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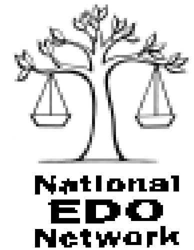

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Tuna Feedlots, ESD and the Burden of Proof

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A recent decision by South Australia's Environment Resources and Development Court has attracted world-wide attention because of the way it deals with "ecologically sustainable development" (ESD) and the "precautionary principle".

Background

On the face of it, the case is a fairly straight-forward planning merits appeal. The Conservation Council of SA Inc. appealed against the approval by the State's statutory planning authority - the Development Assessment Commission - of 42 new tuna feedlots in the waters of Louth Bay in Spencer Gulf near Port Lincoln.

The task of the Court in such cases is to determine afresh whether the proposed developments are "seriously at variance" with the relevant planning scheme. The Conservation Council (represented by the Environmental Defenders Office (SA) Inc.) argued that a range of known and unknown environmental problems together with a lack of enforceable management by relevant government agencies meant that the developments would not be "ecologically sustainable" (as that term is used in the Development Plan).

Because the case was confined to planning issues in South Australian waters, it was not relevant to consider any of the broader sustainability issues associated with the industry. The fact that the species is listed on the World Conservation Union's "Red List of Critically Endangered Species" was not particularly relevant given that the only matter before the Court was the "development approval" for the "change in use" of the subject land.

Southern Bluefin Tuna *(Thunnus Maccoyii)* is a high value species fished by several countries, some of which are parties to an international convention aimed at restricting the global catch. Australia's quota of around 5,000 tonnes is caught during summer off the Great Australian Bight, then towed slowly in cages back to Port Lincoln where the fish are transferred to floating cages. They are then fattened on a diet of mostly imported pilchards, before being exported to Japan for the sushimi market.

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Some of the issues raised by the Conservation Council included the pollution of the water and seabed from tuna waste and uneaten food, the proliferation of scavenging silver gulls, the potential for the introduction of exotic diseases from the use of imported tuna feed and the killing of dolphins trapped in feedlot netting.

The decision

In allowing the appeal and overturning the development approvals, the Court determined that existing industry practice and management regimes under the *Fisheries Act 1982* and the *Development Act 1993* could not be relied on to ensure that the proposed developments would be ecologically sustainable. Of particular importance to Court was the need for the developments to be subject to a “monitored, adaptive management regime”. An essential element of such a regime is the ability of regulators to respond to changed circumstances or increased knowledge by modifying licences and other approvals. The ability of the Minister for Fisheries to licence tuna feedlot operators for up to 10 years with no capacity for licence review was regarded as contrary to the principles of ESD.

As an aside, it is ironic that the tuna industry succeeded in lobbying previous State governments to ensure that the State’s EPA was not given any regulatory responsibility for marine aquaculture. Had the Government not side-lined the EPA, then the Court’s conclusion “most likely would have been different” because EPA licences are readily able to be amended or revoked as circumstances require.

The Government reaction

The reaction of the State Government to the Court’s decision was swift. Amendments to the *Development Regulations 1993* were rushed into place just before Christmas 1999 which ensured that the defeated applications could be re-lodged and approved without risk of further appeals. The “new” applications (which were identical to those overturned) were duly approved in January this year.

The new Regulations provide that aquaculture development applications which are for periods of 12 months or less are not subject to third party notification and therefore third party appeal rights. The stated rationale for this approach is that it was a “short term measure … to address the immediate needs of the valuable tuna industry”.

The removal of public notification and appeal rights is widely feared to be a permanent feature of a new act to regulate acquaculture which is foreshadowed by the Government. The Minister’s stated preferred approach is for public participation to be limited to the preparation of management plans containing aquaculture zones rather than in relation to individual aquaculture development applications. The Tuna Boat Owners Association has stated that its members will move their operations interstate unless they receive greater certainty in the approvals process.

Importance of Appeal decision

Even though tuna feedlots will again be polluting the waters of Louth Bay this year, the decision of the Environment Resources and Development Court is still important because it is one of only a handful of cases that have considered the meaning of “ecologically sustainable development” as it is used in legislation or statutory policy instruments. Whilst there are definitions available, these still leave unanswered important questions such as, “Who has the burden of proof?” and “How do we handle scientific uncertainty?”

Burden of Proof

The approach adopted by the Court was to hold that the onus is on the developer to show that the feedlots are ecologically sustainable rather than the burden being on the opponents of the development to show that they are not. It is sufficient for those challenging the development to show that there is “a prospect of serious or irreversible damage to the environment” in order to shift the burden of proof to the developers. The logic of this approach is clear given that opponents of a proposed development are rarely likely to be able to prove that harm will result. Proof often only emerges once the development is constructed, by which time it can be too late to reverse the damage. Often the best that opponents can do is to show that there is a potential for serious unaddressed or unmanageable impacts if the development were to go ahead.

Scientific Uncertainty

The Court also made several useful observations about science and ESD, particularly in relation to the risk associated with the use of imported frozen pilchards as food for caged tuna. Whilst no scientists were prepared to state categorically that two recent mass mortalities of local pilchards were due to disease brought in with imported pilchards, many scientists were prepared to acknowledge that it is a highly risky practice. The Australian Quarantine and Inspection Service (AQIS) on the other hand was prepared to vouch for the safety of imported pilchards under its scientifically-based Import Risk Assessment (IRA) process. The Court accepted the appellant’s argument that lack of evidence as to risk did not mean that there was no risk. Lack of evidence may be due to the fact that nobody has undertaken the necessary studies to determine whether a risk exists or not.

Post script:
The decision of the Environment Resources and Development Court has been appealed to the full Supreme Court of South Australia by the Tuna Boat Owners Association. The comprehensive appeal challenges most of the findings of the Court, including its findings on ESD, the Precautionary Principle and the burden of proof. The appeal is expected to be heard this year. In the meantime, the Conservation Council of SA and the EDO are urging the State Government to fulfil its promise to convene Stakeholder working groups to redraft the State’s inadequate aquaculture laws.

A BRAVE NEW GENETICALLY MODIFIED WORLD?

A LOOK AT THE *GENE TECHNOLOGY BILL* 2000 (Cth)

Donald K Anton, Solicitor, EDO Victoria

Introduction

As a result, in early 2000, the Interim Office of the Gene Technology Regulator (IOGTR) circulated a Consultation Draft of the *Gene Technology Bill* 2000 (Cth). The purported object of the Bill is to protect human health and safety and the environment by identifying and managing the risks posed by GMOs that are not otherwise addressed by existing law. Unfortunately, as the Bill currently stands, it is unlikely to be up to the task. The following article is a summary of amendments to the Bill that are necessary to ensure its effectiveness.

The objects of the legislation

The central concern of the Bill is "*identifying*" and "*managing*" risks posed by GMOs and that the new law be "consistent with Australia's national interests". While the objects of the Bill are fine as far as they go, they do not go far enough.

Risk prevention
The primary emphasis of the proposed regulatory system must be on the *prevention and elimination* of the risks posed by GMOs. Indeed, the use of the phrase "managing risks" assumes that even high levels of risk are acceptable. Clearly, this is unwarranted in the context of the severe and irreversible threats that GMOs may pose.

