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WA Mining Warden finds hidden treasures at Cape Range

***Finesky Holdings Pty Ltd v Australian Speleological Federation (Inc)
& Others [2001] WAMW 1.***

Sandra Boulter, Solicitor, Environmental Defender's Office WA (Inc)¹

A recent case, heard in the Western Australian Mining Warden's Court, has the potential to change State Government practice on the granting of mining leases in environmentally and culturally significant areas.

Cape Range

The Cape Range peninsula, on the Gascoyne coast of Western Australia, is a breathtaking place of world heritage significance. The unique diversity of subterranean fauna which live in the underground (air or water filled) caves and mesocaverns of this karstic limestone is a treasure hidden under an arid desert surface. Ningaloo Reef is an integral part of this karstic cathedral of natural and cultural heritage.

Cape Range is listed on the Register of the National Estate and its values support a number of recommendations for World Heritage listing. A significant portion of the eastern foothills of the Cape Range has been recommended to be included in the Cape Range National Park. The area is also of interest to the mining industry, for limestone extraction.

In 1995, in response to competing land use interests, a controversial dual purpose policy, brokered between the Department of Minerals and Energy and the Department of Conservation and Land Management, was accepted by the State

Government. This policy allowed the Government to propose the setting aside of a significant area of the south-eastern foothills of Cape Range as a 'section 5(h) reserve'² for the apparently inconsistent purposes of conservation and limestone mining. The area is currently under pastoral leasehold, with compensation to the leaseholder for the excision of the 5(h) reserve remaining unresolved.

In 1999, Finesky Holdings Pty Ltd (now transferred to Learmonth Limestone Pty Ltd) applied for a grant of 10 mining leases over 8,250 hectares of Cape Range, covering approximately 80% of the

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proposed reserve area, and over which the company holds mining exploration licenses.

Mining leases in WA

The *Mining Act 1978* and the Mining Regulations regulate the grant of mining tenements in Western Australia. An application for a mining lease must be lodged at the office of the mining registrar. A person who wishes to object to the grant of a mining lease must lodge the objection at the office of the mining registrar within 35 days of the date of application for the lease.

If a notice of objection is lodged, the Mining Warden must hear the application for the mining lease in open court. The Warden may give any person who has lodged a notice of objection an opportunity to be heard.

After the hearing, the Warden makes a recommendation to the Minister for Mines. Subject to the *Mining Act*, but irrespective of the Warden's recommendation, the Minister may grant or refuse the mining lease on such conditions, as the Minister considers reasonable.

Environmental impacts of mining proposals may be assessed when:

- objections to an application for a grant of mining lease on public interest grounds³ are taken to the Mining Warden's Court, and/or
- environmental impact assessment of the proposal is undertaken by the Department of Environmental Protection, on behalf of the Environmental Protection Authority (EPA)⁴. Typically, such assessments occur after the grant of the lease.

In the present case, the proposal for a mine across some of the ten mining lease applications was before the Mining Warden's Court as evidence. The first mine proposed by the applicant is for the production of limestone blocks for the construction of Maud's Landing, near Coral Bay - a proposed tourist resort coastal development yet to receive development approval.

The Australian Speleological Federation (Inc) ('the ASF') had lodged objections to the grant of the mining leases. The EDO (Western Australia) represented the ASF in the Mining Warden's Court.

Environmental impact assessment of the proposed mine on Cape Range had not been undertaken prior to the objections being lodged, as the proposal to mine had not been referred to the EPA. This may have been because the proponent sought to obtain the grant of the mining leases

before the EPA assessment of a mining proposal (with the role of the EPA reduced to setting conditions on a lease already granted⁵ by the Minister for Mines).

Mining Wardens' Court

Relying on recent cases, in which the EDO WA and others have acted, the jurisdiction of the Warden to hear environmental objections and the standing of an environmental objector in the Court was not an issue⁶. It is now clear that the Warden can exercise his discretion about hearing an objector on environmental grounds⁷.

Environmental objectors are further assisted as the Court is, effectively, a 'no costs' jurisdiction.⁸ This means that an objector is unlikely to face an order for the costs of the applicant if the objector is unsuccessful.

In the Cape Range case, the objections by the ASF to the grant of the leases were against:

- the unnecessary size of the 10 combined mining leases,
- the visual impact of a mine,
- the potential impact on the integrity of the Cape Range karst ecosystem, especially on the aquifer, caves and subterranean fauna,
- the potential impact of the leases on World Heritage listing of the Cape Range peninsula, and
- the public interest in protecting such an area.

Findings of fact

On 9 February 2001, Mining Warden Calder handed down his recommendations, having accepted the evidence of several experts called by the ASF.⁹

In relation to the environmental values of the area, the Warden found that the Cape Range is a unique karst system, outstanding on a world scale in terms of its location, geological structure, subterranean fauna inhabitants and its integrity. He agreed that Cape Range contained extraordinary and unique subterranean fauna, and that it is likely that unique fauna would be destroyed by a mining operation. He also noted a high potential for significant undiscovered anthropological sites.

The Warden accepted that the Cape Range contained World Heritage values and that any mining activity would be a "significant negative factor" in future decisions regarding World Heritage nomination or listing.

On the evidence relating to government policy which fostered the creation of the dual purpose reserve, the Warden found that there was a public interest in the

existence and the operation of the policy, and that this interest may form the basis of objections to the grant of a mining lease.

However, the Warden determined that it was beyond his jurisdiction to make a finding about the suitability of the policy to create the 5(h) reserve for mining and conservation (despite the objector's evidence about the process that led to the creation of that policy).

Warden's recommendations

The Warden recommended that, if it was considered acceptable by the EPA for the proposed mine to operate in the 5(h) reserve, then his recommendation was qualified as follows:

- A mining lease should only be granted for the area presently proposed to be mined (thereby rejecting 99.98% of the area applied for).
- The mining lease should only cover an area that is necessary for the proponent to conduct an efficient mining operation.
- This small mining lease should only be granted if the EPA finds that the proposal to mine is environmentally acceptable.
- EPA assessment of the proposal to mine should be made (contrary to present policy) before the Minister makes his decision.
- If it is found that the mine should not be sited where it is presently proposed, then the applicant should not put the mine in any other site within the lease area without going through the process again.
- The Minister for Mines should take advice from the Department of Minerals and Energy and the EPA before making a decision about the mine site, if the Minister is minded to grant a mining lease large enough to move the mine to an alternative site.

