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'Streamlining' of mining approvals process could leave objectors out in the cold

Kristy Robinson, Outreach Solicitor

There is potential for a major overhaul of WA's mining exploration and development approvals process, as a working group established by the Mines and Petroleum Minister, Norman Moore, works towards making recommendations and a schedule for administrative and legal changes to the current process.

For many, it could have slipped under the radar that the Minister established an industry working group to advise on ways to best way to make WA's approvals processes "more efficient" and "more welcoming for exploration and development activity".

The Minister has indicated that his priority, in taking on the Mines and Petroleum portfolio, "was to dramatically overhaul the current unwieldy approvals process and provide greater certainty and confidence in the mining resources sector".

Objectives of the working group include:

- identifying impediments to be addressed through policies, administrative and legislative change
- providing a schedule for implementation of suggested changes, and
- identifying stakeholders issues with the approvals processes to improve WA's reputation "as a place to do business" in the mineral and petroleum industries.

contents

According to *WA Business News*, the industry working group's members list "reads like a who's who of mining and resources in Western Australia." The Minister has already indicated he anticipated that the working group's findings would reflect the attitude of the resources sector in general, which is very supportive of the State Government's push to "streamline and improve" the approvals process.

The group is expected to provide a report to the Minister in late April 2009. The Minister has indicated he will then consider the recommendations and, depending upon the nature of them, may decide to take the recommendations to Cabinet.

While the working group is yet to report to the Minister, submissions received by the working group, which were leaked to and reported on in the Sunday Times recently and which reflect the views of industry associations, have suggested some alarming propositions.

The submissions suggest the working group is considering a model whereby large projects (eg requiring $50m capital investment) would be decided by the Premier, with no appeal rights. This appears to cut out any involvement of the Minister for Environment, who would normally decide such matters after an EPA review.

The submission also made some other concerning recommendations, for example, reducing and removing appeal rights in certain circumstances e.g. against setting of level of assessment by EPA, and reducing appeal rights in relation to clearing permits.

While the working group is yet to make its own recommendations to the Minister, it is extremely concerning that there is potential for such changes to be recommended.

Identifying 'major projects' which are not determined by the Minister for Environment, and limiting public appeal rights, are all changes that ring alarm bells to anyone aware of the NSW experience in recent years after the introduction of Part 3A in the *Environmental Planning and Assessment Act 1979* (NSW). These changes have left many in the NSW community feeling frustrated and disenfranchised.

The EDO WA would be strongly opposed to any changes which create a two-track system in Western Australia. Subjecting the large resource projects to a less rigorous assessment process than that which applies to other proposals simply does not make sense.

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On the home front

Kristy Robinson, Outreach Solicitor

We welcome a new Principal Solicitor ...

Josie hails from the east coast, where she has been working as a litigation solicitor in the Environmental Defender's Office of New South Wales for the past two years. Before that, she was employed by a Sydney law firm specialising in planning and environmental law, and as a tipstaff at the Land and Environment Court of NSW.

Highlights of her career so far have included *The Hub Action Group v the Minister for Planning*, a case which stopped a badly planned regional waste dump in Orange (Central West NSW) and *Walker v the Minister for Planning*, in which the Court decided that the effects of climate change were a mandatory relevant consideration for planning authorities. This decision was overturned in the NSW Court of Appeal and is now on appeal to the High Court.

During 2008 Josie spent most of the year working on a case related to clearing of endangered woodlands for suburban development in Western Sydney. Unfortunately this case did not succeed in Court, but it has highlighted the need for better laws to protect biodiversity – a pertinent issue for WA as well.

Josie started work at EDOWA in January 2009, and is looking forward to an exciting year ahead, helping the citizens of Western Australia to protect their unique natural environment.

... but farewell our Office Coordinator ...

The EDO is sad to farewell Amber Centa, who has been the Office Coordinator since March 2008.

Throughout her time with us Amber has provided a great source of inspiration to the office – reaching out and developing relationships with members and clients, getting out and about, and promoting EDO at various events (eg South Bound, MOTT), while re-invigorating office and account management with her trademark positive can-do attitude and practical problem solving, to ensure the smooth running of the EDO – even through some tumultuous times!

The EDO would like to warmly thank Amber for the contribution she has made, and wish her the very best in her future endeavours. Amber says:

I would like to take this opportunity to say Thank you! to everyone for their help and support throughout the last year. I have enjoyed working at the EDO very much, and will greatly miss the friends I have made through working in this position.

... and a volunteer legal intern ...

