EDO

edonews

Vol 16 No 5
December 2010

Newsletter of the Environmental Defender's Office WA (inc)

EDO litigation update

Challenge to proposed clearing on James Price Point

Josie Walker, Principal Solicitor

Joseph Roe, Law Boss for the Northern Tradition, has brought two legal challenges in the Supreme Court of Western Australia, to stop the government and Woodside from clearing native vegetation on the site of the proposed gas hub site at James Price Point. The EDO is acting for Mr Roe in both cases, with assistance from barristers Matthew Howard SC and Henry Jackson.

Incredibly, the government has approved the clearing of more than 30ha of native vegetation in connection with this project, even though the environmental assessment report for this site has not yet been published.

Under traditional law Mr Roe is entitled to speak for the Country where it is proposed to carry out the clearing. Mr Roe says in relation to the clearing proposal: "If the Country is not properly looked after it will affect me and my family, because I have a duty to look after it. It will affect the way in which I and other initiated men can 'sing' the Country. It will also affect the connection that the traditional owners of the land have with the Country."

Both cases will be an important test of the powers of the Department of Environment and Conservation to grant clearing permits related to a project which is under assessment by the EPA.

The first case challenges a permit granted by DEC to Woodside in July 2010 to clear 25ha of native vegetation at James Price Point. The clearing is proposed in areas of good quality, highly biodiverse native vegetation.

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James Price Point TysonA_flickr

Reforms to environmental impact assessment process

David Carroll, EDO volunteer

On 26 November 2010, substantial changes were made to the Environmental Impact Assessment (EIA) process in Western Australia. These changes were instituted by proclamation of the substantive sections of the *Approvals and Related Reforms (No.1) (Environment) Act 2010* (WA) (Approvals Act) and the gazettal of the Environmental Protection Authority's (EPA's) *Environmental Impact Assessment Administrative Procedures 2010* (2010 Administrative Procedures). This article will describe the key features of the changes brought about by these instruments and provide an analysis of those changes.

Approvals legislation

The Approvals Act was created to amend the *Environmental Protection Act 1986* (WA) (EP Act), and does so in several ways: primarily by removing the right to appeal the EPA's decision on the level of assessment that is to be applied to a proposal, the right to appeal a decision by the EPA that a referred proposal is a derived proposal, and the right to appeal a decision by the EPA on the scope and content of an assessment of a planning scheme.

The right to appeal the EPA's decision not to assess a referred proposal generally remains, except where a decision not to assess is accompanied by a recommendation that the proposal be managed under the native vegetation clearing provisions of the EP Act. Further amendments specify that decision-making authorities may now make a decision in relation to proposed implementation works of a proposal under assessment where those works are consented to by the EPA as being minor or preliminary.

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Changes to federal FOI procedure increase transparency

Claudia Maw, paralegal

As part of its 2007 election policies, the incoming Rudd Labour government announced its plans to reform the *Freedom of Information Act 1982* (the FOI Act) to promote a pro-disclosure culture across the Federal Government and to build a stronger foundation for administrative transparency. This ambition was finally realised on 1 November 2010, when major amendments to both the Act and the *Freedom of Information (Charges) Regulations 1982* (the FOI Regulations) came into force, following the passage through Parliament of the *Freedom of Information Amendment (Reform) Act 2010* (the Amendment Act) and the *Freedom of Information (Fees and Charges) Amendment Regulations 2010* (No.1) (the Amendment Regulations). This article looks at the main changes to the FOI application process from 1 November 2010.

Reduction of fees & charges

The Amendment Act introduced major changes to the way in which application fees and processing charges are levied under the FOI Act. One of the major changes to the FOI process is the abolition of the previous $30 fee for initial applications under s 15 of the FOI Act and the $40 fee for internal review, thus opening up the FOI process to a wider section of the population.

Changes have been made to the processing charges levied for seeking out and obtaining copies of requested documents; in particular, the first five hours of processing time is now free, with supplemental processing time being charged at $20 per hour. The amended FOI Act also creates incentives for the Minister or agency to process the FOI application in good time, as there is now a provision that if a Minister or agency fails to meet a statutory timeframe for processing an FOI request, no charges will apply.

