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Truth Wins Out

Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited [2000] HCA 11

James Johnson, Barrister

A community group, Truth About Motorways Pty Limited (**TAM**), brought proceedings against Macquarie Infrastructure Investment Management Limited (**MIIM**) alleging that the publication of a prospectus produced by MIIM, relating to the construction of the Eastern Distributor motorway in Sydney, constituted misleading conduct within the meaning of s.52 of the *Trade Practices Act 1975 (Cth)* ('**the Act**'). The Act allows any person to bring proceedings to enforce certain provisions of the Act.

In March 2000, the High Court considered MIIM's arguement that Parliament did not have power under the Australian Constitution to confer standing, through legislation, on "any person" to enforce the law.

This argument had been 'floating in the wings' for some time. It had formed part of the submission by the Minerals Council of Australia to the review of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989 (Cth)* some five years ago, where the Council argued against the introduction of more liberal standing provisions for the enforcement of that Act.

MIIM's argument, as encapsulated by Gleeson CJ and McHugh J, was that s.76 (ii) of the Constitution:

> "empowers the Parliament to make laws conferring original jurisdiction on the High Court in any matter arising under any laws made by the Parliament. Section 77 enables the same jurisdiction to be conferred on another federal court. The essence of the respondent's argument is that in a case such as the present, there is no "matter", and the purported conferment of jurisdiction is therefore invalid.
>
> The reason why there is no matter, it is submitted, is that there is no justiciable controversy. That, in turn, is said to follow from the absence of any direct or special interest of the applicant in the subject matter of the proceedings."

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The judgement

Their Honours held that there was clearly a justiciable controversy between TAM and MIIM, that is, the assertion that MIIM had breached s.52 of the Act. The judgement upheld the right of TAM to bring proceedings against MIIM.

Gaudron J (at para 50) concluded her reasoning by saying:

> "Provided there is a remedy which is appropriately related to the wrong in question, whether the remedy derives from the general law or is created by statute, nothing in Chapter III of the Constitution prevents Parliament from modifying the general rule that only the Attorney-General may bring proceedings with respect to a public wrong and permitting any person to institute proceedings of that kind. If it does so, and if there is a remedy appropriate to the asserted wrong, there is, in my view, a matter for the purposes of Ch III of the Constitution."

Gummow J, at paragraph 79, accepted the policy behind s.52 of the Trade Practices Act of enforcing "norms of conduct", a concept adopted almost 20 years ago by Fox J in *Brown v. Jam Factory Pty Ltd* (1981) *53 FLR 340*, saying:

> "Section 52 thus is an exercise by the Parliament of its powers to create new norms of conduct and require their observance by specified sections of the community."

Gummow J continued (at 121):

> "It is not the case that the only members of the class who may institute and prosecute proceedings under ss 80 and 163A are those who complain of such an injury. As Bowen CJ explained in *Phelps*, the relevant injury is that to the public interest in the observance of the requirements of the Act."

Kirby J commenced by saying:

> "This Court should not accept the attempt to use the constitutional notion of "matter" to erode significantly the legislative powers of the Federal Parliament and to import a serious and unnecessary inflexibility into the Constitution"

and his judgment found accordingly.

Hayne J and Callinan J also concluded that the word "matter" was very wide and that this controversy was within the concept of a "matter".

The US cases, which MIIM sought to rely on, were generally held not to be of assistance because the constitutional context was materially different.

It is pleasing that the High Court has soundly rejected this constitutional attempt to restrict public participation in the enforcement of the law. After being parked for the duration of the High Court case, the case brought by TAM against MIIM is now back before the Federal Court.

The Commonwealth Government and Environment Protection Obligations: A critique of the present legal framework.

Dr Cecilia O'Brien

Extract of essay awarded the NSW EDO's Peter Hunt Memorial Prize for 1999. The essay was submitted for the subject Environmental Law and Ethics (1999) in the LL.M in Environmental Law course, Macquarie University, NSW.

Daily in the media we are confronted with a list of environmental woes facing Australia. Among them are greenhouse gas emissions, the highest per capita in the industrialised world, uncontrolled land clearing in Queensland, the potential demise of native species and whole habitats, the proliferation of harmful introduced species such as the rabbit, and the potentially disastrous degradation of the Murray-Darling Basin. Quite obviously, these pressing issues transcend State boundaries and require attention at the Federal level.

What has the Commonwealth Government done to protect our fragile and unique environment? In answering this question it would be tempting to present a catalogue of past and present flaws in the Federal political processes, legislative framework and administration of that legislation which have contributed to the present unhappy situation. Moreover, the Federal Government has often hidden behind constitutional technicalities to argue that environment protection is predominantly a State, not a Commonwealth, responsibility.

Before addressing specific inadequacies, I would like to start by asking two basic questions: what are the Commonwealth's obligations to the environment, and from where are they derived? Legal commentators, naturally enough, have focused on the legal sources of such obligations in domestic and international law. This paper

will start by canvassing this legal framework of obligation. However, it will also suggest that ethical and moral imperatives will increasingly play a part in determining such obligations.

The paper concludes with an examination of some aspects of the recent *Environment Protection and Biodiversity Conservation Act 1999 [not published here - Ed]*. This legislation, it is submitted, represents a further retreat on the Commonwealth's part. Rather than embracing its widening obligations to environment protection, the Commonwealth seems determined to limit its involvement.

What are the Commonwealth's obligations?

Commonwealth Government obligations and constitutional powers.

There is little doubt that environmental protection in Australia has suffered as a result of decades of wrangling over the constitutional powers of the States versus the Commonwealth. Historically there has not been a national co-ordinated approach to environment protection, and most environmental legislation is State legislation. As Fowler[1] argues, this is "a result of the division of constitutional powers under the Commonwealth of Australia Constitution".

In the Commonwealth Constitution there is no mention of a Federal power over the environment, hence such power resides in the States. Accordingly, the Federal Government, it has been argued, can only make laws concerning the environment through indirect use of other powers. In theory, this severely limits the Commonwealth's power, but in practice, in the last two decades, the Commonwealth has successfully invoked a number of other heads of power under the Constitution to defeat State actions where the environment was threatened.