Kelly joined us in November 2008 and worked on a full-time basis until February this year. She assisted with legal research and advice to clients on a number of issues, worked tirelessly updating many of the EDO's Factsheets, and drafted newsletter and e-bulletin articles.

Thank you Kelly!

... but welcome new 2009 volunteers!

Welcome aboard Renee, Rachel, Divvya, Saxon, Janette, Maite and Liz!

We're always grateful to those willing to squeeze out some spare time in their hectic schedules to progress the work of the EDO. We survive on limited funding, which means limited staff numbers, and there is always so much work to be done, helping clients protect the unique environment of Western Australia. Volunteers arm us with more people power to help us provide our services, in exchange for a learning experience.

Can you volunteer with the EDO?

If you are interested in volunteering throughout the second half of 2009, we will be considering applications soon for new volunteers to start in July. Please send your resume and information on your availability through to edowa@edowa.org.au

On the road again

Margaret River 8 -9 March 2009

EDO lawyers Josie Walker and Kristy Robinson travelled to Margaret River in March 2009 and presented two workshops on the *Environmental Protection and Biodiversity Conservation Act 1999*. The workshops were organised jointly with WWF, Cape to Cape Catchments Group and GeoCatch.

The Margaret River region is home to many species and communities that are specifically protected under the EPBC Act, including Carnaby's and Baudin's black cockatoos, white-bellied frog, western ringtail possum and the Margaret River hairy marron, which is found only in this area. Much of the biodiversity in the area is under threat from proposed development, as well as reducing rainfall and changing climate.

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Are trees to blame for bushfires?

Josie Walker, Principal Solicitor,
Saxon King, EDO volunteer

Following the Victorian bushfires, conservation policies have been criticised for putting trees ahead of human lives, and it seems likely that government authorities and property owners all over Australia will become more vigilant about preventing bushfire risk through measures such as prescribed burning, creation of fire breaks and vegetation clearing around homes. People who love nature are rightly concerned that this could be 'open season' on trees. However, an intelligent response would involve a broad approach to fire mitigation, including better planning to keep people out of harm's way, as well as strategic prescribed burning and clearing where there are demonstrated benefits.

Building housing subdivisions on ridgetops in dense bushland may be more appealing to developers than building on brownfield sites (such as former grazing or industrial land), because they can charge a premium for views, breezes and the 'secluded natural setting'. But the environmental cost of building such a development can be very high. It is now very obvious that the need to protect life and property in isolated residential subdivisions will lead to calls for aggressive prescribed burning and the clearing of large buffer zones, skewing management priorities in surrounding bushland away from protection of biodiversity towards protection of property.

Developers, when proposing development on such sites are usually anxious to show that their development will have minimal environmental impact, and therefore downplay the fire risks and need for cleared buffer zones. Greater public awareness of bushfire risk will make it harder for them to do this.

In 2006 I (Josie) argued a case in the NSW Land and Environment Court where a community group opposed a new six-lot subdivision in a bushland area adjacent to a National Park. The proposed site was on the top of a steep vegetated slope, facing the direction of the most dangerous winds, and had very difficult access. Local community members considered the site a firetrap, and opposed the proposal on the grounds of bushfire risk, as well as impacts on threatened species habitat. However, the developer produced a complex vegetation management plan and succeeded in convincing the Court that the requirements of bushfire protection could be achieved without serious impacts on the native flora and fauna.

I wonder what will happen to this vegetation management plan, once the land is subdivided and the new owners move in? In my view it is likely that the demands of the owners for property protection will eventually lead to the houselots being cleared from boundary to boundary. The National Parks and Wildlife service, which manages the adjacent National Park, will also be under pressure to carry out more aggressive prescribed burning to protect those few houses on the ridgetop.

Landuse planning

It has long been acknowledged that the landuse planning of fire-prone areas is an important measure in preventing property damage and loss of life from natural disaster. In New South Wales local councils are required to prepare bushfire-prone land maps to identify areas that are likely to be subject to bushfires, and these are certified by the Commissioner of the NSW Rural Fire Service (*Environmental Planning and Assessment Act 1979* (NSW), section 146 (1).) Developments in areas that are identified as bushfire prone cannot be granted unless the development complies with the provisions of *Planning for Bush Fire Protection 2006* (Rural Fire Service, NSW), and the authority granting the consent has consulted with the Commissioner of the NSW Rural Fire Service on measures to protect persons, property and the environment from bushfire damage (*Environmental Planning and Assessment Act 1979* (NSW), section 79BA.)

