Dr Ted Christie, Barrister and Mediator, Queensland Bar

Dr Christie will be participating in a panel discussion on the interface between native title, environmental protection and cultural heritage at the upcoming LexisNexis Native Title Law Summit QLD, 15-16 July 2009. The special focus Dr Christie will bring to the Panel will be on sustainability and biodiversity. To reserve your place for more information, email: nicola.mclintock@lexisnexis.com.au/

A full profile of Dr Christie can be found at the following link: http://tedchristie.blogspot.com/

Declarations under the Wild Rivers Act 2005 (Qld) in Cape York and Indigenous Concerns Over Community Consultation: Can the Impasse be Resolved?

Consultation ~v~ Litigation ~v~ Negotiation

"This Government’s idea of consultation is to invite submissions and then ignore what people say unless it is in line with their original intentions... It was a fraudulent consultative process in which there was never any intention by the Bligh Government to listen to people and address concerns they expressed, as long as the Wilderness Society was appeased and got what it demanded ... (1)"

"We received over 2800 submissions [in the community consultation process]... We undertook extensive consultation with over ... 300 meetings involving 100 groups, 300 individuals. And we actually funded ... Balkanu [an Indigenous company in Cape York] ... to assist with the consultation process (2)"

"...the Wild Rivers legislation took from the traditional owners of Cape York the right to develop and manage any protective regimes that affected their land and livelihood ... (3)"

Concerns over community consultation and the administrative decision-making process by Government have long been a feature of environmental conflicts throughout Australia - particularly where the conflict involves volatile, controversial or awkward issues.

The above statements were made following recent declarations to provide special protection for a number of Cape York Rivers under the Wild Rivers Act. An article on this issue by Tony Koch published in ‘The Weekend Australian’ titled “Noel Pearson’s last stand: Cape York’s wild rivers run dry” (7 April 2009), referred to a “fight... over a plan to lock up Aboriginal land along the ‘wild rivers’ of Cape York”. In this regard, Aboriginal leader, Noel Pearson, has made the following observations (4):

- “…declaring them ‘wild rivers’ is a stupid move and it tears at the heart of encouraging Indigenous communities to engage in business”;
- “…Traditional owners exercise[d] their right to put in submissions. They put in submissions to the Government. They have not received any responses or any opportunity to negotiate on those submissions”; and
- Concern over whether a “proper democratic and legal process has been followed”.

Where the outcome of a community consultation process is a Ministerial decision, or a decision by a Government agency, that results in public disbelief and concern being expressed, the agency’s credibility may be eroded and, in turn, may lead to a decline in public trust and confidence in the agency. This will be a significant factor in public interest
Conflicts where there is a need to preserve a long-term, positive relationship between the community and Government - or a need to reconcile an on-going relationship.

Clearly, there may be some misconceptions about the role of community consultation where public notice and comment obligations are prescribed by statute. This leads to very strongly held views and divergent opinion being expressed that reflect uncertainty in terms of the role provided to the community by the consultation process. In particular, what power does the community have in the administrative decision-making process?

Community Consultation: Legal Obligations

An understanding of the legal principles in administrative law that apply to the community consultation process is the essential foundation for finding a solution to the impasse that has arisen in the Queensland Government’s decision to provide special protection for a number of Cape York Rivers.

The developments of common law principles in relation to procedural fairness and the community consultation process are far more extensive and have greater breadth in the UK, relative to Australia. This is particularly the case for the principle of legitimate (or reasonable) expectation and information disclosure as part of the community consultation process.

Community Consultation and the Law: Australia

In Leichhardt Municipal Council v Minister for Planning No. 2 (1994) 78 LGERA 146 [and on appeal to the Appeal Court of New South Wales (1995) 87 LGERA 78] the meaning of the community consultation provision (Section 45) of the Environmental Planning and Assessment Act 1979 (NSW) was in dispute. The Land and Environment Court concluded that “There is no imperative that the advice be accepted or that it be taken into account to any particular degree. The object of consultation is to be apprised or informed of other opinions or positions in regard to a subject before the matter for decision is finally determined”.

On appeal, the Appeal Court of New South Wales concluded that “The obligation was to consult, not to agree”: (1995) 87 LGERA 78.

Comment

(i) Where submissions and public comments are sought by a Government agency, as part of the community consultation process, the legal obligations that must be taken into account by the decision-maker are prescribed by the relevant statute.