In *Murphyores Inc. Pty Ltd v. Commonwealth* (1976) 136 ALR 1, the Commonwealth successfully argued that its power over overseas trade (s.51 (i)) enabled it to use *Export Control Regulations* to regulate exporting of woodchips on environmental grounds. Likewise, the Federal corporations power (s.51 (xx)) was used to defeat the *Tasmanian Hydroelectric Commission in Commonwealth v Tasmania* (1983) 158 CLR 1. As Crawford argues, this power probably "gives the Commonwealth the power to control the environmental impact of mining, manufacturing and other activities even though [these activities do not] constitute trading".[2]

From the late 1980s, Commonwealth legislation used the device of enacting environmental legislation under multiple heads of power. However, until very recently, the Commonwealth wielded these substantial, if indirect, powers in a very ad hoc manner. There has been great reluctance to assume the central role in environmental matters. Fowler's comment that divergent views on the Commonwealth's role in the environment may "reflect broader differences of attitudes concerning the nature of federalism in Australia" is apt.[3] Ever since the environment became of national concern in the 1970s, there has been a marked see-sawing between confrontational Federal intervention in State environment matters, and a more 'softly, softly' approach favouring Commonwealth-State co-operation - the so-called 'new federalism'.

The notion of co-operative federalism underpins many of the Federal initiatives of the 1990s. These include the *Intergovernmental Agreement on the Environment* (1992) (**IGAE**),[4] the formation of the National Environment Protection Council, the NEPMs (National Environment Protection Measures) set by the Council, and the recent *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). It could be argued that new federalism adversely effects environment protection at the Federal level.

In the name of harmony, the Federal Government has chosen to discharge some of its environmental obligations not by direct legislation, but by entering into 'agreements' with the States and Local government and by framing 'policy' documents. Linda Pearson[5] draws attention to Talbot J's comments on the IGAE and the *National Forestry Policy Statement* (another piece of co-operative Federalism) in *Nicholls v Director-General of National Parks and Wildlife* (1994) 84 LGERA 337. According to him, these "are not legislation and accordingly are no more than an understanding between representatives of the Commonwealth, States and Territories. They are a series of policies and objectives with broad general agreement on national strategy. They create no binding obligation upon the Director General of National Parks and Wildlife or this Court".[6]

In the early 1990s, the Government was fond of explaining away its lack of legislative action as a function of the Constitution. Although the High Court has been interpreting the Constitution expansively, there has been a marked political disinclination to make use of this judicial shift to fully protect the environment through Federal legislation.

In fact, some statements made in this regard by Federal Environment Ministers were disingenuous to say the least. The Constitution powers were misrepresented to bolster up the minimalist position. Take, for example, a 1994 speech by Ros Kelly.[7] Noting that most Australians want the Federal Government to play a very active role in protecting the environment, she excuses Federal inaction saying "Australians seem to believe that the Commonwealth actually has more power over the environment than the limited range of specific environmental powers would indicate". Her speech also makes it apparent that she

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believed the Commonwealth's obligations in the area to be confined to those implied by this narrowly construed Constitution. In a similar vein, disappointed commentators have noted the narrow scope of the new EPBC Act and ascribed to the new federalism.[8] Mould argues that the Act reflects "a perception that the vigorous exercise of Commonwealth power would upset the federal balance".[9]

International law and Commonwealth obligations
While the Federal Government may seek to maintain a minimalist stance, the rapidly developing area of international environmental law may ultimately sound the death knell to this approach. At present, most discussion of the application of international environmental law in Australia has focused on domestic implementation of international treaties. Since the 1980s the Commonwealth has invoked the external affairs power (s.51 (xxix)) in support of it's power to make legislation ratifying international treaties.

This use of the power was upheld by the High Court in *Koowarta v Bjelke-Petersen (*1982*)* 153 CLR 168. Much of the subsequent litigation concerning this power revolves around environmental disputes. Such cases include the Tasmanian Dams Case (*Commonwealth v Tasmania (*1983*)* 158 CLR 1 and *Richardson v Forestry Commission of Tasmania (*1988*)* 164 CLR 261). To protect areas endangered by State-sponsored development, the Commonwealth used the tactic of including them on World Heritage Listings, under the World Heritage Convention. Legally, the effect of listing is to impose an international obligation on Australia to protect the listed area and, *inter alia,* to grant the Commonwealth power to do so via legislation.

Obviously the scope of this device as an effective tool for holistic environmental management and protection is limited and clumsy. In order to invoke an international treaty there must be legislation which either specifically refers to the convention or substantially reflects its provisions.[10] There are many environmental issues and a great many international conventions and treaties concerning the environment, and the Government would have to embark on a huge legislative program to cover all contingencies. As Pearson argues, the accepted law is that "the provisions of an international treaty to which Australia is a party do not form part of Australian law unless they have been incorporated into Australian municipal law by statute".[11]
Teoh's case[12] may represent a slight inroad, for there it was held that administrative decision makers should be aware of relevant international treaties, even if not enacted in domestic law, and inform affected persons if they did not propose to apply them. "Conventions may be the source of legitimate expectations rather than enforceable obligations"[13] .

The Future
The Government may not be able rely on such legal technicalities to avoid action on the environment forever. Increasingly, the domestic obligations of sovereign states to the environment will derive automatically from international law. This will come about as a result of the increasing use of the multi-lateral treaty as a device to protect the environment at an international level, and as a result of the parallel development of international customary law of the environment.

When speaking of international law we are actually looking at a system which has two quite distinct components.[14] One type of international law is conventional law, as created by treaties, and is particular to the ratifying nations. This is the type of international law examined in the Australian environmental cases mentioned above.

The other type of international law is customary international law. This is general law applying to the whole international community (*erga omnes*). Treaties can become general law if there is an *opinio juris* of States as confirmed by practice. A number of general multi-lateral treaties on human rights and diplomatic conventions have indeed been subsumed into customary law. Such laws then bind all nations whether signatories or not. Thus Israel, which does not accept the *Fourth Geneva Convention,* is nonetheless considered by the UN to be bound by it.[15]

Obligations to the environment arising from customary international law have yet to be properly addressed in Australian jurisprudence. At a political level there is little indication that anyone considers Australia bound by such norms, whether arising from custom alone or the integration of treaties into customary law by *opinio juris*. In a speech given by Rob Butterworth, the Head of Policy Co-ordination of the Commonwealth Department of the Environment and Heritage at the beginning of 1999, there is clear evidence that the speaker considers multilateral environmental agreements only binding on signatories.[16] He does not mention customary environmental law at all.

While this may reflect the prevailing view of executive government, there has already been some judicial acknowledgement of such norms. For example, in *Leach v National Parks and Wildlife Service and Shoalhaven City Council (*1993) 81 LGERA 270, Stein J discussed the precautionary principle.[17] The NSW *National Parks and Wildlife Act* 1974 did not specifically advert to the principle, nonetheless the learned judge refused to grant a licence for the construction of a road through the habitat of an endangered species because of the principle. In his argument, he mentioned "the international endorsement of the principle".[18] However he avoided "the issue of incorporation of international law into domestic law"[19], insisting instead that the principle was common-sense and scientifically apt.

