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Bob Brown and the Beetle: How two birds and a beetle saved a forest

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Just as many of us were finishing work in preparation for Christmas last year, on 19 December Justice Marshall of the Federal Court gave the forests of Tasmania - and possibly much of Australia - a big fat Christmas present. The former Industrial Relations Commission judge's historic decision may call into question the protection from breaches of Part 3 of the *Environment Protection and Biodiversity Conservation Act* 1999 provided by current Regional Forest Agreements, and many other matters considered settled in relation to that Act.

The crux of Bob Brown's historic Federal Court challenge, *Brown v Forestry Tasmania, Commonwealth of Australia and State of Tasmania (No. 4) FCA 1729* (also known as the Wielangta case, or Bob Brown and the Beetle) was in finding that neither the "comprehensive, adequate and representative" ("CAR") reserve system nor the "relevant management prescriptions" provided for in the Tasmanian Regional Forest Agreement ("RFA") were adequate to restore populations of the Broad-toothed Stag Beetle, Tasmanian Wedge Tail Eagle, and Swift Parrot to non-threatened status in the Wielangta forest area. In the context of a very stringent meaning of "protect" in the EPBC Act ("the Act") applied by the court, this meant that logging operations proposed or already carried out in that area were not "in accordance with" the RFA, so that the RFA did not protect the agency from breach of s18 of the Act[1]. As Forestry Tasmania was also found to be proposing to engage in, or to have engaged in, an action that will or was likely to have a significant impact on a listed endangered species without approval (or other defence or exclusion), an injunction under s475 of the Act was allowable.

Key findings of the case

* That Forestry Tasmania had failed to protect "Priority Species" through the CAR reserve system or "relevant management prescriptions" as required by clause 68 of the Tasmanian RFA. Therefore the logging operations were not "in accordance with" the RFA and were not exempted from s18(3) of the Act (see para 1.33 below);

* That Forestry Tasmania had failed to protect the Priority Species because the Act was to be construed to "view protection of the environment as an act of not merely keeping threatened species alive, but actually *restoring their populations so that they cease to be threatened"* [2] (emphasis added)(see paras 1.25, 1.42 below). This was because an RFA was held to provide an alternative method (as distinct from s18(3) and the other controlling provisions in Part 3 of the Act) by which the objects of the Act may be achieved in a forestry context (see para 1.39 below). This meant that the standard of protection required of an RFA is relatively high.

In addition, the case held that:

* Forestry operations referred to in Forestry Practices Codes, Three Year Wood Production Plans and similar documents, and/or shown on forestry logging maps may be "actions" for the purposes of s18(3) of the Act, even if those logging operations haven't physically commenced (see para 1.13 and 1.15 below). Interestingly, the court accepted the applicant's submission that the provisional couping approach made the logging activity comparable to a subdivision, in that merely because work is not being carried out on subdivided land at present does not mean that the works proposed for it cannot be considered by a court (see further para 1.13 below).

*Forestry operations are to be taken to be carried out by the forest agency for the purposes of the Act even if particular logging activities are carried out by individual contractors or contractor companies

[where (e.g: through an Act) "exclusive management and control of all State forest" is vested in that agency, as with Forestry Tasmania] (see para 1.19 below);

* The fact that *factors other than the subject action may cause a significant impact, or impact, on a protected matter does not mean that the subject action must be held not to have a "significant impact"* on that matter (e.g: just because the wedge-tail eagle faces a significant impact from electrocution as well as from forestry does not mean forestry does not have a "significant impact") (see para 1.25 below);

* *Cumulative impacts* should often be taken into account in assessing significant impact (e.g: in the case of the eagle, "the unique ecology and biology of the eagle meant that actions in a given area are highly unlikely ever, on their own, to be capable of affecting the population as a whole") [NB: this is the court quoting the applicant with approval, not the Court's direct opinion], meaning that in those circumstances the purpose of the Act to protect the species can only be achieved by taking into account cumulative impacts (see para 1.26 below).

Obiter

* Just because an RFA must "provide for" a Comprehensive, Adequate and Representative reserve system does not mean it must "provide" one, as *"provide" means "to give or to make available in fact"*, whilst *"provide for" "looks to the planning stage alone"* [and the Tasmanian RFA did duly "provide for" a CAR reserve system] (see para 1.31 below).

Facts

Cause of action

1.1 Senator Bob Brown brought an injunction under s475 of the EPBC Act 1999 ("the Act") to restrain the logging of old growth forest in the Wielangta area of southern Tasmania. The basis for the injunction was breach of s18(3) of the Act (in Part 3 of the Act), which provides:

18 Actions with significant impact on listed threatened species or endangered community prohibited without approval

…

Endangered species

(3) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the endangered category; or

(b) is likely to have a significant impact on a listed threatened species included in the endangered category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

1.2 Section 38 of the Act exempts certain RFA forestry operations from s18, as follows:

38 Part 3 not to apply to certain RFA forestry operations

(1)Part 3 [which contains s18] does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

(2) In this Division:

RFA or regional forest agreement has the same meaning as in the *Regional Forest Agreements Act 2002*.

RFA forestry operation has the same meaning as in the *Regional Forest Agreements Act 2002*.

Note: This section does not apply to some RFA forestry operations. See section 42.

1.3 "Forestry operation" is defined in s40(2) of the Act as follows:

forestry operations means any of the following done for commercial purposes:

(a) the planting of trees;

(b) the managing of trees before they are harvested;

(c) the harvesting of forest products;

and includes any related land clearing, land preparation and regeneration (including burning) and transport operations. For the purposes of paragraph (c), **forest products** means live or dead trees, ferns or shrubs, or parts thereof.

1.4 Forestry Tasmania asked the court to limit its consideration of the relevant "forestry operations" to logging and road building and not consider burning and regeneration, but the court declined.[3]

1.5 "RFA forestry operation" is (relevantly) defined in s4 of the *Regional Forest Agreements Act 2002* to mean *"(d) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA)".*

1.6 "RFA" is defined as (relevantly) *"an agreement that is in force between the Commonwealth and a State in respect of a region or regions, being an agreement that satisfies all the following conditions:*

…

(b) the agreement provides for a comprehensive, adequate and representative reserve system;

(c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions".

Forest

1.7 The forest the subject of the proceedings is wet forest, dry forest and patches of rainforest. Much of it is "old growth" forest, being at least 110 years old. Sheep farmers ran sheep and established shepherds camps in it in the 1820s. Private land owners cleared some of it up until 1910 when it became a timber reserve.

Logging operations

1.8 The focus of Bob Brown's proceedings was 11 coups (blocks) in the Wielangta area in south eastern Tasmania. These included coups WT017E and WT019D designated on Forestry Tasmania maps as "provisional coups" ("the forests"), that is, coups available for logging between 2008 and 2013.

1.9 Notably, it seems the evidence related mainly to the impacts on species in coups WT017E ("17E") and WT019D ("19D").[4] Only 19D,[5] and presumably 17E as it was logged before judgment was made,[6] were subject to Forest Practices Plans. Forest Practices Plans, which set out the number of hectares that will be logged in a particular coupe, had not yet been certified by Forestry Tasmania for the rest of the coups.

1.10 Forestry Tasmania evidently plans its logging operations in three-year Wood Production Plans, and ten-year "tactical scenarios", though neither of these had been prepared for the Wielangta area at the time of the case.

1.11 The three year plans were admitted by Forestry Tasmania to be the "best prediction available for what will occur within a 3 year time frame".[7]

1.12 The three-year plans for 2004-2005 and 2006-2007 included 19C, 19D, 42C, 44G, 43I.[8] The "current tactical plan" included coups 9F, 12C, 19B, 43E, 10G, 17D, 19C, 44A, 10B, 17F and 19E identified as available to be logged "post 2007".[9] The Court found that it was likely that these coups would be subject to forestry operations up to 2013.[10]

Key issue - Had Section 18(3) of the Act been breached?

"Propose(s) to engage in"

1.13 To bring an injunction under s475 of the Act there must be "a person" who "propose(s) to engage in" a breach of the Act. Forestry Tasmania argued that because no Forest Practices Plan had been prepared for the forests (other than for 17E and 19D), it would be "mere speculation to make any findings about the likelihood of forestry operations in the Wielangta area beyond August 2008". That is, there was no "proposed" action that would be in breach of the Act.

1.14 The Court rejected this argument and considered that it was reasonable to predict that "in the ordinary course of events, forestry operations will occur in the Wielangta area beyond August 2008". The reasons for this were that:

- Forestry Tasmania had admitted that it would engage in "the managing of trees before they are harvested" in those forests (which is work included in the definition of "forestry operations" in s40(2) of

the Act)[11];

- A Forestry Tasmania map [it is assumed that Exhibits BQ and S were Forestry Tasmania maps: they are just described as "maps" in the judgment] "showed the scheduling of coups in Wielangta until 2013"[12];

- "Forestry Tasmania plans its harvesting operations by dividing State forest into coups" and "(a)reas of State forest given a coupe designation are areas which Forestry Tasmania plans to harvest in the future"[13];

- FT acknowledged that "there are areas of State forest within the Wielangta Forest Block…about 10% of the block…which are potentially available for harvesting in the future"[14] (that is, those that are marked "provisional coups" on the forestry maps)[15];

- "The Wielangta area has been a constant source of wood products for many years (and there is) no reason to suggest…that Forestry Tasmania no longer desires that it be a source of wood products";

- "The best guide to future conduct is past conduct, and the past conduct of Forestry Tasmania in the Wielangta area is using it as a source of wood products and it has planned to do so in the future".[16]

1.15 Forestry Tasmania[17] and the Commonwealth[18] also contended that because evidence had only been led in relation to 17E and 19D in the proceedings, any decision should apply only to those forests, not to the entire Wielangta area. The Court rejected this argument on the bases that:[19]

- Forestry operations in 17E and 19D are "actions" under s523, and *"when forestry operations which are proposed to be carried out in other coups are actually carried out, those operations will also constitute an action within s523"*[20] [another reason this is presumably permissible is that s18(3) allows for actions that are "likely to" have a significant impact, though the Court did not cast it like this];

- Other coups were on the various forestry map plans and so were "a project" and therefore an "action" under s523;[21]

- "*it is artificial to seek to break down the forestry operations of Forestry Tasmania in Wielangta into a series of individual actions and thereby avoid scrutiny under the EPBC Act…the relevant "action" for the purposes of this proceeding is Forestry Tasmania's forestry operations in Wielangta. Although there are varying degrees of certainty concerning the extent of forestry operations in individual coups, there is evidence that harvesting operations are planned for Wielangta up to and including 2013"*;[22]

- The "provisional couping" of Wielangta is *"analogous to the concept of subdividing land for the purpose of performing work on that land"* and the activities in total constitute a "project" or an "undertaking" for the purposes of the definition of "action" in s523.[23]

"Action"

1.16 To be in breach of s18(3) the logging operations had to be an "action". With certain exceptions, "action" is defined in s523.

