GOVERNMENT SENATORS' REPORT

by

SENATORS TIERNEY AND LIGHTFOOT

Introduction: Setting the Record Straight

1.1 Government Committee members emphatically reject the claim, which is both explicit in the majority report and implicit in its Terms of Reference, that the Commonwealth government neglected its duty to protect the environment in relation to the Port Hinchinbrook development project at Oyster Point in Queensland. In fact, the Minister for the Environment, Senator Hill, took a pro-active stance in relation to the World Heritage values of the area, and was vindicated for so doing by his Honour Justice Sackville in the Federal Court of Australia (see paragraph 1.13 below).

1.2 The Commonwealth government entered into a comprehensive Deed of Agreement, on 20 August 1996, with Cardwell Properties Pty. Ltd ("Cardwell"), Cardwell Shire Council and the State of Queensland, over Cardwell's ongoing proposal to construct and operate its tourist resort at Oyster Point, Queensland. That ratification took place in the historical context of a chronology of events that goes back to the 1980's, when the Cardwell Shire Council had initially approved a 'Special Facilities Zone' that effectively rezoned the area, and allowed the construction of the resort to proceed.

1.3 The Deed expressly noted that before the Minister for Environment, Senator the Hon. Robert Hill, was prepared to make a decision on the grant of consents, the Minister would specifically require that the company enter into certain legally enforceable arrangements, as to ensure the protection, presentation[1] and conservation of the world heritage values of the area. This included Cardwell undertaking to make adequate arrangements with respect to (i) the stabilisation of the foreshore; (ii) monitoring continuing erosion; (iii) best practice dredging: as well as (iv) acid sulphate soils, *vis-à-vis* the 44 hectare Port Hinchinbrook development.

1.4 The Commonwealth and Queensland governments also signed a Memorandum of Understanding (MOU), which contained a strict administrative agreement on the process, principles and timetable for the development of a regional plan and management arrangements for the Hinchinbrook region.

1.5 At Senator Hill's request, the Great Barrier Reef Marine Park Authority commissioned six independent scientists to review the 'Port Hinchinbrook -

---

1 presentation: "*mise en valeur"* within the context of the Convention for the Protection of the World Cultural and Natural Heritage.

Environmental Risk Assessment with reference to activities requiring Ministerial Consent' study, which had been prepared by Sinclair Knight Merz Pty Ltd on behalf of Cardwell.

1.6 The Director of the Australian Institute of Marine Science, Dr. Russell Reichelt, then provided Senator Hill with a synthesis and summaries of these reviews.[2] Senator Hill also received advice from the Australian Heritage Commission in relation to a number of further matters pursuant to the *Australian Heritage Commission Act 1975* (Cth). And he had invited the Queensland Minister for Environment, Mr. Brian Littleproud, MP, to submit his views. For nearly a month, officers from the Department of Environment, Sport and Territories held a series of discussions with Cardwell, which resulted in significant amendments to its 'Beach and Foreshore Management Plan.'

1.7 It was only after all of the various steps mentioned above, which eventually led to the Commonwealth entering into both the Deed and MOU, that Senator Hill gave his formal consent pursuant to sections 9 and 10 of the *World Heritage Conservation Act 1983* (Cth). Accordingly, on 22 August 1996, Senator Hill authorised:

- pursuant to s. 9(1), a consent to Cardwell Properties dredging the marina access channel;

- pursuant to s. 10(2), (3) and (4), a consent to Cardwell Properties dredging the marina access channel in the marina channel area;

- pursuant to s. 9(1), a consent to Cardwell Properties removing fallen mangroves from specified areas and coppicing (pruning or cutting) mangroves in some of these areas to a height of not less than four metres above average seabed level;

- pursuant to s. 10(3), a consent to Cardwell Properties removing fallen mangroves seaward in the specified areas and coppicing mangroves seaward in some of those areas;

- pursuant to s. 10(3), a consent to Cardwell Properties removing fallen mangroves landward in the specified areas and coppicing mangroves landward in some of those areas; and

2 The developer's report: Sinclair Knight Merz, *Port Hinchinbrook - Environmental Risk Assessment with reference to activities requiring Ministerial Consent*, April 1996. The six peer reviews: Great Barrier Reef Marine Park Authority, *Port Hinchinbrook - scientific review of risk assessment with respect to ministerial consent*, June 1996. R Reichelt, *Overview of the scientific reviews of "Port Hinchinbrook Environmental Risk Assessment with reference to activities requiring Ministerial Consent"*, 9 June 1996.