There is not yet scholarly consensus on what principles of environmental law are international customary law. Boer suggests that "principles of sustainable development which may have attained this status include the precautionary principle, the polluter pays principle and intergenerational equity".[20]

Ethics and obligations Under International Law

In his treatise on humanitarian customary law, Meron[22] offers an extended analysis which suggests that it is moral imperatives, not actual practice, which have been given effect in many human rights cases. According to him there is a tendency:

> "to ignore, for the most part, the availability of evidence concerning state practice scant as it may have been, and to assume that humanitarian principles deserving recognition as the positive law of the international community have in fact been recognised as such by states. The 'ought' merges with the 'is', the lex ferenda with the lex lata".[23]

Further, Meron cites the opinion of Judge Baxter who argues that "the actual conduct of states in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained."[24] For example, although torture and genocide are widespread, and often State sanctioned, they are nonetheless crimes against humanity.

"it could be argued that ecological ethics ... constitute new cornerstones to the notion of good government."

In the humanitarian field, international customary law looks to ethical notions, not actual practice. The idea that fundamental obligations of governments to its citizens are moral in nature finds its ultimate source in the writings of Aristotle.[25] For Aristotle, the ultimate moral good was *eudaimonia* - happiness, goodness, prosperity, or human flourishing. This ethical formulation has survived to the present day, albeit with some modifications. The influential political theorists of the Enlightenment, which ushered in the modern nation-state, were trained in the classics but added new values, freedom and equal rights to the Aristotelian formulation.[26]

If it is ethics which ultimately determines the obligations of governments, then it could be argued that ecological ethics, particularly sustainable development, are now so fundamentally important and universally acknowledged that they constitute new cornerstones to the notion of good government. Recognition of such moral imperatives, and their acceptance into customary law, paves the way for a new understanding of government 'obligations' to the environment which is not narrowly focused on instruments such as the Constitution.

What then are these obligations? In his discussion of the international status of sustainable development, Boer rightly gives priority to certain documents emanating from the *United Nations Conference on Environment and Development (UNCED*) in Rio de Janeiro in 1992. These include the *Rio Declaration*, *Agenda 21* and the *Convention on Biological Diversity*. He further points out that many of the principles enunciated therein have been widely adopted by governments and have become the basis of many programmes initiated by various United National organisations.[27]

There is also a report of the *Expert Group Meeting on Identification of Principles of International Law for Sustainable Development* which identifies 17 main principles. Chief among these were the principles of interrelationship and integration which "reflect the interdependence of social, economic, environmental and human rights aspects of life that define sustainable development and could lead to the development of general rules of international law".[28] In other words, the principles which will govern international environmental law are still developing.

Conclusion

As Boer notes, "in the late 1990s the application of sustainable development through legal and policy mechanisms continues to be discussed and refined at international and domestic levels."[29] So, it is not possible to compile a definitive list of obligations at present. However, the principles expounded in the *Rio Declaration* and in *Agenda 21* provide a good starting point for assessment of the Commonwealth's discharge of its obligations.

Endnotes

1 R. J Fowler Environmental Law and its Administration in Australia", 1 *EPLJ* 10

2 Crawford, "The Constitution" in T. Bonyhady, Environment Protection and Legal Change, Federation Press Sydney, 1992.

3 Fowler (as in note 1)

4 In Schedule 4 of the *National Environment Protection Council Act* 1994 (Cth).

5 L. Pearson " Incorporating ESD Principles in Land-use Decision Making Some issues after Teoh" (1996) 13 EPLJ , 47 - 53, p. 49

6 Underlining author

7 Ros Kelly, "Opening Address: Australian Centre for Environmental Law", Environmental Outlook Conference. Reprinted in S. Streets (ed.) Environmental Law Reader, Deakin University, 1999, Volume 2

8 Helen Mould, "The Proposed Environment Protection and Biodiversity Conservation Act (1998)", 15 *EPLJ* 275- 286 (Macquarie University readings 5-81)

9 ibid

10 Mason J in *Tasmanian Wilderness Society Inc v. Fraser (*1982*)* 153 CLR 270

11 L. Pearson (as in note 5) p.51

12 *Minister for Aboriginal Affairs v Teoh* (1995) 128 ALR 353

13 Pearson (as in note 5) p.51

14 Grigory Tunkin, "Is general International Law Customary Law

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Only?" 1993 *European Journal of International Law*, Vol, 4 No. 4 at www.ejil.org.journal/Vol4/No4/art4.html
[15] Theodor Meron *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989. P56.
[16] "After Dinner Speech to the Melbourne Business School Seminar on Risk Analysis and International Agreements, Canberra 10 February 1999 at www.environment.gov.au/portfolio/minister/env/99/butterworth_sp10feb99.html
[17] Linda Pearson (as in note 5) p. 49
[18] *ibid* p. 49
[19] *ibid*
[20] B. Boer "International Aspects of ESD" in *The ESD Process* (ed) C. Hamilton and D. Throsby Academy of Social Sc and Anv, 1998, p. 87.
[21] Daniel Bodansky, "Customary (and Not So Customary) International Environmental Law", *GLSJ* Vol. 3, no. 1. At www.law.indiana.edu/glsj/vol3/no1/bodansky.html
[22] Theodor Meron (as in note 15)
[23] *ibid*, p. 42.
[24] *Ibid,* p. 43
[25] For text of the Ethics and discussion: www.siu.edu/~philos/faculty/Manfredi/intro/artistotle.html and www.isrv.com/~dianebux/ethics/aristotl.htm
[26] Take for example the writings of Thomas Jefferson. "The care of human life and happiness and not their destruction is the first and only legitimate object of good government". "The equal rights of man, and the happiness of every individual, are now acknowledged to be the only legitimate objects of government." Cited from "Thomas Jefferson on Politics & Government" at etext.virginia.edu/jefferson/quotations/jeff0650.htm
[27] Boer (as in note 20)
[28] ibid p. 89.
[29] ibid p. 87

Reminder:

New Federal Environment laws commence on 16 July 2000

This is a reminder that the new *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act) comes into force on 16 July 2000. It will repeal the following Commonwealth statutes:

- *Environment Protection (Impact of Proposals) Act 1974*
- *Endangered Species Protection Act 1992*
- *National Parks and Wildlife Conservation Act 1975*
- *World Heritage Properties Conservation Act 1983*

The EPBC Act will regulate both Commonwealth actions, and the following matters of national environmental significance:

- Ramsar wetlands,
- listed threatened species and communities,
- World Heritage properties,
- listed migratory species,
- the Commonwealth marine environment, and
- nuclear actions (including uranium mining).

Ministerial Directions - Legal Obligations or Mere Statements of Principle?

