Conclusion

Although the Tribunal has not ruled out development in landscape value areas, the high onus already resting on developers, as well as perceived evidentiary difficulties, means that subdivision approval in such areas may prove a difficult task to achieve.

Graham Castledine & Robert Herrick
Minter Ellison Northmore Hale, Perth

New South Wales

Environmental Planning Instruments - Grounds of Invalidity

Leichhardt Municipal Council v Minister for Planning
Unreported, Court of Appeal (NSW), Priestly, Sheller and Cole JJA, 17 May 1995

The Facts

This case concerned the procedure required by Part 3 Division 3 of the *Environmental Planning and Assessment Act 1979* (the EPAA) for the making of a Regional Environmental Plan (REP). That procedure generally requires an environmental study to be undertaken, consultation with relevant bodies (such as local councils), preparation and submission of a draft REP, public exhibition of that draft REP, submissions to be made and considered and finally, submission of the amended draft REP to the Minister for consideration under s 51 of the EPAA.

In the present case the Greater Metropolitan REP had been made in order to give effect to State Environmental Planning Policy No 32 (SEPP32), which provided for the development of urban land, no longer required for the use for which it had been zoned to be redeveloped for multi-unit housing. Certain land formerly zoned industrial was thus sought to be redeveloped for this purpose.

The appeal was concerned with whether the Greater Metropolitan REP was invalid by reason of non-compliance with Part 3 Division 3 of the EPAA.

The Decision

The Leichhardt Council contended that the REP was invalid on two grounds:

(1) That s 45 of the EPAA had not been complied with; and
(2) That the REP actually made by the Minister was invalid under s 51 of the EPAA.

Ground 1 - Non compliance with section 45

Section 45 of the EPAA required the Director of Planning "to ensure that consultations [were] held with "the Council." During the course of the consultation process it had become apparent that height controls were to be placed on developments allowable under the draft REP. The Council had been consulted as to these height restrictions and agreed to them. However it only became apparent upon public exhibition of the draft REP that the height controls were to be implemented by way of Development Control Plans (DCPs).

The Council argued that there had been non-compliance with s 45 of the EPAA since the Council had not been consulted about how the height restrictions were to be implemented in the planning instruments - that is, in the REP itself or by means of DCPs.

All members of the Court rejected this argument. Priestley JA (with whom Sheller JA agreed) was of the view that s 45 had been complied with insofar as the nature of the height restrictions was concerned and Council's concerns about how those restrictions would be implemented was not relevantly part of the s 45 consultation process.

Ground 2 - Invalidity pursuant to section 51

The Council also argued that because the REP as finally made by the Minister did not include any height restrictions at all, the making of the REP was invalid pursuant to the Minister's power under s 51 of the EPAA.

The basis of this argument wasthat the exercise of the power under s 51 was confined by the process defined in Part 3 Division 3. That is, Part 3 Division 3 requires that the REP actually made have some relationship with the process of consultation otherwise that process would be rendered nugatory. In simple terms, it was argued that the Minister does not have the power to make a REP which is significantly different from the publicly exhibited draft REP.

A majority of the Court (Priestley JA with Sheller JA agreeing) accepted this argument as correct, stating:

> "My conclusion therefore is that the Minister did not have power to make the plan which he made on 21 December 1993. It was not a plan which in all important respects was the product of a Pt 3 Division 3 process. It was a plan which in all respects but one, in my opinion, was a proper product of a Pt 3 Division 3 process but in one important respect, that of height controls, was not. That is a matter of such potential importance to the future development of the land to which the REP applied that the REP cannot, in my opinion, be said to be a plan which the Minister had power to make under s 51(1)". (per Priestley J00 15-16)

Priestley JA felt some concern at this result because in all other respects Part 3 Division 3 had been complied with, nonetheless, "the resulting REP was significantly different from the draft REP publicly exhibited".