For certain development purposes there is a further requirement to obtain a bushfire safety authority from the Commissioner concerning standards considered to be necessary to protect persons, property or the environment (*Rural Fires Act 1997* (NSW), section 100B (2). Prescribed purposes are listed in s100B (6).)

Western Australia also has *Planning for Bush Fire Protection* (2001, FESA/DPI) which sets out the requirements for building in low, medium and high bushfire hazard areas, and stipulates that subdivision, development and habitable buildings should not be permitted in extreme bushfire hazard areas.

The document also states that one of the ways of minimising the damage from bushfire is that "buildings are not located in highly vulnerable positions and are also sufficiently distant from areas of potentially hazardous fire behaviour", and that "road layout and other access features combine both fire service access and resident safety" (*Planning for Bushfire Protectio*n (2001), p6.)

However, local councils in WA are not required by legislation to identify bushfire-prone areas (those categorised as medium, high or extreme bushfire hazard areas) and *Planning for Bush Fire Protection* has the status of a policy document only, so the degree to which this policy is applied and enforced is likely to vary between council areas.

What are the planning requirements in WA?

Town planning schemes for different shires set out

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Are trees to blame?

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different landuse and development requirements relating to bushfires. For example, the Shire of Ravensthorpe Town Planning Scheme ('the Ravensthorpe Scheme') states that developments within "rural conservation and rural small holdings zones" are required to "incorporate hazard separation zones to adequately separate habitable buildings from bushfire hazards in order to protect them from burning debris, radiant heat and direct flame contact [and] to minimise fire intensity around buildings".

The Ravensthorpe Scheme also requires other fire management measures in 'special use zones' which must be provided to the satisfaction of the Bush Fires Board (FESA) and local government. These include firebreaks, watertanks, use of fire retardant building design and materials, and may include the preparation of a bushfire management plan.

Planning for Bush Fire Protection contains specific requirements for the siting of buildings and the size of cleared fire separation zones, which vary depending on the specific conditions of the area. Any development scheme should be required to consider whether these specific conditions can be effectively met in the specific area of development, not just throughout the broadly zoned area.

The *Town Planning Regulations 1967* (TP Regulations) requires that local governments preparing local schemes to rezone land for development consider "whether the land to which the application relates is unsuitable for the proposal by reason of it being, or being likely to be, subject to flooding, tidal inundation, subsidence, landslip, **bush fire**, or any other risk" [emphasis added]. (*Town Planning Regulations 1967* (WA), Appendix B part 10 (2)(m).)

A more balanced approach

In February 2009 the Conservation Council of WA released a 'six-point plan' for the management and mitigation of bushfires. This includes the identification of fire-prone areas and the introduction of enforced planning requirements; enforcement of building standards for fire-prone areas; early detection and rapid response to fires; strategic prescribed burning; fire prevention and preparedness training; and increased efforts to combat arson.

The arguments in the controlled-burn debate have changed little in the last decade. The Conservation Council's six-point plan represents a similar approach to bushfire mitigation as the FESA/DPI *Planning for Bush Fire Protection* publication of 2001, Council of Australian Government reports from 2002 and 2004, and WA Forest Alliance and Conservation Council publications from 2002. Many groups are pressing for a more rounded, sophisticated and effective fire management policy – prescribed burning is only one aspect of the fight to minimise bushfire damage. We must incorporate a range of protective measures if we hope to guard our lives and property, and our environmental heritage.

Final result in *Walker v Minister for Planning*

EDO NSW Bulletin March 2009: No 602

The hearing for an application for special leave to appeal to the High Court of Australia (the Court of final appeal in Australia) in the *Walker v Minister for Planning* matter took place on Friday 13 March.

The EDO argued, on behalf of Jill Walker, that as the objects of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) included the encouragement of Ecologically Sustainable Development (ESD), ESD was a mandatory relevant consideration when making decisions under Part 3A of the Act. Under Part 3A the NSW Minister for Planning determines whether to approve projects of State or regional planning significance.

Initially, the NSW Land and Environment Court found that the Minister had to consider the public interest under Part 3A. The Court further found that consideration of the public interest required the Minister to consider ESD, and therefore required the consideration of the climate change impacts and increased flood risk to the site.

The Court went on to find that the Minister had failed to consider flood risk from climate change in his analysis of ESD, and declared the Minister's decision void.
This decision was overturned in the NSW Court of Appeal. Leave was then sought to appeal the Court of Appeal's decision to the High Court.

