



Extracts from

Access to Environmental Justice Conference

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This document contains extracts by some of the guest speakers. Full papers can be downloaded by EDO members and requested by conference attendees.

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Hon Jim McGinty
State Attorney-General

Judicial Review as a Means of Enhancing Access to Environmental Justice

Introduction

I am again delighted to be the opening speaker at this important conference on “Access to Environmental Justice”. Previously, I had the opportunity to make some introductory remarks at your 2002 conference, on the theme “Lines in the Sand”.

Of course, there have been a number of important developments concerning substantive aspects of environmental law, since I last spoke to you.

A prominent example is the Environmental Protection Amendment Act 2003 (WA) which introduced the most significant amendments to the Environmental Protection Act 1986 (WA) - Western Australia’s principal environmental statute - since its enactment. For example, the reforms include:

- The introduction of new offences of causing “serious environmental harm” and “material harm”;
- A new directors liability provision where directors are deemed liable for environmental offences unless they can establish a defence;
- A system of strategic assessment, where a proposal may be assessed and approved and then future “derived proposals” may be permissible without further assessment; and
- Protection for “whistleblowers” of environmental offences. Indeed, this specific protection compliments the more general protection provided to “whistleblowers under the Government’s Public Interest Disclosure legislation.

Consequently, the 2003 Amendment Act represents one aspect of the recent improvements to environmental law in Western Australia and implements the State Government’s policy of providing greater protection to Western Australia’s environment.

Of similar importance are administrative and legislative reforms, which the State Government has initiated to ensure better and more appropriate access to the legal system. These will assist those who seek to safeguard our State’s environment, where industrial development and urban renewal are an integral part of economic progress, and our modern life-styles.

In that context, the Legislative Assembly has passed the State Administrative Tribunal Bill 2003, as well as its accompanying Conferral of Jurisdiction Bill 2003.

As I will elaborate, these Bills will establish a State Administrative Tribunal, - colloquially known as - “SAT”, with a review jurisdiction permitting it to conduct de novo hearings and make decisions on the merits.

Importantly, to ensure not only maximum efficiency and cost effective proceedings, but also to have the requisite expertise devoted to issues which will be dealt with by SAT, it is proposed that SAT will have four principal divisions.

- a Resources and Development Division;
- a Human Rights and Equal Opportunity Division;
- a Vocational Regulation Division; and
- a General Civil and Commercial Division

Of particular interest to environmental defenders and other persons concerned about our environment, is the Resources and Development Division.

This Division will deal with a myriad of matters affecting the environment that currently come before tribunals such as the Town Planning Tribunal, the Land Valuation Tribunal and the Water Resources Appeals Tribunal.

That is, SAT's jurisdiction will, for example, include appeals previously made to the Town Planning Appeals Tribunal about subdivision decisions, development decisions, and heritage decisions.

All of these matters involve and impact on our environment.

Consequently, at least two important results will ensue:

- First, SAT will take into account State environmental concerns and imperatives; and
- Secondly, SAT will be closely involved in the development of this State's environmental law.

Additionally, SAT's jurisdiction will encompass environmental issues over, for example, areas such as agriculture and fisheries.

Currently, both the SAT and Conferral Bills are in the Legislative Council.

The expeditious passage of these Bills would substantially benefit all West Australians, obviously providing independent appeals and enhanced decision-making about our environment.

Present position

There is no more important community concern than where we live, how we live, and the relationship of human communities with their natural surroundings.

Consequently, a number of different decision-making processes, including courts, tribunals and ministers, are linked to environmental concerns. For example, the town planning assessment process, ultimately leading to a decision by the Town Planning Appeals Tribunal, encompasses environmental issues. This Tribunal's jurisdiction will be conferred on SAT.

The environment is, of course, even more central to the decision-making processes under the Environmental Protection Act. The Environmental Protection Authority prepares reports and recommendations to the Minister for Environment. This includes, under Part IV of the Act, "Environmental Impact Assessments" in relation to an activity or proposal that may potentially impact on the environment. Subject to the possibility of judicial review provided by the common law principles that underlie our system of administrative law, final decisions under the Act are made by the Minister.

The Taskforce Report on the establishment of SAT clearly recognised that the Part IV environmental assessment appeals to the Minister should not be altered. In respect of Part V of the Act, which deals with pollution control, the Report did contemplate that SAT review should be available.

Given the close connection between Part IV and V and the need for conformity between decisions under those Parts, the Bill does not alter the current appeal process.

In this context it is important to recall that, especially in this area of environmental law, the State Government's commitment to establish a modern, efficient and accessible system of administrative law decision-making will be an important and beneficial reform. As I will indicate, the State's common law system will be transformed by new administrative judicial review legislation.

