste disposal was a major issue in that case, but the Appellants could not afford a waste water quality expert to debate with the developers' expert, nor a traffic expert.

The adversarial way in which expert evidence is adduced in the Court has been strongly criticised by Justice Davies, who considers the current system encourages expert witnesses to express opinions biased in favour of their client. Justice Davies has spoken out in favour of Court appointed experts on a number of occasions,[xvi] giving opinions that the financial link between client and expert is a powerful one and that the duty to the Court by the witnesses is not a sufficient counter balance.

Community litigants often complain to EDO Qld of bias by opposing experts and point to where a particular developer routinely uses the same experts. This issue of bias by experts is also a problem in the development application process that precedes court and the EDOs have proposed a few ideas to reduce the problem.[xvii] The idea of a Court appointed expert is attractive so that the Court does in fact obtain independent advice. Due to the financial constraints on community groups it is, however, important that in public interest cases community litigants do not have to pay a share of those witness costs. Another issue is that there is a lack of easy to understand information for community litigants using the Court.

2.4 Lack of information for Self-represented Litigants

Community litigants are often uncertain of and alarmed by the Court processes and have insufficient information. The problems are particularly acute when they are not legally represented. Self-represented litigants, in a small but unacceptable number of cases, are threatened with adverse costs by opposing solicitors when they have done nothing to risk a costs order or sometimes misleadingly treated. They are often worried to be even one day late complying with the Court timetable. In November 2004 I received a copy of a five page letter to a self-represented litigant sent by a well-known Brisbane firm seeking further and better particulars of the submission the self-represented litigant group lodged with council before the development application was decided. The letter stated the request was made pursuant to the directions order of the Court however that was a most unusual interpretation of the directions order to the extent it was misleading. The letter from the solicitors was generally worded in such a way that the self-represented litigant thought compliance was required under the directions order. To comply with this type of request would have taken the self-represented litigants eight to twelve hours of work at least.

It is very important that the Planning and Environment Court produce easy to understand information about Court procedure and the operations of the registry, including an outline of when the Court has the power to award costs against a party. I understand that such an information paper is in an advanced state of preparation, largely courtesy of Judge Alan Wilson's efforts. As well as putting this on the website, such information needs to be given to every party without legal representation when the appeal or application or notice of election is lodged so it can be read before any directions hearing is held. It would be useful to change the Notice of Appeal to refer to the availability of such an information paper or for the paper to be supplied with the Notice of Appeal so that submitters receiving that Appeal and trying to decide what course of action to take have basic information.

The Environmental Defender's Offices have prepared a Community Litigants Handbook[xviii] with detailed advice and guidance for litigants, even with example forms. This will be available on our website and for purchase in hard copy format for a modest fee.

2.5 Tension between Speed and Justice

Developers and their lawyers frequently argue for fast directions timetables and early hearings, often producing affidavits about how much interest their finance is costing them while the appeal proceeds.

Developers often try to create a sense of urgency about their appeal to hurry along the other parties. Self-represented litigants are in many cases badgered with ominous letters warning them not to be late with the Court direction timetable. However the developers will in many cases be late and breach the Court timetable when it suits them[xix] or leave an appeal unpursued for years .[xx] Similarly developers complain that local governments are slow in development assessment yet fail to promptly supply information requested by council, some taking more than ten months.

My observations are that Courts on occasions give too much credence to developers' demands for a fast timetable. This is partly because the Courts are laudably endeavouring to run the Court efficiently and deal with cases in a timely manner. However, this may lead to injustice for the community litigant who does not understand court procedure or forms and who may still be trying to find an expert at a reasonable fee. It is also worth remembering that community litigants, unlike developers and their lawyers, may have to work on their case in the evenings after work or on weekends. So for example, if the timetable gives two weeks to respond to a request for further better particulars, for a self-represented litigant not only will it take many times longer than an experienced professional, it will need to be done on the weekend. Two weeks is really four days for such a litigant. There are also provisions in the IPA pertaining to appeals that are too fast for submitter appellants, such as two business days to serve the Notice of Appeal!

There have also been a number of costs decisions that are harsh against submitters. For example, costs were awarded against a submitter who applied to respond to a developer appeal five weeks after the allowable time when it appeared that the council was going to settle with the developer.[xxi] Community people want to keep out of court if council is doing its job, so that decision is harsh.