Protection of biological diversity
Given the potential threat that the field trials and the release of GMOs pose to the maintenance of biological diversity within Australia (a mega-diverse country), it is disappointing that the objects of the Bill fail to explicitly mention the need for its protection. Indeed, existing GMO developments such as "terminator seeds" require heightened awareness of the need to protect biological diversity from risks associated with GMOs.

Precautionary decision-making
Another disappointing omission from the objects of the proposed legislation is the failure to expressly include the promotion of precautionary decision-making in relation to the anticipated assessment and approvals processes. This is inconsistent with other recent Commonwealth legislation designed to prevent environmental risks, including s 391 of the *Environment Protection and Biodiversity Conservation Act* 1999 (C'th) (EPBC Act).

The scope of the legislation

The Explanatory Guide that accompanies the Bill indicates that the proposed legislation will regulate all activities involving GMOs that are not currently covered by existing national regulatory schemes. Of course, it almost goes without saying that adding another new layer of bureaucracy to the already varied and complex regulatory structure cuts directly against the calls for the new regulation to be "efficient", avoid "unnecessary duplication", and provide a "streamlined" pathway for industry. To avoid these problems, as a matter of sound policy, the new national regulatory system for GMOs should be a comprehensive and integrated regime.

Relationship with other regulators

If, politically, the development of a comprehensive and integrated regulatory system proves unachievable, the new and independent Gene Technology Regulator (**GTR**) established by the Bill needs to be made a referral authority for other regulators. However, it is not enough for existing regulators to "seek and take account of advice" of the GTR on human and environmental safety issues in relation to applications for approval involving GMOs and GM products. Because the GTR is to be completely independent and its decisions must be based on scientific analysis, the GTR needs to be given the power to disallow applications for approval made to other regulators (or impose its own conditions), where the GTR believes that the safety of human health or the environment would otherwise be compromised.

The Gene Technology Regulator

The Bill attempts to ensure that the GTR has complete independence from the political process and the companies it will regulate. This is especially important in light of the perception in other jurisdictions that an industry can 'capture' a regulating agency.

Independence of the GTR
The Bill, however, fails to give adequate consideration to necessary disabilities in connection with eligibility to be the GTR. The same is true of members of the Gene Technology Advisory Body (**GTAC**).

For instance, an individual with an interest (financial or otherwise) in a regulated entity should be precluded from holding the office of the GTR or GTAC. Likewise, an individual who has worked for a regulated entity should be barred from holding the office of GTR or GTAC until the expiration of an adequate amount of time to ensure propriety and the appearance of propriety in impartial decision-making. Disclosure of interest, which is all that is provided for in the Bill, is clearly not sufficient.

Public consultation on GMO policy

We are concerned about the lack of opportunities for public participation in relation to the development of policy by the Ministerial Council in relation to gene technology. At present, the Bill only provides for consultation "as requested" by the Ministerial Council with the Gene Technology Community

Consultative Group (**GTCCG**). Clearly, the wider public should be consulted in the process given the important ramifications for the safety of human health and the environment.

The Gene Technology Advisory Body (GTAC)

Absence of Ethics member
We support the establishment of GTAC to provide expert advice to the GTR. However, given the commitment in the Discussion Paper to take account of "ethical" concerns in decision-making, it is surprising that the proposed composition of GTAC fails to include an expert in ethics. In order to ensure ethical concerns are adequately accounted for, it is important that GTAC include an ethicist.

Applying for a licence

Burden of proof
Given the potential catastrophic risks associated with the use, application or release of GMOs, it is imperative that the national regulatory framework clearly and expressly establishes that the applicant for a licence must demonstrate beyond reasonable doubt that granting the application will not result in damage or harm to human health and safety or to the environment.

Public notice of all applications
In order to give effect to the community's right to know about GMO activities taking place around them, it is vital that the proposed national regulatory system require that the public be given adequate notice of ***all applications*** received by the GTR. This is not provided for in the Bill.

Public register of application details, etc
It is also essential that the regulatory system establish a comprehensive public register relating to licences. The register should be freely available to the public and, at a minimum, contain all information about licence applications, GTAC's report on assessment of risks, reasons for licence decisions, the licence and conditions (if any), any variations of licences, and all monitoring data.

Access to information versus commercial confidentiality
The Bill fails to adequately consider the public's right to access information received by the GTR in connection with applications and monitoring information. There needs to be a presumption in the new system that all information disclosed by an applicant or licence holder is freely available to anyone who seeks it. However, the applicant should be allowed ask the GTR to keep certain information confidential on the grounds that its competitors may be able to acquire and use the information and harm the applicant's competitive business position. The applicant should bear the burden of proof and a narrow and precise definition of commercial confidentiality needs to be provided by the Bill. The GTR should always have the power to override the claim for confidentiality in the public interest, as when human lives or environmental damage are threatened.

Consultation during the risk assessment phase

In relation to public participation in the assessment process, the Bill attempts to draw an artificial distinction between contained experimentation and field trial or general release of GMOs. There is only potential for public participation where field trials or general release are contemplated. This is entirely unacceptable. The public must have the right to be notified and participate in connection with all applications.

Matters to be taken into account

I*mpact on biological diversity*
The Bill indicates that the GTR must consider risks to the environment in making a decision on a licence application. However, no mention is made about impacts on biological diversity. Because GMOs have the dangerous potential to greatly reduce or radically alter the wealth of biological diversity found in Australia, it is crucial that the GTR also specifically be required to consider risks posed to biological diversity.

The precautionary principle
It is unacceptable that the proposed assessment process fails to incorporate the precautionary principle into matters to be considered in deciding whether or not to grant a licence. Given the potential for grave and irreversible harm that GMOs pose, it is irresponsible not to include an express requirement that the precautionary principle be considered in decision-making.

Ethical values and norms
Given the Bill's commitment to "providing a mechanism for considering ethical issues", it is strange to find ethical values and norms omitted from the matters that the GTR must take into account in making a decision on an application. Clearly, if the proposed national regulatory system is to be true to its objectives, ethical issues must be included in the calculus of decision-making.

Granting a licence

Assurance bonds
While money can never remedy death and disease or environmental harm, it is vital that a regime of adequate assurance bonds be established by the proposed national regulatory system. The effective use of assurance bonds finds ample precedent in the mining laws of various States and Territories. Assurance bonds would help to facilitate the highest standard of care in the use, application or release of GMOs through the threat of forfeiture in the event of damage or harm caused by the applicant (either intentionally, recklessly, negligently or accidentally).

Grounds for the decisions
In order to foster community confidence in decisions made by the GTR in relation to licence applications, it is necessary to ensure that the public is fully informed about the reasons for the GTR's decisions. In every case where a licence is granted or refused, the GTR must be required to provide public reasons. These reasons should be made freely available in the public register.

Advance informed agreement required for export
In order to maintain Australia's international obligations under the Biosafety Protocol to the Biodiversity Convention, in cases where a licence is granted the proposed regulatory system should require the country of import to give its advance informed agreement that there can be no export of GMOs or products

thereof unless the requirements of the Australian Quarantine and Inspection Service (AQIS) are satisfied.

State/Territory "wind-back"

A State or Territory should be able to refuse the release of GMOs on the grounds of protection of human health or safety or the environment, in the event it disagrees with the decision of the GTR. It is unacceptable to force States and Territories to harmonise their protection of health and the environment downwards to meet lower standards imposed by the proposed national regulatory scheme.

