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## EDO Takes Legal Action to Prevent Whaling in the Australian Whaling Sanctuary

Jessica Simpson, Solicitor, EDO New South Wales

On 19 October 2004, EDO New South Wales filed an application in the Federal Court of Australia, on behalf of the Humane Society International, for a case against a Japanese company that routinely slaughters whales in the Australian Whale Sanctuary as part of a so called 'scientific research' program.

The Australian Whale Sanctuary was created in 2000 under the *Environment Protection and Biodiversity Conservation Act 1999* and includes Australia's claimed Antarctic waters. Since the sanctuary was created, the Japanese whaling company Kyodo Senpaku Kaisya Ltd has illegally killed over 400 whales within its waters.

Following a Federal Court hearing in Sydney on 16 November 2004, Justice Allsop reserved his judgment on whether the Humane Society International has leave to serve documents to commence legal proceedings against the whaling company. A decision on the issue of leave to serve is expected in early December.

If the application is successful, HSI plans to seek a declaration that the hunt in the Australian Whale Sanctuary is illegal and ask for it to be restrained. Under federal environmental law, conservationists are able to take third party actions to restrain offences in the absence of government action.

'Killing whales in Australian waters is an offence. We hope HSI's case in the Federal Court will embarrass the whaling company and the Japanese Government, and push the Australian Government into prosecuting the whalers themselves', said HSI spokesperson Nicola Beynon.

The International Whaling Commission

imposed a moratorium on commercial whaling in 1986. Since 1987, in defiance of the moratorium, Japan has continued to hunt whales, citing an exception in the convention for 'scientific whaling'. Japan claims the hunts are legal and kills approximately 440 minke whales every year in Antarctic waters.



In the last four years, HSI estimates nearly a quarter of all the whales slaughtered in Japan's Antarctic research program have been killed in the Australian Whale Sanctuary.

On 13 November 2004, five whaling ships from the company departed Shimonseki in Japan headed for Antarctica where they plan to kill 440 minke whales as part of the annual summer hunt. The whale meat will be sold commercially in Japan.

EDO New South Wales has briefed barristers Stephen Gageler SC and Chris McGrath.

Regular updates on the case are available at [www.hsi.org.au](http://www.hsi.org.au).

# Federal Court Awards \$450,000 Fine in Land Clearing Case *Minister for the Environment & Heritage v Greentree (No 3)*

Kane Granville, Volunteer, EDO New South Wales

In *Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741, Justice Sackville of the Federal Court found Mr Ronald Greentree and Auen Grains Pty Ltd guilty of breaching section 16(1) of the Commonwealth *Environmental Protection Biodiversity Conservation Act 1999*. This decision represents the first case concerning impacts on a matter of national environmental significance under the Act.

The court found that Mr Greentree had instructed the manager of Greentree Farming to clear and plough an area of land on Windella, including the Windella Ramsar site, in preparation for a seedbed.

The court found that this was likely to have a significant impact on the ecological character of the Windella Ramsar site. In addition, Auen Grain Pty Ltd was found guilty due to its part in the mismanagement of the Windella Ramsar site located on the Greentree property. Mr Greentree is a director and the sole shareholder of Auen Grain Pty Ltd.

In the subsequent decision on orders and penalty, *Minister for the Environment & Heritage v Greentree (No 3)* [2004] FCA 1317, Justice Sackville made extensive orders preventing both respondents from any further destruction of the internationally significant Gwydir wetlands by prohibiting them from engaging in:

- land clearing, ploughing, cultivating, herbicide or pesticide spraying, sowing, harvesting or other activities disturbing or otherwise affecting the soil within that portion of the declared Ramsar wetlands known as the Gwydir Wetlands;
- any activity on the Windella Ramsar site that is likely to alter the flow regime of waters into, within or out of the Windella Ramsar site, other than activities undertaken with the consent of the proprietors of Windella and in accordance with any approval that may be required under the New South Wales *Rivers and Foreshores Improvement Act 1948* or any other legislation

governing such activity;

- bringing or allowing any vehicles or machinery to be brought onto the Windella Ramsar site at any time, other than such machinery as may be reasonably necessary to carry out any approved activities; and
- bringing or allowing domestic or grazing stock to be brought onto the Windella Ramsar site at any time before 1 April 2007.

In addition, both Mr Greentree and Auen Grains Pty Ltd must do everything reasonable within their power to engage a tree planting contractor to plant one hundred tree seedlings randomly across the Windella Ramsar site. Species to be planted include; coolibah (*Eucalyptus coolabah*), belah (*Casuarina cristate*) and river cooba (*Acacia stenophylla*).

Mr Greentree and Auen Pty Ltd received penalties of \$150,000 and \$300,000 respectively and were ordered to pay costs within sixty days. These penalties represent the highest ever awarded for land clearing in Australia.

## Kurnell Peninsula Granted Emergency National Heritage Listing

Kurnell Peninsula recently became the first place to be placed on the National Heritage list under the emergency listing provisions of the *Environment Protection and Biodiversity Conservation Act 1999*.

Under these provisions, any individual or organisation may apply to the Minister for emergency listing if they believe the place to possess one or more National Heritage values and that these values are under threat. The Minister is required to make a decision on the emergency-listing request within ten business days.

In the case of Kurnell Peninsula, the Minister has found that the place fulfils

three of the National Heritage List criteria, and that those values are under threat. It now joins Budj Bim National Heritage Landscape, the Royal Exhibition Building National Heritage Landscape and the Dinosaur Monument National Monument as the fourth national heritage place.

Kurnell Peninsula will now be referred to the Australian Heritage Council for a full assessment of its National Heritage values, after which a final decision as to its listing status will be made.

To view the current statement of heritage values visit: [www.deh.gov.au/heritage/national/sites/kurnell.html](http://www.deh.gov.au/heritage/national/sites/kurnell.html).

### EDO Network 20<sup>th</sup> Anniversary – Visual History Project

The National Environmental Defender's Office Network celebrates its twentieth anniversary in 2005.

We are seeking photographs, posters, stickers, banners, videos and other materials detailing our work Australia-wide over the last twenty years for a visual history project to be launched during 2005.

For more information, or to contribute material to the project, please contact Samantha Magick, EDO Public Affairs Officer at [samantha.magick@edo.org.au](mailto:samantha.magick@edo.org.au).

# Environmental Consultant Found Guilty of Misleading Conduct

## *Charben Haulage Pty Ltd v EES [2004] FCA 403*

Jessica Simpson, Solicitor, EDO New South Wales

In *Charben Haulage Pty Ltd v EES [2004] FCA 403*, Justice Wilcox of the Federal Court found that Environmental and Earth Sciences Pty Ltd ('EES') had breached section 52 of the *Trade Practices Act 1974* ('TPA') by concluding in its report on an audit of a former service station site owned by Caltex that, following some remediation, the site would be suitable for residential use.

This decision has significant ramifications for the sale and purchase of contaminated land and in terms of the liability of environmental consultants for statements made in reports relied upon by persons who have not requested those reports.

The case arose out of the decommissioning of a former Caltex service station and a contract for the sale of the property for commercial redevelopment.

Caltex commissioned EES to report on remediation of the land. Two reports were prepared, one concluding that following remedial works on the site, it would be suitable for residential use, and the other finding that the land would be suitable for any land use.