Louise Byrne, Barrister

Introduction

Since the commencement of the *Environmental Planning and Assessment Act 1979* (NSW) ('**the Act**') there has been very little case law that examines the nature of s117 directions issued under the Act by the Minister for Urban Affairs and Planning. Section 117 gives the Minister for Urban Affairs and Planning the power to 'direct' a public authority, or person having functions under the Act or an environmental planning instrument, to do certain actions.

These directions cover a wide range of planning and environment matters too numerous to list, but of recent times directions have been issued in respect of Commercial/Retail Development along the Pacific Highway, NSW North Coast (S28) and Acid sulfate soils (C1).

The proceedings

In the recent case of *Belongil Progress Association Inc v Byron Shire Council and the Minister for Urban Affairs and Planning*[1], the Land and Environment Court held that in the preparation of a Local Environmental Plan (**LEP**) the Council was bound to comply with the requirement in the s117 direction S26 – Coastal Lands - to prepare an environmental study, and that in the circumstances of the case the failure to prepare and consider an environmental study, rendered the LEP invalid.

The direction applied to the land the subject of these proceedings, commonly known as the Belongil Spit, at Byron Bay, NSW.

The applicant brought proceedings challenging the making

of Byron LEP Amendment No 66 and argued that the LEP was invalid on the basis, on one ground, that in failing to undertake an environmental study the Council had breached the Act, in that it had not complied with the s117 direction S26.

Separate to the requirement in the S26 direction relating specifically to coastal land, under the LEP-making process of Part 3 of the Act, a council may decide to prepare an environmental study or may be directed to do so by the Minister (s57 of the Act). However, s74(2)(b) of the Act provides an exemption from the requirement to prepare an environmental study.

The case involved an examination of the interrelationship between those sections of the Act concerned with the procedural steps in the preparation of an LEP in the coastal zone, and the Minister's broad powers under s117 to direct councils to do certain things in the preparation of a draft LEP.

The Council argued that, despite the requirement of the s117 direction S26, it could be inferred from the fact that the Minister made the plan pursuant to s70 of the Act that an environmental study was not required by the Minister. The Council also argued that the objects of the direction were merely expressions of 'principle'.

Pursuant to his powers under s64(2) of the *Land and Environment Court Act 1979*, the Minister for Urban Affairs and Planning made submissions essentially supporting the Council's case.

The Minister submitted that the direction did not have mandatory effect, and that the principles referred to in s117 did not create statutory obligations. It seems somewhat incongruous that a Minister of the Crown should make a submission that would have the effect of reducing his own statutory powers.

Findings of the Court

Justice Cowdroy held that the provisions of s117(2)(b) of the Act invested the Minister with the power to issue directions in the very circumstances that arose in these proceedings. There was, therefore, no basis for the submission that a direction so issued could not override the environmental study exemption permitted by s74. A direction issued under s117 has a unique statutory force and is to be given effect accordingly.

This view was reinforced in His Honour's opinion by the fact that s118 of the Act provided that the Minister may appoint an administrator to a council in circumstances where the provisions of a direction under s117 are not fulfilled[2]. This provision demonstrated the obvious significance of a Minister's direction.

Although the Minister possessed the discretion to make the LEP under s70(1) of the Act, despite the Council's non-compliance with the s117 direction this power was based on compliance with the requirements of s69 which is expressed in mandatory terms.

The Minister, however, was never made aware of the non-compliance in the s69 report. Accordingly, the Court could infer that a failure to abide by a direction lead to invalidity (*Project Blue Sky Inc v Australian Broadcasting Association* (1998) 194 CLR 355; applied; *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78, referred to).

Conclusion

Section 117 of the Act gives the Minister an important power to direct and provide policy input into the process of statutory planning performed by councils in NSW[3]. This power should not be overlooked nor read down.

One of the purposes of the S26 direction in the coastal zone is to ensure that councils adequately arm themselves with the fullest information possible (ie. that which an environmental study can provide) when exercising their statutory planning functions in respect of coastline development.

This case establishes that, unless and until the Minister waives the requirement for compliance, local councils are bound to act on such directions in the preparation of a draft LEP.

Endnotes

[1] (1999) 106 LGERA 202; [1999] NSWLEC 271 [Cowdroy J, 22/12/99].
[2] cf the cases of *Balmain Association Inc v Planning Administrator* (1992) 25 NSWLR 615 (CA); *Balmain Association Inc v Planning Administrator* [1991] NSWLEC 3 in relation to the scope of the power pursuant to s118 of the Act.
[3] see Kelly and Farrier "Local Government and Biodiversity Conservation in New South Wales" (1996) 13 EPLJ 374, at 377, reference to Direction G21 – Conservation of environmental heritage and ecologically significant items and areas; Mossop "Coastal Wetland Protection Law in New South Wales" (1992) 9 EPLJ 331, at 339.

Community Road Kill
Standing issues in North Queensland

Michael McNamara, Solicitor, Environmental Defender's Office North Queensland

In a significant victory for both conservation and a community willing to demand better conservation outcomes, the Queensland Government has announced it will not be proceeding with its controversial East-West Connector Road at Mackay, Queensland.

The story so far

EDO North Queensland (**EDO-NQ**) acted on behalf of the Mackay Conservation Group (**MCG**) and the Bird Observers Club of Australia (Mackay Branch) in their appeal against the decision of the Department of Primary Industries (**DPI**) to grant the Department of Main Roads a permit to clear 12.3 hectares of mangroves to make way for the 1.5 km East-West Connector Road at Mackay.

The purpose of the road was to provide an alternate route for heavy traffic, from North Mackay to the sugar terminal at the harbour. Its construction would take out a corridor of old growth mangroves along Barnes Creek, part of the Bassett Basin, which was declared a Fish Habitat Area under section 120 of the *Fisheries Act 1994* ('**the Act**').

The environmental values of the Bassett Basin are extensive. More than 120 bird species are found here, including the rare Rajah Sheldrake, Black-necked Stork and Square-tailed Kite. More than 120 fish species use the Basin as a feeding ground and nursery. The False Water Rat (listed as Vulnerable under the *Nature Conservation (Wildlife) Regulations 1994*) has also been sighted in the area.

In September 1999, to facilitate Main Road's mangrove clearance application, the declaration of Fish Habitat Area for this part of the Bassett Basin was revoked by regulation.

Grounds for an appeal to the Fisheries Tribunal

The grounds on which 'a person whose interests are adversely affected by a decision' can appeal to the Fisheries Tribunal are set out in the Act. The grounds are that the decision was contrary to this Act, was manifestly unfair, and/or will cause severe personal hardship to the appellant.