Comment

The decision is one of general importance. It is clear that Part 3 Division 3 of the EPAA creates a process which must be followed in the making of a REP. More significantly it recognises that there are restrictions on the power of the Minister to make REPs under s 51 - the Minister is confined to making a REP which bears some relationship to the process provided for and which ultimately recognises the importance of the consultation process effected by the EPAA.

Division 2 of Part 3 is concerned with State Environmental Planning Policies (SEPPs) and Division 4 of Part 3 with Local Environmental Plans (LEPs). With respect to SEPPs, s 39(1) of the EPAA is in similar terms to s 51(1), as is s 70(1) with respect to LEPs. Consequently, it would seem that the principles enunciated by the Court of Appeal with respect to s 51(1) would have a similar application to ss 39(1) and 70(1). It should be noted, however, that Division 2 of Part 3 dealing with SEPPs does not provide the same detailed framework for consultation and public exhibition as is required for REPs and LEPs. It may be therefore, that different considerations will apply to the making of SEPPs.

Lachlan Roots
Freehill Hollingdale & Page
Sydney

Consent To Institution Of Proceedings

Kemp v Gough and Gilmour Holdings Pty Ltd

Unreported, Court of Criminal Appeal (NSW), Carruthers, Finlay, and Bruce JJ, 14 February 1995

In *Kemp v Gough and Gilmour Holdings Pty Ltd (1994)* 83 LGERA 257 Bannon J determined that the institution of proceedings pursuant to s 13 of the *Environmental Offences and Penalties Act 1989* (the EOPA) by a person other than the EPA, required written consent be given to commence the "instant" prosecution. That is, a delegation expressed in general terms enabling a person to bring proceedings pursuant to s 13(4) of the EOPA was not warranted by the EOPA.

At the end of the hearing before Bannon J and prior to his decision, counsel for the prosecutor requested that Bannon J state a case to the Court of Criminal Appeal in the event that his Honour arrived at the decision which in fact did.

The stated case to the Court of Criminal Appeal was heard on 28 October 1994 and the Court handed down its decision on 14 February 1995.

The Decision

Section 13(4) of the EOPA relevantly provides:

"Subsection (1) does not apply to the institution of proceedings arising under the Clean Waters Act 1970, other than proceedings for an offence referred to in section 19 of that Act:

(a) by a council of a local government area or an employee of a council of a local government area - if the proceedings are instituted with the consent of the council or with the written consent of such member or employee of the council as may be authorised by the council for the purposes of this subsection; ..."

While Carruthers J (with whom Finlay and Bruce JJ agreed) acknowledged that s 13(4)(a) "gives rise to difficulties of construction", his Honour was nonetheless clearly of the view that s 13(4)(a) had been complied with by the Council in the present case. Carruthers J reached this conclusion by reference to the following matters:

(1) The relevant principle of law is that a person or organisation whose consent is required for the institution of proceedings must in truth consent to the institution of the particular proceedings in question: see *Traveland Pty Ltd v Doherty (1982)* 63 FLR 41;

(2) The object of s 13(4)(a) of the EOPA is to protect individuals from arbitrary prosecution. The requirement of consent ensures that a prosecution will only be instituted if ther elevant person whose consent is required considers the prosecution should in fact be instituted;

(3) That object is not thwarted if the consent to the institution of proceedings is in general terms. It is not incumbent on the person consenting to restrict the consent to a single offence or particularise the precise offence or offences. All that is required is that the person's consent be given "in terms which enable it to be said that the proceedings which are instituted have been instituted with [that person's] consent": see *Traveland Pty Ltd v Doherty (1982)* 63 FLR 41 at 47;

(4) The requirement in s 13(4)(a) does not require that consent be given in writing where the relevant person giving consent is a council. However where an employee or member of council is authorised to give consent the consent must be in writing;

(5) It is sufficient compliance with s 13(4)(a) if an authorised officer (that is, an authorised employee or member of a council) lays an information in writing and substantiates that information by oath as required by s 22 of the *Justices Act 1902* since:

> "Such conduct clearly demonstrated that the Appellant .... considered it appropriate that the proceedings should be instituted and in truth consented to the institution of those proceedings."

