THE ADEQUACY OF INFORMATION FOR ENVIRONMENTAL DECISION-MAKING

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1. Introduction

The gathering and consideration of information are crucial processes in environmental regulation, as in many regimes of governmental regulation. In environmental regulation, it is especially important that these processes be conducted in an open and accountable fashion because of the significant public as well as private interests at stake in environmental management. An open and accountable fashion means that the relevant information must be published in a form accessible to a non-expert person with an interest in the topic and a reasonable capacity to understand it.

A legal question that frequently arises in relation to these processes is how much information must be gathered, published and considered in order to make a valid decision. This question has arisen in environmental law cases in various contexts involving procedures for public participation in regulatory decision-making; such as the provision of notice of applications for development approval and the provision of information in an environmental impact statement or a draft planning document. It could be argued that the legal standard applied in most of these cases (some of which will be reviewed below) is that the amount of information must be "adequate" for the regulatory purposes of the decision-making power being exercised.

The Supreme Court of Western Australia has considered this issue in two recent decisions concerning the management of State forests and has applied a different legal test for the amount of information to be gathered, published and considered; namely, a test of good faith and fundamental non-compliance in the performance of the administrative duties involving the gathering, publication and consideration of information. In other words, the Court has said that it would only invalidate the relevant decisions if the performance of the duties was lacking in good faith or was so fundamentally flawed that one could not say that the relevant agency had performed the duty at all. It now appears that this issue will be considered by the High Court in an application for special leave to appeal to the High Court in the second of these forestry cases; a point that will be explained by way of conclusion.

It will be argued in this article that the standard that should be adopted is that of "adequacy" for the relevant regulatory purposes. Further, it will be argued that the adoption of this legal standard is not dependent on the relevant statutory provisions explicitly using the term or a similar term. Rather, the test of legal adequacy of information should be regarded as a general law presumption of statutory interpretation to give effect to Parliament's intention that information be gathered, published and considered in making the relevant decisions of environmental regulation.

Part 2 of this article will consider the case authority for the test of adequacy of information. Part 3 will consider the Western Australian cases which have adopted the standard of good faith and fundamental non-compliance.

2. Authority for the Test of Legal Adequacy

Generally, the issue of adequacy of information has arisen in challenges to the validity of a decision on the basis of non-compliance with the statutory procedural requirements for making the decision. The usual argument is that the failure to meet a standard of adequacy of information for the relevant statutory procedural requirement means that the procedural requirement has not been met at all. It is submitted that any challenge to the adequacy of information is best argued on the ground of procedural ultra vires. This is preferred to the grounds of abuse of discretionary power such as relevant or irrelevant consideration(s) or unreasonableness - where courts have traditionally been reluctant to risk "trespassing into the merits of any particular decision".[33]

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[33] G Bates, *Environmental Law in Australia,* Butterworths, 4th edn, 1995, p 499.

2.1. Adequacy of Public Notification of Development Proposals

The primary Australian authority for the test of adequacy of information provided in procedures for public notification of development proposals is found in *Scurr v Brisbane City Council*[34]. This case concerned the amount of information given in an advertisement of a development proposal. The Court held that public notification is important for two reasons. First, it provides objectors and others with the means to exercise their rights to participate in the planning process. Secondly, it is a means of exposing additional information and view points, thus relieving the decision maker "of the special burdens associated with decision making when only one side of the argument is known"[35]. The Court held that, if adequate information is not contained in advertisements, not only will effective objection be rendered difficult but the very need to object may not be sufficiently appreciated and consequently the council will be deprived of the benefit of worthwhile objections when considering an application.

Given the importance of public notification in the decision making process, the Court was of the view that the procedural requirement was mandatory.[36] However, the Court doubted whether there was a distinction of any substance between a mandatory and a directory interpretation of the requirement for public notification. Even on a directory interpretation, substantial compliance is required and this necessitates *adequate* particulars.[37]

While provisions for public notification in other statutes may differ in wording, their general purpose will be the same as set out above. On the basis of this High Court authority, such provisions should be regarded as mandatory and rigorously enforced.

2.2. NSW Standard Of Adequacy Of Environmental Impact Statements

2.2.1. Background

Judicial review of environmental impact assessment ("EIA") processes in Australia is generally restricted by the absence of statutory powers to enforce the provisions of environmental legislation, and by restrictive statutory and common law rules of standing.[38] New South Wales is an exception to this pattern for two reasons. First, the matters which have to be addressed in an EIA are stipulated in regulations, as opposed to administrative guidelines which may not be legally enforceable.[39] Secondly, "any person" can enforce the provisions of the *Environmental Planning and Assessment Act* 1979 (NSW), s 123. Thus, the most of the case law on EIA has developed around the NSW requirements for EIA.