Reforms

The establishment of SAT will introduce significant reforms to administrative decision-making in this State on environmental matters.

Significantly, SAT's jurisdiction, over appeals involving the environment, will encompass existing appeals:

- to the Town Planning Appeals Tribunal about subdivision decisions, development decisions, and heritage decisions
- about fishing licences under Fish Resources Management Act 1994
- to the Local Court under the Aboriginal Heritage Act 1990 about land usage, which will affect Aboriginal heritage
- to the Minister for Agriculture under Soil and Land Conservation Act 1945 about soil conservation notices
- to the Minister for Fisheries about pearling licences
- to the water licensing tribunal.

Given SAT's jurisdiction and decision-making powers, these decisions will in the future, be made by an independent, impartial and suitably experienced and qualified Tribunal.

Ultimately SAT will remove the variation that currently occurs between decisions made by these various boards and Ministers, as well as reducing the confusion caused by different procedures. The result will not only be an improved decision-making process and better decisions. It will also lead to better ecological outcomes within our State.

Specifically, the benefits will include:

- Applicants appearing before SAT will be able to request and obtain written reasons for the decision, from the original decision-maker.
- SAT will release written reasons for its review decisions.
- Legal representation will not, in many, perhaps most cases, be required or necessary when parties invoke SAT's jurisdiction.
- SAT will be able to inform itself about the circumstances surrounding an appeal, as well as hearing evidence from all appropriate sources; and
- SAT's ability to provide mediation, including ordering compulsory mediation.

Importantly, the availability of SAT review will not preclude a party from seeking to have a decision judicially reviewed. That is, where an appeal lies to SAT, people will have a choice. They can either utilise SAT or commence judicial review proceedings in court. If they choose to seek SAT's assistance, then as I have indicated, SAT can conduct de novo hearings and make decisions on the merits.

However, if judicial review is sought, the applicant will currently be confined to the traditional common law grounds of administrative law, and remedies such as prerogative writs and declarations.

As you are aware, there are a number of defects and anachronisms, for example, the very limited and stringent standing requirements, in the common law. Indeed, this has been recognised in a number of Australian jurisdictions, which have already enacted legislation dealing with judicial review of administrative decisions. Prominent examples are the Commonwealth, Queensland, Victoria and New South Wales.

In the context of these reforms, I requested the WA Law Reform Commission to examine the deficiencies of the current law relating to the judicial review of administrative decisions and to make recommendations to reform this State's law. In particular, the Commission was requested to consider reforms to the substantive grounds upon which the lawfulness of an administrative decision might be challenged.

The Commission's Report makes a number of recommendations advocating substantial reforms.

Perhaps, among the important recommendations are:

- That WA legislation be enacted following the provisions of the Commonwealth Administrative Decisions (Judicial Review) Act 1977;
- That "any person whose interests are affected by the conduct or decision under review should have standing to seek relief under the proposed statutory remedy"; and
- That "a person whose interests are not affected by the conduct or decision under review should have the power to commence or continue proceedings under the proposed statutory remedy with the leave of the court". The Commission have also indicated "such leave should be granted if the court is satisfied that it is in the public interest for the proceedings to be commenced or continued".

These recommendations are similar to Victorian Attorney-General Law Reform Advisory Council recommendations made in 1999. The Victorian recommendations supported the view that standing should arise "whether the applicant has a sufficient interest in the matter to which the applicant relates, or whether the application is justifiable in the public interest".

Environmental issues impact, for example, on public property such as air, water and soil and on future generations. Consequently, environmental litigation is, more than other types of litigation, public interest litigation.

Since litigants in this area frequently do not suffer from economic or other direct consequences, it is difficult for them to establish standing. The WALRC proposed "public interest" test would reduce this barrier to access.

The Commissions' recommendations also extend the availability of judicial review, from review of only "final decisions", to include "a preliminary or recommendatory decision if this decision is sufficiently connected to the final decision".

Experience in other jurisdictions, implementing statutory reforms to modernise judicial review of administrative and environmental decisions, is that increased accountability and improved qualitative outcomes have been achieved.

Therefore, given the theme of this conference - Enhancing Access to Environmental Justice -- the WA Commission's recommendations regarding standing are particularly important. Their implementation would significantly expand the availability of judicial review to a much wider range of appropriate litigants, for example, those concerned with ensuring that environmental considerations are given the attention they deserve.

I am pleased to inform you that the State Government has authorised the drafting of legislation to implement these important and long over-due judicial review reforms.