The grounds of appeal were limited to legal questions and fairness issues, providing limited scope for a comprehensive review of the environmental, social or economic merits of the decision. EDO-NQ argued that the DPI had acted at the direction of Main Roads, indicating a failure to reasonably exercise its discretion, and otherwise acted contrary to the conservation objectives of the Act. Although the precautionary principle is not expressly referred to in the Act, arguably DPI failed to take a precautionary approach in its decision-making.

Before there was a hearing of these grounds, however, the conservation groups had to meet a preliminary challenge raised by DPI about their 'standing' to bring the appeal. The DPI disputed that the groups were 'adversely effected' by its permit decision.

Standing issue background

Establishing standing to bring legal actions has traditionally been a major hurdle for individuals and conservation organisations seeking to review environmental decision-making in the courts. Where standing provisions are not laid out in legislation, the common law tests still apply.

The High Court set out, in the Australian Conservation Foundation case (*ACF v The Commonwealth (*1980*)* 28 ALR 257), that an interest group would need to demonstrate a special interest in the matter beyond that of any other member of the public in order to establish standing.

'Special interest' can be readily proven if a group demonstrates a financial, property or other private interest (*Fraser Island Defenders Org'n Ltd v Hervey Bay Town Council* (1983) 2 Qd R 72).

A number of factors were identified by the Federal Court in the *North Coast Environment Council Incorporated v Minister for Resources,* (1994) 85 LGERA 270, as supporting a 'special interest'. These include:

- the prominence of the environment group within the region,
- whether the activities of the group relate to the area in question - for example, the undertaking of studies in the area (bird surveys, etc), the making of submissions about activities and receiving funding from government for programs within the area, and
- whether the group has undertaken related projects and/or conferences.

There have been a couple of conservative Queensland cases on standing, with the most recent, *Friends of Castle Hill Association Inc v Queensland Heritage Council* (SC(Qld), No 625,1993, unreported), providing that environment groups need to demonstrate a very direct interest.

Preliminary hearing on standing

The Fisheries Tribunal heard submissions about the standing issue at the Brisbane Magistrates' Court on 17 March 2000. On behalf of the conservation groups, EDO-NQ arranged for EDO Queensland solicitors, Jo-Anne Bragg and Rob Stevenson, to attend and instruct Adrian Duffy, a barrister with extensive experience in Fisheries Tribunal appeals.

The case for conservation groups

Extensive affidavits, directed towards demonstrating the 'special interest' of the MCG and the Bird Observers Club in protecting mangrove ecosystems within the Bassett Basin and the Central Queensland Bioregion, were filed for the preliminary hearing.

Some of the factors in support of MCG's 'special interest' were:

- the recognition of its role as the peak regional conservation group for the Mackay area by all levels of government, and funding received for this role,
- its making of a submission to DPI on the proposed declaration of the Bassett Basin as Fish Habitat Area (1994),
- its involvement in a number of mangrove protection campaigns since 1987, and
- the appointment of MCG to a number of key community advisory committees, including the Great Barrier Reef Marine Park Authority's Water Quality and Coastal Development Regional Advisory Committee, and the Local Marine Advisory Committee.

The Bird Observers Club's 'special interest' similarly demonstrated by:

- conducting numerous bird surveys within the Bassett Basin and the Central Queensland Bioregion, on occasion at the request of government agencies,
- producing bird books and field notes about the bird species in the Bassett Basin, as well as recently completing a video entitled 'Amazing Mangroves',
- rehabilitating injured water and wader birds found within and returned to the Bassett Basin, and
- its continuous involvement since 1993 in a number of campaigns for mangrove protection within the Mackay Region.

The opposing case put by DPI

The case put by DPI was not directed towards disputing whether the MCG or Bird Observers had a 'special interest' in the circumstances, but rather whether any third party, other than applicants for permits under the Act, could appeal to the Tribunal against a permit decision. This argument for reading down the section 196 appeal rights was based upon the absence of any requirements in the Act for the DPI to notify third parties of permit applications or its decisions. Section 196 provides that any person may appeal a decision of a fisheries agency to the Fisheries Tribunal, on grounds that include that the decision was contrary to the Fisheries Act, was manifestly unfair, or caused severe personal hardship to the person.

Fisheries Tribunal decision

On 7 April 2000, the Chairman of the Tribunal, Mr Darryl Rangiah, handed down a decision in favour of the conservation groups. He refused to take a narrow view of the appeal right in the Act and, while not finally determining the issue, was of the view that both conservation groups could demonstrate a 'special interest' sufficient to give them standing to bring the appeal. Perhaps most alarmingly for DPI, the Chairman suggested that DPI might in some circumstances be obliged as a matter of procedural fairness to give notice of the decision to persons whose interests may be adversely affected by the decision, saying:

> "It could not be too difficult a task for a fisheries agency to identify land owners, environmental groups, local businesses and local fishermen whose interests may be adversely affected by a decision and notify such persons of the decision".

The decision provides considerable scope for conservation groups to similarly appeal against marine plant permit decisions, where they can demonstrate a special (ie. local) interest in coastal protection. Further, it shows that the Fisheries Tribunal may be prepared to consider an appeal brought by adversely affected third parties outside of the 28 days provided for an appeal, where as a matter of procedural fairness DPI ought to have but did not notify them of the decision.

Qld Government calls off road

A week after the Tribunal's decision that the appeal would proceed, the Minister for Transport and Main Roads, Mr Steve Bredhauer, announced that the East-West Connector would not proceed. He said the project potentially faced months of uncertainty and protracted legal proceedings, and the Government, therefore, had decided not to proceed with the project.

He said the Government would honour commitments to spend $100,000 towards the environmental management and rehabilitation plan for the mangrove area around Sandfly Creek, and $50,000 for a mangrove monitoring program conducted by the Central Queensland University. The addition of a 22.7 hectare property at Vines Creek to the Bassett Basin Fish Habitat was also assured by the Government.

It remains to be seen whether the Government is also prepared to restore the Fish Habitat status of the 12.3 hectares of mangroves.

Regulating a Brave New Genetically Modified World

Donald K Anton, Solicitor, Environmental Defenders Office (Victoria) Ltd

Following on from his article in the last issue of Impact (No. 57), Don Anton examines the international regulation of genetically modified organisms, under the new Cartegena Protocol on Biosafety, adopted in January 2000 in Montreal.

Since 1992, the genetic material of over 2,000 different crops, livestock, fish, plants, insects, viruses, fungi, and bacteria have been genetically altered in the laboratory in order to change some physical property or capability. It is the international regulation of these genetically modified crops and related products, generally known as living modified organisms (**LMOs**), which the Cartegena Protocol on Biosafety attempts to address. Thus far, international regulation has not been brave enough to address human genetic manipulation.