(ii) In making a declaration, the following legal obligations are prescribed under the Wild Rivers Act for community consultation: a requirement for the declaration proposal to provide details of the community consultation that will take place [s. 12(1)(t)]; the mandatory requirement for the Minister, in preparing a wild river declaration, to consider the results of community consultation and all properly made submissions on the declaration proposal [s. 13(1)(a,b)]; the mandatory requirement for the Minister to prepare a report on the consultation process within 30 days of a wild river declaration being made. The consultation report must include a summary of
issues raised during the consultation process and how the issues have been dealt with [s. 38]; and copies of a consultation report are to be made available for public inspection [s. 39(f)].

(iii) In preparing a wild river declaration, the Wild Rivers Act does not prescribe a legal obligation for the Minister, reviewing submissions on the declaration proposal, to agree with the results of community consultation. For this reason, the reaction by the community to a decision made by Government may be to see the consultation process as an “illusory bargain”.

(iv) It could be argued that the position in Australia is that community consultation is a two-way process of information exchange between the Government agency and the community. The consultation process does not provide the community with any power to be directly involved with the Government agency in making the final decision - or with an opportunity to negotiate the outcome.

Community Consultation and Case Law: the UK

The key legal principles in UK public law that have developed, over time, in relation to community consultation, procedural fairness and legitimate expectation have been summarised (5) and include:

a. To assert that a ‘legitimate expectation’ exists, something must be pointed to, in the nature of a policy, promise, practice or other conduct that a Government agency commits itself, which gives rise to its existence.

b. The consultation process must include sufficient reasons for particular proposals to allow those being consulted to give an ‘intelligent consideration’ and an ‘intelligent response’.

c. Consultation is not litigation. There is an obligation to let those who have a potential interest in the subject matter know in clear terms what the proposal is and telling them enough to enable them to make an ‘intelligent response’.

d. The extent and method of consultation must depend on the circumstances. Underlying what is required must be the concept of ‘fairness’.

e. The overriding requirement is that any consultation process must be ‘fair’. What is fair - and whether fairness demands that new material which was not available during the consultation process should be made available to those consulted so as to have an opportunity to deal with it before a decision is taken - must depend on the particular circumstances of the case.

f. The consultation process will be flawed if the ‘information’ provided to those being consulted is ‘wholly inadequate’ and ‘misleading’.

g. Where there is a commitment given by a Government agency – such as the ‘fullest public consultation’ will be undertaken e.g. by a promise or through a policy - there will be a ‘legitimate expectation’ on those being consulted that the consultation documents do not mislead those being consulted.
Comment

(i) The public law principles developed in the UK for legitimate expectation, information disclosure and the community consultation process would not be binding in Australia. However, they would have persuasive value, given that legitimate expectation is an accepted principle of the law of procedural fairness in Australia.

(ii) The UK public law principles are an important source of knowledge power for conflict resolution and are relevant considerations for a Best Alternative to a Negotiated Agreement ["BATNA"] analysis to assess whether either community consultation or litigation is the best alternative process to negotiation for resolving an environmental conflict.

Effective Public Participation, Power and Administrative Decision-Making

The main options open to the community to resolve environmental conflicts include community consultation, litigation, lobbying or negotiation. A key issue is whether the courts should be used as a remedy of last resort - used when all other conflict resolution strategies have failed – or whether litigation should be the primary pathway for settling environmental problems. This is the foundation for any BATNA analysis.

The “principles for effective public participation” lie at the heart of resolving public interest environmental conflicts and have been an accepted body of scientific knowledge for almost three decades (6). One such principle that requires “[the community to be] aware of the level of power being offered” to them, in the public participation process, is a cornerstone for determining how best to resolve an environmental conflict.

The level of power available in community consultation may restrict the community to make written submissions commenting on a proposal – or the community may only have power to make recommendations as to the form of the final decision. The final decision is not made by the community – but by the relevant Minister or Government agency.

The level of power available in litigation is that the parties have a role in shaping the decision, through the evidence they lead. However, the decision is made by a Judge and imposed by the court on the parties. The outcome of litigation is a winner and a loser. One consequence of litigation is that the relationship between the parties would, in most instances, decline.