- ☛ pursuant to s. 10(4), a consent to Cardwell Properties removing fallen mangroves from the specified areas and coppicing mangroves in some of those areas.

1.8 Government Committee members therefore strenuously reject the gratuitous and unfounded claim that Senator Hill, as the Commonwealth Minister for the Environment, was negligent in his decision under the *World Heritage Conservation Act 1983* (Cth), which allowed work to resume at Oyster Point. It is beyond any doubt that the environmental management of Port Hinchinbrook has been undertaken in a meticulous fashion and, compared to other developments, that this has been onerous for the developer.

1.9 As already pointed out, through a process of wide and exacting consultation, Senator Hill scrupulously informed himself of all the relevant aspects of the development before giving his consent. As is self-evident in Senator Hills's attached 'Statement of Reasons', the grounds for his reaching that ultimate decision were quite comprehensive (see ATTACHMENT).

1.10 What needs to be also emphasised is that Senator Hill's consideration was not limited to the immediate environmental effects of dredging within a few hundred metres of the marina access channel. It is plain from his statement of reasons that he did consider broader issues to do with the development as a whole (such as the impact of increased tourism on the fragile island national parks). And he concluded on all the available data that if these matters were properly managed, the development would not have any detrimental impacts.

Consummate Failure in the Courts by the FOH

1.11 Friends of Hinchinbrook Inc. (FOH) challenged Senator Hill's sections 9 and 10 consent decision in the courts and failed completely to substantiate any of their allegations. There were eight separate hearings of the case of *Friends of Hinchinbrook Society v/s Minister for Environment and Others*, which spanned across the period of 1996-1998. [3]

1.12 There were six hearings before the Federal Court; one before the Administrative Appeals Tribunal; as well as an application for special leave to the High Court.

1.13 As the initial trial judge in the Federal Court, Justice Sackville rejected the arguments that were put forward by FOH. Commenting on the scope of Senator Hill's discretion under s 13 (1) of the *World Heritage Conservation Act 1983* (Cth) and the issue of whether the Minister had regard to the so-called 'precautionary principle', His Honour found that:

---

3 The substantive cases: Federal Court: *Friends of Hinchinbrook Society Inc. v. Minister for Environment and others* [1997] 55 FCA (14 February 1997), 69 FCR 28; on appeal *Friends of Hinchinbrook Society Inc. v. Minister for Environment and others* [1997] 789 FCA (6 August 1997), 77 FCR 153.

> *". . . the Minister in fact applied the more stringent test laid down by Mason J in Tasmanian Dams.*[4] *This test was less favourable to Cardwell Properties, since it was less likely to result in the granting of consent to the actions otherwise prohibited by s 9 (1) . . . Mr. Tobias QC, who appeared with Dr. Griffiths for the applicant* [ie, the FOH], *accepted that this submission was correct. . . This is a matter of some importance.*[5] *. . . .To the extent that the Minister was required to take into account of the need to exercise caution on the fact of scientific uncertainty, in my opinion he did so. There was a great deal of scientific material available to the Minister assessing the risks of the activities requiring Ministerial consent, much of which was summarised in a report by Dr R Reichelt of the Australian Institute of Marine Science. . . . before making a final decision, he* [the Minister] *took steps to put in place arrangements designed to address the matters of concern identified in the scientific reports and other material available to him . . . the Minister accepted that he should act cautiously in assessing and addressing the risks to World Heritage values. . . . he took into account the commonsense principle that caution should be exercised where scientific opinion is divided or scientific information is incomplete."*[6]

1.14 In the light of the rigorous analysis by His Honour Justice Sackville in the Federal court, and without any evidence whatsoever to the contrary, it is simply false, and a patent nonsense, for the majority report to assert that: *" . . . Senator Hill [used] Dr. Reichelt's summary in a deliberately selective way to justify his decision"* (para 3.38).

1.15 It came as little surprise that on appeal to the full court of the Federal Court, Justices Northrop (ACJ), Burchett and Hill rejected all the grounds that were then put forward by the FOH. Among other things, the full court concluded that the FOH had *". . . persisted in insupportable claims."*[7]

1.16 And in a mere twenty minutes of yet another hearing, Justices Gaudron and McHugh in the High Court dismissed the arguments that were agitated by the FOH on the basis that there were simply no *" . . . sufficient prospects of success to justify a grant of special leave."*[8]

---

4 that is to say, *The Commonwealth v/s The State of Tasmania* (1983) 158 CLR 1, as against the more liberal test of Mason CJ and Brennan J in *Richardson v/s The Forestry Commission* (1988) 164 CLR 261]

5 *Friends of Hinchinbrook Society Inc. v. Minister for Environment and others* [1997] 55 FCA (14 February 1997), p26, 69 FCR 28 at 57.