Caltex provided these reports to developer, Charben Haulage Pty Ltd ('Charben'), which subsequently purchased the property for mixed commercial and residential development.

An investigation of the property carried out by the NSW Environment Protection Authority during the redevelopment of the property found that groundwater on the site was contaminated, that significant remediation was required and that the site was not suitable for the proposed use.

Charben commenced proceedings against Caltex for:

- breach of the contract for sale in which Caltex agreed that the site would be remediated to a level suitable for the commercial/residential re-use;
- breaches of the TPA for misleading conduct and negligent misstatement flowing from representations in the reports by EES; and
- negligence.

Charben also claimed damages against EES for misleading conduct, negligent misstatement and negligence.

Wilcox J found that EES had breached section 52 of the TPA in producing the reports. However, the Court found that because the reports were not produced for the purposes of the sale of the land, EES was not guilty of negligent misstatement and did not owe a duty of care to Charben.

Wilcox J found that Caltex had breached the contract for sale in failing to reduce the contamination of the site so as to permit the use proposed by Charben. However, the Court also found that although Caltex commissioned EES to prepare reports and gave instructions about steps to be taken to remediate the site, there was no evidence that Caltex adopted the reports or the opinions and statements in the reports or knew that the content of the report was incorrect or misleading. Accordingly, Caltex was found not to have breached the TPA.

The Court ordered EES and Caltex to pay costs and damages of over \$2,000,000 to Charben.

Caltex and EES have appealed to the Full Federal Court against the decision of Wilcox J. The appeals have not yet been heard.

## Climate Change Report - Legal Action to Protect the Barrier Reef

Samantha Magick, Public Affairs Officer, EDO New South Wales

A report by some of Australia's leading international lawyers sends a warning to the federal government that it could face legal action to protect the World-Heritage listed Great Barrier Reef unless they improve their policies on climate change.

The report, commissioned by the Environmental Defender's Office (NSW), Greenpeace Australia-Pacific and the Climate Action Network Australia, identi-

fies a number of potential breaches of Australia's legal obligations to protect the Great Barrier Reef under the World Heritage Convention.

The report opens the way to legal action against any federal government that fails to address climate change, and thereby protect the World Heritage-listed reef for future generations.

Importantly, the report says that ratifying the Kyoto Protocol alone would not be enough to meet Australia's legal obligations and the Australian Government should commit to and meet a target for deep cuts in greenhouse pollution.

To access the full text of the report, visit: [www.greenpeace.org.au/climate/pdfs/final\\_GBR\\_report.pdf](http://www.greenpeace.org.au/climate/pdfs/final_GBR_report.pdf).

# EDO Climate Change Win in Victoria

Barnaby McIlrath, Solicitor, EDO Victoria

In one of the first decisions of its kind, the Victorian Civil and Administrative Tribunal (VCAT) has ordered that the panel considering submissions in relation to the Hazelwood West Field Project cannot exclude submissions about the greenhouse gas implications of using brown coal.

International Power Hazelwood Ltd wants to use a new coal deposit to supply Hazelwood Power Station beyond 2009, when the current coal deposits will be exhausted.

The Environment Defenders Office (Victoria), generously assisted by pro bono barristers Mark Dreyfus QC and Marita Foley, represented four environment groups – WWF Australia, Environment Victoria, Climate Action Network Australia and the Australian Conservation Foundation.

The tribunal found that the Victorian Minister for Planning does not have the power to direct the panel to exclude

considerations about greenhouse gas impacts.

Further, the tribunal found that greenhouse gas considerations are relevant for a planning scheme amendment which would facilitate mining of coal for use in the power station.

Justice Morris confirmed that the *Planning and Environment Act 1987* seeks to achieve ecologically sustainable development:

‘Many would accept that, in present circumstances, the use of energy that results in the generation of some greenhouse gases is in the present interests of Victorians; but at what cost to the future interest of Victorians?’

‘Further, the generation of greenhouse gases from a brown coal power station clearly has the potential to give rise to ‘significant’ environmental effects.’

This decision sets the scene for a more integrated approach to environmental impact assessments at both State and Federal level.

In his decision, Justice Morris clearly acknowledged the similarity of the environmental impact assessment approaches required under both the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and the Victorian *Planning and Environment Act*.

This decision reinforces the environmental goals and processes built into the Victorian planning system and the need for robust, independent assessment of environmental impacts.

To read the full decision, please visit: [www.austlii.edu.au/au/cases/vic/VCAT/2004/2029.html](http://www.austlii.edu.au/au/cases/vic/VCAT/2004/2029.html).

## Application for Jurisdictional Fact Doctrine to Controlled Action Decisions under the *Environment Protection and Biodiversity Conservation Act 1999*

Jessica Simpson, Solicitor, EDO New South Wales

*This article considers the application of the doctrine of jurisdictional fact to “controlled action” decisions under the Environment Protection and Biodiversity Conservation Act 1999 (Cth). In particular, the article considers whether the jurisdictional fact doctrine can be used as an avenue for de facto merits review of federal environmental assessment decisions.*

### Introduction

Nine times out of ten, stakeholders in environmental and land-use planning decisions are concerned with the merits of decisions made by government

authorities, rather than legal errors that are the subject of judicial review. Although all Australian States and Territories have created specialist courts or tribunals for merits review of environmental and land-use planning decisions, the classes of decisions which are open to merits review are quite limited.<sup>1</sup>

In contrast to the State and Territory governments, the Federal Government has not provided for merits review of environmental and land-use planning decisions in the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (*‘EPBC Act’*).

This failure to permit merits review of decisions is highly significant for both proponents and opponents of proposed development.

In the first three years of operation, over 1000 projects, ranging from small to major developments, were referred to the Federal Government for approval.<sup>2</sup> There have only been a handful of judicial review actions, although one case in particular has recently met with spectacular success.<sup>3</sup>

In the context of the limitation to judicial review of environmental and land-use planning decisions under the EPBC Act,

the potential application of the administrative law doctrine of jurisdictional fact to such decisions is a very significant issue. On a number of occasions during the past decade, the doctrine of jurisdictional fact has been applied by Australian courts in judicial review proceedings to provide *de facto* merits review of critical elements of administrative decisions.<sup>4</sup>

The central question that arises for consideration is, can the doctrine of jurisdictional fact be used as an avenue for *de facto* merits review of the Ministerial decision under section 75 of the EPBC Act, known as the ‘*controlled action decision*’, which provides the opening to the assessment and approval process under the statute?

### ***What is meant by the term ‘jurisdictional fact?’***

The term ‘*jurisdictional fact*’ describes a concept in administrative law where the exercise of an administrative or judicial power is conditional upon the satisfaction of certain factual preconditions.<sup>5</sup>

The most frequently cited definition of the term comes from the leading case on the doctrine: *Corporation of the City of Enfield v Development Assessment Commission* (2000) 169 ALR 400 at 409 (‘*Enfield*’) in the judgment of Gleeson CJ, Gummow, Kirby and Hayne JJ:

*“The term jurisdictional fact (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion. Used here, it identifies a criterion, satisfaction of which mandates a particular outcome.”*

Where an administrative decision-maker, court or tribunal’s power is conditional upon the satisfaction of certain factual preconditions, those facts and the existence of those facts may be said to be jurisdictional facts. The determination of whether a fact is a jurisdictional fact or not is a matter of statutory construction. As an error in deciding a jurisdictional fact amounts to an error in the exercise of a decision-making power, such an error is potentially open to judicial review.