ADR is the only option which provides the community with a level of power to have a direct and active role with the Government agency in the decision-making process. ADR and negotiation incorporates a number of elements – such as joint fact-finding and joint problem-solving. ADR provides a structured negotiation process which facilitates the parties reaching the goal of finding an enduring agreement that all parties can live and abide with.
Comment

**Power** is a key concept for conflict assessment and resolution. Specifically, whether differences in the sources of power available make a party vulnerable to the power of the other side and result in a party having “*an [in]adequate basis of power to participate effectively in the conflict*” (7).

The threat of litigation through **knowledge power of legal rights** e.g. a civil enforcement action, may act as a trigger for a Government agency to consider a negotiated solution to the conflict, particularly where the threat is seen as real, rather than speculative or hypothetical and that there was a reasonable likelihood for such an action to succeed; in addition, where there was a potential source of embarrassment for the political party in Government, arising from media coverage.

Finding a Solution to the Wild Rivers Impasse

“*Where power arising from knowledge of legal rights is properly exercised, opportunities are provided for Government, proponents of development projects and the community to share power to negotiate solutions. Knowledge power, effectively exercised in this regard, should be seen as providing a “trigger” to share power to manage an environmental conflict by joint fact-finding or to resolve an environmental conflict by a joint problem-solving approach to reach a negotiated agreement* (8).”

Based on knowledge power of legal rights, there is one possible approach to address the needs and concerns raised by the Indigenous community in Cape York following the community consultation process and the declaration made under the Wild Rivers Act. This approach would encourage the sharing of power to enable the current land use conflict in Cape York being resolved through ADR and negotiation rather than litigation.

(i) Statutory Pathway: Non-Conforming Use (Or Purpose)

The statutory pathway of a “non-conforming use (or purpose)” represents the foundation for a pathway to resolve the issues raised by the Indigenous community in the media: the need for the Indigenous community to use the wild rivers to engage in business and so develop their own economic base as well as offsetting their concerns relating to dependency, passivity and welfarism (9).

There are a number of examples where the statutory pathway of a non-conforming use has been followed under environmental and planning legislation in Australia. Non-conforming uses (or purposes) have been defined as

“Any legal use of a parcel of land already in existence before the adoption of official controls, that would have not been permitted to become established under the current official controls, if those controls had been in effect prior to the date the use was established (10).”

A good example for a non-conforming use that relates to a zoning plan is the Marine Parks (Moreton Bay) Zoning Plan 1997 (Qld). The Zoning Plan was prepared by the Queensland Department of Environment and Heritage (as the Government agency was
then called) under the statute that applied at that time, the *Marine Parks Act 1982 (Qld).* The Zoning Plan came into force, as sub-ordinate legislation, in December 1997. By a legislative amendment to the Zoning Plan, on 22 May 1998, commercial fishing was permitted in the ‘Peel Island Protection Zone’ – a use contrary to the gazetted zoning plan. The *Marine Parks (Moreton Bay) Zoning Plan (No. 1)1998 (Qld)* has the following provision:

“Entry or use of Peel Island protection zone for non-conforming purpose”

31.A(1) Despite the purpose of the zone [commercial and recreational fishing are prohibited in a protection zone] a person may, under a permission, enter or use the Peel Island protection zone to carry out commercial fishing.”

Commercial fishers in Moreton Bay Marine Park were then invited by the Queensland Department of Environment and Heritage to apply for a Marine Parks permit to fish in the Peel Island protection zone for a specific fish species (“black trevally”). Applications for a Marine Park permit were assessed against guidelines set out in a Departmental policy.

A recent ‘Environmental Management System’ prepared for Moreton Bay in 2007 by the professional fishers of Moreton Bay (the “Moreton Bay Seafood Industry Association”) notes, “All forms of commercial and recreational fishing are prohibited in all protection zones except for the Peel Island protection zone where commercial tunnel netting by one professional operator targeting black trevally is permitted as a non-conforming activity (11).”

(ii) *Indigenous Traditional Knowledge and the Wild Rivers Act: Negotiating an Outcome for the Use of Cape York Wild Rivers*

To resolve the existing conflict relating to the future use of the Cape York wild rivers, the subject of the declaration, consideration needs to be given to the purpose of the *Wild Rivers Act: “… the preservation of the natural values of rivers that have all, or almost all, of their natural values intact”: s. 3. Following a declaration, human “activities” are regulated by classifying the wild river area into a number of management areas e.g. “high preservation area”, “preservation area”, “floodplain management area” (s. 41).