The GTR's "delegates" – accredited organisations

We strongly oppose the accreditation of regulated entities to carry out the GTR's functions and duties under the proposed national regulatory system. Self-regulation in this context will undermine public confidence in the entire system. It defeats the purpose of an independent GTR. Accreditation as allowed in the Bill is akin to letting the wolf guard the sheep.

Review or renewal of licences

The Bill entirely fails to outline requirements for the review or renewal of licences. It is unacceptable that licences will be issued in perpetuity without an established system for review or renewal. Review and renewal procedures are common in licensing regimes across Australia. They are included as a necessary means to ensure protection of public health and safety and the environment.

Monitoring of compliance

Public access to monitoring data
The Bill outlines five different methods for monitoring compliance. However, no mention is made about the right of the public to access data compiled as a result of such monitoring. Accordingly, the new regulatory system needs to require that monitoring data be included in the public register.

Protected disclosures
"Whistleblowers" should receive protection under the new regulatory scheme. They should be protected against victimisation, sacking or other punishments so long as any disclosure is made in good faith and on reasonable belief of risks posed by the GMOs or products thereof. The disclosure must be made to the GTR. Disclosure to the media should also be permitted, but subject to more stringent conditions.

Liability and remediation

Criminal and civil penalties
In order to be effective, the liability provisions involving criminal and civil penalties must impose *strict liability* for breach of the new law. The penalties imposed should be sufficiently large to ensure compliance. Criminal and civil penalties should be provided for, including penalties for Directors and Officers, in cases of: (i) unauthorised use of GMOs; (ii) use of GMOs in breach of conditions imposed by the GTR; (iii) failure to provide information, including new or additional information, whether intentionally, recklessly, negligently or accidentally; (iv) the release of GMOs from a contained environment, whether intentionally, recklessly, negligently or accidentally.

Strict liability for harm at common law
Strict liability should also attach to any person or entity responsible for any damage caused to human health or the environment by the introduction of a GMO or product thereof. Officers of a corporation should be held strictly liable unless they can show that they did all that was possible to prevent the activity in relation to the GMO or product thereof. Liability should also extend to damage caused to the environment and to biological diversity. The person or entity responsible must bear the costs for reinstatement, rehabilitation or clean-up measures and for loss or damage caused by taking preventive measures.

Open standing in action to recover damages to the environment of biological diversity
Of course, in order to reflect legislative "best practice", standing to maintain a strict liability action at common law should be expanded. In addition to the traditional standing requirements for individualised harm to person and property, the new regulatory system should provide that "any person" may bring an action to recover damage caused to the environment or biological diversity from the introduction of a GMO or product thereof. Any damages recovered in such an action should be awarded to an "Environment Compensation Fund" which would be spent on environmental remediation.

Review of GTR decisions

Merits appeals and third parties
The Bill creates a statutory right of appeal for "eligible persons" to the Administrative Appeals Tribunal (AAT) under the *Administrative Appeals Tribunal Act* 1975 (Cth). However, this right is to be limited and exercisable only by applicants for licences. Neighbours, members of the public and other third parties are left without the right to be heard. This limitation is clearly discriminatory and against the public interest.
Third parties should be allowed the right to apply for review of a decision on the merits.

Open standing for third parties in merit appeals and judicial review
The Bill seeks to entrench standing requirements in connection with third party appeal rights that represent a retrograde and backward looking development. Even the Commonwealth most recent piece of environmental legislation, the EPBC Act, creates limited open standing for any individual or organisation (whether incorporated or not) that has been involved in conservation or environmental issues over the previous two-year period. While this is not a complete open standing provision – as it should be - it does at least represent 20th Century thought about access to justice. Accordingly, we strongly advocate that the new regulatory scheme provide open standing to third parties in merit appeals and judicial review.

Australia's new nuclear watchdog – has it got teeth?

Jean McSorley, Nuclear Campaigner, Greenpeace
Recently appointed to the Nuclear Safety Committee of ARPANSA
as the person to "represent the interests of the general public."

Australia gets a nuclear regulator

Critics have argued for some time that there is a need for an independent agency to oversee nuclear activities in Australia; in particular facilities such as the nuclear reactor, isotope production plants and waste conditioning and storage facilities at Lucas Heights in Sydney's south – some of which have been operating for almost forty years.

The Australian Radiation Protection and Nuclear Safety Agency (**ARPANSA**) was established by the *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) ("the **ARPANS Act**"), which came into force on 5 February 1999. ARPANSA incorporates the former Australian Radiation Laboratory and the Nuclear Safety Bureau; thus covering both the radiation and health aspects of nuclear activities, as well as the technical and engineering capacities, of nuclear technology used in Australia.

A major part of ARPANSA's work will be overseeing the Lucas Heights site operated by the Australian Nuclear Science & Technology Organisation (**ANSTO**). On that other thorny nuclear issue - uranium mining - ARPANSA will only have input through reviewing codes and guidelines on uranium mining. By and large, mining of uranium (and mineral sands mining - which can also lead to significant worker exposure and radioactive tailings) will remain under State control.

For the past seven years ANSTO has effectively been without any environmental oversight due to the Federal government's 1992 amendments of its governing legislation,[1] which removed any remaining vestige of State control over ANSTO without replacing those powers with appropriate Federal regulations. For example, unlike most overseas regulatory agencies, the Nuclear Safety Bureau did not have powers to license operations as did overseas regulatory agencies. This left ANSTO open to the charge that it was operating under supervision that did not meet the standards prescribed by the International Atomic Energy Agency (**IAEA**).

Critics contend that the ARPANS Act was passed in order to placate the IAEA and those in the public who had expressed concerns over the lack of regulatory oversight of nuclear activities rather than because the Federal government considers such an agency is actually needed; and that the catalyst for its passage was the proposal to construct a new, larger nuclear reactor and greatly expanded isotope production facility at Lucas Heights. How and when the agency exerts its powers will depend on whether such views are correct. Indeed, the ARPANS Act, and the powers contained in it, would have been far more limited if the government's original attempt to push through the legislation had succeeded.

In May 1998, the Government wanted to pass the first version of the ARPANS Act through Parliament with virtually no discussion just before the end of the Parliamentary sitting. Such undue haste made many people suspicious. Had the legislation gone through in that form, Australia would have ended up with a very poor regulatory system for its nuclear industry. However, even though there was heavy lobbying, and despite the changes made to the final legislation, the Act that was passed is still not sufficiently strong.

Structure of the Act

The ARPANS Act establishes three committees to provide input to ARPANSA's decision making.[2] These are the Radiation Health & Safety Advisory Council and two sub-committees, the Radiation Health Committee and the Nuclear Safety Committee, which have representatives from a cross-section of industrial, government, health, technical and community groups. The members of these committees will hopefully ensure that ARPANSA operates as openly as possible, both in terms of providing information *and* accepting new ideas. However, these bodies are advisory in nature and have no positive powers.