Improved access to documents

In addition to the amendments to the fees and charges associated with the FOI process, the Amendment Act also introduced significant changes to the categories of exempt documents under the FOI Act. In particular, the amended FOI Act now prescribes a single public interest test, weighted in favour of disclosure, which applies to many of the existing exemption categories. These categories, now called 'conditional exemptions', include the exemptions for deliberative process, agency operations, inter-governmental relations, personal privacy and business information. Access to documents that might previously have been exempt under these categories is now only exempt if access would, on balance, be prejudicial to the public interest. In a further attempt to increase the number of documents available to the public under the FOI process, the FOI Act now includes guidance on those factors that should be considered in favour of disclosure – including the promotion of public debate, the promotion of effective oversight of public expenditure, and the consideration of the objects of the FOI Act – and guidance on those factors that must not be considered in favour of non-disclosure, which include embarrassment to the government or potential loss of confidence in government officials.

Creation of the Office of the Australian Information Commissioner

In addition to the amendments brought about by the Amendment Act and the Amendment Regulations, the Federal legislature also passed the Australian Information Commissioner Act 2010 (the AIC Act) in May this year. The AIC Act establishes the Office of the Information Commissioner (the OAIC), which brings together in one agency the functions of information management and independent oversight of privacy protection and FOI. The OIAC – which comprises the Information Commissioner, the Privacy Commissioner and the FOI Commissioner – has three main functions:

- strategic functions relating to information management in the Australian Government
- ensuring proper handling of personal information in accordance with the Privacy Act 1988 and other legislation
- protecting the public's right of access to documents under the FOI Act.

The FOI Commissioner is responsible for managing the FOI functions of the work of the OAIC. In particular, the FOI Commissioner promotes awareness of the Act, oversees the new information publication scheme, which assists agencies to proactively publish information for public use, and provides guidance, assistance and training on FOI matters. The FOI Commissioner also has powers to undertake merits reviews of FOI decisions by agencies, and to investigate complaints from applicants about the administration of FOI applications.

It is hoped that these broad changes to the Commonwealth FOI process will allow greater access to government and administrative information, and will encourage greater transparency amongst government departments and agencies at the Federal level.

Editor's note: *Members who wish to make FOI applications to the Commonwealth Environment department should be aware that the new official title for the Commonwealth Environment department is the Department of Sustainability, Environment, Water, Population and Communities.*

Craig Chappelle

EDO in the community – environmental law workshops

Jessica delivers a talk at July's Peel environmental law workshop

Jessica Smith, Outreach solicitor

The EDO has recently been out in the community, providing free legal education and legal advice as part of its environmental law workshops in rural, regional and remote locations.

In July this year, EDO Principal Solicitor Josie Walker and EDO Outreach Solicitor Jessica Smith travelled to Bunbury to provide a free environmental law workshop. Josie and Jessica presented on environmental impact assessment under State and federal laws, with a focus on opportunities for community involvement. Dan Barker from the Bunbury Community Legal Centre also presented on laws relating to environmental protesting. The workshop was hosted by the South West Environment Centre and held at the Bunbury library.

In November, the EDO, together with WWF-Australia, held an environmental law workshop in the Peel region. EDO Outreach Solicitor Jessica Smith presented on environmental impact assessment under State and federal laws, while Katherine Howard, Policy Officer for the Southwest Australia Ecoregion from WWF-Australia, presented on how to write good submissions. The workshop was hosted by the Peel Preservation Group and held at the Tuckey Room in the City of Mandurah's premises.

At both the Bunbury and Mandurah workshops, the EDO solicitors provided free individual legal advice on public interest environmental law issues prior to the presentations. Both workshops were well-attended, with lots of questions and discussion from participants. It is encouraging to see such enthusiasm for protecting the environment from members of the community.

Our thanks go to the South West Environment Centre and the Peel Preservation Group for ensuring that each of the workshops ran smoothly, and for providing wonderful catering. Thanks also to Dan Barker from the Bunbury Community Legal Centre and to Katherine Howard from WWF-Australia for their excellent presentations and assistance. Finally, thanks to the Bunbury library and the City of Mandurah for allowing us to use their venues.

The EDO holds environmental law workshops in rural, regional and remote locations several times each year. If you are interested in having an EDO workshop in your area on a matter of public interest environmental law, please contact us on (08) 9221 3030 or at edowa@edowa.org.au ■

EDO volunteers 2010

The EDO wishes to thank the following volunteers for contributing their time and enthusiasm to support the work of the EDO in 2010:

Renee Asher
Josephine Barron
Madison Hershey
Edward Fearis
Chloe Henderson
Moshe Phillips
Sally Carlin
Monika Kryger
May Low
David Carroll
Lisa Kastropil
Lisa Harris
Rohini Thomas
Clarence Paul

The *Renewable Energy (Electricity) Amendment Bill 2010*

May Low, EDO volunteer

On 24 June 2010, the Commonwealth Parliament passed the *Renewable Energy (Electricity) Amendment Bill 2010* (the Bill). The main goal of the Bill is to encourage investment in both large-scale and small-scale renewable energy technologies. The government aims to transform Australia's electricity sector into a low pollution model, whereby 20% of Australia's electricity will be generated from renewable sources by 2020.