Of course, as many delegates to this conference know, most jurisdictions in Australia (other than this State) and a number of countries (for example, New Zealand, Canada and South Africa), have included in their environmental protection legislation, expanded standing provisions to enable parties to seek and obtain judicial review of decisions affecting the environment.

Obviously, the benefits of such reforms include:

- wider and more focussed public participation in environmental decision-making and access to environmental justice;
- recognition of the importance of developing a coherent and sustainable environmental law, including appropriate environmental rights, duties and obligations; and

- ensuring transparency and accountability, at all levels, of decision-making, which affects the State's environment.

Some Australian States, most notably NSW, Qld and SA, have moved even further. They have established specialist Environmental Courts. These courts can deal independently with environmental issues on both the merits and substantive law. That, combined with expanded standing requirements, is a model your conference may wish to explore.

Indeed, there have been suggestions that a specialist court or tribunal, similar to the NSW Land and Environment Court, be established in this State, merging a number of planning appeals, pollution control matters and land valuation appeals and compensation actions in the one specialist court.

However, the establishment of SAT will provide a one-stop tribunal over land use planning, land valuation, compensation matters and appeals under other environmental legislation, for example, the Soil and Land Conservation Act 1945 (WA) and the Aboriginal Heritage Act 1972 (WA).

Even in this context, it is important to note that all environmental decision-making, whether or not it comes within SAT's jurisdiction, will be given further protection when the WA Law Reform Commission's judicial review recommendations are implemented.

Further, it should be recalled that the Commission "favour[ed] the view that it is important to maintain the distinction between the judicial function, which is limited to the review of the lawfulness of administrative action, and the administrative function".

Clearly, this important distinction would be harder to maintain when one specialist court, for example an environmental court, deals with both functions. The operation of SAT and the proposed judicial review legislation will ensure this distinction is not blurred.

Conclusion

Everyday and in everyway we are all surrounded by the environment. For those of us involved in the legal system, whether in the government, private practice or within the Environmental Defender's Office, this presents unique opportunities and responsibilities.

Therefore, I am delighted to again have had the opportunity to inform you of the State Government's continuing endeavours to modernise, and provide for all West Australians, enhanced access to environmental justice.

That does not mean that we can stop and rest. More always remains to be done.

So, finally, let me take this opportunity to express the hope that you have a provocative and stimulating conference on all of these issues involving "Access to Environmental Justice"

Dr Robyn Eckersley
Senior Lecturer, Department of Political Science
University of Melbourne

The State and Access to Environmental Justice

Environmental injustices occur when social agents are able to pass on, in space and time, the environmental costs of their decisions or activity to innocent third parties (including marginal classes, future generations and nonhuman nature).

To date, the regulative ideals and legal processes of liberal democratic states tend to perpetuate many environmental injustices. In this paper I suggest that an alternative ‘green democratic state’, informed by the regulative ideals of ecological democracy (rather than liberal democracy) would act as a more effective vehicle for delivering environmental justice.

This entails democratic and legal reforms that provide more inclusive representation on behalf of the entire community at risk, more critical deliberation in relation to all risk generating decisions and a fundamental shift in the onus of proof to risk generators rather than risk victims.

I suggest how this ambitious ideal might be practically embodied in the constitutional framework, environmental legislation and due processes of the ‘green democratic state’.

Dr Wally J. Cox
Chairman
Environmental Protection Authority

The Western Australian Environmental Impact Assessment Process and natural justice.

In Western Australia, the *Environmental Protection Act 1986* incorporates provisions for an Environmental Impact Assessment (EIA) process.

The statutory process provides opportunities for the proponent, interested stakeholders and the broader community to provide formal and informal input to EIA. The key steps of the process are:

- Referral by proponent or third party EPA
- Level of assessment set EPA
- Appeal against level of assessment Minister
- PER or other document Proponent
- Public comment Stakeholders
- Assessment EPA
- Advice, including conditions EPA
- Appeal against advice and draft conditions Minister

The process includes as custom and practice encouragement for early consultation by the proponent with stakeholders, a formal public comment period, and two opportunities for key stakeholders and the proponent to address the EPA.

There are also two statutory appeal opportunities – an appeal to the Minister for the Environment as to the level of assessment set by the EPA and finally appeals on the advice provided by the EPA.

The process is transparent in that the proponent's document and the EPA's advice are all public documents.

The paper will address the issues of further improvements to the EIA process and the option of appeal determination through the State Appeals Tribunal (SAT).

Heide Newton
Community Consultation Manager
Department of Planning and Infrastructure (DPI)

Consulting with the Community - Taking up the Challenge

The Government has established the Department for Planning and Infrastructure to enable land use, transport, the environment and the community to be planned and managed together, based on a shared vision of how we'd like to live.