The difficulty inherent in the application of the concept of jurisdictional fact in judicial review proceedings is that an examination of the facts upon which the exercise of a decision-making power was based can become a *de facto* review of the correctness or merits of the decision. Paradoxically, this is also the attraction of the concept for those litigants and judges who are dissatisfied with the traditional central limitation of judicial review: the refusal to conduct a review of the merits of the decision.

The refusal of the judiciary to enter into merits review is a fundamental dogma of judicial review, which has its origins in the source of judicial power under Chapter III of the Commonwealth Constitution and in English common law. The power of the judicature is strictly separated from the legislative and executive powers. The doctrine of the separation of powers as a rule of law is well illustrated by the following statement of the High Court in the seminal decision of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299 at 309:

*“The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.”*

That the court has a duty not to re-examine the factual findings of an administrative decision-maker in judicial review proceedings was emphatically expressed by the High Court again in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 in which Brennan J said at 35-36:

*“The duty and jurisdiction of the court to review administrative action does not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power...the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the*

*extent that they can be distinguished from legality, are for the repository of the relevant power, and, subject to political control, for the repository alone.”*

The difficulty of distinguishing administrative powers from legal powers and the inherent difficulties with the use of the concept of jurisdictional fact is evident in the historical approach of the NSW Land and Environment Court to the concept. Throughout its history, the Court has taken the view that it should not intrude into the decisions of administrative authorities where that decision was reasonably open for the decision-maker to reach and was not influenced by irrelevant considerations. This line of authority was identified by the Court of Appeal in *Londish v Knox Grammar School and Others* (1997) 97 LGERA 1 in which Stein JA held that that the issue of the characterisation of a development is not a jurisdictional fact<sup>6</sup>.

However, in *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 102 LGERA 52 (‘*Timbarra*’) the Court of Appeal widened considerably the application of the doctrine of jurisdictional fact. In that case the Court reversed the decision of Talbot J at first instance and held that the decision as to whether a Species Impact Statement (‘*SIS*’) is required to be included with a development application is so essential to the determination of a development application as to make that decision a jurisdictional fact.

The immediate consequence of the decision of the Court of Appeal in *Timbarra* was that evidence that the development application in question would have a significant impact on threatened species (as to require an *SIS*) was admissible before the Court. Such evidence may have included additional material which was not presented to the council as the consent authority. Thus, the Court was able to engage in merits review in the context of judicial review proceedings to determine *de novo* whether the proposed development would be likely to significantly affect threatened species.

Whilst this represents an expansion of the power of the courts to delve into the realm of administrative decision-making,

the courts are limited by the rules of evidence and not all evidence about the existence of a jurisdictional fact will be admissible before the court.<sup>7</sup>

The application of the jurisdictional fact doctrine in the context of environmental and planning law was further expanded by the High Court in *Enfield*.

The issue for determination in *Enfield* was the characterisation of a development application. If the development could be found to be 'non-complying' then consent to it could not be granted. The characterisation of the development was a pre-condition to the exercise of a statutory function by the administrative decision-maker, being the granting or refusal of consent to carry out the development.

The relevant legislative provision in *Enfield* was expressed in terms that did not require the formulation of a subjective opinion by the decision-maker as to the existence or otherwise of a particular fact, the provision stipulated a pre-condition, the absence of which required the decision-maker to refuse consent to the development.<sup>8</sup> The High Court held that the determination in accordance with the relevant legislative provision of whether the development was 'non-complying' was a jurisdictional fact.

The decision in *Enfield* represents a very significant shift away from traditional notions of the separation of powers.

In *Enfield*, Gaudron J expressed the view that it is the role and responsibility of the courts acting in their review capacity to ensure that administrative decision-makers are held accountable for their decisions and that their administrative powers are exercised in accordance with the laws which bestow and govern those powers.

In the recent decision in *Chambers v Maclean Shire Council & 2 Ors* [2003] NSWCA 100 ('*Chambers*') the Court of Appeal took the recently expanded application of jurisdictional fact in judicial review of planning decisions developed in *Enfield* one step further. In *Chambers* the Court held that the question of whether a development proposal meets certain criteria, such that

the development must be classified as prohibited under the *Environmental Planning and Assessment Act 1979* ("EPA Act"), is a jurisdictional fact.<sup>9</sup>

*Chambers* concerned an application for prohibited development. The Court held that the council had no power to determine an application for prohibited development and that only the Minister for Infrastructure, Planning and Natural Resources is the consent authority for such development.<sup>10</sup> Ipp JA said that<sup>11</sup>:

*"A valid application for a prohibited development can only be made to the Minister. Thus a development application to a council for a prohibited development is not an application in terms of the Act...and the Council had no power to consent to it."*

In accordance with *Chambers*, the task of characterising a development is no longer a question which may finally be determined by the consent authority (except where the consent authority is the Minister) subject only to the requirement that its characterisation be one which is reasonably open to the consent authority to make on the facts. Ipp JA held that<sup>12</sup>:

*"The scheme of the Environmental Planning and Assessment Act relating to the three-fold classification of developments does not suggest that the determination whether an application for development is for a prohibited development...rests upon a council's own classification of the relevant circumstances. Rather, it indicates that it is not for a council itself to determine, as a matter of its opinion, whether it has power to grant consent to a development application or whether only the Minister has such power."*

In accordance with the reasoning in *Chambers*, a development application to a local council for prohibited development is void. The implications of this finding have immense potential for expanding the scope of judicial review of decisions made under the EPA Act. The decision also arguably ousts the effect of section 101 of the EPA Act (which places a 3 month limitation period on appeals on grounds of jurisdictional error) as a privative clause in relation to the grant of an application for prohibited

development in contravention of section 76B of the EPA Act.

Section 101 provides that any person may commence legal proceedings within 3 months of public notice being given of the granting of development consent to challenge the validity of that consent. It is arguable that a development consent may be challenged outside the 3 month limitation period on the basis that the development was prohibited development and the consent was therefore a nullity in accordance with the reasoning in *Chambers*.<sup>13</sup>

The decision in *Chambers* was upheld by the Court of Appeal in the recently decided case, *Woolworths Ltd v Pallas Newco Pty Ltd & Anor* [2004] NSWCA 422 ('*Woolworths*'). The case was determined by a bench of 5 and confirms that the approach of the High Court in *Enfield* to the doctrine of jurisdictional fact is the leading authority to be followed and that *Londish* must be departed from. The Court of Appeal upheld the decision of Talbot J at first instance in *Pallas Newco Pty Ltd v Votrait No 1066 Pty Ltd* (2003) 129 LGERA 234, that the characterisation of the use nominated in a development application as permissible with consent under the terms of an environmental planning instrument is a jurisdictional fact which must be determined by the court *de novo*. Furthermore, the Court held that the privative clause in section 101 of the *Environmental Planning and Assessment Act 1979* (NSW) does not protect from review consents to prohibited development carried out in contravention of section 76B, which prevents prohibited development from being carried out.