This was merely an application of the principle that a person consents to that which he or she does: *In re Wilmer's Trusts; Wingfield v Moore (1910)*2 Ch 111.

Thus, the authorised officer having laid the information and substantiated it by oath, his consent had been given to the institution of proceedings within s 13(4)(a) of the EOPA.

Comment

This decision gives a wide interpretation to s 13(4)(a) of the EOPA by treating as sufficient compliance with the "written consent" requirement (in the case of authorised officers) the laying of an information combined with its substantiation on oath. It is interesting to note that this decision is consistent in important respects with the decision in *Water Board v Environment Protection Authority (1994)* 83 LGERA 174 where the Court of Criminal Appeal considered s 13(2) of the EOPA, although it is to be noted that s 13(2) has since been repealed.

Lachlan Roots
Freehill Hollingdale & Page
Sydney

Wilful Delay Of An Authorised Officer

Environment Protection Authority v Taylor

Unreported, Land and Environment Court (NSW), Stein J, 10 March 1995

This is the first case which has considered the offence of wilful delay of an authorised officer under s 29(4) of the *Clean Waters Act 1970* (the CWA).

The Facts

The defendant owned and operated a piggery at Branxton. The piggery was operated on a "minimum disease" basis so as to minimise the risk of disease introduced into the piggery from outside.

In December 1993 the piggery was visited by an authorised officer of the Environment Protection Authority (the EPA) and officers from Singleton Council as a result of complaints. The defendant made it clear to the authorised officer that he would not allow him entry into the pig sheds for quarantine reasons. The authorised officer assured the defendant that there was no quarantine risk and was allowed entry into the sheds. The authorised officer also warned the defendant that it was an offence to delay or obstruct an authorised officer from carrying out his duties and functions. Following the inspection, in May 1994, a notice was served on the defendant requiring certain measures to be taken pursuant to the *Clean Waters Regulations 1972*.

On 16 August 1994 the authorised officer returned to the defendant's premises to determine whether the notice had been complied with. As a result of a "heated discussion" the authorised officer arranged to return at 10 am on the following day to carry out his inspection. When the officer returned on 17 August 1994 he was refused access to the area and ordered to leave the property by the defendant.

The defendant gave evidence that he believed he was entitled to impose restrictions on authorised officers when attending his property - such as attending at a convenient time and adopting various minimal disease control standards. It was suggested that this amounted to raising a defence of "honest and reasonable mistake" or a defence of "reasonable excuse". Stein J thus had to determine the nature of the offence provided for in s 29(4) of the CWA and whether, in the absence of any express defence provided for in the CWA, the defences sought to be raised were available under s 29(4).

The Decision

Section 29(4) of the CWA provides:

> "Any person who wilfully delays or obstructs an authorised officer in the exercise of his powers under this Act which he is authorised to do, perform or carry out is guilty of an offence against the *Environmental Offences and Penalties Act 1989*."

Stein J reached the following conclusions from an interpretation of this section:

(1) The offence provided for in s 29(4) of the CWA is one requiring proof of mens rea and the onus of proof rests with the prosecution;

(2) The offence is therefore one satisfying the first category of statutory offences referred to by the High Court in *He Kaw Teh v The Queen (1985) 157* CLR 523;

(3) The defence of honest and reasonable mistake is only available as a defence to offences of strict liability - that is, offences where mens rea is presumed to be present unless material is put in issue negativing that presumption: see *He Kaw Teh v R* (1985) 157 CLR 523 per Gibbs CJ at 532-533; *R v Wampfler (1987)* 11 NSWLR 541 at 546 per Street CJ;

(4) 29(4) of the CWA is not an offence of strict liability and consequently the defence of honest and reasonable mistake of fact is unavailable;

(5) A defence of "reasonable excuse" was also unavailable under s 29(4) of the CWA as there was no clear legislative intent that such a defence should be available. The legislature had made express provision for such a defence elsewhere in the CWA (see ss 27A and 29A) and must be taken to have intended that such a defence was not to be available under s 29(4).