Conclusions

It is to be hoped that the newly elected government of Western Australia adopts the recommendation of the Mining Warden against the grant of mining leases in Cape Range, and examines the nearby Rough Range as a suitable alternative for a strategic limestone reserve.

ASF will continue its call to government to remove the strategic limestone mining purpose from the proposed Cape Range 5(h) reserve, enlarge the Cape Range National Park, as recommended by numerous government agencies, and nominate the Cape Range peninsula for World Heritage listing.

The Warden's decision makes a careful distinction between the role of the Mining Warden's Court and the WA State government mining policy in determining the appropriateness of mining activities in relation to conservation goals, and highlights the uncertainty that the creation of dual purpose reserves presents for industry and the community.

The case also highlighted the inappropriateness of recent government practice in the granting of mining leases prior to environmental impact assessment.

A mining lease may be granted even where there is no firm proposal to mine. In other words, mining leases are granted with a 'no mining' condition, prior to approval by the State Mining Engineer, who is obliged to refer any environmentally significant mining proposal to the Environmental Protection Authority.

End notes

¹ The author wishes to thank Michael Bennett, Principal Solicitor of EDO WA (Inc), for his helpful comments.

² Now under section 5(h) of the *Conservation and Land Management Act 1984* and the *Land Administration Act 1997*, (formerly section 5(g) of the *Conservation and Land Management Act 1984* and the former *Land Act 1933*).

³ See section 111A of the *Mining Act 1978*.

⁴ On behalf of the Environmental Protection Authority, and see section 38 (1)(a) of the *Environmental Protection Act 1986*.

⁵ After the close of the hearings, unknown to the objector and before the Warden's decision was handed down, the proponent referred the proposal for the mine to the EPA under section 38 of the *Environmental Protection Act*. The EPA set a level of assessment, however the ASF has lodged an appeal, arguing that the level of assessment is inadequate. A decision on this appeal has not yet been made and, accordingly, an assessment has not been made. Whether or not the mining leases will be granted is a decision to be made by the incoming Minister for Mines.

⁶ See, for example, *Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd* (1998) 20 WAR 343; and *Re Warden French; Ex parte Serpentine-Jarrahdale Residents and Ratepayers Association Inc* (1994) 11 WAR 315.

⁷ See section 75(4) of the *Mining Act 1978*.

⁸ See section 134(2) of the *Mining Act 1978*.

⁹ *Finesky Holdings Pty Ltd v Australian Speleological Federation (Inc) & Others* [2001] WAMW 1.

The substantial support provided by the EDO WA to the ASF for this case would not have been possible without the financial support of the **Myer Foundation**, for the EDO WA's 'Bush Lawyer' initiative.

First third party test of EPBC Act

Carol Jeanette Booth v. Rohan Brien Bosworth [2000] FCA 1878

Elisa Nichols, Solicitor, and Rob Stevenson, Principal Solicitor, Environmental Defenders Office (Qld) Inc.

Dr Carol Booth, a North Queensland conservationist, has commenced the first court action under the *Environmental and Biodiversity Conservation Act 1999* ('the *EPBC Act*').

Dr Booth has sought an injunction in the Federal Court, at Brisbane, to restrain a fruit farmer from electrocuting large numbers of Spectacled Flying Foxes that roost in the adjacent Wet Tropics World Heritage Area. An application for an interim order to restrain the killings was heard on 13 December 2000 by Justice Spender, and was refused.

While His Honour decided against granting an interim injunction, the reasoning in his judgement highlights the increased potential for environmental protection through third party applications under the *EPBC Act*.

Background

The respondent operates a 60 hectare lychee farm at Kennedy in far north Queensland. He has seasonally operated a system of elevated electric grids, now totalling 6.4km in length, since 1986 as a method of controlling damage to his crop by flying foxes. In response to information received by the North Queensland Conservation Council, Dr Booth inspected the property and recorded over 300 dead Spectacled Flying Foxes (*Pteropus conspicillatus*), on and beneath the grids.

The species is native to the Wet Tropics, providing an important contribution to ecological processes, particularly as seed dispersers. Surveys indicate that the population of Spectacled Flying Foxes has declined, from estimates of over 800,000 ten years ago to 114,000 in 1998, and 74,000 in 1999.

A complaint was made to the Queensland Parks and Wildlife Service who responded by issuing a backdated Damage Mitigation Permit under s.112 of the *Nature Conservation Regulation 1994* (Qld) to take 500 Spectacled Flying Foxes over a three month period. A complaint was also made to Environment Australia, which did not result in any immediate action.

Accordingly, Dr Booth made an application to the Federal Court under s.475 of the *EPBC Act*, which allows interested persons to apply to the Federal Court for an injunction to restrain conduct or proposed conduct that contravenes the Act. In view of the ongoing deaths, an interim injunction was also sought.

The basis of the application was that the respondent's

actions breached s.12 of the *EPBC Act* in that the Spectacled Flying Foxes:

- are resident in the Wet Tropics World Heritage Area adjacent to the Bosworth farm,
- contribute to the biodiversity, ecological function and ongoing evolutionary processes of the Wet Tropics, and
- their destruction is likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area.

Interim injunction decision

Spender J found that Dr Booth had standing to bring the application under the provisions of s.475(6) of the *EPBC Act*. His Honour said that it was apparent that Dr Booth was concerned about the wellbeing of the flying fox population and the environment in the Wet Tropics World Heritage Area. His Honour noted Dr Booth's current employment in the environmental field and the voluntary work she had performed.

Spender J also found that the operation of the electrical grids was an 'action' within the meaning of the Act. His Honour considered that the action was not a 'lawful continuing use' under s.523 of the Act. Neither was it a use authorised by Queensland law, by virtue of s.522B of the Act, as evidence showed that the Damage Mitigation Permit had been issued after the commencement of operation and had been breached, by the taking of numbers far in excess of those permitted.

