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Review

Special cases: planning and the law in Australia

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The recent order gazetted by the New South Wales Planning Minister, Tony Kelly, to remove the iconic Barangaroo site from the need to remediate under New South Wales planning laws was, by definition, an extraordinary exercise of power. Unfortunately, governments around Australia — with New South Wales a serial offender — have all too frequently resorted to extraordinary or "special" measures to resolve planning problems, a tradition that dates back at least to the early 1980s. This article examines the types of circumstances where special legislation or orders have been used in planning matters and the issues around the use of such measures.

At the outset, however, there is a need to define the issue at hand. Special legislation is a loose term of art that refers to the phenomenon whereby laws are introduced to either anticipate or retrospectively validate matters before the court. Such laws are introduced to deal with "exceptions to the rule" — that is, parliament does not wish to alter the law generally but only to do so in respect of a particular set of circumstances, place or person.

In this respect, special legislation or orders need to be distinguished from laws of general application. Two examples elucidate the distinction. In the *Barangaroo* case,[1] the order exempts the Barangaroo development — and it alone — from the state planning policy on remediation, making it the only polluted development site in New South Wales where a remediation plan is not required for planning approval. By contrast, an equally controversial case — the *Stealth* case[2] — is an example of where the government uses its legislative powers to prescribe a different policy response to a perceived problem. In this case, Lloyd J, Land and Environment Court, stated "wilderness is sacrosanct" in holding that the filming of a Hollywood movie in a wilderness area in the Blue Mountains in New South Wales was unlawful. In the aftermath, the New South Wales government passed the Filming Approval Act 2004, clarifying the circumstances in which filming could be done in national parks and wilderness areas. In short, the Barangaroo order was site-specific; whereas the laws responding to the *Stealth* case applied to all.[3]

The use of special legislation is not restricted to planning matters. In fact, it has perhaps been most controversially used in relation to individuals or criminal matters. In the mid-1990s, in Australia, community protection laws were introduced to keep specific individuals in preventive detention — namely, Gary David and Gregory Kable.[4] In the United States, "Terri's Law" was passed in 2003, allowing Governor John Ellis Bush to intervene to, among other things, reinsert the feeding tube for Terri Schiavo, who had suffered extensive brain damage and had been in a persistent vegetative state for 15 years.[5] These laws have been rare but also the subject of vigorous constitutional challenge.

By way of contrast, special legislation in the planning and environmental field has been used all too frequently, with Australia's planning history being replete with examples: Roxby Downs (South Australia), the McArthur River (Northern Territory), the Xstrata Mine (Queensland), and Parramatta Stadium (New South Wales).

Special legislation may take many forms, and it is to this that we now turn.

Models of special legislation

There are arguably four, overlapping, types of special legislation that have been used in planning and environmental matters.

a) Laws that oust prospective legal challenges

This model has been a common response from government. In 1997, the New South Wales government hit a purple patch, passing special legislation on no less than three occasions for the Port Kembla Copper Smelter, the Bengalla Mine and the Kooragang Coal Terminal.

Helen Hamilton challenged the New South Wales government's approval of an application by a Japanese consortium to reopen a copper smelter at Port Kembla.[6] Shortly before the case commenced, the New South

Wales government introduced the Port Kembla Development (Special Provisions) Act 1997, which extinguished all rights of appeal against the grant of consent. Consent was subsequently given.

In the Bengalla Mine matter, the Minister made a State Environmental Planning Policy (SEPP) approving a mine proposal. When this was challenged, the government passed special legislation validating both the SEPP and the approval.[7]

Finally, the Kooragang Coal Terminal (Special Provisions) Act 1997 was introduced to head-off an appeal to the Court of Appeal. The Land and Environment Court had previously upheld the validity of a development consent in connection with the expansion of the terminal in Newcastle. The consent had been challenged by Robert Bell in *Robert Duncan Bell v Minister For Urban Affairs & Planning & Port Waratah Coal Service Ltd* in relation to the adequacy of the Environmental Impact Statement (EIS) regarding noise and vibration issues.[8] The court found that the omissions in the EIS were not sufficiently serious to invalidate it, and therefore the development consent was valid. The purpose of the Act was to remove any doubt about the validity of the Minister's consent for development.

Most recently, the New South Wales government passed the Threatened Species Conservation Amendment (Special Provisions) Act *2008* to pre-empt a planned legal challenge of a declaration of biocertification to the Growth Centres State Environmental Planning Policy (Growth Centres SEPP).[9] The legislation conferred biodiversity certification on the area within the Growth Centres SEPP covered by the original order. This meant that the Growth Centres SEPP would have the benefit of biodiversity certification, even if the original biodiversity order was declared invalid by a court. The proceedings were discontinued.

b) Laws that oust community challenge at or after a hearing

This type of special legislation differs only from the previous in timing. However, it more dramatically brings into relief the loss of legal rights vis-à-vis those enjoyed by the community under general planning laws.

When the Walsh Bay Development (Special Provisions) Act 1999 was read for a second time in parliament, the matter had already commenced and the parties adjourned the matter, as proceeding would have been futile.

In *Barangaroo*, the order came after a six-day hearing before the Land and Environment Court and just days before a judgment was expected, sparking outrage from the group involved in the case, and consternation from the wider community. Justice Biscoe of the Land and Environment Court stated that the group, Australians for Sustainable Development, would have won on the remediation ground but for the special order and conditionally awarded indemnity costs against the Minister due to its lateness.[10]

c) Laws that retrospectively validate or overturn decisions of the court

The proposal to build a Waste Transfer Terminal in Clyde, New South Wales, caused a storm of controversy for some years. A community challenge to the proposal commenced, with the media variously describing it as David versus Goliath battle and analogous to *The Castle*.[11] The Land and Environment Court found that the proposal was prohibited and that the development consent issued for the project was unlawful.[12] Shortly after the judgment, however, the Clyde Waste Transfer Terminal (Special Provisions Act) 2003, the Act overturned the judge's decision validating the project and disallowing further appeals.[13]

The New South Wales parliament passed legislation to retrospectively validate all water sharing plans made under the Water Management Act 2000, including plans that may have been invalidly made.[14] As a result, the Nature Conservation Council, represented by the Environmental Defenders Office (EDO), was forced to abandon its High Court challenge to the Gwydir Water Sharing Plan.

(d) Laws that anticipate and oust community opposition

From time to time, governments pass laws to head off potential challenges to specific proposals. This is arguably a further type of special legislation. For example, the Snowy Mountains Cloud Seeding Trial Act 2004 contained a privative clause ousting the application of all other laws (and, for the removal of doubt, also specifically mentioned the key environmental statutes).[15]

The rationale for special legislation

Governments have used a variety of means to justify intervening in planning matters. A common thread in these cases is the need for *certainty*. The threat that the proponent will go elsewhere and that the economic benefits of the proposal, and associated jobs, will be lost.[16] The Honourable Morris Iemma, then Minister for Public Works and Services, said about Walsh Bay:

> When projects of State significance are put at risk by unnecessary and endless delay and frustration by those who would pursue an ideological campaign, particularly when they place on the public record their determination to pursue every possible avenue simply to defeat a proposal, then the Government must act, as governments have acted in the past.[17]

Of course, certainty for the exempted project does not equate to certainty before the law. The *Barangaroo* case is a rare example of what other developers now know — by dint of the judicial statements made in the case — that, all things being equal, they would have to abide by the relevant remediation requirements. Most often, however, the legislation cuts off judicial analysis and clarification, leaving other developments profoundly uncertain as to the state of the law.

Another approach is to *trivialise* the judicial proceedings, as demonstrated by the *McArthur Mine* case in the Northern Territory. The proposed expansion of the mine envisaged a change from an underground mine to an open cut mine. The authorisation of this was successfully challenged under judicial review proceedings in the case of *Lansen v Northern Territory Minister for Mines and Energy* (*McArthur Mine* case).[18] In introducing the McArthur River Project Amendment (Ratification of Mining Authorities) Bill 2007 (NT), the Northern Territory Minister for Mines and Energy described the Bill as addressing a "technicality".[19] A similar line was argued by the Minister regarding the upgrading and expansion of the copper smelter and refinery at Port Kembla and the recent *Barangaroo* case.[20]

Governments have also sought to focus on the *merits* of the proposal notwithstanding a successful challenge by third parties. This is amply demonstrated in the *Clyde Waste Transfer* case.[21] In this matter, the applicants were successful on both merit grounds before the Land and Environment Court. While acknowledging this, the Minister for Infrastructure and Planning, the Honourable Craig Knowles, expounded upon the evident worth of the project and the expert testimony of the proponents that it should go ahead.[22]

A final thread is the invocation of the *public interest*. In the Second Reading Speech regarding the Penola Pulp Mill Authorisation Bill 2007, the South Australian Minister for Forests, the Hon R J McEwen, stated:

> This government does not use special legislation for significant projects in a rash or unconsidered manner. It will not shy away from doing so, however, when it believes the best interests of the State and, in this case, communities of the South East will be furthered.[23]

Comment

Special legislation is, by its nature, only used in extraordinary circumstances. In effect, by introducing such laws the government is asking Parliament to be the development consent authority over particular parcels of land in New South Wales.

It is telling that government has frequently used these powers to in relation to major developments, precisely the circumstances one would expect to be appropriately supervised by the community and the courts. As Professor Tim Bonyhady[24] has commented:

> … these Acts have deprived the public of their general rights to comment, object and appeal. The result has been a two-tier system in which public participation has been allowed where it mattered least and excluded where it mattered most.[25]

Special legislation arises largely as a result of liberal standing provisions that recognise the right of the community to enforce breaches of planning law.[26] In New South Wales, planning legislation for a long time recognised that public participation is central to the effective operation of those laws.