It was also advanced on behalf of the defendant that the authorised officer had acted ultra vires by failing to act in accordance with standards sought to be imposed by the defendant. Stein J held this contention to be "without substance":

"Mr Colquhoun submits that an officer would lose his 'authority' if, for example, he was drunk. In this instance he submits that the officer has lost his authority by not complying with the defendant's minimal disease standards when visiting the piggery. With respect to the submission I am unable to accept that an authorised officer ... loses his authorisation to exercise his powers under the *Clean Waters Act* by failing to comply with requirements sought to be imposed on him by the defendant."

Accordingly Stein J found the defendant guilty of an offence under s 29(4) of the CWA. The issue of penalty was reserved.

Comment

This case is one of general importance. Section 29(4) of the CWA is to be found drafted in the same terms in s 27(5) of the *Clean Air Act 1961*, s 76(6) of the *Noise Control Act 1975*, and s 45(7) of the *Environmentally Hazardous Chemicals Act 1985*. Accordingly, it must be that the same considerations referred to by Stein J as applying to s 29(4) of the CWA in the present case will apply to these other provisions.

Lachlan Roots
Freehill Hollingdale & Page
Sydney

Pollution - Marine Pollution Act

Morrison v Dilmun Navigation Co Pty Ltd
Unreported, Land and Environment Court (NSW), Bignold J, 24 February 1995

This case was concerned with the *Marine Navigation Act 1987* (NSW) (the MNA) and the nature of the defence under s 8(2) to the strict liability offence created in s 8(1).

The Facts

On 7 June 1993 a ship, the "Pacific Spirit", discharged some 40-50 litres of oil into Botany Bay when it was berthed for refuelling at the Caltex Refinery Wharf. It appeared from the evidence that the likely cause of the spill was a blown gasket. An Environmental Inspector of the Maritime Services Board who inspected the gasket described it as being made of vinyl or plastic and that it was of a "makeshift" nature. There was also evidence from a Wharf Supervisor that it was industry practice to use gaskets made of solid steel or compressed asbestos fibre only. Both the ship's Master and the company which owned the ship were charged with offences under s 8(1) of the MNA.

The Decision

Section 8(1) of the MNA provides:

"Subject to subsections (2) and (4), if any discharge of oil or of an oily mixture occurs from a ship into State waters, the master and the owner of the ship, and any other person whose act caused the discharge, are each guilty of an offence punishable, upon conviction, by a fine not exceeding:

(a) if the offender is a natural person - 500 penalty units; or
(b) if the offender is a body corporate - 2,500 penalty units."

Section 8(6) of the MNA states that "it is a defence if it is proved that, by virtue of subsection (2) or (4), subsection (1) does not apply in relation to the discharge." The Master and the company relied on s 8(2)(b) of the MNA which relevantly provides:

"Subsection (1) does not apply ....

(b) if the oil or oily mixture, as the case may be, escaped from the ship in consequence of damage, other than intentional damage, to the ship or its equipment, and all reasonable precautions were taken after the occurrence of the damage or the discovery of the discharge for the purpose of preventing or minimising the escape of oil or oily mixture, as the case may be;..."

Thus, s 8(2)(b) has two limbs, both of which must be satisfied in order for the defence to be made out, namely:

(1) the oil or oily mixture must be shown to have escaped from damage to the ship which is not intentional damage; and

(2) all reasonable precautions must have been taken to prevent and minimise the escape once the damage has occurred or been detected.

"Intentional damage" for the purposes of s 8(2) is given statutory definition in s 8(3) of the MNA as being damage arising from circumstances in which the master or owner of the ship

(a) acted with intent to cause the damage; or
(b) acted recklessly and with knowledge that damage would probably result."

The defendants in the present case did not adduce any evidence in support of the statutory defence, but simply sought to invoke its exculpatory effect by reference to an argument that the onus of proof rested with the prosecution to rebut the defence once it had been placed in issue.