At the application for leave to appeal before the High Court, two judges heard the matter, Justices Gummow and Heydon. The judges determined that the matter did not have sufficient prospects of success on appeal to grant special leave, despite it being well argued. The High Court did, however, agree that there should be no order as to costs, not disturbing the Court of Appeal's earlier finding that there should be no costs order due to the public interest nature of the proceedings.
The transcript of the High Court proceedings can be accessed at www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2009/50.html?query=Walker%20v%20Minister%20for%20Planning

The EDO would especially like to thank the three barristers who assisted with the Walker litigation: Christine Adamson SC, Matthew Baird and Craig Lenehan. Their efforts and expertise throughout the various proceedings was invaluable, and they ensured the arguments were put to the court in the best possible manner.

On the road again

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The workshops focused on how this piece of Commonwealth legislation can be used as a tool in the fight to protect biodiversity and, in particular, threatened and vulnerable species and ecological communities in the southwest of WA. The workshops included one public workshop and one specifically for council employees.

The EDO thanks in particular Drew McKenzie of Cape to Cape Catchments Group, and Katherine Howard of WWF for their help organising the workshops, which were extremely well attended.

An appealing decision: EPA to reconsider assessment of resort development

Saxon King, EDO volunteer

A successful appeal against a decision by the Environmental Protection Authority (EPA) not to assess a proposed 'eco resort' near the mouth of the Berkeley River in the Kimberley is an encouraging sign that the environmental impacts of the proposed development will now be considered by the EPA.

The location of the proposed development, on the shore of the Timor Sea, is home to nesting grounds for Flatback and other sea turtles, and possesses the only coastal dune system on the North Kimberley coast. The proposed development was for an 'eco resort' to be built 300 metres from the shoreline at the top of a sand dune. The proposal included clearing approximately one hectare of land, construction of 20 'eco cabins', boardwalks and some common areas and staff units.

On consideration of the information provided by the proponents, the EPA decided it was not necessary to assess the development. Several groups, including the Conservation Council, Wilderness Society, and Kimberley Marine Tourism, appealed this decision. The appeals were based on the potential effect on the Flatback turtles; the Berkeley River's aesthetic attribute; water issues; impact on climate change; and the fact that the proposal had not been subject to environmental assessment, among others. The key issue was whether the proposal required formal environmental assessment under the Environmental Protection Act 1986.

After the Appeals Convenor heard the appeals, the Minister for Environment decided that the appeals process had brought to light information that was not available to the EPA at the time of its decision, and that at the time of the EPA decision there was insufficient information to determine the 'extent of biophysical impacts', or the 'environmental value of the area affected', as it is required to do as part of a consideration of the environmental significance of the proposal in accordance with the *Environmental Impact Assessment* (Part IV Division 1) *Administrative Procedures 2002*.

In light of these facts, the Minister remitted the proposal to the EPA for a fresh decision as to whether or not to assess the proposal, and has instructed the proponent to provide more detailed information about the proposal, its impacts and management plan.

This case is a timely reminder of the power, and the necessity, of the appeals process that can encourage us to participate in the process as parties interested in the preservation of the natural heritage of our state of Western Australia.

Fed Government releases carbon bill for public comment

Liz Day, EDO volunteer

On 10 March the Federal Government released a package of six draft bills intended to implement an Australia-wide emissions-trading scheme known as the *Carbon Pollution Reduction Scheme* or CPRS.

Submissions on the package closed on 14 April. The bills are expected to be introduced into Parliament in May this year. Much of the detail of the scheme, including particulars of assistance to emissions-intensive trade-exposed industries, and details of the voluntary opt-in regime for forestry, will be contained in the regulations, scheduled for public release in June.

The central bill of the package, the *Carbon Pollution Reduction Scheme Bill*, confirms the government's commitment for the CPRS to commence on 1 July 2010.

The CPRS is intended to implement Australia's obligations under the United Nations Framework Convention on Climate Change and the Kyoto Protocol. It is also directed towards meeting the government's previously outlined targets to reduce greenhouse gas emissions to between 5% and 15% below 2000 levels by 2020, and the longer term target of 60% below 2000 levels by 2050. Significantly, the Bill does not specify any yearly emission targets or caps, these details being left to the regulations.

On the whole, the draft legislation does not present any significant policy departures from the positions specified in the government's earlier White Paper.

Under the CPRS, liable entities under the scheme will be required to acquire and surrender emissions permits for every tonne of greenhouse gas they emit each year. The scheme will cover around 75% of Australia's emissions and involve mandatory obligations for around 1000 entities. The CPRS will cover the stationary energy, transport, fugitive emissions, industrial processes and waste sectors, and all six greenhouse gases under the Kyoto Protocol.