By both anticipating opposition and ousting it, as well as retrospectively validating unlawful developments, governments of various hues around Australia have shown scant regard for community rights that would otherwise operate under laws of general application.

The public has a right to know what they are fighting against and to shape their actions accordingly. Likewise, the community has a reasonable expectation that developers will carry out their activities in accordance with the law. Special legislation or orders offend these principles and peoples' sense of fair play.

Unlike in the criminal area, special legislation for planning and environmental issues has generally been immune from constitutional challenge. In particular, courts have held that there is no constitutional prohibition on the alteration of rights that may be in issue in judicial proceedings.[27] This was not an unlawful interference with judicial power as argued in the Queensland case of HA *Bacharach v Queensland*[28] (the High Court confined this to the criminal law sphere).

More generally, it is worth noting that some jurisdictions have fast-track or discretionary regimes in place that obviate the need for special legislation in any event. For example, in New South Wales the passage of Pt 3A of the Environmental Planning and Assessment Act 1979 — and, more particularly, provisions relating to critical infrastructure projects — was motivated at least partly by a desire to dispense with the need for special legislation. In fact, the gazetted order in the *Barangaroo* case highlights the ease with which general planning laws can be circumvented since the advent of Pt 3A. As odious as it is, special legislation at least attracts parliamentary scrutiny. Similar discretionary approaches are evident in jurisdictions such as Victoria and Queensland.

Conclusion

It is ironic that the primary means of redress available to people who wish to see that the community has its day in court and that the rule of law is upheld lies in the area of lobbying and politics. In this respect, it would seem we have not learnt from history. In New South Wales, where governments have most frequently used special

legislation and orders, planning law was overhauled over 30 years ago due in large part to a desire to take the heat out of a politicised system characterised by unfairness and uncertainty, and riddled with corruption and green bans. The use of such measures to protect particular projects does little to restore peoples' faith in the planning system and the rule of law.

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Footnotes

1. *Australians for Sustainable Development Inc v Minister for Planning* [2011] NSWLEC 33; BC201101207 (*Barangaroo* case).
2. *Blue Mountains Conservation Society Inc v Director-General of National Parks and Wildlife* (2004) 133 LGERA 406; [2004] NSWLEC 196; BC200402240 (*Stealth* case).
3. Sometimes the distinction may be hard to make out, in law and on the ground. In the *Stealth* case, the community certainly saw the Filming Approval Act 2004 as an attempt to reintroduce filming in the Grose Wilderness Area in the Blue Mountains. Likewise, in 2005, the New South Wales parliament passed legislation to retrospectively validate all water sharing plans made under the Water Management Act 2000, including plans that may have been invalidly made: see Water Management Act 2000, Sch 9, Pt 5, cl 71. As a result of this latter amendment, the Nature Conservation Council, represented by the EDO, was forced to abandon its High Court challenge to the Gwydir Water Sharing Plan.
4. The Community Protection Act 1990 (Vic) applied to Gary David; the Community Protection Act 1994 (NSW) applied to Gregory Kable.
5. See Florida Public Law, ch 2003-418, known as "Terri's Law".
6. *Hamilton v Minister for Urban Affairs and Planning* (1996) NSW LEC # 40307 of 1996, 29 May 1997. See also E Arcioni and G Mitchell,"Environmental justice in Australia: when the RATS became IRATE" (2005) 14(3) *Environmental Politics* 363–379.
7. See the case of *Rosemount Estates Pty Ltd v Cleland* (1995) 86 LGERA 1; BC9504613, and the State Environmental Planning (Permissible Mining) Act 1996.
8. *Bell v Minister for Urban Affairs & Planning & Port Waratah Coal Service Ltd* (1997) 95 LGERA 86; BC9707593.
9. This SEPP was gazetted in July 2006 and establishes the broad framework for development of the Growth Centres over the next 20–30 years.
10. *Australians for Sustainable Development Inc v Minister for Planning* [2011] NSWLEC 33; BC201101207 at [193] and [306]–[308]. The respondents have subsequently applied for different costs orders.
11. See "Backyard legal team that laid a multinational to waste" (2003) *SMH*; and "Judge hails laymen's work in waste case", ABC News, 2003, accessed on 17 April 2011, www.abc.net.au.
12. *Drake v Minister for Planning* [2003] NSWLEC 270; BC200306999.
13. See Clyde Waste Transfer Terminal (Special Provisions Act) 2003, ss 4, 6, 7 and 9.
14. Water Management Act 2000, Sch 9, Pt 5, cl 71.
15. Snowy Mountains Cloud Seeding Trial Act 2004, s 7.
16. For example, the Walsh Bay Development (Special Provisions) Act 1999 and the Penola Pulp Mill Authorisation Bill 2007 (SA).
17. Walsh Bay Development (Special Provisions) Bill, Second Reading Speech, 13 May, 1999, p 4.
18. *Lansen v Northern Territory Minister for Mines and Energy* (2007) 20 NTLR 6; [2007] NTSC 28; BC200702989.
19. McArthur River Project Amendment (Ratification of Mining Authorities) Bill 2007, Mr Natt, Second Reading Speech, June 4, 2007, p 1, at www.austlii.edu.au.
20. For Port Kembla, see Port Kembla Development (Special Provisions) Bill, Second Reading Speech, 29 May, 1997, Mr C Knowles, p 1, at www.parliament.nsw.gov.au. For Barangaroo, see "Keneally says Barangaroo law exemption just a 'clarification'" (2011) *SMH*; and "NSW Premier Kristina Keneally exempts Barangaroo site from environmental laws" (2011) *Daily Telegraph*.
21. *Drake & Ors; Auburn Council v Minister for Planning & Anor; Collex Pty Ltd* [2003] NSWLEC 270.
22. Clyde Waste Transfer Terminal (Special Provisions) Bill, Second Reading Speech, 5 December, 2003, p 1.
23. Penola Pulp Mill Authorisation Bill, Second Reading Speech, 30 May, 2007, The Hon R J McEwen, p 3.
24. ANU Centre for Climate Law and Policy, Director.
25. T Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law*, 1993, Allen & Unwin, pp 25–26.
26. See for example, Environmental Planning and Assessment Act 1979 (NSW), s 123; Threatened Species Conservation Act 1995 (NSW), s 147; Nature Conservation Act 1992 (QLD), s 173B.
27. *Australian Building Construction Employees & Builders Labourers Federation v Commonwealth* (1986) 161 CLR 88 at 96–97; 66 ALR 363; BC8601451.
28. *Bacharach v Queensland* (1998) 198 CLR 547.

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Achieving sustainability in the Murray-Darling Basin

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The public confusion surrounding the Water Act 2007 (Cth) and what it is intended to achieve has been an unfortunate element of the current reform process in the Murray-Darling Basin (MDB). Constant media and political comment around the "correct" interpretation of the Water Act has created considerable distraction from the task at hand — to develop a Murray-Darling Basin Plan that creates a framework for sustainable water management in the Basin. In particular, questions around whether the Water Act prioritises environmental considerations or requires an "equal weighting" of economic, social and environmental factors have dominated the debate in recent months.

The new Senate inquiry into the provisions of the Water Act has focused on these questions directly. While it too is a distraction from the main game, there is hope that an open inquiry will foster a greater shared understanding of what the Water Act is intended to achieve.

This paper puts in context the Water Act, its history and development, and explains why the Water Act is fit for its key purpose — achieving sustainable water management in the Murray-Darling Basin.

The development of the Water Act

National Water Initiative

The National Water Initiative (NWI) was a COAG agreement signed by all Australian governments between 2004 and 2006. The purpose of the NWI was to address decades of over-extraction by state governments and provide a more consistent and modern water management framework across all states. It is premised on the realisation that the sustainability of the Basin for environmental and human uses requires over-allocation to be addressed as a priority and a foundational issue.

Clause 5 of the NWI states that:

> The Parties agree to implement this National Water Initiative (NWI) in recognition of the continuing national imperative to increase the productivity and efficiency of Australia's water use, the need to service rural and urban communities, and to ensure the health of river and groundwater systems by establishing clear pathways to return all systems to environmentally sustainable levels of extraction. The objective of the Parties in implementing this Agreement is to provide greater certainty for investment and the environment, and underpin the capacity of Australia's water management regimes to deal with change responsively and fairly.

A clear objective of the NWI is to "complete the return of all currently over-allocated or overused systems to environmentally sustainable levels of extraction".[2]

National Plan for Water Security

The National Plan for Water Security (NPWS) was announced by the Howard Government in 2007 as the policy basis for the Water Act.[3] The NPWS was aimed at "improving water efficiency and addressing over-allocation of water in rural Australia".[4] It contained a 10-point plan including "addressing once and for all water over-allocation in the Murray-Darling Basin" and setting "a sustainable cap on surface and groundwater use in the Murray-Darling Basin".[5]

In the detail of the NPWS, it states that:

> The Plan substantially addresses over-allocation in the MDB with the objective of putting the MDB back on a sustainable track, significantly improving the health of the rivers and wetlands of the Basin, and bringing substantial benefits to irrigators and the community alike.[6]

The reason for the NPWS and the resulting Water Act was the Commonwealth's determination that it needed to exercise leadership in water management, due to the failure of the previous consensus-based model of water management between the Commonwealth and the states.[7] The NPWS committed to the development of a Commonwealth water act that would achieve these objectives and a number of the others laid out by the NPWS.

The Water Bill was introduced into Parliament in 2007. A Senate inquiry found that despite some reservations from stakeholders about various specific aspects of the Bill there was "broad support for the Bill" among all stakeholders[8] (apart from the state of Victoria, although its support was secured the following year).

