

# Western Australia

**A**pplication for a Writ of Certiorari against the Environmental Protection Authority and an application for a Writ of Certiorari Against the Honourable Kevin Minson MLA, Minister for the Environment for the State of Western Australia

*Coastal Waters Alliance of Western Australia Incorporated (1996) 90(2) LGRA 136.*

## The Facts

Coastal Waters Alliance of Western Australia Incorporated (“Coastal Waters”) applied to the Supreme Court of Western Australia for writs of certiorari to issue against the Environmental Protection Authority (“EPA”) and the Environment Minister for the State of Western Australia (“the Minister”).

Certiorari was sought against the EPA to quash its Bulletin 739 dated May 1994 which contained the EPA’s recommendations, for the purposes of s44(1) of the *Environmental Protection Act 1986* (WA) (“the *EP Act*”), relating to the proposed dredging of shell sand by Cockburn Cement Limited (“Cockburn”) and a strategy for addressing the environmental issues associated with shell sand dredging. Certiorari was also sought against the Minister to quash his decision in a statement dated August 4, 1996 giving conditional approval to Cockburn to dredge portions of Success Bank for shell sand.

## The Decision

The Full Court of the Supreme Court of Western Australia considered s44(1) of the *EP Act* which specified the EPA’s obligations in recommending to the Minister whether or not a proposal with a potentially significant effect on the environment should proceed or not proceed and on what terms and conditions. The Court noted that the EPA’s statutory obligation under s44 was to report on:

- \* the environmental factors relevant to that proposal; and
- \* the conditions and procedures, if any, to which any implementation of that proposal should be subject; and make such recommendations to the Minister in its report as it saw fit. The Minister was then required to issue a statement pursuant to s45 of the *EP Act* deciding whether or not the proposal should proceed and on what terms and conditions. After an appeal by Cockburn the Minister decided in his statement that the proposal could proceed on certain terms and conditions.

What was argued, inter alia, by Coastal Waters in the case was that EPA Bulletin 739 was invalid as the factors referred to in it went beyond proper environmental factors and took into account commercial considerations relating to Cockburn itself. It was argued that the EPA, in reaching its recommendation, had taken into account matters such as the employment of the workforce of Cockburn, Cockburn’s commitments to large contracts for supply and the obligations of the State under the *Cement Works (Cockburn Cement Ltd) Agreement Act 1971* (as amended by the *Cement Works (Cockburn Cement Ltd) Agreement Amendment Act 1986*) which were not matters which the EPA could relevantly consider.

The Court considered, inter alia, the issue of what the EPA could take into account in preparing a report and recommendations and concluded that the EPA was only able to consider environmental factors in assessing the proposal. Going beyond those factors meant that the EPA had exceeded its statutory powers and functions under the Act. In terms of what constituted a factor relevant to the environment, although the definition of “environment” in Sections 3 (1) and (2) of the *EP Act* included the social surroundings of living things, with the social surroundings of man being his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings, this did not mean economic factors specific to Cockburn could be considered.

Justice Rowland commented on this issue in the following terms:

“Whatever may be the meaning of the expression “economic surroundings” in s3 (2), it seems to me, in context, they must be related to the physical area involved in the proposed dredging. It is not a relevant environmental matter if it be the fact that no other shell sand material is available to Cockburn to fulfil its contracts. It is not an environmental factor that Cockburn will suffer loss if it is unable to dredge and that its workforce will suffer if it is unable to dredge. These are no more than the results of the failure to obtain approval to dredge because of the impact on the environment. Those matters will, of course, be

relevant to the question of whether the proposal is permitted by the Minister to go ahead and, if so, on what conditions.”

Justice Franklyn expanded on Justice Rowland’s reasons and concluded that it was indispensable to the use of the definition of “environment” in the *EP Act* (in identifying what constituted environmental factors) that it was an application to a “place.” To quote from Franklyn J’s judgment:

“In my view the definition can only be applied to “living things” as they exist in a place, which place has surroundings, the definition limiting the surroundings to be taken into account to the physical, biological and social surroundings (which last, in the case of “man”, are the aesthetic, cultural, economic and social surroundings of “man” in the place in which the surroundings exist) and interactions between all of those...In my view...”environment” must be identified by the relationship to a place and the statutory definition set out [in the *EP Act*] provides no reason to view its application differently.”

### Conclusion

The case will have ramifications for the EPA in terms of how the EPA reaches its recommendations and prepare reports. It also raises again the issue of the distinction between environmental and economic factors and the extent to which these factors can be taken into account environmental in decision-making processes.\*

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\*The writer is indebted in preparing this short case note to having heard an analysis of the case delivered by Dr Hannes Schoombee at a NELA (WA) lunch-time forum on 24 September 1996.



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