2.6 Decisions made out of step with community values

Community litigants are frequently gravely disappointed by the Court's decisions. In most cases the community litigant (though not every submitter) has made detailed submissions on the planning scheme and seeks to uphold parts of the planning scheme. Sometimes, the reasons for these disappointing decisions are the strength of the expert evidence, or flexibility in the planning scheme skilfully argued by the developer. However in other cases disappointing results can be traced back to a lack of strong State policy on environmental issues where the system is lagging behind community values. For an example of deficits in State policy, there is no State Planning Policy on climate change or on biodiversity in general. There is however legislative scope for Judges considering impact assessable development applications in the Planning and Environment Court to consider and give weight to issues such as climate change that may not have been addressed in the relevant planning instruments or even in the list of issues by parties. I base that comment on the purpose of the *Integrated Planning Act* 1997 which is to seek to achieve ecological sustainability,[xxii] the definition of "impact assessment"[xxiii] which requires a broad consideration of the impacts of development by the decision maker and on the role of the Court in making a fresh decision in relation to the development application before the Court.

3. Improvements to the Court process to benefit community litigants

In conclusion, here are some proposals for making things better for community litigants in the Planning and Environment Court:

Getting to Court

Reduce the number of development applications in the system so the community has a more realistic chance to consider and if necessary appeal on development applications.[xxiv]

Restore Legal Aid and increase resources for Queensland public interest environmental and planning cases.

Court Process

Proceed with Court appointed experts but ensure community litigants are not priced out of Court.

Improve the Court website to include an information paper on the Court for self- represented litigants, including information on costs. We understand such a paper is close to completion.

Provide each self-represented litigant with a copy of the information paper and

Require Appellants to give a copy of the information paper to each submitter when serving the Notice of Appeal

Keep updated a Community Litigants Handbook[xxv] containing detailed advice.

Continue with and strengthen active public interest community legal services -Environmental Defenders Offices.

Set timeframes pertaining to court processes, such as directions timetables or time to serve the Notice of Appeal under the IPA, so as to relate to valid needs of submitters, not just developers' insistence on a speedy process

Courts to take a hard line against harassment and intimidation of self-represented litigants by solicitors.

Decision making and Outcomes

Invite the Court to consider the purpose of the IPA, the definition of impact assessment and the nature of the merit hearing where appropriate in impact assessable development applications on appeal. This is so the Court may explore and give weight to issues such as climate change that may not be dealt with in the planning documents or even the issues of the parties.

Urge the State government to produce strong State policies on important issues such as biodiversity and climate change.

FOOTNOTES

[i] I have endeavoured to estimate the number of community litigants appealing to the Queensland Planning and Environment Court during 2005. Of those 661 appeals/applications filed in Court during 2005 and notified to the Chief Executive of the Department of Local Government and Planning, a search reveals 142 submitter appeals/applications of which I identified 95 as "non commercial submitters". Not all that 95 would fit the definition of community litigants. However the figure of 95 does not include co-respondents.

[ii] On Wednesday 3 May 2006 law student volunteers at EDO Qld Emily Dux, Cecelia Mehl and Claire Bookless, later helped by Nancy Alexander, looked at every Planning and Environment Court decision listed for 2005-6 on the Queensland Court's website to identify the results for submitter appellants There were a total of 122 decisions in 2005 and 35 so far in 2006. Amongst those 157 decisions they identified 48 appeals on impact assessable development applications. Of the 7 cases which were finalised "non-commercial submitter appeals", in 5 cases the development was approved with changed conditions and in 2 cases the development was approved with conditions unchanged.

[iii] *Friends of Springbrook Alliance Inc. & Ors v Council of the City of Gold Coast & Anor* [2005] QPELR. 148. Judgement delivered by Judge Newton at Southport on 19 December 2003. There were three appellants also including Ken and Jeanette O'Shea and the Gold Coast and Hinterland Environment Council Inc. The appellants were represented by EDO Qld, barrister Paul Howorth, town planner Chris Buckley and ecologist Dr. Mike Olsen.

[iv] *Booth v Bosworth* [2001] FCA 1453.
Queensland Conservation Council Inc v Minister for the Environment and Heritage [2003] FCA 1.
Minister for the Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190.

[v] Yorkey's Knob Residents Association was represented by solicitor Kirsty Ruddock of EDO of Northern Queensland. Judgement was delivered by Judge White 1 April 2005.

[vi] *Wingate Properties Pty Ltd v Brisbane City Council & Ors* [2001] QPELR 272. The group was represented by barrister Stephen Keliher with solicitor Robert Stevenson of EDO Qld.