In NSW it is possible to challenge the EIA process at two stages: first, on the decision to require or not require an EIA; and secondly, where an assessment document has been prepared, to test whether it is adequate in content.[40] For the purposes of this discussion, we will focus on judicial review of the second stage.

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[34] (1973) 133 CLR 242. A similar case applying the same principle is *Tickner v Chapman and Ors* (1995) 57 FCR 451.

[35] *Scurr* at 252.

[36] Ibid, at 255.

[37] Ibid, at 255.

[38] According to Bates, this governmental reluctance to open environmental assessment to the judicial process stems partly from a desire to protect administrative discretion and decision-making from judicial scrutiny, and partly from the desire to avoid the experiences in the United States of America with respect to legal challenges to the EIA process. See Bates, Op cit, p 170.

[39] In Western Australia, the content requirements of an EIA are set out in administrative procedures which are probably non-justiciable.

[40] Bates, p 169

2.2.2. What is the Standard of Legal Adequacy?

The test for adequacy for an assessment document was first outlined in *Prineas v Forestry Commission of NSW.*[41] In *Schaffer Corporation Ltd v Hawekesbury City Council*[42] Pearlman CJ of the Land and Environment Court of NSW considered the cases since *Prineas* which have dealt with the issue and enunciated the following propositions relating to the content of an EIS.

1. An EIS must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible environmental consequences of the proposed development (per Cripps J in *Prineas* (at 417)).

2. The purpose of an EIS is to alert the decision maker and the public to the inherent problems of the proposed development, to encourage public participation, and to ensure that the decision maker takes a hard look at what is proposed (per Cripps J in *Prineas* (at 417) and per Cripps J in *Liverpool City Council v Roads and Traffic Authority of NSW*[43] (at 278)).

3. The EIS is not required to be perfect. It need not cover every topic or explore every avenue (per Cripps J in *Prineas* (at 417) and per Hutley JA on appeal (at 163)).

4. The EIS must not be superficial, subjective or non-informative (per Cripps J in *Prineas* at 417).

5. It should be comprehensive in its treatment of subject matter and objective in its approach (per Cripps J in *Prineas* at 417).

6. Changes to the proposed development may be made between the exhibition of the EIS and the decision of the decision-maker but not so as to result in a completely different proposal (per Stein J in *Golden v Coffs Harbour City Council*[44] (at 108)).

Proposition number 2 reflects the High Court's reasoning in *Scurr.* In *Prineas*, Cripps J contended: "I can see no difference in principle between the failure to prepare an environmental impact statement at all and the failure to prepare one which substantially complies". Thus, the minimum standard is that of *substantial compliance*, which echoes the reasoning of the High Court in *Scurr.*

The judgment of Cripps J on the issue of adequacy is in line with United States authorities. According to Preston,[45] the courts in both jurisdictions have consistently stressed that a balance must be struck between the strict standards of the relevant legislative requirements and a rule of reason. However, while the principles of strict compliance coupled with a concept of reasonableness offer guidance in determining the adequacy of an EIS, there are no clear rules which can be applied in all cases. The degree of detail required to meet the adequacy test turns on the factual situation in question. As Preston points out, "what is a critical omission in one case may not be in another."[46]

2.3 New Zealand

Bates suggests that even without apparent legislative direction as to the form and content of an EIS it may still be possible for a court to examine the adequacy of a statement.[47] The New Zealand Court of Appeal in *Environmental Defence Society v South Pacific Aluminium Ltd (No 4)*[48] considered this issue. In that case, there was a statutory direction to prepare an EIS for certain proposed

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41 (1984) 53 LGRA 160.
42 (1992) 77 LGRA 21.
43 (1991) 744 LGRA 265.
44 (1991) 72 LGRA 104.
45 B.J. Preston, "Adequacy of Environmental Impact Statements in New South Wales" (1986) 3 EPLJ 194.
46 Ibid. at 203.
47 Bates, Op cit, at 178.
48 [1981] 1 NZLR 530.

developments but there was no provision in the relevant Act[49] defining the term "environmental impact report" ("EIR"). As Bates explains:[50]

> [t]he court ... found that it must be the intention of the statute that the EIR would contain adequate and reliable references to every significant and relevant issue, and provide a coherent base for consideration of those issues by all parties involved. This intent would not necessarily be satisfied by concentrating only on site specific impacts, rather than the wider environment, and the applicant was not entitled to avoid awkward or significant environmental issues by simply failing to address them in the report. The general tenor of this decision thus displays a judicial approach to adequacy which is very similar to that adopted in NSW.