The Water Act

Essentially, the Water Act tries to operationalise sustainable natural resource management — a feat not achieved in any of the state water acts in Australia. The

Water Act does not remove water management from the "Basin states", rather it sets a Basin-wide framework, and in particular a series of caps on water extraction across the Basin, which the states must then implement through their own water management systems. Thus each state will continue to be responsible for day-to-day water management in the Basin, provided that its management meets the Basin-wide requirements set out in the Basin Plan.

The key purpose of the Water Act is to return extraction in the Basin to long-term sustainable levels to support both the ecosystems that depend on the Basin and the continued productive use of the Basin.[9] It does this by requiring the development and implementation of a Basin Plan that gives effect to relevant international agreements, sets sustainable extraction levels based on best available science, and optimises economic, social and environmental outcomes.[10] Other purposes of the Basin Plan are to improve water security for all users and for water to reach its most productive use through efficient water trading.[11] The Water Act is based on a recognition that long-term social and economic values in the Basin depend on environmental health.

The Water Act contains mandatory contents that must be included in a Basin Plan such as an identification of the risks to Basin water resources, strategies to manage or address those risks, rules for trading Basin water resources, an environmental watering plan, a water quality and salinity plan, and long-term average sustainable diversion limits (SDLs).[12]

The SDLs are described as the maximum long-term average annual average quantities of water that can be taken on a sustainable basis from the Basin or a part of the Basin.[13] Importantly, the SDLs encompass both natural ecosystems that rely on the Basin as well as the functions that support continued productive and recreational use of the Basin. For example, SDLs must be set at a level that would mitigate pollution, limit algal blooms, remove excess salinity from the Basin and reduce acidity.[14] These are all functions that are critical for continued social and economic use of the Basin. Thus the SDLs (and the Water Act as a whole) recognise the importance of social and economic uses of the Basin and also that these activities depend on continued ecosystem health.

Giving effect to international agreements is not a mandatory content of the Plan, rather it is a basis on which the Plan must be made — that is, the Plan must be made in such a way that it will give effect to the relevant international agreements, so far as they are relevant to the use and management of the Basin.[15] The Plan must also be based on the best available science and socio-economic analysis, and provide for the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes (as well as a range of other considerations).[16]

The Murray-Darling Basin Authority (MDBA) must achieve the requirements of the Water Act and the Basin Plan, including the SDLs, in such a way as to optimise economic, social and environmental factors.[17] That is, when setting SDLs or determining other elements of the Plan, the MDBA must do it in a way that achieves the best economic, social and environmental outcomes.

Does the Water Act prioritise environmental considerations?

As can be seen from the previous description, the view put forward by some stakeholders that the Water Act focuses solely on "environmental" considerations with social and economic considerations sidelined is incorrect. The Water Act acknowledges that human use of the Basin should continue and that the Basin Plan should seek to optimise those uses. Similarly the view that the SDLs are purely focused on keeping ecosystems functioning for their own sake is also incorrect (although ecosystem health for that purpose is certainly an important part of the SDLs). The SDLs are partly aimed at halting the degradation of Basin-dependent ecosystems, and partly aimed at maintaining the system in a state where it can continue to support economic uses. Economic considerations are part of the decision of what the SDLs should be, because the question of what is sustainable includes consideration of how much water is needed to maintain the productive base of the resource.

To achieve its key purpose of returning extraction in the Basin to long-term sustainable levels to support continued ecosystem health and productive use, the Water Act requires decisions about the preferred long-term extraction levels to be based on a scientific understanding. Therefore, the requirement to set SDLs does not prioritise "environmental" considerations, it prioritises a scientific assessment of what is sustainable extraction. Much of the confusion around the Water Act comes from a misunderstanding of this concept.

As noted above, the Basin Plan must be made in such a way that it will give effect to the relevant international agreements, so far as they are relevant to the use and management of the Basin.[18] It also includes a provision that gives some direction as to what is needed to implement those agreements.[19] For example, Basin Plan must be prepared "having regard to the fact that the use of the Basin water resources has had, and is likely to have, significant adverse impacts on the conservation and sustainable use of biodiversity" and the fact that the Basin therefore requires special measures to manage their use to conserve biodiversity.[20] In this way, the Water Act recognises and attempts to operationalise our already existing obligations under international law.

The content of the Water Act has been driven by the established policy objectives contained in the NWI and NPWS. The inclusion of operative provisions in relation to international environmental agreements is consistent with the NWI, which recognises the importance of protecting water-dependent ecosystems.[21] There is nothing new in these obligations and the Federal and state governments have an obligation to comply with them regardless of their inclusion in the Water Act. These obligations are an important recognition of Australia's biodiversity and natural ecosystems and it is appropriate that they be included in legislation that manages a natural resource upon which so many natural ecosystems rely.

The criticism that the Water Act is purely about "environmental" considerations also ignore the considerable social and economic considerations in the Water Act. The Water Act gives significant priority to economic and social considerations through the development of the sustainable diversion limit,[22] the requirement to optimise social, economic and environmental factors,[23] and the lead-in time for implementation of the SDLs through transitional water resource plans,[24] interim water resource plans[25] and the option of a temporary diversion limit for up to five years.[26]

What would it mean to give "equal weighting" to economic, social and environmental factors?

One of the key strengths of the Water Act is its decision-making framework for sustainable resource use. Water planning under state water legislation over two decades of water reform has failed to achieve sustainable water extraction. The Water Act uses the learnings from state schemes to go beyond those systems to achieve sustainable water extraction. The current push by some stakeholders to include a requirement in legislation that a decision-maker give "equal weighting" to environmental, social and economic considerations would mean very little operationally. It would not assist the MDBA and the government in achieving the purpose of the Water Act, which is to achieve long-term sustainable extraction levels in the Basin. Although this formulation has superficial appeal, it would be is problematic and counterproductive in practice.

As shown above, the Water Act provides a much more integrated method for incorporating relevant economic, social and environmental factors to reach the desired outcome than simply directing decision-makers to balance undefined economic, social and environmental considerations. How could a decision-maker give equal weighting to incommensurable factors? Any attempt to equally balance will always in fact be a value judgement by the decision-maker.

There is clearly a view taken by some stakeholders that an "equal weighting" of factors would result in more of the Basin water resources remaining for farming and irrigation purposes. However, in light of the extent of over-extraction in the Basin and the evidence gathered to date regarding what is sustainable, it would also be open to a decision-maker to determine that if environmental factors were considered equally with economic factors it would justify a much greater reduction in consumptive use than the 3000–4000GL reduction currently proposed by the MDBA in the Guide to the Basin Plan. This is particularly the case when the Authority's analysis found that 3000GL is the minimum level that could be considered sustainable, and that 7600GL is what is actually required to reach genuine sustainability in the Basin.

While some stakeholders may hope that an "equal balance" would allow for a greater compromise on the reduction of entitlements, in practice the level of uncertainty in the development of the Basin Plan would be increased, as would the risk of not achieving the aim of long-term sustainable extraction in the Basin, which would only lead to ongoing uncertainty and reduced security for entitlement holders.

Conclusion

In 2007, all states, both major Federal political parties and the vast majority of stakeholders, agreed that urgent action was required to ensure a sustainable future for the Basin. The Water Act was passed unanimously under a Liberal Government in 2007, and again supported unanimously under a Labor Government when the Water Act was amended in 2008. Despite recent rains, urgent action is still required to end decades of over-extraction in the Basin. Although the Water Act (like all legislation) has its flaws, it provides the best opportunity in decades to achieve sustainable extraction for the whole Basin. The question now is what the Murray-Darling Basin Authority, the Water Minister and ultimately the Parliament will choose to do with that opportunity.

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Footnotes

1. Nicola Rivers is the Law Reform Director at the Environment Defenders Office (Vic) Ltd (EDO). The EDO has been involved in the development of the Water Act and the Murray-Darling Basin Plan since 2007.
2. National Water Initiative (NWI), cl 23(iv).
3. The National Plan for Water Security (NPWS) can be accessed at www.nalwt.gov.au.

4. NPWS, p 1.
5. NPWS, p 1.
6. NPWS, p 3.
7. See for example, statements in the NPWS.
8. Senate Standing Committee on Environment, Telecommunications, Information Technology and the Arts, *Report on the Water Bill 2007 [Provisions] and Water (Consequential Amendments) Bill 2007 [Provisions]*, 2007, p 27, www.aph.gov.au.
9. This can be seen through the objects of the Water Act, the provisions of the Water Act, and the purpose and basis of the Basin Plan.
10. Water Act 2007, ss 20, 21, 22.
11. Water Act 2007, s 23.
12. Water Act 2007, s 22.
13. Water Act 2007, s 22 item 6.
14. Some of these are specifically set out in notes to the definitions at s 4.
15. Water Act 2007, s 21. The relevant international agreements are the biodiversity convention, the Ramsar convention, the desertification convention, the migratory species conventions, the climate change convention and any other prescribed agreement (none prescribed).
16. Water Act 2007 ss 20 and 21.
17. See for example, Water Act 2007, ss 3 and 20.
18. Water Act 2007, s 21.
19. Water Act 2007, s 21.
20. Water Act 2007, s 21.
21. For example, cl 25(ii), 25(v), 26(i), 41–45.
22. Water Act 2007, ss 4 and 23.
23. Water Act 2007, ss 3 and 20.
24. Water Act 2007, s 241.
25. Water Act 2007, s 242.
26. Water Act 2007, ss 22 and 24.