The central issue in this case is whether Mr Bosworth's activities have, will have or are likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area. However, for the purposes of the interim application the question was one of 'the balance of convenience': whether the risk to the environment was so great that, in the public interest, the respondent should be prevented from continuing to use the grids until the end of the season, in spite of the resulting income loss to the respondent.

His Honour recognised that it was a matter of great public interest that the world heritage values of the World Heritage Area and biodiversity generally are protected. However, in declining to grant the interim injunction, His Honour referred to disagreement between experts on the impact of the killings on the World Heritage Area, the number of evenings remaining in the harvest period, and the loss the respondent would suffer as a result of an injunction.

Spender J emphasised that this ruling was not in any way a rejection of the claims that the applicant makes in the principal proceedings, saying:

“What I am really asked to do by the present application for interim relief is to stop the use of electric grids on the lychee farm of Mr Bosworth for, at most, the next 14 days. The lychee-harvesting season will conclude, according to Mr Bosworth’s affidavit, within the next 12 to 14 days, and the grids will then not be used again until the next year’s season. The question for determination today is quite a different one from whether the use of the electric grids by Mr Bosworth generally over a season, or perhaps even over a longer period, is an action which amounts to a contravention of s.12 of the Act.”

While not directly referring to it in his reasons, Spender J considered the removal of the requirement to give an undertaking as to damages as not being fatal to the case. Under the *EPBC Act*, an applicant for an interim injunction is not required to give an undertaking to pay damages to the respondent, should the application be unsuccessful. In this case, His Honour approached the issue of damages as

another factor in determining where the balance of convenience lay.

Implications

This case highlights the increased potential for the public to protect the environment under the *EPBC Act*. The relatively broad standing provisions under the Act, and the removal of the requirement to give an undertaking as to damages, open the way for community members to bring actions to halt environmental damage, particularly when faced with a permissive approach by government departments.

The Queensland government is currently reviewing methods of protecting fruit crops from flying foxes, and applications for Damage Mitigation Permits under State law now appear to be more rigorously assessed than was previously the case.

Mr Stephen Keim and Mr Chris McGrath of Counsel appeared on a pro bono basis for the applicant, instructed by the EDO Qld. The application for a permanent injunction should be heard later in 2001.

Tasmanian bilateral agreement signed

Louise Blazejowska, Policy Director, Environmental Defender’s Office Ltd (NSW)

The *Environment Protection and Biodiversity Conservation Act 1999* (**‘the EPBC Act’**), which establishes a new Commonwealth scheme for the protection of matters of national environmental significance, permits the Commonwealth to delegate its environmental impact assessment (**EIA**) powers to the States and Territories through bilateral agreements with each State or Territory. This framework attempts to minimise duplication between Federal and State EIA processes.

Under the Act, there can be two types of bilateral agreements:

- *assessment* bilateral agreements, and
- *approval* bilateral agreements.

Before entering into any such agreement, the Commonwealth Minister for the Environment must publish a draft bilateral agreement and call for public submissions for at least 28 days.

Assessment bilateral agreements may declare that certain classes of actions do not require assessment by the Commonwealth Government. Instead, such actions are to be assessed in accordance with a State or Territory environmental impact assessment approach accredited under the agreement. The Commonwealth is still responsible for granting or refusing an approval for a proposed activity, but has no role in assessing the impacts of the activity.

Approval bilateral agreements may declare that State or Territory approval processes are also to be used, delegating the Commonwealth’s approval role for proposed activities.

In July 2000, draft assessment bilateral agreements between the Commonwealth and the various States and Territories were unilaterally released by the Commonwealth Government for public comment. These drafts consist of a generic Commonwealth/State agreement, and an attached Schedule, outlining the particular State or Territory assessment approaches that are to be accredited.

In December 2000, the first assessment bilateral was signed between the Commonwealth and Tasmania. There remain concerns, held by the State environment group Tasmanian Conservation Trust, about the failure by the Commonwealth Government to consult with it during the finalisation of the agreement or to address concerns about certain deficiencies in the operation of the two assessment approaches which have been accredited.

The agreement provides that, if an action has been assessed under an Environmental Impact Statement under the *State Policies and Projects Act 1993* (Tas) or a Development Proposal and Environmental Management Plan under the *Environmental Management and Pollution Control Act 1994* (Tas), no Commonwealth assessment is needed.

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Essentially, the Tasmanian agreement contains the same terms as were contained in the earlier drafts. In relation to the generic terms, most of the comments made by environmental groups on the drafts have not been adopted. One exception is the inclusion of Clause 31, which requires the State of Tasmania to note the particular communication needs of indigenous peoples and ensure that, where appropriate, indigenous peoples affected by a proposed action have adequate opportunity to comment on such actions.

Final agreements with most other States and Territories are

still being negotiated. South Australia, however, has indicated that it does not intend to sign an assessment bilateral agreement at all. Instead, the South Australian Government has introduced the *Statutes Amendment (Avoidance of Duplication of Environmental Procedures) Bill*, which is intended to operate as a sort of 'assessment bilateral in reverse'.

The object of the Bill is stated to be "to ensure that assessment activities undertaken to satisfy the Commonwealth requirements under the *EPBC Act* can be recognised by State and local government authorities for their purposes under State legislation".

New Commonwealth heritage scheme unveiled

Louise Blazejowska, Policy Director, Environmental Defender's Office Ltd (NSW)

In December 2000, the Federal Government released its proposed new Commonwealth heritage scheme with the tabling in Parliament of the following Bills:

- The *Environment and Heritage Legislation Amendment Bill (No 2) 2000*;
- The *Australian Heritage Bill 2000*; and
- The *Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000*.

The Bills were referred to the Senate Environment, Communications, Information Technology and the Arts References Committee for its inquiry and report, with written submissions due on 2 February 2001.

The reforms focus Commonwealth responsibility on nationally significant matters and Commonwealth heritage assets, as well as managing Commonwealth actions that affect heritage places. The changes also include the development of a list of places of national heritage significance and the creation of the Australian Heritage Council to replace the Australian Heritage Commission.

The new regime is to be established within the framework provided by the *Environment Protection and Biodiversity Conservation Act 1999* ('the *EPBC Act*').