ARPANSA's functions are exercised through its Chief Executive Officer (**CEO**), whose responsibilities include:

- issuing licences for siting, construction and operation of nuclear facilities
- providing advice and services, and conducting research, on radiation protection and nuclear safety issues
- accrediting people with technical expertise under the ARPANS Act.[3]

A key failing of the Act is that in making vital decisions about nuclear facilities, much is left to the discretion of the CEO, with no mandated outcomes. There are a series of matters set out in the Regulations to the ARPANS Act that the CEO is required to take into account in making licensing decisions[4]. The CEO is also required to take into account international best practice regarding radiation protection and nuclear safety.[5] However, the CEO need not require a licensee to follow international best practice, throwing doubt upon Government claims that ARPANSA's operations will accord with world's best practice. Also, while the CEO has the power to require certain information to be provided by a licence applicant (such as the radioactive waste management plan for that facility),[6] the CEO is not required to take that information into account. This means there is no requirement for ARPANSA to ensure licensing provisions reflect the latest international developments, and may permit pressure to be brought to bear from political circles if certain activities are believed to be under undue constraints.

Licensing – how will ARPANSA perform?

It remains to be seen how ARPANSA will respond to political influences. There is no doubt though that ARPANSA will have to work hard to overcome the view that the agency was established simply to give a veneer of 'independent oversight' to nuclear proposals already firmly decided on by the

government and that the agency will simply license and regulate nuclear activities without questioning the underlying need for them.

In this regard the replacement reactor proposed for Lucas Heights will certainly be a litmus test. The environmental impact assessment process for this reactor has been going on for several years, in the absence of any regulator with specific expertise in nuclear issues. An environmental impact statement was prepared, submissions from the public sought, and a supplement produced responding to criticisms made. When the new licensing regime under the ARPANS Act came into effect in 1999, ANSTO first applied for a license to prepare a site for the new reactor before submitting applications for existing facilities. Critics argued that ARPANSA could not judge the 'suitability' of the Lucas Heights site for a new reactor until a full assessment of current facilities – such as the isotope production plant and waste conditioning and storage facilities – had been carried out. There is naturally concern that the government will allow more nuclear facilities to be constructed while current waste problems remain to be properly addressed.

The CEO has the power to suspend or cancel licences, but only on four specified grounds:

- a condition of the licence has been breached;
- the CEO believes an offence has been committed against the ARPANS Act or Regulations by the licence holder, or someone covered by the licence;
- licence fees have not been paid; or
- the licence was obtained improperly.[7]

Whether these powers are broad enough will really depend on the CEO's willingness to impose strong licence conditions. For example, as noted earlier, nuclear waste plans may be taken into account under the licensing system. But what if the proposed waste management system does not eventuate? A nuclear facility such as the Lucas Heights reactor might be licensed for construction and operation on the assumption that waste will be removed from the site, but such a plan might never come to fruition and the waste may have to remain on site. Given that this scenario has been played out many times overseas it is not unreasonable to suggest that this might happen here. What will ARPANSA do if the proposal to site a national nuclear waste dump (currently earmarked for South Australia) is not sufficiently 'progressed' before ANSTO applies to construct the new reactor? Will ARPANSA withhold the construction licence until a waste disposal facility is assured? Or will ARPANSA impose a condition requiring waste to be dealt with off site, which would permit the CEO to suspend or cancel the licence if ANSTO sought to deal otherwise with the waste?

Conclusion

There is no doubt that ARPANSA is in an unusual position. Most nuclear agencies in developed countries have grown along with their domestic nuclear industry, allowing for a more consistent approach to be taken to regulation of major proposals. (The Nuclear Installations Inspectorate in the UK recently celebrated its 40th anniversary). ARPANSA, however, is left to play a game of catch-up, since it has been created to regulate an industry that has been established for many years. Its creation also comes in the wake of the EIS process for the Lucas Heights replacement reactor, Australia's most controversial nuclear proposal in decades. Whether ARPANSA gets tripped up by government exigencies as it races to make up for lost time remains to be seen.

Endnotes

[1] *Australian Nuclear Science and Technology Organisation Act 1987*
[2] *ARPANS Act*, Part 4
[3] *ARPANS Act* s 15
[4] *ARPANS Regulations*, cll 41, 42
[5] *ARPANS Act*, s 32(3)
[6] *ARPANS Regulations*, Sch 3, cl 4
[7] *ARPANS Act* s 38

Environmental Reporting at the Crossroads

Marc Allas, EDO Solicitor (NSW)

Introduction

In a previous edition of Impact (Vol 53, p.4), we examined the framework behind the requirement for corporate environmental reporting contained in s.299(1)(f) of the *Corporations Law 1989*. This article examines the need for further government regulations to improve and support environmental reporting in Australia.

Under s.299(1)(f), the directors' reports of a company, registered scheme or disclosing entity for financial years ending on, or after, 1 July 1998 must:

> *"if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or a State or Territory –[provide] details of the entity's performance in relation to environmental regulation'.*

The provision has become known as Mandatory Environmental Reporting ('**MER**'). MER is to be distinguished from Voluntary Environmental Reporting ('**VER**'), which is information which a company voluntarily discloses to the public about its environmental performance. In our view, sound corporate practice requires not only economic performance, but also good environmental performance. Voluntary reporting should be viewed by all corporations as part of an organisation's community licence to operate[1].

VER is however no substitute for MER, which is necessary as a safety net to ensure reasonable levels of disclosure are maintained. MER is essential to providing necessary information to investors and the public on environmental risks. However, there is some uncertainty in the application and interpretation of s.299(1)(f). Therefore in the EDO's view, further regulations are necessary to make environmental reporting effective.

Further clarification to mandatory reporting

Ambiguity of "…significant environmental regulation…"

The duty under s.299 (1)(f) to give "details of the entity's performance" in relation to any particular and significant environmental regulation leaves considerable uncertainty in interpretation.

For instance, in the Australian Industry Group's view,[2] the word 'significant' in s.299 (1)(f) has a subjective meaning. In other words, 'significant environmental regulation' is whatever the directors consider are environmental risks worthy of disclosure. However, the section is not drafted in these subjective terms.

Guidelines issued by the Australian Securities & Investments Commission ('**ASIC**') in Practice Note 68, which provide limited guidance on interpreting s.299(1)(f)), state that accounting concepts of materiality in financial statements are not applicable. However the Practice Note does not go on to describe how "significance" should be determined.

A standard should be developed which incorporates references to financial, environmental and community interests. For example, it may be appropriate that an issue be regarded as "significant", regardless of the amount of money involved, if it is generating significant community or shareholder concern in relation to a company's environmental impacts.

In addition, more detail should be provided about what is required to be reported. One way to do this would be to list, in regulations made under the *Corporations Law*, the matters required to be examined under s.299(1)(f). The list might include the nature and number of the company's environmental licences/permits, details of notices or convictions for environmental damage, environmental incidents or major non-compliances with environmental laws, and whether the company has a system in place across its operations which monitors compliance with the company's environmental obligations.

Regulations including the factors described above would have the benefit of giving all those required to comply with the law a clear and transparent picture of the indicators they need to report against. It would bring certainty for both companies and shareholders.

The possible role of the Australia Securities and Investments Commission

For an environmental reporting scheme to work effectively, the required standards need to be verified carefully by a regulatory authority.

The Australia Securities and Investments Commission ('**ASIC**') should undertake to carry out regular audits to verify that not only are companies complying with the requirement to report, but also verifying that the contents of reports comply with the disclosure requirements, in order to give credibility to the MER scheme.