[vii] *Stradbroke Island Management Organisation Inc & Ors v Redland Shire Council & Ors* [2002] QCA 277. Counsel for SIMO was Mr Tom Quinn. Some years later the Hotel site is however being redeveloped.

[viii] s4.1.23 *Integrated Planning Act* 1997 ("IPA").

[ix] s4.1.28 IPA.

[x] s4.3.22 IPA.

[xi] South East Queensland Regional Plan 30 June 2005, page 1.

[xii] Local Government Association of Queensland, "Survey of Development Application Process" March 2006, page 1.

[xiii] Tarte D. and Greenfield P., "Developing the SEQ Healthy Waterways Strategy" 2006.

[xiv] Environmental Defenders Office (Qld) Inc, Environmental Defenders Office of Northern Queensland Inc. and Queensland Conservation "The review of the *Integrated Planning Act* 1997: Making the System Fairer and Achieving Ecological Sustainability", March 2006.

[xv] *Booth v Frippery P/L & Ors* [2006] QCA 074.

[xvi] For example of some of his views see *Reservilt v Maroochy* [2002] QCA 367 at [9].

[xvii] See 14 above.

[xviii] The Community Litigants' Handbook Using the Planning Law to Protect Our Environment has been prepared by Anita O'Hart, Project Officer and Solicitor on behalf of Environmental Defenders Office (Qld) Inc, and Environmental Defenders Office of Northern Queensland Inc. It is expected to be available in early June 2006.

[xix] *Land Far Pty Ltd v Brisbane City Council and Karawatha Forest Protection Society* No. BD 3534 of 2004.

[xx] *Jimbelung Pty Ltd v Beaudesert Shire Council & Ors* [2005] QPEC 032. The Appeal was filed on 17 April 1998 then notices of election lodged. The next step in the litigation by the Appellant was taken on 25 February 2005 when the developer's lawyers lodged an application for directions. By that time some members of the multiple respondents by election had died, a number of members of the Friend of Mount Tambourine Mountains Association Inc. had expended considerable energy on other major planning projects relating to the Mountain and the regulatory regime had changed. However Judge Alan Wilson granted the Appellant leave to proceed with the appeal under r389 Uniform Civil Procedure Rules.

[xxi] *King v Charters Towers City Council* [2003] QPEC 036.

[xxii] s1.2.1 IPA.

[xxiii] Dictionary IPA:
impact assessment means the assessment (other than code assessment) of—
(a) the environmental effects of proposed development; and
(b) the ways of dealing with the effects.

Climate Litigation First: Californian Attorney General Sues "Big Six" Automakers for Global Warming Damages

On September 20th Californian Attorney General Bill Lockyer filed a lawsuit against leading US and Japanese auto manufacturers, alleging their vehicles' emissions have contributed significantly to global warming, harmed the resources, infrastructure and environmental health of California, and cost the State millions of dollars to address current and future effects.

The complaint names as defendants: Chrysler Motors Corporation, General Motors Corporation, Ford Motor Company, Toyota Motor North America, Inc., Honda North America, and Nissan North America. The lawsuit is the first of its kind to seek to hold manufacturers liable for the damages caused by greenhouse gases that their products emit. Lockyer filed the lawsuit on behalf of the People of the State of California. The complaint alleges that under Federal and State common law the automakers have created a public nuisance by producing "millions of vehicles that collectively emit massive quantities of carbon dioxide." Under the law, a "public nuisance" is an unreasonable interference with a public right, or an action that interferes with or causes harm to life, health or property. The complaint asks the court to hold the defendants liable for damages, including future harm, caused by their ongoing, substantial contribution to the public nuisance of global warming.

As stated in the complaint, the automakers produce vehicles that emit a combined 289 million metric tons of carbon dioxide in the United States each year. Those emissions, the complaint alleges, currently account for nearly 20 percent of the carbon dioxide emissions in the United States and more than 30 percent in California. The defendants rank "among the world's largest contributors to global warming and the adverse impacts on California," according to the complaint.

Announcing the suit, Attorney General Lockyer said:
"Global warming is causing significant harm to California's environment, economy, agriculture and public health. The impacts are already costing millions of dollars and the price tag is increasing.

"Vehicle emissions are the single most rapidly growing source of the carbon emissions contributing to global warming, yet the federal government and automakers have refused to act. It is time to hold these companies responsible for their contribution to this crisis.