As a result of the decisions in *Chambers* and *Woolworths*, the characterisation of development as permissible or prohibited is now a matter of jurisdictional fact and the court in its judicial review function may make a finding of fact to determine what use of land a development proposal will involve.

#### ***What are 'controlled action' decisions under the EPBC Act?***

The EPBC Act provides the Commonwealth regime for the assessment and approval of actions that

*'have, will have or are likely to have a significant impact on matters of national environmental significance'*. These actions, along with actions by the Commonwealth or on or affecting Commonwealth land which have, will have, or are likely to have a significant impact on the environment, are termed *'controlled actions'*.

The following are *'matters of national environmental significance'*:

- the world heritage values of a declared World Heritage property;
- the National Heritage values of a National Heritage place;
- the ecological character of a declared Ramsar wetland;
- listed threatened species and ecological communities;
- listed migratory species;
- nuclear actions; and
- Commonwealth marine areas.<sup>14</sup>

The EPBC Act also applies to the following activities:

- actions on Commonwealth land which will have or are likely to have a *'significant impact on the environment'*;<sup>15</sup>
- actions undertaken outside Commonwealth land that will have or are likely to have a significant impact on the environment on Commonwealth land;<sup>16</sup> and
- actions undertaken by the Commonwealth that will have or are likely to have a *'significant impact on the environment'*<sup>17</sup> both within and outside of the *'Australian jurisdiction'*.<sup>18</sup>

These are known as *'controlled actions'* for which approval by the Minister for Environment and Heritage (the *'Minister'*) is required<sup>19</sup>.

Section 523 defines an *'action'* to include:

- (a) a project; and
- (b) a development; and
- (c) an undertaking; and
- (d) an activity or series of activities; and
- (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).<sup>7</sup>

In accordance with section 68(1), a person who is proposing to undertake an action must refer the action to the Minister for determination as to whether or not the action is a controlled action. In accordance with section 75 of the EPBC Act the Minister must then decide whether the action is a controlled action. In determining that matter the Minister must consider any public comments received on whether the action is a controlled action.<sup>20</sup>

Section 75 of the *EPBC Act* provides as follows:

***Is the action a controlled action?***

- (1) The Minister must decide:
  - (a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and
  - (b) which provisions of Part 3 (if any) are controlling provisions for the action.

...

***Minister must consider public comment.***

- (1A) In making a decision under subsection (1) about the action, the Minister must consider the comments (if any) received:
  - (a) in response to the invitation (if any) under subsection 74(3) for anyone to give the Minister comments on whether the action is a controlled action; and
  - (b) within the period specified in the invitation.

***Considerations in decision***

- (2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:
  - (a) the Minister must consider all adverse impacts (if any) the action:
    - (i) has or will have; or
    - (ii) is likely to have;

on the matter protected by each provision of Part 3; and

- (b) must not consider any beneficial impacts the action:

- (i) has or will have; or
- (ii) is likely to have;

on the matter protected by each provision of Part 3.'

The leading case on section 75 of the EPBC Act is *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463 (*'The Nathan Dam Case'*). In that case Kiefel J set aside the decision of the Minister for refusing to consider the impacts of downstream agricultural development on the Great Barrier Reef World Heritage Area (*'GBRWHA'*) when assessing the impacts of the construction and operation of the Nathan Dam on the Dawson River in Central Queensland.

The Minister refused to consider those impacts, instead finding that the potential impacts of irrigation of land by users of the dam (persons other than the proponents of the action) were not impacts of the construction and operation of the dam<sup>21</sup>. Thus, the Minister did not nominate the controlling provisions of section 15A of the EPBC Act which makes it an offence for a person to undertake an action which results in a significant impact on the world heritage values of a declared World Heritage area.<sup>22</sup>

Kiefel J held that in making his decision under section 75 of the EPBC Act the Minister made an error of law and failed to take it into account relevant considerations which materially affected the decision. In her reasoning, Kiefel J applied the ordinary meaning of the words used in section 75(2) and considered the purpose of the objects of the EPBC Act<sup>23</sup>.

Kiefel J found that in making a decision under s 75 of the EPBC Act the Minister was to consider *'all adverse impacts'* the action is likely to have. In accordance with Kiefel J's decision, the matters which the Minister may be required to consider when making a decision under s 75 include the cumulative and continuing impacts of the action, including the effects of the actions of third parties<sup>24</sup>.

The Minister's appeal of Kiefel J's decision was heard by the Full Federal Court in *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190. The Full Court affirmed the decision of Kiefel J that the ordinary meaning of the words in s 75(2) require the Minister to consider 'all adverse impacts' of an action when making a decision under section 75<sup>25</sup>.

### ***Can the jurisdictional fact doctrine be applied to controlled action decisions?***

Merits review of a decision made by the Minister pursuant to section 75 is not available under the EPBC Act. However, relief may be sought in the judicial review jurisdiction of the Federal Court.

As discussed above, a finding of the existence of a jurisdictional fact enables a court to inquire into and determine the existence of the fact *de novo* without being confined to the evidence or material used by the primary decision-maker. Accordingly, the application of jurisdictional fact to decisions made by the Minister under section 75 of the EPBC Act would have a major effect on the operation of the Act and could potentially provide *de facto* merits review of decisions for persons aggrieved by a decision of the Minister.

The task of determining whether or not an administrative power conferred by a statute is pre-conditioned upon the existence of a jurisdictional fact has been found by the courts to be a matter of statutory construction. In *Timbarra* Spigelman CJ said<sup>26</sup>:

*"The issue of jurisdictional fact turns, and turns only, on the proper construction of the statute"*

Spigelman CJ went on to say that:<sup>27</sup>

*"Where a factual reference appears in a statutory formulation containing words involving the mental state of the primary decision-maker – 'opinion', 'belief', 'satisfaction' – the construction is often, although not necessarily, against a conclusion of jurisdictional fact, other than in the sense that the mental state is a particular kind of jurisdictional fact... Where such words*

*do not appear, the construction is more difficult."*

The relevant provision of the EPBC Act for consideration by the Court in *The Nathan Dam Case* was the obligation (through the use of the word 'must') imposed upon the Minister when determining whether a referred action is or is not a controlled action to 'consider' 'all adverse impacts' that an action 'has, will have, or is likely to have' on a matter of national environmental significance in Part 3 of the EPBC Act.<sup>28</sup> If the Minister finds that an action is likely to result in a significant impact on a matter of national environmental significance, then the Minister must find that the action is a 'controlled action' in accordance with section 75(1).

If a court were to follow the approach of the Court of Appeal in *Timbarra*, *Chambers* and *Woolworths* and of the High Court in *Enfield*, it is possible that it could find that section 75 of the EPBC Act involves a jurisdictional fact. A decision by the Minister under section 75 is pre-conditioned upon the determination of whether or not an action is likely to have a significant impact on a matter of national environmental significance. The consequence of such a finding is that the controlling provisions under Part 3 of the EPBC Act come into effect in respect of the action.

The statutory regime under section 75 of the EPBC Act is arguably analogous to the regime under the EPA Act considered by the Court in *Timbarra* and most recently in *Woolworths*. Furthermore, the decision-making process which the Minister must engage in pursuant to section 75 could be said to be the characterisation of the referred action. Characterisation of an activity is an administrative process which the High Court in *Enfield* held constituted a jurisdictional fact.

