CASE NOTES

WESTERN AUSTRALIA

Special Leave Refused from WA Supreme Court Decision

On 2 April 1998, the High Court refused to grant special leave to appeal in South West Forest Defence Foundation v Department of Conservation and Land Management; Bridgetown-Greenbushes Friends of the Forest v Department of Conservation and Land Management (No 1) [1998] HCA 34. In this case the Environmental Defender's Office of Western Australia represented the applicants and sought leave to appeal from a decision of the Full Court of the WA Supreme Court, which struck out their statements of claim in three actions. A comment on the decision of the WA Supreme Court by Alex Gardner was published in AELN No 2 1997 (June/July). The case raised significant questions in relation to environmental management plans and their justiciability and enforceability. Specifically, on appeal the applicants sought to argue that the:

> Department of Conservation and Land Management was bound to identify, locate and seek to conserve endangered flora and fauna, or alternatively, to take reasonable steps to do so, before logging in the areas set out in the pleadings. The applicants argued that this obligation arose from the:
> (a) *Conservation and Land Management Act 1984* (WA), s33 and the Forest Management Plan made under that Act; and
> (b) *Environmental Protection Act 1986 (WA), s47* and a commitment given to amend an earlier Forest Management Plan made under the *Conservation and Land Management Act.*
> Department had contravened their duty under the earlier Forest Management Plan to liaise with the local community. That duty arose from the terms of commitments given in relation to amend the earlier Forest Management Plan.
> respondents, their agents and contractors' proposed logging activities contravened the flora and fauna provisions of the *Wildlife Conservation Act 1950* (WA).

A majority of the High Court (Gaudron, McHugh, Hayne and Callinan JJ, Kirby J dissenting), refused to grant special leave. In response to the applicant's contentions the majority held that the:

first issue needed to be clarified and repleaded;
second issue did not warrant special leave; and
third raised matters bordering on the hypothetical.

In dismissing the application the Court observed that the WA Supreme Court's judgment would nor preclude the bringing of fresh proceedings with more precise pleadings. However, in dissent, Kirby J made significant objections to the majority's decision. His Honour considered that the case raised a number of important questions of environmental law, practice and approach. In particular, Kirby J noted that the legislation in question was similar to legislation in other Australian jurisdictions and that "[t]he elucidation of the way in which parties claiming an interest can enforce, as against the Executive Government and its agencies, environmental plans, such as the management plan...is an important question." His Honour also observed that the WA Supreme Court's decision stood "as a serious obstacle to the enforcement of such management plans" because of the perception that the decision supported the proposition that management plans in environmental matters are not justiciable and, thus, not necessarily to be obeyed by the Executive Government. On this basis, Kirby J held that "[t]hese proceedings represent a suitable vehicle for allowing an exploration of the approach which should be taken in such cases."

Department Of Environment Protection (Wa) V West Australian Turf Club

The DEP prosecuted a nominal defendant (the Chairman) for and on behalf of the West Australian Turf Club, **(Club)** which is an unincorporated association, for two offences under the Environmental Protection Act 1986 ("the Act").

The Club was prosecuted under Section 49(1) for causing, or allowing to be caused, pollution in that it caused or allowed to be caused a direct alteration of the environment, namely the waters of and fish in the Swan River. The Club was also prosecuted under Section 50 for causing or allowing waste (the pesticide mixture) to be placed in a position from which the waste could reasonably be expected to gain access to the environment (the waters of and fish in the Swan River) thus causing pollution.

An employee of the Club was about to spray the race track with pesticide (to control beetles and weevils) when he noticed a leak from the spraying tank attached to his tractor.

To prevent the pesticide burning the turf he left the track and parked on an area of hard stony ground. The contents of the tank emptied onto the ground and ran down a small incline into a drain and then into the Swan River, killing a significant number of fish.

The Club pleaded guilty to the charges. In determining the penalty, the Magistrate considered that the negative factors were the number of fish killed, the public health risk to those using the river and the need for a deterrent effect. The positive factors included the Club's lack of previous convictions, its complete co-operation during the investigation, its early plea and the new safety policy dealing with pesticide use and equipment maintenance.

A penalty of $3,000 (maximum penalty for an individual was $5,000) was imposed for the Section 50 offence and a penalty of $5,000 (maximum penalty was $10,000 and/or six months imprisonment) for the Section 49(1) offence.