The need for regulation

Before turning to the substance of the Protocol, it is important to consider whether legal regulation of the field is necessary at all, since it has been called into question by not only those with vested interests, but also by apparently independent regulators.

These detractors point out that, since the earliest times, farmers have domesticated and bred plants and animals, selecting them and adapting them to their needs by exploiting and expanding genetic variability. Accordingly, some members of the biotechnology debate view the risks posed by LMOs as merely a conventional extension of traditional breeding. As the U.S. National Research Council has concluded, LMOs "should pose risks no different from those modified by classical genetic methods for similar traits".

This view is false for two important reasons. First, it confuses the difference in the power between modern genetic engineering and conventional breeding. Conventional breeding must observe nature's limits, both in terms of time and in terms of reproductive boundaries. Biotechnology and the ability to splice genes across biological barriers, removes both of these limits of natural breeding in a radical fashion.

Second, the arguement confuses the distinction between the precision of biotechnology and predictability. There is no doubt that DNA techniques which recombine genes are more precise than classical methods for modifying genes. It does not follow that today's scientists have the ability to predict the consequences of these techniques. Knowing precisely how genes have been modified in an organism does not provide a sound foundation for guessing the likely ecological effects of releasing that organism into the wild. Nor does this intellectual leap identify the particular types of risks about which we should be concerned.

The Biosafety Protocol

For these reasons, the regulation of LMOs, and the risks they pose, appears not only necessary, but urgent. This year, the parties to the 1992 Convention on Biological Diversity adopted the Cartegena Protocol on Biosafety, in order to establish a process for the safe transboundary transfer, handling and use of LMOs, and bioengineered products containing LMOs.

The main mechanisms established to achieve this objective are the advance informed agreement procedure (**AIA**) between parties before export or import of LMOs, and a risk assessment process to assist the State of import to decide whether to allow the import.

Scope and coverage

At first glance, the scope of the Protocol seems extraordinarily comprehensive. Article 4 provides that, in principle, the Protocol applies to "the transboundary movement, transit, handling and use of all LMOs that may have adverse effects on the conservation and sustainable use of biological diversity", including risks to human health.

It is notable that the scope is not limited to 'significant' adverse effects, a qualifier found not only in the law of international responsibility for environmental harm, but also in many domestic environmental impact assessment (**EIA**) regimes. The prospect of any adverse effect appears to be sufficient to bring an LMO within the ambit of the Protocol.

A closer look at the Protocol, however, reveals that it is limited by a large number of exceptions. Indeed, given the large number of exceptions, it is difficult to see how the Protocol will successfully meet its objective. These exemptions will be discussed later.

Advanced Informed Agreement

The Cartegena Protocol establishes an AIA procedure as the main mechanism to ensure what Article 1 calls "an adequate level of protection" for biological diversity from the transboundary movements of LMOs. What this level of protection consists of is uncertain, but it is certain that such an obligation will be subject to differing interpretations.

Under Article 7, before a Party of export can ship an LMO "for intentional introduction into the environment" of another State, it must first notify the Party of import, giving information about the LMO as required by Annex I. However, the use of the phrase "intentional introduction into the environment" eliminates the vast majority of LMOs from the notice requirement.

Article 7.1 expressly limits notice to the first transboundary movement. Subsequent similar deliveries appear to be free of regulation. However, under Article 10.3(a), the decision of a Party of import to approve the import of a LMO may include conditions on how the decision will apply to subsequent imports of the same LMO. This could include conditions to limit the approval to a specific delivery, and requiring subsequent imports of the same LMO to comply with the Protocol's AIA procedure.

Risk Assessment and socio-economic considerations

The decision to approve or prohibit import of an LMO must be based on a risk assessment carried out in accordance with Article 15 and Annex II of the Protocol. The assessment must be carried out in a "scientifically sound manner", but may be prepared by the producer and exporter of the LMO. While risk assessment must be scientifically rigorous, in making a decision to approve or prohibit the import of an LMO, the Party of import is entitled to apply a precautionary approach if the scientific knowledge about potential risks is unavailable or uncertain. Article 10.6 provides that

> "Lack of scientific certainty due to insufficient relevant scientific information . . . regarding the extent of the potential adverse effects of a LMO [on biological diversity], shall not prevent [the Party of import] from taking a decision [prohibiting import] . . . in order to avoid or minimise such potential adverse effects."

Under Article 26.1, in reaching a decision to allow or prohibit import, a party is entitled to consider socio-economic considerations arising from the potential impact of LMOs on biodiversity, especially as it relates to the value attached to it by indigenous and local communities.

In practice, the assessment of risks to biodiversity posed by LMOs under the Protocol is likely to replicate risk assessment at the national level. This is because the information required by the Protocol in connection with the assessment is largely what is required by domestic regulatory agencies, such as the Australian and New Zealand Food Authority (and its U.S. counterpart, the Food and Drug Administration).

Unfortunately, these domestic risk assessment systems are woefully inadequate. The result is a voluntary system for assessing the risk of transgenic organisms. Companies that create LMOs regulate themselves by comparing their products against guidelines issued by domestic regulatory authorities. If businesses decide that their genetically modified products meet the guidelines, then they are free to produce, market, and sell their products without any significant governmental oversight. Regulators rely on industry data in granting approvals, and there is no independent governmental assessment of risk.

Exemptions and limitations

As indicated above, there are a number of exemptions and limitations that cut large holes in the coverage and effectiveness of the Protocol. The language of Article 4 itself reveals that the Protocol is not intended to cover the creation or development of LMOs in the first instance. That is left to the domestic law of States.

Article 5 excludes from coverage of the Protocol LMOs that are pharmaceuticals for humans. Article 6 provides exemptions for LMOs in transit and in contained use. Article 6.1 exempts a Party of export from complying with the AIA procedure and risk assessment in relation to States through which LMOs are only in transit.

Article 6.2 exempts a Party of export from complying with the AIA procedure and risk assessment in connection with LMOs destined for contained use in accordance with the standards of the Party of import. Of course, most developing States have no standards at all. In such a case, it might be that the Protocol does not impose any obligations at all, other than the usual soft obligation on developed States to cooperate in capacity building.

If the Party of import has no standards, the export must be permitted for contained use because no standard of the importing Party restricts or conditions it. On the other hand, one might argue that in the absence of standards, export destined for contained use is prohibited because it cannot be "in accordance with the standards of the Party of import" as there are no standards to be in accordance with.

