case notes

Pennings v Shellbay Holdings Pty Ltd & Ors [2001] WASCA 115

Conviction under Wildlife Act 1950 (WA) for wilfully taking protected flora

by **Aidan Kelly,** Solicitor, Freehills Perth Office and Western Australian editor

The WA Supreme Court recently dismissed an appeal by Shellbay Holdings Pty Ltd and its three directors against convictions for wilfully taking protected flora on Crown land without authority under section 23B of the *Wildlife Conservation Act 1950.*

The four defendants were each convicted of 31 offences after clearing a 4WD access track approximately 6.5km long, along a declared but undeveloped road reserve. Each conviction related to a particular plant species. The track was to improve access to a rural block which is surrounded by the D'Entrecasteaux National Park. Each defendant was fined a global penalty of $3,000 and ordered to pay costs of $2,150.22.

The local shire had approved construction of the road subject to approval under the *Environmental Protection Act 1986* (WA) (EP Act). Before the environmental impact assessment (EIA) process under the EP Act had been completed, the defendants commissioned bulldozers to clear the road. The facts of the case suggest at that point in time, the proposal would not have met the Environmental Protection Authority's (EPA) environmental objectives and that it was unlikely the EPA would recommend the proposal be approved.

The main ground of appeal was that because the clearing was carried out on a declared road reserve the land was not Crown land for the purposes of the *Wildlife Conservation Act.* This line of argument was rejected. Alternatively, it was argued that the clearing was an unavoidable consequence of a lawful activity, this being a specific defence to the offences under section 23B. This ground of appeal involved several interesting arguments as to what may constitute a lawful authority for the taking of protected flora in such circumstances.

These included that the declaration of a road reserve in itself provides authority to open up the road, that a surveyor's authority to clear a line to make "authorised surveys" provided lawful authority under the *Licensed Surveyors Act 1909* (WA) and that the requirement to conduct further environmental surveys of the area, for the purposes of progressing the EIA process, provided lawful authority under the EP Act. These arguments were also rejected.

The fact that the prosecutions were made under the *Wildlife Conservation Act* and not the *EP Act*, notwithstanding that the approval process under the later Act had been pre-empted by the defendants, highlights the inadequacy of the provisions of the *EP Act* for controlling unauthorised development , even where arguably a significant environmental impact has occurred. This again highlights the problems which arose in the case of *Palos Verdes Estates Pty Ltd* v *Carbon* [(1992) 6 WAR 223] where similar charges arising from unauthorised development were quashed on appeal because the clearing of vegetation was held not to constitute pollution as defined under the *EP Act.*

Proposed amendments to the *EP Act* are in draft Bill form and will include the introduction of an offence of 'causing or allowing to be caused environmental harm'. Arguably thus would provide for the *EP Act* to be used for prosecutions in circumstance such as these and it will be interesting to see whether the courts' interpretation of environmental harm will support such prosecutions. It is to be noted that a prosecution under the *EP Act* allows for court orders requiring offenders to make good any environmental damage which occurred as a result of the offence.