In broad terms, an entity will be liable under the CPRS if they operate a facility that emits 25,000 tonnes or more of carbon dioxide equivalent ($CO_{2\text{-}e}$) a year. However, a lower threshold of 10,000 t of $CO_{2\text{-}e}$ applies for landfill facilities within a certain distance of a similar landfill facility. CPRS obligations may be transferred from the operator of a facility to another person in certain circumstances.

Importers, producers and suppliers of eligible upstream fuels (which include liquid petroleum fuel and gas, brown and black coal etc) will also be responsible under the CPRS. However, liability may be passed from the supplier to a customer through the use of 'Obligation Transfer Numbers'. Importers, manufacturers and re-suppliers of synthetic greenhouse gases (sulphur hexafluoride and specified hydrofluorocarbons and perfluorocarbons) are also liable under the scheme.

Liable entities can surrender Australian Emissions Units (AEUs) or international Kyoto compliant units (CERs,

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Human rights and the environment: violation of Inuit human rights

Maïté van der Vekene, EDO volunteer

The right to a safe environment should be recognised as a fundamental human right. If the environment doesn't function properly, our well-recognised human rights don't have the same meaning.

Climate change – two words one cannot escape today. It has always occurred but lately, through man-made activity, it occurs faster and the environment of our planet is suffering from it. An excess of greenhouse gas emissions by industrial countries is the cause of it. However, it is not only a question of greenhouse gases and environment: the impact on humans is potentially enormous.

As a Human Rights student, I chose for my Masters thesis to examine the impact that the environment has on our human rights. In April 2008 I went to Greenland and carried out research for my work, entitled 'Global warming in a World of Ice and Snow: Violations of Inuit's Human Rights' to establish a clear link between the importance of a safe and clean environment with the protection of our well-established human rights. This thesis looked at the effects of climate change on Inuit people and their human rights, as they are one of the first populations to endure the impacts of the changing climate.

'Kalaallit Nunaat' meaning the 'Land of the people' is also known as Greenland. This majestic land is inhabited by the Inuit, the indigenous people of the Arctic. The Inuit are closely connected to the environment in which they live. The land, the sea, the animals and sea mammals are all they rely on for their survival. The culture, economy, identity, travelling and hunting methods of the Inuit are dependent on ice and snow.

The Arctic is one of the places the most affected by the consequences of global warming. As a result, the Inuit face an uncertain future.

"The Arctic is the barometer of the globe's environmental health. You can take the pulse of the world's health in the Arctic ... What is happening to the Inuit will happen to you too in the South, soon ... Is it too much to ask for moderation for the sake of my people today, and for your people tomorrow?" are the words of Aqqaluk Lynge, president of the Inuit Circumpolar Council in Greenland.

A healthy environment is a precondition of the respect of human rights. The example of Greenland and its population is relevant to show that a disturbed environment causes a violation of human rights.

The violations of human rights that are occurring here include:

1. Violation of the right to enjoy one's culture: cultural rights. The traditional knowledge that Inuit elders have is becoming less and less relevant as the arctic environment is undergoing such rapid changes. As the connection between Inuit's everyday life activities, such as hunting change with the changing weather conditions, (particularly ice and snow), it is leading to the destruction of Inuit culture. The less the hunters will be able to practice this subsistence way of life, the less they will be able to teach and pass on to younger generations their skills. This is a big threat to the continuity of Inuit culture.

2. Violation of the right to use and enjoy the lands they have traditionally used and occupied: right to property. Inuit have been using the Arctic land for millennia. By the word "land", Inuit include the sea-ice and the snow. The right to use and enjoy their land is being violated because Inuit's land is less accessible, more dangerous and is becoming unfamiliar to them.

3. Violation of the right to the preservation of health. The changing environment has a strong impact on the traditional food resources the Inuit rely on. The traditional diets of the Inuit are more balanced than a diet of foods imported from Denmark, which have higher levels of sugar and more saturated fats. The lack of their traditional food is harming to Inuit's physical health. In addition, as the climate is changing in the Arctic, with the higher temperatures, some diseases that were unknown to that region of the world are appearing there by the movement of insects that have adapted to life in the Arctic.

4. Violation of the right to life, physical protection and security. To go hunting and fishing, the hunters need safe travel conditions. Unfortunately the ice and snow conditions lately have made travelling more dangerous and this at all times of the year and not only during the spring season when the ice melts naturally. The right to life, physical protection and security is therefore at stake.