1.17 The Court held that *"the forestry operations of Forestry Tasmania in coups 17E and 19D and…proposed forestry operations in coups other than 17E and 19D constitute an "action" for the purposes of the EPBC Act"*,[24] and that if this was wrong, at the very least the forestry operations in 17E and 19D were "actions". [Note also the definition of "forestry operations" in the RFA provisions – the activities listed in that definition must necessarily already be *prima facie* an "action"].

1.18 Forestry Tasmania sought to argue that the forestry operations were "a decision by a government body [which includes the Commonwealth, a Commonwealth agency and a State – s524(1)] - to grant a governmental authorisation (however described) for another person to take an action", and therefore excluded from the meaning of "action" by s524. This was on the basis of *Save the Ridge Inc. v Commonwealth & Anor* (2005) 147 FCR 97, where a Ministerial approval of a plan for a freeway extension was taken not to be an "action".

1.19 Forestry Tasmania claimed that it had authorised (via the Forest Practices Plan) Gunns Limited to carry out the logging, and this was a "governmental authorisation for another person to take an action" so was not challengeable in itself. Bob Brown argued that the current case was directed to the carrying out of the "action" of forestry operations, not any governmental authorisation to carry those operations out.

1.20 The Court accepted Bob Brown's submission, saying *"Save the Ridge is distinguishable because the attack in that case was on the steps taken to amend a plan which would authorise the construction of a freeway extension. There was no attack on the construction of the freeway extension [itself]. Here, there is no attack on the Forest Practices Plan, but on the work which is planned to take place under a Forest Practices Plan"*.[25]

1.21 Further, the Court stated that *"it is not to the point that the actual forestry operations will be undertaken by Gunns, or subcontractors to Gunns, when s8(1)(c)(i) of the Forestry Act vests in Forestry Tasmania exclusive management and control of all State forest"*.[26]

The Broad Toothed Stag Beetle

The swift parrot

The Tasmanian Wedge Tail Eagle

"Significant impact on a listed threatened species included in the endangered category"

1.22 The three species the subject of the proceedings were the Broad Toothed Stag Beetle, the Swift Parrot and the Tasmanian Wedge Tail Eagle.

How well the three species chosen by the applicant as the focus for the proceedings – perhaps characterisable as "the large, the pretty, and the very small" – and the landscape itself were able to catch the imagination of the Court stands out from the first line of the judgment:

"Tasmania is an island of unparalleled beauty. It contains wild and picturesque landscapes. Among those landscapes is the Wielangta forest. Wielangta means 'tall forest' in the language of the 'Palawa', the indigenous people of Tasmania" – Marshall J, para 1.

Of the "large" (the wedge tail eagle), Justice Marshall later said:

[The Tasmanian subspecies of wedge tail eagle in question] *is Australia's largest bird of prey. It is almost one metre long, it can weigh up to 5.3 kilograms and have a wing span as wide as 2.2 metres. It builds large nests [and] has a large wedge-shaped tail which, when combined with its low wing-loading, facilitates slow flight through forest. It also has very good braking and manoeuvrability for a bird so large.*

…The eagle has been isolated in Tasmania for about 10 000 years, since Bass Strait last formed. It is not capable of crossing Bass Strait. It has a key ecological function as a top-predator…The eagle is also territorial, sensitive to disturbance and is a shy breeder, mainly nesting in old growth eucalypt forest in large, stable trees, sheltered from prevailing winds.[27]

Of the "pretty" (the swift parrot), his Honour described the bird as "*a small, fast-flying, nectarivorous parrot which exists predominantly in eucalypt forests in south-eastern Australia. It only breeds in Tasmania. It crosses Bass Strait to Tasmania from August to September and returns to the mainland in March to April. It is bright grass green, with red, bordered by yellow, on the throat, chin and forehead. It has blue markings on the crown, the cheeks and the wings, as well as red patches on the shoulder and under the wings".*[28]

Only 1250 breeding pairs remain in Tasmania.[29]

And in relation to the "very small" (the Broad Toothed Stag Beetle), his Honour said:

The broad-toothed stag beetle is one of the rarest animals in Tasmania. Stag beetles (family lucanidae) comprise a small group of about 950 species worldwide. They are believed by scientists to have originated more than 200 million years ago and were once more common…(they) usually breed in rotting wood on the forest floor in old growth or largely undisturbed forests (and) are one of the first group of insects to abandon disturbed forests. [Consequently they] can be an indicator of forest decline.

As a witness in the proceeding, Mr Jeffrey Meggs, accepted, 'the planet could survive perfectly well without human beings, but would die without ants' and that if the world did not have beetles it would be 'a very different place'.[30]

1.23 In relation to the evidence of range and impacts on the species, the Court preferred the applicant's evidence as to the beetle[31] and parrot.[32] In relation to the beetle this was because in Court the experts for Forestry Tasmania on those species were found to be advocates for Forestry Tasmania rather than independent experts.[33] A Court-appointed expert was used in relation to the wedge tail eagle.[34]

Tasmanian Wedge Tail Eagle

1.24 The wedge tail eagle was found to have 6 nests adjacent to coups within the Wielangta forest[35] and possibly more,[36] probably 2 or 3 of which were undisturbed.[37]

1.25 The eagle was subject to a key threatening process of "loss and disturbance of critical nesting habitat and unnatural mortality mainly due to persecution and accidents".[38] The court appointed expert found that forestry operations in coups 17E and 19D would only lead to "a lowered breeding success of one pair and the loss of about 100ha of hunting and potential nesting habitat"[39] which "did not constitute a significant impact considering all other threats[40] to the [species]".[41]

1.26 In relation to the rest of the Wielangta area, the expert considered that the "disturbance at four of the known nests, involving 2 of 6 pairs of eagles" that may occur was also not a significant impact "given other threats the species faces in the State".

1.27 However, importantly, (after *Minister for Environment & Heritage v Queensland Conservation Council Inc. & Anor* (2004) 139 FCR 24)[42] the Court held that the cumulative impact on the species was also important, because "impact" had a broad meaning:

"Even though forestry operations in Wielangta…will cause…relatively insignificant [impacts] *in the context of other factors causing loss to [*breeding and foraging] *habitat, that loss can still be considered "significant" in the context of legislation* [that is, the EPBC Act] *which is designed "to protect native species (and in particular prevent the extinction, and promote the recovery of, threatened species)". Loss of habitat caused by forestry operations, while small when compared to other causes, has a significant impact on a threatened species where "to protect" is seen as a duty not just to maintain population levels of threatened species but to restore the species".*[43]

1.28 The eagle expert by contrast defined "impact" as only effects "significantly close to allow it to be said that they are the consequences of forestry operations".[44]

1.29 The conclusion in 1.13 above was persuaded by Bob Brown's submission that if s18 is to have its "intended protective effect", cumulative impacts must be able to be included in "impact" because the unique ecology and biology of the eagle meant that actions in a given area are highly unlikely ever, on their own, to be capable of affecting the population as a whole.[45] This ecology and biology included its very wide range,[46] there being only 0.5 offspring per active territory and eagles being "very shy nesters" that are "very fussy in their choice of nesting sites",[47] and that the point of protection was to maintain an "ecologically functioning species, not a museum piece".[48]

1.30 The Court was also persuaded to this conclusion by the concept of "disturbance creep", where as more and more nests become disturbed there are fewer undisturbed ones available,[49] and by Bob Brown's evidence that the eagle is expected to become extinct in the Bass District in 200 years.[50]

Broad-toothed Stag Beetle

1.31 The threats to the beetle from the forestry operations were fire, drying out of habitat, and that forestry operations would interfere with the interface between fallen logs and the soil, where most beetle activity occurs, leading to risk of death from machinery and predators.[51] The Court found that there would also be a cumulative impact (and therefore an "impact" for the purposes of s18(3)) on the beetle from forestry operations because *"as each coup is harvested it is unlikely to provide suitable habitat thereafter" and "(l)oss of habitat is crucial to a species with very low population levels and densities and poor dispersal".*[52]

Swift Parrot

1.32 Though the parrot was only likely to be present in the forests when the bluegum is flowering (and the bluegums were not flowering in 2005, meaning only 2 parrots were observed by the applicant's expert),[53] the presence of the parrot in the forests was accepted as fact.[54] Only 1250 breeding pairs remained in Tasmania.[55] The parrot is a migratory bird that arrives in Tasmania to breed in late winter and returns to the mainland in early autumn.[56] The threats from the logging operations were the loss of food resource trees and also hollow bearing trees for nesting.[57]

Key issue - Is Forestry Tasmania exempted from Section 18 by the RFA provisions?