The complaint states: "Global warming has already injured California, it environment, its economy, and the health and well-being of its citizens.
"California is responding to the ongoing impacts and the inevitable additional future impacts of global warming. The State is spending millions of dollars on planning, monitoring, and infrastructure changes to address a large spectrum of current and anticipated impacts, including reduced snow pack, coastal and beach erosion, increased ozone pollution, sea water intrusion into Delta drinking supplies, response to impacts on wildlife, including endangered species and fish, wildfire risks, and the long-term need to monitor on-going and inevitable impacts.
"California has already begun to address the decline in the snow pack and earlier melting of the snow pack in order to avert water shortages and flooding in the future."
Dealing with global warming's harmful effects, the complaint adds, "will almost certainly cost millions more."

The suit is set against the backdrop of Lockyer's fight against the auto industry's attempt to invalidate California's landmark global warming regulations curbing tailpipe emissions. In their federal-court lawsuit, the automakers claim the regulations, adopted in 2005, are pre-empted by federal law. Lockyer is defending the rules against the industry's legal challenge.

According to Lockyer, the Bush Administration's inaction on global warming has forced California and other States to take action on their own. The U.S. Supreme Court is currently reviewing a lawsuit filed by Lockyer, 11 other Attorneys General, two cities and major environmental groups challenging the U.S. Environmental Protection Agency's (EPA) refusal to regulate greenhouse gas emissions. Numerous parties have submitted amicus briefs supporting the states, including climate scientists, three former EPA Administrators, former Secretary of State Madeleine Albright, and environmental and religious groups.

In addition, Lockyer, along with nine other State Attorneys General, the District of Columbia and the City of New York, filed a lawsuit earlier this year challenging the Bush Administration's new fuel economy standards for SUVs and light trucks. That complaint alleges the rules fail to address the effects on the environment and global warming.

California is particularly vulnerable to global warming impacts. According to a report recently submitted by the Climate Action Team to Governor Schwarzenegger and the California Legislature, the consequences of climate change in California will be "severe."

"We are seeing the harmful impacts of global warming today, and if we continue with 'business as usual,' we can expect to see more and larger impacts in the future," said Lockyer. "As a coastal State, an agricultural State, and a State that relies on its Sierra snow pack, California has an enormous stake in acting now to combat global warming."

Intergenerational and Intragenerational Equity

Featured below is an excerpt from a speech delivered by the Honourable Justice Brian J. Preston on Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia at the Law Society of NSW Regional Presidents Meeting on 21st July 2006.

1. Concepts of intergenerational and intragenerational equity

Intergenerational equity is an umbrella concept which is based on the premise that "the present generation is required to ensure that the health, diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations". A related concept is that of intragenerational equity or environmental justice which concerns equality within the present generation, such that each member has an equal right to access the earth's natural and cultural resources.

The concepts of intergenerational and intragenerational equity are integral elements of ecologically sustainable development, and have been incorporated into international law in instruments such as the 1975 Charter of Economic Rights and Duties of States and Principle 3 of the 1992 Rio Declaration.

There are three fundamental principles which form the basis of intergenerational equity, and hence are integral to sustainable development. First, the "conservation of options" principle requires each generation to conserve the diversity of the natural and cultural resource base in order to ensure that options are available to future generations for solving their problems and satisfying their needs. Second, the "conservation of quality" principle holds that each generation must maintain the quality of the earth such that it is passed on in no worse condition that in which it was received. Third, the "conservation of access" principle provides that each generation should give its members "equitable rights of access to the legacy of past generations and should conserve this access for future generations".
To determine whether a decision is likely to be consistent with the principles of intergenerational equity, specific guidelines for implementation need to be established. Young argues that governments "will need to rely on a wide range of policy approaches and institutional arrangements that are conducive to the maintenance of intergenerational equity".

2. Judicial decisions

2.1 Intergenerational equity

In the landmark decision of the Supreme Court of the Philippines, *Minors Oposa v Secretary of the Department of Environment and Natural Resources*, the plaintiffs were minors represented by their parents. They sought an order that the government discontinue existing and further timber licence agreements, alleging that deforestation was causing environmental damage. After the trial court dismissed the complaint, the plaintiffs filed an action for certiorari asking the Supreme Court to rescind and set aside the dismissal order.

The Supreme Court first dealt with certain procedural matters, including the standing of the minors to bring the proceedings. The Supreme Court held that the case brought by the plaintiffs constituted a class suit, not merely because the plaintiffs were numerous and representative enough to ensure the full protections of all concerned interests but also because the plaintiffs represented present and future generations:

"Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors assertion of their right to a sound environment constitutes, at the same time, the performance of the obligation to ensure the protection of that right for the generations to come."