Bignold J concluded that the defendants were guilty of the offence in s 8(1) and that they had not established the defence in s 8(2)(b) on the basis that he was not satisfied that the damage

was not "intentional damage" as defined. In reaching this conclusion, Bignold J made the following comments on the operation of s 8 of the MNA:

(1) The offence created by s 8(1) of the MNA is one of strict liability;

(2) Section 8(6) clearly identifies that the onus of proof rests with the prosecution in respect of the offence created in s 8(1) and that the onus of proof rests with the defence in respect of the statutory defence in s 8(2);

(3) Section 8(6) placed the *legal* burden on the defendant and not merely the *evidential* burden;

(4) Regardless of s 8(6), and by reference to established authority, the burden of proof rests with the defendant to show, on the balance of probabilities, that the defence is made out;

(5) A defendant seeking to rely on the defence in s 8(2)(b) of the MNA must also prove, as part of the defence, that the damage was "other than intentional damage". Proof of this element is an essential element of the statutory defence;

(6) The word "damage" in s 8(2) should bear its ordinary meaning and should not be restrictively interpreted since to do so would be contrary to the expressed objects of the MNA and to the provision of the statutory defence;

(7) Apart from the statutory defences provided in s 8(2) and (4), the offence being one of strict liability, it is open to the defendant to raise as an alternative defence that of "honest and reasonable mistake of fact": *State Rail Authority of NSW v Hunter Water Board* (1992) 28 NSWLR 721.

Lachlan Roots
Freehill Hollingdale & Page
Sydney

Ampol - Penalty Imposed

Environment Protection Authority v Ampol Limited

Unreported, Land and Environment Court, Pearlman J, 22 February 1995

Pearlman J has now handed down her judgment on penalty. The facts of the case and its journey by way of stated case through the Court of Criminal Appeal can be reviewed in the March 1994 and June 1994 issues of *Australian Environmental Law News.*

Having found Ampol guilty of an offence against s 6(2) of the *Environmental Offences and Penalties Act* 1989 (the EOPA) on 18 March 1994, Pearlman J imposed a penalty of $75,000 together with an order that it pay the prosecutor's costs of $27,985.

It should briefly be noted that before Pearlman J it had been argued that different considerations should apply to the imposition of penalties under s 6(1) and s 6(2) of the EOPA on the basis that s 6(1) is concerned with the cause of the harm to the environment, whereas s 6(2) is concerned with contribution to the conditions apposite to that cause. More simply, the argument suggested that the offence in s 6(2) was less serious than that in s 6(1),

and accordingly this should be reflected in the penalties to be imposed under those subsections. Pearlman J rejected this argument:

> "I do not agree with this proposition. In my opinion, the offences under s 6(1) and under s 6(2) are both equally serious. They carry the same penalty and are directed to the same consequence, namely, the escape of a substance in a manner which harms or is likely to harm the environment.... It is the causing of environmental harm which is the crucial matter in proceedings under the EO&P Act, and in this respect it seems to me that both Brir and the defendant were equally responsible for the environmental harm which occurred. Their respective degrees of culpability may be different .... but their responsibility is the same."

Pearlman J thus felt that in the circumstances of this case Ampol should not receive a lesser penalty than that which was imposed upon Brir Pty Ltd, the lessee of Ampol's depot which had caused the diesel fuel to escape into a storm water drain. In a judgment handed down in December 1994 (*Environment Protection Authority v Brir Pty Ltd*, Land and Environment Court, Pearlman J, 5 December 1994) Pearlman J had imposed a penalty of $50,000 together with an order that it pay the prosecutor's costs on Brir.