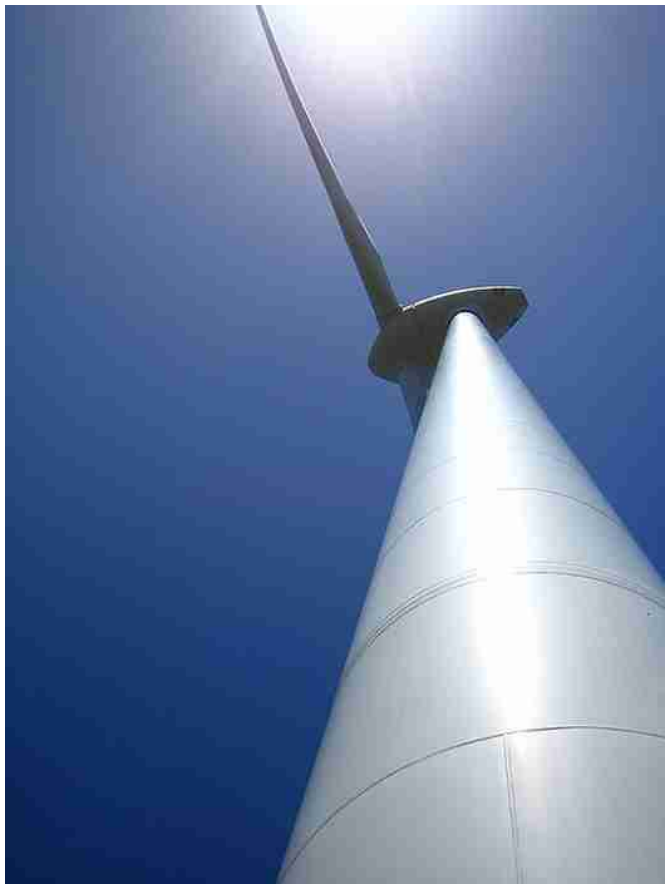
Renewable Energy Targets

Beginning on 1 January 2011, the Renewable Energy Target (the RET) will be divided into the Large-Scale Renewable Energy Target (LRET) and the Small-Scale Renewable Energy Scheme (SRES). This division provides separate targets for differently-scaled technologies, and is designed to prevent the dilution of the Renewable Energy Certificate (REC) market for large-scale technologies such as power stations, by small-scale technologies such as domestic solar panels and water heaters. The goal is to stabilise the price of the RECs and to increase investment in large-scale renewable energy projects. Where there was previously one class of REC, the division results in the creation of two new categories of certificates – large-scale generation certificates (LGCs) and small-scale technology certificates (STCs). The current Register of RECs will be split accordingly into the Register of Large-Scale Generation Certificates and the Register of Small-Scale Technology Certificates.

The process of REC creation for large-scale technologies remains unchanged; for example, an eligible entity must be an accredited power station using solar, wind, biomass, or geothermal technology to produce energy. The new SRES encourages small operations and individuals to invest in eligible solar water heaters, air source heat pumps, and small-scale solar photovoltaic panels, wind and hydro systems. By generating certain units of renewable energy through these small-scale technologies, owners create STCs which are exchangeable for a financial benefit via a registered agent. Alternatively, the STCs can be created and stored in the REC Registry, where they can be purchased by liable agents via the STC Clearing House at a current fixed price of $40 per certificate.

The Australian government believes that the system can incrementally generate at least 45,000 Gigawatt hours (GWh) of renewable energy – the equivalent of approximately 45 million RECs – by 2020, with 41,000 GWh through the LRET and the remainder through the SRES. As an incentive for households to invest in small-scale technologies, there is no cap on the number of STCs produced. The LRET will, however, be reduced yearly by 4,000 GWh to account for legislated annual targets and the support mechanism for small-scale technologies.

Many suppliers have expressed concern that an uncapped SRES will cause the demand for solar and photovoltaic panels to skyrocket, due to the financial gain under the STCs, and cause prices to drop. There is also fear that with a surge in the number of STCs the price may also dip to a level that disincentivises small-scale technologies.



