Prospective own costs order in public interest judicial review matter
By Larissa Brown

In *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355, his Honour Justice Jones of the Queensland Supreme Court granted a prospective application by environment group Alliance to Save Hinchinbrook Inc. ("ASH") under section 49(1)(e) of the *Judicial Review Act 1991* (Qld), for each party to bear their own costs.

The proceedings involve judicial review of a decision by the Queensland Environmental Protection Agency (EPA) and Queensland Parks and Wildlife Service to approve the building of two rockwall breakwaters into the Hinchinbrook Channel at Oyster Point. On 1 December 2005 his Honour Justice Jones found the case involved or affected the public interest because the decision to approve the breakwaters may have a drastic impact on the natural environment of the area. In ordering that each party bear their own costs in the proceedings, his Honour found that ASH had a reasonable basis for the review application and also noted ASH did not stand to financially gain from the proceedings.

This costs decision sets a good precedent for ensuring substantive access to justice for the community in public interest environmental judicial review cases in state courts, and means the merits of this particular case will be heard without fear of crippling costs orders.

The judgment is available from:

http://www.courts.qld.gov.au/qjudgment/QSC%202005/QSC05-355.pdf

This decision comes on the heels of the Queensland Environment Minister's October 2005 decision to reject the application by Cardwell Properties Pty Ltd to construct controversial Port Hinchinbrook Stage 2, a canal-style estate also involving Cardwell Properties Pty Ltd. In recent developments, in late January 2006 it was reported that developer Keith Williams had sold his stake in the development.

For updates on other recent Planning and Environment Court and relevant Court of Appeal cases, see Deacons Lawyers' website www.deacons.com.au and follow links to updates by the Environment and Planning section, or Corrs Chambers Westgarth's website www.corrs.com.au and follow links to the Planning Environment and Local Government Practice Area.

Relationship between the Soil and Land Conservation Act 1945 and Environment Protection Act 1986 considered
By Merinda Logie

In the recent case of *Burns and Commissioner of Soil and Land Conservation* [2006] WASAT 83, the State Administrative Tribunal considered whether a decision to discharge a soil conservation notice could have the effect of causing or permitting the proposal to be implemented and therefore whether the Tribunal was precluded from discharging the notice.

This case highlighted the potential for conflict between the *Soil and Land Conservation Act* and the *Environmental Protection Act* (**EP Act**), at the same time clarifying their effects on each other and the role of the Tribunal in such matters.

The substantive proceedings involved an application by Mr Burns pursuant to section 39 of the *Soil and Land Conservation Act* for a review of the decision of the Commissioner for Soil and Land Conservation not to discharge a soil conservation notice under section 38 of that Act. Mr Burns had applied to clear 99.8% of his 1000 hectare property. Mr Burns subsequently lodged an application for review of this decision.

The issue before the Tribunal was complicated given that the proposal had already been referred to the EPA as a 'significant proposal', in the opinion of the Commissioner, within the meaning of section 37B(1) of the EP Act. By letter dated 22 February 2006, the EPA notified the Tribunal that it had decided to assess the proposal, warning that no decision should be made to allow or implement the proposal until the EPA had reported to the Minister and the Minister had authorised or implemented otherwise.

The Commissioner argued that, because the EPA had notified the Tribunal of its decision and because of the referral itself, the Tribunal did not have power to discharge the notice until it received authority for the Minister for the Environment. Thus two preliminary issues had to be discerned by the Tribunal before proceeding further.

1) Could a decision to discharge the soil conservation notice the subject of the review have the effect of causing or allowing the proposal to be implemented?

2) Is the Tribunal precluded from discharging the notice until the Minister for the environment serves an authority with a statement permitting such a distinction?

The first question turned on the proper interpretation and application of section 41 of the EP Act.

The Commissioner contended that, on its proper interpretation, section 41 precludes a decision-making authority from discharging the notice where the discharge is a necessary but not a sufficient condition for the lawful implementation of the proposal.

The Tribunal examined the meaning of the word 'could, in the language of section 41 in so far as it precludes 'any decision that could have the effect of causing or allowing the proposal to be implemented'. The Tribunal found that the word can, and does, refer 'to a potential event or situation', and, with reference to the decision of *O'Keefe J in Nye v NSW* [2002] NSWSC 1270 at [13] , the word 'could' means 'it is possible that it may'.

The Tribunal also examined section 51F(1) of the EP Act, which relates to clearing permits. The Tribunal found that the section clearly contemplates that section 41 precludes a decision-making authority from making a decision in relation to a proposal involving clearing, even though a clearing permit is also required in order to lawfully carry out the proposal.

In examining the second question, the Tribunal considered and upheld the findings of the decision of the Full Court of the Supreme Court in *Re Town Planning Appeal Tribunal; exp parte Environmental Protection Authority* (2003) 27 WAR 374. There the Supreme Court held that the Town Planning Appeal Tribunal was a 'State ... instrumentality' within the definition of a 'public authority' in section 3(1) of the EP Act and consequently a 'decision making authority' as defined in that section. The Tribunal held it was not able to make a sufficient distinction between it, as established under section 7 of the SAT Act, and the Town Planning Appeal Tribunal as established under Pt V of the *Town Planning and Development Act 1928* (WA) such that Re *Town Planning Appeal* Tribunal; exp parte Environmental Protection Authority could be distinguished.

The Tribunal also agreed that a letter from the EPA to the Tribunal constituted 'notice' under section 39A(4) of the EP Act that a proposal is going to be or being assessed, under section 41(3). It therefore followed that the Tribunal was precluded from making a decision to discharge the notice because it is 'a decision-making authority that has been given notice under [section 39A(4) of the EP Act] that a proposal [in respect of which it is empowered to make a decision by discharging the notice] is going to be or is being assessed': EP Act section 41(3).

Held:

1) The Tribunal determined that a decision to discharge the soil conservation notice 'could' have the effect of allowing the clearing proposal to be implemented and would have that effect if all other approvals were granted. The legislation precluded a decision?making authority from discharging the notice even though a clearing permit was also required in order to lawfully carry out the clearing.

2) The Tribunal also determined that it was a 'decision?making authority' that had been given notice by the EPA and was, therefore, precluded from discharging the notice until authorised by the Minister. Furthermore, as the Commissioner was a 'decision?making authority' precluded from discharging the notice, the Tribunal, in reviewing the Commissioner's decision, was correspondingly limited in its power.