ASIC should employ sufficient people with environmental expertise to verify the contents of MER reports. If a lack of resources makes this impossible, then ASIC could be given the power to require companies to obtain independent verification of the contents of their environmental reports. A statutory accredited auditor scheme could operate to facilitate this, similar to the Victorian and New South Wales contaminated site auditor scheme. Commentators have noted that the quality of environmental reports can differ greatly[3]. External verification of a company's environmental report could be used to verify the following:

- Is the document an accurate representation of the company's environmental performance?

- Is there any information of which the company is aware that is not, but should be, reported in this document?

Conclusion

The EDO supports the principles embodied in VER of requiring companies to be accountable to the public for their environmental performance, as part of their community licence to operate.

The EDO also supports MER as providing a safety net to ensure reasonable levels of disclosure of environmental information. This information can be used by investors and the public for evaluating environmental risks. As it stands, s.299(1)(f) is too vague and uncertain, and requires further regulations as outlined above in order for corporate disclosure to be consistent and meaningful. Otherwise the public and investors are not likely to be convinced that they are receiving the full picture of a company's environmental credibility.

Predictably, many industry representatives are against the introduction of MER, preferring a voluntary approach to disclosure of environment information. Good environmental performance can come at a financial cost, which can affect shareholder profit, at least in the short term.

Industry has a long tradition, both here and overseas, of forestalling tougher regulation by projecting an improved environmental image based on merely voluntary regulations or codes. The problem with voluntary reporting by itself is that it is likely many companies will use it primarily to report the positive, and there will be no sanctions for failure to report significant negative incidents. Rather than improve corporate governance, it will be used as a public relations tool.

Signs of willingness from industry to engage in VER are encouraging. However, investors and the public await to see whether the standard and detail of information under MER is satisfactory and serves a useful environmental purpose.

Endnotes

[1] (1999) "*Mandatory Public Environmental Reporting in Australia: Here today, Gone Tomorrow*" by Professor Craig Deegan, 16(6) Environmental and Planning Law Journal 472

[2] "*Mandatory environmental reporting* " -by AIG, May 1999

[3] "*Can you believe it? Verification of environmental reports*" (1999) by Ms Kate Vinot, Groundwork 3(2)

Ecologically Sustainable Development is relevant in considering DAs

Casenote: Carstens v Pittwater Council [1999] NSWLEC 249

Chris Norton, Senior Solicitor, EDO (NSW)

The applicant (Carstens) put in a development application to construct a house, swimming pool, tennis court and landscaping. The application was refused by Pittwater Council. An appeal against this decision was dismissed by a Commissioner. The applicant then appealed to a judge (Lloyd J) of the Land and Environment Court, raising 11 grounds of appeal, and was unsuccessful on all grounds. The decisions on three of these grounds are of particular note:

Relevance of draft development control plans and council policy

Section 79C(1) of the *Environmental Planning and Assessment Act 1979* (the **'EP&A Act'**) specifies certain matters which a consent authority (including a Commissioner determining an appeal to the Court) is required to take into account in determining whether to consent to a development application. The applicant claimed that the Assessor had erred by taking into account several draft development control plans, and the Council's "Environmental Values Statement – Urban Development". The applicant argued that s 79C(1) is a complete code, and consent authorities do not have the power to consider matters not set out in that section.

Lloyd J held that while a consent authority is required to take into account the matters set out in that section, it is not an exhaustive list. A consent authority may take into account other matters of relevance to the development application which are related to the objects of the EP&A Act. The draft plans and policy considered by the Commissioner were relevant.

Relevance of ecologically sustainable development

The applicant claimed the Commissioner erred by holding that principles of ecologically sustainable development (ESD) must be taken into account in assessing impact of a development application. Using similar reasoning to that described above, Lloyd J held that ESD is a relevant consideration. Indeed, one of the objects of the EP&A Act is to encourage ESD. In these circumstances, Lloyd J held that the Commissioner was not in error.

Application of eight-part test

Development applications must be accompanied by a species impact statement (SIS) if they are "likely to significantly affect threatened species, populations or ecological communities, or their habitat". In determining whether there is likely to be a significant effect, the consent authority must have regard to the 'eight-part test' set out in s 5A of the EP&A Act, which specifies eight matters to be taken into account. Applying the eight-part test to the subject development, the Commissioner held that because a significant number of trees and their canopy comprising the habitat of an endangered ecological community were to be removed, there would be a significant impact on that community and a SIS was required, on the basis that one limb of the eight-part test was satisfied. The applicant argued that this was an error – the Commissioner had to apply all eight parts of the test and could not determine there would be a significant impact on the basis of just one limb.

Lloyd J held that there was no error. In particular, some of the limbs of the test would not be relevant to any application. It was open to the Commissioner to conclude that there would be a significant impact after having regard to only one limb of the test.

Launch of National Pollutant Inventory

In January this year, the national pollutant inventory (NPI) was launched. The NPI is a publicly available database listing the amount of certain chemicals emissions. All Commonwealth, State and Territory governments have responsibility for the maintenance of the database.

Currently there are 36 substances that industry is required to report on, including ammonia, benzene, carbon monoxide, chlorine, hydrochloric acid and lead. The reporting requirements will be expanded to the full list of 90 substances in July 2002.

Who has to report?

Industry must report if its activities involve the use of more than a threshold amount in a reporting period. Generally this threshold amount is 10 tons. There are many smaller organisations that will not be required to report but whose emissions in total add up to a significant level. To provide a picture of the level of these emissions, States and Territories are estimating the emissions of the substances listed on the NPI from activities including service stations, dry cleaners, carpet cleaning companies, printing services, motor vehicle finishing, bakeries, carpet making, house building, and fish farming.

Household and transport related activities can also be significant contributors to emissions. State and Territory governments provide estimates of the level of emissions of the substances listed on the NPI from lawn mowing, domestic wood combustion, solvents such as hair spray, cigarette smoking, swimming pools, and architectural surface coating.

The NPI database can be found at: environment.gov.au/epg/npi/

THE NEW QUEENSLAND VEGETATION MANAGEMENT ACT 1999

Jo-Anne Bragg
Solicitor, Environmental Defenders Office (Qld) Inc.

This article gives a general overview of the new *Vegetation Management Act 1999* ('**VMA**') and how it would regulate clearing of native vegetation on freehold land in Queensland. That Act has not yet commenced operation.

Does the VMA codify the law on vegetation protection?
No. Local laws (vegetation protection ordinances) can impose requirements on the clearing of vegetation in a specific local government area. Also, local planning instruments such as planning schemes may impose requirements on vegetation clearing under the *Integrated Planning Act 1997* ('**IPA**'). Tree clearing on leasehold land continues to be regulated under the *Land Act 1994*.

Will the VMA stop all native vegetation clearing?
No. However, clearing of native vegetation on freehold land in some cases will now constitute *assessable development* (see below) for the first time and so require a development permit for that development. The process for assessing the applications is a modified form of the Integrated Development Assessment System contained in the *Integrated Planning Act 1997*. Starting assessable development without a development permit is an offence.

What types of vegetation clearing are regulated?
Vegetation clearing is *assessable development* if it involves *clearing* of *vegetation* as defined in the VMA.

Vegetation is defined as a native tree or a native plant, other than a grass or a mangrove.

Clear means destroying the vegetation in any way, excluding :

- Destroying the standing vegetation by stock or lopping a tree; and
- Destroying the vegetation in any way as a *forest practice*.