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Force majeure clauses — a timely topic

***Professor J W Carter, Kate Cahill** and **Kate Draper** FREEHILLS*

The recent extreme weather events experienced in Queensland were not only a test of strength for many, but also a test of the force majeure provisions in a number of legal agreements. Force majeure, by direct translation, means "a superior force" and is used in many commercial agreements to address the way in which circumstances occurring beyond the control of a party affect each of their contractual obligations. There is no common law concept of force majeure in Australia, and therefore what amounts to force majeure needs to be sufficiently defined in order to eliminate the risk of being void for uncertainty.

The concept

The concept of force majeure applies only if there is a force majeure clause in the contract, and accordingly, the scope and effect of the clause is entirely a matter of agreement. There are very few Australian cases on force majeure clauses.

There is no magic in the expression "force majeure". Clauses which achieve the same results go by other names such as a clause dealing with "prohibition of export", "restraints of princes" or "perils of the sea". From a commercial perspective, the concern is with clauses which either provide defences against breach or which define the scope of a party's performance duty.[1]

Expressed in general terms, force majeure clauses seek to fill a gap in the law. Because the duty to perform many contractual obligations is strict in nature, impossibility of performance is not a general defence.[2] The parties may consider the common law doctrine of frustration — but not only is this doctrine narrow in application, its effect is to terminate the contract, thereby automatically discharging the parties from their obligations to perform. Unlike frustration, a force majeure clause allows the contract to continue by establishing a process under which one party will inform the other that it is of the view that a force majeure event has occurred and that it intends to commence the agreed process for managing the event.

In essence, force majeure clauses provide excuses for what might otherwise be a breach of contract, without going so far as to bring the contract to an end.

Clause components

There are no hard and fast rules in drafting a force majeure clause, however, each clause generally has three components:

a) a definition of what amounts to "force majeure" (or applicable concept);
b) a statement of what steps a party who wishes to rely on force majeure must take; and
c) a statement of the consequences of force majeure.

While component (b) may be considered optional, the other components are essential.

The event

Careful consideration needs to be taken in drafting the definition of force majeure, to ensure that circumstances are clearly and specifically described, and to avoid being disregarded by the courts as unclear. The approach to definition, almost invariably, is to include three elements:

a) a general concept, usually an "event" beyond the reasonable control of the party invoking force majeure;
b) a specific list of events, such as floods, cyclones or earthquakes; and
c) a statement of what impact the evenx must have, such as to "prevent", "hinder" or "delay" performance.

Depending on the drafting of the definition, it may be that an event amounting to a force majeure may be:

a) a discrete event — for example, the Brisbane River breaking its banks on 12 January 2011;
b) a combination of a number of events — for example, during January parts of Queensland experienced heavy rainfall, overloaded water catchment areas, road closures and power outages; or
c) a single event that culminates over a period of time, such as continuous heavy rainfall.

Whether a party needs to be able to point to a particular event in time to call a force majeure will depend on whether the clause is drafted in a narrow manner, identifying only specific occurrences, or whether it has a broad application and includes any combination of events or events that occur over a long period of time. Parties negotiating a force majeure clause will need to turn their minds to whether the drafting of their clause ultimately enables them to call force majeure in the circumstances they require. All too often, parties reach

for a "standard" force majeure clause without giving thought to the likely circumstances in which it might be used.

It may also be prudent for the definition to exclude particular circumstances to make it clear that certain events (for example, insolvency or industrial action specific to a party and not an industry) will not amount to force majeure under the contract.

On a practical level, a clear definition of what amounts to a force majeure event will also assist the parties in the management of a force majeure event.

It is worth noting that generally the onus of proving that the failure to perform was attributable to an event of force majeure that was beyond a party's control rests on the party calling force majeure.[3]

Steps to be taken

It is common for force majeure clauses to have a notice provision, so that a party is required to actually "call" force majeure. However, unfortunately it is not usual practice to state what impact delay in the giving of notice has, or to indicate whether a failure to provide sufficiently detailed information prevents reliance on the force majeure event. The way force majeure is defined in a contract may be limited to the actual event (for example, "a force majeure includes events such as … flood"), or the definition may also extend to require that such an event has "prevented a party from performing their obligations under the contract". Regardless of the form of drafting used, to sufficiently call a force majeure the party providing the notice must identify the link between the force majeure that has occurred and the effect this has on its contractual obligations. The identification of a force majeure event requires much more than describing in the notice the event that has occurred (for example, flood, excess rain, power failures) — the party giving the notice is required to go a step further to state that because of the event, its contractual obligations are affected and how they are affected. This is necessary for the other party to be able to identify exactly what impact the event is likely to have on the contractual relationship. Failure to identify this link leaves the party who is not affected by the force majeure uncertain as to how the contract will continue to operate from that point forward. Depending on how the clause is drafted, it may also invalidate the force majeure notice.

In deciding whether due compliance with the clause is essential, the first step is to decide whether the steps are promissory in nature. If that is the position then the relevant element of the clause must be construed to determine whether it is a condition, a warranty or an intermediate term.[4] If the requirement is not promissory, it must be determined whether due compliance is a condition precedent to the right to call force majeure. If that is the position then although failure to comply is not a breach of contract, it will deprive the party who wishes to call force majeure of the right to do so. Because force majeure clauses have often been treated as analogous to exclusion clauses, some cases suggest a process of strict interpretation for force majeure clauses.[5]

As already noted, some of the difficulties with the enforcement of force majeure notices arise in the context of timing. It is vital to be prescriptive when drafting a clause in respect of the time by which parties are required to inform the other party of the force majeure event and issue any relevant notices providing such detail. For example, a clause may require parties to give notice "immediately" upon becoming aware of a force majeure event. What amounts to "immediate" is not clear, but it will generally mean the shortest possible time in the circumstances. Given recent events in Queensland, a force majeure event may in fact cause an office to close, an evacuation of one of the contracting parties, or isolation in respect of communication and transport. What will be deemed to be "immediate" will clearly be different depending on the surrounding circumstances. Using clear time stipulations such as "five business days after", or something similar, will assist to avoid such ambiguity.

The drafting of some force majeure clauses may also provide that time is of the essence. Assuming the clause operates unilaterally, the party that is intended to benefit from the clause would seek to ensure that the time to provide notices was stated to be of the essence. However, if the clause were to apply equally to both parties then this drafting may not be desired. Again, providing for compliance to occur within a specified number of days will avoid uncertainty and remove the need to interpret the actions of the party providing the notice in light of the force majeure circumstances.

The impact

The statement of the impact of the clause is relative to the performance obligation to which it applies. In building contracts, where the primary concern is usually delay, the impact of the force majeure clause is usually to permit the contractor to claim an extension of time. In other contexts, the impact may be:

a) to suspend performance; or
b) to excuse non-performance.[6]

The force majeure clause may operate to provide protection to one or all parties. This will be determined by the nature of the contractual relationship and the particular obligations and duties of each party to the contract. Either way, it is necessary for the clause to determine the effect that a force majeure event will have on the way both parties continue to perform their

respective obligations under the contract, or indeed whether they create new obligations, such as the obligation to pay liquidated damages.

It is useful to keep in mind that even if a force majeure clause does not expressly require a party to take reasonable steps to mitigate the impact of the event, or to avoid the event, such a requirement will be implied by law.[7]

Frustration and force majeure

The mere fact that a contract includes a force majeure clause does not oust the doctrine of frustration. Therefore, where an event which is within the scope of a force majeure clause has the impact that the contract is frustrated, the parties are discharged and neither party acting alone can require performance by the other.[8]

However, two points are important. First, in deciding whether the impact of the event is to frustrate the contract, account must be taken of the force majeure clause.[9] Second, the force majeure clause may itself provide for termination for prolonged events of force majeure, usually defined as events lasting for a specified period. A point of negotiation in relation to such clauses is whether any party may terminate the contract or only the non-affected party.

In New South Wales, Victoria and South Australia, the consequences of frustration are also regulated by the frustrated contracts legislation.[10] However, that legislation does not apply where:

a) a contract is merely suspended, or a party is excused, under a force majeure clause or similar provision; or

b) if the force majeure clause provides for cancellation of the contract if the force majeure event lasts for a specified period.

The final word

Too often a practitioner will not turn his or her mind to the particular circumstances of the contract when drafting the force majeure clause and look for a more "off the shelf approach". If the first months of 2011 are anything to go by, the natural disasters of flood, cyclone and earthquake are all possibilities that are too real and can have lasting impacts on contractual relationships if they are not adequately provided for by carefully drafted force majeure clauses.

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Footnotes

1. See generally on force majeure clauses, Donald Robertson "Force Majeure Clauses" (2009) 25 *JCL* 62.
2. There are exceptions, however, for example, in contracts for personal services illness will excuse a party non-performance and performance of the contract may be suspended during illness. See *Robinson v Davison* (1871) LR6Exch 269; 40 LJ Ex 172; 19 WR 1036; [1861–73] All ER Rep 699.
3. See *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Refinery AD (No 2)* [2003] 2 Lloyd's Rep 635 at 638; [2003] 2 All ER (Comm) 640; [2003] EWCA Civ 1031 at [12].
4. See *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 (contrasting conclusions in relation to prohibition of export clause and force majeure clause in sale of goods contract). See, J W Carter "Partial Termination of Contracts" (2008) 24 *JCL* 1.
5. See *SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc (The Azur Gaz)* [2006] 1 Lloyd's Rep 163 at 168; [2006] 2 All ER (Comm) 515; [2005] EWHC 2528 (Comm) at [25] and [28].
6. See for example, *European Bank Ltd v Citibank Ltd* (2004) 60 NSWLR 153; [2004] NSWCA 76; BC200401303 (force majeure clause providing for suspension of obligations under banking arrangements).
7. See *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419.
8. See for example, *Jackson v Union Marine Insurance Co Ltd* (1874) LR10CP 125 ("perils of the seas excepted" clause).
9. In this regard, see for example, *Bangladesh Export Import Co Ltd v Sucden Kerry S A* [1995] 2 Lloyd's Rep 1 at 5, where an inability to import goods was held to not be a frustrating event where there was an obligation to obtain a licence to import and the contract provided that inability to obtain the licence was not a force majeure event. Compare this approach with that applied in *Finch v Sayers* [1976] 2 NSWLR 540, where a provision for payment during illness did not deal with prolonged incapacity of employee.
10. See, J W Carter, *Carter on Contract*, LexisNexis Butterworths, Sydney, §§39–650ff.