Addressing the substantive issues, the Supreme Court found that the complaint focused on a specific fundamental legal right, namely the right to a balanced and healthful ecology, incorporated in the fundamental constitutional law. The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment. A denial or violation of the plaintiffs' right to a balanced and healthful ecology by the government who has the correlative duty or obligations to respect or protect the same gave rise to a cause of actions. The Supreme Court therefore granted the petition and reversed the trial court's order dismissing the complaint.

In India, in State of *Himachal Pradesh v Ganesh Wood Products*, a writ petition was filed seeking issuance of a writ restraining the government of the State of Himachal Pradesh from permitting the establishment of any factory units for the manufacture of Katha in the State on the ground that the establishment of Katha manufacturing units would lead to indiscriminate felling of Khair trees which would have a deep and adverse effect upon the environment and ecology of the State.

After considering the applicability and significance of the concept of sustainable development, the Supreme Court of India (B.P. Jeevan Reddy J and M.K. Mukherjee J) in a judgment delivered by B.P. Jeevan Reddy J upheld the appeal. In relation to the concept of intergenerational equity, the Supreme Court held that the government body's actions were:

"contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and inter-generational equity. After all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations."

2.2 Intragenerational equity or environmental justice

In India, the principle of intragenerational equity and environmental justice has been judicially recognised in a number of cases.

In *Ratlam Municipality v Vardhichand*, residents of a locality within the municipality of Ratlam were tormented by the stench and stink caused by open drains and public excretion by nearby slum-dwellers. They moved the Magistrate under s 133 of the Criminal Procedure Code to require the Municipality to fulfil its duty to members of the public. The Magistrate gave directions to the Municipality to draft a plan for removing

the nuisance within six months. After appeals to the Session Court and the High Court, the case came before the Supreme Court who affirmed the Magistrate's order. Krishna Iyer J, who delivered the judgment of the Supreme Court, emphasised that the role of the court is to deliver social justice, regardless of wealth or social standing. In an environmental context, all persons have a right to a clean and healthy environment. Krishna Iyer J stated:

"A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from tits principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies."

In *Rural Litigation and Entitlement Kendera v State of Uttar Pradesh*, the petitioners were rural villagers concerned about the unauthorised and illegal mining of limestone in the Mussorie-Dehradun belt in the State of Uttar Pradesh which adversely affected the ecology of the area and led to environmental disorder. Over time, the public interest litigation expanded. The number of parties increased to include the Governments of the Union of India and of Uttar Pradesh, several government agencies and mining lessees. The Supreme Court appointed various Committees which inspected the mines and reported to the Supreme Court. Over a period of two years, the Supreme Court ordered the closure of some mines (category C and some category B) mines and subjected the remaining mines to enquiry.

In 1987, the Supreme Court found that limestone quarrying in the Doon Valley area should be stopped and directed the closure of three operating mines. In 1988, following the consideration of further evidence, the Supreme Court gave reasoning for its conclusion that mining in the Doon Valley area should be stopped. The Supreme Court surveyed the importance of maintaining the forests in the area, stating that "forests hold up the mountains, cushion the rains and they discipline the rivers and control the floods. They sustain the springs; they break the winds; they foster the bulks; they keep the air cool and clean. Forests also prevent erosion by wind and water and preserve the carpet of the soil."

The Supreme Court then described the environmental consequences caused by the excessive exploitation and clearing of the forests, and considered the impact of mines that were operating in the reserved forests. The Supreme Court held that:

"to allow mining in these areas even under strictest control as a permanent feature would not only be violative of the provision of *Forest (Conservation) Act* but would be detrimental to restoration of the forest growth in a natural way in this area. Once the importance of forests is realised and as a matter of national policy and in the interests of the community, preservation of forests is accepted as the goal, nothing which would detract from that end should be permitted. In such circumstances we reiterate our conclusion that mining in this area has to be totally stopped".

However, the Supreme Court considered that the three category A mines could be allowed to continue mining operations so long as appropriate conditions were complied with. One such condition was the giving of an undertaking to a Monitoring Committee that "all care and attention shall be bestowed to preserve ecological and environmental balance while carrying on mining operations" and that "25% of the gross profits of the three mines shall be credited to the Fund in Charge of the Monitoring Committee in such manner as the Committee may direct and the Committee shall ensure maintenance of ecology and environment as also reforestation in the area of mining by expending money from the fund."

The Supreme Court's decision, therefore, addressed both intergenerational equity and intragenerational equity for the affected villagers in the valley.

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