1.33 Bob Brown argued that section 38 didn't exempt Forestry Tasmania from s18 because:

- The forestry operations were not being carried out under an "RFA forestry operation" because the relevant (Tasmanian) RFA did not "provide for" a comprehensive, adequate and representative reserve system" as required by the definition of RFA in s4 of the RFA Act (see paragraph 1.6 above)[58] and so was not an "RFA" under that section; or in the alternative that:

- The forestry operations were not being carried out "in accordance with" the RFA because they did not "protect" the relevant threatened species.

1.34 His Honour held, after *Stocks and Parkes Investments Pty Ltd v The Minister* [1971] NSWLR 932, that "provide for" in the definition of RFA was not the same as "provide", and that Bob Brown's arguments amounted to requiring that it "provide" a CAR reserve system. This was because "provide" meant "*to give or to make available in fact*", while "provide for" "*looks to the planning stage alone*".[59]

1.35 The Court held that the RFA duly "provided for" a CAR reserve system by referring to Ecologically Sustainable Forest Management, the National Forest Policy Statement and other measures,[60] so was an RFA within the meaning of s4 of the RFA Act.[61]

Were the forestry operations being carried out "in accordance with" the RFA?

1.36 Clause 68 of the RFA provided that Tasmania agreed to protect "Priority Species" through the CAR reserve system or by applying relevant management prescriptions. Bob Brown argued that this established an obligation on Forestry Tasmania to "deliver protection of" these species (not merely an obligation to "agree to try and protect"),[62] and that as this obligation was not being met, the forestry operations were not being carried out "in accordance with" the RFA.

1.37 Forestry Tasmania argued that the Court was not permitted to consider Forestry Tasmania's compliance with clause 68 because it was similar to the (unenforceable) intergovernmental agreement at issue in *South Australia v The Commonwealth* (1961 – 1962 108 CLR 130.[63] The Court responded that unlike clause 68, an intergovernmental agreement was a merely political matter, and clause 68 was within the matters the Court could – and must, for the purposes of considering whether s38(1) applies - address.[64]

1.38 Alternatively, Forestry Tasmania argued that it did not have to comply with the precise terms of clause 68 because a forestry operation would be "in accordance with an RFA" if it fell within its "parameters" and did not conflict with its terms.[65] Also, "systemic species protection" was all that was required (and was provided through the CAR reserve system)[66] rather than a "guarantee of some right to survival" of particular species.[67]

1.39 The Commonwealth argued that whether the requirements of clause 68 were met depended on "the CAR Reserve System and relevant management prescriptions across the whole of the relevant Priority Species' known and likely range",[68] not whether any particular forestry operation is consistent with the protection of a species.[69] In the alternative, it contended that the habitat available for the three species outside 19D and 17E meant that the requirements of clause 68 had been met.

1.40 Bob Brown contended that the exemption from s18 under s38 should be construed strictly because it is a "privilege only where there is strict compliance…with the obligations provided in an RFA".[70] This was because "the RFA is a parallel process to provide environmental protection to that otherwise provided directly by the EPBC Act."[71] Thus the RFA must "deliver protection which prevents the occurrence of a significant impact on the relevant environment and the species which inhabit it",[72] implement the international obligations on which it was founded,[73] and be informed by the precautionary principle.[74] This reflected the Explanatory Memorandum to the Bill of the Act, which stated that "The objects of this Act will be met through the RFA process for each region".[75]

1.41 Consequently, the RFA must provide "real, practical protection to threatened species and facilitate their recovery to appropriate and sustainable population levels".[76]

1.42 The Court agreed with this submission, stating that *"the exemption provided by s38 provides an alternative method by which the objects of the EPBC Act may be achieved in a forestry context"*.[77] It would therefore not be sufficient if "mere lip service" (c.f Forestry Tasmania's submissions in para 1.35 above) was paid to an RFA,[78] and that "an agreement to "protect" means exactly what it says".[79]

1.43 The Court held that as clause 68 stated that protection will be afforded through the CAR Reserves System or relevant management prescriptions, the obligation to protect will not be met if that system or prescriptions do not protect the relevant species.[80] The Court considered that both the CAR reserve system and the "relevant management prescriptions" under the RFA were inadequate to protect the beetle,[81] parrot[82] and eagle,[83] and that the CAR reserve system would not be adequate in the future.[84] The failure of the management prescriptions was partly because no recovery plan had been prepared as required by clause 70 of the RFA.[85]

1.44 Specifically in relation to the parrot, this was because "*Protection is not delivered if one merely assists a species to survive*…[it must also] aid…*in its recovery to a level at which it may no longer be considered to be threatened*."

1.45 It also held that "*the legislative intent behind ss18, 19(3)(a)* [which provides that s18 does not apply if Pt 4 lets the action be taken without a Part 9 approval] *and 38…when read together, is that the objects of the EPBC Act will be met, in a forestry context, through the RFA process, apart from the exceptions provided by s42[86]"*.[87] Put another way, in light of the EPBC Act implementing an international convention,[88] *"the exemption for RFA forestry operations in s38 of the [Act] must be seen, in context, as providing an exception only if an alternative means of promoting recovery of a species is achieved by*" an RFA.[89]

1.46 Finally, speaking generally about the appropriate construction of the EPBC Act, the Court held that "*(p)romotion of the conservation of biodiversity [as required by the object of the EPBC Act in s3(1)(c) of that Act] in context, can only be achieved by favouring a construction of the EPBC Act which views protection of the environment as an act of not merely keeping threatened species alive, but actually restoring their populations so that they cease to be threatened*."[90]

Footnotes listed on page 15...

Paul Stevenson

Gray v Minister for Planning & Centennial Hunter Pty Ltd [2006] NSWLEC 720

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A case brought by climate change activist Peter Gray in the Land & Environment Court last year has succeeded in requiring the climate change impacts of coal *burning* to be taken into account in the environmental assessment of coal mines. Whilst a challenge to the release of the environmental assessment for public comment and not a challenge to any mine approval itself (which has as yet not been granted), the case stands to have considerable impact on the assessment of development projects. The case was heard by Justice Pain.

Changes to the *Environmental Planning and Assessment Act 1979* now in force since the case was heard are noted at the end of the article.

Background

1.1 In January 2006 Centennial Hunter Pty Ltd applied to the Minister for Planning for Part 3A approval of the proposed Anvil Hill coal mine in the Hunter Valley ("the project"). The proposed mine was to produce up to 10.5 million tones of coal per annum and operate for 21 years. About half the coal was to be exported to power stations in Japan[1], while the rest would be sold to Macquarie Generation for the Bayswater and Liddell power stations, which supply 15% of the east coast of Australia's (and the equivalent of 40% of NSW's[2]) electricity.[3]

1.2 Section 75F(2) of the *Environmental Planning & Assessment Act 1979* ("the Act") requires the Director-General of Planning ("the DG") to issue "environmental assessment requirements" ("EARs") for projects to which Part 3A of the Act applies. The EARs must have regard to any guidelines published by the Minister in the NSW Government Gazette with respect to EARs (s75F(1)), and set out the form of "environmental assessment" that is to be prepared by or on behalf of the proponent (s75F(5))[4].

1.3 The DG issued EARs for the project in April 2006. These included a requirement that the environmental assessment include "a detailed greenhouse gas assessment". The assessment was to take into account "relevant State Government technical and policy guidelines"[5], and a list of suggested relevant guidelines was attached to the EARs. None of the ("not exhaustive"[6]) list specifically related to greenhouse gas assessment; one referred to a Department of Environment and Conservation air quality guideline[7], but the parties agreed this did not refer to greenhouse gases[8].

1.4 The subsequent environmental assessment ("the assessment") (described by the Court as a "very large and detailed document") contained (at Appendix 11) an "Energy and Greenhouse Assessment" based on, among other things[9], the joint World Business Council for Sustainable Development and World Resources Institutes' *Greenhouse Gas Protocol 2004* ("the Protocol")[10]. Importantly, the Protocol provided for assessment of three types of emissions (emphasis added):

"**Scope 1" emissions** - "Direct Greenhouse Gas emissions" that "*occur from sources that are owned or controlled by the company*, for example emissions from combustion in owned or controlled boilers, furnaces, vehicles, etc.; emissions from chemical production in owned or controlled process equipment"[11];

"**Scope 2" emissions**"[12] - "Electricity indirect GHG emissions" "from the generation of *purchased electricity consumed by the company*"[13]; and

"Scope 3" emissions - An "optional reporting category that allows for the treatment of all other indirect emissions. Scope 3 emissions are a consequence of the activities of the company, but occur *from sources not owned or controlled by the company* (e.g.) extraction and production of purchased materials; transportation of purchased fuels; and use of sold products and services".[14]

1.5 The assessment addressed Scope 1 and 2 emissions, but did not assess Scope 3 emissions for the project, and only contained (emphasis added):

- "An assessment of the energy and greenhouse gas emissions *from the [project]* in accordance with recognised assessment guidelines;

- "Calculation of *energy consumption and greenhouse gas emissions* for the [project] for various operational scenarios including maximum annual production, average annual production and the total project; and

- "Assessment and identification of, where relevant, management controls can be utilised to *minimise* energy use and greenhouse gas emissions and nomination of specific mitigation strategies to achieve this objective"[15].

1.6 A departmental Minute[16] filed as evidence in the proceedings indicated that the Department of Planning had advised the DG that this approach to environmental assessment of greenhouse gas impacts, given current guidelines[17], adequately assessed the requirements of the EARs.

1.7 After some amendment to other aspects of the assessment (not relating to greenhouse gas emission assessment), the DG wrote to the proponent stating his view that the assessment adequately addressed the EARs and that the assessment would be placed on public exhibition[18]. Public exhibition commenced on 23 August 2006.