Large-scale Renewable Energy Target: A breath of fresh air for windfarms?

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More than one-third of Australia's greenhouse gas emissions are produced by electricity generation. To address this issue, the Australian government implemented the Renewable Energy Target (RET) scheme with a target of 20% of Australia's electricity supply being generated by renewable energy sources by 2020.[1]

Key changes to the scheme came into effect on 1 January 2011. The most significant change was to divide the scheme in two: the Large-scale Renewable Energy Target (LRET) scheme and the Small-scale Renewable Energy scheme.

One catalyst for the changes was to provide greater certainty around the legislative requirements and commercial pricing of large-scale renewable energy projects.

This article focuses on the changes to the LRET scheme in the context of commercial-scale windfarms. Empirical analysis suggests that although it may take some time before the changes have their intended effect, they will facilitate greater investment in commercial-scale windfarms. This in turn will go some way to ensuring the RET is met by 2020.

Background

The RET scheme is a market-based scheme. A legal obligation is placed on "liable entities" to source a percentage of their electricity purchases from renewable energy sources to meet annual targets. "Liable entities" are wholesale electricity purchasers such as retailers (eg, AGL Energy and Origin) and large users of electricity.[2]

Liable entities do this by acquiring renewable energy certificates (RECs) and surrendering them to the Australian government each year. RECs are issued based on the volume of electricity produced using "eligible energy sources". The Renewable Energy (Electricity) Act 2000 (Cth) (the Act) provides an extensive list of eligible energy sources, which include hydro, wind and solar.

The number of RECs that a liable entity must surrender is based on the volume of electricity that it acquires in a given calendar year. Where there is a shortfall in meeting the annual target, the liable entity must pay a penalty (currently between $5000 and $1 million).

Changes to the RET scheme arose due to unforseen rapid expansion of the scheme in 2009, which saw a surge in the creation of RECs. There were concerns that small-scale technologies such as solar panels purchased by households, were flooding the market and devaluing RECs and therefore delaying investment in large-scale renewable energy projects. There were concerns that any delay in such investment would substantially impact on achieving the RET in the long-term.

The LRET scheme

The key components of the LRET scheme are:

- Replacement of RECs with a new type of renewable energy certificate, known as large-scale generation certificates (LGCs), which are created from the generation of electricity by "accredited power stations".
- Accredited power stations are electricity generation systems approved by the Office of the Renewable Energy Regulator (ORER) for the purposes of the Act.
- To be eligible for accreditation, some or all of the power generated by the power station must be generated from an "eligible energy source" such as wind. Other sources are solar and hydro-electric.
- The amount of electricity generated by an accredited power station determines the number of LGCs that are created. Each LGC is equivalent to 1MWh of renewable electricity generated.
- A liable entity is required to surrender LGCs to ORER each year. The number of LGCs to be surrendered is calculated based on a formula set out in the Act,[3] which essentially is a percentage of the total amount of electricity that a liable entity acquires in a year.

Implications for commercial windfarm operations

It is likely that the revamped RET scheme will promote increased investment in commercial windfarms.

The original RET scheme encouraged the development of commercial windfarms, as a windfarm operator

could derive revenue from the sale of wholesale electricity and also from the sale of RECs. However, the high volume of RECs created by the small-end of the market meant that less revenue was generated from the sale of RECs.

As the revamped RET scheme establishes two separate categories of RECs, this creates two markets for RECs: a large-scale and small-scale one. Therefore, if a commercial windfarm registers with ORER as an accredited power station, the windfarm operator will benefit from the sale of LGCs at a higher market price.

The impact of the revamped RET scheme on an individual windfarm will vary depending on whether the windfarm is in the planning or operational stage.

Start-up windfarm projects

A start-up windfarm developer will likely have difficulty raising project finance in the current environment. This is because (depending on the debt-equity ratio) the developer would need to demonstrate to the financier that there will be a stable revenue stream over the life (or a substantial period of the life) of the project to off-set the initial start-up and ongoing operational costs.

This may be difficult to demonstrate because the LGC price is not fixed but dependant on demand and supply and therefore market-variable. To negate this, a developer would typically seek to lock in a purchaser subject to a long-term power purchase agreement (PPA).

That uncertainty as to the market price may also discourage a purchaser from entering into a long-term PPA. Instead, a purchaser may opt to acquire some of his or her electricity and LGCs on the spot market,[4] particularly where supply exceeds demand.

Existing windfarm projects

Similarly, a windfarm operator with an existing PPA at, or approaching the end of its contract term may find itself in a difficult position. This is because the windfarm operator may face difficulty in recontracting on acceptable terms, particularly with regard to price.

In the past, purchasers have been willing to enter into long-term PPAs because of fluctuations in the wholesale electricity price and REC price, preferring to "lock in" a price.

A long-term PPA will typically factor in a price premium (relative to the prevailing spot price). This reflects the commercial benefit for a purchaser in having a stable supply of wholesale electricity and RECs at a set price.

However, given the prevailing low spot prices for wholesale electricity and the excess supply of REC credits, it has become difficult for windfarm operators to recontract at an acceptable price.

Ultimately, the price that the windfarm operator and the purchaser find acceptable will depend on their respective views as to the long-term spot price for LGCs, which is an unknown at the moment.

Going forward

As the new LRET scheme only recently came into effect, it will take some time before the implications, particularly in relation to the market price of LGCs, are known. Consequently, further investment in windfarms may remain static until market trends become more certain.

A statutory review of the RET scheme will take place in 2012 and biannually thereafter.

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Footnotes

1. The Department of Climate Change and Energy Efficiency is responsible for administering the scheme. See generally, www.climatechange.gov.au.
2. Renewable Energy (Electricity) Act 2000 (Cth), ss 31 and 35.
3. Above note 2 at s 38.
4. A spot market is one in which a financial instrument or commodity (such as electricity) is traded at a prevailing market price on the basis of immediate settlement. By comparison, the parties to a long-term PPA will contractually agree on a contact price (or the formula that will be used to determine the contract price) for the term of the contract.

Changes of note to the Environmental Protection Act 1994 (Qld)

Dr Rachel Baird *CLAYTON UTZ*

Two Bills introduced in the latter months of 2010 propose significant amendments to the Environmental Protection Act 1994 (Qld). Although none of these amendments are law yet, it is important to be aware of them for they alter obligations and introduce a new range of penalty orders.

The two instruments are:

- Natural Resources and Other Legislation Amendments (No 2) Act 2010; and
- Environmental Protection and Other Legislation Amendment Bill 2010.

Natural Resources and Other Legislation Amendment (No 2) Act 2010: duty to notify

The Natural Resources and Other Legislation Amendment (No 2) Act 2010 was assented to on 1 December 2010, but (other than Pt 5) it is yet to commence.

Currently under s 320 of the primary Act, there is a "duty to notify" the administering authority (Department of Environment and Resource Management) of environmental harm, unless that harm is authorised by a policy, approval or similar order.

The new Act significantly expands upon, and alters, that duty.

First, a new Div 2 has been created, and s 320 is now a definitions section for the Division.

Section 320A applies the Division to:

(a) a person who while carrying out an activity (the primary activity), becomes aware that an event has happened that causes or threatens serious or material environmental harm because of the person's or someone else's act or omission in carrying out the primary activity or another activity being carried out in association with the primary activity; and

(b) to Ch 5A activities (GHG storage, petroleum activities) when a person carrying out an activity becomes aware the activity has negatively affected or is likely to negatively affect, the water quality of an aquifer and/or the activity has caused the connection of two or more aquifers.

The timeframe for notification of an event has been significantly shortened. The current obligation under s 320 is to notify "as soon as reasonably practicable after becoming aware of the event". The new duty in ss 320B and 320C will require a person "no later than 24 hours after becoming aware of the event and unless the person has a reasonable excuse, [to] give the administering authority written notice of the event, its nature and the circumstances in which it happened".

The new obligations of employees are set out in s 320B. An employee must, no later than 24 hours after becoming aware of the event and unless the person has a reasonable excuse:

(a) notify the employer of the event, its nature and the circumstances in which it happened; or

(b) if the employer can not be contacted — give the administering authority written notice of the event, its nature and the circumstances in which it happened.

Under s 320C(3), there is a duty to give written notice to occupiers and registered owners of affected land or give public notice as soon as reasonably practicable after becoming aware of the event.[1]

Section 320E provides some guidance on how notice can be given to occupiers of land. That section states:

> (1) Without limiting the ways in which a person or employer may give written notice to an occupier of affected land under this division, a person or employer is taken to have given written notice under this division to an occupier of affected land if the notice is:
>
> (a) left with someone who is apparently an adult living or working on the affected land; or
>
> (b) if there is no-one on the affected land or the person has been denied access to the affected land — left on the affected land in a position where it is reasonably likely to come to the occupier's attention; or
>
> (c) posted to the affected land.
>
> (2) Written notice that is posted to, or left at, affected land may be addressed to "The Occupier".

Under s 320F(1), it is a defence for a person or employer to prove that, despite failing to comply with a provision in the division, that person or employer made reasonable efforts to identify the affected land and gave written notice to each registered owner or occupier of the affected land.