The Government's rationale for reform of the existing scheme, which is based on the *Australian Heritage Act 1975*, relies on the same rhetoric used to justify the introduction of the *EPBC Act*, that is, that the existing scheme is "seriously outdated and subject to significant limitations". The claim is made that the proposed new scheme "harnesses the strengths of our Federation by providing for Commonwealth leadership while also respecting the role of the States in delivering on-ground management of heritage places".

While some reform to the heritage area may be necessary, to a large extent the Government's new approach to

heritage is more a case of throwing the baby out with the bath water. Under the proposed changes, the Commonwealth has restricted its involvement in heritage to 'national' matters only, and has effectively absolved itself of any real leadership role in the heritage area.

Of major concern is the insertion of the new scheme into the *EPBC Act* framework without any acknowledgement and accommodation of the achievements and extensive expertise gained by the Australian Heritage Commission over the last 25 years. In effect, heritage issues will be streamlined along with other matters of national environmental significance, without any real consideration of the appropriateness and effectiveness of doing so.

An example of this approach is the change to listings under the Register of the National Estate. Under the new scheme, the Register of the National Estate will, for all non-Commonwealth owned properties, be effectively abandoned and replaced by two new and smaller lists:

- the National Heritage List of places which have national heritage values, and
- the Commonwealth Heritage List for Commonwealth property only.

The old Register will remain a non-statutory list, available over the Internet. All listings that are not on Commonwealth properties will need to undergo fresh and lengthy national heritage assessments if they are to be considered for the new statutory lists.

In the absence of effective transitional provisions, this will leave approximately 12,000 heritage places without any protection. This is despite the fact that these places were listed because the Australian Heritage Commission had made a formal determination that they had aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community.

It is also proposed that the Australian Heritage Commission, in its new form, be downgraded from an independent statutory decision making body to a purely advisory one. The amendments contain significant constraints on the independence of the Council, including:

- Decisions on including a place in the National Heritage List will ultimately be the Minister's.
- The Council will not be permitted to undertake an assessment of a place's National Heritage Values unless the Minister asks it to do so.
- If someone nominates a place for National Heritage status to the Minister, and the Minister decides not to forward the nomination to the Council, the Council will not be permitted to undertake any assessment of that place's National Heritage Values.
- The Council will not have the express power to monitor and co-ordinate responsibility for heritage across all levels of government or provide advice as it sees fit, or upon request to State and local authorities.

Other issues of concern in the proposed scheme are:

- The Minister for the Environment has substantial

discretion in relation to various decision-making processes under the scheme, which creates the potential for heritage decisions to be influenced by the political process.

- There is insufficient allowance for public participation in the listing process and in the development of management plans for heritage properties.
- Checks on Commonwealth agencies in relation to proposals to develop Commonwealth properties are inadequate under the proposed changes.
- There is a need for clear and appropriate heritage terminology to support the aims of the new scheme and comprehensive protection for heritage properties.
- Practical measures which will ensure the meaningful involvement of Indigenous communities in various processes under the Act and which address Indigenous concerns and needs in relation to heritage issues are lacking in the proposed scheme.

The Senate Standing Committee is due to report on its findings on the proposed new heritage scheme later this year.

Blue Mountains listed as World Heritage

Marc Allas, Solicitor, Environmental Defender's Office Ltd (NSW)

On 29 November 2000, the World Heritage Committee of UNESCO (meeting in Cairns) accepted Australia's nomination of 1.03 million hectares of the Greater Blue Mountains, west of Sydney, as Australia's fourteenth World Heritage area. The areas covered by the listing include the Blue Mountains, Kanangra-Boyd, Nattai, Wollemi, Gardens of Stone, Yengo and Thirlmere Lakes National Parks.

The declaration comes after many years of campaigning for a Blue Mountains World Heritage area by environment groups such as the Colong Foundation for Wilderness.

World Heritage values

The area has been nominated for its globally outstanding eucalypt vegetation biodiversity. The World Heritage Committee stated that Australia's eucalypt vegetation is worthy of recognition because of its adaptability and evolution in post-Gondwana isolation.

The area contains 90 eucalypt varieties and a wide and balanced representation of eucalyptus habitats, including wet and dry sclerophyll (hard leafed) vegetation, mallee heathlands, localised swamps, wetlands and grasslands. The area is host to 120 nationally rare and threatened plant species.

The listing was made under the World Heritage Natural Criteria (ii) and (iv). Criteria (ii) applies to areas that are

"outstanding examples representing significant ongoing ecological and biological processes". Criteria (iv) applies to areas that "contain the most important and significant natural habitats for in-situ conservation of biological diversity".

The Blue Mountain region contains a wide range of altitudes, which provided various species with exceptional stability during climatic variations, as well as containing a diverse range of landscapes, enabling major evolutionary change in the biodiversity. The region also has experienced continental biological isolation, geological stability, low soil nutrient derived from sandstone, and fire-adaptability. The Committee emphasised Australia's responsibility to protect eucalyptus in their original ecosystems.

The future

The most likely threats to the integrity of the Blue Mountains World Heritage Area are from high levels of tourism and inappropriate development on private holdings near or in the area. NSW National Parks and Wildlife Service is acquiring private land holdings within the declared area.

Any future development or expansion of existing development that is likely to significantly affect the World Heritage values of the declared area will now need to be approved under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Inappropriate development rejected in Victoria

Phillip Island Conservation Society & Others v Bass Coast Shire Council and James W Sadler Pty Ltd - 17 Nov 2000

Megan Bowman, Solicitor, Environmental Defenders Office (Victoria)

In July 2000, the Bass Coast Shire Council granted a permit for the construction of a 9.5 storey conference-centre/residential hotel overlooking the foreshore at Cowes, Phillip Island. The building would have been the largest of its type outside metropolitan Melbourne. In contrast, Cowes is a seaside, rural township with a population of around 4,000 people. Its urban fabric is made up of buildings ranging from 3 to 5 storeys, within a dominant landscape and tree canopy. The design and size of the proposed development conflicted starkly with the character of its surroundings.

Sixteen objectors to the permit application sought a review of Council's decision in the Victorian Civil and Administrative Tribunal ('**the Tribunal**'). The EDO (Victoria) represented 7 of the objectors, including the Phillip Island Conservation Society Inc. and Westernport and Peninsula Protection Council Inc. His Honour Judge Wood and Mr I. R. Marsden presided as the Tribunal.