A wind turbine. Amy Dianna_flickr

With encouragement from the government, a global trend towards green energy, and the initial $40 price tag on STCs, it is unlikely that the typical household will be discouraged from turning to solar energy even as the price of STCs drops later on. There is also discussion of giving the Office of the Renewable Energy Regulator (ORER) the authority to adjust the Solar Credits multiplier, which will help alleviate the pressure of market forces on the price of solar and photovoltaic panels.

Large-scale technology project companies are rejoicing at the division of the RET because it gives them confidence to invest in large-scale renewable energy projects. A macro view suggests that such projects will help to stimulate regional investment and provide greater employment opportunities in the renewable energy technology sector. The amendments also clarify the obligations of electricity retailers and large energy users, which should further encourage them to pursue more sustainable methods of generating energy.

Surrender of RECs

Liable entities are wholesale purchasers of electricity who must buy RECs and then surrender them to the Regulator, to show that they have complied with their individual targets under the LRET or SRES. Individual targets are set in proportion to the entity's share of the national wholesale electricity market and the total LRT for that year. The ORER has the authority to announce the Renewable Power Percentage each year to provide businesses with an indication of the number of RECs that they are likely to have to surrender.

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Indian Minister favours conservation over mining application

David Carroll, EDO volunteer

Given our state's heavy dependence on the resource industries, Western Australians are acutely aware of the difficulty of balancing environmental protection and conservation goals with the need for economic growth. However, the tension between these competing priorities is even stronger in developing countries, where the decision to undertake major resource projects is not just a matter of economic growth but often a necessary precondition to modernisation.

In this context it is encouraging to see that the Indian government is prepared to prioritise environmental considerations over financial reward in its decision-making processes. In August of this year a proposed forest clearing of 660 hectares of land on the Niyamgiri Hills, in the eastern state of Orissa, was rejected by the Indian Ministry of Environment and Forests (MEF), thus preventing a significant bauxite mine from commencing operations. In his reasons, the Minister listed three broad factors that had influenced his decision: violations of the *Environment (Protection) Act 1986* (India) (the EPA); violations of the *Forest (Conservation) Act 1980* (India) (the FCA); and violations of the rights of tribal groups.

Violations of the EPA

The Minister found that the proponent, Vedanta Alumina Ltd, had commenced construction of a massive expansion project without environmental clearance approval under the EPA. This transgression of the relevant legal requirements was compounded by evidence that in an application for environmental clearing earlier in the project, the proponent had misled the MEF as to the location of protected forest relative to the project site.

Local tribal groups challenged these earlier clearance approvals before the National Environment Appellate Authority on the grounds that the relevant full Environmental Impact Assessment was not made available to the public, and was different to the Assessment submitted to the MEF. The matter was reserved for judgment when the Minister made his decision.

The Minister also found that 11 of the 14 bauxite mines that would have supplied the proposed refinery had not been granted mining licenses, and only one of the 14 had obtained a clearing permit.

Violations of the FCA

The Minister found that the proponent had engaged in wilful and repeated violations of the FCA, specifically by denying local villagers access to their lands, and by illegally constructing roads and enclosures.

More generally, the Minister found that the impact of the proposed clearing on surrounding ecology and biodiversity compared with the estimated amount of bauxite ore to be extracted was so disproportionate as to have a significant influence on the decision to reject the application. The proposed clearing area would have destroyed more than seven square kilometres of wildlife habitat that had previously been earmarked to form part of the Niyamgiri Wildlife Sanctuary, threatening local fauna including deer and elephants. Further, the stripping of the hillside would have drastically altered the region's water supply, and severely disrupted the local ecological system.

Violations of the rights of tribal groups

The Minister found that the project proponents had acted with blatant disregard for the rights of local tribal groups, as established in the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006* (India). Specifically, the proponent's failure to adhere to and implement specific provisions of the legislation for the protection of culture, livelihood and rights was condemned.

The Minister rejected the proposed clearing despite the Indian Supreme Court's 2008 decision to approve the project. In doing so, the Minister asserted the role of the MEF as an independent government department, bound to apply its own decision-making policies and to consider all the relevant facts in deciding whether to approve a clearing application. In the course of its investigations, the MEF found compelling and significant evidence of illegal behaviour on the part of the proponent – evidence that had not been put to the Supreme Court in 2008. The MEF's decision emphasises the importance of maintaining an independent and diligent government agency as an effective enforcer of environmental protection laws. ■

James Price Pt clearing challenged

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Woodside claims it needs clear the land in order to drill boreholes to test subsurface conditions and groundwater availability for the proposed LNG gas hub.