Forest practice includes removing standing trees for an ongoing forestry business. To enjoy this exclusion, a business in a native forest must either be conducted in accordance with a code for native forest management approved by the Queensland Minister for Natural Resources, or alternatively, in accordance with other requirements set out in the definition of forest practice in the VMA.

Some types of vegetation clearing are not 'assessable development'. These include the following activities:

- Clearing of native mangroves or grasslands;
- Burning native vegetation; or
- Poisoning vegetation or taking other steps to substantially damage it that do not amount to 'clearing' under the Act.

When must an application to clear native vegetation be lodged?
If the proposal involves *assessable development,* an application for a development permit must be lodged if it is proposed to clear:

- a remnant (non regrowth) *endangered regional ecosystem* for an area covered by a regional ecosystem map; or
- a remnant (non regrowth) *of concern regional ecosystem* for an area covered by a regional ecosystem map; or
- an area of *high conservation value*; or
- an area *vulnerable to land degradation* in a non-urban area.

(For definitions of these terms, see under the heading '*What are endangered and 'of concern' ecosystems?*' below.)

However**,** no application for a development permit is necessary if the proposal is to clear:

- to the extent reasonably necessary to build a single residence and any reasonably associated building or structure; or
- as necessary for *essential management*; or
  as necessary for *routine management* outside:
  - -an area of *high nature conservation value*; or
  - -an area *vulnerable to land degradation*; or
  - -a remnant (non regrowth) *endangered regional ecosystem* for an area covered by a regional ecosystem map; or
  - -a remnant (non-regrowth) *of concern regional ecosystem* for an area covered by a regional ecosystem map.

The terms 'essential management' and 'routine management' are both defined in the VMA.

Other exceptions
An application to clear is not required for routine management in an area covered by a remnant map. This seems to have the serious and possibly unintended consequence that clearing of vegetation including endangered regional ecosystems, or 'of concern' regional ecosystem could occur for the purpose of routine management as well as the more restricted essential management. This may happen if those ecosystems were in an area covered by a remnant map.

An application is not required for limited types of land in a non-urban area if the clearing is a reconfiguration of a lot which does not involve opening a road.

Also an application is not required for clearing carried out before 1 July 2000 if the clearing is the natural and ordinary consequence of other development (eg. clearing the pad for a shopping centre to be constructed). After that date, this exception only applies to land of less than 5 hectares in a non-urban area.

What are endangered or 'of concern' regional eco-systems?

The chief executive of the Department of Natural Resources **('DNR')** may certify a map as a regional ecosystem map for the purpose of showing regional ecosystems which are either remnant (ie not regrowth) endangered or remnant 'of concern'. This is probably the most direct way to check the status of an ecosystem. Most of those maps for areas with high clearing rates are already completed, or will be done by June 2000. However, given the scale of the regional maps, you may need to check with the Department whether a particular block contains vegetation of an endangered type. An applicant for a clearing permit could also try to pick faults in the map and argue that their block was wrongly classified. In either case it may be necessary to examine and classify the vegetation on a particular block and to compare it to the formal definitions in the VMA which follow-

A *regional ecosystem* is a vegetation community in a bioregion that is consistently associated with a particular combination of geology, landform and soil.

An *endangered regional ecosystem* is a regional ecosystem that is prescribed under a regulation and has either-

(a) less than 10% of its pre-clearing extent remaining; or
(b) 10%-30% of its pre-clearing extent remaining, and the pre-clearing extent was less than 10,000 ha

An *'of concern' regional ecosystem* is a regional ecosystems that is prescribed under a regulation and has either-

(a) 10% to 30% of its pre-clearing extent remaining; or
(b) more than 30% of its pre-clearing extent remaining and the pre-clearing vegetation was less than 10 000 ha.

The regulation lists the endangered or 'of concern' regional ecosystems and a number for each ecosystem.

Does clearing vegetation under existing development approvals constitute assessable development?

No. So long as the application was made to the assessment manager before s73 of the VMA commenced, the approval permits the clearing to take place as if the VMA has not been enacted.

When is a property vegetation management plan required ('PVMP')?

A PVMP must include at least 8 matters prescribed by regulation, such as the property's main topographical features, the extent and conservation status of regional ecosystems comprising or included in the property and the action proposed to be taken to prevent land degradation during and after the clearing.

A PVMP must be lodged with the chief executive of DNR if the chief executive is the assessment manager for the application; or, if the chief executive is not the consent authority but his/her concurrence is needed.

The requirement to include this plan with the application is likely to encourage developers to choose already cleared sites for new developments due to the cost of plan preparation and the public exposure of information about the site.

Who assesses the clearing application?

This will be clarified in a regulation under the *Integrated Planning Act*. It is most likely that the DNR is the assessment manager unless developments other than clearing are involved in the application.

What is the State code?

The State code is part of the State policy on vegetation management that must be prepared by the Minister for Natural Resources under the VMA. No public consultation is required by the VMA in the preparation of the State policy. Elements of the draft State policy were discussed at meetings of the Vegetation Management Advisory Committee, which included representatives of key non-government stakeholders. Rural stakeholders and environmental groups commented on the draft State code prior to the VMA going through Queensland Parliament.

The contents of the State code are very important because applications to clear are assessed against the contents of the code unless there is a relevant regional vegetation management plan, in which case the code in that regional vegetation management plan applies instead of the State code.

How are regional vegetation management plans made?

The Minister is obliged to prepare and make regional vegetation management plans. The Minister must consult with a vegetation management advisory committee, a relevant regional vegetation amendment advisory committee and affected local governments in preparing a regional vegetation management plan. Any regional vegetation management plan prepared for a region must include a code for clearing of native vegetation.

After it is prepared the Minister must give public notice of the preparation of the plan and invite then consider public submissions on the plan. Copies of the plan must be made available for inspection and purchase.

Once the State policy is approved (by the Governor in Council) or any regional vegetation management plan is approved (by the Minister making the plan by gazette notice), then in each case a copy must be kept available for inspection by the public at the DNR's head office and regional offices. The policy and any plan must also be made available on the DNR's website.

How are clearing applications assessed?

Some parts of the *Integrated Planning Act 1997* that restrict the power to refuse applications do not apply to clearing applications, making it easier to refuse an application for clearing.

If the Department of Natural Resources is the assessment manager, then the decision on the application must not conflict with applicable codes. If DNR is a concurrence agency, then it may tell the assessment manager to refuse the application if the development does not comply with a relevant law, policy or code. In either case, the contents of any State policy (including a code) on vegetation management, or of any regional vegetation management plan (including a code) are relevant.

Currently there is a draft State policy on vegetation management, including a code. It may take some time for regional vegetation management plans to be made.

What role does the public have in applications to clear?

The public is entitled to inspect and purchase the application and supporting materials, from the time the application is lodged. As the applications to clear are proposed to be subject to code assessment, the concurrence agencies and the assessment manager can seek advice from anyone, including the general public, at any time, but people making submissions do not have appeal rights.

The State policy, but not the code contained within it, provides that the application must be publicly notified. However it does not detail who must notify or how the applications must be publicly notified; so enforcing this point against the DNR may prove problematic

The DNR has indicated that it will publicly notify applications on its website, which will be updated weekly. Groups interested in making submissions on vegetation clearing applications will need to monitor this site. If people do make a submission, the assessment manager must consider it.

Will the VMA protect regional ecosystems?