Applicant's case

1.8 The Applicant argued that Scope 3 greenhouse gas emissions from the project – specifically, greenhouse gas emissions from the *combustion* of the coal bought from the project by third parties – should lawfully have been included in the "detailed greenhouse gas assessment" required by the EARs. That the DG released the assessment for public comment without requiring Scope 3 emissions to be included rendered the decision to release the assessment for public comment invalid.

1.9 Part 3A environmental assessments are released for public comment under sections 75H(1) – (3) of the Act as follows:

75H Environmental assessment and public consultation

(1) The proponent is to submit to the Director-General the environmental assessment required under this Division for approval to carry out the project.

(2) If the Director-General considers that the environmental assessment does not adequately address the environmental assessment requirements, the Director-General may require the proponent to submit a revised environmental assessment to address the matters notified to the proponent.

(3) After the environmental assessment has been accepted by the Director-General, the Director-General must, in accordance with any guidelines published by the Minister in the Gazette, make the environmental assessment publicly available for at least 30 days.

1.10 Importantly, the premise of the applicant's argument was that by releasing the assessment for public comment, the DG necessarily had to have decided that the assessment complied with the EARs, giving rise to a *reviewable administrative decision*.

1.11 The applicant claimed the decision to release the assessment for public comment was invalid for two reasons. Firstly, the assessment could not have complied with the EARs because a "detailed greenhouse gas assessment" necessarily considered carbon dioxide emissions when the coal was burnt[19]. This was because "environmental assessment" in s75F(5) (not defined) had the same meaning as in s75H, that is, was an "assessment of the impact on the environment of the proposal".

1.12 This argument arose because the DG raised the submission (paragraph 47 of the judgment) that due to the use of "may" in s75F(5), EARs could, in some circum-

stances, not require environmental assessment at all. The Court did not accept this submission, and held that Part 3A requires environmental assessment of a project[20]. The DG's submission that release for public comment of an assessment that did *not* comply with the (original) EARs impliedly amended those EARs (so that the assessment did then comply with them)[21] was also rejected[22].

1.13 Consequently, the applicant argued, the assessment necessarily had to be characterisable as an "environmental assessment" if it was to be able to meet any EARs issued in relation to the project. Therefore the requirement for a "detailed greenhouse gas assessment" was by definition an "environmental assessment". Then, the broad definition of "environment" in the Act (that it "includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings"[23]) meant that the assessment had to include impacts from coal *burning* given that global climate change was an impact on the (global) surroundings of humans. The Applicant did not succeed on this ground, for the reasons set out in paragraphs 80 – 81 of the judgment.

1.14 The Applicant's second argument was that in deciding the assessment complied with the EARs (and so releasing the assessment for public comment), the DG failed to take into account the principles of Ecologically Sustainable Development ("ESD"). Taking into account ESD was necessary because the principles were included in the objects of the Act and were "applicable to all decisions under the EP&A Act."[24] The Court found for the Applicant on the basis that the EARs failed to take into account ESD.

Court's decision

1.15 Her Honour found for the Applicant on the ground of failure to take into account ESD on the basis that the principles of intergenerational equity and the precautionary principle had not been considered. The Court also (necessarily) agreed that the decision to release the assessment for public comment was predicated on a decision that the assessment complied with the EARs[25], and that this was a justiciable decision[26].

1.16 The DG was required to take the principles of ESD into account because of the "numerous decisions of [the Land & Environment Court] that have confirmed the importance of ESD principles for decision makers who make decisions under legislation which adopts ESD principles."[27] The DG had had not taken the precautionary principle aspect of ESD into account firstly in not requiring cumulative impacts to be assessed[28] (which would have included the impacts of coal burning[29]), and secondly in not requiring that the impacts of coal burning be assessed even though there might be some scientific uncertainty about the extent of those impacts[30].

1.17 The failure to take into account cumulative impacts also constituted a failure to take into account the principle of intergenerational equity[31].

1.18 Fundamental to this conclusion was the finding that climate change effects from coal burning were sufficiently proximate to the project itself as to be an "environmental impact" of the project[32]. This was despite the submission that "*any later use of coal mined over time…can only occur as a result of independent and voluntary human action* [which will be] *subject to actual and potential regulation in that context* [and result in impacts that are] *completely separate from the* [project]"[33]. For the reasons set out in paragraphs [84], [86], [87] and [90 – 93] of the judgment, at paragraphs [97] – [100] her Honour held as follows:

Given the quite appropriate recognition by the Director-General that burning the thermal coal from the Anvil Hill Project will cause the release of substantial GHG in the environment which will contribute to climate change/global warming which, I surmise, is having and/or will have impacts on the Australian and consequently NSW environment, it would appear that Bignold J's test of causation [in Bell] based on a real and sufficient link is met.

[The fact that] the use of coal as fuel occurred only through voluntary, independent human action, that alone does not break the necessary link to impacts arising from this activity given that the impact is climate change/global warming to which this contributes…

"…The fact that there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored in the environmental assessment process. The coal intended to be mined is clearly a potential major single contributor to GHG emissions deriving from NSW given the large size of the proposed mine.

…

"I consider there is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Pt 3A".

1.19 In the exercise of its discretion the Court did not require the assessment to be re-exhibited (assessment of Scope 3 had been required by the DG during the public submission period, under s75H(6)(a))[34], but the decision to release that assessment for public comment under s75H(3) was declared to be void and without effect. Consequently the DG was required to consider this decision again before the process of approval under Part 3A could progress any further.

1.20 As her Honour noted in the judgment, this wide interpretation of the "environmental impact" of a project is not radical in a planning law context. Many other cases, such as *Bell v Minister for Urban Affairs and Planning and Port Waratah Coal Service Ltd* (1997) 95 LGERA 86[35], *Queensland Conservation Council Inc. v Minister for the Environment and Heritage* [2003] FCA 1463[36] and that case on appeal[37], *Kivi v Forestry Commission of NSW* (1982) 47 LGRA 38[38], *Wildlife Preservation Society of Queensland Prosperpine/Whitsunday Branch Inc. v Minister for the Environment and Heritage* [2006] FCA 736[39] have held that effects beyond the physical boundary of a project can be taken into account in assessing environmental impact.

1.21 However, two important effects can be expected to flow from *Gray*. Firstly, the climate change impacts of the use of a product (albeit one of the most greenhouse-intensive products used by humans) were for the first time required to be taken into account in a "detailed greenhouse gas assessment" required for the project. This was despite the fact that the project did not involve use of the product itself (other than through contracts with purchasers for the use of the product) and though that use would be by third parties not directly related to the project[40] (other than contractually). Having been included in the assessment, a decision maker considering that assessment will now be specifically aware of the climate change impacts in deciding whether to approve the project. Secondly, the application of two important ESD principles, often dismissed as being "motherhood" statements only, were given real teeth in determining how a development project is to be assessed.

Significant amendments to the Act have come into retrospective force since the judgment, but their impact on the above key outcomes of the case is likely to be limited. The prerequisite to Part 3A approval of compliance with EARs has been removed from section 75J(1)(b). Compliance with the EARs is now assessed by the DG in his or her report (s75I(2)(g)) but remains for the Minister a relevant consideration (s75J(2)(a)) . These changes, though weakening the role of EARs, do not affect the fundamental findings of the case that ESD and climate change impacts must be addressed with breadth and seriousness in the assessment of developments, and that in many instances decision makers must consider the climate change/global warming implications of the use of products and services if the environmental impact of a project is to be properly assessed. Consequently assessments that fail to do these things may be subject to challenge in the NSW Land and Environment Court and be found to be unlawful.

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ANEDO Submission on Amendments to the Environment Protection and Biodiversity Conservation Act

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On 12th October 2006 the Federal Government introduced over 400 pages of amendments to the primary federal environmental law – the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The government gave eleven days for the public to prepare submissions, and two short Senate Committee hearing days were held a week later. These were followed promptly by a report from the government-dominated Committee roundly supporting all the reforms. The Bill was then passed, without amendment, and contrary to the serious concerns expressed in the majority of submissions made.

The government did itself a disservice by adopting this rushed approach, which took the meaning and value out of public consultation. Consultation has the potential to add to the quality of decision-making and the legitimacy of law passed by the Parliament.

Introduction of an extensive amendment Bill presented an important opportunity to update the key legislation to address the most serious environmental issues facing Australia today. However, despite increasing levels of public concern, the Bill was silent, for example, on the issues of addressing impacts of climate change and over-extraction of water.

Instead, the Bill had a different focus. According to the Explanatory Memorandum: the Bill was designed to "reduce processing time and costs for development interests." Our overriding concern was that this push to "streamline" EPBC Act processes would be at the expense of comprehensive and adequate environmental assessment and a transparent and accountable process for public participation.

An extensive submission on the Bill was made by the Australian Network of Environmental Defender's Offices (ANEDO) which was endorsed by over 70 other submissions. While ANEDO supports the efficient and effective implementation of the EPBC Act, we had a number of key concerns regarding the purposes of the Bill. Our key concerns focused on changes to:

- Third party enforcement and review
- Nominations and listing processes for threatened species and heritage
- Consideration of impacts
- Streamlining of the referrals and assessment process; and the
- Failure to address Matters of National Environmental Significance

Third party enforcement and review

A fundamental requirement of an accountable regime is public participation and opportunities for third party enforcement and review. While the Bill made improvements to the compliance regime by including strict liability and corporate liability provisions, the potential for civil enforcement action was undermined.

The Bill included amending provisions aimed at significantly limiting public interest environmental litigation in two ways: first, it removed rights to challenge the merits of environmental decision-making by seeking review of Ministerial decisions, and second, it reinstated a significant barrier to civil enforcement (regarding undertakings for damages).