3. "Adequacy Of Information" In Recent WA Cases

There have been two significant decisions of the Supreme Court of Western Australia in the last three years that have confronted the issue of how much information should be gathered, published and considered in making decisions about the management of State forests. Those cases are:

- *South West Forests Defence Foundation (Inc) v The Lands and Forests Commission and the Minister for the Environment (WA)* [51], and
- *Bridgetown-Greenbushes Friends of the Forest Inc and Balingup Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management*[52]

In each case, the Full Court of the Supreme Court has applied a different legal test from the adequacy standard discussed above; namely, a test of good faith and fundamental non-compliance in the performance of the administrative duties involving the gathering, publication and consideration of information. In other words, the Court has said that it would only invalidate the relevant decisions if the performance of the duties was lacking in good faith or was so fundamentally flawed that one could not say that the relevant agency had performed the duty at all. We will review the decisions of the Court in each of these cases to demonstrate the Supreme Court's approach.

3.1. South West Forest Defence Foundation (Inc) V The Lands And Forests Commission And The Minister For The Environment Of WA

In this case, the Foundation challenged the validity of the decision taken by the Lands and Forests Commission to release for public comment amendments proposed to the 1987-1997 Regional Forest Management Plans prepared by the Lands and Forests Commission through the agency of the Department of Conservation and Land Management ("CALM") pursuant to the planning procedures of Part V of the *Conservation and Land Management Act* 1984 (WA). The proposed amendments were also subject at the same time to the environmental impact assessment procedures of Part IV of the *Environmental Protection Act* 1986 (WA). The challenge was based on allegations that the proposed amended plans omitted reference to certain unfavourable scientific research findings gathered by the Department and did not properly present some information that was vital for understanding the environmental impact of the proposed amendments. At first instance, the Foundation's application for orders *nisi* was dismissed by White J on the grounds that there was undue delay and that there was no arguable case. On Appeal, the unanimous decision of the Full Court of the Supreme Court was to dismiss the Foundation's case.

The first issue was whether CALM, in preparing the proposed amendment, had failed in its obligation to inform the public by failing to refer to the existence of certain research information? The Foundation relied on *Scurr* to support its argument. Anderson J, giving the judgment of the Full Court, distinguished *Scurr* on the ground that the regulations required the notice to provide

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[49] National Development Act 1979

[50] Bates, Op cit, at 178-179.

[51] (1995) 86 LGERA 365.

[52] Delivered 17 June 1997, Library No.970301.

"particulars" of the proposed development and that the notice did not include even elementary particulars. Anderson J seems to have failed to acknowledge the policy issues behind the Court's reasoning in *Scurr* in favour of a strict statutory reading of the relevant legislation. His Honour looked at the requirements of public notification of proposed management plans under s.57 *CALM Act*. He found that there was no express or implied requirement that the proposal document must notify the public of all research studies and information, about which there could be honest differences of opinion as to relevance. His Honour concluded:

> "The essential duty arising under the Act is to prepare a forest management plan and to publish that plan so that it may be reviewed by the public and all interested parties. No doubt any competently prepared forest management plan will state the scientific basis for it and make appropriate reference to data relied on for the strategies proposed. It might be arguable that a complete failure to do this will deprive the plan of the essential character of a forest management plan, such that there is no power to approve it. But it is not suggested in this case that the proposal documents were deficient in that way. The appellant's complaint is that there was not, in addition to a disclosure of data relied on, a disclosure of the existence of other material not relied on."[53]

While his Honour acknowledged that a competent management plan will state the scientific basis for it and make appropriate reference to data relied on, a plan will only be regarded as *incompetent* when there is a *complete failure* to do this. This represents an "all or nothing approach" and implies that a plan which provides only scant scientific information will not be a complete failure to inform the public. This is contrary to the policy behind public notification procedures as expressed in *Scurr* and if these policy objectives are to be achieved the need for a legal standard of adequacy of information is apparent.