If one follows the reasoning of the Court in *Timbarra* and applies the normal rules of statutory construction, then the starting point is the language of section 75. The provision does not contain words involving the mental state of the Minister – 'opinion', 'belief', or 'satisfaction'.

This may provide further support for the argument that the Minister's decision as to whether an action is a controlled action is contingent upon a finding of significant impact and that fact-finding process is an objective one which is essential to the operation of the EPBC Act, such that it could be said to be a condition precedent to a valid decision under section 75.<sup>29</sup>

In *Woolworths*, Spigelman CJ reaffirmed his reasoning in *Timbarra* that facts of an extrinsic or ancillary or preliminary nature are more likely to be jurisdictional.<sup>30</sup> Section 75 could be considered to involve a preliminary fact finding process that is a condition precedent to a subsequent assessment process under Parts 8, 9 and 10 of the EPBC Act. Whether or not the proposed action is a controlled action for the purposes of the Act is arguably a threshold question, where the Minister is in essence asking the question: "can I control this act?" This is "legally and logically antecedent to and distinct from" the later merits inquiry which asks: "should I" approve it? and if so, what conditions "should I" impose?<sup>31</sup>

In my opinion, this is a reasonable interpretation of the legislative intention of section 75 which leads to the conclusion that the provision is to be construed as involving a jurisdictional fact rather than facts to be found finally and definitively by the Minister. This conclusion would allow a court in its judicial review capacity to consider evidence about the likelihood of an action significantly affecting a matter of national environmental significance.

Part 7 of the EPBC Act requires the Minister to engage in a process of public consultation in relation to referred actions. Section 74(3) requires the Minister to invite public comment in relation to whether a referred action is a controlled action and in accordance with section 75(1A) the Minister must consider any comments received. These provisions for public consultation may arguably lead a court to conclude that it was the intention of Parliament that a decision under s 75 is final and non-reviewable on merits issues.

A finding that section 75 involves a jurisdictional fact could arguably lead to

an inconvenient operation of the provision which is contrary to one of the objects of the EPBC Act in section 3(2)(d), being the 'efficient and timely' approval process to ensure that 'activities that are likely to have significant impact on the environmental are properly assessed'.

If the Minister's decision as to whether an action is a controlled action were subject to review on the ground that section 75 involves a jurisdictional fact, this could lead to substantial delays in the assessment and approval process.

Conversely, an examination of the objects and purposes of the EPBC Act could also lead to a conclusion that section 75 does involve a question of jurisdictional fact. In *The Nathan Dam Case* Kiefel J considered the objects of the EPBC Act. In reaching her decision that the Minister 'did not undertake the full enquiry required by s 75' Kiefel J found that the intention of Parliament in enacting the assessment provisions of the EPBC Act was as follows:

*"The true focus of the EPBC Act...is on the area or species in question. It is concerned with the prospect of damage or some other adverse impact upon them. The Act is not so concerned with persons undertaking particular activities as it is in the consequences of them. The assessments made by the Environment Minister at this point are not as to the extent to which a proponent should be held responsible or whether their proposed action held up. Section 75 directs attention to areas and species and asks the question – what are likely to be the impacts upon them if the proposal proceeds?"*<sup>32</sup>

If the main purpose of the EPBC Act is to ensure that impacts on matters of national environmental significance are properly assessed so as to minimise damage to those matters, then it is arguable that Parliament intended that the Minister's decision as to the likelihood of an action significantly affecting those matters be subject to judicial review on the ground of jurisdictional fact.

Whilst the cases on this issue are difficult to reconcile, in the light of the decisions in *Woolworths*, *Timbarra* and *Enfield*, I

would argue that it is open to a court to find that section 75 involves a jurisdictional fact.

### Conclusion

There is much debate about whether the courts in decisions such as *Timbarra* and *Enfield* have overstepped their role and intruded into the realm of administrative decision-makers.<sup>33</sup> Aronson and Dyer in *Judicial Review of Administrative Action* state that where courts do engage in fact review, which they necessarily do where there is a finding of jurisdictional fact, that review should be 'strictly limited'.<sup>34</sup> It has been suggested that it is problematic for courts to enter into merits review under the guise of jurisdictional fact because it undermines the separation of powers and damages the integrity of the democratic processes fundamental to administrative decision-making.<sup>35</sup>

There is no doubt that the expansion of the jurisdictional fact doctrine as a ground of judicial review has brought the judicial review jurisdiction of the courts closer to merits review. As suggested above, a finding that section 75 of the EPBC Act involves a jurisdictional fact could result in unreasonable delays in the referral and approval process under that Act.

However, given that decisions of the Minister under the referral, approval and assessment provisions of the EPBC Act are immune from merits review, an implication of jurisdictional fact in the operation of section 75 may in fact provide a valuable tool to hold the Minister accountable for his decisions under those provisions of the Act and to ensure that those decisions are consistent with the objects and intentions of the statute.

### FOOTNOTES

<sup>1</sup> For example, see *Friends of Hinchinbrook Inc. v Minister for the Environment and Heritage* (1997) 69 FCR 28.

<sup>2</sup> These referrals are publicly available at [www.deh.gov.au/epbc](http://www.deh.gov.au/epbc).

<sup>3</sup> *Queensland Conservation Council v Minister for the Environment and Heritage* [2003] FCA 1463; and *Minister for Environment & Heritage v Queensland Conservation Council and*

*WWF Australia* [2004] FCAFC190.

<sup>4</sup> The leading case is *Corporation of the City of Enfield v Development Assessment Commission* (2000) 169 ALR 400.

<sup>5</sup> The concept of judicial review as a precondition to the existence of a power was given emphasis in *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611. For a good general discussion of the concept of jurisdictional fact, see Aronson and Dwyer, *Judicial Review in Australia* (2nd ed, LBC, Sydney, 2000), pp 194-204. <sup>6</sup> (1997) 97 LGERA 1 at para. 8.

<sup>7</sup> The rules of evidence do not apply in Class 1 merits appeals in the Land and Environment Court. However, the *Evidence Act 1995* applies to evidence before the court in Class 4 judicial review proceedings: refer to Practice Direction Number 17 – Pre-Hearing Practice Direction.

<sup>8</sup> (2000) 169 ALR 400 at 411.

<sup>9</sup> [2003] NSWCA 100 in the judgment of Ipp JA.

<sup>10</sup> *Ibid*, at para 37.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*, at para 46.

<sup>13</sup> Query whether the grant of consent to prohibited development pursuant to clause 40 of the *Environmental Planning and Assessment Regulation 2000* (NSW) on the basis of the development application being for an enlargement, expansion or intensification of an existing use may be a valid defence to such a challenge to the validity of a development consent.

<sup>14</sup> Defined in sections 11-25.

<sup>15</sup> ss 26(1) and 27.

<sup>16</sup> ss 26(2) and 27.

<sup>17</sup> s 28.

<sup>18</sup> Defined in s 5(5) as 'the land, waters, seabed and airspace in, under or above (a) Australia; or (b) an external Territory; or (c) the exclusive economic zone; or (d) the continental shelf'.

<sup>19</sup> s 67.