In August 2010, Mr Roe lodged an appeal to the Minister for Environment against DEC's decision to grant the clearing permit on legal and environmental grounds. On 7 December 2010, the Minister for Environment, John Day, dismissed the appeal and confirmed DEC's decision.

The EDO will argue that the permit was granted illegally because section 51F of the *Environmental Protection Act 1986* prohibits the grant of a permit which is related to a project under assessment by the EPA.

The second case challenges a permit granted by DEC to Main Roads in October 2010 to clear a 4m wide, 18km long 'trace-line' along the route of the proposed access road between the existing Cape Leveque road and James Price Point. The EDO will argue that grant of this permit was also prohibited because of the pending assessment of the Kimberley Hub proposal.

In addition, it will be alleged that the Main Roads permit is invalid because DEC should have known that Mr Roe had an interest in the permit application and did not notify him of the application by Main Roads. In fact, Mr Roe did not find out about this application until more than a month after the Main Roads permit was granted.

Both cases were listed for hearing at the Supreme Court of Western Australia on 31 January 2011. ■

New film raises concerns about Australia's coal seam gas industry

Lisa Kastropil, EDO volunteer

The release of the award-winning documentary *Gasland* into Australian cinemas in November sparked a national debate. *Gasland* reveals how the Bush administration's deregulation of environmental laws in 2005 led to a rapid expansion of shale gas drilling across America. In turn this led to widespread pollution of water supplies, allegedly by a drilling process know as hydraulic fracturing (fracking), in which a mixture of water and chemicals known as 'fracking fluid' is pumped into a well at high volumes, to fracture rocks surrounding coal seam gas (CSG) deposits and allowing gas to be extracted more easily. However, it also raises concerns that chemicals in the fracking fluid will contaminate local water tables and artesian wells.

CSG in Australia

Australia's federal and state governments place the expansion of the CSG/Liquefied Natural Gas (LNG) industry high on the political agenda. It is viewed as an important export opportunity which will provide thousands of jobs and emphasise the benefit of a cleaner energy source. The natural gas industries in Australia and America are very different, and *Gasland*'s relevance to the Australian landscape is questionable. However, the film's message of caution, transparency and regulation highlights the need for such a new industry to take a precautionary approach – particularly in Australia, which is becoming increasingly reliant on artesian water supplies.

Conservation groups and rural communities have raised concerns about CSG having potentially significant impacts on local water supplies and ecosystems, and there is evidence that the concerns are well-founded. In October, samples taken from eight CSG exploration wells forming part of the Australia Pacific Liquefied Natural Gas (APLNG) project in Queensland were found to contain traces of contaminants such as benzene, toluene, ethylbenzene and xylene (though the project owners were later cleared of contaminating groundwater.)

Regulatory response

To manage potentially significant impacts associated with CSG, states will need to carefully regulate the industry, and particularly the chemicals used in fracking. In Queensland, where CSG accounts for nearly 90% of the state's natural gas production, regulatory and legislative changes have been implemented to minimise the potential harm to the State's water supplies.

The *South-East Queensland Water (Distribution and Retail Restructuring) and Other Legislation Amendment Act 2010* (Qld) has amended various parts of the *Environmental Protection Act 1994* (Qld) (EP Act) to regulate CSG water – the water used in fracking, and resultant waste-water. The amendments require all applications for CSG activities to be accompanied by an environmental management plan.

The *Natural Resources and Other Legislation Amendment Bill 2010* (Qld) (the Natural Resources Bill) proposes amendments to the EP Act that will address concerns about the environmental and social impacts of fracking, seek to restrict the fluids that can be used in fracking, and prohibit the use of certain restricted fluids. The Bill also seeks to impose a responsibility on proponents to alert the administering authority if their activities impact on, or threaten the water quality of an aquifer.

The *Water and Other Legislation Amendment Bill 2010* (Qld) (the Water Bill) seeks to manage the impacts of underground water extraction from petroleum and CSG activities, and establish an overall management regime in the *Water Act 2000* (Qld) by setting trigger thresholds for obligations to make reparation for impacts to water bores. The Water Bill also proposes to expand the role of the Queensland Water Commission, and addresses the safety impacts that CSG activities could have on drinking water by amending the *Water Supply (Safety and Rehabilitation) Act 2008* (Qld).

In addition to actual and proposed amendments, the Queensland Department of Environment and Resource Management has introduced an adaptive CSG Water Management Policy, which includes the preparation of Environmental Management and CSG Water Management plans.