The Bill contained a number of provisions which remove the right of review by the Administrative Appeals Tribunal (AAT) of Ministerial decisions.[1] The rationale for this amendment in the Explanatory Memorandum is to "leave the merits of these important decisions to the Government." ANEDO submitted that 'important decisions' must be subject to review if the EPBC regime is to be legitimate, credible, transparent and accountable. Merits review also enables the AAT to consider the effectiveness of conditions imposed in relation to these decisions.

The ability to appeal wildlife trade imports and exports at the AAT has existed since 1982, in the *Wildlife Protection Import and Exports Act.* This right has not led to an opening of the floodgates and an overburdening of the AAT with frivolous appeals. Indeed, under the EPBC Act, there have only been 3 reported matters.[2]

The amendments remove the right to appeal wildlife import and export decisions if made by the Minister (section 303GJ). This will mean that there will be no review of Ministerial decisions regarding, for example: import of CITES specimens (Asian elephants), live regulated specimens (bees and wasp imports) and export permit decisions for live native regulated specimens (koalas to Thailand) or wildlife Trade Operations (for example regarding southern blue-fin tuna).

While less controversial wildlife trade decisions made by delegated officials will be reviewable, any important or controversial decision will be beyond review. For example, important decisions regarding the dwindling stocks of southern bluefin tuna will continue to be made by the Minister and therefore will not be amenable to review. This has the potential of allowing the process to be dominated by commercial interests, with no recourse for community or environment groups.

In relation to reinstating barriers to third party enforcement (ie, repealing s478 undertaking for damages), ANEDO argued existing avenues for third party enforcement and review have not lead to a deluge of frivolous cases, and have in fact significantly contributed to the effective enforcement and implementation of the Act. It is essential for the credibility and legitimacy of the EPBC regime that avenues for review are maintained. As noted in the Senate Committee *Minority Report by Labor and Australian Greens Senators,* ANEDO made an important observation at the hearing that environmental law is public law and proper access to justice requires that the public is able to make recourse to the court system to seek redress. As submitted at the hearing, EDO experience strongly indicates that our clients do not take action lightly as the costs associated with litigation are often prohibitive for community members and not-for-profit organizations; and a repeal of this section will lead to fewer enforcement actions.

Nominations and Listing processes

The Bill also changed nomination and listing processes by attempting to corral nominations annually according to Ministerially-determined themes. References in the Explanatory Memorandum to redesigning the nominations process to focus on matters of 'real' national importance is ostensibly aimed at reducing the administrative burden. Many concerned groups including ANEDO argued that giving the Minister greater control over the nominations process, both in relation to listing threatened species and heritage items, has the potential to undermine the independent assessment role of the Scientific Committee and Australian Heritage Council. Species, communities or heritage items that do not fit annual nomination 'themes' may not qualify for assessment, regardless of their conservation status. The Bill also sought to potentially 'write off' assessment of 500 threatened ecological communities from consideration, by repealing s185. Whilst ANEDO believes that the removal of the section will lighten the administrative burden, it is nevertheless heavy handed, arbitrary and contrary to the principles of Ecologically Sustainable Development and good governance.

The new streamlined process also institutes a way for the Minister to avoid dealing with contentious nominations, such as commercial fish species. We maintain that the nominations and listing process for both species and heritage should be based on conservation status only. The new process is unclear on what happens when a nomination falls outside a theme. For some species, it may be too late for effective recovery if they repeatedly fail to qualify for thematic nomination. More resources should be directed to the Department of Environment and Heritage to properly assess nominations, rather than curtailing what nominations are

deemed relevant annually.

Consideration of Impacts[3]

In the wake of the *Nathan Dam* decision,[4] the Bill attempts to clarify the extent to which impacts that are indirect consequences of actions must be considered or dealt with under the Act. The amendments provide that an event or circumstance is an indirect impact of an action if the action was a substantial cause of it.

The amendments insert a definition of "impact" in section 527E.[5] Other than the requirement to be a "substantial cause" this definition uses the language of the *Nathan Dam* Case and seems reasonably consistent with the principles established in that case.

The likely consequence of these amendments and the insertion of ss25AA and 28AB, is that a person will not have civil or criminal liability for third party actions, but the Minister must still consider third party "impacts" as defined under s527E, when considering "all adverse impacts" in s75(2).[6]

There is a distinction between civil or criminal *liability* for impacts from a third party action (sections 25AA and 28AB clearly remove a proponent from liability for the actions of a second person, except where the proponent has directed or requested the second person to undertake the action), and the need for the Minister to consider those third party actions in assessing the impacts of the action - which the Bill appears to preserve.

In simple terms, this means that the *Nathan Dam* principles will still apply for Parts 7-9 (the referral, assessment and approval of controlled actions) of the EPBC Act, but not for the offence provisions in Part 3.

Despite the clarification, arguably, the Bill still does not enable the EPBC Act to fully consider cumulative impacts.

There is currently no assessment of the cumulative impacts of development. While amendments to the *EPBC Act* have enabled the EPBC Unit within the DEH to consider a development as a whole rather than in stages (where approval may often be granted in stages through State laws), there is no assessment of the overall impact of a series of unrelated developments on critical habitat for certain species or World Heritage values. For example, if the impacts of several developments on migratory birds are each assessed in isolation, it is difficult to prove that any one development will have a significant impact on a particular species. However, if considered cumulatively, there may be a clear significant impact.

Streamlining of the referrals and assessment process

The Bill includes a number of amendments designed to 'streamline' processes and reduce the regulatory burden on DEH. The driving force (as indicated in the Explanatory Memorandum and second reading speech) behind amendments relating to the referrals and assessment is to speed up development approvals for development proponents. A lack of DEH resources and capacity to undertake statutory functions is a poor excuse for streamlining statutory requirements. Where issues involve potentially significant impacts on matters of national environmental significance, it is crucial that resources are available for comprehensive, transparent and accountable environmental impact assessment to be undertaken. The attempt to cater for 'development interests' must not be at the expense of accountability, public participation and full consideration of environmental impacts.

As noted in the Explanatory Memorandum, nearly 2000 referrals have been made since the commencement of the Act, with approval required for around 420 development proposals. This is indicative of a relatively high bar to trigger application of the EPBC Act to a proposed development, and a very high approval rate. The approvals that have been granted to date, include the building of a marina and subsequent clearing of coastal habitat adjoining the Great Barrier Reef World Heritage Area which affected migratory and threatened species in the area (Port Airlie), several mining operations, and two new dams (Paradise Dam in Queensland and Meander Dam in Tasmania). Environmental groups have criticised these approvals and the conditions placed upon many of the proposals, as not going far enough to protect the environment.

There seems to be a reluctance to use the powers under the *EPBC Act* given to the Minister to refuse developments. Instead, all major developments have been approved, mostly with extensive conditions. Many of these conditions require the further provision of management plans before actions can commence. However, it is yet to be seen whether such management plans will actually prevent harm to the threatened and migratory species they are designed to protect, or appropriately safeguard against damage to World Heritage values. Similarly, there is no guarantee that attaching conditions will be sufficient to effectively protect the environment.

Various changes in the Bill aim to speed up decision-making, for example, providing for "assessment on referral material" (Div 3A, s92-93) and refining the process for assessment on preliminary documentation (s94-95C). Furthermore, amendments providing for DEH assessment responsibilities to be abrogated under accreditation state and territory plans, policies or programs, and bioregional plans is potentially open to abuse (for example, regarding uranium mining or coastal development). The EPBC Act must remain as a safety net for regulating impacts of matters of national environmental significance, and an "important check" in relation to particular development and conditions attached to consents.

Failure to address Matters of National Environmental Significance (MNES)

While Australia has put considerable effort into implementing certain international environmental principles and obligations, such as declaring and protecting world heritage areas, there are a number of issues now dealt with by international environmental law instruments that are not currently included as MNES under the EPBC Act.

In his second reading speech on the amending Bill, the Parliamentary Secretary to the Environment Minister, Greg Hunt MP, said the changes "will allow the Australian Government greater flexibility and capacity to deal with the emerging environmental issues of the 21st century."

Consistent with our previous submission ANEDO recommended additional amendments to provide for new MNES. These include:

> Insert a **greenhouse gas emission trigger** that recognises any development that produces over 100,000 tonnes of CO2 equivalent per year as a matter of national environmental significance. This could be supplemented by provision for all projects on a designated development list (including expansion of existing projects and significant land use change, including significant land clearing and motorway projects) to trigger the approval provisions. This would ensure the trigger was more comprehensive in capturing diffuse emissions.

During passage of the Bill, the Australian Democrats proposed an amendment that no person be allowed to carry out an action that will or is likely to result in GHG emissions of over 100,000 tonnes of CO2e in any 12 month period or 5 million tonnes of CO2e over the likely lifetime of the action, without an appropriate approval. The Australian Greens proposed a similar amendment but it did not include the 5 million tonne lifetime clause. Senator Milne emphasised that the insertion of a trigger does not mean that such activities are prevented, but that it would trigger and environmental assessment and approvals process which would include an assessment "of whether the project was consistent with the national target for reducing greenhouse gas emissions." The Labor Party also proposed a greenhouse trigger but one set at 500,000 of CO2e per year. These proposed amendments were not passed by the Senate although the Labor amendment came close; 29 ayes to 32 noes.

> ANEDO recommends that a trigger be included in Part 3 for **abstraction of surface and ground water resources** over 10,000 megalitres which is likely to have a significant impact on aquatic or groundwater-dependent ecosystems. The focus of the trigger should be on major development projects in the Murray Darling Basin (using the Murray Darling Basin Commission Agreement as the basis for power to Act). Criteria for assessing impact should be based on interference

with rivers caused by major works (such as dams over a certain size); the extraction or diversion of volumes of water over a certain amount of that are likely to impact upon compliance with the Murray Darling Basin Commission cap. This is consistent with the National Water Initiative objective to have better environmental impact assessment (EIA) for large water infrastructure.