Decision of the Tribunal

The objectors were successful on all key issues, being:

- urban design and architectural considerations,
- car parking, and
- tourism imperatives.

Urban design and architectural considerations

In response to Council and community concerns about appropriate development at Phillip Island, a process of extensive consultation occurred earlier in 2000 to produce the "*Cowes Foreshore Precinct Phillip Island: Urban Design Report*". This Report was adopted by Council in April, and was incorporated into the Planning Scheme in August 2000.

The proposed site is a 'landmark site'. The landmark nature of the site was recognised in a Tribunal decision in 1989, and was formalised in the Planning Scheme through the adoption of the Urban Design Report. The Tribunal noted that, in relation to this application, the Urban Design Report was the most relevant and significant provision in the Planning Scheme.

The Urban Design Report specifies indications of a landmark site and criteria for design assessment of those sites. The Tribunal analysed whether the height and bulk of the proposal complied with the Planning Scheme in the context of its location and coastal setting.

The Tribunal concluded that the building did not "reflect the traditional Island character", finding that the building would dominate the site unacceptably and would be too prominent when viewed from the foreshore. It also

concluded that the architectural features were lacking the international quality worthy of a landmark site.

Car parking

The Tribunal was critical of the inadequacy of proposed car parking for the development, stating that evidence from traffic experts for both the Council and developer lacked in several serious regards. The Tribunal concluded that the proposal would worsen parking problems in the area.

Tourism imperative

The emphasis of the submissions on behalf of the developer and the Council was that of tourism. The Tribunal found that much of the expert evidence relating to tourism was "speculative in the extreme". While the Tribunal acknowledged that the Planning Scheme provided specific encouragement for the advancement of tourism on Phillip Island, it concluded that those provisions were not overriding. The Tribunal stated that the tourist argument comes down to one of 'need', and that such need is not an overriding factor of a planning application.

Accordingly, the Tribunal rejected the notion that an inappropriate building should receive planning approval simply because its presence might boost local economy.

Conclusions

This decision has implications not only for the township of Cowes, but for potential development in other Victorian coastal shires. The Cowes Urban Design Report was created as a direct response to a governmental and community desire to work together and define the parameters of appropriate development within a coastal context.

Such a process embodies a healthy role model for other shires. As part of that framework, Councils must require the proper analyses of key aspects of a development proposal so that implications of a proposal are in line with local planning guidelines.

It may be that a council is placed in the position of being persuaded to agree to an objectionable planning proposal due to the perceived 'need' of jobs and tourism. In that regard, the Tribunal is clear:

"In a sense, this case is an illustration of a classic paradox. In fulfilling the need, care must be taken not to destroy the attributes of Phillip Island which make it special in the first place, and provide the impetus for tourism on the Island."

Development consents can be modified retrospectively

Windy Dropdown Pty Ltd v Warringah Council [2000] NSWLEC 240

Chris Norton, Senior Solicitor, Environmental Defender's Office Ltd (NSW)

The NSW Land and Environment Court has held that development consents can be modified to grant consent retrospectively to works that have already been carried out.

Facts

Windy Dropdown Pty Ltd ('WD') owned land at Curl Curl, in northern Sydney, and held a development consent to subdivide that land. Some landfill was placed on the site, in breach of conditions regarding preservation of the landscape. WD lodged an application to modify the development consent, to approve the increased filling.

Warringah Council argued that the Court had no power to modify the consent in the way sought, when the work that would be the subject of the modified consent had already been unlawfully carried out.

The Council relied upon a number of cases in which the Court had held there was no power to retrospectively authorise unlawful work, either by way of a grant of development consent (*Longa v Blacktown City Council* (1985) 66 LGRA 47), amendment of a building approval (*Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council* (1994) 82 LGERA 192), or amendment of a development consent (*Connell v Armidale City Council* (Pearlman J, 25 September 1996, unreported), *Herbert v Warringah Council* (1997) 98 LGERA 270).

The Court's decision

Talbot J reviewed the earlier cases and, in particular, the provisions of the *Environmental Planning and Assessment Act 1979* ('the *EP&A Act*') that had been the basis of the earlier decisions. Many of these decisions had referred in particular to the relationship between s 124(3) and s 76A(1) (formerly s 76(2)) of the *EP&A Act*.

Section 76A(1) expressly prohibits the carrying out of development for which consent is required, unless in accordance with an operative development consent.

Section 124(3) provides that, where failure to obtain consent has resulted in a breach of the *EP&A Act* being committed, the Court can adjourn the proceedings to permit an application for consent to be made, and grant an injunction to prevent the breach continuing in the meantime.

Several of the cases mentioned above have suggested that the combination of these provisions indicates that while development consent can be obtained for an unlawful use which is continuing, it cannot be obtained for development

already carried out (such as the construction of a building).

Talbot J contrasted the situation where an existing consent is modified under s 96 of the *EP&A Act* to extend the works covered by that consent. He drew particular attention to s 96(4), which his Honour held indicates that a modification of a development consent operates retrospectively.

Accordingly, his Honour ruled that an application can be made to modify a development consent which would extend that development consent to cover work already carried out. His Honour found no reason on the merits not to grant the modification sought by WD.

Comment

This situation indicates the unsatisfactory state of the legislation dealing with retrospective approval of unlawful work. As a result of the various decisions on this topic, the position is as follows:

- An application cannot be made under s 106 of the *Local Government Act 1993* to amend an approval given under that Act to approve work already carried out.
- An application cannot be made for development consent under s 78A of the *EP&A Act* if that development has already been carried out, and is not a continuing use.
- However, where development consent has been granted for a development, an application can be made under s 96 of the *EP&A Act* to modify that consent so that it extends to work that has already been unlawfully carried out.

Of course, a modification to authorise unlawful work can only be made if the various prerequisites of s 96 are fulfilled, including that the development to which the consent as modified relates would be substantially the same development as the development for which the consent was originally granted.



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Integrated natural resource management in NSW?

Tim Holden, Policy Officer, Environmental Defender's Office Ltd (NSW)

Introduction

Land degradation across Australia is increasing at an alarming rate. Salinity affecting many inland rivers and farming land is increasing. In the past year, there has been a flurry of reports and discussion papers discussing the concept of integrated natural resource management (INRM) as a possible strategic solution to these problems.

