

**The WA Commissioner of Soil and Land Conservation v
Nabarlek Nominees Pty Ltd and Ors (2002) WASC 18**

Application for injunction under Soil and Land Conservation Act 1945

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WESTERN AUSTRALIA EDITOR'S NOTE:

The case again highlights the lack of effective legislation in WA to control and manage land clearing. See also Pennings v Shellbay Holdings [2001] WASC in NELR No 2 of 2001 (Page 27) where the provisions of the Wildlife Protection Act were used to prosecute illegal land clearing.

On 19 December 2001 The Honourable Dr Christine Sharp (The Greens WA) introduced to the Legislative Council a Bill entitled Environmental Protection (Land Clearance) Amendment Bill 2001. The proposed amendments would require a person who wished to clear land to notify the EPA of the proposal and prohibits the person from clearing land until authorised by the Commissioner. The proposed penalty for failing to comply is a fine not exceeding \$50,000. While unlikely to be enacted, the Bill is an indication of the level of concern currently associated with the issue of land clearing in WA.

The Minister for the Environment has indicated that proposed amendments to the EP Act for causing environmental harm, which are aimed at controlling land clearing, will be introduced as soon as possible.

On 15 December 2001 at the Lakes, 60km east of Perth, contractors engaged by BGC (Australia) Pty Ltd (BGC) cleared approximately 80 hectares of native vegetation (mixed eucalypt woodland) to extend its quarrying operations without notifying the Commissioner of Soil and Land Conservation (Commissioner) of its intention to clear land under the Soil and Land Conservation Act (SLC Act).

The SLC Act requires a person intending to clear more than 1 hectare of land to notify the Commissioner in writing (Regulation 4). Once notified the Commissioner has 90 days to issue a notice to control or prohibit any clearing that is considered to be liable to cause land degradation (Section 32).

On 17 December 2002 the Commissioner was granted an interlocutory injunction until 18 March 2002, restraining BGC from cutting down, destroying or otherwise damaging trees, shrubs, grass or other plants on the land, other than for firewood, posts and timber contrary to the SLC Act. The matter was listed for final hearing on 1 February 2002.

On 22 January 2002 BGC gave written notice to the Commissioner of its intention to clear the land. On 25 January 2002 the Commissioner issued a soil conservation notice under Section 32 of the Act, without having inspected or surveyed the land to examine the likelihood of salinity, on-site or off-site, as a result of the clearing and the risk of soil erosion. The notice required BGC to, among other things, refrain from clearing the land. The penalty prescribed by the Act for breaching a soil conservation notice is \$3,000.

At the final hearing on 1 February 2002, White J held that the Court did not have the power to restrain BGC from committing the offence of breaching a soil conservation notice because in its view the Act provided an exhaustive code of the remedies available for breaching a soil conservation notice, which does not include obtaining an injunction.

The Court dismissed the Commissioner's concerns that BGC might breach the soil conservation notice if an injunction was not granted, on grounds that there was no evidence that it would do so, nor any great benefit of it doing so, given that it also needed several approvals from several authorities before it could commence quarrying. Consequently the Court rejected the argument put by the Commissioner that, while acknowledging that courts are reluctant to grant injunctive relief where the legislature provides criminal sanctions that have not been exhausted, circumstances occur in which injunctive relief will be afforded. These circumstances include where:

- the particular penalty may be ineffective to deter the defendant in the particular circumstances;
- the defendant has made it clear that it will continue to flout the criminal law; and
- the defendant's defiance could lead to widespread breaches of the law by others similarly situated.

The decision highlights that, the Act provides the Commissioner with limited powers to prevent clearing of land which may be harmful to the environment after it has issued such a soil conservation notice. As the Commissioner argued before White J, the \$3,000 statutory penalty is not likely to be adequate to ensure that BGC and other large companies will comply with a soil conservation notice.

It is submitted that the only appropriate course of action to remedy this situation is for Parliament to amend the Act to substantially increase the penalty and possibly to provide the Commissioner with specific power to apply for injunctions to enforce soil conservation orders and halt clearing in those situation where a proponent has not provided notice of an intention to clear. Until then the effectiveness of a soil conservation notice to protect against unauthorised clearing will largely depend on the conscience and resources of the person or company to whom it is issued.

The penalty for not submitting a notice of intent to clear land under Regulation 4 is \$2,000, however, it is not known whether proceedings are to be commenced against BGC for this offence.