Due to the fact that the ice is thinner, new and unpredictable areas of open water cause hunters to fall through the ice with their sled or snowmobiles which can cause severe injuries and sometimes death by drowning.

5. Violation of the right to the Inuits' own means of subsistence. Climate change has deprived the Inuit of their own means of subsistence, by rendering travel conditions difficult and traditional food sources hard to harvest.

6. Violation of the right to residence and movement and inviolability of the home. Forced relocation is occurring is due to the changing climate. Because the Inuit cannot fish nor hunt anymore, their whole economy that was relying on that resource disappeared. To get money they need to seek jobs in larger towns. Relocations have also been forced in some cases due to the lack of reliable ground transport access to bring in basic supplies.

The Inuit are early victims of this phenomenon but many other cultures in the world will also suffer. Other obvious casualties will be the inhabitants of small islands that lie very close to sea level, many low-lying coastal cities; and people whose water resources are provided by glaciers, and so on.

Global warming is too often thought of in terms of science and the impact of any mitigation measures on the economy. Unfortunately, the link with human rights is too rarely considered. Human rights instruments could be a strong tool to highlight the cost of global warming, which might hasten the process of making a decision to reduce greenhouse gas emissions.

A human rights framework for Australia

Maïté van der Vekene, EDO volunteer

The Federal Government is undertaking a public consultation process for Human Rights, which it calls the National Human Rights Consultation.

The three key considerations for consultation are:

1) Which human rights and responsibilities should be protected and promoted?
2) Are human rights sufficiently protected and promoted?
3) How could Australia better protect and promote human rights?

The consultation is run by an independent committee, which has been asked to report to the Australian Government by 31 August 2009 on the issues raised and the options identified to enhance the protection and promotion of human rights. Any person can make submissions to the committee by 15 June 2009.

Why a right to a healthy environment?

A right to a healthy environment could help protect those whose lives and livelihoods are impacted by environmental abuses, such as the impact of climate change in the Asia Pacific region. To date, governments have generally responded to the ecological and economic implications of climate change, rather than to the social and human rights implications. Australia has committed to the protection of human rights by supporting and ratifying international human rights instruments such as the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. These should also be protected when responding to climate change.

In its 2008 Background Paper on Human Rights and Climate Change, 'Human Rights: Everyone, Everywhere, Everyday' the Australian Human Rights and Equal Opportunity Commission stressed the need to formulate domestic laws responding to the issue of climate-affected refugees because: "it is clear that international law is not yet equipped to respond adequately to the diverse causes of climate-induced migration."

Is this right needed in Australia?

The effects of climate change, the growing demands on clean drinking water, and the change of natural landscapes in Australia suggest that establishing a right to a healthy environment could be valuable, as it would create an additional tool to challenge actions that did not recognise that right.

Even if the right to a healthy environment was not recognised as such, other human rights can be used to protect and correct environmental abuses – such as the right to life and the right to the respect for one's home and property.

It is noteworthy to consider Kofi Annan's theory, that different human rights cannot exist in isolation. To share your ideas, see www.humanrightsconsultation.gov.au

Traditional owner wins against goldmine expansion

Barrick Gold & Williams v Minister for Planning & Ors [2009] NSWLEC 5

Josie Walker, Principal Solicitor

Traditional owner Neville'Chappie' Williams has succeeded in a legal challenge against the proposed expansion of Lake Cowal Gold Mine in Northern New South Wales. The mine commenced operation in 2005 despite the objections of many traditional owners, who consider the Lake Cowal area a sacred site. The mine, which uses arsenic to extract gold ore, also poses a serious environmental risk to plant and animal life in Lake Cowal.

In December 2007, Barrick Gold lodged an application to expand the mine operations, almost doubling the size of the pit, and extending the life of the mine by up to 11 years. They described this as a 'modification' of the existing project. Under New South Wales law, a 'modification' of a major project can be approved with much less environmental assessment than would be required for a new project application, and no public exhibition period.

Williams argued that the 'modification' involved such major changes to the proposal that it needed to be treated as, effectively, a new project. Justice Biscoe of the Land and Environment Court agreed. He held that the term 'modification' in s 75 W of the *Environmental Planning and Assessment Act 1979* (NSW) meant "to change without radical transformation". Barrick's proposal would involve a "radical transformation" of the project, therefore Barrick needed to lodge a fresh major project application. This means that the proposal will have to go through a more rigorous environmental assessment process, and there will be an opportunity for the public to lodge submissions.