The Democrats and Greens proposed a water use trigger be inserted, however the proposed amendment was rejected by the Senate. Similarly, an EPBC trigger proposed by the Greens and Democrats requiring assessment for any proposal likely to have a significant impact on the environment by the construction and/or operation of a large dam[7] was also rejected.

Insert a comprehensive **land clearing** trigger comprising three main alternative elements. First, a trigger for the clearing of native vegetation over 100 ha in any two year period; second, a trigger for the clearing of any area of native vegetation which provides habitat for listed threatened species or ecological communities, or listed critical habitat; and third, a schedule of activities that would trigger the Act regardless of the hectares proposed to be cleared (for example, major coastal resort developments).

The Democrats and Greens also proposed a broadscale clearing trigger incorporating the first two elements, however the amendment did not gain support in the Senate.

In conclusion, instead of allocating sufficient resources for DEH to effectively implement the EPBC Act, the Bill facilitates the preferred approach of streamlining legislative requirements. Instead of including necessary amendments to address impacts of climate change, land clearing and over extraction of water, the Bill focuses on facilitating broadscale development and limiting public participation and review. Finally, we note that the sheer size of the Bill and its rushed passage through pre-Christmas parliament sadly excluded many stakeholders from engaging in consultation, discussion and debate on our most important federal environmental law.

For further detail on ANEDO's concerns please see our full submission at www.edo.org.au Submission on the *Environment and Heritage Legislation Amendment Bill (No. 1) 2006* [27 Oct 2006].

Please refer to our submission on Possible New Matters of National Environmental Significance under the ***EPBC Act 1999*** - May 2005, which can be found at: http://www.edo.org.au/edonsw/site/policy.php.

FOOTNOTES

1 The affected decisions are: decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to: a listed threatened species or ecological community (section 206A); a migratory species (section 221A); whales and other cetaceans (section 243A); listed marine species (section 263A); international movement of wildlife specimens (section 303GJ); and Ministerial decision to give advice in relation to contravention of a conservation order (sections 472 and 473). Decisions of a delegate of the Minister remain reviewable.

2 Three merits appeals cases have been reported under sections 206A, 221A, 243A, 263A, 303GJ, and 473 of the EPBC Act: 1. *International Fund for Animal Welfare (Australia) Pty Ltd and Minister for Environment and Heritage, Re* (2005) 41 AAR 508; [2005] AATA 1210; [2006] AATA 94 (the Asian Elephants Case); 2. *Wildlife Protection Assoc of Australia Inc and Minister for the Environment and Heritage, Re* (2003) 73 ALD 446; [2003] AATA 236; [2006] AATA 29; and 3. *Humane Society International and Minister for the Environment and Heritage* [2006] AATA 298 (the Southern Bluefin Tuna Fishery Case).

3 As summarized by Chris McGrath.

4 *Minister for the Environment and Heritage v Queensland Conservation Council Inc and WWF Australia* [2004] FCAFC 190 30 July 2004 - "Nathan Dam Case".

5 **527E Meaning of *impact***
(1) For the purposes of this Act, an event or circumstance is an ***impact*** of an action taken by a person if:
(a) the event or circumstance is a direct consequence of the action; or
(b) for an event or circumstance that is an indirect consequence of the action—subject to subsection (2), the action is a substantial cause of that event or circumstance.
(2) For the purposes of paragraph (1)(b), if:
(a) a person (the ***primary person***) takes an action (the ***primary action***); and
(b) as a consequence of the primary action, another person (the ***secondary person***) takes another action (the ***secondary action***); and
(c) the secondary action is not taken at the direction or request of the primary person; and
(d) an event or circumstance is a consequence of the secondary action;
then that event or circumstance is an ***impact*** of the primary action only if:
(e) the primary action facilitates, to a major extent, the secondary action; and
(f) the secondary action is:
(i) within the contemplation of the primary person; or
(ii) a reasonably foreseeable consequence of the primary action; and
(g) the event or circumstance is:
(i) within the contemplation of the primary person; or
(ii) a reasonably foreseeable consequence of the secondary action.

6 It must be read with a critical amendment to the definition of "controlled action" in s67. The Bill proposes to amend s67 by inserting after "would be" the words "(or would, but for section 25AA or 28AB, be)".

7 A large dam was defined as "any artificial barrier that obstructs, directs or retards natural water flow and that: has a crest height of 15 metres or more; or has an impoundment capacity of over 1 million cubic metres.


Celine Steinfeld

Court of Appeal Ruling - Developments can be approved without a Statement of Environmental Effects

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On 5 December 2006, the Court of Appeal handed down its decision in *Cranky Rock Road Action Group Inc v Cowra Shire Council* [2006] NSWCA 339. The decision confirmed the earlier ruling of Justice Bignold that a development application can be validly approved without a Statement of Environmental Effects ("SEE") having been lodged.

The EDO and barristers Brett Walker SC and Philip Clay acted for the Cranky Rock Road Action Group Incorporated ("CRRAG"), an association of farmers in Cowindra who were opposed to the subdivision of rural landholdings into small lifestyle blocks. These subdivisions resulted in the loss of productive agricultural land and made it difficult for farmers neighbouring these subdivisions to engage in ordinary rural land management practices. The proceedings concerned one development consent granted in February 2004 for the subdivision of 28 rural residential allotments.

A positive outcome of the case was that Cowra Council came under pressure to amend its Local Environment Plan (LEP) to prevent these types of subdivisions in rural areas where they were likely to come into conflict with agricultural land uses. Through amendments to the LEP gazetted in April 2006, subdivisions of this type are no longer permissible in the 1(a) zone, although existing subdivision consents remain valid.

The EDO initially challenged the development consent in the Land and Environment Court on several grounds, including that the Council had failed to properly consider the environmental impacts of the proposal, and absence of a Statement of Environmental Effects (SEE). Justice Bignold of the Land and Environment Court found that no errors had been made which invalidated the consent.

The finding that a development consent could be validly granted without an SEE surprised many people involved in environmental and planning law in NSW, where SEEs have operated as a fundamental part of the development application process since at least 1994. Because the decision had important implications for the development consent process generally, the EDO and CRRAG decided to appeal to the Court of Appeal. The Minister for Planning also participated in the appeal as Second Appellant.

An SEE is a statement setting out the environmental impacts of the development, and any steps which will be taken to mitigate those impacts. The size and complexity of an SEE varies depending on the scale of the development and likely impacts. It can range from a very simple one-page document prepared by the applicant for consent, to multi-volume reports prepared by a range of experts.

An SEE is the principal environmental assessment document for the vast majority of development applications lodged in this State. Applications for more complex or high-risk developments (known as "designated development") must be lodged with an Environmental Impact Statement ("EIS") instead of an SEE.

There was no dispute in this case that the development application should have been accompanied by an SEE, pursuant to the *Environmental Planning and Assessment Act 1979* ("the Act") and the *Environmental Planning and Assessment Regulation 2000* ("the Regulation"). The question for the Court was, was this just a technical breach of the Act which had no consequences, or was this a breach which resulted in invalidity of any consent which was granted to the application?

The Court of Appeal found that there were strong indications in the Act that failure to submit an SEE was not a breach of the Act which was intended to result in invalidity. These indications may be summarised as follows:

The requirement for an SEE is found in a schedule of the Regulation along with about a dozen other requirements for development applications, many of them relatively insignificant. The Court said it was unlikely that the legislature intended that failure to comply with any one of these requirements would result in invalidity of the consent.

The fact that the Regulation did not specify in detail the contents of an SEE, and the fact that SEEs are prepared by applicants means that SEEs are inevitably "limited" in their ability to contribute to the development assessment process.

Under the Regulation, councils have power to reject a development application which is not accompanied by an SEE. This is an alternative sanction for failure to submit an SEE, so it is not necessary to find that failure to submit an SEE results in invalidity.

The Court of Appeal did stress the need for a consent authority to properly consider the impacts of a proposal before deciding whether to grant consent. They pointed out that failure to submit a SEE could lead indirectly to invalidity of the consent if there was insufficient information before the consent authority to enable them to make a proper assessment of the impacts of the proposal.

The EDO is concerned that this decision will result in a less rigorous assessment process for many developments, and will make it more difficult for the community to participate in the development assessment process.

It is true that an SEE is often biased in favor of the applicant's point of view. However, it usually contains a lot of information which the applicant is in a better position to provide than anyone else. For example, it usually contains details of compliance with development standards, the characteristics of the site and details of proposed land uses. Without this kind of information it is difficult for members of the community to comment in a meaningful way on the development proposal.

The SEE also provides the starting point for the development assessment process. In many cases, the consent authority will request further information after receiving the SEE, or will brief its own consultants to review and comment on the accuracy of the SEE. The consent authority usually does not have the resources to carry out its own original assessment of all potential impacts of a development proposal. Without this starting-point, there is a danger that potentially serious impacts could be overlooked.

This case has served to highlight a weakness in the legislation, where the practical importance of SEEs in the planning system is at odds with their prominence in the Act and Regulation. It is to be hoped that the Minister for Planning, who was a party to the appeal, will take action to correct this anomaly by amending the Act and Regulation. It would be a simple matter for the legislation to specify that consent cannot be validly granted without an SEE being submitted, in cases where an SEE is required.

At the same time, the mandatory contents of SEEs should be expanded to ensure that SEEs do perform the function of properly informing the decision-maker and the community of the likely impacts of development proposals.

Will Planning laws contribute to the extinction of cassowaries at Mission Beach?