The key issues become whether the extent and intensity of the “activity” identified by the Indigenous community for the use of the prescribed management areas for the Cape York rivers:

(i) Could be managed in a way that that would minimise any adverse impacts of the proposed activity on the natural values of the wild rivers; and
(ii) Could preserve the natural values that were identified as the basis for making the declaration?

It may well be the case that the activity identified by the Indigenous community for the use of the Cape York wild rivers could be consistent with these requirements. Permitting the activity as a non-conforming purpose under the *Wild Rivers Act* may represent a creative solution for resolving the impasse.

Contemporary trends in North America in environmental decision-making highlight the importance of Indigenous traditional knowledge as a mechanism by which participatory approaches can be implemented. Local values, priorities and traditional knowledge in
environmental management are incorporated in the outcome to be achieved. For the Cape York wild rivers, the use of Indigenous traditional knowledge in relation to biodiversity and the management of natural and cultural resources should be promoted.

It would also be prudent for the Government agency to recognize the Indigenous community as the “expert agency” with respect to evaluating aspects of the use of natural resources that relate to their legal rights e.g. hunting and fishing rights and the protection of cultural resources (12).

In this regard, the following statement is a relevant consideration in Cape York:

“... these are lands that have been held by Indigenous peoples for thousand for years ... and they’ve been held under Crown titles, in the form of an Aboriginal reserve for 100 years, and they’re still pristine...” (13)

Ideally, ADR would be used to negotiate the outcome required for minimising any adverse impacts of the proposed activity on the natural values of the wild rivers - as well as preserving the natural values that led to the declaration. Power would be shared between the Indigenous community and the relevant Government Agency (in this case, now the Queensland Department of Environment and Resource Management, but formerly the Queensland Department of Natural Resources and Water ) in reaching mutual agreement as to the outcome.

Conclusions

The pathway suggested for resolving Indigenous needs and concerns over Cape York wild rivers is consistent with the landmark United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the United Nations on 13 September 2007. It was approved after 143 Member States voted in favour; there were 11 abstentions. Four States, including Australia, voted against the text at this time. The Declaration is non-binding that promotes, amongst other things, the full and effective participation by Indigenous peoples in all matters that concern them, and their right to remain distinct and to pursue their own visions of economic and social development.

In recognizing that “respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment”, the United Nation’s Declaration on the Rights of Indigenous Peoples (2007) stated that:

“Indigenous people have the right to participate in decision-making matters that would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institution (Article 18)”.

On 27 March 2009, the Rudd government stated that it would support the UN Declaration on Indigenous rights which the previous government had voted against in 2007. A statement released by Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs on 3 April 2009, put it this way:

“Today, Australia takes another important step in re-setting the relationship between Indigenous and non-Indigenous Australians and moves toward a new future. Today,
Australia joins the international community to affirm the aspirations of all Indigenous peoples...

Where possible, the Australian Government encourages land use and ownership issues to be resolved through mediation and negotiation rather than litigation. The ownership and management of land gives Indigenous Australians the capacity to forge new partnerships and pursue economic development (14).”

There are also significant advantages for the Government agency to consider pursuing this pathway. It would share in the credit for successfully resolving the impasse over the wild rivers declaration related to the needs and concerns of the Indigenous community, avoided any potential threat of litigation by resolving the conflict through ADR and negotiation, ensured that the negotiated outcome complied with the need to preserve the natural values of the Cape York wild rivers – voluntarily - and reconciled the relationship between the Indigenous community and government.

END NOTES


(5) For a discussion on public participation processes see Chapter 3 “Constraints to participation in public interest environmental conflicts” in, Christie, Edward Finding Solutions for Environmental Conflicts: Power and Negotiation, Edward Elgar, Cheltenham, UK (2008). For a review of case law on community consultation, see Chapter 3 at 50-53; and Chapter 4 at 78-9, for UK case law on procedural fairness and public notice and comment provisions.


(8) See Christie, Reference (5) Chapter 1 “Introduction” at p. 7; this statement is the cornerstone for this cross-disciplinary book.

(9) See Reference (4).


(12) See Reference (5), where Indigenous traditional knowledge is discussed in a number of Chapters that focus on resolving conflicts over “Sustainability”, “Environmental Impact Assessment” and “Biodiversity”; the UN Declaration on the Rights of Indigenous Peoples (2007) is also referred to.

(13) See Reference (4) and the statement by Noel Pearson in an interview on ABC radio on 6 April 2009.