This article reviews how natural resources are managed through legislation in NSW, considers whether this management regime is 'integrated', and explains what needs to be done to make it so.

What is integrated natural resource management?

INRM is the "the coordinated and sustainable use and management of land, water, vegetation and other natural resources ... so as to balance resource utilisation and conservation"¹. If management of these resources is occurring within a water catchment it is often referred to as either integrated catchment management or total catchment management - the principles being the same.

INRM recognises that the results of poor land management, such as dry land salinity, soil erosion and degradation and reduced water quality may extend well beyond the land on which an activity is occurring. To address environmental problems, it is often necessary to deal with land management issues for a whole catchment.

Which agencies are responsible for natural resource management in NSW?

In NSW, legislation that controls activities that may have catchment wide impacts includes:

- the *Environmental Planning and Assessment Act 1979*,
- the *Native Vegetation Conservation Act 1997*,
- the *Soil Conservation Act 1938*,
- the *Water Management Act 2000*, and
- the *Catchment Management Act 1989*.

Under these Acts, a variety of bodies have responsibility for planning and controlling activities within a particular water catchment, including:

- catchment management trusts,
- planning authorities: local councils and the State Government,
- regional vegetation management committees,

- water management committees, and
- soil conservation catchment committees.

Catchment Management Trusts

There are currently 18 catchment management trusts operating under the *Catchment Management Act*. Each Trust is required to develop a Corporate Plan detailing the programs and strategies by which it intends to achieve the protection and restoration of the catchment and the ecologically sustainable use, development and management of natural resources (called the 'catchment management plan').

Plans must be approved by the Minister for Land and Water Conservation. The Trusts, however, have very limited powers to control activities on land within the catchment for which they are responsible.

Planning authorities

The State Government and local councils have the power to control activities that are occurring within a catchment under the *Environmental Planning and Assessment Act*. These activities can be controlled using local environment plans, regional environment plans and State environmental planning policies.

Regional environment plans in particular can be used to control activities in a catchment area. Historically, these planning instruments have been used mainly to control urban planning, however, they could be used to regulate rural activities.

Regional vegetation management committees

Clearing native vegetation can seriously affect the health of the catchment. Clearing is regulated under the *Native Vegetation Conservation Act*.

Regional vegetation management plans are documents that determine when clearing of native vegetation may occur. Regional vegetation management plans are developed by regional vegetation management committees, and cover regions declared by the Minister.

Water management committees

The *Water Management Act* controls the extraction of water from watercourses, the carrying out of works in watercourses and, in some circumstances, the undertaking of activities in watercourses. The controls that apply in a water management area are determined by the water management plan for that area.

The management plan is drafted by the Minister for Land

and Water Conservation or by a water management committee appointed for that area. Water management areas are not required to follow water catchment or other boundaries.

Soil conservation catchment committees

The *Soil Conservation Act 1938* allows the Minister for Land and Water Conservation to declare an area of land as a catchment area under certain circumstances. The Minister may also create soil conservation catchment committees. These committees are primarily advisory.

Are the activities of these bodies 'integrated'?

To achieve INRM the following principles must be met:

- there must be agreement on the desired environmental targets for salinity, water quality and biodiversity,
- there must a strategic plan on a catchment or regional basis with the express purpose of achieving these outcomes,
- if there are sub-plans which control matters such as vegetation clearance, land use and water management, these must be required to be consistent with the catchment plan and the environmental targets,
- decision making must be required to be coordinated and consistent with the strategic plan,
- expenditure on protection and rehabilitation must accord with the priorities set by the strategic plan, and
- there must be a requirement to monitor and review the plan to determine whether it is achieving the desired outcomes.

The system of natural resource management in NSW, as implemented through legislation, fails to fully meet any of these principles. There are currently no State-wide targets for native vegetation retention. While targets exist for river salinity² and more general water quality objectives³, there are no legislative requirements that these targets be addressed in any of the four key planning mechanisms.

In NSW, there are at least six key plans that may apply to any particular place:

- catchment management plans,
- water management plans,
- regional vegetation management plans,
- local environment plans,
- regional environment plans, and
- State environmental planning policies.

Each of these plans is prepared by a different body. There are some limited and apparently ad-hoc requirements for consistency between the plans.

For example, a water management plan must be consistent with any State environmental planning policies (under the *Environmental Planning and Assessment Act*) and with any protection of the environment policies under the *Protection of the Environment Operations Act 1997*. However, there is no clear 'lead' plan with which the others must be consistent.

In some circumstances, when a plan is being prepared, the author of the plan is required to take into consideration other relevant plans, for example, when drafting regional vegetation management plans any relevant catchment management plan must be taken into consideration.

More often, there is simply a requirement to consult with other relevant agencies. Interdepartmental membership of committees is often used as a mechanism to try to achieve an integrated approach. However, neither of these mechanisms are sufficient to ensure achievement of INRM.

There are also some mechanisms in place to promote consistency in decision making. For example, where an agency receives an application for an activity that requires approval, it may be required to refer the application to other relevant agencies, either for comment (consultation) or approval (concurrence).

However, these requirements are limited and, in many cases, decision-making under the various planning schemes tends to be uncoordinated and inconsistent. No agency has a clear integrative role.

Where to from here?

That current legislation and administrative procedures are inadequate to achieve INRM is clear. The consequences of this situation are clearly being felt in the Murray-Darling Basin, where salinity is emerging as a major threat to its resources.

As a result of introduced land uses that are not sufficiently adapted to this unique environment (including clearing and replacement of native trees and grasses with annual crops and pastures, irrigation developments, and poor water management in urban areas), between 3 and 5 million hectares of the land in the eastern and southern regions of the Basin will be salt affected within 50-100 years.

Estimates indicate that the total annual cost of dryland salinity in eight tributary valleys of the Basin amounts to \$247 million. The costs of salinity to users of Murray River water have also been found to amount to \$47 million per year.

In the Basin, dryland and irrigation salinity are now being

cont...page 12

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recognised as catchment scale issues. While some impacts, such as salinised land and reduced agricultural productivity, are 'on-farm' impacts, other impacts, such as river salinity, are mostly 'off-farm' and can be felt tens or even hundreds of kilometres downstream.