Environmental Protection and Other Legislation Amendment Bill 2010: new orders

The Environmental Protection and Other Legislation Amendment Bill 2010 was introduced to the Queensland State Parliament on 24 November 2010. The major change under the Bill is the introduction of new types of court orders for certain general offences.[2]

These new orders are similar in style to those existing under Pt 17 of the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (EPBCA) and New South Wales and Victorian environmental legislation,[3] with the key difference being that under the EPBCA the orders are of an administrative nature.

The proposed new orders under s 502 of the Environment Protection Act 1994 (Qld) will only be available to the court upon sentencing and only in relation to specific sections. If the court finds the defendant has caused environmental harm by contravention of the Act that constitutes an offence or has committed an offence against a particular listed section,[4] then it may make one or more of the following orders:

- a rehabilitation or restoration order;
- a public benefit order;
- an education order;
- a monetary benefit order; and/or
- a notification order.

Rehabilitation and restoration orders are already available under s 502 but the other types of orders are new options in sentencing. The scope of these orders will be defined in a new s 502 of the Environment Protection Act 1994 (Qld). For example, under the new s 520(7), an education order is one "requiring the person against whom it is made to conduct a stated advertising or education campaign to promote compliance with this Act". A public benefit order requires "the person against whom it is made to carry out a stated project to restore or enhance the environment in a public place or for the public benefit". These orders are aimed at requiring offenders to take positive action (which is often time-consuming) to benefit the environment rather than simply paying a fine and moving on.

One other change of note is that, under the existing law, the order for rehabilitation or compensation and/or the payment of compensation, is expressly stated to be in addition to the imposition of a penalty or any other order under the Environment Protection Act 1994 (Qld). Under the new s 502, there is no such requirement. If a person fails to comply with a s 502 order, the Department of Environment and Resource Management (DERM) may take action to carry out work or any other action reasonably necessary to fulfil the requirements of the order. The costs reasonably incurred in doing so are a debt due to DERM.

Implications for practitioners

These recent amendments mean:

- Companies and businesses must review their environmental management procedures to ensure that their systems can accommodate the new requirements to notify no later than 24 hours after becoming aware that an event has happened, which threatens serious or material environmental harm.
- Employers must ensure that employees are aware of their obligations to notify them (or the administering authority) in the event of environmental harm to the environment or negative impacts to aquifers.
- Companies and businesses should be alert to the new range of sentencing options available to the courts, which may impact their work practices much more than the payment of a fine.

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Footnotes

1. Some terms in s 320 are defined. The defined terms are:

   Definitions for Div 2

   In this division—

   affected land means land on which an event has caused or threatens serious or material environmental harm.

   employer see section 320B(1).

   occupier, of affected land, means a person who lives or works on the affected land.

   primary activity see section 320A(1).

   public notice means a notice given in the way, and under the circumstances, prescribed under a regulation.

   registered owner, of ***affected land,*** means—

   (a) the registered owner of the land under the Land Title Act 1994; or

   (b) the lessee of the land under the Land Act 1994.

2. The Bill's other proposed amendments include defining the term "Transitional Environment Program" (TEP) and defining its content, and introducing requirements to keep work diaries for temporary environmentally relevant activity approvals, which are not permitted to operate for more than 28 days, at a single location.

3. See, Protection of the Environment Operations Act 1997 (NSW), s 253A; and the Environmental Protection Act 1970 (Vic) s 67AC.

4. Environment Protection Act 1994 (Qld), ss 426, 426A, 427, 430, 435, 435A and 440ZG.

Australian
Environment
Review

Case note: *Straits Exploration (Australia) Pty Ltd v Kokatha Uwankara Native Title Claimants*

Zsofia Korosy *BAKER & MCKENZIE*

Background

The decision of the Environment, Resources and Development Court of South Australia (ERD Court or the court) in *Straits Exploration (Australia) Pty Ltd v Kokatha Uwankara Native Title Claimants*[1] concerns the first application to the court under s 63S of the Mining Act 1971 (SA) (the Act). It is instructive in its detailed consideration of the factors the court must take into account in determining whether to authorise mining operations under Pt 9B of the Act, and in its discussion of the relationship between the Act and the Native Title Act 1993 (Cth) (the NTA).

The application was brought by two companies: Straits Exploration (Australia) Pty Ltd (Straits) and Kelaray Pty Ltd (Kelaray). The applicants were engaged in a joint venture with Straits as the tenement operator. They sought authorisation from the court to conduct mining operations in the form of exploratory drilling on Lake Torrens near Andamooka Island in South Australia. They held an exploration licence over the area on which they proposed to carry out their operations.[2]

The respondent, the Kokatha Uwankara Native Title Claimants (Kokatha), had a claim before the Federal Court for a determination of native title over an area. The land covered by the exploration licence formed a part of the claimed area. The claim was registered by the National Native Title Tribunal (the Tribunal) on 21 August 2010. The area had been subject to native title claims since 1996.

An exploration authority does not confer a right to carry out mining operations on native title land, unless certain factors apply. Section 63F(2) of the Act provides that the holder of such an authority may acquire the right to carry out such operations through an agreement or determination authorising them, made under Pt 9B. The exploration licence held by the applicants also stipulated that they had no right to carry out operations on native title land within the area of the licence, other than in accordance with Pt 9B. Under s 63S of the Act, if agreement is not reached within a prescribed period, any party to the negotiations, or the Minister, may apply to the court for a determination. It was on this basis that the application came before the court. Under s 63S(2), the court may determine that mining operations may not be conducted on native title land, or that they may be conducted subject to conditions determined by the court.

Unauthorised drilling

Judge Tilmouth gave a significant amount of consideration to the fact that, between October 2007 and February 2008, Straits had undertaken drilling activities without entering into the Pt 9B processes with the Kokatha. At the time, the land was subject to more than one native title claim and a number of arrangements concerning drilling had been entered into with other claimant groups from 2004 onwards. It had been communicated to Straits at various times that separate agreement would need to be sought from the Kokatha, and that Lake Torrens was of particular significance to them. On 20 December 2007, the anthropologist for the Kokatha provided to Straits a report, which stated that none of the four proposed drilling sites could be given heritage clearance because of the high cultural significance of the area to the Kokatha and the damage the drilling would cause. Drilling was not stopped until some two months after Straits had received this report. Judge Tilmouth found that there was no adequate explanation for this delay and was highly critical of the applicants' conduct, calling Straits's behaviour "unacceptable, unforgiveable and unaccountable" (at [257]).

Application of s 63T Criteria

Section 63T of the Act sets out the criteria the court must take into account in making its determination under s 63S. In applying these criteria, the court determined that mining operations could not be conducted on the land. Three elements of the court's reasoning under this section are of particular interest.

The first criterion, under s 63T(1)(a)(i), concerned the effect of the proposed mining operations on native title to the land. In applying this criterion, Tilmouth J considered the interaction of the Act with the NTA. Unlike the process contemplated in the analogous provisions of the NTA, the court does not have jurisdiction to inquire into the nature of given "registered native title rights and interests" or to engage in the process of determining such rights and interests.

There was argument before the court as to the proper extent of the enquiry into the effect on native title. The applicants claimed that the court should look only to those rights recognised through registration with the Tribunal, and should also take into account the effect of any extinguishing acts and the "non-extinguishment principle". The Attorney General for South Australia, intervening, argued that the court could also consider claimed native title rights and interests even if they were not registered, albeit to a lesser extent than those that were registered. The Kokatha supported this view. Judge Tilmouth found that the court could consider claims extending beyond those that had been registered if there was evidence to support them, although these would be given lesser weight than registered claims. This allowed consideration of a claimed right of exclusive possession by the Kokatha, which Tilmouth J considered would, on the basis of the evidence, be open to the Federal Court to find, despite it not having been registered by the Tribunal. Questions of extinguishment of claimed native title rights, or of the application of the non-extinguishment principle under s 238 of the NTA, were also held to be questions for the Federal Court to determine.

The argument under s 63T(1)(a)(i) therefore became one of the potential effect of the exploration on the claimed native title rights. The applicants claimed that the drilling would be of minimal effect. The Kokatha witnesses, meanwhile, considered the areas in the vicinity of the proposed drilling sites as the most important and sacred in their country. Judge Tilmouth found that the impact of the proposed drilling, in the physical and practical sense, would be of more than nuisance value, while the impact in the spiritual sense would be quite dramatic.

Secondly, under s 63T(1)(d), the court must consider the economic, or other, significance to Australia and the state of the proposed operations. Justice Tilmouth distinguished between the impact of the activity proposed in the Pt 9B application, namely the exploratory drilling, and the impact of the potential extractive activity to which that drilling would be the precursor. His Honour considered that the chance of successful mining must colour the investigation, in so far as it affects the nature of the exploration and its potential economic significance to the state and the nation. His Honour considered that the drilling operations themselves would have very little economic significance for the state. His Honour also found that there was inadequate evidence to support the applicants' claim that the initial results of the exploratory activities were very encouraging. As a result, his Honour considered it almost impossible to measure the potential long-term state and national effects of the project, and concluded that the economic, or other, significance to South Australia or the nation was rather slight. Nonetheless, in weighing public interest in the development of mineral resources against the public interest in preserving prospective native title in land under s 63T(1)(e), his Honour considered that the balance was more or less even, but tilted slightly in favour of mining.

Finally, under s 63T(1)(f), the court is to take into account any other matter it considers relevant. It was under this criterion that the court took into account the failure of the applicants to undertake the Pt 9B processes with Kokatha, and Straits' delay in ceasing drilling, despite Straits being on notice of Kokatha opposition. The court also took into account the applicants' misstatements that there were no Aboriginal heritage issues of concern in a series of Declarations of Environmental Factors submitted to the government. His Honour found that "it is difficult to place any confidence in the capacity of the applicants to comply with legal requirements in the future" (at [253]).