The second issue was whether the failure of CALM to have regard to the research information in preparing its proposal rendered it invalid? Anderson J viewed this argument as one alleging failure to have regard to a relevant consideration or affording it adequate weight. In answer to this argument his Honour stated:

> "A mere failure to take account of relevant scientific data will not, of itself, amount to an improper exercise of power, although it may affect the quality of the forest planning and the overall merit of a particular plan. Unless a deficiency is so fundamental, as to quantity or quality, as to lead fairly to the conclusion that in reality the proposals do not amount to a bona fide attempt to design a management plan for any of the purposes set out in the Act I do not see how the deficiency can be said to make the proposal "invalid".[54]

The Court's reluctance to take up the Foundation's argument about the failure to refer to or have regard to certain scientific information is in accordance with well established traditions of administrative law. It would be a difficult exercise for a court to assess whether certain information should be given particular weight in policy decisions concerning the planning and EIA of natural resources management.[55] However, there is still the concern about whether the Court applied the proper test of the sufficiency of information to be gathered and considered by the decision-maker.

The third issue concerned the Applicant's argument that CALM represented to the public in the proposed amendment that logging and thinning of trees would not occur in the reserve areas (ie. areas reserved from logging for a period of 15 years) of the second order catchment streams of the intermediate and low rainfall zones when it was always intended that some logging would occur in these zones. Anderson J interpreted the Foundation's argument as one alleging *mala fides* on the part of the LFC through the Department of CALM. This may not have been the interpretation which best expressed the substance of the Foundation's challenge which turned on the adequacy of the

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[53] (1995) 86 LGERA 365, 376.

[54] (1995) 86 LGERA 365, 377.

[55] A Gardner, "Natural Resources Law and Policy in Western Australia", *The Australasian Journal of Natural Resources Law and Policy*, Vol 2, No 1, 1995, p 197.

information provided in the proposal document. In particular, the issue was what was the meaning of *uncut*, and whether it permitted thinning operations - the Department of CALM and the EPA having opposing views on the issue.

Fundamentally, this echoes issue 1 concerning the adequacy of information provided for public review. Ultimately, the Court's view was that, even if there was a misrepresentation in the proposal document, the detailed consideration of the issue later in the EIA process cured any possible legal defect.[56]

The fourth issue was whether CALM was in breach of its statutory duty in that it failed to notify the public of the volume of logs that would be extracted from the forests affected by the proposed amendment? This argument was rejected by Anderson J because his Honour was "... unable to see why it should be necessary or desirable from a conservation standpoint or for public or other review purposes to set out in a forest management plan, a total volume of logs to be removed from the forest."[57] His Honour distinguished this detail from others such as type, age and quality of timber to be taken. If the object of management plans being exposed to public review is to allow for informed public comment, then the necessity for a fact as fundamental as the volume of logs to be extracted to be made public would appear to be obvious. Anderson J's distinction appears to be unjustifiable it terms of providing adequate information for public review.

3.2. Bridgetown-Greenbushes Friends Of The Forest Inc & Balingup Friends Of The Forest Inc V Executive Director Of The Department Of CALM

This decision of the Full Court[58] was on appeal from first instance decisions on applications by CALM to strike out the statements of claim in three separate actions seeking to restrain CALM's logging operations. One action, concerning the Kerr and Hester State forests, was brought by the Bridgetown-Greenbushes Friends of the Forest and the Balingup Friends of the Forest. The other two actions, concerning, respectively the Jane and Sharpe State forests, were brought by the South-West Forests Defence Foundation. In each case, the Plaintiffs were seeking to enforce the amended Forest Management Plan which was the subject of the case discussed above. The Plaintiffs argued that the logging plans prepared for each forest were invalid because CALM, in preparing the logging plans, had failed to comply with certain duties set out in chapter one of the Forest Management Plan or had failed to have regard to those provisions as relevant considerations. The essence of the argument for these failures was that CALM did not adopt appropriate methods to gather and consider sufficient information about the non-timber values of the State forests; namely, the statutorily designated values of recreation, nature conservation and water catchment protection. There were a number of other arguments in the cases which need not be explored here.

At first instance, the relevant parts of the Kerr / Hester Statement of Claim were struck out by Parker J but the same relevant parts of the Jane and Sharpe Statements of Claim were not struck out by Master Chapman. On the consolidated appeals and cross-appeals to the Full Court, the unanimous decision of the Court was to completely strike out from each Statement of Claim the pleadings that CALM had breached its legal duty to carry out its operations in accordance with the relevant management plan, and / or failed to consider the objectives of the management plan as relevant considerations.