Article 11 establishes a separate procedure for the transboundary movement of commodities containing LMOs, including those intended for direct use as food or livestock feed, or for processing. No direct notice of export and import is required. However, a Party that allows such an LMO to be used domestically (except in field trials) must inform the Biosafety Clearing-House established by the Protocol and provide information about its genetic make-up and risks associated with its use.

By using the Clearing-House, under Article 11, a Party can take a decision regulating the import of LMO food and feed products that is consistent with the objective of

cont...page 12

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the Protocol and based on scientific evidence of risk. Once again, in making the decision, the Party can apply the precautionary principle.

International trade rules

Consider the case where a State of import decides to prohibit the import of an LMO, under Article 10, because it believes that the science is incomplete and uncertain about its potential long-term effects on the environment.

The State of import believes that, at a minimum, the potential effects of the LMO should be studied in a closed microcosm, replicating the exact conditions of the open environment where the LMO will be released, over a number of generations, to determine long-term effects. (Note that the Protocol is silent on this sort of risk assessment methodology.)

Suppose further that both the State of import and export are parties to the World Trade Organisation (**WTO**) and General Agreement on Tariffs and Trade (**GATT**), and that the exporter claims that the decision represents a disguised barrier to trade, in violation of the GATT. What happens?

Although no direct conflict between a multilateral environmental agreement and trade rules has yet found its way before a WTO dispute settlement panel, the scenario raises a number of interesting issues.

Articles 2.4 and 26 of the Protocol are the only provisions that directly address its relationship with existing international trade agreements. Under Article 2.4, the relationship between the Protocol and trade rules are only addressed in the event that the State of import acts in a manner more protective of the environment than provided by the Protocol.

It does not address the relationship in the case where the State of import acts according to the Protocol. It provides that a Party may take action that is more protective of biodiversity than that required by the Protocol, provided this heightened level of protection is "in accordance with its other obligations under international law", and allows consideration of socio-economic factors in deciding whether to let a LMO in to the country.

Presumably, these qualifications were included to ensure that the preexisting treaties, including trade agreements, would take priority in cases of conflict in accordance with the interpretive rule set out in Article 30.2 of the Vienna Convention on the Law of Treaties, although this result is by no means certain. Article 30.2 only applies to successive treaties relating to the same subject matter, and arguments can be made both ways as to whether this is in fact the case.

In the case presented, the Party of export may argue that, since the microcosm risk assessment methodology required by the State of import is not mentioned in the Protocol, it constitutes heightened protection and, because it does not comply with existing international trade law, it should be not permitted under the Protocol. On the other hand, the State of import may claim that the use of a microcosm is a scientifically 'recognized risk assessment technique', which Article 15 allows to be taken into account and, therefore, does not constitute heightened protection.

If we accept, for the moment, the State of import's claim that it is acting within the scope of the Protocol, it still does little to settle the underlying question about the priority of norms in the case of a conflict with the GATT/WTO.

> **"the Protocol....does little to settle the underlying question about the priority of norms in the case of a conflict with the GATT/WTO"**

The regime established by the Protocol may get the benefit of the 'interpretive rule', in Article 30.3 of the Vienna Convention, under which it could be argued that earlier trade treaties apply only to the extent that their provisions are compatible with those of the Protocol. Again, for this rule to apply, the subject matter of the two treaties would have to be seen to be identical.

We might also turn to the Protocol's Preamble (though it does little to aid in interpretation), which states:

- that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,
- that the Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements, including trade agreements, and
- that the foregoing recital is not intended to subordinate the Protocol to other international agreements, including trade agreements.

This language seems to take us nowhere. It implies that the Protocol and trade agreements should be mutually supportive. However, we are given no guidance where it is most necessary - in cases of conflict. We are merely told that trade agreements and the Protocol have equal weight. To resolve this dilemma, the WTO needs to adopt a set of environmental friendly interpretive rules, and to reverse at least one presumption under the Dispute Settlement understanding.

Conclusion

While the Biosafety Protocol represents the beginning of international regulation of genetic engineering, much remains to be done. Areas of human genetic manipulation, LMO pharmaceuticals, the transit and contained use of LMOs, labeling (which space did not permit coverage of), the development of independent risk assessment, and reconciliation of international trade rules with multilateral environmental agreements are all areas where improvements are needed.

The National EDO Network submission on the *Gene Technology Bill 2000,* which will regulate LMOs in Australia, is available from the EDO web site at:

edo.org.au/edovic/policy/Gene_Tech_Bill.html

NSW Pastoral Leases and Native Title

Casenote: Anderson v Wilson [2000] FCA 394

James Johnson, Barrister

On 5 April 2000, a Full Bench of the Federal Court (Black CJ, Beamont and Sackville JJ) delivered judgment in a stated case about native title. The judgment confirmed that Western Lands leases do not necessarily extinguish native title rights in the Western Division of NSW; that is, that native title rights can co-exist with leasehold rights.

Mr Anderson, on behalf of his clan, has made a native title claim over land in the Western Division of NSW. Mr Wilson ('**the Lessee**') has a pastoral lease over the land. The Lessee raised a question of law in the native title proceedings: by virtue of the *Western Lands Act 1901* (NSW) and regulations in force when the lease was granted, did the lease confer upon the Lessee a right to exclusive possession of the land?

The Lessee argued that the lease conferred a right to exclusive possession when it was granted. The main plank in support of the argument was that the term 'lease' in the legislation should be read as having all the incidents of a common law lease, one of which is the right to exclusive possession.

In order to succeed, the Lessee needed to distinguish the High Court's judgment in *The Wik Peoples v The State of Queensland* (1996) 187 CLR 1, which involved a similar argument about whether native title could co-exist with leasehold rights, pursuant to a lease granted under the Queensland statutory framework.

The Lessee argued that the Act and lease in *Wik* were different from those in this case, they contained nothing to contradict an intention to confer a right to exclusive possession, and indeed they contained provisions which confirmed an intention to confer a right to exclusive possession.

The Mirage of Certainty

The Court was critical of the approach adopted in seeking to have the question stated. The question of the existence of native title is highly fact specific, yet no facts had been found prior to stating the case. Second, questions framed by reference to rights of exclusive possession divert attention from the critical question: whether the rights that are given [by the Lease] are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title.

In a nutshell, the Court held that the word 'lease' in the legislation did not mean 'common law lease' and did not confer exclusive possession. The legislation conferred the power to grant leases in perpetuity, which was inconsistent with the concept of a common law lease for a fixed period. The lease contained broad reservations and exemptions, including reserving the existing rights of third parties to use 'reserves' or 'tracks', terms which are likely to have broad meanings, on Crown land.

The lease was not necessarily inconsistent with all native title rights. As Black CJ and Sackville J said in their joint judgment,

> "Until the content of any native title rights is determined by reference to the evidence, all that can be said is that there may be inconsistency between some native title rights and the rights conferred by the Lessee."