KIRSTY RUDDOCK
PRINCIPAL SOLICITOR, EDO NSW

There are currently, on best estimates, between 1000 and 1500 Southern cassowaries (*Casuarius casuarius johnsonii)* in Far North Queensland. The Southern cassowary is an iconic species crucial to the distribution of rainforest seed in the Wet Tropics World Heritage region. Habitat clearing, habitat fragmentation, loss of connectivity, coastal development, deaths from dogs, disease and vehicles are threatening most of the significant coastal populations with extinction.[1]

The Southern Cassowary population at Mission Beach is currently under serious threat of extinction. On best estimates the adult population is now around 40 adult birds which is not sufficient to maintain a viable breeding population in the area.[2] Cyclone Larry has also significantly impacted on the viability of the local population with around nine cassowary deaths since the cyclone: six from collisions with cars, one from dog attack, one from Bacterial hepatitis and one from starvation.[3] Cyclone Larry has lead to an 80% reduction in native fruit trees in the habitat area of the cassowary, which has not been helped by the increasing development of cassowary habitat in the Mission Beach area over the past 10 years.[4]

The current state of the Southern cassowary in Mission Beach means that governments of all persuasions, including local government, need to take the utmost precautions to ensure that their decision making does not contribute to the further demise of the cassowary. Mission Beach is valuable real estate and this often means that not enough weight is given to cassowary protection in planning decisions where there are conflicts with economic development of the area. Mission Beach also straddles two Shire Councils, Cardwell Shire Council and Johnstone Shire Council. At present, both Cardwell and Johnstone Shire Councils are under significant financial constraints because of their small ratepayer base. This is placing increasing pressure on these Councils to approve developments in order to obtain infrastructure payments and increase their ratepayer base.

The Courts have, in some cases, supported the Council's pro-development approach, as shown in the outcome of *Suddaby & Ors v Johnstone Shire Council*. This case highlights the deficiencies inherent in the *Integrated Planning Act 1997* in protecting endangered species, and the need for proper biodiversity planning to inform all planning laws throughout Queensland. It also urgently highlights the need for a Cassowary Conservation Plan to ensure that there is a freeze on further development applications in the area until proper assessments of the impacts of development on cassowaries across the area can be considered.

Suddaby & Ors v Johnstone Shire Council (No. 232 of 2005/234 of 2005)

The Community for Coastal and Cassowary Conservation (C4) and a group of local residents appealed the decision of Johnstone Shire Council to grant development approval to Cavanah for a material change of use (uses consistent with the Rural Residential and Conservation Zone) and a development permit for a reconfiguration of a lot (1 lot into 21 lots plus balance) of land situated at Alexander Drive, Mission Beach. C4 argued that the material change of use conflicted with the Rural Conservation Zoning of the land. Rural conservation zoning in Johnstone Shire Council allows certain limited development rights with up to 4 bonus lots available as a trade off in certain areas, if the owner seeks to formally protect other areas of their property through conservation covenants. In this case the developer provided a conservation covenant over part of the land and applied for the rest of the block to be subdivided into 22 lots of rural residential land. C4 argued that the decision conflicted with the Planning Scheme requirements for rural conservation land, compromised the desired environmental outcomes for the area and also conflicted with the State Planning Policy on Good Quality Agricultural Land.

On 25th September 2006, Judge White dismissed C4's appeal. His Honour rejected C4's arguments about the application of Bonus Development rights. C4 had argued that because this area fell outside those rights, additional development rights in this area could not be allowed. His Honour found that the Planning Scheme allowed flexibility to allow for greater development to secure important cassowary habitat on the balance of the subject land (which is now to be handed over to National Parks). He noted that the

Planning Scheme provided a guide only and nothing prevented the Council from agreeing to a higher density of development. He particularly noted that higher density development could be envisaged where, in return, other areas that formed significant habitat were left undisturbed.

His Honour found that the site was not good quality agricultural land, mainly because it fell into disuse before it was purchased, thereby showing that it was not a viable farm (although the developer was the one who did not use it for farming). C4 called expert evidence from an organic farmer that the land could be used viably for a number of different organic crops. His Honour indicated that the fact that organic farming would make it viable showed how unviable it was for farming. He commented in particular that people should not be forced to invest in a relatively unusual farming method in the hope of turning it into a viable farm, and nothing in the State Planning Policy on preservation of agricultural land required such an approach.

His Honour was swayed by the arguments on need and that Mission Beach was facing a strong demand for residential allotments. He therefore found that there were good planning grounds for the development, on the basis that some cassowary habitat on the part of the block would be preserved as it would be secured as a Conservation Area.

On the cassowary arguments, His Honour was satisfied that a 1500mm chainmesh fence would be sufficient to keep cassowaries out of the subdivision and sought that the area of the fence be extended slightly to make it harder for them to wander accidentally into the development. This was despite expert evidence called by C4 that increased densities around important cassowary habitat would impact on cassowaries due to the incursions of weeds, cars, dogs and increased human interactions which were generally not desirable. His Honour refused to consider any submissions about banning dogs from the development, or a higher fence to restrict entry of weeds and rubbish into the conservation area.

In relation to submissions made by the residents, His Honour dismissed arguments about the amenity concerns of the residents and the rezoning of the area from rural to rural residential.

Where to from here?

Continued urban expansion in the Mission Beach area is resulting in significant fragmentation of essential cassowary habitat. The continued spread of the urban footprint is preventing cassowaries from accessing the required food sources and leaving small populations of birds isolated from other birds, contributing to the decline of the species in the lowland coastal areas under Mission Beach. These small isolated populations are especially vulnerable to the impacts of feral pigs, domestic dogs and motor vehicles, which continue to take their toll on the species.

One positive outcome of this case is that the developer agreed to hand over the cassowary habitat to National Parks which will ensure that the area remains protected. This case does, however, highlight the problems for cassowary conservation outside of essential habitat with the current Johnstone Shire Council Planning Scheme as it provides the Council with considerable discretion to allow development of sensitive areas in the Mission Beach area. It also shows the difficulties in succeeding in the Planning and Environment Court on the basis of environmental arguments when pitted against strong development factors.

C4 and the EDO North Queensland have been working with a number of other conservation groups in Far North Queensland including the Cairns and Far North Environment Centre, to lobby for immediate protection of the habitat and surrounds of the Southern cassowary. In particular, those organisations called on the Queensland Minister for Environment to implement urgently a Cassowary Conservation Plan, similar to the Koala Plan in South East Queensland.

While the Environment Protection Authority introduced a Southern Cassowary Recovery Plan in 2001-2005, this has not assisted in arresting the significant decline in habitat of the Southern Cassowary. This is partially because the Recovery Plan does not focus on how planning schemes are impacting on essential cassowary habitat, particularly in the Mission Beach area.

A Conservation Plan under the *Nature Conservation Act* would prevail in the event of a conflict with the provisions of a Planning Scheme. A local government cannot issue or give any approval for the use of land that is inconsistent with a Conservation Plan. Conservation Plans may also implement protection and regulation measures into the development approval process under a Planning Scheme.

The Queensland Government has introduced a Koala Conservation Plan and a State Planning Policy. The Koala Conservation Plan imposes significant control on developments in important koala habitats. It also encourages koala sensitive design in areas on the fringe of koala habitat. Similar principles should be applied to the Southern Cassowary, a species in a far more precarious situation. A Cassowary Conservation Plan could introduce a scheme classifying remnant vegetation according to its significance as cassowary habitat or corridors. Controls could be accordingly introduced ensuring no further development or loss or fragmentation of habitat in areas of most significance. In areas of less significance, that is supplementary habitats or areas of occasional use, the Conservation Plan could require cassowary sensitive design, and prohibit changes to Planning Schemes or further development which would adversely impact on cassowaries.

Besides habitat loss, the main threats in the Mission Beach area are dogs and motor vehicles. Road calming devices are urgently needed in the area and a concerted approach needs to be taken to ensure that the threat posed by dogs is reduced. In all areas of key cassowary habitat and areas neighbouring cassowary corridors, new developments should have restrictions on the ability to have dogs in order to remove this additional pressure on this threatened species.

The other significant issue is the rehabilitation of areas suitable for increasing cassowary habitat. Many areas adjoining essential cassowary habitat are cleared but could be rehabilitated for use as habitat or corridors. At present most of these areas such as the land at issue in the Cavanah case are being developed which is causing significant further fragmentation of cassowary habitat. A Conservation Plan could provide the EPA with a concurrence agency role where it is able to influence the outcome of development applications that affect Cassowary habitat. It would also ensure that conservation of endangered species overrides the economic development objectives which tend to be most influential on planning decisions. It would also ensure that in future situations similar to the Cavanah case that development on cleared areas adjoining cassowary habitat is restricted, providing a suitable buffer between the habitat and people.

A Temporary Local Planning Instrument which freezes all development applications until better protections can be implemented into the Planning Scheme is necessary in Mission Beach. As there are a large number of development applications before the Council and in contemplation this needs to be done urgently, before further fragmentation of cassowary habitat occurs in the area.

A precautionary approach that takes immediate steps to protect the Southern Cassowary is urgently needed. These steps need to be taken at a State or Federal level to ensure that economic pressures do not continue to threaten the Southern Cassowary with extinction, given the lack of assistance from the Courts and Local Councils in protecting this iconic species.

FOOTNOTES

1 Dr Les Moore's research including MSc by research on *Ecology and Population Viability Analysis of the Southern Cassowary Casuarius casuarius johnsonii, Mission Beach, North Queensland).* .

2 Records of cassowaries at Mission Beach kept by Community for Coastal and Cassowary Conservation (C4) and research of Les Moore as above.

3 Report from Graham Laurisden, Innisfail/Tully Vet Surgery who attends to cassowaries in Mission Beach area to C4.

4 Report of Barry Forster for C4

What's New?
Changes to the EP&A Act in December 2006

The *Environmental Planning Legislation Amendment Act 2006* was gazetted on 4 December 2006*. The amendments give the Minister significant new powers to override local planning controls when approving major projects under Part 3A of the *Environmental Planning and Assessment Act* 1979 ("the Act").