Under amendments effective from 1 July 1998, the current Section 50 offence is contained in the amended Section 50(2) and the penalties are $250,000 for individuals (daily penalties of $50,000) and $500,000 for bodies corporate (daily penalties of $100,000). A new offence is contained in Section 50(1) to address intentional or criminal negligence which doubles the Section 50(2) penalties.

The current Section 49(1) will be included in the amended Section 49(3) with penalties of $250,000 or three years imprisonment or both for individuals (daily penalties of $50,000), and $500,000 or three years imprisonment or both for corporate bodies (daily penalties of $100,000).

The two existing sewerage treatment ponds were constructed from salt marsh clay prior to the requirement for a works approval being legislated. The DEP considered that, as the ponds existed when the legislation was introduced and had sealed over time, they could be licensed. However, the DEP did not consider that salt marsh clay was satisfactory for any new sewerage treatment ponds because of ongoing problems with leakage.

In imposing all of the penalties, the following general factors were considered to be significant. The charges all related to the issue of possible damage to the environment, the groundwater and particularly the Marine Park. To prevent such a breach occurring again, and in particular by this defendant, a deterrent penalty was warranted. The defendant had no previous convictions under the Act.

In determining a fine of $5,000 for Section 53(1)(b)(i) for failing to obtain a works approval, the Magistrate said that there were no similar cases to provide a benchmark for the fine. The Magistrate also noted that this was a wilful ignoring of the regulations of the requirements of a works approval. The current maximum is $5,000 for individuals (no daily penalties) and $10,000 for bodies corporate (no daily penalties). The new maximum will be $50,000 for individuals (no daily penalties) and $100,000 for bodies corporate (no daily penalties).

A fine of $2,500 was imposed for each of the second and third charges under Section 56 because of the defendant's failure to apply for, obtain and renew a licence. The current maximum for Section 56 is $25,000 for individuals (daily penalties of $5,000) and $50,000 for bodies corporate (daily penalties of $10,000). The new penalties will be $50,000 for individuals (daily penalties of $10,000) and $100,000 for bodies corporate (daily penalties of $20,000).

Another issue which arose in the case was the importance of applying for a transfer of licence if a new operator was to take over the site.

Department Of Environment Protection (WA) V Western Mining Corporation

The DEP recently prosecuted Western Mining Corporation (WMC) for an emission from its Kalgoorlie smelter which exceeded the levels set down in WMC's environmental licence.

There are two other companies operating smelters in Kalgoorlie, and collectively the companies monitor their emission levels and report to the DEP.

The prosecution of WMC failed when the Court decided that the units of measurement by which the excess emission was recorded were not Australian legal units of measurement as required by Section 10 of the National Measurements Act. Therefore the evidence was not admissible. The DEP has appealed this decision.

The main potential consequences are:

(a) the measuring processes may be re-examined by the DEP and more stringent requirements set;

(b) the DEP may not be as ready to allow companies to monitor their own emissions, and

(a) the legislation may be amended to deem that certain measurements are admissible in Court.

NEW SOUTH WALES

Filipowski v Gyeong Ryong; Filipowski v Adriatic Tankers Shipping Company, Nos 50076 & 50077 of 1997, Land and Environment Court of New South Wales, Sheahan J, 23 April 1998.

The Defendants, Adriatic Tankers Shipping Company and Gyeong Ryong, were the owner and Master (respectively) of a ship named the "Hegg" which, on 12 December 1994, allegedly discharged a liquid substance into the water of White Bay wharf in the port of Sydney, in contravention of Section 18(1) of the *Marine Pollution Act 1987* ("MPA").

The elements of the offence were the discharge of a liquid substance from the ship, the carrying of the substance as cargo, the discharge of the substance into State waters, and the identity of the defendants as owner and/or Master. The penalties provided for were 2,000 penalty units ($110 per unit) for a natural person and 10,000 penalty units for a body corporate convicted of the offence.

The Court was satisfied beyond reasonable doubt that:

500 litres of soy bean oil discharged from the "Hegg" into the waters of White Bay within the State of NSW on or about 12 December 1994;

Adriatic Tankers Shipping Company owned the "Hegg", and that Gyeong Ryong was, at that date, its Master;

at the relevant time, soy bean oil was being carried by the "Hegg" as cargo within the meaning of s18(1) of the MPA.

However, the court noted that soy bean oils are category D under the Schedule to the MPA, indicating that they are among the least harmful of noxious liquid substances that might pollute waters.