Future approval concerns

CSG producers in Queensland will need to acknowledge potential CSG impacts, and proceed with caution. They must appropriately and responsibly implement management plans and restrictions, as other states are likely to base their CSG water management systems on the Queensland model.

A CSG drillrig in New York State, USA. Helen Slottje_flickr

Record compensation in environmental class action

Case Note: *Ellen Smith v Inco Limited* (2010) ONSC 3790

David Carroll, EDO volunteer

In a judgment handed down in July, Ontario (Canada) Superior Court Justice JR Henderson ordered the mining company Vale (formerly Inco Limited) to pay $36m in damages for discharge of nickel into residential properties neighbouring its former refinery in the town of Port Colborne.

Owners of approximately 7000 properties brought the class action against Inco, alleging that the discharge of nickel particles from the refinery's smokestacks and a corresponding increase of nickel levels in surrounding soil led to devaluation of their properties. Inco was found liable under the doctrine in *Rylands v Fletcher* (1866) Law Reports, 1 Exchequer Cases 265, which holds a person strictly responsible for damage caused by the escape of something likely to do mischief from their land, when that land is being put to a non-natural use. Justice Henderson found that the nickel particles were not dangerous *per se*, but that the escape of the particles from Inco's land had the potential to cause damage.

Critically, the Court rejected Inco's submission that operating their nickel refinery in compliance with all environmental and zoning regulations amounted to natural use of the land. Justice Henderson distinguished natural use of land from reasonable use of land, and held that in a *Rylands* claim, the reasonable use of land for a lawful commercial purpose is not necessarily a defence. The Court also rejected Inco's submission that for the *Rylands* doctrine to apply, the escape giving rise to potential liability must occur in a single isolated instance. In arriving at this conclusion Justice Henderson examined the underlying principle of the doctrine as assigning responsibility to a person who creates an abnormal risk of harm to his or her neighbour, and held that there was no logical reason to restrict the doctrine in the manner suggested.

Inco was also found liable for private nuisance causing material injury to property, as the Plaintiff was able to prove that the nickel accumulated on class members' property to the extent that their property value was diminished.

In the landmark case of *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 the High Court of Australia effectively eliminated the rule of *Rylands* as a separate cause of action in Australia, deciding that the ordinary rules of negligence, and sometimes nuisance and trespass, would provide sufficient remedies for situations where *Rylands* would apply. The fact that Inco was found liable under both the *Rylands* doctrine and private nuisance lends some credence to this position. However, the decision in *Smith* is groundbreaking not only for the unprecedented quantum of damages awarded in an environmental class action, but also because it contemplates that certain abnormally dangerous activities covered by the *Rylands* doctrine must attract a strict standard of liability that supplants that of both negligence and nuisance.

By recognising that compliance with approvals and licences may not be enough to protect against a claim in tort, the Smith decision represents a potentially significant development for industries that engage in lawful emission of harmful substances, and represents a persuasive comparative authority that may assist in the development of environmental class actions in Australia. ■

High Court reopens property rights debate

Madison Hershey, EDO volunteer,
Josie Walker, EDO Principal Solicitor

Earlier this year NSW farmer Peter Spencer attracted the media spotlight when he climbed up a wind monitoring tower on his property near Cooma, NSW, and declared a hunger strike until the government improved compensation for native vegetation clearing restrictions on privately-owned land. Mr Spencer said he had been unable to earn a living as a result of native vegetation clearing restrictions on his property. He argued that the restrictions, which were implemented under the NSW *Native Vegetation Act 2003*, amounted to acquisition of his land, including his carbon sequestration rights, for which the government should have compensated him.

Mr Spencer argued that the Commonwealth entered into a deal with NSW to implement the laws, so it could avoid its obligations under section 51 of the Constitution to compensate farmers "on just terms" for the acquisition of property rights. On 1 September 2010 the High Court unanimously declared that Mr Spencer's case raised important constitutional law questions and that the Federal Court had been wrong to throw it out on the basis that Mr Spencer had "no reasonable prospect" of success. The High Court granted Mr Spencer special leave to appeal and quashed the Federal Court's March 2009 decision.

While Mr Spencer has won the battle to have his case heard, he has yet to convince the Federal Court that he should get compensation. Constitutional lawyer Professor George Williams has said that the High Court's decision "doesn't signify much, except that they feel it is in the public interest to hear the case" – a statement which reflects the widely held view that Mr Spencer still has an uphill battle.

It would be surprising if the High Court were to find that laws prohibiting broadscale clearing of native vegetation amounted to an acquisition of property, given the many government regulations which affect economic activities on land. For example, planning laws may prohibit certain types of landuse within a given planning zone, but this has never been treated as an acquisition of private property rights. However, the trend towards legal recognition of carbon as a property right in many jurisdictions makes this case more complex.