While this decision is specific to the terminology of the NSW Act, the question of how one distinguishes between 'modifications' to a proposal and a new proposal requiring a new assessment process is relevant to many jurisdictions. For example, s 46C of the *Environmental Protection Act 1986* (WA) provides that the Minister for Environment may approve of changes to a project after a Part IV approval has been granted, if he or she forms the view that changes will not have a significant detrimental effect on the environment.

Dates for your diary

Free EDO Environmental Law workshops and advice clinics

Broome

Saturday 16 May 2009, Lotteries House, Lot 692 Cable Beach Rd: Workshop 10am–1pm; Advice Clinic 2pm–3:30pm.

Exmouth

Tuesday 16 June 2009, Environment Centre, Exmouth District High School, 5.30pm.

Albany

Tuesday 25 August 2009, 5.30pm. Venue etc TBA.

Can you challenge a development application as being misleading and deceptive? Apparently not.

Kristy Robinson, Outreach Solicitor, and Maïté van der Vekene, EDO volunteer

The NSW Supreme Court has demonstrated the difficulties of challenging a development application (and subsequent representations by a developer) on the basis of being misleading and deceptive, in a recent decision *Street & 7 Ors v Luna Park Sydney Pty Limited & 3 Ors* [2009] NSWSC 1.

The case involved a proposal to redevelop and to operate Luna Park, an amusement park adjacent to Sydney Harbour.

The developer lodged a development application (DA) for a staged development process, and lodged a 'masterplan' DA in 2001, indicating the overall scope of the proposal (2001 DA). The 2001 DA was accompanied by a map (provided 'for information only') showing that only children's rides (i.e. not adult thrill rides, which are much noisier) would be located in the northern part of the site.

In May 2002, the developer held a public meeting at which a representative informed the audience that children's rides would be located in the northern part of the site (2002 Meeting).

In June 2002, however, the developer lodged a further DA for Stage 2 (2002 DA), which addressed the detailed design of the entertainment complex and which indicated thrill rides would be located on the northern part of the site.

Consent was eventually granted for the site in 2003 and the park re-opened in August 2004, with several large thrill rides operating in the northern part of the site.

The Court proceedings were brought by a group of owners and occupiers of properties in the vicinity of the park (plaintiffs), who were affected by the noise of thrill rides located on the northern part of the site.

The plaintiffs challenged the park's operation on several grounds, including that the actions of the developer in lodging the 2001 DA and the 2002 meeting constituted misleading and deceptive conduct, by remaining silent as to the intention to locate the adult thrill rides in the northern part of the site. They claimed this breached s52 of the *Trade Practices Act* (Cth) 1974.

Section 52 (1) of the Trade Practices Act provides that "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

The plaintiffs arguments failed on these grounds.

Firstly, the Court found that the 2001 DA was not misleading or deceptive. Justice Brereton considered that lodging a DA is not a representation that the applicant will in fact undertake the development in question if consent is granted. It conveys no commitment on the part of the applicant to proceed with the development if consent is granted; an applicant is entitled to amend or withdraw the application, or even submit a new DA for a different development. The DA could merely be a way to "test the water". Even if consent was granted, there is no obligation to implement the consent.

In any event, this DA was only seeking consent as to the scope of the proposal, and for general ground rules (eg land use and building envelopes) to be set down. It was not specifically seeking consent for the location of the thrill rides, which was provided 'for information only'.

However, the Court did find that there were misleading representations made at the 2002 meeting. What was previously included in the DA was now presented to an audience as a statement of what was proposed for the park. It was a positive statement that children's rides would be located in the northern part of the site. The Court found that this was only "half the truth" and that the circumstances gave rise to "a reasonable expectation that the whole truth would be told". The developer's silence as to its proposal to put adult thrill rides in the northern part of the site was found to be misleading.

The second element that had to be demonstrated to satisfy s52 of the *Trade Practices Act* (Cth) 1974, was that the misleading conduct was "in trade or commerce". The Court explained this to mean that "the corporation's conduct be towards persons, whether or not consumers, with whom the corporation has or may have dealings of a trading or commercial character, and that the conduct be in the course of the corporation carrying on its trading or commercial activities."

So, where there is a potential or actual trading or commercial dealing or transaction between the corporation and the person to whom the conduct is directed, this is likely to be considered in 'trade or commerce'.

The Court found that neither the lodging the DA, nor the 2002 meeting were actions in trade or commerce and therefore s52 of the Trade Practices Act did not apply.

This case brings up two important implications for anyone seeking to challenge a DA for being misleading or deceptive:

- The lodgement of a development application, and public meetings where a developer explains a proposal (even where it is found to be misleading) is not conduct "in trade and commerce" and is therefore not capable of being misleading and deceptive under the Trade Practices Act (Cth) 1974.
- The Courts have considered that lodging a development application is not a representation by a developer that it will undertake the development in accordance with that DA.