Related proceedings

The applicants have filed an appeal against this decision. Under s 30 of the Environment, Resources and Development Court Act 1993 (SA), leave is required to appeal questions of fact — appeals on questions of law lie as of right. In *Straits Exploration (Australia) Pty Ltd v Kokatha Uwankara Native Title Claimants*,[3] the Full Court of the South Australian Supreme Court refused leave to appeal Tilmouth J's findings that the relevant native title parties had clearly and consistently opposed mining activities in the area, or that the proposed mining would be of little economic impact. The Full Court did, however, grant leave to appeal in relation to his Honour's findings critical of the applicants' conduct, as these seemed to have been given great weight and "might have tilted the scales against the applicants" (at [17]).

Separately, Straits had obtained authorisation from the Minister for Aboriginal Affairs and Reconciliation under s 23 of the Aboriginal Heritage Act 1988 (SA) to "damage, disturb or interfere with any Aboriginal sites, objects or remains that may exist on Lake Torrens and a portion of Andamooka Island… designated for mining exploration activity". In judgment on an application for judicial review of this decision, the validity of the authorisation was upheld by the South Australian Supreme Court: *Starkey v State of South Australia*.[4]

Conclusion

In its judgment on the application for leave to appeal, the Full Court of the South Australian Supreme Court considered that the appeal raised questions of public importance as this was the first application to the ERD Court under s 63S of the Act, and the first appeal on the

issues raised. The Full Court considered that these issues would be likely to be raised again in the future.

While the Full Court is yet to determine the appeal, the significance afforded to Straits's prior drilling conduct in the judgment of the court highlights the importance for those undertaking exploration operations of paying attention to the requirements of Pt 9B. A failure to consider this issue at an early stage can come at a significant cost — as Tilmouth J noted, Straits spent almost $5 million on the proposal, including in excess of $1.5 million on native title and land access issues.

Zsofia Korosy,
Solicitor,
Baker & McKenzie.

Footnotes

1. *Straits Exploration (Australia) Pty Ltd v Kokatha Uwankara Native Title Claimants* (2011) 178 LGERA 151; [2011] SAERDC 2.
2. A licence was granted to Kelaray on 14 October 2009, and the judgment notes that this licence (which was numbered 4296) had previously existed under other numbers.
3. *Straits Exploration (Australia) Pty Ltd v Kokatha Uwankara Native Title Claimants* [2011] SASCFC 9; BC201101180.
4. *Starkey v South Australia* [2011] SASC 34; BC201101318.

Rozen v Macedon Ranges Shire Council — water supply catchments and development and the application of the precautionary principle

Rupert Watters *OWEN DIXON EAST CHAMBERS*

The decisions of the Victorian Civil and Administrative Tribunal and the Supreme Court in the *Rozen v Macedon Ranges Shire Council (Rozen)*[1] series of cases raise two important issues in relation to applications for planning permits in open potable water supply catchments:

1. How does the precautionary principle apply in such cases?
2. How do the *Guidelines: Planning Permit Applications in Open, Potable Water supply catchments*[2] (the guidelines) operate and when will the exemption to the 1:40ha dwelling density requirement apply?

Facts and background

Maurice and Esther Rozen (the Rozens) were the owners of four lots of land, totalling approximately 72 hectares, in the vicinity of the town of Woodend (the land). Each of the lots fronted the Campaspe River and were within the catchment for the Campaspe Reservoir, which supplies drinking water to Woodend. The Reservoir forms part of the water storage system for the Lake Eppalock catchment.

The catchment is an "open" catchment, meaning that access to the catchment is unrestricted and the catchment is not controlled by a public authority.

In 2005, the Rozens sought a permit to develop four dwellings on the land;

the Macedon Ranges Shire Council refused the permit application. The Rozens sought review of the decision in the Victorian Civil and Administrative Tribunal (VCAT).

The first VCAT review

On review, Western Water was joined to the proceedings and supported the council's refusal on water quality grounds. Western Water argued that:

a) the land was within the proclaimed catchment of the Campaspe Reservoir;
b) onsite waste water treatments systems pose a risk to water quality;
c) the greater the density of dwellings (and, by extension, associated wastewater systems), the greater the risk to water quality;
d) Guideline 1 of the *Interim Guidelines: Planning Permit Applications in Open, Potable Water Supply Catchments* (August 2000) provided that a density of one dwelling per 40 hectares as the presumptive rule in water supply catchments;
e) the proposed developments would increase the density of dwellings to more than one per 40 hectares — beyond that point, the cumulative risk to the water supply was unacceptably high; and
f) that a precautionary approach should be adopted that prioritised protection of drinking water over development.

VCAT rejected Western Water's argument, finding that the proposed development did not pose a risk of irreversible harm to the environment. It found that:

a) the proposal was consistent with the applicable planning controls; and
b) the wastewater treatment systems proposed complied with the Septic Tank Code of Practice and that this was sufficient to address water quality concerns.

The first Supreme Court appeal

Western Water appealed to the Supreme Court on the ground that the Tribunal had misinterpreted the precautionary principle by requiring irreversible, as opposed to simply serious, environmental harm.

On appeal, Osborn J held that the Tribunal had misstated and misapplied the precautionary principle. His Honour stated that irreversible harm was not required, and also rejected a submission that the precautionary principle was not applicable to risks to human health.

Formalisation of the Guidelines

Between the first Supreme Court appeal and the second VCAT review in May 2009, the Minister for Planning formally adopted the Interim Guidelines as the Guidelines.

In doing so, however, significant changes were made to Guideline 1. In particular, the circumstances in which a planning application would be exempt from the presumptive 1:40ha density requirement were amended in a way that made it more difficult to obtain the benefit exemption.

The second VCAT review and Supreme Court appeal

On the remitter, the Tribunal accepted the submission that three or more dwellings would have an unacceptable impact on water quality in the catchment.

The Tribunal went on to find that two dwellings were unacceptable on other planning grounds. Accordingly, it ordered that a permit should be issued for one dwelling.

The applicants appealed to the Supreme Court. Numerous grounds of appeal were identified but argument focused on the water quality issue, particularly the application of the precautionary principle and the Guidelines.

How does the precautionary principle apply to permit applications in water supply catchments?

It was not disputed that the precautionary principle was a potentially relevant consideration in this application. Both the *Intergovernmental Agreement on the Environment*, incorporated into the Macedon Ranges Planning Scheme, and the *State Environment Protection Policy (Waters of Victoria)*, to which the Tribunal was required to have regard, contained formulations of the principle.

In the first Supreme Court decision of *Western Water v Rozen*,[3] Osborn J rejected a submission based on the decision of McLauchlin QC DCJ in *Theo v Caboolture Shire Council*[4] that the precautionary principle did not apply to risks to human health. His Honour observed:

> I do not accept that the distinction between the risk of damage to the environment and danger to human life is readily applicable to the present context when the primary beneficial use of the waters in issue is that of potable water.[5]

In the second Supreme Court decision of *Rozen v Macedon Ranges Shire Council*,[6] his Honour endorsed the formulation of the precautionary principle given by Preston CJ in *Telstra Corp Ltd v Hornsby Shire Council (Telstra)*.[7] On the *Telstra* approach, the precautionary principle will apply if it can be shown that:

a. there is risk of serious or irreversible environmental harm; and

b. there is uncertainty as to the risk of harm.

Once the precautionary principle applies, the evidentiary onus shifts to the applicant to show that there is no (or a negligible) risk of environmental harm.

In this case, the second Tribunal was satisfied, based on expert evidence, that the cumulative installation of waste water treatment systems in the catchment potentially posed a risk of serious harm to human health.[8] Accordingly, the onus lay on the permit applicants to show that there was no, or a negligible, risk of harm to human health.

In considering the application of the precautionary principle in open, potable water supply catchments, the second Tribunal referred to the *Australian Drinking Water Guidelines* (ADWG),[9] which required a "multiple barrier" approach to water contamination. Under this approach, the first barrier to water catchment is catchment management and source water protection. The ADWG states that:

> Where catchment management is beyond the jurisdiction of drinking water suppliers, the planning and implementation of preventive measures will require a coordinated approach with relevant agencies such as planning authorities.[10]

The second Tribunal found the ADWG to be directly relevant, both as part of the *National Water Quality Agreement*, incorporated into the planning scheme, and as a matter to which responsible authorities and the Tribunal should have regard under s 60(1A)(g) of the Planning and Environment Act 1987 (Vic).[11] On appeal, Osborn J held that "it cannot be disputed" that the ADWG "provided a proper framework within which to consider the application of the precautionary principle in this case".[12]

The ADWG expressly recognises the regulation of development as one aspect of the protection of surface water catchments. Accordingly, the application of the precautionary principle may justify refusal to issue a planning permit. As Osborn J observed, however, precaution is not the same as prohibition.[13] Any restrictions imposed by the precautionary principle must be proportionate to the risk sought to be prevented.

On the facts, his Honour found that the second Tribunal had properly applied the precautionary principle in this case.[14] He found that it was open to the Tribunal to find, based on the expert evidence, that a risk of serious harm had been demonstrated and that that the imposition of a requirement that dwelling densities not exceed 1:40ha was a proportionate response to that risk.

How do the Guidelines operate?

The Guidelines, where relevant, are a mandatory consideration under s 60(1A)(g) of the Planning and Environment Act, however, they are not determinative.

In the second Supreme Court decision, Osborn J observed that "the Guidelines comprised matters required to be considered, rather than matters required to be given effect to".[15]

The Guidelines expressly provide that:

> The proper application of the precautionary principle requires consideration of the cumulative risk of the adverse impact of onsite waste water/septic tank systems on water quality in open, potable water supply catchments resulting from increased dwelling density.