6 *Friends of Hinchinbrook Society Inc. v. Minister for Environment and others* [1997] 55 FCA (14 February 1997), p45, 69 FCR 28 at 79.

7 *Friends of Hinchinbrook Society Inc. v. Minister for Environment and others* [1998] 432 FCA (30 April 1998), 84 FCR 185 at 189.

8 S99/1997 (13 March 1998) at p. 6.

Unethical Use of Committee Proceedings

1.17 Government Committee members also deplore the way in which some witnesses have used the committee's proceedings to make allegations that have nothing to do with environment protection, but apparently aim generally to undermine public confidence in commercial aspects of the development. In particular, two aspects need to be singled out:

- Claims that the economic viability of the development is dubious (majority report, paragraph 5.14ff). The Wilderness Society, for example, referred to a 'Dransfield Report' which purported to show that Port Hinchinbrook was 'not economically feasible'.[9] On inspection it turns out that the 'Dransfield Report' is actually an affidavit made in the context of the FOH's Federal court case, in which Mr Dransfield described types of information which he thought Senator Hill *should* have gathered before making his 1996 decision. It made no comments whatever specific to Port Hinchinbrook.

- Claims that buildings on site are at risk from acid sulfate soils (see comments at paragraphs 4.45 and 4.61).[10] It must be stressed that recent reports have specifically addressed this possible problem. They identified four small acid sulfate 'hot spots' - none of which are near residential areas of the site. They recommended remedial measures, which are routine in such situations, and the developer has agreed to carry out the remedial measures.[11]

1.18 Many other claims have been advanced, which have nothing to do with environment protection. And paradoxically, they make no sense even in terms of the agenda of the environment groups that make them - since, if the Port Hinchinbrook development is not commercially successful, it is probably less likely that best practice environmental management will be maintained in the longer term. It can only be presumed, therefore, that such claims are made either with the continued hope of somehow stopping the development; or simply to gratify the witnesses' antipathy towards the developer.

Instrumental and Ideological Use of Science

1.19 Government Committee members would like to comment on the related tendency to deify scientific research in this debate, given the essentially speculative basis of so much of the so-called 'scientific judgment'.

---

9 V Young (The Wilderness Society), Evidence 10 August 1998, p 216.

10 North Queensland Conservation Council, further information 10 August 1999, p 849.

11 AGC Woodward Clyde Pty Ltd, *Port Hinchinbrook Eastern Precinct - Site Environmental Audit*, 9 August 1999; *Port Hinchinbrook Site Environmental Audit for Acid Sulfate Soil Potential - Phase 2*, 6 August 1999: further information, p 915ff. The Hon. R Hill, Minister for the Environment and Heritage, further information 12 August 1998, p 852.

1.20 Environmental chemistry is a complex and inexact science, given that chemicals behave differently because of a range of environmental changes that cannot always be predicted. Indeed, science itself is a complex and inexact human endeavour.

1.21 For decision-makers slavishly to defer to any particular scientific paradigm, or to any particular group of scientists is, therefore, for them to abdicate their responsibilities in favour of a system of human knowledge that is in an almost perpetual state of flux. To therefore invoke a favoured view as being synonymous with making a ***scientific judgment***, whose pristineness is to be held in a lofty and deprecatory contrast with an unwanted view, which is termed a ***political judgment***, is to reveal not only a gross ignorance of the scientific process, but it is to debase it.

1.22 In this context, any firm distinction between supposedly value-free statements of scientific 'fact', and professional advice or opinion drawing on the supposed facts, is dubious. This applies particularly when discussing less easily observable phenomena with less easily deducible chains of cause and effect. For example, 'acid runoff' may be easily measurable; 'environmental harm caused by acid runoff' is not. Likewise, the extent and effect of any modification to the hydrodynamic regime at Oyster Point, consequent upon the construction of breakwaters in the Hinchinbrook Channel is, fundamentally, a matter of sheer speculation.

1.23 Given these uncertainties, scientific advice can be no more than one of the factors that decision-makers are to take into account when making their decisions in the public interest. Government Committee members reject the attitude, implicit in the majority report, that the concerns of the scientists who gave evidence should be uncritically accepted as weighing conclusively against Port Hinchinbrook. Some of the scientists described possible environmental damage that can be avoided - and in the opinion of Government Committee members, through the controls of the Deed of Agreement it *is* being avoided.