<sup>20</sup> S 75(1A). Pursuant to s 74(3) the Minister must invite public comment within 10 business days of the referral of the action being published on the Internet. This provision only applies if the person who referred the action does not state that the action is a controlled action.

Continued on page 15

# Implications of the *Nathan Dam Case* for Environment Assessment in Victoria

Barnaby McIlrath, Solicitor, EDO Victoria

This article discusses the consideration of environmental effects in Victoria under the *Planning and Environment Act 1987* ('PEA') in light of the decision of the Full Court of the Federal Court of Australia in *Minister for Environment and Heritage v Queensland Conservation Council and WWF Australia* [2004] FCAFC190 ('the *Nathan Dam case*').

In particular, the article seeks to explore the implications of the *Nathan Dam case* on a long applied principle of planning law known as the *National Trust* principle, and consider its relevance in light of the decision in the *Nathan Dam case*.

## The National Trust Principle

In *National Trust of Australia (Victoria) v Australian Temperance and General Mutual Life Assurance Society Ltd* [1976] VR 592, the Full Court of the Supreme Court of Victoria was concerned with an application under clause 24(4) of the Melbourne Metropolitan Planning Scheme for a permit to erect a building in excess of the height permitted in the relevant area.

Clause 5A of that planning scheme required the responsible authority to consider the primary purpose for which the land was zoned, the orderly and proper planning of the area, the proximity of the land to any reservation, and the amenity of the neighbourhood.

The court concluded that the National Trust's concerns about the retention of an existing historic building which was to be demolished was not a relevant consideration primarily on the basis that the purpose of the discretion was to control the height of buildings rather than preservation of heritage.

## Application of the National Trust Principle

Whilst decided a long time ago, the principle has been widely applied, and

confirmed recently by a number of decisions of the Supreme Court.

In *Shalit v Jackson Clement Burrows Architects Pty Ltd* [2002] VSC 528 Balmford J applied the National Trust Principle to conclude that a provision which required a permit to be obtained to construct works on land affected by a Land Subject to Inundation Overlay was to be exercised having regard to flooding matters and did not extend to issues such as maintaining views. Whilst an application for leave to appeal the decision was granted, the matter settled before the appeal was heard.

Relying upon the National Trust principle, the President of the Victorian Civil and Administrative Tribunal ('VCAT'), Justice Stuart Morris recently commented:

*'If, upon application for a permit under one of the specific provisions, the decision maker was required to consider the full panoply of planning considerations set out in sections 60 and 84B of the Planning and Environment Act and in clause 65 of each planning scheme, planning decision making would grind to a standstill.'*<sup>1</sup>

In making this observation, Justice Morris placed some emphasis on provisions which provide that a permit is required in specific circumstances, as opposed to permits required under more general provisions such as the Residential Zone requirements.

The observation of the Tribunal outlined above appears to be inconsistent with the width of the required assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act').

The Full Court of the Federal Court has recently ruled that the assessment required under section 75 of the EPBC Act is particularly wide, for the purpose of identifying the relevant controlling

provisions that dictate which are the *relevant impacts* for assessment of a controlled action as defined by section 82(1) of the EPBC Act ('the *relevant impacts*').

It is submitted that the test applicable under the EPBC Act is, in essence, quite similar to that required under the PEA in relation to consideration of environmental impacts. The conflicting approach at State and Federal level raises important questions for the protection of the environment in Victoria.

## The Nathan Dam case

In *Minister for Environment and Heritage v Queensland Conservation Council Inc and WWF Australia* [2004] FCAFC 190 ('the *Nathan Dam case*'), the Full Court of the Federal Court of Australia rejected an appeal by the Commonwealth Minister for the Environment and Heritage that in determining the relevant controlling provisions under section 75, he was not required to consider the actions of third parties that would be facilitated by the development of the proposed dam in Northern Queensland, including the use of pesticides for irrigated agriculture.

In construing section 75, the Full Court held:

*'It is unhelpful, we consider, to attempt to paraphrase the expression 'all adverse impacts' in section 75(2)(a) of the EPBC by recourse to phrases like 'inextricably involved' or 'natural consequence'.*

*'Impact' in the relevant sense means the influence or effect of an action: Oxford English Dictionary, 2<sup>nd</sup> ed, vol VII, 694-695. As the respondents submitted, the word 'impact' is often used with regard to ideas, concepts and ideologies: 'impact' in its ordinary meaning can readily include the 'indirect' consequences of an action and may include the results of acts done by*

persons other than the principal actor. Expressions such as 'the impact of science on society' or 'the impact of drought on the economy' serve to illustrate the point.

Accordingly, we take s 75(2) to require the Minister to consider each way in which a proposed action will, or is likely to, adversely influence or effect the world heritage values of a declared World Heritage property or listed migratory species. As a matter of ordinary usage that influence or effect may be direct or indirect.

'Impact' in this sense is not confined to direct physical effects of the action on the matter protected by the relevant provision of Part 3 of Chapter 2 of the EPBC Act. It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter.

Provided that the concept is understood and applied correctly in this way, it is a question of fact for the Environment Minister whether a particular adverse effect is an 'impact' of a proposed action. However, we do not consider that the Minister did apply the correct test in answering the question of fact which had arisen in the present case.'

The court also observed that:

'It is sufficient in this case to indicate that 'all adverse impacts' includes each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not.'

Clearly, the Full Court has found that the EPBC Act does not allow a restrictive interpretation of which impacts must be considered in determining the controlling provisions for any controlled action.

### A Conflicting Approach

It might be observed that the EPBC Act does not provide for the regulation or prohibition of the use or development of land via planning schemes in the sense that this occurs under the *Planning and Environment Act 1987* ('PEA').

Nevertheless, it begs the question, how can we have a coordinated approach to environmental impact assessment at State and Federal level if the State process only looks at policy specific impacts, and the EPBC Act requires proponents to look at all impacts on matters of national environmental significance? Is it possible to accommodate the National Trust principle with the requirements of the EPBC Act?

This question is important, because it is an objective of the EPBC Act under section 3(1)(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples. Section 3(2) provides that in order to achieve its objects the EPBC Act:

*'(b) strengthens intergovernmental co-operation, and minimises duplication, through bilateral agreements; and*

*(c) provides for the intergovernmental accreditation of environmental assessment and approval processes; and*

*(d) adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed'*

In Victoria, assessments under the PEA, either through permit applications or planning scheme amendments will be the backbone of this process if the EPBC Act is to achieve these objectives. Through the development of bilateral agreements, or accreditation of State processes, the EPBC Act seeks to reduce duplication and provide for an efficient and timely impact assessment process. This, notably, is an objective that benefits the development industry as well as the public.

While it is open to argue that the two processes are independent, and may occur parallel to each other, it would appear difficult for the State to accredit a State process, in the knowledge that any assessment under the PEA is likely to be quite narrow, depending on which particular provision of a planning scheme a permit is required. How would it ever

be possible to finalise a Bilateral Agreement for Victoria if State assessment processes could not guarantee that assessment of impacts on matters of national environmental significance will occur?

The problem extends beyond matters of national environmental significance. Before the Commonwealth can issue an approval under the EPBC Act, the State must send a notice under section 130(1B)(b) of the EPBC Act representing that the impacts of the action on *things* other than matters of national environmental significance have been assessed to the greatest extent practicable. It is submitted that things, for the purpose of this section includes the environment more broadly. Such a conclusion would be consistent with the objectives of the EPBC Act set out in section 3.