The native title case has been remitted to a single judge of the Federal Court.

National EDO Network News

National Meeting In Melbourne

The National EDO Network meets regularly to coordinate EDO work on issues of national relevance, and to share resources and information about environmental law matters in Australia. The Network meets by telephone conference and, where resources permit, face to face.

The Network recently held a meeting in Melbourne, coinciding with a seminar on the ***Environmental Protection and Biodiversity Conservation Act 1999***, hosted by EDO Victoria. The meeting was attended by solicitors, education officers and administrative staff representing EDOs in all States and Territories. The cost of the meeting was covered by a grant from Family Law and Legal Assistance Division (**FLLAD**), part of the Commonwealth Attorney-General's Department. The Network would like to thank FLLAD for its support.

Papers from the Melbourne EPBC Act seminar are available from the Victorian EDO,
Tel: 03 9328 4811.

WA Award recognises Volunteer Lawyer

Jean-Pierre Clement, a lawyer who has donated over 2000 hours of free services to the Western Australian community, has been recognised for his efforts by the Butterworths Lawyers Community Service Award.

Mr Clement, currently a lawyer with the Sustainable Rural Development organisation and a member of the WA EDO's management committee, has provided significant *pro bono* assistance to the WA EDO, and other heritage conservation organisations, since 1996. Mr Clement's research for the EDO included areas such as forestry and biodiversity law reform, and he is editor of the *Guide to Environmental Law in Western Australia*, published by the EDO. He was also the principal author of *The Law of Landcare,* which covers a wide range of issues ranging from salinity and land clearing to air pollution, chemical use and water rights.

Michael Bennett, the WA EDO's Principal Solicitor, says that Mr Clement's contribution has been outstanding. "He manages to combine good legal knowledge with a plain English style that is accessible to non-lawyers".

The award recognised that Mr Clement's work has resulted in a much greater knowledge of environmental law for farmers and regional conservation organisations, as well as community groups and low-income individuals. The National EDO Network congratulates Mr Clement, and thanks him for his continuing support of the WA EDO.

The EDOs are not-for profit organisations. We rely on volunteer services to help us defend the environment. For more information about offering volunteer services, contact the EDO closest to you.

Farewell to Impact Editor

Tessa Bull, an Education Coordinator at the EDO NSW, has left the EDO after 5 years. Tessa has made a significant contribution to the EDO's NSW and National education programmes. Since joining the EDO, she has been instrumental in building the programme to double its original size, with 2 part-time Education Coordinators now employed in NSW, running a wide range of community education activities on local, State and Commonwealth law issues.

Tessa has been editor of both *Impact* and *Environmental Defender*, the NSW EDO quarterly newsletter, as well as editing and publishing many EDO publications on environmental law. She has run conferences, seminars and workshops on State and Commonwealth laws and has participated in international environmental law programmes.

Tessa leaves us to pursue opportunities in the UK. We wish her every success, and thank her for her contribution to the EDO.

ACT Principal Solicitor moves on

Rosemary Budavari, solicitor at the ACT EDO for 3 years, has decided to leave the EDO to take on new challenges at the ACT Women's Legal Centre.

Chair of the ACT EDO, Dr Andrew Parratt says of Rosemary, "the reputation and value she has added to the

ACT EDO within the wider community has been well received. Rosemary's work in the area of Law Reform has been recognised by the ACT Assembly, in one instance changes recommended by the EDO to a bill being acclaimed by all sides as excellent additions to new legislation. She has also championed our legal education programs in schools to great effect."

Rosemary has worked with State and Territory based EDOs to gain better representation in Canberra. Fortunately for the ACT and the CLC community, Rosemary is staying within the network. Rosemary will be missed greatly by all at the ACT EDO and the National EDO Network.

New WA EDO publications

The ***Forest Activist Handbook*** is an essential guide for anyone using direct action to protect forests in Western Australia. The book covers preparations for actions, offences you might be arrested under, what to do if you're arrested, and the penalties you may face.

Seminar papers from the WA EDO's May seminar, ***"Planning for the Environment"***, will be available soon. Topics include an overview of Western Australian planning laws, integrated planning, sustainable development, and planning for environmental justice. Includes papers from Simon Holthouse, Chairman of the WA Planning Commission, Les Stein, Chair of the Town Planning Appeals Tribunal, and Michael Bennett, Principal Solicitor at the WA EDO.

The Forest Activist Handbook and Planning seminar papers are available from the Western Australian EDO, Tel: 08 9221 3030.

Impact regular joins ANU

Don Anton, a regular contributor to Impact, is leaving the EDO Network to take up a position as Lecturer in Environmental Law at the Australian National University in Canberra. Don has previously worked for the NSW EDO, as Policy Officer, and most recently as a solicitor with EDO Victoria.

Don has made a significant contribution to the EDO's work on international and national environmental law and policy. His membership of international networks, particularly **E-LAW** - an international network of public interest environmental lawyers - has increased the EDO's participation in international debates on issues that include the regulation of genetically modified organisms, greenhouse emissions, the Multilateral Agreement on Investment, and ecologically sustainable development. He has also has a long standing interest in Papua New Guinea, establishing the EDO's program in PNG which supports public interest lawyers working on forests.

The excellent **Environmental Links page** on the EDO web site, which provides links to legal and green sites around Australia and the world, has been developed largely due to Don's work.

Don is also taking on the position of Acting Director of the Australian Centre for Environmental Law (ACEL), for the next year. We wish Don all the best and look forward to future contributions to Impact in his new role.

James Blindell goes to private practice

The EDO-SA is sad to be losing its founding solicitor, **James Blindell**. James joined the EDO in 1994. Highlights of James' time at the EDO include the running the EDO-SA's first ever civil enforcement action in the Environment Resources and Development Court.

Despite the restriction on litigation imposed by the Commonwealth Government, James managed to diversity EDO-SA's funding in order to conduct important test cases before the Courts. Most recently, he has worked on inappropriate olive developments and has assisted with the Tuna Case (previously reported in *Impact*). James has also made a valuable contribution to law reform and community legal education in SA.

James is moving to private practice, to continue work in the field of environmental and planning law. The National EDO Network wishes James well in his new role.

@ Visit the EDO webpage at www.edo.org.au for: @

- **EDO network information**
- **EDO events and publications**
- **Policy page, including EDO submissions on law reform**
- **Comprehensive links to environmental, legal and related organisations**

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For free confidential advice on including the EDO in your will, please contact Lisa Ogle, Director, at the NSW EDO on (02) 9262 6989, or talk to a solicitor at your State or Territory EDO (see front page for contact details).

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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