1.24 Furthermore, it was obvious that some of the scientists who gave evidence were motivated by a personal dislike of the Port Hinchinbrook development. As a consequence, they tacitly adopted an instrumental and, therefore, an ideologically filtered approach to science and to scientific research. Not surprisingly, these so-called scientists effectively undermined their own credibility through their failure to keep their personal opinions and prejudices separate from the professional advice that they purported to give.

1.25 In the light of all of the preceding remarks, Government Committee members must also therefore object to the excessive use of a consensual "we" in the text of majority report, especially when referring to conclusions, when Committee members hold quite diametrically opposing views on how to interpret the 'scientific' evidence. And moreover, the *façade* of unanimity that the vocabulary of the main report contrives is a transparent one indeed when this report effectively consists of three reports: one main report, and *two* minority reports.

Comments on the Recommendations of the Majority Report

1.26 Government Committee members reject the recommendations of the majority report. The recommendations that relate to Port Hinchinbrook simply duplicate activities that already exist. Because certain environment lobby groups will not accept that the rigorous environmental management regime of Port Hinchinbrook has found no environmental harm, they demand that another futile, taxpayer funded layer of management should be superimposed, so as to monitor the monitors. Who will then monitor the monitors, monitoring the initial monitors? And at what point does the absurdity stop?

1.27 The other more general recommendations of the main report are either superfluous, or they involve broader issues which are strictly not relevant to the Terms of Reference of this particular inquiry. Further comments on the recommendations are provided below, and in these, some of the text of the recommendations from the majority report has been paraphrased for clarity.

***Recommendation 1*:** **The Commonwealth should engage an independent assessor to report on whether the developer has been complying with the Deed of Agreement**

1.28 Government Committee members reject the clear conflicts of interest that such a naive and ill-conceived recommendation would pose for the Commonwealth. As one of the parties to the Deed, the Commonwealth is being asked to (i) step out of that role; (ii) then appoint an independent assessor to advise it; (iii) to then accept, review and make recommendations on the basis of that assessor's report; and (iv) to then step back into its role as one of the parties to the Deed, and act on its own recommendation(s) to itself.

1.29 Moreover, the proposal is superfluous because of the strict requirements that are already in place. Under the Deed of Agreement, there is already an Environmental Site Supervisor (a Queensland government official) with power to order the developer to cease or modify work so as to eliminate any adverse environmental impact; *and* an Independent Monitor (appointed by agreement of the parties) with various tasks to do with monitoring and advising on the environmental management of the site.

1.30 The clear implication of the recommendation is that these officials are ineffective, biased or under the influence of the developer. Opponents of Port Hinchinbrook believe that the development must be detrimental to the environment; and if monitoring does not show it, it must be that the monitors are biased. This reasoning is fallacious and totally without foundation. Apart from such defamatory allegations, the Committee heard no credible evidence whatsoever to suggest that either of these officials is biased.

Recommendation 2: **Deeds of Agreement should not be used as a means of avoiding compliance with an existing regulatory regime.**

1.31 Government Committee members reject the clear implication that the Port Hinchinbrook Deed of Agreement was effected as a mere contrivance so as to avoid compliance with a regulatory regime. This completely misrepresents the situation. When the project was revived in 1993-4, the Deed of Agreement was an initiative of the Queensland government to compensate for the fact that the development had already been approved in 1988: under 1994 planning law no further application was necessary and no further environmental assessment could be demanded. In the circumstances of the case, the Deed was in fact used to enhance environmental protection - not to diminish it.

Recommendation 3: **Authorities should commit to thorough independent environmental impact assessments for significant developments.**

Recommendation 4: **Where the Commonwealth is involved it should ensure early, consultative environmental impact assessment of significant developments.**

1.32 Government Committee members emphatically reject the assertions that Australian governments are not sufficiently committed to environmental protection. All tiers of governments have development control laws with provision for environmental assessments of significant developments. How 'significant' a development is, so as to warrant a certain level of assessment; and how much effort should be devoted to environmental assessment in particular circumstances; and how that environmental assessment ought to be weighted against other factors in the minds of decision-makers, are all matters of judgment and debate. Regrettably, this is a debate that the majority report has failed to make a useful contribution to.

Recommendation 5: **A full assessment of acid sulfate soils at Port Hinchinbrook should be undertaken … the Commonwealth should ensure that the developer remedies any breaches.**

1.33 The recommendation is superfluous. There is a Port Hinchinbrook Acid Sulfate Management Plan. No evidence in the inquiry showed actual environmental harm from acid runoff, particularly to World Heritage values. Both the Commonwealth and Queensland governments have demonstrated, and continue to maintain, their pro-active commitment to World Heritage values.