The need for a strategic response on an unprecedented scale, which involves broad scale land use change, is now considered to be the only long-term option for controlling salinity to avoid these immense costs.

The draft Basin Salinity Management Strategy, released in September 2000 and published by the Murray-Darling Basin Ministerial Council, provides an example of an integrated approach to the crisis facing the Murray-Darling Basin. It does so by establishing a framework for State salinity strategies, catchment management strategies and Land and Water Management Plans to work together to achieve common objectives.

The Strategy sets out a process to identify key community values and assets at risk, develop targets to protect them, and establish a 15 year program of works and landscape change, within an accountable Integrated Catchment Management approach to achieve those targets. Whether the Strategy will be sufficient to achieve the changes needed is yet to be seen.

The Commonwealth House of Representatives Standing Committee on Environment and Heritage, in releasing the report of the Inquiry into Catchment Management, in February 2001, has called for a "massive national program to ensure the ongoing health of Australia's crucial water catchments..", and recommends the establishment of a National Catchment Management Authority⁴.

Both the Commonwealth's National Action Plan for Salinity and Water Quality⁵ and the NSW Salinity Strategy⁶ recognise that a more integrated and coordinated approach is required if we are to successfully resolve these major environmental problems.⁷

The NSW Parliament has already missed an opportunity to demonstrate its commitment to reform of natural resource planning, when setting the terms of reference for the Select Committee on Salinity. Rather than considering what should be done at a whole of Government level, the Committee is instead focussing on what local councils should be doing and the adequacy of the Commonwealth Government's response.

The next opportunity for reform in NSW is with the recently released "Review of Plan Making in NSW, White Paper"⁸. The reforms proposed in this White Paper focus on the planning system under the *Environmental Planning and Assessment Act 1979*. It appears that they will not address

the broader problems with inconsistency of planning and decision making under other natural resource planning frameworks. If this is this case, then yet opportunity for much needed reform will have been missed.

What is needed is a hierarchy of strategic, whole-of-government, whole-of-environment plans, integrated across all resource sectors, with operational responsibilities clearly identified and implementation audited⁹.

Legislative change is clearly required if the environment of NSW is to be comprehensively and effectively protected and managed. Current rhetoric needs to be matched by action.

Endnotes

¹ *Catchment Management Act 1989* section 4.

² NSW Salinity Strategy (2000, Department of Land and Water Conservation) page 30.

³ Available from the EPA on 131 555.

⁴ Media Release, House of Representatives Environment and Heritage Committee: Report of Inquiry into Catchment Management, 26 February 2001.

⁵ This is available from Agriculture, Fisheries and Forestry Australia on (02) 6272 4936 or on the internet at www.dpie.gov.au/docs/nrm/actionplan/index.html

⁶ Available from the Department of Land and Water Conservation on (02) 9228 6111 or on the internet at: www.dlwc.nsw.gov.au/care/salinity/index.html

⁷ See also: the report of the Commonwealth Government's Standing Committee on Agriculture and Resource Management, "Management of Dryland Salinity - Future Strategic Directions"; a discussion paper commissioned by the National Dryland Salinity Program, "Enhancing Institutional Support for the Management of Dryland Salinity"; the Murray Darling Basin Commission's draft "Integrated Catchment Management Policy Statement" and draft "Basin Salinity Management Strategy".

⁸ For information on the release of this document contact the Department of Urban Affairs and Planning's Information Centre on (02) 9391 2222.

⁹ Prof. D. Farrier, Integrated management of land and water? Planning and project approvals under the White Paper on NSW water management legislation, University of Wollongong, 2000.

The EDO NSW will be holding a **conference on Friday, 27 April 2001**, in Sydney, to examine the current review of NSW planning schemes and the adequacy of natural resource management policy, legislation and practice in NSW.

See the page 15 for registration details, or contact the EDO on ph: (02) 9262 6989 for a full program.

East Timor: building a new country

Lisa A Ogle, Director, EDO NSW

In January 2001, EDO (NSW) Director, Lisa Ogle, addressed a conference in Dili on Sustainable Development for East Timor. Lisa writes about some of the environmental and legal challenges facing this emerging nation.

Have you ever thought about what one needs to do to build an entire country from scratch? This is the challenge for East Timor, which is slowly rebuilding itself after 25 years of Indonesian occupation and the widespread destruction it experienced following the vote for independence on 30 August 1999. The task is immense. The country has no currency, no industry, and no stable power supply, and, apart from the urgent and temporary arrangements established by the United Nations Transitional Administration in East Timor (UNTAET), it has no political, administrative or judicial systems.

The role of the United Nations (UN) of not just peacekeeper but also of administrator represents a new experience for the UN in that it is the first time that it has acted as a transitional government for a country. The UN Security Council has declared a very broad mandate for it to do so. Under UN Security Council resolution 1272 (1999), UNTAET, through its Transitional Administrator, Sergio Vieira de Mello, is “empowered to exercise all legislative and executive authority, including the administration of justice” in East Timor.¹

What is the applicable law in East Timor?

One of the first actions of the UN was to declare the applicable law for the new country. It deemed that the law in East Timor as at 25 October 1999, namely Indonesian law, continues to apply in so far as it does not conflict with:

- specified international laws, such as the Universal Declaration on Human Rights,
- the fulfilment of the mandate given to UNTAET by the Security Council, or
- any UNTAET Regulations or Directives².

UNTAET has so far promulgated more than 30 different regulations that form the basis of its administration, including the creation of a judiciary and court system. Serious crimes, such as war crimes, crimes against humanity and murder committed before 25 October 1999, are being heard under the applicable law in the courts in the capital, Dili.

Environmental laws

There are presently two UNTAET Regulations that relate to the environment. These are:

- *Regulation prohibiting logging and export of wood from East Timor* (UNTAET Reg. 2000/17), which prohibits the logging, burning or export of wood from East Timor without permission, and

- *Regulation on protected places* (UNTAET Reg. 2000/19), which declares 15 designated areas in East Timor to be protected, and which also provides for the protection of endangered species, coral reefs, wetlands, mangroves, and historic, cultural and artistic sites.