This case provides an opportunity for the High Court to clarify the states' powers to legislate for environmental protection, especially in areas that impact on Australia's greenhouse gas emission targets. ■

Env impacts assessment reforms

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EPA administrative procedures

Under s122 of the EP Act, the EPA may draw up and subsequently amend a set of administrative procedures that establish the principles and practices of EIA under the EP Act. The EPA's 2010 Administrative Procedures update and replace the 2002 Procedures, and provide additional information regarding the administration of the EIA provisions of the EP Act.

The 2010 Administrative Procedures have been specifically revised to support the amendments brought about by the Approvals Act. The main changes are the introduction of a seven day online public comment period for all development proposals referred to the EPA, and the move from the previous five levels of EIA to only two new levels: Assessment on Proponent Information (API) and Public Environmental Review (PER). Assessment at the level of API occurs where the environmental acceptability or unacceptability of a proposal is readily apparent based on the information provided at the referral stage. It involves no public review prior to the publication of the EPA Report. This level of assessment is further divided into categories A and B, which largely reflect the old Assessment on Referral Information/Proposal Unlikely to be Environmentally Acceptable distinction.

The PER level of assessment under the 2010 Administrative Procedures effectively combines two levels of assessment under the 2002 Administrative Procedures, namely the Public Environmental Review and Environmental Review and Management Programme levels of assessment. Assessment at the level of PER generally involves a public review period of 4-12 weeks.

Other changes in the 2010 Administrative Procedures include:

- the introduction of an option for the EPA to prepare the Environmental Scoping Document in simpler proposals where the environmental factors are easily understood;
- a procedure whereby the EPA will provide a proponent with a summary of the submission received in any public review period; and
- the encouragement of confidential consultation between the EPA, the proponent and key decision-makers in relation to draft recommended conditions prior to the finalisation of the EPA Report.

Analysis of the changes

The EDO has been consistently opposed to the removal of appeal rights under the EIA provisions of the EP Act. The combined effect of the Approvals Act and the EPA's 2010 Administrative Procedures is the replacement of a statutory right to appeal the level of EIA assessment to be applied to a proposal with a seven-day public comment period prior to a decision on the level of assessment being made. Taken on its own, the creation of this seven-day comment period is laudable, as it provides a valuable avenue for interested third parties to express their views on a referred proposal before the EPA decides whether or not to assess and if so, at what level. However, this system of pre-emptive consultation is not a sufficient substitute for a formal right of appeal enshrined in statute. The 2010 Administrative Procedures do not create any legally binding obligation upon the EPA to accept the public comments provided during the seven day period, and provide third parties with no guarantee that their views will be properly considered before the EPA moves to the reporting stage of EIA. The removal of existing appeal rights as effected by the proclamation of the Approvals Act was not a necessary condition for the introduction of the public comment system introduced by the 2010 Administrative Procedures, and the net result appears to be a reduction in the level of public participation in the EIA process.

As discussed above, the 2010 Administrative Procedures have streamlined the five previous levels of assessment into two new levels. What is clear is that despite the change in assessment levels, the decision as to which level of assessment is applied to a proposal is still as important as it was before the introduction of the 2010 Administrative Procedures. In this respect, the changes contained in the new Procedures in no way compensate for removal of appeal rights brought about by the Approvals Act.

The Uniform Legislation and Statutes Review Committee of the Legislative Council, in reviewing the Approvals Bill, expressed concerns that the practical effect of removing appeal rights in the earlier stages of EIA assessment may be to force legal challenges against EPA assessment decisions into the remaining review avenues available under the EP Act – for example, appeals against the EPA's report and recommendations, submissions for Ministerial intervention and judicial review. Ultimately the Review Committee found that this change may lead to greater uncertainty, lengthier approval time and more cost.

Earlier this year, the EDO reported that the Minister for Environment had argued that as the new Administrative Procedures allow for more up-front public consultation, the right to appeal against the level of assessment for a proposal would become unnecessary (EDO Newsletter Vol 16 No 3, July 2010). Unfortunately, this prediction has not been borne out, as the seven day consultation period introduced by the 2010 Administrative Procedures is not a sufficient substitute for an appeal right under statute. The combined proclamation of the Approval Act and gazettal of the 2010 Administrative Procedures has not resulted in the removal of duplicative and unnecessary rights of appeal in the EP Act, but rather has weakened the system of public participation in EIA in Western Australia. ■

The EDO WA (Inc) thanks all its members for their support in 2010, and wishes everyone a prosperous 2011.