Recommendation 6: **The Commonwealth should allocate special funds to CSIRO for acid sulfate research and acid sulfate mapping.**

Recommendation 8: **The Commonwealth and Queensland should research the effects of aquaculture on the Great Barrier Reef World Heritage Area …**

Recommendation 10: **The Commonwealth, State and local government should expedite making regional plans in areas where planning decisions may affect the World Heritage values of the Barrier Reef.**

Recommendation 11: **The Commonwealth should fund a program of regional planning in areas where planning decisions may affect the World Heritage values of a World Heritage property. The Commonwealth should fund a program of information and education in those areas about World Heritage conservation.**

Recommendation 12: **The Commonwealth and States should expedite identifying World Heritage properties and update statements of significance.**

Recommendation 13: **The Commonwealth and States should expedite research into risks to world heritage values of Australia's World Heritage properties.**

1.34 Government Committee members reject the implication that the Commonwealth is insufficiently committed to World Heritage protection. The government has consistently acknowledged its interest and responsibility in World Heritage protection. A further initiative of the present government is manifest in its *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which has the effect of strengthening Commonwealth involvement in World Heritage protection.

1.35 Under the Act, persons proposing developments likely to have a significant impact on world heritage values, must seek the approval of the Commonwealth Minister for the Environment, and provide environmental impact assessments.

Recommendation 7: **The Commonwealth and Queensland should expedite action to control threats to dugongs in the southern Great Barrier Reef Region.**

1.36 This recommendation is superfluous. Senator Hill has articulated further measures to protect dugongs, which were agreed to by a meeting of the Great Barrier Reef Ministerial Council on 30 July 1999. This included further restrictions on commercial fishing; co-operative agreements on indigenous hunting; speed limits in the Hinchinbrook Channel; and commitments from the Queensland government to pursue efforts to minimise the effects of on-land activities on dugong habitats.[12]

Recommendation 8: **. . . pending improved knowledge of the environmental effects of aquaculture on the Great Barrier Reef World Heritage Area, discharge of effluent to the World Heritage Area should not be permitted and no new licences should be issued.**

1.37 Whilst Government Committee members support, in principle, research on the environmental effects of aquaculture, any assumption, without credible evidence, that the environment has no capacity to assimilate the slightest amount of effluent safely, is simply untenable. The Commonwealth government is committed to the principle that an appropriate regime be maintained for the discharge of effluent. In the absence of perfect knowledge, decisions about the risks of development, and what the

12 The Hon. R Hill, Minister for the Environment and Heritage, *New measures announced to protect dugong*, media release 5 August 1999.

precautionary principle ought to mean in practice, are matters of judgment that should, among other things, take community values into account.

Recommendation 9: **Planning authorities rather than developers should be responsible for selecting consultants for environmental impact studies by lot from a short list of tenderers.**

1.38 The recommendation is quite unsupported by any substantive evidence or discussion in the report. It is yet another gross example of the main report's proof by assertion. Ironically, it flies in the face of the majority's hysterical exhortation of the Commonwealth government to use 'scientific judgment', through now recommending the very abdication of that lofty rigour in favour of a process of selection 'by lot'.

1.39 Moreover, this recommendation blithely disregards the rights of developers to have some say in how their money is spent. It is oblivious of the likely administrative ramifications and difficulties, such as, for example, how to ensure that tenderers do in fact have the necessary expertise, and how to finalise a short list fairly and expeditiously. It must be stressed that the EIA process in all jurisdictions has been, and continues to be, for the respective proponents to prepare, pay for, and submit the necessary environmental impact assessment documentation. And there are other mechanisms within that process to ensure its transparency, such as, for example, assessment by various government agencies as well as through public consultation.

Conclusion

1.40 Government Committee members consider that the stringent environmental controls in the Deed of Agreement; the Memorandum of Agreement; the cautionary steps that Senator Hill undertook; as well as the other Commonwealth and Queensland regional planning initiatives since then, have ensured, and will continue to ensure, that the development at Oyster Point has no significant environmental impacts.

1.41 However unnecessary this inquiry was in that regard, it might at least have had a useful purpose if it had served to bring the hostile parties together for some constructive end. The majority report has missed that opportunity.

1.42 Instead, the report's inveterate bias, which is, among other things, reflected in the fact that its Terms of Reference simply problematised a one-sidedly 'green' agenda and outcome, meant that much of the energy of certain 'green' groups and cohorts, would invariably be given over to acrimonious exchanges, hysterical displays, as well as to apportioning blame for the fantasised sins of the developer and/or various authorities.

Senator John Tierney,
Deputy Chair