Guideline 1 of the Guidelines provides:

> Where a planning permit is required to use land for a dwelling or to subdivide land:
> - the density of dwellings should be no greater than one dwelling per 40 hectares (1:40 ha); and
> - each lot created in the subdivision should be at least 40 hectares in area.
>
> This does not apply if a catchment management plan, water catchment policy or similar project addressing land use planning issues and the cumulative impact of onsite waste water/septic tank systems has been prepared for the catchment, and the objectives, strategies and requirements of the plan or project have been included in the planning scheme.

Much of the argument before the second Tribunal and in the second Supreme Court hearing focused on the question of whether the exemption to Guideline 1 was applicable to the facts. Before the Supreme Court, the permit applicants argued that requirements for the exemption were satisfied by the inclusion of cl 22.03, headed "Catchment Management and Water Quality Protection", and cl 22.19, headed "Northern Catchments", of the *Macedon Ranges Planning Scheme*.

Justice Osborn rejected these submissions. His Honour held that, as a matter of fact, neither policy addressed the cumulative impact of the septic tank/waste water systems and, accordingly, neither engaged the exemption.[16] His Honour also stated in *obiter*:

> Further, in my view, what the Guidelines envisage is a catchment plan or policy prepared by the Catchment Management Authority, independently of the Planning Scheme, and then incorporated in terms of its outcomes within the Planning Scheme. This has not occurred.[17]

There was also a question as to whether two policy documents, referred to in cl 22.03, might provide a basis for engaging the exemption. These documents could not be located before the second Tribunal hearing, but were provided to the Supreme Court in response to a subpoena. On inspection, it was agreed that neither document met the requirements of the exemption.[18]

Other matters

In his second judgment, Osborn J appeared to take the view that the application of ordinary planning principles was sufficient to dispose of the application on water quality grounds. Noting that both the zoning and overlay controls on the land included objectives seeking to "ensure" the protection of water supply,[19] his Honour held that "[i]t was open to the Tribunal to refuse a permit for four dwellings if it was of the opinion that this was necessary to "ensure" the protection and maintenance of water quality".[20]

The second Tribunal found that the water quality issues meant that development of three or more dwellings was inappropriate. It recognised that two dwellings were potentially acceptable on water quality grounds.[21] The Tribunal concluded, however, that planning policy around rural development meant that only one dwelling should be permitted.[22]

There was some argument on appeal regarding whether this approach adequately took into account the impact of livestock on water quality. It was submitted on behalf of the applicant that the risk of livestock-related pathogens meant that non-rural development was appropriate. This submission was rejected. The expert evidence accepted by the Tribunal supported a finding that the risk to human health from human pathogens was greater than the risk to human health by animal pathogens.[23]

Consequences

The consequence of the *Rozen* series of cases is to make it significantly harder to develop land in open water catchments, at least where those catchments are approaching a dwelling density of 1:40ha.

The expert evidence accepted by the second Tribunal would appear to suggest that once a density of around 1:40ha is reached, the possibility of contamination of the water supply — and, by extension, harm to human health — cannot be excluded. Given the evidentiary onus on the permit applicant to negative such a risk, it is likely to be difficult for permit applicants to succeed in these circumstances.

Moreover, Osborn J's *obiter* observation regarding the kind of plan required to engage the exemption to Guideline 1 may mean that the exemption is largely unavailable in the short-term. Although many catchment management plans exist in Victoria today, it is unclear whether any of those plans currently meet the requirements of the exemption to Guideline 1. It is also unclear how quickly plans that did meet the requirements of the exemption could be developed.

Rupert Watters,
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Footnotes

1. *Rozen v Macedon Ranges Shire Council* [2007] VCAT 1814; *Western Water v Rozen* (2008) 24 VR 133; [2008] VSC 382;

BC200808497; *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746; and *Rozen v Macedon Ranges Shire Council* [2010] VSC 583; BC201009565.

2. Department of Planning and Community Development, *Guidelines: Planning Permit Applications in Open, Potable Water Supply Catchments*, State Government of Victoria, Melbourne, 2009, www.dpcd.vic.gov.au.
3. *Western Water v Rozen* (2008) 24 VR 133; [2008] VSC 382; BC200808497.
4. *Theo v Caboolture Shire Council* [2000] QPEC 59.
5. Above note 3 at [115].
6. *Rozen v Macedon Ranges Shire Council* [2010] VSC 583; BC201009565.
7. *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10; [2006] NSWLEC 133; BC200601529.
8. Above note 1 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [18].
9. Above note 8 at [39]–[42].
10. National Health and Medical Research Council, *Australian Drinking Water Guidelines (2004)*, 3–10.
11. Above note 8 at [43].
12. Above note 6 at [43].
13. Above note 6 at [46].
14. Above note 6 at [47].
15. Above note 6 at [61]–[62].
16. Above note 6 at [68]–[75].
17. Above note 6 at [73].
18. Above note 6 at [76]–[82].
19. Above note 6 at [26]–[30].
20. Above note 6 at [32].
21. Above note 6 at [100]ff.
22. Above note 6 at [134].
23. Above note 6 at [102]–[122].

The Queensland Lungfish case: *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 8)*

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On 4 March 2011, Logan J of the Federal Court of Australia, handed down his decision in *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd* (No 8)[1]. The case provides a recent example of public interest litigation being instituted by an "interested person" under the Environment Protection and Biodiversity Conservation Act's (EPBCA) broad standing powers in relation to compliance with a condition on an approval.

The case concerned a condition attached to the construction of Paradise Dam on the Burnett River. The Burnett River is one of the few rivers in Australia inhabited by the Queensland lungfish, Neoceratodus forsteri.

The construction of the dam constituted (and its operation continues to constitute) a controlled action under the EPBCA. Approval by the Federal Environment Minister for the construction and operation of the dam was granted on 25 January 2002.

In August 2003, the approval was amended with the consent of both parties to include, among other things, the condition that:

> Burnett Water Pty Ltd must install a fish transfer device on the Burnett River Dam suitable for the lungfish. The fishway will commence when the dam becomes operational.[2]

The Conservation Council alleged that Burnett Water had contravened this condition by constructing a dam that was not "suitable" for the lungfish and sought an injunction requiring Burnett Water to comply with the condition.

The alleged contraventions

The Conservation Council argued that Burnett Water had contravened the condition by not installing a fish transfer device which was "suitable" for the lungfish. This was because Burnett Water had:

(i) installed the downstream fishway with an operation range of water levels in the dam reservoir between EL 62.0 m and EL 67.9 m, such that it was not suitable for lungfish when water levels in the dam reservoir were beneath EL 62.0 m because it could not be operated and lungfish were unable to enter it;

(ii) failed to commence to operate the downstream fishway when the dam became operational in or about November 2005; and

(iii) failed to operate the downstream fishway continuously, subject only to minor interruptions for repairs and maintenance and environmental flows, after the dam became operational in or about November 2005.[3]

His Honour's findings

Standing of the interested person

In relation to standing under the EPBCA, the court observed that "in the field of public law, there has never been such universality of standing for the prevention, in the public interest, of illegality".[4] The court compared this to standing under the Crimes Act 1914 (Cth), which allows any person to institute criminal proceedings against another but is "tempered though by the ability of the Commonwealth Director of Public Prosecutions to take over and decline to carry on any such proceeding".[5] His Honour observed that there may be some value in a similar power being conferred on the Minister.[6]

The construction of the condition

The court found that the general construction of the condition left it to Burnett Water to "use its discretion, good sense and judgment as to how to achieve the specified result", in ensuring that the fishway was "suitable".[7]

The court rejected the submission of the Conservation Council that in order to be "suitable" the fishway must "maintain similar opportunity for lungfish movement as existed prior to the construction of the dam".[8] Rather:

> the fishway which must be "suitable" for the species is one which takes into account the needs of the species in the context of the impact of the approved dam as constructed. Such considerations flow naturally from recalling that the condition must be construed in the context in which is appears.[9]

In considering whether the fishway was "suitable", the court accepted evidence that under pre-development

conditions it was unlikely that suitable lungfish spawning conditions would have been available in the river every year, to the extent that some years water levels would have been so low as to prevent the passage of the lungfish past the dam site.[10] The court found that:

> As designed, the fishway still provides considerable opportunities for lungfish to move past and access habitat downstream. In these circumstances, the existence of the Paradise Dam with this fishway is not likely to result in serious or irreversible harm to lungfish populations in the Burnett River or across the distribution of the species.[11]

The court acknowledged that there was a three-year period between the completion of the dam and the fishway becoming operational because of the time it took for the dam to reach EL 62, the water level required for the fishway to work. Notwithstanding this, the court found that the device was ready for use in 2005.[12] In the alternative, if the fishway did not commence when the dam became operational, his Honour stated that he would not have granted the injunction as the period when the device did not operate was, from a long-term perspective, a transitory commissioning event that had now passed, making the fishway presently suitable for the lungfish.[13]

Burnett Water was not found to have contravened the condition and the injunction was not granted.

Kathryn Pacey,
Partner, and
Stephanie Bashford,
Trainee Lawyer,
Clayton Utz.

Footnotes

1. *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 8)* [2011] FCA 175; BC201100871.
2. Above note 1 at [13].
3. Above note 1 at [46].
4. Above note 1 at [26].
5. Above note 1 at [25].
6. Above note 1 at [26].
7. Above note 1 at [53].
8. Above note 1 at [64].
9. Above note 1 at [64].
10. Above note 1 at [122]–[123].
11. Above note 1 at [126].
12. Above note 1 at [74].
13. Above note 1 at [167].

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