In addition to these UNTAET Regulations, Indonesian environmental laws continue to apply in East Timor, although their implementation and enforcement is problematic due to the differences between the Indonesian and UNTAET public administration systems.

Environmental issues

In terms of its natural resource base, East Timor has very limited opportunities for development. Apart from offshore petroleum and natural gas reserves in the Timor Gap, the country has very few high value resources to exploit. Its soils are poor and prone to erosion due to deforestation, very steep slopes, and low but concentrated tropical rainfall. High value timbers such as sandalwood, have already been exhausted. There may be some mineral resources, such as gold and copper, available for mining. Illegal fishing in East Timor’s territorial waters is widespread but, without a navy, impossible to regulate. Water pollution from agriculture and small industry development, such as coffee factories, is becoming a problem, as is waste management.

Land ownership

Effective resolution of land ownership disputes will also be essential for sustainable development to occur. As a result of the violence in September 1999, up to 70% of the population was forcibly expelled or displaced, with many people fleeing to the forests or to West Timor. In addition, thousands of land titles were issued during the Indonesian occupation, many without the consent of the lawful or customary landowners. Until such time as the lawful owners are determined, UNTAET has assumed the administration of all property which was previously registered in the name of the Republic of Indonesia, and all privately owned property that was abandoned after 30 August 1999.

Free elections, to be supervised by UNTAET, are due to be held in August or September 2001, after which the people of East Timor will embark on the next stage of their transition to an independent country: the preparation and adoption of a constitution.

Endnotes

¹ An express provision in the UN mandate for East Timor, as granted by the UN Security Council, is “to assist in the establishment of conditions for sustainable development.”

² See UNTAET Regulation No. 1999/1.



National EDO Network News

EDO conferences

New EDO Tasmania solicitor

Stephen Hall has joined EDO Tasmania as Principal Solicitor, joining Caroline Flood, Coordinator. Stephen has come from the Hobart Community Legal Service, Bridgewater office, with considerable legal experience, having been in private practice for some years and the community legal service since 1998. We welcome Stephen to the EDO Network.

EDO publications

The EDO NSW has published the 4th edition of the **NSW Environmental Law Fact Sheets** on the EDO NSW web site. These plain English fact sheets cover all aspects of environmental law in NSW, with a focus on public participation. Commonwealth laws are also explained. Access the fact sheets at: www.edo.org.au/edonsw/edonsw.htm.

For fact sheets and publications covering other State and Territory law contact the EDO closest to you, or visit their web site, from www.edo.org.au.

“Disappearing Acts: A Guide to Australia’s Threatened Species Law” is the EDO Network’s guide for the community, environment groups, lawyers, students and others on what laws protect threatened species throughout Australia and what role the public can play in enforcing those laws.

The guide compares State, Territory and Federal laws, as well as discussing the role of international treaties and conventions. To order a copy, ph: (02) 9262 6989 or 1800 626 239, or contact the EDO in your State or Territory.

Commonwealth law workshops

EDOs around the country are running workshops and seminars explaining how the *Environment Protection and Biodiversity Conservation Act 1999* works and how the public can participate under this new law.

To find out when there is a workshop in your area, contact the EDO closest to you (contact details on the front cover of *Impact*).

National EDO conference: marine and coastal issues

The National EDO Network conference for 2001 will focus on marine and coastal issues. Fishing rights, aquaculture and coastal development will be examined in a conference to be held in Queensland later this year.

To register your interest in this conference, contact the EDO Queensland on Ph: (07) 3210 0275, or email to edoqld@edo.org.au. **Check the June issue of *Impact* for registration details.**

NSW EDO conference: current review of planning laws

The **NSW EDO conference** for 2001 will examine the review of the State’s planning system currently underway in NSW. To be held in Sydney on Friday, 27 April 2001, the conference will include speakers from rural, indigenous, government and environment groups, discussing laws governing how resources are management in NSW work, and whether the current, or proposed, systems will deliver environmental protection and sustainability of land use.

To register, complete the form on the opposite page.

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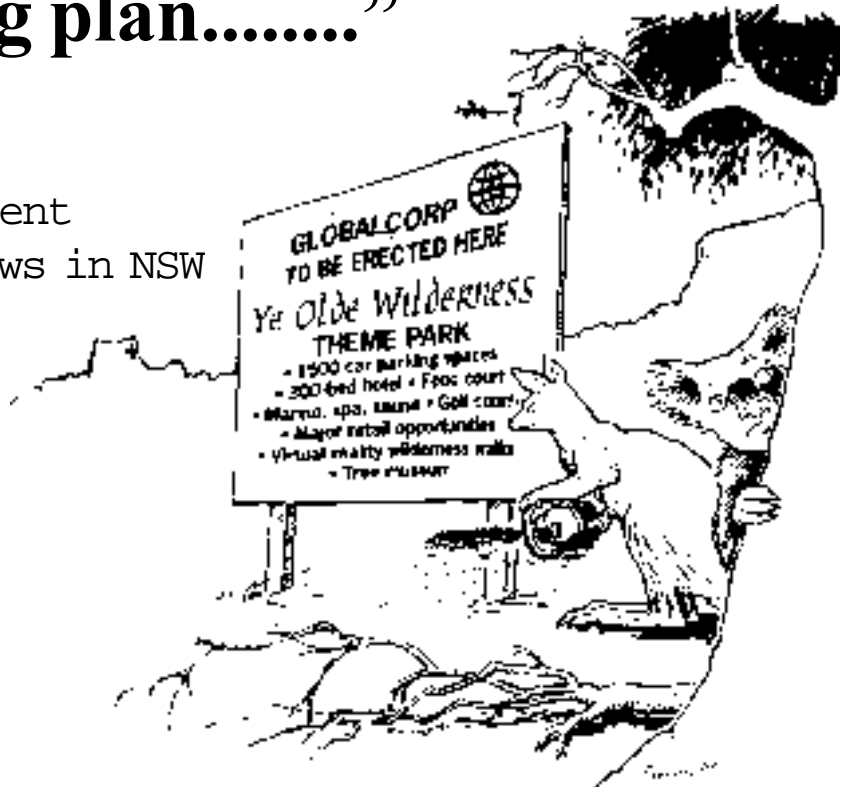
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