The concept of "major projects" (also known as "Part 3A development") was introduced into the Act in May 2005. The Minister can declare any proposal to be a major project if he forms the opinion that the development is of state or regional environmental planning significance.[1] If a proposal is declared to be a major project, it is dealt with as a project application under Part 3A of the Act, rather than as a development application under Part 4. The rules applying to Part 3A development are quite different from the rules applying to other types of development under Part 4 of the Act.

The recent amendments allow the Minister to approve a major project application even if the proposal is wholly prohibited under the Local Environmental Plan which applies to the site. This results in a weakening of the overall planning framework, where plans which are developed by Councils to guide development in their local area do not apply to any development which the Minister decides to call in, as a major project.

The amendments allow the Minister to make changes to any Local Environmental Plan, Regional Environmental Plan or State Environmental Planning Policy to authorise the carrying out of an approved project. Amendments relating to major projects can now be made by order in the gazette, rather than going through the usual procedures for making an amendment to an existing planning instrument.[2]

Other changes to the wording of key sections may make it more difficult to challenge decisions made under Part 3A. For example, subsection 75J(1) previously stated that the Minister could only approve a project if an application had been 'duly' made and the environmental assessment requirements under Part 3A had been complied with. This made it fairly clear that these matters were an essential prerequisite to grant of an approval under Part 3A. The amended section simply states that the application must have been "made", and the Director-General must have provided a report to the Minister. Under the re-worded section it is unclear what the consequences will be if the proper assessment procedures are not followed. Possibly this will not lead to invalidity of the consent.

Another area of concern is removing the requirement for approvals under other Acts. In some cases, a development will have impacts on several different aspects of the environment. Under Part 4, an applicant for consent may have to obtain permits from several different agencies with responsibilities for those different aspects. For example, the Department of Natural Resources looks after the health of rivers, while the Rural Fire Service has responsibility for bushfire safety.

Section 75U provides that various other permits which would normally be required under other Acts are not required for approved major projects. For example, if a project is approved under Part 3A which involves damage to Aboriginal heritage, the applicant will not have to seek a permit from the Department of Environment and Conservation. Nor does the applicant have to obtain a bushfire safety authority for development on bushfire prone land.

A new subsection (4) of the amended Act extends this exemption to investigative work required to be carried out in the project-specific environmental assessment requirements issued by the Director-General for Planning. This amendment is of concern because potentially damaging activities could be undertaken in the course of investigation, with no opportunity for the impact of these works to be assessed by the relevant departments. In some cases, investigative works for major projects may themselves be quite significant. For example, geotechnical studies for mines could result in damage to native vegetation, aquifers or Aboriginal heritage.

The overall effect of these amendments is to further widen the gap between the highly structured assessment requirements under Part 4 of the Act, and the Part 3A process which gives the Minister for Planning unfettered discretion to determine what level of assessment will be required for major projects.

* *Although they have been gazetted, not all of the above changes had commenced at the date of writing. Interested readers should check Parliamentary Counsel's website www.pco.nsw.gov.au to confirm the commencement date of particular amendments.*

1 EP&A Act s 75B(2)(a)
2 S 75R(3A)

Continued from page 7...

FOOTNOTES

1 Para 4.
2 http://www.macgen.com.au/
3 http://www.macgen.com.au/
4 That EARs by definition require an "environmental assessment" was a key aspect of the judgment: see further paragraph 1.11 of this article below, and paragraph 70 of the judgment.
5 Para 16.
6 Para 16.
7 The Department of Environment and Conservation's *Approved Methods for the Modelling and Assessment of Air Pollutants in NSW*
8 Para 17.
9 That is, the draft *NSW Energy and Greenhouse Guidelines for Environmental Impact Assessment* (Sustainable Energy Development Authority and Planning NSW, 2002) and the Australian Greenhouse Office *Factors and Methods Workbook December 2005*.
10 Para 18 – 19.
11 Para 19.
12 Para 19.
13 "Purchased electricity" is defined as "electricity that is purchased or otherwise brought into the organisational boundary of the company, (emissions that) physically occur at the facility where electricity is generated" – para 19.
14 Para 19.
15 Para 18.
16 Undated.
17 That is, the Protocol and the AGO workbook.
18 Para 21.
19 Para 76.
20 Para 70.
21 Para 73.
22 Para 73.
23 Section 4.
24 Paras 41, 105.
25 Para 72.
26 Para 75.
27 Para 109.
28 Para 122, 131.
29 Para 126.
30 Para 131.
31 Para 134.
32 Para 137.
33 Para 54.
34 Para 27 – 28.
35 Para 84
36 Para 86
37 Para 90 – Para 92 - 93

EDITOR'S NOTE: On 9 February 2007, it was announced that the Commonwealth will be intervening in Forestry Tasmania's appeal against the Federal Court ruling of 19 December 2006, known as the Wielangta decision. The Commonwealth will be intervening in order to clarify technical issues relating to the Environment Protection and Biodiversity Conservation Act 1999.

EDO Book Launch - Campaigning and the Law in New South Wales: A guide to your rights and responsibilities

The Environmental Defender's Office invites you to the launch of "Campaigning and the Law in New South Wales: A guide to your rights and responsibilities" in Lismore on 31 March 2007.

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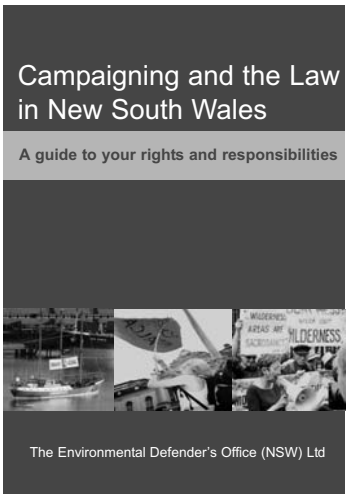
The book will be officially launched by **Ian Cohen,** Greens MP, and **Jeff Smith,** Chief Executive Officer of the Environmental Defender's Office.

Limited copies of the handbook will be available on the day for $20.

Date: 31 March 2007, 11.00am
Place: Caddies Café, 20-24 Carrington Street Lismore
Cost: Free
RSVP 16 March 2007 to Tisha Dejmanee (02) 9262 6989 or tisha.dejmanee@edo.org.au



Continued from page 5...

FOOTNOTES

1 Para 293.
2 Para 300.
3 Para 26.
4 Para 58.
5 Para 82.
6 Para 56.
7
8 Para 64.
9 Para 64.
10 Para 83.
11 Para 28.
12 Para 38.
13 Para 32.
14 Para 35.
15 Para 35.
16 Para 40.
17 Para 58.
18 Para 230.
19 Para 62.
20 Para 62.
21 Para 62.
22 Para 63.
23 Para 65.
24 Para 66, also para 46.
25 Para 53.
26 Para 54. See also *Coote v Forestry Tasmania* (2006) 227 ALR 481 at 487 per Gummow J.
27 Para 10 - 12.
28 Para 15.
29 Para 138.
30 Paras 13-14.
31 Para 69, 117 and 125 [Mr Meggs], 132 [Dr Roberts], 133 [Mr Wapstra], 134 [Dr Laffan], 136 [The Richards Report].
32 Para 146 and 157 [Mr Brown], 156 [Mr Kennedy].
33
34 Para 73.
35 Para 76, also 73.
36 Para 76, also 74.
37 Para 76, also 75.
38 Para 84.
39 Para 86. This was because eagles in 17E had abandoned 2 inactive nests and built another one in a less disturbed place in their territory (para 88.
40 These other threats were listed as starvation, accidents, indigenous disease, sever weather and wildfires, collision with human items, electrocution, non-target killing and incapacitation, persecution, trophy hunting, competition with exotic carnivores, arson, pollution, exotic disease, loss of nesting and hunting habitat to tree dieback, predation, territorial fights and escaped fires: para 85.
41 Para 86.
42 This case held (relevantly) that *"""Impact" [in s75(2), which sets out the matters the Minister must take into account in deciding whether to grant approval under Part 9 of the Act]…is not confined to direct physical effects of the action on the matter protected…(i)t includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter.": Minister for Environment & Heritage v Queensland Conservation Council Inc. & Anor* (2004) 139 FCR 24 at [53].
43 Para 94.
44 Para 93.
45 Para 95.
46 Para 96 and 98.
47 Para 101.
48 Para 96.
49 Para 100.
50 Para 104.
51 Paras 108-110
52 Para 111.
53 Para 78.
54 Paras 79, 80, 81.
55 Para 138.
56 Para 138.
57 Para 140.
58 Para 192.
59 Para 197 quoting *Stocks and Parkes Investments Pty Ltd v The Minister* [1971] NSWLR 932 at 940.
60 Para 203.
61 Para 205.
62 Para 215.
63 Para 224, 235.
64 Para 234, 236.
65 Para 225.
66 Para 228.
67 Para 226 - 227.
68 Para 230.
69 Para 229.
70 Para 216.
71 Para 219.
72 Para 219.
73 Para 221.
74 Para 222-224.
75 Para 219.
76 Para 220.
77 Para 238.
78 Para 238.
79 Para 240.
80 Para 241.
81 Para 261 re CAR reserve system, para 273 re management prescriptions.
82 Para 264-267 re CAR reserve system, para 275 re management prescriptions.
83 Para 268 – 270 re CAR reserve system, para 282 re management prescriptions.
84 Para 271.
85 Para 283.
86 Para 301
87 Environmental Planning & Assessment Amendment Act 2006 No 123 – Schedule 1 items [6] – [8] which commenced on 12 January 2007, though note fn 33 below.
88 Id – Schedule 1 Item [57].
89 These last two amendments were introduced on the floor of the parliament at the lobbying of the ALP Member for Coogee, Paul Pearce MP, at the request of environment groups; without them it is arguable that EARs would have become completely meaningless.

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