### How should this conflict be resolved?

While the application of a State law is subject to the requirements of any Federal law under section 109 of the Commonwealth Constitution, it is necessary to find an application of the PEA that does not hinder the objectives of the EPBC Act. If this is accepted, it might be suggested that the National Trust principle (as it relates to considering environmental impacts) has outlived its usefulness, and that the Victorian Government should consider making this clear in the construction of planning schemes, perhaps by broadening the scope of objectives applicable under any provision which requires a permit.

But is it really a problem of the construction of Victorian planning schemes? Upon closer examination of the PEA it would appear that the findings of the Full Court of the Federal Court in the Nathan Dam case might easily be applied to the PEA as well. For example, in considering a permit application, section 60 of the PEA requires a responsible authority to consider all *significant effects* which the responsible authority considers the use or development will have on the environment.

This requirement is not so different from the requirement in section 75(2) of the

EPBC Act that all adverse impacts be considered before deciding what the controlling provisions of an action are. It must be remembered that before the Minister can determine that a matter is a controlling provision for an action, s/he must be satisfied that the action is at least likely to have a *significant impact* on a matter protected by Part 3 of the EPBC Act, including listed threatened species and communities (sections 18 and 18A) and Ramsar wetlands (sections 16 and 17B).

In essence, this test is no different to the test which applies to a responsible authority under section 60 of the PEA. So it might be felt that the test applied by the Full Federal Court should be followed, at least for the sake of an integrated planning framework, if not for constitutional reasons.

The National Trust principle also begs the question of whether it is open for a planning scheme, in regulating or

prohibiting the use or development of land, to restrict the consideration of environmental impacts when making decisions about permit applications. The PEA does not expressly provide that a planning scheme is empowered to do this.

#### FOOTNOTE

<sup>1</sup> *Victorian National Parks Association Inc. and Ors v Iluka Resources Ltd* [2004] VCAT 20 at paragraph 35 of His Honour's decision.

## Establishment of an Environment Protection Authority for the Northern Territory

**Tom Cowen, Solicitor, EDO Northern Territory**

The EDO Northern Territory recently made a submission to the Northern Territory Sessional Committee on Environment and Sustainable Development arguing for the establishment of an Environment Protection Authority for the Northern Territory.

The submission was made on behalf of:

- Environment Centre Northern Territory;
- Australian Conservation Foundation;
- Australian Marine Conservation Society;
- Environmental Defender's Office (Northern Territory);
- World Wide Fund for Nature Australia; and
- Threatened Species Network.

This article briefly sets out the key points of the submission. To read the full text of the submission, please visit the EDO Northern Territory website: [www.edo.org.au/edont](http://www.edo.org.au/edont).

### Environmental Context

The environment of the Northern Territory is currently under significant

and increasing threat from a wide range of human activities. Scientists are warning that these accumulated activities are driving a major extinction wave across northern Australia and increasing pollution and unsustainable resource use.

These threats will only continue to increase in the future, yet the environmental institutions which are in place in the Northern Territory to deal with environmental issues are inadequate to deal with the existing pressures, let alone the future pressures.

### Existing Institutions

While the staff of environmental institutions in the Northern Territory may be committed to environmental protection, the structure of these institutions means they are simply no longer appropriate to deal with the territory's environmental issues.

The Environment and Heritage Division of the Department of Infrastructure, Planning and Environment is beset by an increasingly large and complex workload, potential conflicts of interest and inadequate resources.

The division lacks a statutory basis or statutory functions, and is therefore liable to be changed or abolished by mere executive action without any parliamentary or public scrutiny. The division is not independent or individually accountable to the public or parliament.

There is an urgent need for existing institutions to be completely overhauled and for a new independent environmental regulatory agency to be established.

### A New Institution

The Northern Territory has an opportunity to put in place an Environment Protection Authority which accords with world best practice. In particular, the regulator would be:

- an independent, statutorily constituted agency;
- subject to statutory objects and statutory responsibilities;
- governed by an independent board;
- be subject to formal accountability mechanisms;
- constituted in separate divisions to avoid conflicts of interest; and

- adequately resourced (including appropriate funding and expert and experienced staff).

The regulator would undertake the following functions:

- environmental planning;
- environmental policy development;
- environmental impact assessment;
- monitoring;

- enforcement;
- provide a registry of information;
- facilitate community consultation;
- encourage voluntary initiatives;
- design environmental economic instruments;
- environmental education
- state of the environment reporting;
- audit other government institutions; and
- implement sustainability.

Also, an environmental appeals system should be established to provide a check and balance on decisions of the regulator and to ensure a robust environmental decision making process generally.

For more information, please contact Tom Cowen, Solicitor, EDO Northern Territory.

## EDO Victory Saves 30,000 Hectares of Woodland

**Leigh Simpkin, Solicitor, EDO Western Australia**

The EDO has been working hard to assist the Wilderness Society of Western Australia to prevent the logging of 30,000 hectares of woodland to the west of Widgiemooltha, 100 kilometres south of Kalgoorlie.

The woodland is amazing. Although the Forest Products Commission (FPC) would have us believe it is simultaneously degraded and overstocked due to previous logging activity in the 1930's, it is, in fact, a diverse landscape with a mixture of shrubland and woodland of various ages, providing vital habitat to as yet largely undescribed ecological communities.

The proposal to log 30,000 hectares of woodland was first advanced by the FPC in 2002. After being referred to the Environment Protection Authority (EPA) by the Conservation Council of Western Australia, the proposal was then advertised by the EPA in November 2003.

The proposal documents, at this stage, presented few details of the actual proposal and almost nothing on the environmental impacts. Despite the paucity of detail, the EPA determined the level of assessment as; *'not assessed - public advice given'*.



The Wilderness Society then sought advice and assistance from the EDO to appeal the decision. From this point on, it became apparent that although the proposal was significant in its own right, it also raised important issues in relation to the EPA assessment process.

The appeal became protracted with FPC given two opportunities to resubmit the proposal by the Appeals Convenor, although nothing like sufficient detail and a comprehensive environmental impact assessment eventuated. The EPA never changed its view that the proposal should not be assessed.

The final document remained flawed, contradictory and inconsistent with previous iterations. This is illustrated by comments from the Minister for the Environment in upholding the appeal.

Particular attention was drawn to the inadequate level of detail in the proposal and concerns relating to environmental monitoring.

Whilst we deserve to celebrate the win - after all you don't prevent logging in 30,000 hectares of bush everyday! - clearly this entire process demonstrates inadequacies within the EPA assessment process that need to be addressed. Perhaps we could start by deleting the option of a non-decision (*'not assessed; public advice given'*) from the EPA's assessment options menu.

The win demonstrates the effectiveness of teamwork, with the Environmental Defenders Office, the Wilderness Society and the Conservation Council of WA forming a powerful trioka.

# EDO Tasmania Water Conference

Jessica Feehely, Solicitor, EDO Tasmania

*Whiskey is for drinking, water is for fighting over*

Mark Twain

Water is mobile, unpredictable and valuable to a range of competing stakeholders. The management of water resources therefore requires an understanding of scientific and ecological issues that influence the quantity and quality of supply, coupled with equitable rules for sharing water resources and resolving disputes.

