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Ms Bev Sinclair
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Communications Branch
Department of Environment and Conservation
PO Box K822
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17 August 2006

Dear Madam,

Interim Industry Guide to Community Involvement (2003) Review

Thank you for the opportunity to provide feedback on the Interim Industry Guide to Community Involvement ("Guide"). The EDO has concerns with the Guide, and with the former Department of Environment (DoE), now Department of Environment and Conservation's (DEC) understanding of its consultation obligations generally. Our main concerns are set out below.

From the experience of our clients and through many discussions with the DEC, it is clear that the DEC does not fully understand its common law obligation to consult with certain sectors of the community. Case law in WA has highlighted the obligation on government to consult not just with people or groups that have a statutory right or interest, but also those with a private right and those with a "special interest".

This obligation was most recently highlighted in the South Beach case¹ in which the South Fremantle/ Hamilton Hill Residents Association ("Association") sought relief from a decision of the DoE, the Department of Health and the WAPC to approve an EMP produced by Stockland South Beach Pty Ltd. The basis of the court action was the failure of the DoE to provide the Association with Stockland's EMP before it made a decision to accept the EMP. In that case the court held that:

- The Association had a special interest in the outcome. It represented the residents of the area and was recognised as doing so by the DoE and Department of Health earlier in the consultation process
- As the Association had a special interest it should have been afforded procedural fairness
- The test of procedural fairness was held to be - what does fairness require in all the circumstances of the case?

¹ *Re Western Australian Planning Commission; Ex Parte South Fremantle/Hamilton Hill Residents' Association Inc* [2005] WASC 50

- Fairness in this case required that the applicant be given an opportunity to be heard by each of the government agencies before their decisions were made
- DoE and the Department of Health could and should have informed Stockland that although Stockland could not be compelled to disclose successive versions of the EMP to the applicant, its various proposals would not be considered by the agencies unless it did so.

Although this case was an Order Nisi or preliminary case, rather than a full hearing, the court decided that the Association had good prospects of success and the case was settled with disclosure of the document being given to the Association.

The Interim Industry Guide does not explain the circumstances in which the common law duty to consult exists and therefore some proponents do not realise that consultation is compulsory in some situations, as opposed to a mere public relations exercise with the community.

It is clear from the case law that consultation is required when:

- A private right or interest is affected, such as when a person will suffer economic loss or an alteration is made to riparian rights
- A group contains members whose private rights or interests will be affected²
- An individual has a 'special interest' in the outcome of a decision
- A group contains members who have a special interest

Although precisely which persons and groups have a special interest is not clearly defined by the case law, it is clear that it goes beyond those with private rights, but does not include the community at large. As can be seen from the South Beach case, it includes residents concerned about a realistic public health issue arising from a proposal.

The South Beach case exposed the limitations of the DoE's approach to document production during consultation with community groups. Current policy in the Information Statement 2004 is to produce documents with regard to statutory rights and interests only (mainly relating to the Freedom of Information legislation). Contrary to the common law duty to consult, documents are not produced where private rights and special interests are affected. This omission has not yet been corrected.

Although the Guide is focused on the duties of industry members to consult, it is clear from the South Beach case that a refusal by industry to consult will not absolve the Government from lack of consultation based on privacy grounds. Therefore the Guide should make it clear that the DEC has a common law duty to consult in certain situations and if industry will not cooperate, the DEC will not be able to proceed with the approval until it does cooperate.

To support this, further consultation requirements should be included in the *Environmental Protection Act 1986*. For example, where the Act states that an application must be in a form and manner approved by the CEO (see for example sections 51E, 54 and 57) the CEO should specify that satisfactory consultation is required as part of the application, and that an application will not lawfully be considered to be complete, and will not be processed, until that consultation is correctly carried out.

In support of the Guide, it distinguishes informing the community from consulting the community. Consultation involves a person being asked for their view before the decision is made on which their private rights and interests are affected. It also requires an open mind. One obvious mistake made by proponents and their consultants is that the 'consultation' is in effect done after the decision has been made and the process is really just informing the residents.

A recent WA Supreme Court case³ reviewed the case law on what consultation entails and stated that rather than mere notification, consultation requires the provision of sufficient information and a sufficient opportunity to respond. Although in that case the court decided that the failure to properly

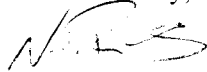
² See for example *Re MacTiernan; ex parte Coogee Coastal Action Coalition Inc* [2005] WASC 109

³ *Yallingup Residents Association (Inc) -v- State Administrative Tribunal & Ors* [2006] WASC 162

consult was not a significant enough omission to invalidate an alteration to a town planning scheme, the judge stated “*I do not believe that the conclusion I have reached undermines the importance of consultation. The obligation remains, is the subject of considerable authority on its importance, and can be enforced.*”⁴

The Guide should make it clear that the mere provision of information without the opportunity for meaningful input is not consultation and will not meet the minimum standard of consultation required by the Department.

Yours sincerely,



Nicola Rivers
Solicitor

⁴ Yallingup n3 at [177]