CASE NOTES

New South Wales

Planning - Fauna Impact Statements

Helman v *Byron Shire Council*

Unreported, Court of Appeal (NSW), Kirby ACJ, Priestley and Handley JJA, 4 August 1995

This case involved consideration of whether a Fauna Impact Statement ("FIS") which had not been publicly exhibited at the time of seeking development consent meant that the consent subsequently granted was invalid.

The Facts

Batson Sand & Gravel Pty Ltd ("the Company") sought development consent from Byron Shire Council ("the Council") for an extension of a quarry on land situated about 5 kilometres south of Byron Bay and in respect of which it had existing use rights. In November 1992, the Company lodged a development application which was accompanied by an Environmental Impact Statement ("EIS") pursuant to section 77(3)(d) of the *Environmental Planning & Assessment Act* 1979 (NSW) ("the EPAA"). The development application was publicly exhibited as required by section 84 and clause 37 of the regulation. The period of public exhibition under the regulations ended on 24 December 1992. In May 1993, the Company submitted a FIS and on 28 May 1993 the Council determined the application by granting consent subject to conditions.

Proceedings were commenced in the Land and Environmental Court by certain objectors. Pearlman J at first instance dismissed those proceedings and granted consent to the development subject to additional conditions. That decision was appealed to the New South Wales Court of Appeal on two grounds, namely:

* that the development application was invalid because of failure to comply with certain provisions of the EPAA, the EPAAR, and the *National Parks and Wildlife Act* 1974 (NSW) ("the NPWA"); and

* whether Condition 53, which required the company to obtain a licence under section 120 of the NPWA, was valid.

This case note only discusses the first ground, the second ground not being necessary for the determination of the appeal, and the comments of the Court consequently being obiter dicta only.

The Decision

Handley JA (with whom Kirby ACJ and Priestley JA agreed) determined that it was necessary for a separate FIS to be submitted together with the development application. This was so because it was clear that the development proposed was "likely to significantly affect the environment of endangered fauna" within section 77(3) of the EPAA. Furthermore, the EIS had not fully or properly dealt with the impact of the development on endangered fauna and thus section 92D(4) of the NPWA did not apply in the circumstances to obviate the need for a FIS.

It was clear that when the development application was lodged on 16 November 1992 it did not comply with section 77(3) of the EPAA. It was not until May 1993 when the FIS was lodged that the application was properly accompanied by a FIS pursuant to section 77(3) of the EPAA. However, by this stage, the obligation imposed on the Council under section 86 of the EPAA (to ensure that all the documents accompanying the development application were available for public inspection) had been breached.

Pearlman J in the Land and Environment Court had determined that, despite the failure to comply with the relevant provisions of the EPAA, nonetheless the circumstances of the case did not relevantly deny to objectors and those wishing to make submissions proper involvement and participation in the assessment of the

development application. She went on to hold that the ultimate submission of a FIS did not preclude the granting of consent to the development application.

Handley JA approached the issue of the legal consequences of the breaches from the standpoint of the scheme of the EPAA, having stated that - "Parliament had failed to clearly express what the consequences should be in circumstances of non-compliance". Handley JA made the following observations in his review of the scheme of the EPAA:

* insofar as EIS's are concerned, substantial compliance with the terms of clause 34 of the regulations is required. Statements of Samuels JA in *Guthega Development v the Minister* 1986 7 NSWLR 353 at 361 and Hutley JA in *Prineas v Foresty Commission* 1984 53 LGRA 160 at 163 were expressly approved in support of this proposition;

  the requirement of section 92D(1) of the NPWA, that a FIS comply "to the fullest extent reasonably practicable", imposes a high but not an absolute standard. Accordingly the requirements for a FIS are similar to those for an EIS and substantial compliance with the relevant provisions of the statute and regulations is adequate. In so reaching this conclusion, Handley JA approved the approach adopted by Stein J in *Leatch* v *National Parks* (1993) 81 LGERA 270 at 278-280;

* insofar as the public notice, exhibition, and submission provisions of the EPAA were concerned (see sections 84, 85, 86, 87 and 88), Handley JA concluded that:

  "Parliament evidently considered that this duty was so important that a consent authority should not proceed to a decision until the time for lodgment of objections had expired and twenty-one days had elapsed after their transmission to the Secretary. These provisions demonstrate the importance Parliament attached to the objection procedure": see at p 10;

* by recourse to *Scurr* v *Brisbane City Council* (1973) 133 CLR 242, Hadley JA concluded that compliance with the statutory requirements, and specifically sections 7(3)(d1) and 86 of the EPAA, were conditions precedent to any consideration of the application by the Council and concluded as follows:

  "In the result, late lodgement of the FIS by-passed the statutory requirement that such a document be available for inspection and consideration by the public. Compliance would have enabled relevant and better informed objections to be lodged. Whilst the decision maker had the benefit of an appropriate FIS, the objectors had no opportunity to consider it or make submissions based upon it. In the result, there has been something akin to a denial of natural justice": see at p 12.

Given that there had not been compliance with the conditions precedent specified in the statute, there could be no means by which the Court could know "whether other objectors may have come forward and other objections raised had there been proper compliance with the statutory requirements". Accordingly Handley JA was compelled to the view that there had not been substantial compliance with sections 77(3)(d1) and 86 of the EPAA, with the result that the consent granted by the Council was invalid.

Comment

This case is significant in indicating the limits imposed by the EPAA on consent authorities when determining development applications. It reinforces the mandatory nature of the provisions and in particular those associated with the public exhibition of development applications and their supporting material (for example EIS's and FIS's).

There can be little doubt that the decision of the Court of Appeal in the present case is correct. It conforms with the underlying intention of the relevant statutory provisions which requires that members of the public be given a full and proper opportunity to object by way of formal submissions to development applications. In order that this opportunity granted by the EPAA not be curtailed, all material necessary to enable those objections to be properly formulated should be lodged at the time the development application is made and then made available to the public.

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Pollution - Occupiers and the Definition of "Pollution" in the Clean Waters Act

Environment Protection Authority* v *Leaghur Holdings Pty Limited
Unreported, Court of Criminal Appeal (NSW), Allen, Sully and James JJ, 26 June 1995

This case involved an appeal by way of stated case from a decision of Bannon J in the Land and Environment Court where he dismissed proceedings by the Environmental Protection Authority ("EPA") for an alleged offence pursuant to section 27A of the *Clean Waters Act* 1970 (NSW) ("the CWA"), in that Leaghur Holdings Pty Ltd ("Leaghur") had failed to comply with the direction to remove pollution specified in the notice issued pursuant to that section.

The Facts

Leaghur had become the registered proprietor of sub-divided lots at Batemans Bay in 1981. There were two rows of sub-divided lots which Leaghur owned, but surveys conducted in 1988 and 1993 showed that the front row of blocks had been lost as a result of the extensive encroachment of the waters of Batemans Bay. It was on the front row of blocks that a groyne of motor tyres chained together was situated. In the present case, the alleged pollution was said to arise from the groyne made for protection from the sea as well as from concrete and building material forming a retaining wall.

Bannon J held that because the relevant land had been lost to the waters of Bateman Bay, Leaghur, although the registered proprietor, was no longer the occupier of that land for the purposes of the Act and accordingly could not be guilty of failing to have complied with the written notice issued pursuant to section 27A of the CWA.

The Decision

On appeal, the EPA sought to rely on section 27(2) of the *Pollution Control Act* 1970 (NSW) ("the PCA") which provides:

"In any legal proceedings by the Authority, no proof shall be required (until evidence is given to the contrary) of the fact that the person is, or at any relevant time, was the occupier of any land to which the proceedings relate."

The EPA contended that because no evidence had been given by Leaghur to the contrary at the time when the written notice pursuant to section 27A of the CWA had been issued, the company must be taken to be the occupier of the land for the purposes of the CWA. In determining the correctness of this contention, Allen J (with whom Sully and James JJ agreed) made the following observations:

* Section 27(2) of the PCA refers to **evidence** to the contrary being given, not **proof** to the contrary, and accordingly the section imposes apparently an evidentiary burden on a defendant and not simply an onus of proof;

* Until evidence to the contrary is raised, it is not incumbent upon the prosecution to prove the element. If it becomes incumbent upon the prosecution to do so, it must prove to the ordinary criminal standard of beyond reasonable doubt;

* The content of the evidentiary burden placed upon the defendant is the same as in other areas of the criminal law and requires the defendant to establish evidence from which it can be inferred that there is a "reasonable possibility" of the facts sought to be relied upon to exculpate the defendant from criminal sanction.