Clearing of remnant regional ecosystems that are endangered or 'of concern' conflicts with the proposed code and must not be approved, with a few very limited exceptions. However the remnant map may allow clearing of endangered or 'of concern' regional ecosystems for routine management purposes without an application needing to be lodged. See under header above '*Other exceptions*'.

With those exceptions, the VMA with the State code will, in effect, end clearing of remnant endangered or 'of concern' regional ecosystems. The Queensland Herbarium states that there are 4.7 million hectares of these ecosystems in Queensland (Chart, 29 November, 1999).

Declarations of areas of high nature conservation value or land vulnerable to degradation

An area may be declared to be a high conservation value area or area vulnerable to land degradation under any of the following-

- a regional vegetation management plan;
- a declaration made by the Governor in Council; or
- an interim declaration made by the Minister.

'Conservation value' is not defined in the VMA. 'Land degradation' is defined to include the soil erosion, rising water tables, the expression of salinity, mass movement by gravity of soil or rock, stream bank instability and a process that results in declining water quality.

The State code protects only *declared* areas of high conservation value or *declared* areas vulnerable to degradation from clearing, subject to limited exceptions.

We are not aware of any firm timelines to make regional vegetation management plans or declarations of areas. Consequently even when the Vegetation Management Act commences, those areas will be inadequately protected.

Will riparian vegetation be protected?

The draft State code does deal directly with management and protection of riparian vegetation for the purpose of prevention of land degradation. It sets out a number of standards called 'performance requirements'. Applications must achieve those standards to the greatest extent practicable, having regard to the proposed use and development of land. Those performance requirements are numerous but ill defined (eg maintain aquatic habitat).

The State code also sets out acceptable solutions to assist the applicant for approval in satisfying the performance requirements. However it is open to the applicant to try to convince the decision-maker that a different solution (eg a narrower riparian corridor) would still meet the performance requirement. Those acceptable solutions are:

- In Central Queensland Coast Bioregion, South East Queensland Bioregion, and Wet Tropics Bioregion, vegetation is retained in riparian areas of at least:
    - 50m width from each high bank or a river; or
    - 25 m width from each bank of a creek.

- In all other areas vegetation is retained in riparian areas of at least:
    - 200m width from each high bank of a river
    - 100m width from each bank of a creek; or
    - 50m width from each bank of a gully.

Enforcement

A person who undertakes unauthorised vegetation clearing may commit an offence under the *Integrated Planning Act*. Offences include carrying out assessable development without a permit, or contravening a development approval, including any condition of approval. The VMA names development offences, including those two mentioned, as vegetation clearing offences to the extent the provision relates to the clearing of vegetation on freehold land.

Any person, including an environmentalist, community group, or government department, has the right to enforce the VMA. For example, orders can be sought declaring clearing to be unlawful, and injunctions can be granted to prevent unlawful clearing. Sometimes the public needs to play a watchdog role and take enforcement action using the legal standing entitlement if the relevant government agency fails to enforce the law. However, taking such action may drain the resources of the environmentalist or community group concerned.

The penalties for unlawfully carrying out assessable development are low: $125,000 plus restoration of damage costs. Those penalties are far lower than for demolishing a building of heritage significance, which carries a penalty of over $1,000,000. While the VMA states that specified offences under the *Environmental Protection Act* might apply, it is harder to prove environmental harm than breaches of condition of an approval, so that is no justification for the low penalties.

Compensation

There is a busy public debate between Queensland State Ministers and Federal Ministers about which government should shoulder the major burden for payment of compensation to land owners as a consequence of Queensland introducing new

restrictions on clearance of vegetation on freehold land.

The landowners have no established legal right to claim compensation. However, for political reasons there is an assumption that landholders whose rights to clear will be restricted shall receive compensation, which is probably better characterised as 'financial assistance'.

Compensation provisions in the *Integrated Planning Act 1997* relate only to new planning schemes coming into force and so do not give landholders a right to compensation as a result of the enactment of the VMA. The State code and later regional vegetation management codes, not schemes, are used to assess applications to clear.

Conclusion

The *Vegetation Management Act 1999* is a historic leap forward in the regulation of vegetation clearing on freehold land in Queensland. However, political battles between the State and Federal governments over who should pay financial assistance to affected landholders are delaying proclamation of the Act. This allows unregulated vegetation clearing on freehold land to continue in Queensland.

Update

At the time this article went to press, Queensland Premier Beattie is publicly backing away from commencing the operation of the Vegetation Management Act 1999. The government has been under pressure from rural lobby groups not to enact the legislation, and the Commonwealth has to date refused to provide financial support. A Commonwealth Ministerial Taskforce and Commonwealth Officials Taskforce have been set up to report to the Prime Minister on this issue. These taskforces will examine existing Commonwealth programs to see whether their eligibility criteria would allow funds to go to Queensland for this purpose. The Ministerial taskforce must report within 6 months.

Mills and Ors v Department of Land and Water Conservation and Ors [1999] NSWLEC 254

Damon Anderson, Graduate Intern, Environmental Defender's Office (NSW)

Background

This case clarifies the principle that the Land and Environment Court will apply when awarding costs in appeals from decisions of Local Land Boards under the Water Act 1912.

After a hearing before a local land board, the Board approved an application for construction of a levee bank on the Lachlan River. The applicants (other local occupiers) appealed to the Land and Environment Court under s 174 of the *Water Act 1912* (NSW). The Court upheld the appeal and the applicants sought an order that the respondents pay their costs. The Court ordered the respondents to pay the applicants' costs of the appeal. The Court held that costs in proceedings of this nature (appeals by way of rehearing from local land board decisions) are at the discretion of the Court; and in general the successful party to such proceedings is entitled to an award of costs in its favour.

Costs in Class 3 of the Land and Environment Court

These proceedings were in Class 3 of the Land and Environment Court's jurisdiction. The usual practice of the court is that no order for costs is made in valuation appeals, farmland rating appeals, and subdivision appeals in Class 3, unless the circumstances are exceptional (*Land and Environment Court Practice Direction 1993*). However some Class 3 proceedings are subject to costs, and this decision confirms that appeals from Land Boards are subject to the usual court practice that the 'loser' pays the 'winner's' costs.

Implications

In most merits appeals (such as those from decisions of Local Councils in Class 1 & 2), the Court usually makes no order as to costs. The practice in these particular merits proceedings is therefore somewhat anomalous, particularly since it is the practice of Local Land Boards hearing the initial appeals under the *Water Act* not to award costs.

Landholders deciding whether to appeal to the Court against land board decisions will have to weigh up the cost consequences. The awarding of costs may motivate a landholder to proceed in court, because they know that costs may be awarded to them if they are successful. Conversely, this situation may motivate a landholder not to proceed, because if the land holder is unsuccessful, costs may be awarded against them. There will usually be at least two respondents – the licence applicant, and the Department of Land and Water Conservation – so the cost of losing could be significant.

Record fine for Sydney Harbour Oil Spill

Chris Norton, Senior Solicitor, EDO (NSW)

On 3 August 1999, 294,000 litres of oil was spilt from the carrier Laura D'Amato into Sydney Harbour. Today, Justice Talbot of the Land and Environment Court imposed a record fine of $510,000 on the owner of the ship, Italian company Fratelli D'Amato S.r.l.