Every decision made by the Department has at its heart the social and environmental considerations we consider essential to safeguard the future of our communities.

Initiative ideas such as community forums and citizen's juries have already been conducted successfully, and there will be more to come.

People now have the chance to actively participate - to sit at the drawing board with planners, councillors and business proprietors; to become educated about all the options; and to have their values and priorities included from the beginning.

DPI Community Consultation Manger, Heide Newton, will speak on how the community can participate in the planning process, outlining both formal and informal consultation methods and mechanisms.

Dr Beth Schultz
Vice President
Conservation Council of Western Australia

How people can attempt to access environmental justice by participating in CALM management plan preparation process.

Under the *Forests Act 1918*, the Forests Department was required to prepare working plans for State forest. No public input was contemplated. The first plan to be shown to the public was Part 1 only of General Working Plan No. 86 of 1977. The Australian Labor Party State platforms from 1976 to 1984 included a clause that would require the forest management agency to submit working plans for public scrutiny and comment. The *Conservation and Land Management Act*, passed by the Burke ALP Government in 1984, requires public notification of management plans and allows for written submissions for at least two months. The same Act resulted in public input for management plans for the conservation estate as well as State forest. However, while the legislation requires submissions to be called for, there is no provision or mechanism to ensure that submissions are heeded. Public input to management plans has been achieved more via political avenues and community pressure than legislated requirements.

Recent Supreme and High Court cases and community forest inspections have demonstrated how little opportunity there is for the public to hold forest managers accountable for forest management decisions and activities.

Major law reform and change in departmental ethos are needed if environmental justice is to be achieved though CALM's public consultation process.

Mr Garry Middle
PhD Student
School of Urban and Regional Planning
Curtin University of Technology

How people can access environmental justice by making submissions to planning authorities on development proposals.

This presentation will provide a guide to individuals and community groups making submissions on planning proposals. The key issues covered are: understanding the planning context of the proposal; the constraints Local Governments and the Western Australian Planning Commission are faced in making Planning decisions; knowing the relevant Planning Scheme and any relevant policies and regional strategies; identifying where any concerns submitters have fit into the overall Planning context; the process of reviewing submissions by Council and DPI officers; and, building on the previous points, tips for a meaningful submission. The presentation will conclude with some examples of submissions that are meaningful and some that would be considered irrelevant. In general, it is not the number of submissions that are critical but the quality of the submissions.

Mr Bruce Denham
Executive Director
Office of the Information Commissioner

The Importance of FOI in providing access to Environmental Justice

The workshop will cover the FOI process including tips and advice on how to increase your chances of successfully obtaining the documents you are seeking. Provisions in the legislation to assist in lodging a valid application and improving your dealings with Government agencies during the processing of an application will be explained, including: strategies to obtain advice on the existence of key documents of interest to you thereby reducing the number of documents an agency has to deal with; obtaining a decision as quickly as possible; the rights of third parties; and how to seek review if you are dissatisfied with the agency's response to your application.

The session will be conducted on an inter-active basis and any issues of concern can be raised, discussed and clarified at any stage. There will be brochures available and a copy of the overheads provided with room for notes by participants.



Dr Christina Gillgren
Director, Citizens and Civics Unit
Department of Premier and Cabinet

Using public participation mechanisms to address environmental justice

A fundamental tenet of environmental justice is that no community should be forced to shoulder a disproportionate share of exposure to the negative effects of environmental pollution or degradation due to a lack of political or economic strength. Statutory approaches to environmental justice can sometimes fall short in this regard.

Environmental legislation and regulations are often, by necessity, highly technical. This can represent a barrier to communities or individuals seeking statutory support for an environmental complaint. Statutory mechanisms often devalue local knowledge and understanding in favour of expert opinion, making communities dependent on expert or external assistance. Statutory approaches to environmental justice are also limited in that their focus on interpreting existing laws and regulations often fails to address the underlying causes of community discontent.

Public participation is a rights-based approach to environmental justice that shifts the emphasis away from procedural fairness and focuses it back on the need for just and sustainable outcomes. It not only involves communities having the right to timely information in an accessible format but also access to the process through which information and knowledge is generated. It involves giving communities a say in the planning, implementation, enforcement, and evaluation of environmental policies and decisions that will affect them.

The Citizens and Civics Unit was established to develop strategies, policies, and initiatives to promote civic involvement and foster public participation in all levels and aspects of community life. The Unit has undertaken a number of initiatives aimed at fostering a culture of best practice in public participation and community consultation within the WA public sector, including, the release of two practical consultation guides, numerous training workshops, and the recently completed State Citizenship Strategy.