The issue in the case essentially became whether there was evidence before Bannon J from which it could be inferred that there was a reasonable possibility that Leaghur was not the occupier of the relevant land encompassed by the written notice.

The Court held that there was evidence raising such a reasonable possibility, namely, that the land had been lost to the sea as a result of a gradual and imperceptible erosion and that the land so taken reverted, in accordance

with common law principle, to the Crown: see *Southern Centre of Theosophy Incorporated v State of South Australia* (1982) AC 706 at 720. Allen J stated:

> "The very loss of lands to the sea ordinarily raises a reasonable possibility that the loss has been occasioned by gradual and imperceptible erosion. No doubt there would be circumstances in which it would not raise that as a reasonable possibility... But it is manifest in the present case that the reasonable possibility of loss by gradual and imperceptible erosion was raised by the evidence of the loss of the lands. That possibility raised by the evidence was one on which reasonable doubt could be rested as to whether the company was the occupier of the land lost to the sea. The requirement of section 27(2) of the *Pollution Control Act* 1970 of evidence having been given 'to the contrary' in respect of occupation was satisfied, casting upon the [EPA] the burden of proving occupation to the criminal standard... [I]n the present case, as ownership of the land as evinced by the registered title was the only matter relevantly connecting the company to the land, evidence tending to put in doubt the fact of ownership tended to put in doubt also the fact of occupation, hence satisfying the requirement of subsection 27(2) of the *Pollution Control Act* section at pp 8-10.

Given that the company had satisfied the evidentiary onus in section 27(2) of the PCA, it then became incumbent upon the EPA to prove that the company was nonetheless still the occupier of the land. Being unable to do so, it was clear that the appeal could not succeed on this point.

The EPA had also sought to raise that there had been pollution arising out of the construction of the retaining wall. In rejecting this argument on grounds that there was no evidence from which any relevant inference could be drawn supporting such an argument, Allen J made the following interesting observation in relation to the definition of "pollution" in section 5 of the CWA:

> "The [EPA] failed to establish beyond reasonable doubt that the retaining wall was not erected upon land which at that time was not lost to the sea but was, indeed, above the reach of tidal waters. That founds an argument that if the retaining wall was so erected, then not only was it not then 'pollution' within the meaning of the Clean Waters Act but also it did not become pollution when the forward march of the sea by erosion of land overtook it. It is necessary to turn to the definition of 'pollute' (section 5). It is a lengthy definition, dealing with three categories of pollution, but there is the common requirement that 'pollute' means 'to place in or on, or otherwise introduce into or on to, the waters (whether through an act or omission)' the offending material. Manifestly the construction of a solid retaining wall on dry land, out of the reach of tidal waters, was not pollution. The Act (section 5) specifically provides that 'pollution' has a corresponding interpretation to 'pollute'.... It is strongly arguable that the encroachment of the sea did not render the wall 'pollution' within the meaning of the Act. When the sea encroached upon and overtook the wall, the wall was not being led or brought into the sea. It remained where it was. The movement was the other way around. The sea moved upon it": see at pp 13-14.

Comment

It is clear that the observation of Allen J in relation to the definition of "pollute" in section 5 of the CWA is obiter dicta. However, the observation appears clearly to be in accordance with both logic and principle. The opening words of section 5 of the CWA, upon which Allen J did not comment, provide that the definitions apply "except in so far as the context or subject-matter otherwise indicates or requires". It is strongly arguable that this is yet another consideration supporting the view reached by Allen J, as the gradual encroachment of waters which then causes that water to (theoretically) become polluted would seemingly not be "pollution" since the context does not require the application of the definition in these circumstances.

It is submitted, however, that given the exceptional circumstances of this case, the subsequent cases in which Allen J's observations will be able to be relied upon to avoid liability for the pollution of water will be rare.

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