The legacy of water licensing regimes in the twentieth century has been deteriorating water quality, loss of environmental flows, rising salinity and degradation of catchments.

EDO Tasmania recently hosted a conference entitled *Protecting Our Liquid Assets*, bringing together a range of scientific and legal experts to discuss options for the reform of water management law in Tasmania. The conference highlighted a number of important factors in an effective water management regime.

## ***Need for Integrated Catchment Management***

The protection of water quality and quantity is necessarily a planning function. Decisions regarding water allocation should not be made in isolation from decisions about land use. The Victorian Catchment Management

Framework provides a good example of a community driven, multi-disciplinary management system focussed on stewardship and the triple bottom line.

## ***Priority for Environmental Protection***

Water management systems must focus on sustainable management of water resources, not water allocation. Dr Lee Godden (University of Melbourne)

criticised the National Water Initiative's emphasis on security of consumptive entitlements, rather than protecting the environment. The NWI provides discrete environmental entitlements, however the environment does not enjoy priority. Further, there is no certainty that the defined environmental reserve can achieve sustainable outcomes where existing allocations already exceed catchment capacity.

Craig Woodfield (Water Policy Officer, Tasmanian Conservation Trust) also stressed that water management systems must address the needs of water dependent ecosystems, water efficiency and the implications of land uses.

## ***Consistent Approach to Resource Management***

Dr Gerry Bates emphasised the importance of developing management systems to reflect ecological realities, noting that current management is often characterised by control – creating rights to resources without any related obligations or consideration of how natural systems actually behave.

Craig Woodfield also noted the inherent inconsistencies in government policies that promote increased agricultural production or forestry without addressing issues of salinity, water quality, biodiversity and environmental flows.

## ***Transparent and Inclusive Allocation System***

A recurrent theme of the conference was the need to address 'intercepting' uses - land use activities that significantly alter stream flow and water availability. Studies of forest practices conducted by the CRC for Catchment Hydrology and Dr. David Leaman show that vegetation clearance and conversion to plantation has significant long term impacts on

seasonal flow patterns, erosion and siltation.

Dr Leaman emphasised the need to plan for the hydrological consequences of land use changes and recommended detailed research to better understand the impacts of:

- § land use changes; and
- § translocation of water (through pipelines, irrigation systems or cloud seeding).

An understanding of the impact of these activities on flow regimes is essential to the equitable management of water allocations. An assessment and allocation system that excludes large water users (such as forestry) and fails to consider water losses can only lead to future difficulties.

## ***Demand Management***

An effective water management system must adopt mechanisms to encourage efficient use of water. The introduction of water metering in urban areas and achieving full-cost recovery for water infrastructure will facilitate improvements in water efficiency.

## ***Public Involvement***

Water management systems must involve transparent assessment and allocation processes. Decisions should be made in consultation with a range of stakeholders, particularly when assessing ecosystem needs and services. Water management systems should provide broad rights of appeal.

## ***Flexibility***

A system of water allocations must include flexibility to accommodate changes in water availability due to climate change, improved scientific knowledge and changes in government

policy. The National Water Initiative aims to clarify who will bear the risk of allocation changes.

#### Clear, Stable Funding and Clear Strategic Directions

Water planning is clearly a long-term objective. The availability of stable long-term funding, clear lines of accountability and clear strategic directions are essential to the effective implementation of integrated catchment management.

The debate generated by *Protecting Our Liquid Assets* illustrates both the need to develop an effective and equitable system for the sustainable use of water resources and the complexity of the task. However, improvements to the current system are definitely worth fighting for!

Full proceedings of *Protecting Our Liquid Assets* will be available shortly on the EDO Tasmania website at: [www.edo.org.au/edotas](http://www.edo.org.au/edotas).

#### Application for Jurisdictional Fact

#### Doctrine to Controlled Action Decisions under the EPBC Act

*Continued from page 9*

<sup>21</sup>Refer to the Minister's statement of reasons dated 20 November 2002 in the judgment at para 22.

<sup>22</sup>[2003] FCA 1463 at para 22.

<sup>23</sup>Which include (s 3): '(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and (c) to promote the conservation of biodiversity'.

<sup>24</sup>Para-phrasing the ratio of the decision of Kiefel J.

<sup>25</sup>[2004] FCAFC 190 at [57] and [61].

<sup>26</sup>(1999) 102 LGERA 52, at 60.

<sup>27</sup>*Ibid.*, at 61.

<sup>28</sup>Section 75(2).

<sup>29</sup>(1999) 102 LGERA 52 at paras 66 and 71.

<sup>30</sup>[2004] NSWCA 42 at para 484.

<sup>31</sup>*Ibid.*, at para 142.

<sup>32</sup>[2003] FCA 1463, at para. 35.

<sup>33</sup>See generally Aronson, M., *Resurgence of Jurisdictional Facts*

## EDO Network News

### EDO Network Conference 13 -14 May 2005

On 13 and 14 May 2005, the EDO Network will be celebrating its twentieth anniversary with a national conference in Sydney on public participation and public interest environmental law.

The conference will celebrate positive developments in public interest environmental law over the last twenty years and identify key challenges and opportunities for the future.

#### Western Australia

The EDO WA 2005 Conference will be held in June 2005 it will be focussing on Water Law in Western Australia. The three main themes will be:

- Sustainability of water quality and quantity;
- Water allocation models; and
- Water trading

The National Water Initiative and COAG – in particular WA's experience – will be included in the key note speech (speaker to be confirmed).

The focus of the afternoon session will be a hypothetical set in a fictitious WA regional area. The panel will comprise (we hope) a member of each stakeholder group within the region:

- Mining industry which provides employment but uses huge quantities of water;
- Agricultural industry – specifically irrigators;
- Town dwellers who want sustained high quality water at minimum cost and inconvenience;
- Conservation/environmental groups;
- Viticultural industry – newly emerging in the region;
- Aboriginal groups with heritage interests; and
- Politician in a marginal seat.

It is hoped the hypothetical will be a lively debate as each representative puts forward the stakeholder group's opinion about water in the region. We will be looking for social, cultural, economic, political and environmental implications set in the current legal framework and how a new approach may work better.

For further information, contact Leigh Simpkin at the EDO WA on 08 9221 3030.

#### New South Wales

Thank you to Elisa Nichols for her time and effort with the EDO as Solicitor. She was employed with the New South Wales office and previous to that she was with the Queensland office.

Chris Nunn is welcomed as a solicitor.

(2001) 12(1) *Public Law Review* 17; Gageler, S., 'The Legitimate Scope of Judicial Review' (2001) 21(3) *Australian Bar Review* 279; Pearson, L., 'Jurisdictional Fact: a Dilemma for the Courts' (October 2000) 17(5) *Environmental and Planning Law Journal*, 453; and Sackville, R., 'Limits of Judicial Review of Executive Action

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<sup>34</sup> 2<sup>nd</sup> ed, (LBC Information Services 2000) at p. 203.

<sup>35</sup> Pearson, L., 'Jurisdictional Fact: a Dilemma for the Courts' (October 2000) 17(5) *Environmental and Planning Law Journal*, p. 467.