The amount of oil spilt was not in dispute, and it was also common ground that the oil was spilt through the ship's sea chest valves, which were open at the time oil was being transferred to the shore terminal. Talbot J could not find an explanation for why the valves had come to be open. However, his Honour accepted that the spill occurred as a consequence of the failure to carry out proper and adequate tests of the valves before commencing unloading using the sea crossover pipe during unloading, a procedure which his Honour found to be "risky".

There was extensive environmental impact from the spill. Oil spread throughout much of the inner harbour and up the Parramatta and Lane Cove rivers. A public health alert was issued. The fumes were detected as far north as Ku-ring-gai. Site inspections subsequent to the spill revealed that all observable fauna in the bay where the oil was released had died. Expert evidence was given that harm from the oil spill is ongoing, with rocky areas and mud flats continuing to leech oil, and hydrocarbon levels still substantially exceeding ecological criteria. However, his Honour held that overall the environmental consequences of the incident were not significant in terms of the potential for widespread, short term and long term damage to the harbour waters and its foreshores.

The maximum penalties available for the relevant offences under the *Marine Pollution Act* are $1.1 million for a corporation, and $220,000 for a natural person. The owner and master of a ship are automatically guilty of an offence, as is any other person whose act caused the discharge. The proceedings were brought against the owner, master and chief officer of the ship, all of whom pleaded guilty. The charge against the first officer was based on his failure to carry out a proper and adequate test of the sea chest valves before using the sea crossover line for unloading.

His Honour found that the failure to adopt proper procedure was negligent, but did not amount to gross negligence; and the offences are not to be regarded as the worst kind. His Honour imposed penalties of $510,000 on the ship owner and $110,000 on the chief officer, around 50% of the maximum penalty available. Although Talbot J found the offence against the master proved, his Honour dismissed the charge and did not record a conviction on the basis that it was inappropriate to punish the master for an offence over which he had no personal control except in a detached sense.

The Laura D'Amato oil spill is arguably Sydney's worst ever marine pollution incident. That a spill of this magnitude, caused by negligent omissions to follow appropriate procedures, can attract a penalty of only 50% of the maximum must prompt speculation as to what kind of incident would justify imposition of the full penalty.

High Court upholds right to open standing under the constitution

Truth About Motorways judgement

On 9 March 2000, the High Court of Australia has handed down an important decision (*Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd [2000] HCA 11*) upholding the validity of the open standing provision in section 80 of the *Trade Practices Act 1975* (Cth). "Open standing" provisions permit the public to bring legal proceedings to enforce laws without needing to demonstrate that they have some personal interest in the outcome. These provisions are often used in environmental cases, where it is the environment itself which is sought to be protected.

Truth About Motorways (TAM) is arguing in Federal Court proceedings that a prospectus issued by Macquarie Infrastructure raising funds for the construction of the Eastern Distributor motorway was misleading and deceptive, in breach of the *Trade Practices Act*. TAM claims that information in the prospectus relating to projected volumes of traffic on the road is misleading. Macquarie Infrastructure argued, as a preliminary legal point in the High Court, that the open standing provision of the *Trade Practices Act* allowing "any person" to bring proceedings under the Act, was unconstitutional.

The High Court unanimously rejected Macquarie Infrastructure's argument, and upheld the validity of the open standing provision of the Trade Practices Act. The Court found that there was no constitutional basis for restricting the powers of Parliament to make laws providing that any person could enforce laws relating to public rights, rather than just the Attorney-General (as is the traditional common law position). In doing so, the High Court chose not to follow a number of United States cases that had found such provisions to be unconstitutional under the United States Constitution, which is in similar but not identical terms to the Australian Constitution.

The case establishes that the Commonwealth Government is not constitutionally prevented from including such provisions in legislation relating to public rights and duties. The decision will assist those arguing that the Commonwealth should include open standing provisions in legislation relating to the environment, as is already the case with most New South Wales environmental laws.

A copy of the case can be found on the Internet at:
http://www.austlii.edu.au/au/cases/cth/high_ct/2000/11.html

Staff Changes

The EDO NSW's Director of Policy and Education, **Katherine Wells**, left the EDO in February. Katherine is expecting a baby in early April. She plans to return with her husband to her home town of Melbourne to raise the next generation. Katherine has made an extraordinary contribution to environmental policy and law reform at both the State and Federal levels during her three years with the EDO. She has also been a central support to the National Network of EDO offices around Australia. We wish her well with her new family and her future career.

Louise Blazejowska is the EDO NSW's new Director of Policy. Louise was most recently Senior Policy Officer with the Attorney General's Department where she was responsible for developing legislation and policy in a range of areas including juvenile justice, human rights, Indigenous issues, domestic violence, and child protection. She has also worked as a solicitor for the Kingsford Legal Centre, Redfern Legal Centre, Aboriginal Legal Service, and with the Royal Commission into Aboriginal Deaths in Custody as a legal officer and as a researcher. Louise will manage the NSW EDO's policy and law reform work.

Margaret Jones has joined EDO (NSW) as Bookkeeper. She worked for 11 years in an accounts/book-keeper role for Bruce & Stewart Solicitors, and has spent the last 12 months raising her daughter, Madeleine.

We welcome Louise and Margaret to the team.

Workshop news

The EDO has a regular workshop program called Environmental Law for Green Campaigners. This short course provides an introduction to State and Federal laws that affect the environment. Three courses are planned for 2000, in July and October.

This month we are also conducted a workshop on Criminal Law for Green Campaigners. The workshop, presented by barrister Howard Packer, is for activists who use non-violent direct action to protect the environment. The workshop was very well received and covered issues such as getting arrested, police and court procedures, and the implications of getting a criminal record. A further wrokshop is planned

For information on these and other EDO Education programs, call our Education Coordinators, Debbie White or Tessa Bull, at the EDO on (02) 9262 6989.

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For free advice (confidentiality guaranteed) on preparing your will, or for more information, please contact Lisa Ogle on 9262 6989.

A suggested wording for your will is:

"I bequeath the sum of $__________ (you can also include part or all of any property that you own), to the Environmental Defender's Office Ltd for its general purposes, and declare that the receipt of the Treasurer of the time being of the Environmental Defender's Office Ltd shall be a complete discharge to my executors in respect of any sum paid to the Environmental Defender's Office Ltd".

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ERRATUM

Due to a printing error, the first paragraph of the following article on Page 3 of Impact (March 2000, no 77), was omitted. It should read as follows.

A BRAVE NEW GENETICALLY MODIFIED WORLD?

A LOOK AT THE *GENE TECHNOLOGY BILL* 2000 (Cth)

Introduction

New developments in biotechnology and techniques in genetic modification allow scientists to alter the DNA of a cell directly and create genetically modified organisms (GMOs). Contemporary biotechnology allows us to create new combinations of genes between species in a way that would be impossible in nature. This development has produced grave international concerns about the unknown and potentially catastrophic health and environmental risks that GMOs may pose.

As a result, in early 2000, the Interim Office of the Gene Technology Regulator (IOGTR) circulated a Consultation Draft of the *Gene Technology Bill* 2000 (Cth). The purported object of the Bill is to protect human health and safety and the environment by identifying and managing the risks posed by GMOs that are not otherwise addressed by existing law. Unfortunately, as the Bill currently stands, it is unlikely to be up to the task. The following article is a summary of amendments to the Bill that are necessary to ensure its effectiveness