Lachlan Roots
Freehill Hollingdale & Page
Sydney

Open Cut Coal Mine in the Upper Hunter Valley

Rosemount v Kevin Cleland, Minister for Planning and Bengalla Mining Company Pty Ltd

Land and Environment Court, Waddell J, 24 January, 1995

The Third Respondent, Bengalla Mining Company Pty Limited (Bengalla) proposes to establish an open cut coal mine in the Upper Hunter Valley, 3-4 Kilometres west of Muswellbrook. It made a development application seeking the consent of Muswellbrook Council (the Council) pursuant to the Muswellbrook Local Environment Plan, 1985 (LEP). The Second Respondent, the Minister for Planning, had previously pursuant to sections 101(1) of the *Environmental Planning and Assessment Act 1979* (the EPA Act), given a direction in writing to the council to refer to the Secretary, the Department of Environment and Planning for determination by him in applications for consent to new coal mines or new coal leases. Pursuant to this direction the Council referred the application to the Minister. As the application was for a designated development and submissions had been made under s87(1) in relation to it, the Minister, pursuant to s101(5) and (6) directed that an inquiry be held in accordance with s119, by a Commission of Inquiry.

By instrument of appointment dated 7 January 1994 the Minister appointed the First Respondent, Kevin Cleland, (the Commissioner) to hold the inquiry. The Commissioner was thereby required to hold an inquiry in accordance with s119(1) (b) of the EPA Act "with respect to the environmental aspects of the Bengalla coal project..."

In August 1994 the Commissioner delivered his report to the Minister in which he recommended the Minister "Grant consent to the proposed Bengalla Coal Project subject to conditions to control and mitigate potential environmental impacts".

Rosemount then commenced Class 4 proceedings in the Land and Environment Court seeking a declaration that the report, findings and recommendations of the Commissioner were invalid, a declaration that the development was prohibited and an order that the Minister be restrained from determining the application until such time as an inquiry is held and a report, findings and recommendations are made in accordance with the law.

It was generally accepted, until this case, that there was no right to judicial review with respect to the report of a Commission of Inquiry but that there was such a right with respect to the decision of the Minister.

It was argued on behalf of the Minister, that *R v Toohey* 158 CLR and *Brettingham-Moore v The Municipality of St Leonards 1969* 121 CLR were to be distinguished. In both of those cases it was submitted that a favourable or particular recommendation was required to be contained in the report by virtue of the statutory regime. In the instant case the legislative regime does not require any particular recommendation to be contained in the report and the Minister is at liberty to make such decisions as he deems appropriate.

Mr Walker QC also argued on behalf of the Minister that - "...you don't get to attach a Wednesbury label to a decision until there is a decision and one does not get to describe matters as absurd until one sees what the Minister has accepted from the smorgasbord of information and views available to him. As we derive from that passage in Chief Justice Gibb's reasons support for the proposition that the Courts view with equanimity the possibility of a recommending stage being flawed by logic, error of fact or the like, doesn't render it any less a report containing recommendations"

The relevant provisions of the LEP required the Commissioner to recommend that the development was prohibited, (which would have entitled the Minister to approve it pursuant to the provisions of s100A of the Environmental Planning and Assessment Act) or to find that the development did not visually intrude into its surroundings except by way of suitable screening. The Court found that :

(1) The material before the Commissioner overwhelmingly leads to the conclusion that the development will, despite screening on the site, intrude into large parts of the surrounding countryside in that it will be visible to people going about their lives there and will be an unwelcome addition to the landscape. The conclusion that it would not do so is manifestly unreasonable.

(2) The foundation of the Commissioner's recommendation that consent be granted is his finding that the development is permissible with consent. This finding was manifestly unreasonable and it therefore follows that the recommendation, as one put forward as based on the findings in the Report, is manifestly unreasonable.

(3) If a recommendation is manifestly unreasonable - where the statutory scheme envisages a report containing findings and recommendations, resulting from a public inquiry and which is to be made public - it cannot be regarded as complying with the statutory requirements.

(4) The recommendation of the Commissioner is not a recommendation for the purposes of ss 199 and 101 of the EPA Act.

As a result of these findings the Commissioner was ordered to exercise according to law the functions required of him by the reference of the Minister. The Commissioner did so and a further report was submitted to the Minister after the Inquiry was reopened and further submissions received.

John Connors
FitzGerald White Talbot & Co
Muswellbrook NSW