Although this judgment was in the NSW Supreme Court which is not binding upon the WA Supreme Court, we expect that this decision will be considered closely and most likely followed in WA as it applies Commonwealth legislation. The outcome is likely to be different, however, for misleading conduct offences under other statutes which do not have the "in trade and commerce" qualification, for example r. 9 of the Town Planning and Development (Subdivision) Regulations 2006 makes it an offence to give false or misleading information in relation to a subdivision application.

SAT applies the precautionary principle to subdivision

WA Development Pty Ltd and Western Australian Planning Commission [2008] WASAT 260

Kelly Dawson, EDO volunteer,
Kristy Robinson, Outreach Solicitor

In November last year the State Administrative Tribunal (SAT) handed down a decision in which it emphasised the relevance of considering the principles of ecologically sustainable development and, in particular, the precautionary principle, in planning considerations.

The case involved an application by WA Developments Pty Ltd to subdivide a lot at Picton East into two lots. The application made to the Western Australian Planning Commission (WAPC) to enable the site to be used for motor racing and industrial purposes.

The central boundary of the proposed subdivision traversed a small wetland area containing the largest known population of the Tall Donkey Orchid, *Diuris drummondii*, a plant which is:

- declared rare flora under the *Wildlife Conservation Act 1950* (WA);
- classified by the Department of Environment and Conservation (DEC) as 'vulnerable'; and
- listed as 'vulnerable' under the section 179 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

The WAPC granted subdivision approval, subject to four conditions, including one requested by DEC that required "the central boundary be realigned to ensure that all Declared Rare Flora populations are located within one lot" (Condition 1).

The SAT found that to be validly imposed a condition must be for a planning purpose and not for any ulterior purpose; fairly and reasonably relate to the proposed development or subdivision; and not be so unreasonable that no reasonable planning authority could have imposed it.

The SAT concluded that Condition 1 was clearly for a planning purpose and not for any ulterior purpose because its planning purpose was to avoid or minimise the impact of the subdivision on the environment.

It also found that the condition fairly and reasonably related to the subdivision, because the subdivision would pass directly through the area containing the Tall Donkey Orchid and could involve construction of a fence and clearing of a firebreak along the boundary.

In finding that the condition was reasonable, the SAT confirmed that sustainability or ecological sustainability is now recognised as an important objective of urban and regional planning.

The SAT concluded that the precautionary principle applied in this case, as the proposed subdivision, and its location, posed a threat of serious or irreversible environmental damage and there was scientific uncertainty as to the environmental damage posed by the threat.

Condition 1 was seen to embody a precautionary measure because it mitigated the anticipated threat of environmental damage, was proportionate to the threat, and cost-effective.

NT proposes recycling refund

Divvya Doss, EDO volunteer

The Northern Territory Government recently announced a plan to adopt a recycling refund proposal, modelled on the 30-year-old South Australian container deposit legislation whereby cans, bottles and cartons attract a 10c refund. The proposal aims to improve recycling efforts and reduce litter, which the South Australian experience has shown to be successful.

The Territory government has said it will adopt the program by 2011, subject to the scheme being "financially viable, legally sound [and able to] deliver in both urban and remote centres".

A reference group will investigate the criteria and report back to government in July. The group is chaired by Environment Minister Alison Anderson, and includes several other ministers and MPs.

We hope this positive move will be followed by other states, including Western Australia.

Carbon bill

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ERUs or RMUs) to meet their obligations under the scheme (with one unit being surrendered for each tonne of $CO_{2\text{-}e}$ emitted. There is an initial price cap of $40 on AEUs, which increases by 7.5% per year until 2015, when the price cap will be phased out. Considering that CERs are currently trading at around $20, and that entities can use an unlimited number of CERs to meet their commitments, the cost of compliance is not expected to be much above $20 per tonne of carbon.

The Bill also establishes the Australian Climate Change Regulatory Authority, which will administer the CPRS and is given extensive monitoring and enforcement powers. If a liable entity fails to surrender sufficient eligible emissions units to meet its obligations, it will be required to pay a monetary penalty and will be required to 'make good' the shortfall in the following compliance year.

For further information on the proposed CPRS and for copies of the exposure draft legislation see www.climatechange.gov.au/emissionstrading/legislation/index.html

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We would like to take this opportunity to thank all the members who have renewed and sent donations in the past month.

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