There were three stages in the Plaintiffs' arguments. The Court accepted the first stage of the argument that s.33(3)(a) of the *CALM Act* created a justiciable obligation to manage State forests in accordance with the Forest Management Plan. The Court also accepted the second stage of the argument that the provisions of chapter one of the Forest Management Plan constituted justiciable duties and / or relevant considerations to be fulfilled or considered in the preparation of the logging plans. However, the Plaintiffs failed at the third stage of establishing a breach of the duties or a

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[56] Ibid. at 204.

[57] (1995) 86 LGERA 365, 380.

[58] 17 June 1997; Library No 970301.

failure to consider the relevant considerations by failing to adopt appropriate methods of consultation and to gather, publish and consider adequate information about the non-timber values.

Crucial to the Court's reasoning were the tests it adopted for compliance with the duties and consideration of relevant factors, and the test of sufficiency of the information to be gathered, published and considered in preparing the logging plans. The Court concluded that although there was a duty to fulfil the Forest Management Plan, "it is a matter for the defendants to implement those plans as they think fit, and subject to any direction given by the Minister. The defendants no doubt have a duty to act honestly, and in good faith, but subject to that, it seems to me that their discretion is largely unfettered".[59] Further, the way in which the defendants took into account the factors identified by the Forest Management Plan and the weight to be given to them are matters for the defendants' discretion.[60] Because the Plaintiffs had not pleaded a complete failure to fulfill the duties or to consider the relevant factors, the relevant paragraphs would be struck out.

On the test of the sufficiency of the information, the Court relied on the judgment of Black CJ in the Full Federal Court decision in *Tickner v Bropho*[61] where his Honour (and the Court) held invalid, as unreasonable, a decision of the Minister for Aboriginal Affairs (Cth) that was made "without obtaining up to date information which was readily available to him".[62] Contrasting that decision with the claims pleaded by the Plaintiffs, Templeman J held that the Plaintiffs had failed to establish, *by their pleading,* that the information to be gathered is readily accessible. Templeman J concluded:[63]

> Not only is there an absence of any allegation that the defendants have done nothing with respect to those matters: there is an inference to be drawn from the pleadings that the material, said by the plaintiffs to be necessary, is not readily available.

The law on the duty to inquire and the adequacy of information was not argued before the Full Court on appeal because it had neither been the subject of determination by the judges at first instance nor the subject of challenge by the Defendants at any stage. The question is left open, therefore, whether it is appropriate to apply strictly the test from *Tickner* (which in turn relied on *Luu v Renevier*) in circumstances where there is no person seeking the grant of a permission or privilege but rather a public agency bound by a duty to manage natural resources in the public interest. In the case of managing public natural resources such as State forests, any information to be gathered will need to be gathered by the public agency charged with the duty of management.

In summary, therefore, the Court applied tests of fundamental non-compliance to determine the validity of CALM's management actions against the Plaintiffs' pleadings. It effectively rejected the Plaintiffs' allegations that the CALM had to gather adequate information in order to fulfil its duties or properly consider the relevant factors.

4. Conclusion: Hearing Before The High Court

As mentioned in the Introduction, the High Court has ordered that the application for special leave to appeal to the Court in the *Bridgetown-Greenbushes case* (heard initially on 5 December) be argued in full before a bench of five justices. The hearing is scheduled for 1 April 1998 in Hobart. The appeal hearing will range over a number of issues besides compliance with the Forest Management Plan, but this issue and the question of gathering, publishing and considering adequate information in environmental decision-making should be a focal issue. The opportunity will be presented to the High Court to address this difficult and fundamental question. It is our submission that the High Court should reject the test of fundamental non-compliance applied by the WA Supreme Court and adopt a legal standard of adequacy of information for the relevant regulatory purposes for which the

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[59] Ibid, transcript of reasons of Templeman J, 40.

[60] Ibid, transcript of reasons of Templeman J, 44.

[61] (1993) 114 ALR 409. Black CJ relied, in turn, on the decision of the Federal Court in *Luu v Renevier* (1989) 91 ALR 39, 50.

[62] 17 June 1997; Library No 970301, transcript of reasons of Templeman J, 45.

[63] Ibid, 46.

decision is being made. It will be interesting to see whether the Court moves in the direction of constructing a general standard of adequacy or endeavours to restrict its test to a construction of the language of the pertinent statute or regulatory document.