Book review

Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects

Eds: Tim Bonyhady and Andrew Macintosh

Edward Fearis, EDO volunteer

The effectiveness of environmental assessment of major projects in Australia has a dubious track record. Major developments have the potential to generate significant economic benefits, and are thus often lent weighty political capital. Yet, under relevant state, territory and Commonwealth legislation, environmental impact assessment (EIA) processes should still have a fundamental role to play. *Mills, Mines and Other Controversies* questions whether this theory is adequately reflected in practice.

Each of the book's nine main chapters is written by a different author, scrutinising a particular major project in each of the Australian jurisdictions. The contributors are all environmental law experts, including EDO solicitors from the ACT and NSW and EDOWA convenor Dr Hannes Schoombee. The case studies are headline politico-environmental controversies, such as Gunns' pulp mill in the Tamar Valley, Queensland's Traveston Dam, the dredging of Port Phillip Bay, expansion of the McArthur River mine and, closer to home, the Gorgon Gas development. Each chapter explains the legal framework, recounts the political and legal narrative of the particular project and its assessment process – including the economic and scientific background – and measures the framework's effectiveness in the context of that project.

The author's conclude that EIA processes are too easily circumvented or manipulated to serve political ends. For example, projects in which a lot of political capital has been expended are often regarded as a *fait accompli*, with the EIA processes then made superfluous or sometimes totally bypassed, through the enactment of special authorising legislation. The reality of this process of 'assessment' was effectively articulated by Douglas J of the United States Supreme Court in *United States v SCRAP* 412 U.S. 669 (1973), who commented on "the apparent tendency among federal agencies ... to decide first what they want to do, and then prepare an impact statement as an apologia for what they have done. That puts the cart before the horse."

The book is primarily intended for readers with some legal training, as there is a focus on specific legislative provisions and substantive principles of law, and the contributors occasionally rely on detailed case analyses to forward their theses. There is limited discussion on how the regimes could be improved (an exception being the chapter on Queensland and the Traveston Dam), and this is one area where the book could be restructured. Overall, however, the book is a very interesting and informative analysis and critique of the EIA processes in each jurisdiction, and skilfully uses major project case studies as catalysts to explore these issues.

The final chapter details recent developments in a few of the profiled projects, especially since the 2007 change of federal government and a positive account of how, despite heavy state political pressure, Minister Garrett refused to approve the Traveston Dam due to its severe environmental impacts when weighed against dubious economic benefits. In the wake of the latest election and the appointment of a new Environment Minister, it will be interesting to see whether Garrett's decision is viewed as the beginning of a more reasonable EIA process, or merely a blip in the system's gradual deterioration.

Mills, Mines and Other Controversies is available in Australia from Federation Press. ■

Renewable Energy (Electricity) Amendment Bill 2010

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Prior to the passage of the Bill, liable entities could voluntarily surrender RECs for any reason at any time. Though this option is still available, there is now a mandatory surrender of RECs under the relevant enforceable undertaking sections of the Amendment throughout the year. STCs are surrendered quarterly, while LGCs are surrendered annually, to demonstrate liability compliance against the requirements of the RET. RECs can also be surrendered for non-compliance throughout the year.

Authority of the Minister

The Amendment gives the Minister for Climate Change, Energy Efficiency and Water (the Minister) authority to seek independent advice on matters relating to STCs – including whether the $40 price for STCs remains appropriate over time – and power to reduce the price by way of legislative instrument. The Minister may also prescribe that an emerging renewable energy technology is to be included in the RET scheme by legislative instrument. Granting the Minister and the ORER heightened authority to manage the REC program ensures that people with specialised industry know-how and renewable technologies are making the decisions. A proper review process should ensure that abuse of this authority does not occur.

Civil and criminal penalties

Additionally, there are new penalties to give teeth to the Act, with improper creation of certificates now carrying civil and criminal penalties. Providing false or misleading documents to a person who could create certificates for a small generation unit or solar water heater in reliance on that information carries a civil penalty. Executive officers of a body corporate may be liable if they knew of contraventions of civil penalty provisions, and were in a position to influence that conduct and failed to take all reasonable steps to prevent the contravention.

This amendment is crucial, and demonstrates the government's commitment to supporting the renewable energy sector. Without the compliance and enforcement mechanisms, the entire renewable energy legistation would have been merely for show. It now remains to be seen how dedicated the ORER will be in utilising these new tools. ■